

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: Statement of Facts, Issues and Contentions

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: 14/12/2020 6:51 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.



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 2 of 2020

Re Application for authorisation AA1000473 lodged by New South Wales Minerals Council and mining companies to collectively negotiate with Port of Newcastle Operations Pty Ltd all terms and conditions of access relating to the export of coal from the Port of Newcastle.

PORT OF NEWCASTLE OPERATIONS PTY LTD (ACN 165 332 990)

Applicant

APPLICANT'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS

A. FACTS

A1. The applicant

1. The applicant, Port of Newcastle Operations Pty Ltd (**PNO**) operates the Port of Newcastle (**Port**) under a 98-year sublease which commenced on 30 May 2014.
2. PNO was not the applicant for authorisation.
3. PNO is the target of the conduct the subject of the Determination. (The conduct which was the subject of the Determination is identified below at paragraph 18 and is defined in this document as the Conduct.)
4. The Port is the largest port on the East Coast of Australia. It services the Hunter Valley coal fields and is the world's largest coal export port. More than 70% of the Port's revenue is derived from coal export operations.

5. Not all functions at the Port are performed by PNO. In particular:
 - (a) the NSW Government retains regulatory oversight of the Port and has responsibility for a range of maritime safety and security functions at the Port, including emergency response, the Harbour Master, as holder of the Port Safety Operating Licence, and pilotage functions;
 - (b) the Minister has power under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (the **PAMA Act**) to fix and levy port cargo access charges and berthing charges at the Port; and
 - (c) the pilotage services operator has power under Part 5 of the PAMA Act to fix and levy pilotage charges.
6. The functions for which PNO is responsible, as Port operator under the PAMA Act and under the terms of the sublease, include the fixing and collection of port charges, and the making of directions for the purpose of maintaining or improving safety and security at the Port.
7. In particular, Part 5 of the PAMA Act permits PNO to fix and levy three types of port charges without approval from the relevant Minister:
 - (a) the navigation service charge, which is payable in respect of general use by a vessel of the Port and its infrastructure (**navigation service charge**) (the navigation service charge is described in more detail below at paragraphs 30 to 36);
 - (b) the wharfage charge, which is payable in respect of the availability of a site at which stevedoring operations may be carried out (**wharfage charge**), and is paid by the owner of the cargo at the time it is loaded or unloaded; and
 - (c) site occupation charges, which are payable by occupiers of land-side facilities such as stevedoring at terminals.

8. Part 5 of the PAMA Act permits PNO, concurrently with the Minister, to fix and collect port infrastructure charges from port users, subject to obtaining Ministerial approval pursuant to the sublease.
9. The Conduct relates to the terms and conditions of access to the Port provided by PNO. PNO is directly affected by the Conduct.
10. As the target of the Conduct, and a party directly affected by the Conduct, PNO has a sufficient interest in the Determination, within the meaning of s 101(1AA) of the *Competition and Consumer Act 2010 (CCA)*.

A2. The Application for authorisation

11. This proceeding concerns the application for authorisation lodged on 6 March 2020 by the NSW Minerals Council on behalf of itself and certain coal producers who export coal through the Port of Newcastle (the **Port**) (the **authorisation applicants**), seeking authorisation under subsection 88(1) of the CCA.
12. The following coal producers were the persons on whose behalf the NSW Minerals Council sought authorisation:
 - (a) Glencore Coal Assets Australia Pty Ltd;
 - (b) Yancoal Australia Ltd;
 - (c) Peabody Energy Australia Pty Ltd;
 - (d) Bloomfield Collieries Pty Ltd;
 - (e) Centennial Coal Company Ltd;
 - (f) Malabar Coal Ltd;
 - (g) Whitehaven Coal Mining Ltd;
 - (h) Hunter Valley Energy Coal Pty Ltd;
 - (i) Idemitsu Australia Resources Pty Ltd; and
 - (j) MACH Energy Australia Pty Ltd.

13. On 15 May 2020, the NSW Minerals Council clarified that future participants in the proposed conduct could include other mining companies, such that the class of persons to whom the authorisation application relates is mining companies including the persons identified at paragraph 12 above.
14. Following receipt of the application for authorisation, the ACCC conducted a consultation process.
15. On 2 April 2020, the ACCC granted interim authorisation under subsection 91(2). The ACCC said this was done 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. The interim authorisation remained in place until the date of the ACCC's final determination.
16. PNO participated in the ACCC's consultation process, including by providing three written submissions (dated 18 March 2020, 7 April 2020 and 10 July 2020).

A3. The ACCC's determination

17. On 27 August 2020, the ACCC issued its final determination in respect of the application.
18. The conduct which the ACCC authorised the applicants to engage in is set out in paragraph 5.5 of the ACCC's determination as follows:
 - (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,

(together, the **Conduct**).

19. Participation by the applicants in the Conduct is voluntary.
20. The authorisation does not authorise the applicants to:
 - (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.
21. The ACCC granted authorisation for the Conduct for a period of ten years, until 30 September 2030.

A4. Global coal market in which Hunter Valley coal producers participate

22. Coal producers operating in the Hunter Valley produce thermal coal.
23. Coal producers operating in the Hunter Valley export most of the thermal coal they produce to customers overseas.

Particulars

- (a) As at September 2020, approximately 75-80% of Australia's thermal coal output was exported;
 - (b) Coal from the Hunter Valley is exported to around 20 countries, primarily in Asia. Approximately 165 million tonnes of coal was exported through the Port in 2019; and
 - (c) In 2015 and in 2018-19, approximately 88% of coal exports from the Hunter Valley was supplied to customers in Japan, China, Korea and Taiwan.
24. By reason of paragraphs 22 and 23 above, coal producers operating in the Hunter Valley participate in a global market for the supply of thermal coal.

25. Participants in the global market for the supply of thermal coal include coal producers in other parts of Australia, and coal producers overseas.

Particulars

- (a) 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 per cent 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;
 - (b) The two largest exporters of thermal coal are Australia and Indonesia;
 - (c) In Australia, 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;
 - (d) The authorisation applicants include the largest coal producers operating in Australia; and
 - (e) For example, Glencore, the largest coal producer in Australia, has 17 mining operations across New South Wales and Queensland. For the year ended 31 December 2019, Glencore reported revenues from its Australian operations in thermal coal production of approximately US\$6 billion, and adjusted earnings before interest, taxes, depreciation and amortisation from its Australian operations in thermal coal production of approximately US\$2.3 billion.
26. The global thermal coal market is highly competitive. Hunter Valley coal producers are constrained by global thermal coal prices.

A5. Global thermal coal prices

27. During 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\$76 per MT.

28. Global coal prices (which also include prices for coal from Newcastle which is a benchmark price on world coal markets) are unpredictable and fluctuate on a daily basis and routinely by more than 1%.

A6. PNO's charges for navigation services at the Port

29. By contrast to the fluctuations in global coal prices, PNO's charges for navigation services at the Port are not unpredictable, and do not fluctuate regularly.
30. Pursuant to a 50 of the *PAMA Act*, PNO charges a navigation service charge for all vessels (including coal vessel) which enter the Port.
31. This charge is imposed on vessel owners or charterers (**vessel operators**) of vessels which enter the Port.
32. Each time a vessel enters the Port, the vessel operator enters into a contract by conduct with PNO for use of the shipping channels containing PNO's published standard terms and conditions including the applicable navigation service charge. This contract is a single visit contract that covers the duration of the vessel's visit to the Port.
33. On a day-to-day basis, PNO does not deal directly with vessel operators, but rather deals with agents, known as ships' agents, that act on behalf of vessel operators. Before vessels enter the Port, the relevant ships' agent submits details pertaining to the visit to the Port. After vessels leave the Port, PNO issues invoices to the ships' agents, on behalf of vessel operators, for the payment of charges at the Port payable by those vessel operators. Those ships' agents pay the invoiced charges on behalf of the vessel operators.
34. The navigation service charge payable by vessel operators of coal vessels is fixed and payable according to the gross tonnage of a vessel that enters the Port and uses the channels, 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.

35. Since 16 December 2019, PNO has published on its website standard terms governing use of the channels by vessel operators.
36. The navigation service charge under PNO's current published schedule of Port Charges is \$1.04 per GT.
37. In recent years, ten different ships' agents have represented the vessel operators of all the coal vessels that have used the Port.
38. **[Confidential to PNO]**
39. **[Confidential to PNO]**
 - (a) **[Confidential to PNO]**
 - (b) **[Confidential to PNO]**
 - (c) **[Confidential to PNO]**
40. **[Confidential to PNO]**
41. By reason of paragraphs 27 to 40 above:
 - (a) the charge levied by PNO on coal vessels for navigation services at the Port is unlikely to exceed 1% of the global thermal coal price per MT; and
 - (b) any reduction in the charge levied by PNO on coal vessels navigation services at the Port that may be negotiated by coal producers would be unlikely to exceed 0.2% of the global thermal coal price per MT.

A7. Bilateral negotiations between PNO and individual coal producers

42. In or around December 2019, PNO started negotiating with a number of Port users on a bilateral basis, including the applicants, in relation to long-term pricing arrangements according to the terms of a Port User Pro Forma Long Term Pricing Deed (**Long Term Pricing Deed**) published on PNO's website.

Particulars

- (a) The Long Term Pricing Deed has an initial term of 10 years - the same period as the ACCC's authorisation determination. The initial term can be extended by agreement, with renewal discussions to commence not later than three years prior to expiry of the initial term.

- (b) Pricing arrangements for the navigation service charge under the Long Term Pricing Deed start at substantially similar levels to the Port's standard 2019 Schedule of Port Charges, at \$0.81/GT.
- (c) Entry into the Long Term Pricing Deed by Port users is voluntary. For parties who do not wish to enter into the Port User Pro Forma Long Term Pricing Deed, PNO has publicly committed to ensuring transparent and open access to the land side and port side services and facilities provided by it at the Port, through its open access arrangements for users published on its website.

43. **[Confidential to PNO]**

- (a) **[Confidential to PNO]**
- (b) **[Confidential to PNO]**
- (c) **[Confidential to PNO]**

44. The current draft of the Port User Pro Forma Long Term Pricing Deed provides that:

- (a) access charges can only be increased where the increase is consistent with pricing principles under Part IIIA of the CCA;
- (b) the navigation service charge will remain fixed for the whole 10 year term of the Long Term Pricing Deed except for annual escalation of the greater of 4% or CPI, and PNO may increase the navigation service charge once a year, but only if it can be justified under the Part IIIA pricing principles;
- (c) the producer / vessel agent may dispute a proposed price increase if it considers that the proposed increase is not in accordance with the variation provisions. The Long Term Pricing Deed sets out a dispute resolution process and principles for the arbitrator to apply which are drawn from Part IIIA of the CCA;
- (d) PNO must provide coal producers with forward looking forecasts of any proposed capital expenditure; and

- (e) PNO cannot discriminate adversely between any coal producer or vessel operator in relation to the navigation service charge.
45. Bilateral negotiations between PNO and individual coal producers in relation to long-term access terms promote efficient outcomes, including because:
- (a) coal producers in the Hunter Valley have a spectrum of unique and varied incentives and interests that are more easily accommodated in bilateral negotiations;
 - (b) for some coal producers, non-price terms are as important as price terms, and their preferences in this regard are more easily accommodated in bilateral negotiations;
 - (c) some coal producers may be more flexible on price terms in exchange for better non-price terms that could make passage of its coal through the Port more efficient;
 - (d) bilateral negotiations ensure that the interests of smaller coal producers are not marginalised by larger coal producers; and
 - (e) bilateral negotiations ensure that long-term access terms are not reduced to a lowest common denominator amongst all coal producers.
46. By contrast, collective negotiation by coal producers with PNO would not promote efficient outcomes compared with bilateral negotiations between PNO and individual coal producers.
47. Bilateral negotiations between PNO and individual coal producers do not reduce information asymmetry compared with collective negotiation by coal producers.
48. Bilateral negotiations between PNO and individual coal producers do not involve higher transaction costs compared with collective negotiation by coal producers.
49. **[Confidential to PNO]**
- (a) **[Confidential to PNO]**
 - (b) **[Confidential to PNO]**

50. To date, notwithstanding the negotiations between PNO and individual coal producers in relation to the Long Term Pricing Deeds, no individual coal producers have entered Long Term Pricing Deeds with PNO.
51. PNO remains ready and willing to negotiate and enter Long Term Pricing Deeds with individual coal producers, but does not intend to participate in collective negotiations with coal producers.

A8. Risks associated with collective negotiation by coal producers

52. Notwithstanding that the authorisation does not authorise the sharing of commercially sensitive information, the Conduct is likely to facilitate increased risk of collusion and anti-competitive information sharing, because it will encourage, if not require, competing coal producers to meet with each other regularly, and to share information about the markets in which they compete that otherwise would not be shared.

B. ISSUES

B1. Issues for determination by the Tribunal

53. The present proceeding is a re-hearing of the ACCC's decision to grant authorisation pursuant to s 90(7) of the CCA: s 101(2).
54. By virtue of the operation of s 90(8)(a), s 90(7)(a) does not apply.
55. Accordingly, the ultimate issue for determination by the Tribunal in this proceeding is whether, pursuant to s 90(7)(b), the Tribunal is satisfied in all the circumstances:
 - (a) the conduct would result, or be likely to result, in a benefit to the public;
and
 - (b) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.
56. In deciding this ultimate issue, the following issues arise for determination:
 - (a) whether the conduct would be likely to result in any benefit to the public?

(b) if so, whether the conduct would be likely to result in any detriment to the public?

(c) if so, whether the public benefits outweigh the public detriments?

57. Finally, in the event the Tribunal is satisfied the public benefits outweigh the public detriments, the Tribunal must decide whether authorisation should be granted as a matter of discretion.

C. CONTENTIONS

C1. No public benefits are likely

58. The Conduct is not likely to result in any significant public benefit because:

(a) it has not been identified or established that the Conduct would facilitate more certain or efficient terms and conditions of Port access in agreements between PNO and ship agents, particularly given **[Confidential to PNO]**;

(b) it has not been identified or established that the Conduct would facilitate more certain or efficient terms and conditions of Port access in agreements between PNO and coal producers;

(c) it has not been identified or established that the Conduct would result in any meaningful reduction in transaction costs relative to bilateral negotiations between PNO and coal producers;

(d) it has not been identified or established that any improvement in the terms and conditions of Port access, or the transaction costs in negotiating such terms and conditions, constitutes a public benefit, rather than a private benefit to coal producers.

59. Further, contrary to the ACCC's finding in its determination (at [4.48]), the Conduct is unlikely to enhance the competitiveness of coal exported from the Hunter Valley given:

(a) coal producers in the Hunter Valley sell coal in a global, competitive market for thermal coal;

(b) the charge levied by PNO on coal vessels for navigation services represents a very small proportion of the global thermal coal price per MT;

- (c) without the Conduct, coal producers have certainty about the Port's charges for navigation services;
 - (d) coal producers face much greater uncertainty from other sources, including, principally, fluctuations in the price of coal.
60. The Conduct is not likely to result in any significant public benefit given it involves cartel conduct that:
- (a) is presumptively harmful to competition;
 - (b) could facilitate the exchange of commercially sensitive information between coal producers that otherwise would not occur; and
 - (c) could adversely affect competition and/or efficient investment in a range of markets in which coal producers participate in the Hunter Valley.

C2. Significant public detriments are likely

61. The Conduct would be likely to result in significant public detriment by inhibiting competition between coal producers in the acquisition of services from PNO in the following circumstances:
- (a) the Conduct would be likely to have the effect of discouraging individual coal producers from pursuing bilateral negotiations, and consequently it is less likely that individual producers will be able to negotiate terms and conditions tailored to their own individual needs; and
 - (b) collective negotiations, to the extent they occur, will be less likely to be tailored to the needs of individual producers, and will more likely reflect the needs of the larger producers.
62. The Conduct may result in the consequences identified above in paragraph 60(b) and 60(c), each of which would represent a public detriment.

C3. Discretionary considerations favour not making the determination

63. Even if the Tribunal is satisfied that the Conduct would be likely to result in a benefit to the public which outweighed any detriment to the public, the Tribunal

should still, as a matter of discretion, decline to authorise the Conduct given the following circumstances:

- (a) the Conduct involves cartel conduct which is presumptively harmful, and therefore should not be authorised unless it is likely to result in a substantial net public benefit;
- (b) any benefit that would be likely to result in the present case (which is denied) would be of a private nature; and
- (c) any net benefit that would be likely to result in the present case (which is denied) would not be substantial.

C4. Relief sought by PNO

64. PNO seeks the determination set out in its application, namely:

- (a) the ACCC's determination be set aside;
- (b) that the interim authorisation determination of the ACCC dated 2 April 2020 be set aside and the interim authorisation be revoked; and
- (c) the application for authorisation AA1000473 be dismissed.

Dated: 14 December 2020

Cameron Moore SC

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