

## NOTICE OF LODGMENT

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#### 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



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Dated: 28/01/2021 1:19 PM

#### Important information

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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**

## **NEW SOUTH WALES MINERALS COUNCIL'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS**

### **A. INTRODUCTION**

1. New South Wales Minerals Council (**NSWMC**) and certain coal producer members<sup>1</sup> (the **Authorisation Applicants**) are seeking to negotiate collectively with Port of Newcastle Operations Pty Limited (**PNO**) the terms and conditions of access to the channels and berthing facilities at the Port of Newcastle (**Port**), which access is necessary for the export of coal from the Hunter Valley in New South Wales. In that regard, the Authorisation Applicants are seeking to achieve a long-term commercial solution so as to provide certainty for long term investment in the Hunter Valley region.
2. The need for collective negotiations with PNO arises in the following circumstances. The Port is a natural “bottleneck” facility at the end of a multi-user coal export supply chain. The Authorisation Applicants are seeking to negotiate matters that apply across the Hunter Valley coal industry. PNO enjoys the commercial negotiating position of being a monopoly service provider. Since 2014, when PNO was granted a long-term lease by the State of New South Wales, PNO has repeatedly increased the Port access charges with no change in the nature or quality of the service.
3. Highlighting the need and importance of the Authorisation Application is the absence of any regulatory constraint or other mechanism to constrain PNO's unfettered monopoly power over Port access. By comparison, the Australian Rail Track Corporation (**ARTC**) provided an access undertaking to the Australian Competition and Consumer Commission (**ACCC**) in relation to ARTC's monopoly rail infrastructure network used for the export of coal in the Hunter Valley. This network takes coal from coal mines to the industry loading terminals at the Port. In the absence of specific processes such as those applicable to the ARTC, the authorisation process under the *Competition and Consumer Act 2010* (Cth) (**CCA**) enables the Authorisation Applicants to seek to collectively bargain with PNO on behalf of its members in compliance with Australian competition laws.

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<sup>1</sup> These coal producer members are: Yancoal Australia Limited; Peabody Energy Australia Pty Ltd; Bloomfield Collieries Pty Ltd; Centennial Coal Company Limited; Malabar Coal Limited; Whitehaven Coal Mining Limited; Idemitsu Australia Resources Pty Ltd; MACH Energy Australia Pty Ltd and Glencore Coal Assets Australia Pty Limited. Note: Hunter Valley Energy Coal Pty Ltd is no longer seeking to collectively negotiate with PNO.

4. Access terms and conditions to the Port are significant and important issues for the Hunter Valley coal industry. It is critically important to the Authorisation Applicants to ensure that infrastructure costs imposed by PNO on Port users (through Port access charges) are fair, reasonable and efficient and the terms and conditions of access give the industry certainty in relation to future investment. This is particularly so given:
- a. The significant price increases imposed by PNO following revocation of declaration of the Port, which have occurred without any right of recourse. In the absence of regulatory constraints or other mechanisms to constrain PNO's unfettered monopoly power over Port access, there is a legitimate concern that PNO will impose further price increases, which have significant ramifications for the Hunter Valley coal industry.
  - b. The critical importance to NSWMC in ensuring that access charges imposed by PNO do not contribute to individual mines in the Hunter Valley becoming uneconomic, as global coal customers turn to alternatives of overall less costly coal. Noting the constant trade challenges faced by the industry, a recent significant example being the trade issues with China affecting coal exports, Hunter Valley producers must seek to be competitive in the global market, including by finding new markets as alternatives to exports to China.
  - c. PNO is seeking to develop a large container terminal at the Port and the industry is concerned that the costs of that terminal development may be imposed on the coal industry (through Port access charges). These concerns are acute because PNO has publicly stated that coal industry operations in the Hunter Valley have a 15-year timeframe.<sup>2</sup> In this context, PNO has a commercial incentive to extract from coal industry participants as much as it can over that period, including to facilitate the development of the new container terminal operations. Importantly, the access terms that PNO currently imposes (and that the Authorisation Applicants are seeking to negotiate), expressly remove any ability for coal exporters to discuss or negotiate user funded expenditure and do not provide any real ability to negotiate future capital expenditure at the Port by PNO. The Authorisation Application provides the opportunity for the industry to seek a solution to issues including long term pricing and access terms at the Port, and in particular, creating certainty as to user funded expenditures and for investment in the future by both PNO and the mining industry. These are perfectly reasonable industry issues requiring long term certainty given the billions invested by the industry in the Hunter Valley coal export chain, including in the coal export terminals operated by Port Waratah Coal Services Limited (**PWCS**)<sup>3</sup> and Newcastle Coal Infrastructure Group (**NCIG**).<sup>4</sup>
  - d. In 2020, NSWMC lodged a declaration application under Part IIIA of the CCA for access to the channel with the National Competition Council (**NCC**). That application is currently being considered by the Federal Treasurer. NSWMC lodged that application in response to the deemed revocation of the declared

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<sup>2</sup> NSWMC submission to National Competition Council, 25 November 2020, page 2. See: <https://ncc.gov.au/images/uploads/NSWMC.pdf>

<sup>3</sup> <https://www.pwcs.com.au/>

<sup>4</sup> <https://www.ncig.com.au/>

service at the Port in 2019 when the Treasurer did not make a decision within the statutory timeframe. Given the relevant provisions of Part IIIA, the coal industry was not able to appeal the deemed revocation (appeal rights do not extend to third parties on a revocation). PNO's claims that the coal industry is satisfied with its access arrangements at the Port are not correct. Rather than seeking to have litigation or declaration applications, NSWMC's collective bargaining application to the ACCC was a genuine attempt by the industry to seek a constructive solution. NSWMC's Part IIIA application only arose because after the ACCC granted interim authorisation, PNO refused to even meet with the industry to seek to discuss access terms, something the coal industry has not experienced with any other service provider.

5. In this context, the Authorisation Applicants seek to collectively bargain with PNO, as the monopoly infrastructure provider, on access to the Port to ensure that Hunter Valley coal exports remain commercially viable and globally competitive now and into the future. This has both direct and indirect impacts on employment and investment in the Hunter Valley.
6. The Authorisation Applicants' key contentions are that the authorisation should be allowed, because:
  - (a) the Tribunal can be satisfied that the Authorisation Conduct will be likely to result in significant public benefits;
  - (b) the Tribunal can be satisfied that there will be no significant (if any) public detriments likely to result from the Authorisation Conduct;
  - (c) there are no discretionary reasons for refusing the authorisation.

#### **A1. Background**

7. On 6 March 2020, NSWMC lodged application for authorisation AA1000473 (**Application**) with the ACCC on behalf of itself and certain member coal producers that export coal through the Port.
8. The Application sought authorisation to collectively discuss and negotiate (on a voluntary basis) the terms and conditions of access, including price, to the Port for the export of coal (and any other minerals) through the Port; to discuss amongst themselves matters relating to the above discussions and negotiations; and to 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 **Authorisation Conduct**).
9. On 2 April 2020, the ACCC granted interim authorisation under s 91(2) of the CCA to enable the Authorisation Applicants to commence collective discussions among themselves and negotiations with PNO in relation to the terms and conditions of access, including price, to the Port. The interim authorisation did not extend to entering into any collectively negotiated agreements.

10. Since that time, NSWMC has participated in the ACCC's consultation process. This has included lodging submissions with the ACCC dated 30 April 2020, 15 May 2020 and 17 August 2020.
11. On 27 August 2020, the ACCC authorised the Conduct in **Determination** AA1000473. The ACCC noted that the conduct may involve a cartel provision. The ACCC granted authorisation for ten years, until 30 September 2030. The ACCC did not authorise any collective boycott activity and did not authorise the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume/capacity projections for individual Port users.
12. The ACCC determined that the Authorisation Conduct is likely to result in public benefits. In particular, by providing the Authorisation Applicants with greater input into the terms and conditions of access and increased transparency around capital expenditure plans and cost allocation at the Port.
13. The ACCC considered that the conduct would provide greater certainty for the price of coal, more timely resolution of industry-wide issues and facilitate more efficient investment decisions at the Port and across the Hunter Valley coal industry. The ACCC also considered that these outcomes would enhance the international competitiveness of the Hunter Valley coal industry, including by more efficient contracting and associated public benefits from lower transaction costs.
14. The ACCC considered there were likely to be minimal public detriments. In particular, the ACCC determined that there was unlikely to be any negative impact on competition among coal producers because they were free to negotiate terms and conditions of Port access through bilateral discussions with PNO. The ACCC acknowledged that the Authorisation Conduct does not involve coal producers sharing individual coal projection volumes, customer pricing information or marketing strategies.
15. On 17 September 2020, PNO lodged its application for review of the ACCC's Determination with the Tribunal under s 101 of the CCA.

## **A2. Jurisdiction of the Tribunal**

16. The Tribunal's review of the ACCC's Determination is a hearing *de novo* pursuant to s 101(2) of the CCA.
17. As a re-hearing, the Tribunal must assess the Application on its merits and by reference to the information and evidence given to the ACCC and any further material that the parties put before the Tribunal.
18. The role of the Tribunal in conducting the review is not confined by the issues raised by the parties to the review and the Tribunal must determine itself whether the statutory test for authorisation is satisfied.
19. The ACCC's Determination may provide the Tribunal with a reference point for determining which matters are truly in dispute: *Application by Flexigroup Limited (No 2)* [2020] ACompT 2 at [136].

### **A3. The Test for Authorisation**

20. The statutory precondition for authorisation is stated in ss 90(7) and (8) of the CCA. As the Authorisation Applicants seek authorisation in respect of the possible application of the cartel conduct prohibitions, the relevant statutory precondition is s 90(7)(b) of the CCA.
21. The Tribunal must be satisfied that the conduct would result, or be likely to result, in a benefit to the public and the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.
22. The CCA does not define what constitutes a public benefit. The ACCC takes a broad view as to what constitutes a public benefit. In the ACCC's Authorisation Guidelines, a benefit to the public includes:

...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress. Plainly the assessment of efficiency and progress must be from the perspective of society as a whole: the best use of society's resources. We bear in mind that (in the language of economics today) efficiency is a concept that is usually taken to encompass "progress"; and that commonly efficiency is said to encompass allocative efficiency, production efficiency and dynamic efficiency.
23. Similarly, a detriment to the public includes "any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency".
24. In *Medicines Australia*, the Tribunal stated:

Although "detriment" covers a wider field than anti-competitive effects in many cases the important detriments will have that character. The relevant detriment will flow from the anti-competitive effect of the conduct to which authorisation is sought. This does not exclude consideration of other detriments which may be incidental to and therefore detract from a claimed public benefit. To that extent such detriment will be relevant in weighing the public benefit".<sup>5</sup>
25. The statutory test requires the Tribunal on review, to compare the future with the conduct and without the conduct.
26. Satisfaction of the statutory conditions does not oblige the Tribunal to grant authorisation. Nevertheless, if the Tribunal on review were to be satisfied that the conduct is likely to result in a net public benefit, ordinarily authorisation would be granted.

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<sup>5</sup> *Re Medicines Australia Inc* [2007] ACompT 4.

## **B. FACTS**

### **B1. The Hunter Valley coal industry**

27. The Hunter Valley coal industry and associated supply chain are the largest coal export operations in the world. The Hunter Valley/Newcastle coalfields produce approximately 170 million tonnes of saleable coal per year.
28. The Hunter Valley coal supply chain is made up of coal producers (or mines) who export their coal, above rail haulage and below rail (track) providers, three coal export terminals operated by PWCS and NCIG, port managers and the Hunter Valley Coal Chain Coordinator.
29. There are more than 30 coal mines in the Hunter Valley operated by 11 coal producers as well as other coal projects. Coal is transported by rail haulage providers from the mines to the three terminals at the Port, and is then loaded onto vessels at one of the loading terminals.
30. The Hunter Valley coal industry and its associated supply chain is responsible for around 90% of New South Wales's coal production and around 40% of Australia's total black coal production.
31. The Hunter Valley coal industry presently faces volatile market conditions. For example, some 70 ships carrying Australian coal have been unable to unload in China since October 2020. Coal exports to China from Newcastle have ceased and data reflects that export levels of thermal and metallurgical coal to China were down 83% and 85% respectively between November 2019 and November 2020.
32. There are, therefore, significant cost pressures on the Hunter Valley coal industry, as coal customers turn to alternatives and Hunter Valley producers compete in finding new markets as alternatives to exports to China (coal from Australia competes with coal from other countries such as Indonesia, Russia and the United States of America). It is therefore important that infrastructure charges whether for rail (in respect of the ARTC) or at the Port are fair, reasonable and efficient in order to facilitate the competitiveness of Australia's coal exports.<sup>6</sup>

### **B2. The Port**

33. The Port is the largest coal exporting port in the world. Coal is the primary commodity exported through the Port.<sup>7</sup> The Port is the only means of exporting coal from the Hunter Valley. For that reason, the shipping channels are a natural "bottleneck" monopoly.
34. The task of exporting coal from the Port involves vessels entering the Port, transiting the channels in the Port, tying up at the berths to load coal at the coal terminals and then once again transiting the channels before exiting the Port for delivery of the coal at its

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<sup>6</sup> Hao Tan, Elizabeth Thurbon, John Matthews and Sung-Young Kim "Opinion: Forget about the trade spat – coal is passe in much of China, and that's a bigger problem for Australia" UNSW Sydney Newsroom (20 January 2021), citing Australian Bureau of Statistics data.

<sup>7</sup> Other commodities also pass through the Port including machinery, project cargo and vehicles, pitch and tar products, steel and grains.

ultimate destination. The destination of the coal is another port or ports located in the country where the coal exporters' customer is located.

### **B3. New South Wales Mineral Council**

35. NSWMC is the leading mining industry association in New South Wales. Many of NSWMC's members are exporters of coal (and other commodities) from the Hunter Valley region through the Port. The Port is located at the end of a multi-user export supply chain that involves an extensive rail network from multiple mine sites that culminate at coal loading terminals located at the Port.

### **B4. Port of Newcastle Operations Pty Ltd**

36. PNO is jointly owned by The Infrastructure Fund (**TIF**, a wholesale investment fund under the trusteeship of Gardior Pty Ltd) and China Merchants Group.
37. The Infrastructure Fund is an Australian infrastructure fund with a portfolio of Australian and overseas assets worth more than \$2.4 billion. TIF's portfolio is managed by Macquarie Infrastructure and Real Assets.
38. China Merchants Port Holdings Company is part of the China Merchants Group, and is a global port developer, investor and operator, with a ports network portfolio spanning across 18 countries and regions. China Merchants Group is headquartered in Hong Kong with business sectors which extend beyond infrastructure to property development and financial investment. In 2018, China Merchants Group had total assets in the value of 8 trillion RMB, with 649 billion RMB in revenue (approximately AUD\$130 billion). Currently, China Merchants Group operates 53 ports in 20 countries and districts, and in 2017, its container throughput exceeded over 100 million TEU<sup>8</sup> for the first time. It is understood that China Merchants Group would technically be considered to be a Chinese State-Owned Enterprise.
39. PNO has operated the Port since May 2014, under a 98-year lease from the State of New South Wales. Prior to this, the Port was operated by the State of New South Wales.
40. Under the terms of its long-term lease, PNO has a licence to operate shipping channels at the Port and, as noted above, it has unfettered monopoly power over Port access.

### **B5. Privatisation of the Port and Port charges**

41. Until 2014 the Port Authority of NSW, a government owned corporation of the State of New South Wales, was responsible for the overall development and operation of the Port. As the port operator from May 2014 onwards, PNO has controlled the terms and conditions of access to the Port. PNO has and may exercise the statutory powers conferred under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA**) and the *Ports and Maritime Administration Regulations 2012* (NSW).
42. On each occasion a vessel enters the shipping channels, it incurs liability to pay usage charges for the use of the Port at rates determined by PNO, which has the express entitlement under the lease of the Port from the State of NSW, to exclude access to the channels if the shipping charges are not paid.

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<sup>8</sup> Twenty-foot equivalent units, a measure of container size.

43. PNO publishes a schedule of service charges that apply to the commercial use of the Port, in accordance with the PAMA including, a Navigation Service Charge (**NSC**) and a Wharfage Charge (**WC**). PNO may vary this schedule from time to time, including varying or introducing new fees without consultation or negotiation.
44. Shortly after assuming its role as port operator, PNO substantially increased Port access prices (including, in relation to port access charges, by between 40% and 60% for some vessel types) and re-valued the Port assets from \$1.75 billion to \$2.4 billion. Subsequently, PNO has continued to substantially increase Port access prices. By way of example, the price increase for the NSC between 2019 and 2020 was 33.5%.
45. These price increases were not associated with any increase in productivity, efficiency or service provided by PNO, and nor were they imposed for the purpose of funding any further investment in the services provided at the Port.
46. PNO's significant price increases and the consequent uncertainty for coal producers provide critical context for the Authorisation Application. As noted by the Tribunal:

...the understandable commercial incentive to maximise its profitability, and its revenue, may be served in different ways at different times, depending upon the strength of the coal export market. The fact remains (as noted above) that coal miners supplying coal into that market from mines in the Hunter Valley have no real practical alternative to using the Service, and in more profitable times (accepting what has been said about the present state of that industry) be vulnerable to charging changes imposed by PNO for access to the Service to absorb to a significant degree the profitability of exporting coal produced from the Hunter Valley.<sup>9</sup>

#### **B6. The Producer Deed**

47. As an alternative to its published schedule of service charges, at the end of 2019 PNO invited coal producers, vessel agents, vessel operators and Free on Board coal consignees to enter into bilateral long-term discounted pricing arrangements (or deeds). The deed offered to producers (**Deed**) includes NSC and WC prices at a "discount" to PNO's published charges. It is the terms and conditions of the Deed (and any other access arrangements) that the Authorisation Applicants seek to collectively negotiate with PNO. The term offered by PNO under the Deed is ten years.
48. Importantly, the pricing mechanism set out under the Deed does not provide Port users with any pricing certainty. The Deed provides PNO with a number of "re-openers" and mechanisms by which it can adjust the price for use of the Port based on factors including capital expenditure that is solely within the discretion of PNO.

#### **B7. No price regulation**

49. In some cases of bottleneck infrastructure, there is a certified access regime or other effective regulatory framework to 'manage' the prices set by the monopoly owner or operator for use of the infrastructure. There is no such regime in place in relation to the Port. Given that it is no longer declared under Part IIIA of the CCA, there is no constraint on PNO's pricing that arises from ACCC oversight.

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<sup>9</sup> *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [166].

50. While the prices levied by PNO are subject to price reporting to the relevant Minister of the State of New South Wales under Part 6 of the PAMA, and the Minister may refer the pricing for investigation to the New South Wales Independent Pricing and Regulatory Tribunal, it is not a certified or effective access regime.
51. PNO has in the past claimed that there are some existing constraints on PNO in relation to its pricing structures (e.g. the price reporting mechanism under the PAMA). However, the fact is that at present, there are no direct regulatory constraints on its pricing structures.
52. The Authorisation Applicants understand that the New South Wales Government has no present intention to put in place any form of regulatory oversight for access charges at the Port. This creates considerable uncertainty for the Hunter Valley coal industry, particularly in the present commercial environment (as noted above).
53. The Authorisation Conduct provides the opportunity for the Authorisation Applications to seek a solution, creating certainty for the benefit of the Hunter Valley mining industry as a whole.
54. While there is no certainty that there will be an industry agreement with PNO as to access issues at the Port as a result of the Authorisation Conduct, for the reasons outlined below, it would provide the conditions to allow the mining companies to have such discussions that would facilitate fair, reasonable and efficient access arrangements. In turn, this would provide certainty for long term investment in the region.

**B8. PNO's negotiations with coal producers**

55. PNO declined collective negotiations with the Authorisation Applicants on 11 May 2020 and has continued to decline any engagement in this process.

**C. ISSUES**

56. The issues for the Tribunal are (as correctly stated by PNO):
  - (a) whether the Authorised Conduct would result, or be likely to result, in any benefit to the public;
  - (b) whether the Authorised Conduct would result, or be likely to result, in any public detriment; and
  - (c) whether, as a matter of discretion, the Authorised Conduct should not be authorised.

## **D. CONTENTIONS**

### **D1. The Authorisation Conduct sought**

57. The Authorisation Applicants seek authorisation under the CCA to:
- (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.
58. The Authorisation Conduct does not involve any collective boycott activity.
59. Participation in the Authorisation Conduct will be voluntary. The Application seeks to allow each applicant to independently determine for themselves whether to accept the terms and conditions offered by PNO following collective negotiations. Each applicant is also able to freely undertake independent negotiations with PNO at any time they wish to do so.
60. Authorisation is sought for a period of 10 years. This reflects the prospective term of an access agreement which PNO has proposed in the Deed. It also allows for renegotiation of prices associated with review events that PNO is seeking under its proposed Deed.
61. PNO will not be required to negotiate collectively with the Authorisation Applicants – authorisation merely provides the opportunity to do so.
62. The class of parties able to collectively negotiate under the proposed authorisation is not closed. Pursuant to s 88(1) of the CCA, the authorisation is sought on terms that would allow other access seekers / Port users to have the benefit of the authorisation if it chooses to participate in the collective negotiation.
63. The Authorisation Conduct will not operate to permit any collusion or information sharing between the Authorisation Applicants. It will not allow them to agree prices or other terms and conditions in respect of the coal production services which they offer in competition with one another.

### **D2. Relevant market/s**

64. The primary market affected by the Authorisation Conduct is the market for the access to PNO's Port services. In respect of this market, PNO has a complete monopoly. PNO has the unfettered ability to raise access charges.
65. In its Application for Review and Statement of Facts, Issues and Contentions, PNO focuses on the global thermal coal market. In this context, PNO argues that any reduction in port charges that may result from a collective bargaining process will be negligible (less than 0.2% of the global thermal coal price per metric tonne) and would

not be likely to result in any materially improved competitiveness for coal producers in coal export markets.<sup>10</sup>

66. PNO's focus on the global thermal coal overlooks the market for access to PNO's Port service and other up-stream markets (as explained below).<sup>11</sup>

### **D3. Authorisation will provide significant public benefits**

#### **D3.1 Improving efficiency with collective negotiations**

67. The Authorisation Applicants contend that the Authorisation Conduct would likely result in more efficient terms of access and resolution of associated industry issues. This was the view formed by the ACCC, following submissions from interested parties.
68. PNO has proposed a Deed for access to the Port for a period of 10 years that includes issues that affect all users of the Port (e.g. capital expenditure at the Port). The Authorisation Applicants submit that an industry response, and one facilitated by the Authorisation Applicants, is the most efficient course.
69. Contrary to PNO's contention,<sup>12</sup> unilateral negotiations between PNO and Port users would not likely provide an efficient means of resolving industry-wide issues.
70. The current commercial reality is that the Authorisation Applicants, being nine of the largest coal exporters of the Port, have not been able to agree with PNO in relation to the Deed. They seek to settle industry-wide issues from an industry perspective. In that respect, bilateral negotiations with PNO have not succeeded and collective bargaining by the industry is needed to achieve the economic goals of "efficiency and progress".<sup>13</sup>
71. It is not economically efficient for PNO to charge Port users for the cost of assets already funded by users. It also has a material impact on the related markets (as noted below) and the commercial ability / incentive for industry participants to invest in the mining industry in the Hunter Valley.
72. Because PNO analyses the test for authorisation exclusively through the lens of the global thermal coal market and concludes that collective negotiations will not result in any meaningful improvement in competitiveness in that market, PNO asserts that any benefits obtained as the result of collective negotiations will only be 'private' benefits, rather than 'public' benefits for the purposes of the statutory test. This assertion does not bear scrutiny when consideration is given to the nature of the industry-wide issues (including Port access and long-term infrastructure investment) sought to be negotiated by users of the Port with PNO.
73. The Authorisation Conduct will facilitate an industry discussion on industry issues relevant to the Port, including as to capital expenditure relating to services to be provided by the Port for the mining industry, and as to how user funding should be treated within that framework. As a matter of efficiency, the resolution of these issues (through the Deed) should apply across the industry. This would benefit all PNO's users in creating certainty for investment and long-term pricing.

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<sup>10</sup> Application for Review at [27].

<sup>11</sup> See [4.4] to [4.7] of the ACCC's Determination.

<sup>12</sup> At [33]-[35].

<sup>13</sup> ACCC Authorisation Guidelines at [8.1].

74. This contention is supported by others in the industry. Yancoal and Port Waratah Coal Services in submissions to the ACCC highlighted that bilateral negotiations with PNO have been difficult, due to the inequality of bargaining power between an individual coal producer and PNO. Coal producers are dependent on PNO's services but PNO is not dependent on any user, particularly where PNO has statutory rights to increase prices at its discretion.
75. Contrary to PNO's assertions, it is evident from the Yancoal submission that the issues relating to PNO's regulated asset base is one which concerns the whole industry, and which warrants collective discussion as to how it is contemplated to be factored into the pricing mechanisms of the template producer Deed.
76. Collective negotiations will likely improve efficient outcomes for the whole Hunter Valley coal industry, as the terms and conditions of access to the Port relate to issues such as future capital expenditure at the Port, and the impact on prices paid by coal producers whether directly or indirectly.
77. The resolution of such industry issues in an efficient manner will likely deliver significant public benefits. It would create long term certainty for both coal producers and PNO, creating a far more favourable environment for future investment in coal production and Port infrastructure. In turn, this would generate significant public benefits in Australia of improved commercial outcomes, including the maintenance of strong exports, employment, coal royalties for the State of New South Wales and economic growth.
78. The Authorisation Applicants contend that the encouragement of long-term investment solutions underpinned by certainty about access terms at the Ports is crucial to securing a future for efficient coal exports in the Hunter Valley region.
79. Without the Authorisation Conduct, it is far less likely that PNO will agree to make any concessions in relation to the industry wide issues covered by its proposed Deed, including the basis on which costs will be allocated by PNO.
80. The proposed Deed reflects PNO's monopoly position. For example, the proposed Deed offered to coal producers:
  - (a) protects PNO from changes in tax and other laws by enabling it to pass on any adverse effects of those changes to users who have no alternative to the Port for the export of coal;
  - (b) allows PNO to increase charges to maintain the rate of return for its shareholders;
  - (c) prevents scrutiny of PNO's future investments in the Port which may have the effect of preventing Port users from being able to access data and assess whether such investments and expenditures by PNO are justified and efficient (and even related to coal export).<sup>14</sup>
81. In the absence of collective bargaining, and in light of the heavily skewed terms and conditions offered by PNO in the Deed, it is unlikely that there will be an efficient

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<sup>14</sup> Item 7 of the annexure to the Deed.

resolution of these industry-wide issues with a significant detrimental effect on individual investment decisions on the coal production side.

82. Further, increased transparency in respect of these industry-wide issues, such as expenditure and costs allocation at the Port, has the potential to lead to more efficient outcomes for the mining industry.
83. As the monopoly infrastructure services provider, PNO holds all of the data on expenditures and costs at the Port. Coal producers, irrespective of their size or volumes of coal exported through the Port, have little bargaining power or ability to question PNO in relation to capital expenditures or costs.
84. This is particularly the case because of the lack of regulatory oversight. The imbalance in bargaining power and information would persist in the absence of the Authorisation Conduct. The Authorisation Applicants do not have any meaningful ability to reasonably negotiate with PNO on an individual basis in this regard.
85. A non-discrimination term as proposed by PNO under the template Deed<sup>15</sup> will likely be of no real utility or protection to users where no user, large or small, has any real visibility of the contractual set of terms other users have agreed with PNO.
86. PNO has asserted that it has committed to providing to users a forward looking five year forecast of its projected capital expenditure that may impact access prices. However, Port users have no input or ability to materially influence that forecast. Clause 7(c) of the Annexure to the template producer Deed expressly provides that "for the avoidance of doubt, PNO may, but is not obliged to, implement any comments made by the Producer on its 5 Year CAPEX Forecasts or any proposed increase to the Producer Specific Charges".
87. The industry is particularly concerned about this issue given the lack of evidence that recent increases in Port charges have been re-invested in the Port for the benefit of coal export operations.<sup>16</sup> The Authorisation Conduct would allow applicants to discuss the CAPEX forecasts provided by PNO which would likely improve information asymmetry and associated inequality in bargaining power, so as to facilitate a more efficient solution.
88. PNO's contentions that individual negotiations will bring to bear equally if not more effective resolution of industry issues, does not withstand scrutiny.
89. The reality that has transpired is that the Authorisation Applicants (9 of the largest coal producers of the Port) have not agreed with PNO's negotiating stance and have sought to negotiate industry issues collectively from an industry perspective. To this extent, individual, bilateral negotiations between PNO and users of the Port have not succeeded and collective bargaining is needed to resolve the industry issues in order to achieve the economic goals of "efficiency and progress".
90. Given this, the Authorisation Applicants are seeking the opportunity to be able to discuss and collectively engage with PNO in relation to the contractual framework proposed

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<sup>15</sup> Item 5 of the Annexure to the Deed.

<sup>16</sup> As noted in the PWCS Submission to ACCC dated 3 April 2020, at page 2.

under the template Deed, in circumstances where users clearly have a common and legitimate interest in seeking to understand and negotiate the mechanics and language of the proposed terms and conditions of access in a streamlined, cost effective, reasonable and efficient manner.

91. The absence of the Authorisation Conduct, would likely result in users having to accept the contractual terms proposed by PNO on a less efficient basis. To this end, PNO has the ability to exert greater, individual commercial pressure on users to accept its terms. It is likely that coal producers, particularly smaller miners with more limited resources, will likely cede to such commercial pressure.
92. Finally, the template Deed purports to provide an avenue for dispute resolution where a "Permitted Price Dispute" arises between PNO and the Port user. However, private resolution cannot be likened to the regulatory oversight nor does it provide a meaningful avenue for dispute resolution by an access seeker.
93. In addition, the template Deed provides that "no appeal may be made to the Court on a question of law arising out of an award of the arbitrator appointed under this Dispute Resolution Process", and that the "particulars of the Dispute, any negotiation, mediation or arbitration and any terms of resolution including any Award must be kept strictly confidential by PON and the Producer".<sup>17</sup>
94. In these circumstances, authorisation of the proposed conduct is necessary to allow the Authorisation Applicants to seek to negotiate more efficient positions as to pricing and accountability with PNO which the Authorisation Applicants believe would improve pricing outcomes and create an improved environment for investment in the Hunter Valley.
95. The process of collective bargaining will likely assist in seeking to address the clear inequality in bargaining power in this respect.
96. In summary, the Applicants submit that in the absence of the Authorisation Conduct, the reality that would likely transpire is that PNO would be able to impose significantly less efficient terms and conditions to maximise its commercial interests as the monopoly infrastructure service provider, to the detriment of competition, exports, State royalties, employment, investment in the Hunter Valley region and growth of the Australian economy (as explained further below).

### **D3.2 Enhancing investment and promoting competition in relevant markets**

97. The Authorisation Conduct will provide efficient terms and conditions of access by all Port users and increased certainty in investment that would facilitate increased usage of PNO's services on a more efficient basis. It is the efficiencies derived from the requested authorisation that are likely to be most important in dealing with PNO as a monopoly provider of services at the Port, as they will foster the ability of the mining companies to export coal more efficiently (and thereby compete with each other more effectively).

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<sup>17</sup> CI 5.3, Schedule 3 of the Deed.

98. In particular, the requested authorisation would promote a material increase in competition in a number of dependent markets, including the following:
- (a) the coal export market - mining export infrastructure occupies a strategic position in the mineral export industry, and provides services required to compete in the dependent seaborne coal and other mineral markets. Considering the current economic climate and experience of Australian coal producers, even incremental cost increases at the margin may have the degree of impact to drive coal producers to exit the market, which would inevitably have repercussions for the related markets that support the coal export market. The requested authorisation would provide coal producers with the opportunity to negotiate such cost increases with PNO in a more effective and meaningful way, thereby driving competition in this market;
  - (b) the markets for the acquisition and disposal of exploration and / or mining authorities (the **Tenements Market**). With authorisation, owners of tenements will have increased incentives and confidence to invest in the exploration of their tenement(s), either for the purpose of developing the tenement itself or obtaining more information about the tenement to improve its prospective value. Sellers will enjoy greater competition amongst buyers when selling their tenements, thereby driving up price and activity in the Tenements Market. The New South Wales Government (as the originating seller of tenements) will benefit from increased competition in the bidding for licences, underpinned by pricing certainty in relation to Port access prices;
  - (c) the markets for services such as geological and drilling services, construction, operation and maintenance (the **Specialist Services Market**). If competition is materially increased in the Tenements Market, this will likely have a positive flow-on effect to the Specialist Services Market, as there will be increased demand for the specialist services which would be involved in developing mining tenements.

### **D3.3 Transaction cost savings**

99. The Authorised Conduct would lead to transaction cost savings for both PNO and also the mining industry. It would focus the negotiations on key industry issues that would otherwise be inefficient for all involved if PNO sought to negotiate mining company by mining company – for example, PNO's proposed capital investment program that would affect the coal industry as a whole. Over the proposed 10 year period these efficiencies would likely be substantial.

### **D4. Authorisation has no significant (if any) public detriments**

100. In the absence of authorisation, the Authorisation Applicants would not be able to collectively discuss with PNO industry issues relating to access to the Port and the provisions of the proposed Deed that PNO has issued, particularly in relation to capital expenditure and PNO's investment in the Port. On the other hand, recognising that PNO is free to decline to collectively negotiate if it so chooses, the Authorisation Conduct would not result, or be likely to result, in any significant (if any) public detriments.

#### **D4.1 The Authorisation does not permit collective boycott**

101. PNO has already publicly indicated that it wishes to deal with its users rather than have ongoing litigation as to the pricing at the Port. However, it is up to PNO if it wishes to engage in the proposed collective negotiations. There is no suggestion of any collective

boycott being sought by the Authorisation Applicants (which would not be feasible in any event given the monopoly position of PNO). Accordingly, there would be no likely public detriment arising from the application in this regard.

#### **D4.2 There is no meaningful risk of impermissible information sharing**

102. PNO's contention that authorisation will facilitate collusion and anti-competitive information sharing between coal producers is not supported by any evidence, and runs contrary to the established history of collective bargaining by industry associated members.
103. The exchange of information between the Authorisation Applicants and the reaching of any understanding only relates to the Authorisation Conduct. Information will only be shared to the extent that it is reasonably necessary for this purpose.
104. The Authorisation Conduct does not involve the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume / capacity projections for individual users. This is because, consistent with the ACCC Determination, access pricing is not on a user basis and as such there is no reason to share production or customer information or industry data (which is already publicly available).
105. The Authorisation Conduct is not novel. By way of example only, the ACCC granted coal producers authorisation to negotiate access to the Dudgeon Point Project Management Terminal proposed for Dudgeon Point, to collectively bargain on the terms and conditions, including price.
106. Finally, the companies seeking to negotiate with PNO are sophisticated mining companies which have compliance processes in place to ensure that no information is exchanged that would be problematic under the CCA. The risk of impermissible information sharing is limited and there is no evidence that this is likely to occur.

#### **D4.3 No discrimination against smaller producers**

107. PNO asserts that collective negotiations are likely to result in the coal producers attempting to negotiate as a bloc with PNO and use their dominant position to preclude smaller producers from engaging in separate negotiations.<sup>18</sup> The point is without substance.
108. The Authorisation Applicants are seeking to discuss and negotiate the terms and conditions of access under the contractual framework proposed by PNO. The Authorisation Applicants and others in the industry have common interests in transparency and efficiency in this respect, and in the spirit of 'non-discrimination' as suggested by PNO, so that the terms and conditions of access are understood and approached in a consistent manner across the industry.

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<sup>18</sup> At [44] and [59].

## **D5. Discretion**

109. Given the Authorisation Conduct would likely result in significant public benefits and no significant (if any) public detriments, the conduct should be authorised – and there is no discretionary reason to the contrary.
110. PNO's assertion that authorisation is unnecessary in circumstances where PNO is "voluntarily opting into contractual regulation of its prices", is illusory and not sustainable. Equally, PNO's proposition ignores the public benefits outlined above, relating to transaction cost savings and the ability for the Applicants to discuss issues which apply to the whole industry (in relation to which PNO and users of the Port, have inherently diverging interests).
111. Finally, as a matter of discretion, as the ACCC correctly noted, PNO's assertion that if authorisation is granted it does not intend to participate in collective negotiations with coal producers does not negate the case for authorisation.
112. The Tribunal's role is to assess the public benefits and detriments that are likely to arise in the future with and without the Authorised Conduct. It is not the Tribunal's role to attempt to predict whether the proposed conduct will be engaged in by the parties, or the outcome of collective negotiations on any specific issues.

## **D6. The ACCC's Determination is supported by the evidence and submissions**

113. Each of the findings made by the ACCC were the subject of evidence and submissions before the ACCC by NSWMC, PNO and other interested parties.

## **D7. Redaction of material by PNO**

114. NSWMC notes that PNO in its application has redacted certain provisions on the grounds of claimed confidentiality. These claims prevent NSWMC from responding to those allegations at this time. PNO made similar claims of confidentiality before the ACCC, which were put to NSWMC on a limited basis, and the ACCC otherwise appears to have rejected those arguments.

## **E. Relief sought by the Authorisation Applicants**

115. NSWMC seeks the following relief:
  - (a) PNO's application for review of the ACCC's Determination be dismissed;
  - (b) Authorisation Application AA1000473 be allowed;
  - (c) Indemnity costs.
116. NSWMC notes that costs orders before the Tribunal are discretionary. However, PNO has made this application to the Tribunal in circumstances where the authorisation was necessary in order for NSWMC to be able to seek to collectively bargain with PNO (in a manner compliant with the CCA), where the Determination did not require PNO to negotiate, where the Determination did not allow the coal exporters to engage in any activity to force PNO to negotiate, and where PNO has declined to negotiate with NSWMC.

117. In circumstances where it is not seriously in dispute that the coal industry faces significant cost pressures (including due to trade issues with China), and where it is clearly in the hands of PNO whether collective bargaining negotiations occur, this application creates unnecessary costs and is not a good use of taxpayer resources, Tribunal resources, nor time. NSWMC as an industry association seeks an indemnity costs order because while it was necessary for NSWMC to seek the authorisation from the ACCC, there is no utility in this Tribunal application.

Nicholas De Young QC

Daniel Tynan

Clifford Chance

**28 January 2021**