



NSW MINERALS COUNCIL
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For public register

Mr David Hatfield
Director, Adjudication
Australian Competition & Consumer Commission
23 Marcus Clark Street, Canberra ACT 2601

17 August 2020

Dear Mr Hatfield

Authorisation Application AA1000473 – response to substantive submissions

This submission by the NSWMC responds to the public submission by Port of Newcastle Operations Pty Ltd (PNO) dated 10 July 2020 (Submission), that was provided to us in redacted form on 6 August 2020.

NSWMC notes that PNO's latest submission was subject to redactions for claimed confidentiality reasons. In a public authorisation process, to the extent we have been denied an ability to respond to those matters on the grounds of claimed confidentiality, the ACCC should not rely on such submissions from PNO because they cannot be subject to appropriate testing.

For example, much of PNO's claims in paragraph 2.6 of its Submission on the Australian Competition Tribunal's (Tribunal) findings are miscategorisations of the Tribunal's actual findings. The ACCC was a party to the Full Federal Court appeal of the Tribunal's determination (Appeal) and is well placed to examine the transcript regarding PNO's arguments. In any event, as PNO notes, the Tribunal's findings are subject to appeal and therefore to the extent PNO's arguments are reliant on the Tribunal's findings, they are not grounded in conclusive findings.

The fact of the Appeal also addresses PNO's protestations in relation to re-ventilation of the Tribunal's findings. They have, as a matter of fact, been re-ventilated in an appeal court. Further, any Appeal decision which reverses the Tribunal's decision regarding the \$912 million user-funding will set a precedent that raises questions how PNO could legitimately seek to continue to impose such costs on Port users. That would clearly be the proper subject of collective bargaining by the New South Wales (NSW) coal industry, to address that issue raised by PNO.

In the Submission, PNO also questions whether the granting of collective bargaining authorisation by the ACCC would lead to any pro-competitive impacts and/or public benefits. In relation to the positive impact on competition for the NSW coal industry, its application to the NCC, NSWMC has highlighted that the granting of collective bargaining authorisation will have the positive impact of being able to negotiate with PNO in relation to industry issues, and the pro-competitive outcomes if the Port was once again, subject to declaration.¹ This addresses this particular argument raised in the Submission from PNO.

¹ See: <http://ncc.gov.au/application/application-for-declaration-of-certain-services-in-relation-to-the-port-of-newcastle>.



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[REDACTED]

[REDACTED] it is unclear what commercial reasons large users would have in dissuading smaller users from negotiating terms with PNO if they so wish, as it would be their risk if they end up paying more for Port access.

[REDACTED]

The more concerning issue [REDACTED] the pressure being placed on small (and large) coal producers to sign up to PNO's terms and conditions at this time when doing so may see them unnecessarily paying for the \$912 million user-funded expenditure, if the Federal Court rejects PNO's claims.

This pressure and the negotiating power exerted by PNO clearly highlights the actual need for a collective bargaining authorisation.

Yours sincerely

[REDACTED]

Stephen Galilee
CHIEF EXECUTIVE OFFICER