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For public register

30 April 2020

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

Dear Mr Hatfield

Authorisation Application AA1000473 – response to substantive submissions

1. Introduction

This submission is on behalf of the New South Wales Minerals Council (**NSWMC**) and the ten mining company members (the **Applicants),** in relation to the proposed collective bargaining conduct (**Proposed Conduct**) as set out in our authorisation application dated 5 March 2020 (**Application**).This submission responds to the submissions made at the request of the Australian Competition and Consumer Commission (**ACCC**), for substantive comments in relation to the Application.

We note the submissions that have been made in support of the Application by industry participants. This submission addresses the matters raised by Port of Newcastle Operations Pty Ltd (**PNO**) in its submission dated 7 April 2020 (**PNO April Submission**) and the submission from the NSW Government owned Port Authority of NSW (**PANSW**) dated 16 April 2020 (**PANSW Submission**) in relation to the lease arrangements at the Port of Newcastle (**Port**).

The Applicants believe that the Proposed Conduct will assist the NSW Mining industry to increase efficiencies, improve productivity, seek growth and increase employment. The Applicants submit that authorisation of the Proposed Conduct will deliver public benefits that far outweigh the minimal (if any) detriments that have been alleged by PNO in the PNO April Submission. Therefore, we consider that authorisation of the Proposed Conduct for a period of 10 years would enable the industry to constructively negotiate and discuss the terms and conditions for access to the Port with PNO in a transparent and cooperative way.

2. Interim authorisation and Applicants' proposed engagement with PNO

The Applicants appreciate the ACCC's decision on 2 April 2020 to grant interim authorisation for the Proposed Conduct (**Interim Authorisation**). The Applicants have formed a collective bargaining negotiating committee (**Negotiating Committee**), to discuss key industry issues related to the terms and conditions of access to the Port, and intend shortly to approach PNO, in accordance with the

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terms of the Application and Interim Authorisation.

We believe that a collective negotiation of these industry issues will assist the mining industry in more efficiently exporting minerals from Australia. Furthermore, a collective bargaining group dealing with these industry issues is much more effective and the appropriate course rather than the proposed joint buying group suggested by PNO. There is no suggestion of "joint buying" of capacity; nor is there any suggestion of managing the amount of access to or capacity at the Port, which is determined by PANSW in any event (and not PNO).

In addition, it is noted that one of PNO's arguments as to why authorisation should not be granted was that PNO does not propose to collectively bargain. In order to address this issue, the NSWMC advises the ACCC that it will be lodging an application with the National Competition Council (**NCC**) for declaration of the channel services at the Port.

3. Response to matters raised in PNO April Submission

Applicants are seeking the opportunity to discuss legitimate industry-wide concerns and engage with PNO constructively

The Applicants, through the Application, the letter to the ACCC dated 25 March 2020, and this submission, are seeking to legitimately raise issues that have an industry-wide application. In the PNO April Submission, PNO asserts that the Application is an:

> "...*illegitimate use of the processes set out in the CCA, to seek to re-open the user contributions issue by way of forming a cartel to conduct a collective negotiation where there is no public interest arising in Australia*".

Contrary to what PNO asserts, as we have explained in this submission, issues such as user funded expenditure at the Port, is not limited to past user contributions or the issues raised in previous litigation between Glencore, PNO and the ACCC, but also raises ongoing industry issues as and when further expenditure is contemplated by PNO at the Port. For example, the user funded dredging capital expenditure of approximately $912m were undertaken primarily by industry owned coal terminals Port Waratah Coal Services (**PWCS**) and Newcastle Coal Infrastructure Group (**NCIG**). These issues as to industry capital expenditure are most appropriately dealt with at an industry level.

Further, the Applicants note that the issue of user contributions is not a closed one as PNO suggests, but rather is the subject of litigation before the Federal Court of Australia. It is also an issue that concerns the industry as a whole, as the ACCC would be aware given the ACCC has itself also appealed the Tribunal's decision to

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allow PNO to include user funded expenditure in its capital base.[1]

It is also noted that PNO in the pricing principles and cost base that has put forward to users at the Port in the template Producer Deed, has expressly included user funded expenditure such as the industry dredging expenditure in its capital base and requires producers and the industry to effectively waive raising this issue going forward, despite it being a very much open issue subject to litigation as to past expenditure and an open issue going forward. Moreover, even if the ACCC litigation is unsuccessful, it is likely the industry will seek to have regulatory reform to expressly exclude such user funding being incorporated into the service provider's asset base (in the absence of the industry/users' agreement).

Given these circumstances, the Applicants believe that authorisation of the Proposed Conduct would result in improved economic efficiency through seeking to decrease negotiation costs, seeking to address users' concerns as to information asymmetry, and seeking to reduce potential future expenditure on disputes through collective discussions by the Applicants as an industry.

It is understood that PNO may not agree to collectively bargain with the Applicants. It is the Applicants' view that collective bargaining can lead to acceptable commercial outcomes for both the users and PNO, and under such circumstances, would result in genuine public benefits being obtained. As such, we believe the test for authorisation of the Proposed Conduct is satisfied, as considered in further detail below.

Test for authorisation is satisfied

Public benefits

The public benefits that are likely to flow from authorisation of the Proposed Conduct are the very kind contemplated in previous ACCC authorisations, such as those considered in relation to Queensland coal producers' authorisation application relating to collective negotiation of terms and conditions of access to the Dudgeon Point terminal infrastructure,[2] and as considered in the ACCC's *Guidelines for Authorisation of Conduct (non-merger) March 2019* (**Authorisations Guidelines**), rather than being merely private in nature as asserted by PNO.

As noted in the Authorisation Guidelines, although "public benefit" is not defined in the *Competition and Consumer Act 2010* (Cth) (**CCA**), the ACCC has traditionally given it a broad meaning so as to include:

> "…*anything of value to the community generally, any contribution to the aims*

[1] https://www.accc.gov.au/media-release/accc-appeals-decision-on-user-funding-at-the-port-of-newcastle .

[2] See: https://www.accc.gov.au/system/files/public-registers/documents/D13%2B32694.pdf .

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> *pursued by the 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*".[3]

It is difficult to see how PNO's proposition that individual negotiations will bring to bear equally if not more effective resolution of industry issues, could practically transpire. The reality that has transpired is that 10 of the largest users of the Port have not been persuaded by PNO's negotiating stance and have sought to negotiate industry issues from an industry perspective. Individual, bilateral negotiations between PNO and users of the Port have not succeeded and it would appear that collective bargaining by the industry is needed to achieve the economic goals of "efficiency and progress" as contemplated within the Authorisation Guidelines.

As discussed in further detail below, PNO's suggestion that authorisation is unnecessary in circumstances where PNO is "voluntarily opting into contractual regulation of its prices", is not sustainable. First that proposition is illusory in a similar manner to PNO's claims that the proposed contracts put forward by PNO provide contractual certainty and replace regulatory certainty or regulation of its prices. They do not. Equally, PNO's proposition ignores the public benefits outlined below, 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).

The Applicants' experience to date has been that PNO derives substantial bargaining power from the position (that has been accepted by the Tribunal), that there are no alternative means for the Hunter Valley coal producers to export their coal other than through the Port. It is through this infrastructure monopoly position and the data that PNO holds on the Port's historical expenditures and future required expenditures, that as a practical matter it is not possible to effectively question or otherwise challenge the positions PNO takes without a means to test the underlying data or propositions that are put forward. This is particularly the case noting the existing lack of public regulatory oversight or mandatory reporting / audits that PNO is subject to. The imbalance in bargaining power/ information and the unregulated current 'state of play' would persist in the absence of authorisation of the Proposed Conduct. Therefore, the Applicants do not see any meaningful ability to reasonably negotiate with PNO on an individual basis. A non-discrimination term as proposed by PNO under the template Producer Deed will likely be of minimal

[3] ACCC, Authorisation Guidelines, p. 43.

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utility or protection to users in a situation where no user, large or small, has any real prospect of achieving a balanced and reasonable contractual set of terms with PNO.

Given this, the Applicants are seeking the opportunity to be able to discuss and collectively engage with PNO in relation to the contractual framework proposed under the template Producer 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.

In the absence of authorisation of the Proposed Conduct, there would be no ability for the Applicants to engage in such discussions individually, which would likely result in users having to accept the contractual terms proposed by PNO on a 'take it or leave it' basis, and PNO having the ability to exert greater, individual commercial pressure on users to accept such terms on this basis. In these instances, it is likely that smaller miners with more limited resources will have no option other than to cede to such commercial pressure.

In addition, consistent with the ACCC's Authorisation Guidelines, the Applicants consider that there are a number of key public benefits that would likely flow from authorisation of the Proposed Conduct:

a. **Improving efficiency**

   i. Having regard to the nature of the services provided by PNO and that it is a monopoly infrastructure service provider, the Applicants submit that there are substantial efficiencies arising from collective negotiations. The template Producer Deed sets the terms and conditions of access to the Port and includes aspects that affects all users (such as capital expenditure at the Port), rather than just some users individually.

   ii. The Applicants note that PNO has not sought to outline to the industry in detail as to how the Port would operate with a container terminal in operation and in particular, how costs incurred in a container terminal establishment including channel and harbour dredging would be reflected in charges imposed on other users of the shipping channel at the Port. Such issues are not able to be effectively addressed at an individual user level.

b. **Improving pricing outcomes**

   i. As explained in the Application, authorisation of the Proposed Conduct will enable users to collectively, as an industry, discuss with PNO the basis on which costs will be allocated by PNO and the

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means for PNO to more efficiently engage in capital expenditure on a transparent basis. Improved pricing outcomes, in particular certainty as to future price paths, for users of the Port will likely in turn have the effect of encouraging further investment in the Hunter Valley region.

ii. While the template Producer Deed purports to provide an avenue for dispute resolution where a "Permitted Price Dispute" arises between PNO and the producer / user, such mediation / arbitration by ACICA cannot be likened to the regulatory oversight that would have been in place had declaration of the Port not been deemed to be revoked, nor is it suggested that it provides a meaningful avenue for dispute resolution by an access seeker.

iii. As the ACCC would be aware, an ACCC determination following arbitration of an access dispute between PNO and a producer / user has precedent value in so far as it is considering appropriate principles for access terms and conditions (including as to price) for any user of the Port, as pricing would be determined by the ACCC irrespective of the volumes of coal exported through the Port, based on extensive data provided by the access provider.

iv. In contrast, [5.2] and [5.3] of Schedule 3 of the template Producer Deed provide 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*".[4]

v. Given this important distinction between PNO's proposed (private) contractual approach and the regulatory regime previously in place at the Port under declaration, the Applicants consider authorisation of the Proposed Conduct necessary to allow the Applicants to seek to negotiate more transparent positions as to pricing and accountability by PNO which the Applicants believe would improve pricing outcomes and create an improved environment for investment in the Hunter Valley.

c. **Improving commercial outcomes**

i. As noted by Yancoal in its submission to the ACCC dated 3 April 2020

[4] See: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf .

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(**Yancoal Submission**) and Port Waratah Coal Services in its submission to the ACCC dated 3 April 2020 (**PWCS Submission**), authorisation of the Proposed Conduct will likely improve commercial outcomes for users and for PNO. It is understood that the Applicants' experience has been consistent with that noted by Yancoal being that bilateral negotiations have been difficult, due to the inequality of bargaining power that exists between an individual coal producer and PNO, where the coal producer is dependent on PNO's services but there is an absence of dependence by PNO on any user, particularly where PNO has statutory rights to increase its pricing as it sees fit.

ii. Collective negotiations will improve commercial outcomes for the whole 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. Contrary to PNO's assertions that the Application stems from an illegitimate attempt by a single producer to re-litigate issues as to user funding, 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.

iii. The resolution of such industry issues will likely deliver very clear public benefits and 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 NSW, and economic growth.

d. **Transaction cost savings**

i. As noted in the Yancoal Submission, given the significant number of coal producers impacted, it is likely that a single, collective negotiation will involve materially lesser negotiation costs and resources for all parties, including PNO, in comparison to a series of bilateral negotiations between numerous producers and PNO (which to date have not yielded a satisfactory resolution of industry issues).

e. **Improving information asymmetry and inequality in bargaining power**

i. Being the monopoly infrastructure services provider, PNO holds all of the data on past expenditures at the Port while users, irrespective of their size or volumes of coal exported through the Port, have little

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bargaining power or ability to question PNO in relation to capital expenditures or price increases, particularly in the absence of declaration of the Port. Access seekers or a party seeking to negotiate or arbitrate PNO's proposed template Producer Deed would face information asymmetry given much of the data will not be available other than to PNO, noting that the material that was before the ACCC in the PNO / Glencore arbitration is not public in any degree of granularity other than the public version of the ACCC's arbitration determination.[5] In addition, the process of collective bargaining should assist in seeking to address the clear inequality in bargaining power.

ii. Although PNO asserts that it has committed to providing to users a forward looking 5 year forecast of its projected capital expenditure that may impact access prices, it is clear that it is simply a forecast and users have no input or ability to materially influence that forecast as the Producer Deed currently stands. Clause 7(c) of the Annexure to the template Producer Deed expressly provides that "*for the avoidance of doubt, PON 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*".

iii. As noted in the PWCS Submission, the industry is concerned at the lack of evidence that PNO has provided to show that recent increases in Port charges have been re-invested in the Port for the benefit of coal export operations. Authorisation of the Proposed 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 that the industry can make more informed investment and commercial decisions.

f. **Promoting competition in the relevant markets**

i. The Applicants consider it likely that authorisation of the Proposed Conduct will have the effect of promoting competition in relevant dependent markets such as the markets for coal tenements, coal mining, and associated specialist services. As noted in the supporting submission to the Application, the requested authorisation would provide coal producers with the opportunity to negotiate cost increases with PNO in a more effective and meaningful way. This is the case particularly in the current economic climate where even incremental cost increases at the margin may have the degree of

[5] https://www.accc.gov.au/system/files/public-registers/other/Glencore%20PNO%20access%20dispute%20-%20Final%20Determination%20-%20Statement%20of%20Reasons%20-%2018%20September%202018%20%28Public%20version%29.pdf .

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impact to drive coal producers to exit the market, which would inevitably have repercussions for the related markets that support the coal export market. Further, authorisation of the Proposed Conduct will likely boost incentives and confidence for owners of tenements to invest in the exploration of their tenement(s).

In summary, the Applicants submit that in the absence of authorisation of the Proposed Conduct, the reality that would likely transpire is that PNO would be able to impose the 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.

Alleged detriments unlikely to transpire

The Applicants consider that the alleged detriments contemplated by PNO are unlikely to transpire, for the reasons set out in the Application. It is unclear the basis upon which PNO alleges that there is a risk of exchange of competitively sensitive information such that there would be a detriment to competitive tension, when there is a clear lack of incentive to do so in factual circumstances where information relating to the terms and conditions of access, including price, is public and not volume-based. In any event, there is not any competitively sensitive information being shared among the coal producers and they would have no incentive to do so.

As noted above, the Applicants are seeking to discuss and negotiate the terms and conditions of access under the contractual framework proposed by PNO. Practically, this would likely involve discussions / negotiations related not only to price of access, but also the mechanics / language of the template Producer Deed. Given this, it is unclear why PNO claims that Port users may have a "spectrum of unique and varied incentives and interests in the transaction". Instead, the Applicants would seem to have common interests in transparency and efficiency, and in the spirit of 'non-discrimination' as suggested by PNO, that the terms and conditions of access are understood and approached in a consistent manner across the industry.

In addition, the industry action being sought by the Applicants is not novel, as explained in our letter to the ACCC dated 25 March 2020. For example, in relation to the Dalrymple Bay Coal Terminal, there is a collective approach to ongoing engagement and negotiation of the terms of access, between the monopoly infrastructure services provider and users (i.e. the DBCT User Group), the process of which is overseen by the QCA and delivers material efficiencies as compared to the significant costs that would arise if users had to make separate submissions

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and seek to individually negotiate access arrangements.[6]

Similarly, the Port of Melbourne (Consolidated Group) operates under a rigorous regulatory framework.[7] In the absence of declaration and in circumstances where a key infrastructure at the end of a coal export supply chain has been privatised by the NSW State with minimal regulatory oversight and no regulatory reviews as other State Governments have undertaken, the Applicants are merely seeking the opportunity for a constructive way to engage with PNO, under a process which has clear and demonstrable public benefits and minimal if any detriments.

Further, the Applicants do not see any sound basis for PNO's views that "anticompetitive harm" would flow from authorisation of the Proposed Conduct, in circumstances where individual negotiations have not culminated in any resolution of industry issues, and where engaging in collective, transparent industry discussions in a reasonable manner as contemplated in the Application would more likely lead to beneficial outcomes for the industry and the Australian economy.

4. Response to PANSW Submission

The Applicants do not consider it necessary to deal with PANSW's submission in any detail as the arguments in relation to public benefits and detriments have been largely dealt with in responding to PNO's submissions. It appears from the PANSW Submission that the PANSW's key concern is that if the Applicants are successful in negotiating better prices for access, that may affect the amount that PANSW receives from PNO as part of the navigation services charge. In particular, PANSW has requested the ACCC impose a condition that would "prevent the Applicants from entering into any agreement with PNO that would have the effect of reducing the revenue that the Port Authority would otherwise have received under the Navigation Charge".

Our understanding is that the commercial arrangements between PANSW and PNO are confidential to those parties, and it is therefore very difficult to understand the basis of PANSW's argument. Nonetheless, the Applicants do not consider it appropriate that the conditions contemplated by PANSW should be imposed on authorisation of the Proposed Conduct because access seekers should be able to negotiate efficient pricing from PNO irrespective of what the NSW Government

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[6] See submission by the DBCT User Group at https://www.qca.org.au/project/dalrymple-bay-coal-terminal/2019-draft-access-undertaking/ .

[7] The Applicants note that the Essential Services Commission (**ESC**) is currently considering whether the Port of Melbourne has power in relation to the process of setting and reviewing its land rents between 1 November 2016 and 31 October 2019. If the ESC finds that the Port of Melbourne has power and it has caused material detriment to the long-term interests of Victorian consumers, the commission will recommend possible economic regulation to the Assistant Treasurer. See: https://engage.vic.gov.au/port-melbourne-market-rent-inquiry-2020 .

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may charge PNO and that should be a separate matter between PNO and PANSW.

The Applicants note that the State of NSW has already received the purchase price paid by the purchasers of the long term leases at Port Kembla and Port Botany (approximately $5 billion) and the long term lease of the Port of Newcastle ($1.74 billion from PNO) and we would hope that funding for PANSW has already been achieved through those privatizations. The NSWMC's members make significant contributions to the State of NSW and we would hope that those contributions are taken into consideration in determining whether it is better to see more efficient exports and public benefits arising through the Proposed Conduct, than seeking to limit the scope of collective negotiations.

In addition, given that coal vessels are separately levied charges for pilotage of vessels entering the Newcastle harbour by PANSW, it is unclear why PANSW has highlighted in its submission that it provides a service to PNO in relation to a report of PANSW's performance of pilotage services. That report may be better provided directly to the mining industry which pays for those services.

In any event, it is not necessary to go into a debate about the weighing of benefits of increased certainty in channel pricing or other benefits arising from the Application compared to any impact on PANSW from a reduction in the navigation service charges imposed by PNO. While the Applicants certainly would not wish to see PANSW's ability to conduct safe port operations compromised, we believe that the State of NSW by virtue of the sale proceeds of port privatizations mentioned above, and the charges, taxes and royalties that it already collects from the mining industry, should have existing mechanisms in place for obtaining sufficient funds for the current and future operations of PANSW.

5. Authorisation should be granted

The Applicants consider that authorisation of the Proposed Conduct for a period of 10 years is appropriate so as to facilitate continued engagement between PNO and the Applicants in an effective, sustainable and transparent manner. In circumstances where PNO and the users have not been able to reach an agreement as to the terms and conditions of access, users / coal producers are exposed to the uncertainty of significant future increases in charges due to PNO's unconstrained bargaining position as the monopoly Port operator.

The continued uncertainty faced by users at the Port as to PNO's future pricing and access terms has significant consequences for future investments in the Hunter Valley coal industry. Through a collective industry negotiation as per the Proposed Conduct if a workable industry way forward can be reached between the Applicants and PNO, authorisation of the Proposed Conduct for a period of 10 years would deliver material efficiencies and public benefits.

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The Applicants consider that the matters / assertions raised by PNO and PANSW in their submissions to the ACCC have been addressed in the Application and the Applicants' subsequent submissions to the ACCC. The Applicants further consider that the matters raised by PNO / PANSW do not present a legitimate basis upon which to assert that authorisation of the Proposed Conduct should be denied.

The Applicants therefore respectfully submit that authorisation should be granted by the ACCC.

Yours sincerely

Stephen Galilee
CHIEF EXECUTIVE OFFICER