



Draft Determination

Application for authorisation AA1000473 lodged by
NSW 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.

Authorisation number: AA1000473

Date: 19 June 2020

Commissioners: Sims
Rickard
Court
Keogh
Ridgeway

Summary

The ACCC proposes to grant authorisation to enable the NSW Minerals Council and coal producers that export coal through the Port of Newcastle (Port) to collectively negotiate with Port of Newcastle Operations Pty Ltd (PNO) in relation to the terms and conditions of access, including price, to the Port.

The ten coal producers that export coal through the Port are Glencore Coal, Yancoal Australia, Peabody Energy Australia, Bloomfield Collieries, Centennial Coal, Malabar Coal, Whitehaven Coal, Hunter Valley Energy Coal, Idemitsu Australia, and MACH Energy Australia.

The bargaining group seeks authorisation for ten years to enable them to collectively negotiate terms of access for coal vessels entering the channels and berthing at the Port. The group also seeks authorisation to jointly discuss and negotiate common industry issues, such as proposed capital expenditure at the Port and allocation of costs. The proposed collective bargaining conduct is voluntary for all parties and does not include boycott activity.

PNO has been the operator of the Port since it was privatised in 2014, and publishes a full schedule of service charges that apply to the commercial use of the Port.

In December 2019, PNO invited coal producers to commence bilateral discussions with it to secure discounted access charges under a new long term (ten year) Producer Deed, subject to annual price reviews by PNO.

During the ACCC's consultation process, PNO indicated that it does not support the proposed collective bargaining conduct, and will only continue to discuss the long term Producer Deed with coal producers individually. As such, PNO submits that the proposed collective bargaining conduct will have no effect because PNO will not participate in any collective negotiations.

The ACCC recognises that the outcome of voluntary collective bargaining arrangements is uncertain. However, the ACCC is not required to attempt to predict the likely outcome of the collective negotiations on the relevant issues. The ACCC's role is to assess whether proposed collective bargaining conduct is likely to result in public benefits if the parties engage in the conduct.

In this instance, the ACCC has assessed the likely public benefits and public detriments if the coal producers have the opportunity to collectively negotiate with PNO, including any likely public detriments resulting from a lessening of competition.

The ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in public benefits. In particular, the ACCC considers that the bargaining group will have greater input into the terms and conditions of access under the Deed, and increased transparency around capital expenditure plans and cost allocation at the Port. This will provide greater certainty for the delivered price of Hunter Valley 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 considers these outcomes will enhance the international competitiveness of the Hunter Valley coal industry, with investment and employment benefits in Australia.

Further, collective bargaining conduct can result in more efficient contracting, which can benefit both PNO and the bargaining group. The ACCC considers the proposed collective bargaining conduct is also likely to result in public benefits from lower transaction costs.

The ACCC considers there is likely to be minimal public detriment from the proposed collective bargaining conduct because participation in the proposed collective bargaining conduct is voluntary for both coal producers and PNO, and does not include boycott activity. The ACCC considers that there is unlikely to be an impact on competition between the coal producers. Individual coal producers are still free to negotiate terms and conditions of Port access separately through bilateral discussions with PNO if they believe it is in their commercial interests to do so. In addition, the proposed collective bargaining conduct does not involve coal producers sharing individual coal projection volumes, customer pricing information or marketing strategies.

Therefore, the ACCC is satisfied that the proposed collective bargaining conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the proposed collective bargaining conduct.

Accordingly, the ACCC proposes to grant authorisation for ten years.

The ACCC invites submissions in relation to this draft determination by 10 July 2020 before making its final decision.

1. The application for authorisation

1.1. On 6 March 2020 the NSW Minerals Council lodged application for authorisation AA1000473 with the Australian Competition and Consumer Commission (the **ACCC**) on behalf of itself and certain coal producers that export coal through the Port of Newcastle (the **Applicants**). The ten applicant coal producers that export coal through the Port of Newcastle (**Port**) are:

- Glencore Coal Assets Australia Pty Limited
- Yancoal Australia Limited
- Peabody Energy Australia Pty Ltd
- Bloomfield Collieries Pty Ltd
- Centennial Coal Company Limited
- Malabar Coal Limited
- Whitehaven Coal Mining Limited
- Hunter Valley Energy Coal Pty Ltd
- Idemitsu Australia Resources Pty Ltd, and
- MACH Energy Australia Pty Ltd.

- 1.2. This application for authorisation (AA1000473) was made under subsection 88(1) of the Competition and Consumer Act 2010 (Cth) (**the Act**). The ACCC may grant authorisation which provides businesses with legal protection for arrangements that may otherwise risk breaching the law but are not harmful to competition and/or are likely to result in overall public benefits.
- 1.3. The Applicant coal producers are likely to be considered competitors for access to the Port. Accordingly, the Applicants seek authorisation to collectively negotiate and discuss the terms of access to the Port, including price, with Port of Newcastle Operations Pty Ltd (**PNO**). Specifically, the Applicants seek authorisation to:
- 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
 - discuss amongst themselves matters relating to the above discussions and negotiations, and
 - 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,
- collectively, the (**Proposed Collective Bargaining Conduct**).
- 1.4. The Proposed Collective Bargaining Conduct is voluntary for all parties, including PNO, and does not include boycott activity by the coal producers.
- 1.5. The Proposed Collective Bargaining Conduct 'does not include the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume / capacity projections for individual users.'¹
- 1.6. The Applicants seek authorisation on behalf of themselves and 'future access seekers / port users' that choose to participate in the proposed collective bargaining group in the future.² On 15 May 2020 the Applicants clarified that the proposed collective bargaining group will primarily comprise coal mining companies. However, future participants could conceivably involve other mining company members of NSW Minerals Council. The class of persons proposed to engage in the Proposed Collective Bargaining Conduct is confined to mining companies.³ Authorisation is sought for ten years.
- 1.7. The Applicants submit they are seeking authorisation to collectively negotiate with PNO following significant increases in access charges that have occurred since the Port was privatised in 2014 and given future pricing uncertainty at the Port.⁴
- 1.8. More specifically, the Applicants submit the need for this application for authorisation arises because PNO:

...is an infrastructure monopoly service provider that enjoys the commercial benefits of that position in circumstances where the Port was privatised at the end of a multi user export supply chain, and in the absence of any regulatory constraints...

¹ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 6.2.

² NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 3.5.

³ NSW Minerals Council submission, 15 May 2020, paragraph 2.5.

⁴ NSW Mineral Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.23.

...it is noted that after revocation of the declaration [at the Port of Newcastle], PNO increased its prices significantly once again and in particular, based on the inclusion of user contributions that PNO did not...expend.⁵

Interim authorisation

- 1.9. On 2 April 2020 the ACCC granted interim authorisation under subsection 91(2) of the Act⁶ to enable the 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 does not extend to entering into any collectively negotiated agreements.
- 1.10. Since then, the Applicants advise that they wrote to PNO on 29 April 2020 requesting an initial meeting with it to 'commence negotiations around pricing and access principles that may work for both PNO and the Applicants.'⁷ In response, PNO wrote to NSW Minerals Council on 11 May 2020 declining the request for an initial meeting and indicating that it does not support the proposed collective bargaining arrangements.
- 1.11. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the interim authorisation is revoked.

The Applicants

- 1.12. The **NSW Minerals Council** is an industry association representing the NSW minerals industry. The NSW Minerals Council's members include many of the largest coal exporters from the Port. The Port is the only practical alternative to export coal to international customers from the Hunter Valley, Gunnedah Basin, Gloucester Basin, and parts of the Western Coalfields.
- 1.13. The NSW Minerals Council seeks authorisation on behalf of itself and ten member coal producers listed in the application that export (or intend to export) coal through the Port:⁸
 - **Glencore Coal** – one of Australia's largest coal producers, operating seven mines in the Hunter Valley and one in the Western Coalfields in NSW.⁹
 - **Yancoal** – is Australia's largest pure-coal producer, operating several mines in the Hunter Valley region.
 - **Peabody Energy** – operates the Wambo and Wilpinjong coal mines in the Hunter Valley.
 - **Bloomfield Collieries** – an Australian owned group of private companies which operates two open cut mines in the Hunter Valley.
 - **Centennial Coal** – wholly owned by Banpu Pcl (a Thailand company). It operates mines in the Hunter Valley and Western coalfields near Lithgow.

⁵ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 3.8.

⁶ See ACCC decision of 2 April 2020 available at [Authorisations Public Register - NSW Minerals Council](#).

⁷ NSW Minerals Council submission, 15 May 2020, p. 6.

⁸ Unless otherwise stated, information about the Applicants' mining operations is sourced from NSW Minerals Council supporting submission to the application for authorisation, 6 March 2020, Schedule One.

⁹ Glencore's website: <https://www.glencore.com.au/en/who-we-are/energy-products/Pages/coal.aspx>, viewed 24 April 2020.

- **Malabar Coal** – an independent Australian-owned mining company. It expects to export coal through the Port in the future. It owns two exploration licenses in the Hunter Valley.
- **Whitehaven Coal** – operates several mines in NSW’s Gunnedah Basin.
- **Hunter Valley Energy Coal** – is a wholly owned subsidiary of BHP Billiton. It operates the Mount Arthur mine, which is the largest mine in the Hunter Valley region.
- **Idemitsu Australia** – owns the Boggabri and Muswellbrook coal mines in the Hunter Valley region, and
- **MACH Energy Australia** – formed the Mount Pleasant Joint Venture with Japan Coal Development Australia Pty Ltd, and currently operates the Mount Pleasant mine in the Hunter Valley.

1.14. The ACCC understands that there are two coal producers exporting coal through the Port which are not currently Applicants, but could join the bargaining group in the future – namely, Delta Coal and New Hope Group.¹⁰

The target – Port of Newcastle Operations Pty Ltd

1.15. **PNO** became the operator of the Port in May 2014, following the privatisation of the Port by the NSW Government. It controls the terms and conditions of access at the Port under a long term lease arrangement from the NSW Government, as trustee for the Port of Newcastle Unit Trust (**‘Port of Newcastle Ops’**).

1.16. Port of Newcastle Ops is equally owned by two investors: The Infrastructure Fund and China Merchants Port Holding Company.¹¹ *The Infrastructure Fund’s (TIF)* 50 per cent shareholding in the Port is held on behalf of TIF investors. According to PNO’s website, TIF is an Australian infrastructure fund with a portfolio of Australian and overseas assets worth more than \$2.4 billion. TIF investors include industry superannuation funds and other institutional investors.¹²

1.17. *China Merchants Port Holdings Company Limited* was listed on the Hong Kong Stock Exchange in 1992. According to PNO’s website, China Merchants Port Holdings Company is China’s largest port developer, investor and operator, with a comprehensive ports network portfolio spanning six continents and 18 countries and regions.¹³

1.18. PNO publishes a schedule of service charges that apply to the commercial use of the Port, in accordance with the *Ports and Maritime Administration Act 1995 (NSW)* (the **PAMA Act**) and *Ports and Maritime Administration Regulations 2012* – including, a **navigation service charge** and **wharfage charge**.¹⁴ PNO may vary this schedule from time to time, including varying or introducing new fees, subject to it providing ten business days’ notice on its website before it takes effect.¹⁵

¹⁰ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 2.6.

¹¹ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.18.

¹² PNO’s website, <https://www.portofnewcastle.com.au/about-our-port/>, viewed on 6 May 2020.

¹³ PNO’s website, <https://www.portofnewcastle.com.au/about-our-port/>, viewed on 6 May 2020.

¹⁴ Port of Newcastle, *Schedule of Service Charges, effective 1 January 2020*, p. 1.

¹⁵ Port of Newcastle, *Schedule of Service Charges, effective 1 January 2020*, p. 2.

Navigation Service Charge means the charge levied by PNO under section 50 of the PAMA Act upon a vessel's entry to the Port of Newcastle for the general use of the Port and its infrastructure – excluding the use of a pilot, the use of land based port facilities, and the port access for cargo at the interface between the vessel and land-based facilities for the purpose of stevedoring operations. This charge is in addition to any Wharfage Charge, Site Occupation Charge and any other fee (for example, Non-Standard Vessel Charges). The charge is payable by the owner of the vessel and is calculated by reference to the gross tonnage of the vessel.¹⁶

Wharfage Charge means the charge levied by PNO under section 61 of the PAMA Act for the availability of a site at which stevedoring operations can be carried out. For vessels being loaded at a site, the charge is payable by the owner of the cargo (immediately prior to the cargo being loaded). This charge is calculated by reference to the quantity of cargo loaded or unloaded at the site (unless the PAMA Regulations say otherwise).¹⁷

- 1.19. From 1 January 2021, the published navigation service charge and wharfage charge for coal vessels will be increased annually by at least CPI, and may also be increased to reflect additional investment at the Port or increases in government charges or taxes.¹⁸
- 1.20. As an alternative to its published schedule of service charges, at the end of 2019 PNO invited coal producers, vessel agents, vessel operators and FOB coal consignees to enter into bilateral long term discounted pricing arrangements (the **Deed**), which includes discounted navigation service charges and wharfage prices set by PNO. It is the terms and conditions of this Deed that the Applicants seek to collectively negotiate with PNO. The term offered by PNO under the Deed is ten years.
- 1.21. Further detail about the access charges levied by PNO, its alternative long term Deed offered to coal producers, and role of PNO at the Port is provided in the Background section of this draft determination.

The Proposed Collective Bargaining Conduct in practice

- 1.22. This application for authorisation focuses heavily on proposed collective bargaining in relation to access charges that apply to coal vessels entering the channels and berthing at the Port – namely, the navigation service charge and wharfage price set by PNO.
- 1.23. Having said that, the Applicants advise that, for the avoidance of doubt, they seek authorisation to 'negotiate all terms of access to the Port that are practically necessary or otherwise desirable for their export task involving the use of the channel and berth facilities at the Port.'¹⁹
- 1.24. Practically, the Applicants submit that they are seeking to discuss and negotiate the terms and conditions of access under the contractual framework put forward by PNO – that is, the price of access and the 'mechanics / language of the producer Deed.'²⁰ They also seek to collectively discuss and negotiate industry wide issues within the

¹⁶ This definition is compiled from section 50 of the PAMA Act and from Port of Newcastle, *Schedule of Service Charges, effective 1 January 2020*, p. 5.

¹⁷ This definition is compiled from section 61 of the PAMA Act and from Port of Newcastle, *Schedule of Service Charges, effective 1 January 2020*, p. 6.

¹⁸ Port of Newcastle, *Schedule of Service Charges, effective 1 January 2020*, p. 5.

¹⁹ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.4.

²⁰ NSW Minerals Council submission, 30 April 2020, p. 9.

producer Deed with PNO. By way of example, the Applicants submit this could involve proposed collective discussions and negotiations with PNO about the following issues:

- pricing mechanisms under the producer Deed, for example the inclusion of user funded expenditure in PNO's capital base²¹
- PNO's capital expenditure forecasts at the Port and the impact on prices paid by coal producers either directly or indirectly,²² and
- PNO's proposed annual price adjustments under the Deed.²³

*The Negotiating Committee and proposed contracting process*²⁴

1.25. Following interim authorisation, the Applicants formed a Port of Newcastle Working Group (**the Working Group**) for the purposes of coordinating any collective discussions or negotiations. The Working Group is comprised of representatives from the Applicant mining companies and NSW Minerals Council.

1.26. Further, the Applicants advise that a Negotiating Committee will be formed from the members of the Working Group, which are yet to be selected.

1.27. Regarding the proposed collective bargaining process, the Applicants advise that the Negotiating Committee will:

- (a) seek instructions from the Working Group as to the key industry concerns / issues to be collectively discussed / negotiated
- (b) engage in collective discussions / negotiations in relation to such concerns / issues with PNO (to the extent that PNO is willing to participate in such discussions / negotiations with the Negotiating Committee), and
- (c) report back to the Working Group in relation to outcomes achieved through such collective discussions / negotiations, and where necessary, seek instructions as to further negotiations with PNO.

1.28. It is also proposed that the Working Group will convene on an ongoing basis, as the Applicants consider necessary, in response to annual access price adjustments by PNO.

1.29. Under the Proposed Collective Bargaining Conduct each coal producer can independently determine whether to accept any negotiated terms and conditions offered by PNO following collective negotiations. Each coal producer may undertake independent negotiations with PNO at any time, should they wish to do so.²⁵

²¹ NSW Minerals Council submission, 30 April 2020, pp 2, 3, 7.

²² NSW Minerals Council submission, 30 April 2020, p. 7.

²³ NSW Minerals Council supporting submission to the application AA1000473, 6 March 2020, paragraph 1.10.

²⁴ Unless stated otherwise, the information under this heading was obtained from NSW Minerals Councils' submission, 15 May 2020, pp 4-6.

²⁵ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.33.

Who pays Port access charges?

- 1.30. The Applicants submit that PNO has previously disputed whether coal producers are entitled to negotiate with PNO in relation to access arrangements.²⁶
- 1.31. PNO advises that in practice, the coal customer engages the vessel operators who are responsible for transporting the coal. In turn, vessel operators appoint vessel agents to engage with PNO on their behalf in respect of a vessel's visit to the port, including the payment of relevant port charges. PNO does not deal directly with the vessel operators, but rather 8 to 10 vessel agents. The vessel agent receives the navigation service charge invoice from PNO, together with details about the vessel's visit and gross tonnage loaded, and then pays the invoice to PNO on behalf of its principal (the vessel operator). As such, apart from a small minority of cases where the coal producer happens to be the charterer of the vessel, the Applicants' interest in the navigation service charge is limited to the effect of this charge in the price of coal in the international market.²⁷
- 1.32. The Applicants consider that PNO's invitation for coal producers to enter into bilateral negotiations of a long term Deed indicates that PNO now recognises that 'directly or indirectly coal exporters bear the cost of the infrastructure service charges imposed by PNO irrespective of the form of contractual arrangement with the [coal] customer.'²⁸
- 1.33. Further, in an oral submission to the ACCC, Whitehaven Coal acknowledged that it is the coal customers that pay the navigation service charge (due to coal being sold FOB), but it impacts the competitiveness of Newcastle coal in the international market. It advised that some customers have expressed interest in having the uncertainty over the level of the navigation service charge resolved to provide greater certainty over (delivered) coal prices.²⁹

2. Background

The Port of Newcastle and access charges

- 2.1 The Port is located at the end of a multi-use coal export supply chain that involves an extensive rail network from multiple mine sites in the Hunter Valley, Gunnedah Basin, Gloucester Basin, and parts of the Western coalfield.
- 2.2. Excluding the coordination of supply chain logistics between the mines and landside coal loading terminals, 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 terminals and then once again transiting the channels before exiting the Port.
- 2.3. The Port has deep water channels, capacity to double trade volumes, available portside land, and berthside connections to an extensive rail network.³⁰ In 2019, there were 2 296 ship visits to the Port, with coal representing 96 per cent of the commodities exported (or 165 252 666 mass tonnes).³¹ Other commodities exported

²⁶ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.6.

²⁷ Submission from PNO, 7 April 2020, paragraphs 48 – 49.

²⁸ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.6.

²⁹ Record of oral submission from Whitehaven Coal, 18 March 2020.

³⁰ PNO's website, <https://www.portofnewcastle.com.au/about-our-port/>, viewed on 15 May 2020.

³¹ PNO, *Port of Newcastle 2019 Trade Report*, p. 2.

at the Port include ammonia, metal concentrates, general cargo, aluminium, pitch and tar products, steel and wheat.³²

- 2.4. Coal from the Port is exported to around 20 countries, primarily in Asia. Japan is the largest customer of coal from Newcastle, receiving 44 per cent of exports. China, Korea and Taiwan currently account for a further 44 per cent.³³
- 2.5. At the Port, PNO works closely with the **Port Authority NSW**, a state-owned corporation with responsibility for Sydney Harbour, Port Botany, Port Kembla and the ports of Newcastle, Yamba and Eden. Among other things, PNO is responsible for channel dredging services, vessel schedules and wharf and berth services for vessels entering the Port, while Port Authority NSW provides a variety of services including, navigation (pilotage), security and operational safety at the Port. The Port Authority NSW receives a quarterly fee from PNO for those services (excluding pilotage services) which, for recent and future years, is calculated as a fixed proportion of the navigation service charge that PNO receives from its customers.³⁴

Published schedule of service charges at the Port of Newcastle

- 2.6. As mentioned, PNO publishes a full schedule of service charges that apply to the commercial use of the Port. Where a Port user has *not* entered into a long term Deed with PNO, the following 2020 access prices include:³⁵

Service	Vessel (gross tonnage)	Price
Navigation service charge	<i>Non-coal vessels</i> (over 600GT)	\$0.5247 per GT for the first 50,000 GT plus \$1.1810 per GT thereafter. (Subject to a maximum NSC for passenger cruise ships of \$55,816.82 per visit)
	Standard price for <i>coal vessel</i> (over 600GT) where bilateral long term price deed does <i>not</i> apply to the vessel.	\$1.0424 per GT
Wharfage (non-containerised cargo by berth)	Dyke 1	\$1.91 (per revenue tonne)
	Dyke 2	\$1.02 (per revenue tonne)
	Mayfield 4, West Basin 3 and 4, Kooragang 2 and 3	\$2.07 (per revenue tonne)
	East Basin 1 and 2, Dyke 4 and 5, Kooragang 4 - 10, BHP 6 and Mayfield 7	\$0.0802 (per revenue tonne)

³² PNO, *Port of Newcastle 2019 Trade Report*, p. 3.

³³ NSW Minerals Council supporting submission to the application for authorisation AA1000473, paragraph 2.3.

³⁴ Port Authority NSW submission, p. 2.

³⁵ The ACCC has only listed the navigation service charge and wharfage price for the purposes of the Proposed Collective Bargaining Conduct. For the full schedule of PNO's services charges, see *Port of Newcastle Schedule of Service Charges, effective 1 January 2020*, available at <https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Schedule-of-Charges-2020-V2-13-March-2020.pdf>.

2.7. Following the privatisation of the Port in 2014, PNO's published port access charges at the Port have increased significantly. Since 2014, the navigation service charge has increased 143 per cent, and there has been a 22 per cent increase in the wharfage charge.³⁶

Overview of PNO's long term pro forma Deed for coal producers

2.8. As previously mentioned, PNO offered an alternative to its published schedule of access charges to coal producers in December 2019, and it is the terms and conditions of this long term Deed that the Applicants seek to collectively negotiate with PNO. The Deed³⁷ is for an initial term of ten years and sets out the following 'producer specific charges' for covered vessels transporting producers' coal at the Port:

- **navigation service charge** – currently **A\$0.81** per vessel gross tonne (adjusted annually) and
- **wharfage charge** – currently **\$0.08** per revenue tonne of producer coal loaded onto a covered vessel (adjusted annually).

2.9. Other features of PNO's pro forma producer Deed include:

- Annual price adjustments (clause 7 of the Deed) – at the beginning of each contract year, PNO will apply an annual price adjustment of the navigation service and wharfage charges (it will apply the higher of two formulae). It may also vary producer charges following arbitration of a pricing dispute (under the Deed) or in accordance with PNO's projected 5 year capital expenditure.
- Notice of variations to proposed producer charges (clause 8 of the Deed) – PNO will provide no less than 45 days written notice of variations to producer charges at the Port. Coal producers may object to a price variation by lodging a Price Variation Objection Notice within 14 days.
- Non-discriminatory pricing (clause 5 of the Deed) – PNO commits not to discriminate adversely against any coal producer on price.
- Consultation in relation to efficiency improvements and capital expenditure at the Port (clause ten of the Deed) – PNO will meet coal producers with executed Deeds at least twice in any contract year to consult on the following matters:
 - efficiency improvements to vessel services that PNO could make, and
 - PNO's delivery of vessel services – including capital expenditure, proposed variations to fees and charges, PNO's cost of operations, a coal producer's future needs (including the producer's forecast coal volumes to be shipped from the Port for the next six months) and any other matter agreed between a coal producer and PNO.

³⁶ NSW Minerals Council's supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.22.

³⁷ PNO, *Producer pro forma long term pricing deed*, available from https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

The Hunter Valley coal chain

- 2.10. The Hunter Valley coal export supply chain is the largest coal export operation in the world.³⁸ In 2018-19, NSW exported 168 million tonnes of coal, and 161 million tonnes (or 96 per cent) was exported through the Port. The remainder was exported through Port Kembla.
- 2.11. The Hunter Valley coal chain is made up of coal producers (mines), rail haulage providers³⁹, the Australian Rail Track Corporation (**ARTC**) as the owner of the track, three coal export terminals (owned by Port Waratah Coal Services and Newcastle Coal Infrastructure Group), port managers, and the Hunter Valley Coal Chain Coordinator (**HVCCC**).
- 2.12. The current application does not cover coal chain logistics coordination in rail or at the coal loading terminals at the Port themselves. Such long term coordination is the subject of a separate ACCC authorisation.⁴⁰

Recent history and developments at the Port of Newcastle

- 2.13. Over the last several years there have been significant regulatory issues at the Port, including: 'declaration' of the Port under Part IIIA of the Act, and the removal of that 'declaration'; an ACCC 'access determination' under Part IIIA; and an ongoing Federal Court review of the Australian Competition Tribunal's decision on the terms of access by Glencore Coal Assets Australia Pty Ltd (Glencore) to certain services at the Port. The following overview of these issues provides broader background to the Proposed Collective Bargaining Conduct:
- **2015** – Glencore seeks declaration of the shipping channel at the Port by the National Competition Council (**NCC**). The NCC does not recommend declaration of the channel services.
 - **2016** – Glencore appeals the NCC's decision and the Australian Competition Tribunal (**Tribunal Determination No. 1**) determines that the shipping channel at the Port of Newcastle is declared.
 - **November 2016** – Pursuant to this declaration, Glencore notifies the ACCC of an access dispute with PNO about the increase in price for coal vessels entering the Port, and requests the ACCC to arbitrate.
 - **July 2018** – following amendment of the declaration criteria under Part IIIA of the Act in 2017, PNO seeks recommendation from NCC to revoke declaration of the shipping channel service at the Port .
 - **October 2018** – the ACCC finalises its arbitration of the access dispute between Glencore and PNO. The **ACCC's Access Determination** concludes that PNO should charge ships entering the port to carry Glencore's coal \$0.61 per gross tonne (GT). In this process, the ACCC had to establish the value of assets used to provide the 'declared' shipping channel service. The ACCC determined it was

³⁸ NSW Minerals Councils' supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 2.1.

³⁹ There are currently four rail operators providing rail haulage services to coal producers in the Hunter Valley coal chain – Pacific National, Aurizon, Genesee & Wyoming and Southern Shorthaul Railroad.

⁴⁰ ACCC determination, 9 December 2009, applications for authorisation A91447-A91449, A91168-A91669 lodged by Port Waratah Coal Services, Newcastle Coal Infrastructure Group and the Newcastle Port Corporation – see [Final Determination](#).

appropriate to exclude previous user-funded channel dredging from the costs that PNO could recover.

PNO subsequently appealed the ACCC's Access Determination to the Australian Competition Tribunal.

- **July 2019** - NCC recommends that the declaration of the Port under Part IIIA of the Act be revoked.
- **October 2019** – the Australian Competition Tribunal issues a determination increasing access charges (from \$0.61 per gross tonne) to \$1.01 per gross tonne (**Tribunal Determination No. 2**). In its determination the Tribunal included previous industry-funded expenditure for channel dredging in PNO's regulated asset base. This allowed PNO to recover the user-funded amounts in its access charge.

The Tribunal's Determination No. 2 is limited to the terms and conditions of access where Glencore owns or, either directly or by agent, charters a vessel that enters the Port and loads Glencore coal. It does not apply to:

- the terms and conditions of access to apply in respect of vessels carrying coal that are not owned, or have not been chartered, by Glencore
 - the terms and conditions of access for vessels other than those calling at the coal terminals at the Port, and
 - any charges imposed by PNO other than the Navigation Service Charge and the Wharfage Charge.
- **September 2019** – the Treasurer confirmed that following the expiration of the 60 day period to consider the NCC's recommendation, the declaration at the Port is deemed to be revoked.
 - **November 2019** – the ACCC applied to the Federal Court for a review of the Tribunal Determination No. 2. The ACCC seeks review of the Tribunal's treatment of user funding at the Port. While the declaration of the Port has been revoked, the Tribunal Determination No. 2 remains in force until 2031. This Federal Court review is ongoing.

2.14. The Applicants recently advised the ACCC that the NSW Minerals Council intends to lodge an application with the National Competition Council (**NCC**) for declaration of the channel services at the Port in or around June 2020.⁴¹

⁴¹ Applicants' response to ACCC information request, 15 May 2020, p. 4.

3. Consultation

- 3.1. A public consultation process informs the ACCC's assessment of the likely public benefits and detriments from the Proposed Collective Bargaining Conduct.
- 3.2. The ACCC invited submissions from a range of potentially interested parties including PNO, other service providers and infrastructure owners in the Hunter Valley coal chain, and relevant government departments.⁴²
- 3.3. The ACCC received two public submissions opposing the application for authorisation, from PNO and the Port Authority NSW, which are summarised below:

- **PNO**, the target, submits that the application is seeking to re-litigate the issues which are the subject of continuing dispute between PNO and Glencore and are currently before the Full Court of Australia (see paragraph 2.13 above for relevant history).

PNO submits that there are no public benefits likely from the Proposed Collective Bargaining Conduct, and authorisation is not necessary for the certainty of pricing or future investment in the Hunter Valley. PNO submits that there are clear mechanisms in the Deed to understand how pricing increases will occur over the course of the Deed. Changes will be consistent with the Competition Principles Agreement pricing principles,⁴³ under which PNO will need to justify those changes above the greater of 4% or CPI in that year. PNO submits that it has been open with port users about its future plans, and PNO is under a contractual obligation to provide coal producers with a forward looking five year forecast of its projected capital expenditure, potentially impacting its Producer Specific Charges, and to discuss those changes.

PNO submits that contractual negotiation processes between PNO and Port users are already occurring and that PNO has been open to reasonable commercial compromise.

PNO submits that the Proposed Collective Bargaining Conduct is likely to remove each Port user's unique interests, and negotiations would proceed on the basis that users all have the same interests. PNO submits that in its experience, users have a spectrum of unique and varied incentives and interests in the transaction, and for some Port users, non-price terms of the Deed are equally important to price aspects. PNO submits that the interests of smaller exporters and Port users would be marginalised.

PNO submits its concerns that the Proposed Collective Bargaining Conduct carries a risk of improper information exchange, with serious implications for competition. Further it would be extremely difficult to detect and monitor any improper information exchange through such discussions.

PNO submits that any reduction in Navigation Services Charges would result in an immaterial reduction in price in overseas export markets, and any public benefits will have no material impact on relevant domestic markets.

- **Port Authority NSW** submits that the proposed collective negotiation of the navigation service charge between the Applicants and PNO, and the potential for a reduction of those charges, may have flow on effects to the amount that PNO

⁴² A list of the parties consulted and the public submissions received is available from the ACCC's public register www.accc.gov.au/authorisationsregister.

⁴³ PNO submits that the pricing Principles reflect those found in Part IIIA and the Competition Principles Agreement requirements for an access regime to be certified.

pays the Port Authority NSW for services provided at the Port (it receives a proportion of the navigation service charge). It submits that this has the potential to compromise the safe operation of the Port. The Port Authority NSW submits that authorisation should be limited to collective negotiation of the wharfage charge only, alternatively, it submits that a condition to authorisation should be imposed by the ACCC to limit any change to the revenue that Port Authority NSW receives under the navigation services charge.

Further, Port Authority NSW submits that the Proposed Collective Bargaining Conduct has the potential to result in information sharing amongst the Applicants, which could impact the domestic market for coal supply.

3.4. The ACCC received three public submissions expressing support for the application for authorisation, from Port Waratah Coal Service (**PWCS**), Yancoal, and Whitehaven Coal, which are summarised below:

- **PWCS** (a coal loading terminal operator) supports the application to allow the Applicants to collectively negotiate with PNO on all terms of access that are necessary for the exporting of coal.

PWCS raises concerns around the current lack of transparency in recent increases of Port charges by PNO and its re-investment into the Port. Further, PWCS is concerned with PNO's proposed regulated asset base, particularly the inclusion of over \$500 million for channel dredging works funded by PWCS.

PWCS submits that the Proposed Collective Bargaining Conduct is likely to lead to public benefits including, increased investment and employment in the Hunter region, increased transparency of pricing and certainty as to longer term expenditure and investment, increased competition for supply of coal to export markets, and reduced transaction cost savings.

- **Yancoal** (a large coal producer, and Applicant) submits that bilateral negotiations have so far been difficult, and public benefits from the Proposed Collective Bargaining Conduct are likely to include, transaction cost savings for all parties, and a higher degree of certainty for PNO and the Hunter Valley coal industry as to future increases in charges, creating a more favourable environment for future investment in both coal production and Port infrastructure.

Yancoal submits that detriments due to the Proposed Collective Bargaining Conduct will be minimal, considering that participation is voluntary for all parties, there is no collective boycott proposed, and the exchange of information between coal-producers will only relate to channel services terms, and exclude any sensitive information relating to future marketing, production plans or coal operations.

- **Whitehaven Coal** (mines operator and Applicant) submits that the uncertainty of navigation charges impacts the competitiveness of Newcastle coal in the international market, and customers require greater certainty over coal pricing.

Whitehaven Coal submits that it is important that all coal producers face the same terms and conditions of access so that shippers don't favour one over another based on their terms of access.

3.5. The ACCC received a submission from the **Hunter Valley Coal Chain Coordinator Ltd (HVCCC)**, which submits that generally it finds it unlikely that there would be either a benefit or detriment to HVCCC's ability to meet its objects, regardless of the outcome of this application.

Applicant's response to submissions

3.6. In response to submissions made by interested parties, the Applicants submit that:

- they are seeking to discuss legitimate industry-wide concerns. Discussions are not limited to past user contributions or issues raised in previous litigation between Glencore and PNO, but include future user-funder expenditure at the Port
- bilateral negotiations between PNO and Port users have not succeeded
- there is no incentive for any competitively sensitive information to be shared amongst the Applicants. Information relating to terms and conditions of access to the Port, including price, is public and not volume based. Further, the Applicants have common interests for transparency and efficiency, and through collective negotiations, they seek that terms and conditions to be understood and approached in a consistent manner across the industry, and
- the condition of authorisation suggested by Port Authority NSW should not be imposed. Access seekers should be able to negotiate efficient pricing with PNO irrespective of commercial arrangements between PNO and Port Authority NSW.

3.7. The public benefits and detriments claimed are further considered in the ACCC's Assessment below.

3.8. Public submissions by the Applicants and interested parties are available on the ACCC's [Public Register](#) for this matter.

4. ACCC assessment

4.1. The ACCC's assessment of the Proposed Collective Bargaining Conduct is carried out in accordance with the relevant authorisation test contained in the Act.

4.2. The Applicants have sought authorisation for the Proposed Collective Bargaining Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.⁴⁴

4.3. Consistent with subsection 90(7) and 90(8) of the Act as they apply to this application for authorisation, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, 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 (**authorisation test**).

Relevant areas of competition

4.4. To assess the likely effect of the Proposed Collective Bargaining Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.

4.5. The Applicants submit the main area of competition affected by the Proposed Collective Bargaining Conduct is the 'market for the provision of infrastructure access at the Port.'⁴⁵

⁴⁴ NSW Minerals Council submission, 15 May 2020, paragraph 2.2-2.3.

⁴⁵ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 4.3.

- 4.6. The Applicants consider the Proposed Collective Bargaining Conduct could also impact the following other areas of competition:⁴⁶
- the coal export market
 - the acquisition and disposal of exploration and/or mining authorities (the Tenements Market), and
 - supply of specialist mining services such as geological and drilling services, and construction, operation and maintenance services.
- 4.7. The ACCC considers that the most relevant area of competition affected by the Proposed Collective Bargaining Conduct is competition for access to port services at the Port which are owned and operated by PNO. This includes channel shipping services and wharfage, but does not include landside coal loading infrastructure which is owned by other parties, or marine pilotage services.

Future with and without the Proposed Collective Bargaining Conduct

- 4.8. In applying the authorisation test, the ACCC compares the likely future with the Proposed Collective Bargaining Conduct that is the subject of the authorisation to the likely future in which the Proposed Collective Bargaining Conduct does not occur.

Submissions

- 4.9. The Applicants submit that without the Proposed Collective Bargaining Conduct, they 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.’⁴⁷
- 4.10. PNO submits that in the absence of the proposed collective bargaining arrangements, and if individual Applicants elect not to enter into a long term Deed with it via bilateral discussions, ‘the terms and conditions of access are openly available, as are the fees and charges’ in its published schedule of service charges, albeit at non-discounted rates.
- 4.11. The Applicants acknowledge that with the Proposed Collective Bargaining Conduct ‘PNO is free to decline to collectively negotiate if it so chooses.’⁴⁸
- 4.12. PNO advises that:⁴⁹

...it has stated explicitly to the Applicants that any authorisation will have no practical effect given that PNO will not be engaging in collective negotiations with the Applicants, but rather will continue to offer to undertake bilateral negotiations.

ACCC view

- 4.13. As noted above, the ACCC’s role is to assess the public benefits and detriments that are likely to arise in the future with and without the Proposed Collective Bargaining Conduct. It is not the ACCC’s role to attempt to predict whether the proposed conduct

⁴⁶ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 5.6.

⁴⁷ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 4.2.

⁴⁸ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 4.2

⁴⁹ Port of Newcastle Operations submission, 7 April 2020, paragraph 5.

will be engaged in by the parties, or the outcome of collective negotiations on any specific issues.

- 4.14. The ACCC considers that with the Proposed Collective Bargaining Conduct, the Applicants would seek to engage in collective negotiations with PNO, through the Negotiating Committee and the process outlined above at paragraphs 1.25 – 1.29, for the purpose of entering a long term Deed for access to the Port. During these collective negotiations, the Applicants would seek to discuss issues common to the Hunter Valley coal industry, such as PNO's planned capital expenditure at the Port. The Applicants would then individually decide whether to enter any long term access Deed agreed upon with PNO for a period of ten years, or undertake individual negotiations with PNO.
- 4.15. The ACCC considers that without the Proposed Collective Bargaining Conduct, each member of the bargaining group is likely to seek to engage in bilateral discussions with PNO about the terms and conditions of access proposed in its ten year pro forma Deed. In the absence of entering into a long term Deed with PNO, the vessels carrying coal for the Applicants will be subject to PNO's published access charges (referred to at paragraph 2.6 of this draft determination).

Public benefits

- 4.16. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that the term should be given its widest possible meaning, and includes:

*...anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁵⁰

- 4.17. The Applicants submit that the Proposed Collective Bargaining Conduct will result in public benefits including the following:⁵¹
- efficiencies, including transaction cost savings, from collective negotiation generally, and from collective discussion of industry wide issues, such as proposed capital expenditure at the Port
 - improved pricing outcomes through increased transparency on PNO's capital expenditure and cost allocation, and
 - enabling coal producers to more efficiently compete to export coal from the Hunter Valley, and a material increase in competition in a number of dependent markets.
- 4.18. PNO submits that 'there are no discernible public benefits likely to flow from the Proposed Collective Bargaining Conduct.'⁵² It believes that many of the claimed benefits already exist without the Proposed Collective Bargaining Conduct (via bilateral

⁵⁰ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

⁵¹ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraphs 5.1 – 5.6.

⁵² PNO submission, 7 April 2020, paragraph 8.

discussions), represent private benefits to coal producers only, or are benefits that flow offshore.

- 4.19. In any event, PNO submits that the Proposed Collective Bargaining Conduct 'will have no practical effect because it will not be engaging in collective negotiations with the Applicants.'⁵³
- 4.20. The ACCC notes that upfront statements from 'targets' of proposed collective bargaining that they will not engage with a bargaining group does not mean there can be no public benefits from the proposed conduct.
- 4.21. A collective bargaining authorisation granted by the ACCC, when it does not include a collective boycott, does not compel the target to deal with the group. It is not uncommon in these circumstances for the target to submit that they will not engage with the group, or that they would not change their standard terms in any event. However, the ACCC's role is to assess the public benefits that are likely to result from the proposed collective bargaining conduct if it is engaged in by the parties.
- 4.22. In addition, the ACCC considers that public benefits result from providing the opportunity for the collective bargaining group to form and attempt to collectively bargain, even when the target advises that it will not deal with the group.
- 4.23. Generally, the ACCC considers that collective bargaining can result in public benefits by improving the efficiency of contracting between the 'target' and members of a collective bargaining group - for example, generating mutual benefits by reducing transaction costs or reducing information asymmetries between negotiating parties.
- 4.24. In assessing the current application for authorisation, the ACCC has assessed the public benefits and public detriments that are likely to arise if the Applicants have the opportunity to collectively negotiate with PNO, including any public detriments resulting from a lessening of competition.

Increased certainty and efficient investment from having greater input into the template producer Deed and reducing information asymmetry

- 4.25. Information asymmetry occurs when one party to a negotiation has access to relevant information that the other party does not. Where there is information asymmetry, the party lacking information may accept or contemplate different terms than it would if more information were available to it. Under these circumstances, the outcomes of the negotiation may not capture many of the available efficiencies. Information asymmetry can often be addressed by improving the transparency of market information. If collective bargaining improves the availability and use of information, it has the potential to enable more complete and efficient contracts to be negotiated that better reflect the needs of members of the bargaining group.

Submissions

- 4.26. The Applicants submit that collective negotiation of common industry issues under the Deed, such as cost allocation at the Port (for example, how user funding should be treated in that framework) and increasing transparency about PNO's forecast capital expenditure relating to services at the Port would be likely to lead to 'more efficient

⁵³ PNO submission, 7 April 2020, paragraph 5.

investment and ... the potential for reduced charges being imposed on the mining industry over time.⁵⁴

- 4.27. Conversely, PNO submits that the Proposed Collective Bargaining Conduct would not likely result in any discernible public benefits from increased transparency and providing greater input into the terms and conditions of Port access because this already occurs without collective bargaining. In particular, it submits that it has been open about its plans with Port users and has offered producers the opportunity to enter into discounted long term pricing arrangements through bilateral negotiations on its template Deed. Even if producers do not elect to enter into a long term pricing Deed, PNO publishes its Port access terms and conditions on its website.⁵⁵
- 4.28. Further, PNO submits that during bilateral discussions about its template producer Deed it has been open to reasonable commercial compromise – for example, it added a new clause in its template Deed which commits PNO to not discriminate adversely against any producer on price.⁵⁶
- 4.29. PNO also submits that under the current template producer Deed, a variation to the access charges covered by the Deed can only be made by PNO once a year. It submits that:⁵⁷

A variation can only be made over and above the 4%/CPI increase where it is Material (as that term is defined in the Deed), which is designed to avoid trivial increases. Moreover, in the event of a Permitted Price Dispute (as that term is defined in the Deed) arising, the parties are bound to conduct mediation and, failing the resolution within 28 days, arbitration in accordance with the Australian Centre for International Commercial Arbitration (ACICA) Arbitration Rules.

- 4.30. In response, the Applicants submit that the Proposed Collective Bargaining Conduct could facilitate more effective resolution of industry-wide issues, as opposed to individual negotiations. In this regard, the Applicants note that ten of the largest users of the Port have not been satisfied with bilateral discussions to date and seek authorisation to negotiate industry issues from an industry-wide perspective.⁵⁸ While noting PNO's new 'non-discrimination clause' in the template producer Deed, the Applicants consider that it provides 'minimal utility' to producers in circumstances where they have limited prospect of 'achieving a balanced and reasonable contractual set of terms with PNO' through bilateral negotiations.⁵⁹
- 4.31. Further, the Applicants submit that PNO holds all of the data on past expenditures at the Port while coal producers, irrespective of their size or volume of coal exported through the Port, have little 'bargaining power or ability to question PNO in relation to capital expenditures or price increases.'⁶⁰ Individual coal producers seeking to have bilateral negotiations with PNO in relation to its long term template Deed would not have access to that data.

⁵⁴ NSW Minerals Council supporting submission to the application for authorisation AA10000473, 6 March 2020, paragraph 5.2.

⁵⁵ PNO submission, 7 April 2020, p. 3.

⁵⁶ PNO submission, 7 April 2020, p. 3.

⁵⁷ PNO submission, 7 April 2020, p. 3.

⁵⁸ NSW Minerals Council submission, 30 April 2020, p. 4.

⁵⁹ NSW Minerals Council submission, 30 April 2020, pp. 4-5.

⁶⁰ NSW Minerals Council submission, 30 April 2020, pp 7-8.

4.32. The Applicants note that although PNO has committed under its template Deed to provide individual Port users with a five year forecast of its projected capital expenditure, they consider this 'is simply a forecast and users have no input or ability to materially influence that forecast.'⁶¹ For example, the Applicants note that Clause 7(c) of the annexure to the template Producer Deed states that PNO:⁶²

...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.

4.33. Similarly, PWCS submits that increasing transparency of PNO's expenditure and cost allocation would likely lead to more efficient investment and pricing at the Port.⁶³

4.34. Further, PWCS submits that the Proposed Collective Bargaining Conduct will 'assist the coal industry overcome material concerns relating to access to essential infrastructure and services at the Port, including significant increases in prices and inflexibility in commercial negotiations.'⁶⁴ For example, PWCS submits that it shares the Hunter Valley coal industry's concerns about:

PNO's proposed regulated asset base (RAB) and, in particular, the inclusion of expenditure totalling in excess of \$500 million related to dredging of the channels. Port Waratah [PWCS] funded the construction of the existing deep-water channel, swing basin, berth pockets and seawalls adjacent to the Kooragang Coal Terminal. As a result, our customers have already paid for these construction costs via historical terminal access charges.

...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 coal export operations.⁶⁵

4.35. Yancoal considers the Proposed Collective Bargaining Conduct is likely to improve the prospects of a beneficial negotiated outcome because bilateral discussions with PNO have been difficult – for example, individual coal producers are reluctant to reach an arrangement with PNO that might be less favourable than an outcome reached by another producer; there is an inequality of bargaining power that exists between an individual coal producer and PNO; and the proposed producer Deed relates to issues that are relevant to the Port and coal industry as a whole, such as future capital expenditure at the Port, and the impact on prices paid by coal producers.

ACCC view

4.36. The ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in public benefit through addressing, in part, an asymmetry of information between each of the Applicants and PNO. In so doing, this is likely to facilitate more efficient and timely outcomes from negotiations, including the terms and conditions of the Deed and ultimately, investment decisions within the Hunter Valley coal industry.

4.37. The ACCC considers that the Proposed Collective Bargaining Conduct will allow the Applicants to jointly identify, strategise and propose solutions in relation to standard contract terms under the template Deed, as well as common industry issues such as forecast capital expenditure at the Port and cost allocation methodology. The ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in a public benefit where the increased input of the Applicants into the Deed results in more

⁶¹ NSW Minerals Council submission, 30 April 2020, p. 8.

⁶² NSW Minerals Council submission, 30 April 2020, p. 8.

⁶³ PWCS submission, 3 April 2020, p. 2.

⁶⁴ PWCS submission, 3 April 2020, p. 1.

⁶⁵ PWCS submission, 3 April 2020, p. 2.

efficient terms and conditions and more timely resolution of common industry issues, which are mutually beneficial to both the Applicants and PNO (for example, through more efficient capital expenditure at the Port). Increased certainty about terms and conditions of access at the Port is also likely to lead to more efficient investment decisions within the Hunter Valley coal industry, which is a public benefit.

Increasing competitiveness of Australian export coal industry

4.38. The Act recognises that increasing the international competitiveness of Australian industries is a public benefit.⁶⁶ In the current application for authorisation, the Applicants and some interested parties submit that the Proposed Collective Bargaining Conduct ultimately enhances the international competitiveness of Australian coal exports.

Submissions

4.39. The Applicants submit that the Proposed Collective Bargaining Conduct is likely to result in the more efficient use of PNO's services, which in turn will allow Australian coal companies to more efficiently export coal from the Hunter Valley.⁶⁷

4.40. In its oral submission to the ACCC, Whitehaven coal acknowledged that it is the customers that pay the navigation charge (due to coal being sold FOB), but it impacts the competitiveness of Newcastle coal in the international market. Some international customers have expressed interest in having the uncertainty over the level of the navigation service charge resolved to provide greater certainty over (delivered) coal prices.⁶⁸

4.41. PWCS submits that access to services provided by PNO for use of the channel, a key piece of monopoly infrastructure, on reasonable terms and conditions is essential to the efficient operation of the Hunter Valley coal chain. It considers that collective negotiations are likely to assist the industry in reaching long-term, sustainable and beneficial commercial outcomes.⁶⁹ In particular, assisting Australian coal producers, particularly smaller producers, to manage long term pricing certainty and investment is likely to promote competition in relation supply of Hunter Valley coal into export markets.⁷⁰

4.42. PNO submits that the Proposed Collective Bargaining Conduct will not result in any discernible public benefits, particularly as any benefits would flow offshore given that 'coal from the Port is exported to overseas markets and it is customers in North Asia that ultimately pay the charges in question.'⁷¹

ACCC view

4.43. The ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in increased pricing certainty and more timely resolution of industry-wide issues, which facilitates more efficient investment decisions for Australian coal producers, as well as increased certainty for the delivered coal price for international coal customers. The ACCC considers these outcomes are likely to ultimately enhance the international

⁶⁶ Section 90(9A) of the Act

⁶⁷ NSW Minerals Council supporting submission to the application AA1000473, 6 March 2020, paragraph 5.5.

⁶⁸ Whitehaven Coal oral submission to the ACCC, 18 March 2020.

⁶⁹ PWCS submission, 3 April 2020, p. 1.

⁷⁰ PWCS submission, 3 April 2020, p. 2.

⁷¹ PNO submission, 7 April 2020, p. 1.

competitiveness of the Hunter Valley coal industry, with employment and investment benefits for Australia.

Improved efficiencies through transaction cost savings

- 4.44. Collective bargaining enables members of a bargaining group to share some or all of the transaction costs of preparing to negotiate and negotiating, and thus can reduce the total costs borne by members of the group. Lower transaction costs can result in more efficient outcomes. This can potentially benefit both the bargaining group and the target.
- 4.45. The Applicants consider that generally, ‘given the nature of services provided by PNO and that it is a monopoly infrastructure service provider’, there are substantial efficiencies likely to result from the Proposed Collective Bargaining Conduct.⁷² By offering a ten year pricing Deed to coal producers, which includes features impacting the entire Hunter Valley coal industry (such as forecast capital expenditure at the Port), a collective approach to negotiations would be more efficient than dealing with these common issues bilaterally.
- 4.46. The Applicants submit that the Proposed Collective Bargaining Conduct will realise transaction cost savings for both PNO and the Applicants, relative to PNO negotiating individually with each member of the bargaining group.⁷³ The Applicants consider that over the proposed (ten year) authorisation period, these savings could be significant.
- 4.47. The Applicants, including Yancoal, submit that through collective negotiations, and 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 in comparison to a series of bilateral negotiations with PNO (which to date have not yielded a satisfactory resolution to industry issues).⁷⁴
- 4.48. PWCS submits that PNO’s proposed access arrangements will affect the industry as a whole (for example, forecast capital expenditure at the Port) and should be dealt with at an industry level. In particular, it considers a long-term arrangement on user funded expenditure will lead to more certain pricing and efficient investment for the Hunter Valley coal industry.⁷⁵
- 4.49. PWCS also considers that collective negotiations with PNO would result in transaction cost savings to all parties, who would otherwise be required to negotiate with PNO on an individual basis.⁷⁶
- 4.50. PNO did not specifically comment on whether the Proposed Collective Bargaining Conduct would result in transactions cost savings.

⁷² NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 5.1.

⁷³ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 5.4.

⁷⁴ NSW Minerals Council submission, 30 April 2020, p. 7.

⁷⁵ PWCS submission, 3 April 2020, p. 2.

⁷⁶ PWCS submission, 3 April 2020, p. 2.

ACCC view

4.51. Compared to the 'future without the conduct', where members of the bargaining group would negotiate individually with PNO the terms and conditions of the long term Deed, the ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in transaction cost savings (to all parties to the collective negotiations):

- The Applicants are likely to share the costs associated with preparing for, and engaging in negotiations through identifying and discussing common contractual issues, and sharing the costs of engaging expert advice and/or administrative services.
- PNO, is likely to reduce its costs, through reducing the number and length of negotiations, legal and administrative costs, compared to engaging in individual negotiations with each Applicant – including, for example, annual transaction cost savings by conducting collective discussions with the group rather than twice yearly consultation with individual coal producers (as contemplated under the Deed) to discuss PNO's capital expenditure, any proposed variation to PNO's fees and charges, and PNO's costs of operations.

ACCC conclusion on public benefits

4.52. The ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in public benefits. In particular, the ACCC considers that the bargaining group will have greater input into the terms and conditions of access under the Deed, and increased transparency around capital expenditure plans and cost allocation at the Port. This will provide greater certainty for the delivered price of Hunter Valley 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 considers these outcomes will also enhance the international competitiveness of the Hunter Valley coal industry, with investment and employment benefits in Australia.

4.53. The ACCC also consider the Proposed Collective Bargaining Conduct is likely to result in a public benefit in the form of transaction costs savings.

Public detriments

4.54. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined public detriments as:

...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.⁷⁷

4.55. The ACCC considers that public detriment may arise as a result of collective bargaining arrangements in circumstances where competition is reduced between members of the group as a result of acting collectively, the ability of businesses outside of the bargaining group to compete against the group is affected, and/or by increasing the potential for collective activity beyond the collective bargaining arrangements which are sought to be authorised.

⁷⁷ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

- 4.56. The Applicants submit that the Proposed Collective Bargaining Conduct is likely to result in minimal, if any, public detriment, due to the following:
- The voluntary nature of the participation by the coal mining industry in the application, including the absence of any requirement on PNO to collectively negotiate.
 - There is no collective boycott activity proposed.
 - The Applicants are seeking to engage with PNO regarding its pricing arrangements and access terms to the Port that are already publically available, and so they submit that there is no risk of any information sharing as prohibited under the Act.
- 4.57. The ACCC considers the Proposed Collective Bargaining Conduct is unlikely to materially harm competition between coal producers. In particular, the proposed arrangements are voluntary, with coal producers free to enter collectively negotiated agreements with PNO or to seek to enter into bilateral discussions with PNO in relation to long term terms and conditions of access under the Deed. In addition, the Proposed Collective Bargaining Conduct is limited in scope and relates to terms and conditions that are publicly available in PNO's published template Deed, and authorisation is not being sought for members of the collective bargaining group to share individual coal projection volumes, customer pricing information or marketing strategies.
- 4.58. PNO submits that the Proposed Collective Bargaining Conduct carries a risk of improper information exchange, with serious implications for competition. The Port Authority NSW shares this concern.
- 4.59. Further, PNO submits its concerns that the unique interests of each coal producers in the collective bargaining group will be overshadowed by the interests of the collective group as a whole, resulting in a 'lowest common denominator position.'⁷⁸ PNO believes this will likely favour the interests of the larger coal producers.
- 4.60. Port Authority NSW submits that the proposed collective negotiation of the navigation service charge between the Applicants and PNO, and the potential for a reduction of those charges, may have flow on effects to the amount that PNO pays the Port Authority NSW for services provided at the Port.
- 4.61. These issues are discussed below.

Increased potential for collective activity beyond that authorised

- 4.62. Generally, the ACCC considers that information sharing in collective bargaining arrangements is of concern if it allows the parties to co-ordinate their conduct beyond that for which authorisation is granted, for example, if it facilitates collusion or provides a focal point for competitors to align their behaviours in related markets such as the downstream supply of services to consumers.

Submissions

- 4.63. The Applicants submit that the exchange of information between the Applicants, and reaching an understanding only relates to the Proposed Collective Bargaining Conduct. Information will only be shared to the extent that it is reasonably necessary for, and related to, this purpose. The Proposed Collective Bargaining Conduct does not involve the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume/capacity projections for individual users. The

⁷⁸ PNO submission, 7 April 2020, paragraph 25.

Applicants submit that pricing at the Port has been historically based on a 'cost to use' basis (rather than individual volumes), and as such there is no reason to share production, customer information or industry data (which is already publicly available).

- 4.64. Further, the Applicants submit that they are generally large and sophisticated mining companies which have compliance processes in place to ensure that no information is exchanged that would be problematic under the Act.
- 4.65. Yancoal submits that the exchange of information between coal producers will only relate to channel services terms, and exclude any sensitive information relating to future marketing, production plans or coal operations, given the non-customer specific pricing model proposed by PNO.
- 4.66. PNO submits that authorisation would give the Applicants the ability to collectively discuss and negotiate the terms of access, including price to the Port for the export of coal through the Port. It would be extremely difficult to detect and monitor any improper information exchange through such discussions. Further PNO submits that, the fact that companies may be large and sophisticated does not diminish the risk of improper information exchange, with serious implications for competition.
- 4.67. Port Authority NSW agrees with PNO and submits that the Proposed Collective Bargaining Conduct has the potential to result in information sharing amongst the Applicants, for example sharing sensitive information on future production and export volumes, could potentially give the bargaining group insight into each other's intentions for domestic coal supply for energy generation.

ACCC view

- 4.68. The ACCC notes the concerns of PNO and Port Authority NSW, that there is a risk that competitively sensitive information may be shared in any collective bargaining discussions, which could potentially impact domestic coal supply.
- 4.69. The ACCC notes that the majority of Hunter Valley thermal coal is exported, with some supplied to power stations in the region for domestic energy generation. All competing coal companies will potentially be engaged in the Proposed Collective Bargaining Conduct, thereby increasing the risk of collusion.
- 4.70. However, the ACCC considers that the Proposed Collective Bargaining Conduct does not significantly increase the likelihood of collusion occurring in relation to matters for which authorisation is not being sought, or increase the likelihood of the members of the bargaining group sharing commercially sensitive information. The Applicants have not sought authorisation to share customer information, marketing strategies or volume/capacity projections. Such conduct would not be covered under the authorisation and any such information sharing would be subject to the operation of the Act.

Potential to lose unique interests of bargaining group members

- 4.71. PNO submits that in its experience, Port users have a spectrum of unique and varied incentives and interests in the transaction, and for some Port users, non-price terms of the Deed are equally as important as price aspects. PNO submits that the Proposed Collective Bargaining Conduct would proceed on the basis that all members of the bargaining group have the same interest, and removes Port users' unique individual interests. Further, it considers that that the collective negotiations would favour the interests of the largest exporters in the bargaining group.

Submissions

4.72. The Applicants submit that they are seeking to discuss and negotiate the terms and conditions of access under the contractual framework proposed by PNO. This will include discussions related not only to price but also the mechanics of the template Deed. The Applicants also submit that they have largely common interests in transparency and efficiency, and for the terms and conditions of access to be understood and approached in a consistent manner across the industry.

ACCC view

4.73. The ACCC considers there are common issues at the Port which are appropriately dealt with on an industry-wide basis. This can be facilitated by the Proposed Collective Bargaining Conduct. The ACCC also notes that PNO is offering standard terms and conditions to producers under its template Deed.

4.74. Further, the Proposed Collective Bargaining Conduct is voluntary for all coal producers, who will still be free to negotiate terms and conditions of Port access separately through bilateral discussions with PNO if they believe it is in their interests to do so, or where their individual commercial interests have not been met through collective negotiations.

Effect of collective bargaining on Port Authority NSW's revenue

4.75. The Port Authority NSW receives a quarterly fee from PNO for certain services at the Port, which is currently calculated as a fixed proportion of the navigation service charge that PNO receives from its customers.

Submissions

4.76. Port Authority NSW submits that the collective negotiation between the Applicants and PNO around the navigation service charge, and the potential for a subsequent reduction of those charges, may have flow on effects to the amount that PNO pays Port Authority NSW. Port Authority NSW submits that this has the potential to compromise the safe operation of the Port and its ability to meet its future costs.

4.77. Port Authority NSW submits that it anticipates material investments and cost increases in its Port operations in the next few years to meet more stringent safety obligations, including new nationally-mandated accreditations, upgrades to its Vessel Traffic Information Service, and increases in personnel.

4.78. Port Authority NSW submits that any authorisation should be limited to collective negotiation of the wharfage charge only. Alternatively, that a condition of authorisation should be imposed by the ACCC to limit any change to the revenue that Port Authority NSW receives from PNO by way of the navigation service charge.

4.79. In response, the Applicants submit that commercial arrangements between Port Authority NSW and PNO are confidential, and that the fees payable between the two service providers is a matter between PNO and Port Authority NSW. The Applicants submit that they would not wish to see the safe operation of the Port compromised. However, the State of NSW by virtue of the sale proceeds of port privatisations, and the charges, taxes and royalties it collects from the mining industry, should have sufficient funds for current and future operations of Port Authority NSW.

4.80. The Applicants submit that the conditions proposed by Port Authority NSW should not be imposed by the ACCC. Access seekers should be able to negotiate efficient pricing

with PNO irrespective of commercial arrangements between PNO and Port Authority NSW.

ACCC view

- 4.81. The ACCC considers that the contractual relationship between each individual Applicant and PNO is open to bilateral negotiation, including in relation to the discounted navigation service charge offered under the Deed, whether or not authorisation of the Proposed Collective Bargaining Conduct is granted by the ACCC. The Proposed Collective Bargaining Conduct will be voluntary for the Applicants and PNO, and will be a commercial decision for each party as to what terms and conditions they agree to, in considering their particular incentives and interests.
- 4.82. Similarly, the contractual relationship between PNO and Port Authority NSW is subject to commercial negotiation between those parties. When Port Authority NSW agreed to payments from PNO that are linked to the navigation service charge payments PNO receives, it accepted the risk that those payments may go up or down over time. The ACCC does not consider that any potential flow on impact on Port Authority NSW's revenue is a relevant consideration in its assessment of this application. Port Authority NSW's obligations to operate the Port safely, or to cover future expenditure, are its own separate responsibility and a matter for commercial negotiation between Port Authority NSW and PNO.
- 4.83. As a result, the ACCC considers that the condition of authorisation requested by Port Authority NSW is not necessary for the proposed authorisation to further enhance the likely public benefits, or reduce the likely public detriments.

ACCC conclusion on public detriment

- 4.84. The ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in minimal, if any, public detriments from any reduction in competition because:
- participation in collective bargaining will be voluntary, both for the Applicants and PNO
 - the Applicants have not sought authorisation for collective boycott activity
 - authorisation would not extend to the sharing of sensitive information about which PNO and Port Authority NSW is concerned, for example future production or export volumes. Authorisation of collective discussions will be limited to the terms and conditions of access to the Port, including price, contained in the proposed Deed, and
 - the ACCC does not consider that a condition of authorisation is required to reduce the likely minimal public detriments discussed above.

Balance of public benefit and detriment

- 4.85. For the reasons outlined in this draft determination, based on the information before it, the ACCC is satisfied that the Proposed Collective Bargaining Conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Collective Bargaining Conduct. Accordingly, the ACCC proposes to grant authorisation.

Length of authorisation

- 4.86. The Act allows the ACCC to grant authorisation for a limited period of time.⁷⁹ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.
- 4.87. In this instance, the Applicants seek authorisation for ten years. The Applicants submit that authorisation of the Proposed Collective Bargaining Conduct for ten 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 co-operative way.
- 4.88. The Applicants have noted their intention to lodge an application with the National Competition Council (**NCC**) for declaration of the channel services at the Port, around June 2020. Pursuant to ACCC authorisation, the Applicants intend to collectively negotiate with PNO prior to and subsequent to any declaration of the Port's channel services.
- 4.89. Port Authority NSW submits that the ten year authorisation sought is unusually long, and impacts of the authorisation may be long lasting and difficult to predict across the full period.
- 4.90. The ACCC considers that an authorisation term of ten years is appropriate considering that the subject of the Proposed Collective Bargaining Conduct, being the long term Deed, is proposed for ten years. This would enable the Applicants to collectively negotiate any proposed changes during the operation of the Deed, for example in response to annual access price adjustments by PNO.
- 4.91. Further, the ACCC notes that the proposed period of authorisation would also cover a period where the Applicants envisage potentially seeking to collectively negotiate terms and conditions of access with PNO in the event that the NSW Minerals Council's intended application for the declaration of the Port was successful.

5. Draft determination

The application

- 5.1. On 6 March 2020 the NSW Minerals Council lodged application AA1000473 with the ACCC on behalf of itself, certain coal producers that export coal through the Port of Newcastle (the **Port**), and mining companies requiring future access through the Port of Newcastle⁸⁰ (the **Applicants**), seeking authorisation under subsection 88(1) of the Act.
- 5.2. The ten Applicant coal producers are:
- Glencore Coal Assets Australia Pty Limited
 - Yancoal Australia Limited
 - Peabody Energy Australia Pty Ltd
 - Bloomfield Collieries Pty Ltd

⁷⁹ Subsection 91(1)

⁸⁰ Section 88(2)

- Centennial Coal Company Limited
- Malabar Coal Limited
- Whitehaven Coal Mining Limited
- Hunter Valley Energy Coal Pty Ltd
- Idemitsu Australia Resources Pty Ltd, and
- MACH Energy Australia Pty Ltd.

5.3. The Applicants seek authorisation to:

- 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
- discuss amongst themselves matters relating to the above discussion and negotiations, and
- enter into and give effect to contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port (the **Proposed Collective Bargaining Conduct**).

5.4. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

5.5. Under subsections 90(7) and 90(8) of the Act as they apply to this application for authorisation, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Collective Bargaining Conduct would result or is 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.

5.6. For the reasons outlined in this draft determination, the ACCC is satisfied, in all the circumstances, that the Proposed Collective Bargaining Conduct would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Collective Bargaining Conduct, including any lessening of competition.

5.7. Accordingly, the ACCC proposes to grant authorisation as described below.

Conduct which the ACCC proposes to authorise

5.8. The ACCC proposes to grant authorisation A1000473 to enable the Applicants to collectively negotiate with Port of Newcastle Operations Pty Ltd in relation to the terms and conditions of access, including price, to the Port as described in paragraph 5.3 above and defined as the Proposed Collective Bargaining Conduct.

5.9. The Proposed Collective Bargaining Conduct may involve a cartel provision within the meaning of Division 1 of Part IV of the Act or may have the purpose or effect of substantially lessening competition within the meaning of section of the Act.

5.10. The ACCC proposes to grant authorisation AA1000473 for ten years.

5.11. This draft determination is made on 19 June 2020

Conduct which the ACCC proposes not to authorise

5.12. The proposed authorisation does not extend to permit the Applicants to engage in any collective boycott activity, and does not involve the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume / capacity projections for individual users.

6. Next steps

6.1. The ACCC now invites submissions in response to this draft determination by Friday, 10 July 2020. In addition, consistent with section 90A of the Act, the applicant or an interested party may request that the ACCC hold a conference to discuss the draft determination. Any such request must be made by Friday, 3 July 2020.