



AUSTRALIAN
COMPETITION
& CONSUMER
COMMISSION

NSW Minerals Council and coal producers – application for authorisation AA1000473

Interim authorisation decision

2 April 2020

Decision

1. The Australian Competition and Consumer Commission (the **ACCC**) has granted interim authorisation in respect of the application for authorisation AA1000473 lodged by the NSW Minerals Council and coal producers that export coal through the Port of Newcastle (the **Applicants**) on 6 March 2020.
2. Interim authorisation is granted to enable the Applicants to commence collective discussions amongst themselves and negotiations with Port of Newcastle Operations Pty Ltd (**PNO**) in relation to the terms and conditions of access, including price, to the Port of Newcastle (**Port**).
3. Interim authorisation does not extend to entering into collectively negotiated agreements. Interim authorisation was not sought, and does not extend to, the members of the collective bargaining group sharing individual coal projection volumes, customer pricing information or marketing strategies.
4. Interim authorisation commences immediately and remains in place until it is revoked or the date the ACCC's final determination comes into effect.

The application for authorisation

5. The Applicants are:
 - NSW Minerals Council
 - Glencore Coal
 - Yancoal
 - Peabody Energy
 - Bloomfield Collieries
 - Centennial Coal
 - Malabar Coal
 - Whitehaven Coal
 - Hunter Valley Energy Coal
 - Idemitsu Australia, and
 - MACH Energy Australia.

6. The Applicants are also seeking authorisation on behalf of future producers that choose to participate in the proposed collective bargaining group in the future.
7. The Applicant coal producers currently, or propose to, export coal through the Port. At the Port, this involves vessels entering the Port, transiting the channels in the Port, tying up at the berths to load coal at one of the coal loading terminals, and then once again transiting the channels before exiting the Port to deliver coal to overseas customers.
8. This application for authorisation is primarily focused on proposed collective bargaining in relation to access charges that apply to coal vessels entering and berthing at the Port of Newcastle – namely, the navigation service charge and wharfage price set by PNO. However, 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.’¹
9. The application is for voluntary collective bargaining, and does not involve any boycott activity. The Applicants seek authorisation for 10 years to enable them to collectively bargain all terms and conditions of access to the Port, including price, with 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 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**).
10. PNO has controlled the terms and conditions of access at the Port of Newcastle since May 2014, following the privatisation of the Port of Newcastle by the NSW Government. PNO operates the port under a long term lease arrangement from the NSW Government.
11. PNO publishes a schedule of service charges that apply to the commercial use of the Port. At the end of 2019, PNO invited coal producers to participate in individual discussions about entering into alternative long term pricing arrangements (the **Deed**), which includes discounted navigation service charges and wharfage prices set by PNO. The term of the Deed is 10 years, and service charges are subject to annual price adjustments. Unless a producer executes a Deed with PNO, higher navigation service charges and wharfage prices may apply to coal vessels loading that producer’s coal.

The authorisation process

12. Authorisation provides protection from legal action for conduct that may otherwise breach the competition provisions of the *Competition and Consumer Act 2010* (Cth) (the **Act**). Broadly, the ACCC may grant authorisation if it is satisfied that the benefit to the public from the conduct outweighs any public detriment, including from a lessening of competition. The ACCC conducts a public consultation process to assist it to determine whether a proposed arrangement results in a net public benefit.

¹ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.4.

Interim authorisation

13. Section 91 of the Act allows the ACCC, where it considers it appropriate, to grant interim authorisation. This allows the parties to engage in the proposed conduct while the ACCC is considering the substantive application.
14. The Applicants requested urgent interim authorisation to commence collective discussions and negotiation of the terms and conditions of access to the Port of Newcastle with PNO as soon as possible. The Applicants submit that PNO has already sought to commence individual negotiations with many of the larger miners in relation to the alternative long term pricing Deed. The Applicants submit that:²

The industry is concerned that the 'alternative' terms and conditions as set out under the Deed are offered completely at PNO's discretion, particularly as the 2020 Schedule of Charges came into effect on 1 January 2020.

15. In support of the interim authorisation request, the Applicants submit:³
 - the Proposed Collective Bargaining Conduct is likely to have minimal impact on competition given the voluntary nature of the arrangements – PNO is not compelled to enter into collective negotiations,
 - sensitive information such as downstream customers, customer pricing, volume projections, or marketing strategies will not be shared by the Applicants, and
 - interim authorisation will assist the Applicants in assessing the benefits and consequences of the terms and conditions offered by PNO under the long term Deed, particularly in circumstances where there is significant information asymmetry between PNO and port users.

Consultation

16. 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.⁴
17. The ACCC received a public submission from PNO which opposed interim authorisation. PNO submits that there are no grounds for urgency as bilateral negotiations in relation to the Deed can continue indefinitely. PNO also considers that interim authorisation would permanently alter competitive dynamics in the industry by allowing coal producers to establish their collective position in relation to the long term pricing arrangements in the Deed, which could not be undone if the ACCC were to subsequently decide not to authorise the conduct.
18. The ACCC received three public submissions expressing support for the application for authorisation and request for interim authorisation, which are summarised below:
 - **Port Waratah Coal Service (PWCS)** – supports interim authorisation and considers the proposed conduct is likely to result in substantial public benefits, including: certainty for investment for the Hunter Valley coal industry; access to better term for coal producers; efficiently addressing industry wide issues such as capital

² NSW Minerals Council supporting submission to application for authorisation AA1000473, 6 March 2020, paragraph 1.41.

³ NSW Minerals Council supporting submission to the application for authorisation AA1000473, 6 March 2020, paragraph 1.39.

⁴ A list of the parties consulted and the public submissions received is available from the ACCC's [Authorisations Public Register](#).

expenditure at the Port; and increasing transparency of expenditure and cost allocation by PNO.

- **Yancoal** – supports urgent interim authorisation because PNO has advised that any bilateral negotiations are to be concluded urgently. It also submits there will be no permanent impact from granting interim authorisation as the Proposed Collective Bargaining Conduct would involve the Applicants discussing terms and conditions that PNO has already published, and will not involve the Applicants sharing commercially sensitive information about their individual mining operations.
- **Whitehaven Coal** – has met PNO to discuss the Deed, but has not reached an agreement. Whitehaven considers that collective bargaining could help the industry reach agreement with PNO over the Deed quickly, which would provide greater certainty over pricing for the next ten years.

19. In response to PNO's submission, the Applicants submit that:

- Pricing at the Port has historically always been applied on a 'cost to use' basis, rather than on individual producer's volumes. Given this, urgent interim authorisation will not result in a disruption of the status quo as there is no need to share competitively sensitive information such as individual coal producer's projection volumes, customer information or marketing strategies.
- There is urgency because PNO is advising coal producers to urgently finalise bilateral discussions in relation to the long term access Deed or face higher access charges.
- Interim authorisation would provide an opportunity for the industry to collectively discuss long term access terms and conditions with PNO immediately.
- Should the ACCC deny final authorisation, there would be no impact on the status quo as producers would still be dealing with PNO as the Port operator in a situation where it has complete pricing power.

20. In granting interim authorisation, the ACCC has taken into account all submissions received. Further information in relation to the application for authorisation, including any public submissions received by the ACCC as this matter progresses, may be obtained from the ACCC's [Authorisations Public Register](#).

Reasons for decision

21. The ACCC has granted interim authorisation 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 of Newcastle.

22. In granting interim authorisation, the ACCC considers that:

- There is real urgency to the request for interim authorisation while the ACCC considers the application for final authorisation, as the Applicants have been told to execute a ten year access Deed with PNO in a short timeframe, or alternatively face higher Port service charges for their loaded coal. The ACCC notes that some producers have been engaged in individual discussions with PNO since December 2019.
- Interim authorisation will provide an opportunity to reduce ongoing uncertainty over the terms and conditions of access to the Port of Newcastle, and the potential to achieve more timely outcomes for the industry.

- It is unlikely that interim authorisation will materially harm competition. The Proposed Collective Bargaining Conduct is voluntary, with coal producers free to commence or continue any bilateral discussions with PNO that may already be taking place. The Applicants do not seek authorisation for the members of the collective bargaining group to share individual coal projection volumes, customer pricing information or marketing strategies. Further, interim authorisation does not extend to entering into collectively negotiated agreements. Therefore, if authorisation is ultimately not granted, the ACCC considers that it is likely that the relevant markets will return to substantially their current state.

Reconsideration of interim authorisation

23. The ACCC may review the interim authorisation at any time. The ACCC's decision in relation to the interim authorisation should not be taken to be indicative of whether or not the final authorisation will be granted.