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By email

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

25 March 2020

Authorisation Application AA1000473 – response to PNO submission

Dear Mr Hatfield,

1. Introduction

We refer to the submission by Port of Newcastle Operations Pty Ltd (PNO), to the Australian Competition and Consumer Commission (ACCC) dated 18 March 2020 (PNO Submission) in relation to the New South Wales Minerals Council (NSWMC) and ten mining company members' (together, the Applicants), request for interim authorisation of proposed collective bargaining conduct (Proposed Conduct) as set out in the Applicants' authorisation application to the ACCC (Application). NSWMC appreciates the opportunity to respond to the PNO Submission.

2. Response to PNO Submission

The approach taken by the NSWMC on behalf of the Applicants as mining industry users of infrastructure, is entirely proper and consistent with what the mining industry has done in the past to seek industry solutions to achieve efficiencies for Australian exports, including in the past the establishment of the Hunter Valley Coal Chain logistics team. Further, the Application was to seek to ensure compliance with the *Competition and Consumer Act 2010* (Cth) (CCA).

In order to respond to the PNO Submission in a constructive and helpful manner for the ACCC, we have set out below our responses in a factual manner.

The request for an urgent interim authorisation was put forward and is necessary in circumstances where PNO has sought to impose tight timeframes in relation to the negotiation process that PNO itself has initiated and is undertaking. For example, Yancoal Australia Limited's (Yancoal) submission to the ACCC dated 18 March 2020, "*PNO has indicated to Yancoal that it requires any negotiated arrangements to be concluded urgently (noting that price was originally intended to commence from 1 January 2020)*". As to PNO's suggestion there has been delay by the Applicants, putting together an industry application takes time, particularly when its members employ many Australians and senior management have been involved in the multitude of issues associated with COVID-19 in Australia.

It is apparent from the submission to the ACCC from Yancoal and the Application on behalf of 10 coal companies, that individual negotiations with PNO have failed to provide a resolution to industry issues. In these circumstances, urgent interim authorisation of the Proposed Conduct is important to allow the industry the opportunity to find a way forward on industry issues as soon as practicable. We say "opportunity" as it is ultimately solely within PNO's control over whether such negotiations occur and therefore the interim authorisation will simply facilitate the conditions for such discussions



by the Applicants in compliance with the CCA.

Moreover, PNO has not provided any compelling reasons as to why it opposes the interim authorisation other than to say that doing so will allow some form of cartel conduct which if allowed, will forever distort the competitive process that PNO claims could not be returned to, if the ACCC ultimately does not grant an authorisation. This assertion should be considered from a factual perspective as to why industry participation is relevant to dispel any suggestion by PNO that this Application is anything but appropriate.

While in many respects the issues between Glencore and PNO are irrelevant to this Application, the ACCC arbitration determination between those parties is relevant.¹ The ACCC arbitration determination is relevant in so far as it sought to consider appropriate principles for access terms and conditions (including as to price) for any user of the Port, not just Glencore as the pricing was determined by the ACCC irrespective of Glencore's volumes of coal exported through the Port. Given the revocation of the declaration of the Port of Newcastle by the National Competition Council (NCC) in 2019,² and the appeal by Glencore and PNO of the ACCC determination now only binding on those parties, the pricing principles and issues the ACCC considered remain relevant for the industry. For example, the relevant issues that continue to arise in relation to PNO from an industry perspective are what is a reasonable return for PNO and in particular, the appropriate treatment of user funded expenditure that forms part of its regulated asset base that generates that return. Further industry issues arise as to what capital expenditure PNO may undertake if it proceeds to build a container terminal as the costs and process would affect all users, not just a single user.

Therefore, the matters that the Application seeks to address are industry issues, not single user issues, and can be most effectively addressed by allowing a cohesive, industry approach. PNO has brought on the negotiations, and the issues on user funding and the container port are well known and are public. Such legitimate industry issues are intended to be discussed with PNO, but even if the authorisation for some reason was ultimately denied by the ACCC, this does not irrevocably alter the status quo as PNO has claimed. Port users would still be dealing with PNO as the Port operator in a situation where it has complete pricing power. Given this, it is hard to see any factual basis for PNO's claims that any attempt at collective bargaining under the auspices of an interim authorisation would disrupt the status quo (i.e. the same (monopoly) state).

The Applicants acknowledge that PNO is likely to be unwilling to collectively negotiate given its monopoly position, but believe that it is incumbent on industry to try and reach a solution with PNO that may lead to a resolution of the above issues, and which results in long term certainty, increased investment and therefore employment in the Hunter Valley. In the current economic environment, the NSWMC believes that is very important and the best uses of resources and time to attempt to collectively bargain and resolve these industry issues.

However, the NSWMC understands that in March 2020, PNO wrote to certain mining companies indicating serious concerns with mining companies seeking to reach agreement with PNO by means of industry action under the ACCC authorisation process. Accordingly, contrary to its public statements of "*look[ing] forward to sitting down with all our customers to discuss our services and pricing as part of a return to a normal commercial relationship*",³ it would appear there is limited desire on the part of PNO to discuss industry issues.

The Applicants wish to take a sensible approach to this Application by recognizing that ultimately it is

¹ ACCC Final Determination, Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, 18 September 2018.

² NCC Recommendation, Revocation of the declaration of the shipping channel service at the Port of Newcastle, 22 July 2019.

³ See PNO media release dated 31 October 2019: <https://www.portofnewcastle.com.au/news/port-welcomes-return-to-normal-commercial-relationship-with-customers/>.



a matter for PNO whether it wishes to collectively bargain with the industry/Applicants, but we seek an interim authorisation from the ACCC to allow the Applicants the opportunity to discuss these important industry issues in compliance with the CCA.

3. Interim authorisation should be granted

The industry response of the nature sought by the Applicants is not novel and has been used effectively to the benefit of competition in relation to other essential infrastructure in Australia.⁴ As outlined in the Application, the issues which the Applicants seek to collectively discuss and negotiate with PNO not only pertain to price, but also to issues of capital expenditure, such as PNO's announced intention to develop a container terminal at the Port.⁵

In its consideration of Queensland coal producers' authorisation application relating to collective negotiation of terms and conditions of access, including price, with Adani Mining Pty Ltd's Dudgeon Point terminal infrastructure and Aurizon Network's connecting below rail infrastructure for the purposes of transporting coal from the Bowen Basin to the terminal for export, the ACCC recognised that enabling an industry approach and discussion would support the timely development of the Dudgeon Point Terminal which would likely result in:

- a. transaction cost savings;
- b. greater commercial certainty regarding infrastructure investment within the Bowen Basin and supporting infrastructure; and
- c. enable the coal producers to secure, on a more timely basis, access to the infrastructure to support mining expansions in the region and avoid any unnecessary delays in the generation of additional export revenue.⁶

Given the scale of investment involved in mining operations and the current circumstances faced by the mining industry and Australian economy, urgent interim authorisation is critical in supporting mining companies in their operations and continued investment in the Hunter Valley region.

Further, it is unclear the basis upon which PNO argues that interim authorisation will cause harm to competition. In contrast, there are compelling reasons as to how interim authorisation will preserve competitive tension in the market and maintain the status quo. As noted above, urgent interim authorisation is necessary in circumstances where PNO is urging mining companies to urgently finalise their positions or face higher charges.

Granting interim authorisation of the Proposed Conduct will maintain the status quo by allowing the Applicants to discuss and collectively negotiate industry issues, including the terms offered under the Producer Deed, which have been made publicly available. Moreover, the Applicants note that pricing at the Port has historically always been applied on a 'cost to use' basis, rather than on individual volumes, consistent with the approach taken by the ACCC in its arbitration of the access dispute between Glencore and PNO.⁷ 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 projection volumes, customer information or marketing strategies.

PNO in the PNO Submission makes much of the promise not to discriminate in how it treats users. As an infrastructure monopoly, that promise does not give much comfort. While PNO's inclusion of a

⁴ For example, A91350 and A91351 (*Application for authorization lodged by various Queensland coal producers in respect of proposed collective bargaining with QR Network Pty Ltd and Adani Mining Pty Ltd*) and AA1000425-1 (*NSW Track Access Collective Bargaining*).

⁵ Application, [1.12].

⁶ See: <https://www.accc.gov.au/system/files/public-registers/documents/D13%2B32694.pdf>, page 16.

⁷ ACCC, Final Determination, Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, 18 September 2018.



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clause in its template Producer Deed purports to commit PNO not to discriminate adversely against any producer on price, the Applicants are concerned as to how the Producer Deed will operate in practice and in the absence of any regulatory oversight, the ability for PNO to impose terms and conditions to its fullest commercial advantage without any recourse or avenue for ACCC arbitration. In such circumstances, urgent interim authorisation will give the Applicants an opportunity to discuss real effects of the Producer Deed, noting the significant imbalance in bargaining power as users no matter how large, have no other option but to distribute through the Port.

Finally, it is difficult to foresee any difficulties or harm that PNO may face as a result of interim authorisation being granted, given the voluntary nature of this process, such that should PNO decline to enter into collective discussions with the Applicants, there will be minimal impact on the status quo.

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

Yours sincerely

A handwritten signature in blue ink, appearing to read "Stephen Galilee", with a large, sweeping flourish at the end.

Stephen Galilee
CHIEF EXECUTIVE OFFICER