

For public register

Your ref: AA1000473

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15 May 2020

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

Dear Mr Hatfield,

Authorisation Application AA1000473 (Application) – response to ACCC request for information dated 1 May 2020

1. Request for information from the ACCC in relation to the Application

- 1.1 We refer to your letter dated 1 May 2020 (**Letter**) requesting information related to the scope of the Application and how the Proposed Conduct as set out in the Application is proposed to work in practice. We have provided below a response to the ACCC's questions as set out at Attachment A of the Letter (**ACCC RFI**).
- 1.2 By way of update, we have also received an indication from the Port of Newcastle Operations Pty Limited (**PNO**) that they do not wish to participate in collective negotiations. We consider this point in further detail in our response to Question 4 of the ACCC RFI.

2. Applicants' responses to ACCC RFI

Question 1

- 2.1 As outlined in the Application, the Proposed Conduct involves the New South Wales Minerals Council (**NSWMC**) and the 10 mining company applicants (together, the **Applicants**), seeking authorisation from the ACCC under the Competition and Consumer Act 2010 (Cth) (**Act**) to:
- (a) *collectively discuss and negotiate with the operator of the Port of Newcastle (Port), PNO, the terms and conditions of access for the export of minerals through the Port;*

The negotiations would essentially relate to the terms and conditions that PNO proposed to the mining industry in PNO's Template Producer Deed referred to at paragraph 13 of PNO's letter to the ACCC dated 7 April 2020 and to any other access terms and conditions that PNO has published from time to time on its website applicable to access arrangements for vessels, which would be used in any capacity, whether directly or indirectly, by mining companies for the export of their products.¹

It is noted that such discussions would potentially also relate to price, in so far as to how PNO has calculated and proposes to calculate in the future, prices relating to its public schedule of charges and in particular the Initial Capital Base component that underpins those prices that PNO is proposing to use for those charges. In PNO's proposed dispute resolution guidelines relating to access,² the Initial Capital base is defined to mean "*...the value established by reference to the depreciated optimised replacement cost as at 31 December 2014 of the assets used in the provision of all of the services at the Port of Newcastle and, unless otherwise agreed by PON, without deduction for user contributions.*" As the ACCC is aware, how PNO has calculated the Initial Capital Base is a key issue for the Applicants.

Just as the ACCC in arbitrating the dispute between PNO and Glencore as to access terms and conditions looked to set principles that would apply to all users of the Port based on how PNO had calculated its regulatory asset base, it is intended that while any of the Applicants would be free to negotiate prices with PNO, the collective bargaining would seek to establish clear principles for the terms and conditions of access based on a greater understanding of PNO's current and future proposed capital base. This discussion arises because the Applicants have concerns with the current PNO access terms, and given that the declaration of the Port has now been revoked, it is now no longer currently possible to have the ACCC perform an independent arbitration role. Therefore, the Applicants are seeking to negotiate a set of terms and conditions of access in a similar manner as the ACCC determined, based on general regulatory principles for infrastructure assets. In this regard, please see the last paragraph of the ACCC's published report on the arbitration, where the ACCC noted that

¹ See: <https://www.portofnewcastle.com.au/what-we-do/port-open-access-arrangements/>.

² See: <https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/Dispute-Resolution-Terms.pdf>.

while the matter was a dispute between two particular parties, its pricing principles would potentially have application to other users of the Port.³

- (b) *discuss between themselves matters relating to the discussion and negotiations with PNO referred to at paragraph (a) above so that those discussions can be undertaken in a constructive and efficient manner for all parties; and*
- (c) *enter in and give effect to any contracts, arrangements or understandings relating to any access terms and conditions that the collective bargaining group may negotiate with PNO for the export of minerals through the Port.*

- 2.2 The Applicants anticipate that the aspects of any contract, arrangement or understanding that might be cartel provisions within the meaning of Division 1 of Part IV of the Act could arise as a result of the collective negotiation of the terms and conditions of access (including price) to the Port facilities and infrastructure required for the export of minerals (e.g. coal), and the conclusion (if any) of prices that might be agreed between any particular Applicant and PNO. The Applicants do not wish to see there being any suggestion that they have not taken all appropriate steps to ensure compliance with the Act.
- 2.3 The Applicants also anticipate that the collective negotiation of such contractual provisions and the conclusion (if any) of such provisions for each Applicant, may be subject to the general provisions of section 45 of the Act.
- 2.4 The Applicants note that the Proposed Conduct does not involve any collective boycott activity.

Question 2

- 2.5 The Applicants anticipate that the proposed collective bargaining group will primarily comprise coal mining companies but note that the class of potential applicants could conceivably involve other mining company members of the NSWMC. However, the potential class of persons to engage in collective bargaining is sought to be confined to mining companies.

³ See: <https://www.accc.gov.au/system/files/public-registers/other/Glencore%20PNO%20access%20dispute%20-%20Arbitration%20Report%20-%2018%20September%202018%20%28Published%20version%29.pdf>.

Question 3

- 2.6 The NSWMC 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 and will provide the ACCC with a copy of such an application after it is lodged.
- 2.7 The NSWMC brought the future lodgement of a declaration application to the NCC to the ACCC's attention, as PNO had suggested in its submissions to the ACCC that mining companies were satisfied with PNO's access terms and conditions to the Port. Such an application by the NSWMC is a strong indication that is not the case.
- 2.8 It is hoped, but it is not necessary to determine definitively, that any authorisation granted pursuant to this Application would allow mining companies to seek to jointly negotiate with PNO access terms and conditions if the channel services were declared. It is noted it would be irrelevant if PNO agreed to negotiate or not in light of a collective negotiation as any access dispute so arising would be subject to the ability to have the ACCC arbitrate the dispute.
- 2.9 Given it would appear likely that PNO may oppose a declaration application and appeal processes in relation to access declarations last many years, an authorisation for a longer term than 5 years and instead 10 years is being suggested, to allow time for appeal processes, noting that the Port was previously declared by the Australian Competition Tribunal for a period of 15 years.

Question 4

Composition of Negotiating Committee

- 2.10 The NSWMC has established a Port of Newcastle Working Group (**PNWG**) for the purposes of coordinating any collective discussions / negotiations, consistent with the terms of the interim authorisation granted by the ACCC on 2 April 2020. The PNWG is comprised of representatives from the Applicant mining companies and the NSWMC.
- 2.11 The Negotiating Committee, formed from members of the PNWG, will therefore also consist of representatives chosen from the Applicant mining companies. The Applicants will update the ACCC as to the composition of the Negotiating Committee once these representatives have been chosen, in due course.

Proposed processes of the Negotiating Committee

- 2.12 In relation to proposed processes for the Negotiating Committee seeking and providing feedback to the members of the collective bargaining group about the outcomes of any collective negotiations, it is anticipated that the Negotiating Committee will:
- (a) seek instructions from PNWG 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);
 - (c) report back to the PNWG in relation to outcomes achieved through such collective discussions / negotiations, and where necessary, seek instructions as to further negotiations with PNO.
- 2.13 In relation to the proposed processes for the Negotiating Committee collectively negotiating any annual price changes under any long-term access contract signed as a result of proposed collective negotiations, it is important to note as per the response to ACCC RFI Question 2, the Applicants would be seeking to discuss a framework in relation to how PNO sets charges based on what would essentially be a regulated asset base, with price increases based on new inputs from PNO. As such, it is anticipated that the PNWG will convene as the Applicants consider necessary in response to price changes proposed by PNO, so as to be able to understand and discuss the basis for such price changes (for example, capital expenditures at the Port or other issues which have industry-wide implications).
- 2.14 The Applicants consider that the proposed processes and reporting structure between the Applicants, the PNWG and the Negotiating Committee will facilitate efficient negotiations with PNO as to the common terms and conditions of access to the Port. It is anticipated that through collective negotiations between the Negotiating Committee and PNO as described above, the Applicants and PNO may be able to come to an agreement as to a template deed / contract, which individual Applicants may then choose to enter into with PNO.
- 2.15 As noted in the Application, the exchange of information between the Applicants (for example, through the PNWG or the Negotiating Committee) is confined, and does not involve the sharing of competitively sensitive information among mining companies such as that which relates to customers, marketing strategies, or volume / capacity projections for individual users. As can be seen from the ACCC's public arbitration

determination, no such sensitive information relevant to Glencore in its capacity as a mining company was involved in the arbitration between Glencore and PNO, and equally, such information is not relevant to nor needed in relation to the proposed collective bargaining by mining companies with PNO.

Update on collective negotiations to date

- 2.16 By way of update, the NSWMC wrote to PNO on 29 April 2020 requesting an initial meeting with PNO to commence negotiations around pricing and access principles that may work for both PNO and the Applicants. A copy of this correspondence is enclosed as **Attachment 1**. On 11 May 2020, PNO wrote to the NSWMC declining the request for an initial meeting and indicated that it does not support the collective bargaining arrangements in place between the Applicants.
- 2.17 Nevertheless, as outlined in the Application and the Applicants' subsequent submissions to the ACCC to date, it is submitted that authorisation of the Proposed Conduct will deliver significant public benefits that far outweigh any potential detriments (if any). While the Applicants note that PNO has declined its request for an initial meeting, the Applicants remain open to collective discussions with PNO in future to work towards the efficient resolution of important industry issues. Therefore, given the potential for significant public benefits to arise from the Proposed conduct, the Applicants continue to request for the authorisation to be granted.

Yours sincerely



Dave Poddar
Partner
Clifford Chance



Craig Carmody
Chief Executive Officer
Port of Newcastle
Level 4, 251 Wharf Road
Newcastle NSW 2300

29 April 2020

By email: [REDACTED]

ACCC Collective Bargaining Authorisation - Request for Initial Meeting

Dear Craig

As you are aware the ACCC has authorised the Hunter Valley coal producers to collectively negotiate with Port of Newcastle for the purposes of trying to reach agreement over pricing and terms of use of the Port of Newcastle shipping channel. We will advise you of the collective bargaining group nominees in advance of an agreed initial meeting.

As an industry we have commenced discussions, consistent with the terms of the ACCC interim authorisation, around pricing and access principles that may work for both the Port of Newcastle and industry. As you will appreciate there is a significant effort involved in coordinating this industry position so that we may be able to move forward in a constructive manner with the Port of Newcastle.

It would be appreciated if you could confirm Port of Newcastle's preparedness to engage with the industry in these negotiations?

To ensure the most effective use of resources in preparation for any agreed initial meeting, it would be appreciated if you could provide the following information on the current situation:

- Current pricing being charged to all port users;
- Indication of the number of Vessel Agents or other port users who have executed a Deed;



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- Port of Newcastle's understanding on how Agents Deed would interact with Producer Deeds.

We would also appreciate you advising some suitable times in the coming weeks for an initial meeting with the industry negotiating team, as well as confirmation of the preferred contact person within Port of Newcastle.

Thank you in anticipation.

Yours sincerely



Stephen Galilee
CHIEF EXECUTIVE OFFICER