

David Hatfield, Director
Jaime Martin, Contact Officer

Adjudication Division
Australian Competition and Consumer Commission
23 Marcus Clarke Street
Canberra ACT 2601

cc: adjudication@acc.gov.au

**RE: New South Wales Minerals Council collective bargaining application for authorisation
AA1000473 — interested party consultation**

This letter sets out Port Authority of New South Wales' (**Port Authority's**) initial submission concerning the New South Wales Minerals Council's application (on behalf of itself and its member coal producers, together "**Applicants**") for authorisation of collective bargaining conduct.

The Applicants seek authorisation to collectively bargain with Port of Newcastle Operations Pty Limited (**PNO**) including as to port access charges, which comprise the navigation service charge (**Navigation Charge**) and the wharfage charge (**Wharfage Charge**).

Port Authority notes that on 2 April 2020 the Australian Competition and Consumer Commission (**Commission**) granted interim authorisation for the Applicants to begin discussions amongst themselves and with PNO, but not to enter into any collectively negotiated agreement.

Port Authority's role at the Port of Newcastle

Port Authority is a state-owned corporation which manages the navigation, security and operational safety needs of commercial shipping in Sydney Harbour, Port Botany, Port Kembla and the ports of Newcastle, Eden and Yamba.

Relevantly, Port Authority provides the following services at the Port of Newcastle (**Port**) to PNO in PNO's capacity as port manager:

- Vessel scheduling functions.
- Emergency response to incidents in the marine environment.
- Harbour management system access services.
- Vessel traffic services.
- Provides reports in relation to Port Authority's performance of pilotage services.

YAMBA
PO Box 143
Yamba NSW 2464
T: 61 2 6646 2002

NEWCASTLE
PO Box 663
Newcastle NSW 2300
T: 61 2 4985 8222

SYDNEY
PO Box 25
Millers Point NSW 2000
T: 61 2 9296 4999

PORT KEMBLA
PO Box 89
Port Kembla NSW 2505
T: 61 2 4275 0100

EDEN
PO Box 137
Eden NSW 2551
T: 61 2 66461596

Commission must be satisfied that public detriments are adequately identified and weighed before granting authorisation

Part VII of the *Competition and Consumer Act 2010* (Cth) (**CCA**) relevantly provides that the Commission must not authorise conduct unless satisfied that the likely public benefits outweigh any likely public detriments.¹

The CCA tasks the Commission with weighing the public benefits and detriments flowing from the conduct, including any pro- and anti-competitive effects, respectively. The relevant public detriments are broad (“*any impairment to the community generally harm or damage to the aims of society*”)² and notably include any reduction in public safety.³

The applicant bears the onus of establishing the factual basis for an authorisation, and must describe the proposed conduct for which authorisation is sought in a sufficiently precise manner.⁴ Without sufficiently complete information from the applicant, the ACCC cannot fulfil its statutory role: it cannot know what it is authorising, and cannot be satisfied that the conduct should be exempted from the competition laws that would otherwise apply.

The Commission has the power to impose conditions when granting an authorisation so as to increase the likelihood of the public benefits, or limit the likelihood of public detriments, arising from the conduct.⁵ The ACCC must be guided by its assessment of the authorisation test when deciding to impose conditions.⁶

Applicants have not provided the Commission with sufficient information about potential public detriments

The Applicants state that “*The only impacted party for the relevant conduct is considered to be PNO*”.⁷ That statement is incorrect, at least in the case of Port Authority.

As noted above, Port Authority provides a variety of services to PNO, including to ensure safe Port operations. Port Authority receives a quarterly fee from PNO for those services,⁸ which (for recent and future years) is calculated as a fixed proportion of the Navigation Charge that PNO receives from its customers, i.e. Port users. (Port Authority does not receive any proportion of PNO’s Wharfage Charges). Accordingly, to the extent that the proposed collective bargaining conduct results in PNO receiving reduced Navigation Charge revenue from the Applicants, Port Authority’s fee will similarly reduce.

The fee that Port Authority receives from PNO under-recovers the cost of providing the relevant services. The nature of those services, which are provided for the whole Port on a 24-hour basis, means that the costs of providing those services are largely fixed, i.e. independent of vessel traffic.

Port Authority’s operations at the Port in respect of services provided to PNO have been loss making from day 1, and Port Authority’s costs increase annually. This loss making business in Newcastle means it is

¹ CCA, section 90(7). The Commission may also authorise conduct if it is satisfied the conduct is not likely to have the effect of substantially lessening competition. Even where the statutory test is met, the Commission’s decision whether to authorise remains discretionary.

² See e.g., *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357 at 42,683.

³ *ACCC Guidelines for Authorisation of Conduct (non-merger)*, page 48.

⁴ *Ibid.*, page 13; *Queensland Co-operative Milling Association Ltd* (1976), ATPR 40-012, at 17,244.

⁵ CCA, section 88(3); *Re Medicines Australia Inc* [2007] ACompT 4 at [129]; *ACCC Guidelines for Authorisation of Conduct (non-merger)*, page 50.

⁶ *Ibid.*, page 50; *Re Medicines Australia Inc* [2007] ACompT 4 at [129] – [133].

⁷ NSW Minerals Council, *Application for Authorisation*, 6 March 2020, page 4.

⁸ With the exception of pilotage services, which are charged according to the Port Authority’s published statutory Pilotage Charges at the Port, as set out in the *Schedule of Port Charges* (Effective 1 July 2019), page 11.

being subsidised by other parts of Port Authority's businesses and, in the context of IPART's determination in 2016/17 during its cruise pricing review, that Port Authority is operating efficiently.

Further, Port Authority anticipates material investments and cost increases in its Port operations in the next few years to meet more stringent safety obligations, including for new nationally-mandated accreditations, upgrades to its Vessel Traffic Information Service (**VTIS**) and increases in its personnel. Any reduction in fees under the Navigation Charge would reduce Port Authority's ability to meet those costs, and may lead to deferral of that investment and/or reduce Port Authority's ability to contemplate investments that would exceed the minimum requirements.

Port Authority considers that there is a public interest in ensuring that the Applicants' proposed conduct does not undermine the adequacy and certainty of funding for Port Authority's services at the Port, particularly as to safe port operations.

The Applicants' submission makes much of the importance of certainty for investment; Port Authority considers that this equally applies in relation to Port Authority's investments. Port Authority understands that the Navigation Charge is only a small proportion of the total amount paid by Port users.

Public detriments across supply chain may be complex and enduring

Port Authority is concerned that the above may be just one instance in which the Applicants have failed to properly consider, or provide the Commission with information about, a potential public detriment arising from the proposed conduct.

There may be many such instances, given the complexity of the Hunter Valley Coal Chain and the myriad third parties and adjacent markets involved along its length. Further, authorisation is sought for an unusually long period (at least 10 years), such that those impacts may be long-lasting and difficult to predict across the full period.

These circumstances illustrate the importance of the Commission receiving and considering full information, before it can determine whether to exempt the Applicants' proposed conduct from the CCA. In Port Authority's view, the Applicants have not provided sufficient information to satisfy the Commission that the application may (or should) be granted.

Other observations on Applicants' submission

Port Authority makes the following additional comments on the Applicants' submission.

- **Imprecise definition of conduct.** The Applicants' submission is impermissibly imprecise as to the conduct to be authorised. Some examples of the unclear and open-ended language deployed are underlined below.

"The Applicants are seeking 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. Accordingly, nothing in this general description of the export task should be taken as narrowing what the Applicants are seeking to be negotiated with PNO (e.g. because it is not expressed in detail) having regard to this practical perspective of coal export operations. In other words, the Applicants are seeking to be able to negotiate with PNO all terms and conditions of access that are necessary or desirable for export operations of coal from the Port."

Neither the authorisation provisions in the CCA nor the approved form contemplate or permit applicants to seek such a "blank cheque" exemption from the cartel prohibitions or Part IV. In the Port Authority's view, precision is critical in this case, given that the Applicants seek exemption

from the *per se* cartel prohibitions (and the associated criminal penalties), and both PNO and third parties require clarity as to what conduct and collective arrangements (and are not) legally permissible.

- **Over-broad authorisation sought.** The Applicants' submission indicates that the Applicants' only material concern is as to the price charged by PNO for Port access. Yet a far broader authorisation is sought, extending to all terms and conditions of access, i.e. not just those charges. Such an unbounded authorisation may, for example, permit the Applicants (through their agreement with PNO) to effectively coordinate on allocation of supply chain constraints, or to enter into agreements that are not 'Take or Pay' such that spare capacity remains inefficiently unused and/or non-participating coal producers are excluded. The latter could, in effect, force all coal producers using the Port to participate in collective negotiations with PNO. None of this is adequately dealt with in the submission.
- **Applicants could achieve equivalent outcome without a CCA exemption.** Authorisation is not necessary, and should not be granted, in circumstances where the Applicants could form a buying group and rely on the collective acquisition exemption in the CCA.⁹
- **Authorisation may have unintended domestic impacts not canvassed in the submission.** Port Authority notes that the Applicants are not only coal exporters, but also suppliers to domestic industries such as electricity generation assets. Sharing of competitively sensitive information about future production and export volumes may, for example, give the group insight into each other's intentions for domestic coal supply. This is just one example of how the proposed conduct may reduce competitive uncertainty or result in tacit collusion in domestic markets, which was not canvassed in the submission.
- **Current regulation assumes that the CCA would apply.** The Applicants assert that "*there are no direct regulatory constraints on [PNO's] pricing structures*".¹⁰ Even if that is accepted, Parliament has considered whether and how to regulate PNO and the Port (directly or indirectly), and has imposed statutory arrangements, including those outlined in the submission.¹¹ Parliament did so in the knowledge and expectation that PNO and all Port users (including the Applicants), would be subject to the CCA. The submission acknowledges that the Applicants are "generally large and sophisticated"¹² Australian or global mining corporations, indicating their significant bargaining power in dealings with any supplier.
- If the current arrangements are insufficient, there are avenues for that to be considered by the Minister (including under the provisions concerning pricing investigations mentioned in the submission at paragraph 1.28) or by Parliament (if the arrangements are to be altered). The Commission may exempt the Applicants' proposed conduct from the CCA if it considers the test is satisfied, but it should be cautious to do so in these circumstances.

Potential conditions to any authorisation

For the reasons above, a thorough investigation of the potential broader impacts of any authorisation determination is particularly important in this case. Port Authority suggests that the Commission also consider whether conditions to the authorisation would be appropriate to mitigate any public detriments identified (or, indeed, increase the likelihood of any public benefits arising).

⁹ CCA, section 45AU.

¹⁰ NSW Minerals Council, *Application for Authorisation*, 6 March 2020, para. 1.29.

¹¹ *Ibid.*, paras. 1.25 to 1.30.

¹² *Ibid.*, para. 6.3.

Were the Commission to propose to grant authorisation, but also considers that there is a public interest in ensuring that the collective bargaining does not undermine the adequacy and certainty of funding for Port Authority's services at the Port (particularly as to safe port operations), then one possibility would be to impose appropriate conditions. For example, the Commission could consider conditions that would:

- prevent the Applicants from entering into any agreement with PNO that would have the effect of reducing the revenue that the Port Authority would otherwise have received under the Navigation Charge; or
- permit the Applicants to collectively negotiate the Wharfage Charge only.

Adequate consultation during COVID-19

The Applicants' submission was lodged just prior to the unusually large influx of urgent authorisation applications from late March 2020 onwards in response to the COVID-19 crisis. The Port Authority is conscious that the COVID-19 crisis may have reduced the volume of interested party submissions that the Commission might otherwise expect to receive on an important application such as this one.

Port Authority was unable to prepare this submission prior to interim authorisation being granted. It may be that a number of businesses in markets adjacent to the Hunter Valley Coal Chain and other interested parties are in a similar position concerning the substantive application.

These circumstances may suggest that additional efforts to elicit interested party submissions, an extended period to consider the draft determination, would be prudent.

Please let me know if Port Authority can assist the Commission further.

Yours sincerely,

A large grey rectangular box redacting the signature of Amy Beaumont.

Amy Beaumont
General Counsel

16 April 2020