



## PORT WARATAH COAL SERVICES

10 July 2020

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

[adjudication@acc.gov.au](mailto:adjudication@acc.gov.au)

Dear Mr Hatfield

### **New South Wales Minerals Council application for authorisation - submission in response to the ACCC's draft determination (AA1000473)**

Port Waratah Coal Services Limited (**Port Waratah**) welcomes the opportunity to provide a further submission on the ACCC's Draft Determination dated 19 June 2020 in relation to the application by the NSW Mineral Council and various other parties (**Applicants**) seeking authorisation to conduct collective negotiations with Port of Newcastle Operations Pty Limited (**PNO**).

Port Waratah supports the ACCC's decision to grant authorisation for the Proposed Conduct. We consider that the Proposed Conduct will deliver substantial benefits to the Hunter Valley and New South Wales.

### **ACCC Draft Determination**

Port Waratah agrees that the Proposed Conduct will deliver significant public benefits as identified by the ACCC in its Draft Determination. We consider that the Proposed Conduct is likely to increase investment and employment in the Hunter Region, increase pricing transparency, provide certainty for long-term investment and expenditure, increase international competitiveness of Hunter Valley coal, and reduce transaction costs for both PNO and the Applicants.

In our view, the decision to grant authorisation should enable the industry to reach a long-term commercial solution in relation to port charges. Uncertainty in relation to these charges has the potential to undermine industry confidence and threaten future long-term investment in the Hunter Valley region.

We understand that PNO is currently offering port users access to a long-term, 10-year contract at "discounted" rates. However, these access charges are still significantly above pre privatisation levels

and will be increased further from 1 January 2021.<sup>1</sup> Over this period there have been no changes to service levels delivered. Further, this approach does not provide port users with any transparency around capital expenditure plans and cost allocation at the port.

We note that PNO wrote to the NSW Minerals Council on 11 May 2020 declining a request for a meeting and indicating that it does not support the Proposed Conduct.<sup>2</sup> We remain concerned that PNO has so far refused to engage with the Applicants. Given the importance of coordination across the Hunter Valley coal chain, we believe the most efficient outcome is for an ACCC authorisation to enable the Applicants and PNO to discuss access charges, annual access price adjustments, projected capital expenditure, the cost of operations, efficiency improvements to vessel services, delivery of vessel services and the future needs or demand for vessel services.

This will provide significantly increased certainty for Hunter Valley coal miners and their international coal customers.

### **Port Authority NSW submission**

#### **(i) Impact on safe operations at the Port**

Port Waratah has a number of concerns in relation to the submission by Port Authority NSW (**Port Authority**) which claims that granting the authorisation may compromise the safe operation of the Port.<sup>3</sup>

First, we note that payments made by PNO to Port Authority that are linked to the Navigation Services Charge (**NSC**) were negotiated as part of the overall \$1.75b sale of the Port in 2014. As the ACCC points out in its draft determination,<sup>4</sup> by linking payments from PNO to the NSC, Port Authority accepted the risk that these payments may go up or down over time. Further, Port Authority states that its “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.”<sup>5</sup> Even if this is correct, the NSC has increased substantially since privatisation, from \$0.42/GT to \$1.04/GT. Therefore, any losses must have been significantly reduced over this time period. Accordingly, there could be no public detriment unless the NSC was reduced to below the level just prior to privatisation.

Second, we agree with ACCC that Port Authority’s statutory obligations to operate the Port safely are separate to any commercial considerations. It cannot be the case that, in any real-world scenario, collective negotiations by the Applicants in relation to commercial matters will raise concerns in relation to the safe operation of the Port.

#### **(ii) Conditions to authorisation**

Port Waratah agrees with the ACCC that the condition to the authorisation proposed by Port Authority should not be imposed.

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<sup>1</sup> ACCC Draft Determination, at [1.19]. See <https://www.accc.gov.au/system/files/public-registers/documents/Draft%20Determination%20-%2019.06.20%20-%20PR%20-%20AA1000473%20NSWMC.pdf>

<sup>2</sup> ACCC Draft Determination, at [1.10].

<sup>3</sup> Port Authority of NSW Submission, pg 3. See: [https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20Port%20Authority%20of%20NSW%20-%2016.04.20%20-%20PR%20-%20AA1000473%20-%20NSWMC%20-%20Final%20Version\\_0.pdf](https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20Port%20Authority%20of%20NSW%20-%2016.04.20%20-%20PR%20-%20AA1000473%20-%20NSWMC%20-%20Final%20Version_0.pdf)

<sup>4</sup> Draft Determination, at [4.82].

<sup>5</sup> Port Authority of NSW Submission, pg 2.



### (iii) Definition of conduct and scope of the authorisation

Port Waratah considers that the current definition of the Proposed Conduct is reasonable in the circumstances as 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.”<sup>6</sup> Negotiations in relation to all terms and conditions of access, including price, are required to reach an efficient outcome. We note that this will not extend to sharing sensitive information. Port Waratah therefore does not agree that the current description of the Proposed Conduct amounts to a “blank cheque” exemption. It is clear what conduct is and is not authorised.

We are also surprised that Port Authority, as a member of the Hunter Valley Coal Chain Coordinator, has suggested that “the Applicants would coordinate on allocation of supply chain constraints, or to enter into agreements... such that spare capacity remains inefficiently unused and/or nonparticipating coal producers are excluded.”<sup>7</sup> We do not understand the basis for this concern and, unless Port Authority is able to provide further information, this does not appear to us to be a credible risk.

### Additional information

For more information on the importance of industry collaboration across the Hunter Valley coal chain please refer to the HVCCC website (<https://www.hvccc.com.au/history/>). As important industry members, the collaboration of both PNO & Port Authority to create efficiencies remains in the mutual interest of all parties to ensure future investment and employment in the Hunter Region by improving the international competitiveness of Hunter Valley coal.

If the ACCC has any further questions, Port Waratah would be pleased to assist.

Yours sincerely



**HENNIE DU PLOOY**  
**CHIEF EXECUTIVE OFFICER**

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<sup>6</sup> NSW Mineral Council and others Application for Authorisation, at [1.4]. See <https://www.accc.gov.au/system/files/public-registers/documents/Application%20-%2006.03.20%20-%20PR%20VERSION%20-%20AAI000473%20NSWMC.pdf>

<sup>7</sup> Port Authority of NSW Submission, pg 4.

