PUBLIC REGISTER VERSION

By email

18 March 2020

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

Dear Mr Hatfield

Authorisation Application AA1000473 - Submission in respect of interim authorisation

Port of Newcastle Operations Pty Ltd (**PNO**) appreciates your invitation to express its views regarding the application for urgent interim authorisation by the New South Wales Minerals Council (**NSWMC**) and ten mining companies that export coal through the Port of Newcastle (the **Applicants**) to collectively negotiate with PNO all terms and conditions of access relating to the export of coal from Port of Newcastle, including the Proposed Collective Bargaining Conduct as defined in your letter of 11 March 2020.

PNO will provide a separate and comprehensive submission to the Commission at a later date in respect of the substantive application for authorisation, including in respect of the alleged public benefits and effect on competition, or any other public detriment, from the Proposed Collective Bargaining Conduct.

In this submission, PNO strongly urges the Commission to reject the request of the Applicants for urgent interim authorisation dated 5 March 2020 (**Application**).

In summary, the Application:

- fails to provide any immediately compelling justification for the proposed serious cartel conduct if interim authorisation was granted;
- provides no evidence of any imminent harm to the Applicants which would eventuate if interim authorisation was not granted; and
- gives no explanation for the Applicants' substantial delay in lodging the Application concerning the terms and conditions of access to navigation services.

In circumstances where interim authorisation will not maintain the status quo and will have a lasting and irrevocable impact on competitive dynamics at the Port of Newcastle, PNO considers that the normal timeframe for consideration of the authorisation is appropriate to examine the competitive effects of authorisation on a key export gateway.

Application for interim authorisation does not meet ACCC Guidelines

First, interim authorisation is inappropriate under the ACCC's Authorisation Guidelines where, as here, the proposed conduct has the potential to be significantly anticompetitive, unless the applicant had demonstrated immediately compelling reasons.

Section 1.39 of the submission supporting the Application fails to provide any meaningful justification reasons for interim authorisation that would justify the breach, as the Application specifies[1], of every prohibition in Part IV of the CCA in relation to the terms of access to one of Australia's most significant infrastructure export gateways.

Rather, stripped to its essence, the Application states at [1.11] that the Applicants are seeking to collectively negotiate as an industry, to achieve a long term commercial solution for channel and berthing charges that provides the industry with certainty for long term investment in the Hunter Valley region in circumstances where:

1. the mining industry does not benefit from the ACCC's current appeal of the Tribunal's 2019 determination relating to the ACCC's arbitration determination; and

2. because of the NCC's recommendation to revoke the declaration, the mining industry has no ability to have any access disputes arbitrated by the ACCC to address the imbalance in negotiating power between the mining companies and PNO.

These circumstances do not comprise immediately compelling reasons justifying urgent interim authorisation. Moreover, these circumstances have been foreseeable by the Applicants since 2016 and no explanation has been provided for the delay in lodging the Application.

Despite the assertion that Application is to do with terms of conditions of access generally (para 1.4-1.5 of supporting submission), in fact the material lodged with the ACCC deals only with collective bargaining in relation to charges for navigation services and berthing.

As the Commission is aware, the long running dispute between PNO and Glencore Coal Assets Australia Pty Ltd (**Glencore**), arose at a time when the navigation service at the Port of Newcastle were subject to declaration. Glencore lodged an access dispute with the Commission in November 2016 and following a lengthy arbitration, the Commission published its Determination and statement of reasons on 8 October 2018. PNO and Glencore each sought review of the Commission's Determination by the Tribunal, and on 30 October 2019 the Tribunal handed down its decision. Both Glencore and the Commission have appealed the Tribunal's decision to the Full Court of the Federal Court of Australia. Those appeals are currently before the Court.

By this Application for authorisation, the Applicants are seeking to re-litigate the issues which are the subject of the continuing dispute between PNO and Glencore, and which are currently the subject of two appeals from the Tribunal's decision currently before the Full Court of the Federal Court of Australia. The litigation has been running for more than 4 years.

Insofar as Glencore is concerned, it has availed itself of the safeguards offered by national access regime and is apparently unhappy with the outcome. Despite PNO offering substantially better

[1] Application, para 2(b): the proposed conduct comprises cartel conduct, contracts, arrangements or understandings that restrict dealings or affect competition, concerted practices, secondary boycotts, misuse of market power, exclusive dealing, resale price maintenance and/or a dual listed company arrangement.

price terms that Glencore managed to achieve in 4 years of litigation, Glencore is part of an "urgent" application for collective bargaining.

Insofar as the other Applicants are concerned (aside from Glencore), if they had wished to lodge an access dispute with the ACCC for arbitration in relation to their individual circumstances, they could have done so in accordance with the process set out in Part IIIA of the CCA at any time in the period of over 3 years before the declaration of the relevant service at the Port was revoked on 24 September 2019 (which in itself was a lengthy process).

Although it was open to any of the Applicant coal exporters to notify the ACCC of an access dispute relating to port services pricing during the period of over three years that the relevant service at the Port was declared, no party did so apart from Glencore. There is no justification in these circumstances for those applicants to seek interim authorisation to collectively negotiate the terms and conditions of such access.

Second, interim authorisation will meaningfully and permanently alter the market status quo.

PNO is currently individually negotiating with a number of port users[2] including Applicant coal exporters in relation to the terms of long-term pricing arrangements subject to agreeing the terms of a Port User Pro Forma Long Term Pricing Deed, with a prospective term of 10 years - the same 10 year period for which the Applicants seek authorisation to give effect to their cartel. These negotiations are well progressed, and PNO has republished on 13 March 2020 a revised agreement on its website. The attachments to the Application are already out of date – demonstrating that the process of negotiation with all of the Applicants is actively continuing. Copies of the respective template Producer Deed and Vessel Agent Deeds which have been sent to every producer and every vessel agent on 13 March 2020 are found at:

https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020_.pdf.

PNO has included a clause in its template Producer Deed published on 13 March 2020 and sent to every producer on that date which unambiguously commits PNO not to discriminate adversely against any producer on price:

Non-discriminatory pricing	PON represents that: (a) the terms of Item 4 and Item 7 do not adversely discriminate against the Producer by comparison with Producer Specific Charges applicable to like circumstances to other Producers who have entered into materially similar deeds including as to the period of the Initial Term; (b) PON will not: (i) enter into bilateral arrangements with any other coal producer concerning Producer Specific Charges to apply over the Initial Term, or (ii) give effect to any variations made to such charges under Item 7, which are materially dissimilar to the relevant provisions of, or different to any such variations under, this deed.

[2] See Confidential Annexure A

Interim authorisation would permanently, and potentially for a substantial period (of 10 years), alter competitive dynamics at the Port by changing the relevant market, and enabling the Applicants to collectively negotiate for a period of up to 6 months thereby comprehensively establishing the collective position of all of the applicants (and probably in effect all other producers exporting coal through the port) with respect to long-term pricing arrangements, prior to the Commission's consideration of the substantive authorisation application. In such circumstances, the grant of interim authorisation risks inhibiting the market from returning to its pre-interim state if final authorisation is later denied because any competitive tension would have been permanently removed by such a period of collective bargaining.

Put shortly:- interim authorisation of the cartel conduct permanently removes competitive tension for the next 10 years without the opportunity for the ACCC properly to determine if that anti-competitive detriment is outweighed by public benefit arising from that conduct.

Third, the Applicants have failed to demonstrate any urgency warranting the grant of interim authorisation.

To date the Applicants have not agreed to the terms offered by PNO as part of the ongoing pricing negotiations mentioned above, but there is no impediment to these commercial bilateral discussions continuing[3]. Furthermore, there is no explanation of why this Application, if thought to be necessary, was not brought some time ago. The Applicants waited more than 5 months following the revocation of the declaration of services at the Port to lodge their Application for authorisation. The delay in seeking authorisation has not been explained nor why it is now considered to be so urgent rather than after the normal period of consultation and assessment of this serious matter.

Fourth, the Applicants make no attempt to demonstrate imminent harm justifying urgent interim authorisation, let alone articulate that harm in any meaningful way. The offer of the long term deed by PNO to port users is voluntary and the price established by PON to apply in 2020 under the PAMA Act is the price determined by the ACT following its detailed and comprehensive review of the access dispute with Glencore as the economically justified price for the relevant services provided at the Port.

PNO notes that even if interim authorisation is granted, it will not be of any practical effect given that PNO will not be engaging in collective negotiations with the Applicants, but rather will continue to offer to undertake bilateral negotiations[4].

Finally, PNO does not believe that the interim authorisation process permits the Commission to properly form a view, even on an interim basis, as to whether the serious potential effects of the proposed cartel conduct may be justified on countervailing public interest grounds concerning the terms of access by access seekers at the Port. The ACCC's arbitration of those terms took 2 years and the ACT's review of that decision a further 2 years and was attended by extensive lay and expert evidence. 28 days to consider this application is insufficient to properly assess the anti-competitive detriment and alleged public benefits claimed by the applicants and should be rejected.

[3] See Confidential Annexure A.

[4] See Confidential Annexure A

No less than the detailed assessment which can be undertaken in the normal 6 month statutory period for assessment is appropriate in this matter as it requires an appropriately detailed examination of a proposal to engage in numerous types of serious anticompetitive conduct by some of the world's largest coal traders and miners at a key Australian export market gateway.

PNO submits that interim authorisation should be refused by the Commission.

Yours sincerely,

Craig Carmody

Chief Executive Officer

Port of Newcastle