By email

PUBLIC VERSION

10 July 2020

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

Dear Mr Hatfield

AA1000473 – NSW Minerals Council – submission by Port of Newcastle Operations Pty Limited on proposed draft determination

1. Background

1.1 On 6 March 2020, the NSW Minerals Council (**NSWMC**) lodged application for authorisation AA1000473 (**Application**) with the Australian Competition and Consumer Commission (**ACCC**) on behalf of itself and certain coal producers that export coal through the Port of Newcastle (**Applicants**).

1.2 On 2 April 2020, the ACCC granted interim authorisation under s 91(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to enable the Applicants to commence collective discussions amongst themselves and negotiations with Port of Newcastle Operations Pty Limited (**PNO**) in relation to the terms and conditions of access, including price, to the Port of Newcastle (**Port**).

1.3 On 19 June 2020, the ACCC issued a draft determination proposing to grant authorisation for the Proposed Collective Bargaining Conduct (defined below) for ten years (**Draft Determination**).

1.4 The ACCC proposes to grant authorisation to the Applicants to:

(a) collectively discuss and negotiate the terms and conditions of access, including price to the Port for the export of coal (and any other minerals) through the Port;

(b) discuss amongst themselves matters relating to the above discussion and negotiations; and

(c) enter into and give effect to contracts, arrangements or understandings with PNO containing common terms which relate to access to the Port and the export of minerals through the Port,

(**Proposed Collective Bargaining Conduct**).

1.5 The ACCC has invited submissions from interested parties on the Draft Determination.

2. Summary

2.1 PNO has serious concerns regarding the Proposed Collective Bargaining Conduct and the terms of the Draft Determination proposed to be granted to the Applicants by the ACCC. PNO refers to and relies on its submissions of 18 March 2020 (**March Submission**) and 7 April 2020 (**April Submission**) in respect of the Application.

2.2 As stated in [4.3] of the Draft Determination, the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would result or be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would result or be likely to result from the conduct.[1]

2.3 PNO submits that this test is not satisfied here for the reasons set out in this submission.

2.4 In summary:

(a) The Proposed Collective Bargaining Conduct will result in public detriments and competitive harm:

(i) the fact that participation in collective bargaining will be voluntary, both for the Applicants and PNO, does not mean that public detriments will not arise. The Proposed Collective Bargaining Conduct has the potential to detrimentally and substantially alter competitive dynamics in the market for access to port services at the Port. This concern arises from the pressure that will be placed on smaller producers to remain within the negotiating bloc in practice. The Proposed Collective Bargaining Conduct may well make it less likely for agreement to be reached; and

(ii) although authorisation would not extend to the sharing of certain sensitive information, it increases the potential for collective activity beyond the authorised conduct. It will be extremely difficult to detect and monitor any improper information exchange through the Working Group discussions.

(b) There are no discernible <u>public</u> benefits arising from the Proposed Collective Bargaining Conduct:

(i) no increased certainty and efficient investment is likely to arise from the Proposed Collective Bargaining Conduct. PNO has been undertaking active negotiations over several months and is well aware of the parties' positions. Simply putting these positions collectively is unlikely to be of benefit. It is difficult to see how the Proposed Collective Bargaining Conduct will reduce asymmetry of information issues;

(ii) the competitiveness of the Australian export coal industry is unlikely to be enhanced by the Proposed Collective Bargaining Conduct. The navigation service charge (**NSC**) (at the level already set by PNO and likely to be the subject of negotiation by the Proposed Collective Bargaining Conduct) will not impact on the competitiveness of Hunter Valley coal in the international market; and

(iii) there are unlikely to be improved efficiencies through transaction cost savings. Amongst other things, collective negotiations will make reaching any negotiated outcome with PNO significantly less likely.

2.5 The ACCC has noted at [1.8] of the Draft Determination that the Applicants have submitted that the need for this application for authorisation arises because PNO:

> *…is an infrastructure monopoly service provider that enjoys the commercial benefits of that position in circumstances where the Port was privatised at the end of a multi user export supply chain, and in the absence of any regulatory constraints…it is noted that after revocation of the declaration [at the Port of Newcastle], PNO increased its prices*

[1] s 90(7) and 90(8) of the CCA

significantly once again and in particular, based on the inclusion of user contributions that PNO did not…expend.

2.6 In this context, PNO considers it is important to recognise that:

(a) as found by the Australian Competition Tribunal (**Tribunal**),[2] there was very significant under-recovery of costs at the Port of Newcastle for many years prior to privatisation – exceeding $8b since 1990 alone;

(b) PNO implemented a pricing review which took effect on 1 January 2015 - the first in 20 years - which took into account for the first time an assessment of the cost of service. At that time, the previous two tiered NSC construct was removed and replaced with a flat rate / GT for coal vessels, and the maximum NSC for large coal vessels was removed.

		Pre price increase 2014	Post price increase 2015
NSC First 50,000	Per GT	$0.4292	$0.6900
NSC Above 50,000	Per GT	$0.9656	$0.6900
Max NSC Charge	Cap	$45,633.68	None

The 2015 increase to $0.69 per GT was still well below the actual cost of service. While the 2015 increase has been cited as a 40 – 60% increase based on a whole of vessel calculation, the navigation service charge (much less the portion of increase) per GT represents much less than 1% of the delivered price per tonne of coal, which sells for $100 per tonne or more;

(c) the service at the Port for which the NSC is payable was previously declared and subject to the regulatory constraints under Part IIIA until late 2019. At that time, the National Competition Council (**NCC**) recommended that the declaration be revoked on the basis that the declaration criteria were no longer fulfilled, and declaration was ultimately revoked;

(d) whilst the service at the Port for which the NSC is payable was under declaration, the Tribunal found a NSC of $1.04/GT in 2020 - around 1% of the delivered coal price per tonne - to be economically justified. PNO offers this price for the navigation service, which has been published transparently on the PNO website. The offer of the long term deed by PNO to port users is entirely voluntary and is at a substantial discount to this price; and

(e) the question of user contributions is currently before the Full Federal Court (in relation to Glencore), and was a matter considered extensively by the Tribunal. The Tribunal ultimately concluded that no deduction should be made to the initial capital base for user contributions. Importantly, the Tribunal found that the evidence indicated that there had been very significant cost under-recovery at the Port of Newcastle as mentioned above, and the basis on which user funded arrangements had been made and the circumstances as they occurred (including whether there were costs to the State) were not in evidence. It is not appropriate that this question should be re-opened by way of a collective negotiation.

[2] Application by Port of Newcastle Operations Pty Ltd [2019] ACompT 1 at [330]-[336]

3. Confidentiality

3.1 This submission contains information that is confidential and commercially sensitive to PNO. Information that is confidential to PNO is shaded **blue**.

3.2 PNO asks that the ACCC receive this information on a confidential basis in accordance with the ACCC's statutory obligations on the basis set out below:

(a) there is no restriction on the internal use, including future use, that the ACCC may make of the information consistent with its statutory functions;

(b) the confidential information may be disclosed to the ACCC's external advisors and consultants on condition that each such advisor or consultant is informed of the obligation to treat the information as confidential; and

(c) the ACCC may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with section 155AAA of the CCA.

3.3 PNO has separately provided a public version of this submission with confidential information redacted for publication on the public register, in accordance with ACCC guidance.

4. Proposed Collective Bargaining Conduct will result in public detriments and competitive harm

4.1 PNO does not agree with the ACCC's conclusion that the Proposed Collective Bargaining Conduct is likely to result in minimal, if any, public detriments from any reduction in competition for the reasons set out below.

The fact that participation in collective bargaining will be voluntary, both for the Applicants and PNO does not mean that public detriments will not arise

4.2 In circumstances where the ACCC proposed to authorise the Proposed Collective Bargaining Conduct for a period of ten years, PNO re-states its serious concern that the Proposed Collective Bargaining Conduct has the potential to detrimentally and substantially alter competitive dynamics in the market for access to port services at the Port. This concern arises from the pressure that will be placed on smaller producers to remain within the negotiating bloc in practice. The interests of the all of the coal producer members of the NSWMC are not aligned and the collective approach will not allow those differing interests to be ventilated.

4.3 There is clear public detriment arising from the reduction in competitive tension through homogeneity of port user bargaining positons. As PNO has stressed, port users have a spectrum of unique and varied incentives and interests in the transaction, and for some port users, non-price terms of the Deed are as important as price aspects. The ACCC rejected these concerns on the basis that, firstly, "*there are common issues at the Port which are appropriately dealt with on an industry-wide basis",* and secondly, that producers *"will still be free to negotiate…through bilateral discussions with PNO if they believe it is in their interests to do so".*

4.4 However, in PNO's view, notwithstanding that participation in the collective negotiation is voluntary and that smaller producers may well be technically free to negotiate through bilateral discussions with PNO:

(a) in practical terms, smaller producers will be placed under pressure not to break from the negotiating bloc, and are likely to find it difficult to conduct such bilateral discussions with PNO in these circumstances. This will mean that discrete issues, unique to individual Applicants and PNO, will be unable to be appropriately dealt with on a commercial, bilateral basis. The interests of smaller producers and other port users are marginalised;

(b) large producers are likely to use their dominant position to hold out reaching any compromise until their interests were met. Even if a reasonable compromise could be reached which satisfied the interests of PNO, smaller producers and other port users, it is extremely unlikely that this compromise would proceed because negotiation would proceed on the basis of the bloc's single, collective interest (which would inevitably favour the interests of the largest exporters);

(c) [Redacted].

Although authorisation would not extend to the sharing of certain sensitive information, it increases the potential for collective activity beyond the authorised conduct

4.5 The ACCC has stated at [4.55] of the Draft Determination that *"… public detriment may arise as a result of collective bargaining arrangements in circumstances where competition is reduced between members of the group as a result of acting collectively … and/or by increasing the potential for collective activity beyond the collective bargaining arrangements which are sought to be authorised"* (emphasis added).

4.6 As the ACCC has further noted at [4.69] of the Draft Determination, all competing coal companies will potentially be engaged in the Proposed Collective Bargaining Conduct, thereby increasing the risk of collusion. Although the Applicants have not sought authorisation to share customer information, marketing strategies or volume/capacity projections, and such conduct would not be covered under the authorisation, the Applicants have formed a Port of Newcastle Working Group made up of representatives from the Applicant mining companies and the NSW Minerals Council, and which will convene on an "*ongoing basis*".

4.7 Although the sharing of certain sensitive information is not covered by the scope of the authorisation, the point is that the authorisation is likely to facilitate such information sharing and anticompetitive conduct. It would be extremely difficult to detect and monitor any improper information exchange through the Working Group discussions.

4.8 As the ACCC is aware, these concerns were shared by the Port Authority of New South Wales (**Port Authority**). In its submission to the ACCC dated 16 April 2020, the Port Authority noted 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.*

5. No discernible public benefits arising from the Proposed Collective Bargaining Conduct

5.1 For the reasons set out below, PNO does not agree with the ACCC's conclusions set out in the Draft Determination that the Proposed Collective Bargaining Conduct will result in public benefits. Rather, PNO submits that there are no discernible public benefits which would arise from granting authorisation.

No increased certainty and efficient investment is likely to arise from the Proposed Collective Bargaining Conduct

5.2 Over the past several months PNO has been actively negotiating with a number of port users including the Applicants 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 and the parties' respective positions have been clearly articulated. It is difficult to see how simply putting these positions collectively will achieve any 'increased certainty and efficient investment'.

5.3 As noted in PNO's April Submission, PNO has already offered port users discounted long-term pricing arrangements, subject to agreeing the terms of a Port User Pro Forma Long Term Pricing Deed (**Deed**). That is, in the absence of any authorisation, PNO is already voluntarily

opting into contractual regulation of its prices under the Deed. The relevant provisions of the Deed state that the charge can only be varied under the Deed where the increased charge is consistent with pricing principles drawn from the Competition Principles Agreement. The current offers have been published transparently on the PNO website, and offer long-term certainty if port users wish to take up the voluntary offer.

5.4 Even if the Applicants do not wish to enter into the Deed, PNO has publicly committed to ensuring transparent and open access to the land side and port side services and facilities provided by it at the Port, through its open access arrangements for users published on its website. The terms and conditions of access are openly available, as are the fees and charges, as set out in the Schedule of Service Charges, which will apply to a vessel's visit to the Port of Newcastle.

5.5 The ACCC states at [4.36] of the Draft Determination that it considers that the Proposed Collective Bargaining Conduct is likely to result in public benefit through addressing, in part, an asymmetry of information between each of the Applicants and PNO. However, it is doubtful this reduction in asymmetry of information will arise. For example, at [4.31] of the Draft Determination, the ACCC references the Applicant's submission that PNO holds all of the data on past expenditures at the Port, and that individual coal producers seeking to have bilateral negotiations with PNO in relation to its long term template Deed would not have access to that data. Even on the assumption that this assertion is correct, it is difficult to understand how the Proposed Collective Bargaining Conduct would reduce this asymmetry of information.

5.6 At [4.32] of the Draft Determination, the ACCC references the Applicant's submission that although PNO has committed under its template Deed to provide individual Port users with a five year forecast of its projected capital expenditure, this is 'simply a forecast and users have no input or ability to materially influence that forecast'. It is not clear what further commitment the Applicant's expect in this regard. To the extent there is future capital expenditure at the Port by PNO, PNO is prepared to consult in good faith with port users prior to any future development and receive their comments in relation to such investment (as reflected in Clause 7(c) of the annexure to the template Producer Deed). However, any final decision in relation to future development of the Port must, of course, remain at PNO's discretion. PNO further notes that under Clause 10 of the annexure to the template Producer Deed, PNO and the Producer will meet at least twice in each Contract Year (or such other frequency as is agreed) to consult on a variety of matters including PNO's capital expenditure, any proposed variation to PNO's fees and charges, and PNO's costs of operations.

5.7 At [4.35] of the Draft Determination, the ACCC refers to Yancoal's submission that individual coal producers are reluctant to reach an arrangement with PNO that might be less favourable than an outcome reached by another producer. As PNO noted in its April Submission, PNO has already committed to non-discriminatory pricing in the deed offered to all port users, so that PNO will not enter into bilateral agreements or give effect to variations to charges on terms which are materially dissimilar to the relevant provisions of the deeds which have been entered into with other like port users. Given this non-discrimination commitment, it is difficult to understand Yancoal's concern, or to see any necessity for the Proposed Collective Bargaining Conduct.

5.8 [Redacted].

5.9 [Redacted].

5.10 [Redacted].

5.11 [Redacted].

5.12 [Redacted].

5.13 [Redacted].

The competitiveness of the Australian export coal industry is unlikely to be enhanced by the Proposed Collective Bargaining Conduct

5.14 PNO notes that under section 90(9A) of the CCA, the ACCC must take into account matters that relate to the international competitiveness of any Australian industry. However, PNO submits that the Proposed Collective Bargaining Conduct is unlikely to increase the competitiveness of the Australian export coal industry.

5.15 Contrary to Whitehaven Coal's oral submission to the ACCC, as referenced at [4.40] of the Draft Determination, the NSC (at the level already set by PNO and likely to be the subject of negotiation by the Proposed Collective Bargaining Conduct) will not impact on the competitiveness of Hunter Valley coal in the international market. As noted in PNO's April Submission:

(a) the NCC stated at [7.211] of its recommendation on the 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', dated 22 July 2019 (**Revocation Recommendation**), that coal from the Hunter Valley is predominantly exported, with Glencore estimating in 2015 that 70% of exports go to Japan, Korea and Taiwan, with a further 20% exported to China. Australian coal producers participate in the international trade and compete against coal produced and sold through other ports in Australia and overseas.

(b) significantly, the NCC stated *"it is also highly unlikely that changes in the price of the Service within the range considered in paragraph 7.160 above [i.e. $0.41 per GT to $1.36 per GT] in any given period are likely to alter export prices for coal*". The starting price for 2020 under the Deed is well within this range, and is at a substantial discount to the price determined to be economically justified by the Tribunal of $1.04/GT in 2020 (which is also well within the range considered by the NCC).

There are unlikely to be improved efficiencies through transaction cost savings

5.16 The ACCC states at [4.51] of the Draft Determination that compared to the 'future without the conduct', where members of the bargaining group would negotiate individually with PNO, the ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in transaction cost savings (to all the parties to the collective negotiations).

5.17 In PNO's view, such transaction cost savings are unlikely to materialise. From a practical perspective, as PNO has stated explicitly to the Applicants, any authorisation will have no 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.

5.18 Even on the assumption that PNO were prepared to engage in collective negotiations, PNO considers that transaction cost savings will not arise given that collective negotiations will make reaching any negotiated outcome significantly less likely. As PNO stated in its April Submission, even if a reasonable compromise could be reached which satisfied the interests of PNO, smaller exporters and other port users, it is extremely unlikely that this compromise would proceed because negotiation would proceed on the basis of the bloc's single, collective interest. Notwithstanding that participation in the collective negotiation is voluntary, PNO expects that large exporters would use their dominant position to hold out reaching any compromise until their interests were met. This is inherently contrary to the structure of negotiation that is desirable for infrastructure services and is likely to increases costs for both PNO and Applicants, rather than result in transaction cost savings.

6. Response to Applicants' submissions

6.1 PNO notes that a number of the Applicants have provided submissions in support of the Application. PNO responds to the overall themes in these Applicant submissions below.

Nothing in this submission should be taken as acceptance by PNO of any assertion made by any Applicant in its submission to the ACCC.

There is no "increased certainty" in Port charges, as asserted in submissions

6.2 Yancoal asserts that coal producers are exposed to the *"uncertainty of significant future increases in charges due to PNO's unconstrained charging powers under the Ports and Maritime Administration Act 1995 (NSW)*". This assertion is incorrect.

6.3 PNO's statutory power to levy certain fees and charges under the PAMA Act is not "unconstrained". For example, PNO can only fix NSC in accordance with its operating licence, and can only fix site occupation charges by reference to the amount of time during which the site is reserved or occupied. Part 6 of the PAMA Act contains a price monitoring mechanism for charges levied under the PAMA Act - including those levied by PNO. For example, PNO is required to give notice of any proposed changes to Port charges to the responsible Minister and on PNO's website. PNO is also required to provide an annual report to the responsible Minister on its charges, and is subject to directions from the Minister to produce specified information in respect of PNO's charges.[3]

6.4 Yancoal also asserts that the purported uncertainty in Port charges *"creates traction for potential regulatory change to resolve that position, which in turn creates uncertainty for PNO and its future investment decisions"*. Yancoal offers no explanation as to what regulatory change will likely occur if the status quo is maintained. Even if this submission were to be accepted, arresting *"traction for potential regulatory change"* is neither the proper function of authorisation, nor a public benefit for the purpose of the statutory test in s 90.

6.5 The NSWMC submits that:[4]

> *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*.

First, neither regulatory oversight nor arbitration is required to enforce the terms of the Deed. The Deed will be subject to the normal rules of contract law like any other agreement between contracting parties. Moreover, in the event of a Permitted Price Dispute (as defined in the Deed) arising, the parties are bound to conduct mediation and, failing the resolution within 28 days, arbitration in accordance with the Australian Centre for International Commercial Arbitration's Arbitration Rules. Relevantly, the mediator must take into account, and the arbitrator must apply, the pricing principles set out in the Deed, which are substantially the same at those set out in the Competition Principles Agreement.

Secondly, PNO has made it clear to the Applicants "how the Producer Deed will operate in practice" throughout its engagement with coal producers. As noted in the April Submission, the drafting of the Deed is clear. The relevant provisions state that the charge can only be varied under the Deed where the increased charge is consistent with the Pricing Principles. This gives the Producer rights under this Deed it would not otherwise have because this places PNO under the discipline of having to ensure that it is in a position to justify by reference to the Pricing Principles any variation it proposes to implement. These Pricing Principles are drawn from the Competition Principles Agreement, which would not otherwise apply to PNO given revocation of declaration of the shipping channel service at the Port of Newcastle in September 2019.

6.6 Port Waratah also observes that:[5]

---

[3] PAMA Act ss 80-82.
[4] NSWMC Submission at page 4.
[5] Port Waratah Coal Services, *New South Wales Minerals Council - Application for authorisation (AA1000473)*, 3 April 2020 (**Port Waratah Submission**) at page 2.

> *There have been significant price increases since the privatisation of the Port, and the industry is seeking greater transparency in how cost and charges are allocated, and the benefits that these price increases are delivering.*

6.7 The increases to Port charges levied by PNO since the privatisation of the Port need to be considered in the context of the significant under-recovery by the State in the period prior to privatisation. As the unchallenged expert evidence established before the Australian Competition Tribunal:[6]

> *In the period after the 1990 restructure until 2014, NSC at Newcastle were largely unchanged with charges in 2014 only 7 percent higher than in 1990 in nominal terms. In the same period, the CPI rose by over 80 percent, so prices fell substantially in real terms …*
>
> *…*
>
> *Prices remained unchanged from 1990 until 1996. In June 1996 the Premier announced a 10 percent reduction over two years commencing 1 July 1996. This was to assist trade and improve competitiveness to support the coal industry and employment in the Hunter. There was no commercial or financial basis for this reduction.*
>
> *After that date, charges remained essentially unchanged until 2012 when a series of small CPI-type annual increases of 3 percent to 4 percent were applied.*
>
> *…*
>
> *We conclude that prior to a price restructure in 1990, Port charges were little more than a tax on different commodities with no attempt to reflect the costs of the services provided and that financial accounts were non-commercial and asset values understated or simply not recorded.*

6.8 Further, contrary to the assertion that 'users have no pricing certainty', PNO has provided Producers with clear mechanisms to understand how pricing increases will occur over the course of the term, and has applied a contractual form of the Competition Principles Agreement pricing principles, under which PNO will have to justify if it wishes to increase these charges above the greater of 4% or CPI, in any year of the term. PNO is also contractually bound to provide Producers with a forward looking forecast of its proposed capital expenditure. These provisions provide very significant transparency and accountability benefits to Producers.

Much of the submissions include illegitimate attempts to re-litigate PNO and Glencore's ongoing Part IIIA dispute

6.9 Many of the contentions put forward by the Applicants in their submissions and in the Application are no more than an illegitimate attempt to re-agitate issues that have already been extensively considered over four years of litigation and dispute resolution (including a current appeal before the Full Court of the Federal Court of Australia).

6.10 Both Port Waratah and the NSWMC make numerous references in their respective submissions to the user contributions issue. For example:[7]

> *Port Waratah shares the Applicants' concern with PNO's proposed regulated asset base (RAB) and, in particular, the inclusion of expenditure totalling in excess of $500 million related to dredging of the channels. Port Waratah funded the construction of the existing deep-water channel, swing basin, berth pockets and seawalls adjacent to the Kooragang Coal Terminal. As a result, our customers have*

[6] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [332]; see also at [333]-[334], [365].

[7] Port Waratah Submission at page 2

> *already paid for these construction costs via historical terminal access charges. Customers should not be required to pay twice through PNO's access charge.*

6.11 The user contributions issue was an important area of the dispute before the Tribunal and arguments from both parties, as well as the approach taken by the ACCC, were thoroughly ventilated and examined in that forum. The Tribunal concluded after a detailed consideration of the arguments that no deduction should be made to the RAB for user contributions.

6.12 As noted in the April Submission, if Port Waratah (or any other Applicant) 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 three years before the declaration of the relevant service at the Port was revoked. 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 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 authorisation to collectively negotiate the terms and conditions of such access.

6.13 The NSWMC contends that the ACCC's arbitration of PNO and Glencore's access dispute "*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*".[8] The NSWMC's submission continues:[9]

> *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.*

6.14 These issues were ventilated at length before the Tribunal in its re-arbitration, which determined $1.04/GT as an economically justified and reasonable return for PNO. The Tribunal also settled the appropriate treatment of user funded expenditure - that is, that no adjustment should be made to the RAB for so-called user contributions. It is inappropriate for the Applicants to seek to re-open these issues by way of collective negotiation.

7. Conclusion

7.1 For the reasons set out above, PNO submits that authorisation should be refused.

Yours sincerely

Simon Byrnes
Chief Commercial Officer

[8] NSW Minerals Council, *Authorisation Application AA10004723 - response to PNO submission*, 25 March 2020 (**NSWMC Submission**) at page 2.
[9] NSWMC Submission at page 2.