By email

7 April 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 Limited in relation to the application for authorisation

1. In this letter Port of Newcastle Operations Pty Ltd (**PNO**) expresses its views regarding the application for authorisation (**Application**) by the New South Wales Minerals Council (**NSWMC**) and ten mining companies that export coal through the Port of Newcastle (collectively, 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.

2. The Application suffers from a fundamental defect: it fails to engage with the statutory criteria for the granting of authorisation:

   (a) it does not demonstrate that the conduct would not be likely to have the effect of substantially lessening competition; and

   (b) it does identify *any* public benefit, much less one which would outweigh the detriment likely to result from the grant of authorisation.

3. Once the extraneous background / explanatory material is removed, the closest the Application comes to articulating its purpose appears to be at [1.11] which states 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".

4. Even if it is assumed that the Proposed Collective Bargaining Conduct were successful in achieving the objective set out in [1.11] (notwithstanding the comments at paragraph 5 below), the only potential benefits that could arise are **private benefits** to the Applicants, or **benefits flowing offshore** (given the fact that coal from the Port of Newcastle is exported to overseas markets and it is customers in North Asia that ultimately pay the charges in question[1]).

[1] See paras 47-52 below and NCC: 'Revocation of the declaration of the shipping channel service at the Port of Newcastle', 22 July 2019, especially paras 7.211-7.212.

5. If the statement at [1.11] of the Application is the objective of the Proposed Collective Bargaining Conduct, the Application fails to articulate how this objective will be achieved if authorisation is granted, or that there is any necessity for the Proposed Collective Bargaining Conduct, in circumstances where:

   (a) PNO is already offering port users access to a long-term, 10 year contract at discounted pricing which will provide certainty to the industry for long-term investment if entered into. The only objective of the Proposed Collective Bargaining Conduct appears to be a desire to reduce the starting price offered by PNO under the deed, and the indexation of that starting price. The Applicants do not need to act collectively in order to raise those matters with PNO and have done so already. Such arguments can be made on a bilateral basis; there is no improvement in the clarity of the argument for a lower price because 10 voices say it collectively rather than in parallel;

   (b) 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 see any necessity for the Proposed Collective Bargaining Conduct; and

   (c) as noted at [5.2] of the Application, the Proposed Collective Bargaining Conduct for which authorisation is sought is voluntary in nature and PNO is not compelled to engage in collective negotiations as part of the proposed arrangement. PNO has stated explicitly to the Applicants that 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.

6. PNO's submission is divided into two sections. Part A articulates the anticompetitive harm which will flow from a grant of authorisation, and the lack of any tangible public benefit for any market in Australia associated with the Proposed Collective Bargaining Conduct. Part B in turn sets out PNO's response to additional contentions made by the Applicants in their submission in support of authorisation.

A. THE TEST FOR AUTHORISATION IS NOT SATISFIED

7. The Proposed Collective Bargaining Conduct does not satisfy the test for authorisation.

8. There are no discernible public benefits likely to flow from the Proposed Collective Bargaining Conduct. It is not possible to understand from the Application what the benefit to the community generally would be if authorisation were granted. Rather, even if it were assumed that the Proposed Collective Bargaining Conduct is successful in achieving the objective set out in [1.11] (notwithstanding the comments at paragraph 5 above), the only potential benefits that arise are **private benefits** to the Applicants, or **benefits flowing offshore** (given the fact that coal from the Port of Newcastle is exported to overseas markets).

No discernible public benefits

9. PNO submits that there are no discernible public benefits which would arise from granting authorisation.

10. The Application states at [1.35.1] that "the key public benefit is that given that the coal exporters account for the majority of exports from the Port, an agreement with the coal exporters creates certainty for investment in the Hunter Valley, and that investment would facilitate employment and growth in the Hunter Valley region".

11. However, authorisation is clearly not necessary for certainty for investment in the Hunter Valley. In the absence of authorisation, PNO has offered port users the opportunity for discounted long-

term pricing arrangements which start at substantially similar level to the 2019 port charges, subject to agreeing the terms of a Port User Pro Forma Long Term Pricing Deed. The offer of the long term deed by PNO to port users is entirely voluntary and is at a substantial discount to the price determined to be economically justified by the Australian Competition Tribunal of $1.04/GT in 2020.

12. PNO has been open about its plans with port users, and has offered the security of long term pricing. This is apparent by the current offers which have been published transparently on the PNO website, and which offer long term certainty if port users wish to take up the voluntary offer.

13. Under the current Template Producer Deed (**Deed**), a variation to the charges covered by the Deed can only be made once a year. A variation can only be made over and above the 4%/CPI increase where it is Material (as that term is defined in the Deed), which is designed to avoid trivial increases. Moreover, in the event of a Permitted Price Dispute (as that term is 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 (**ACICA**) 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. These arrangements cannot be said to give rise to a degree of uncertainty that is materially different from that applying to services provided by any significant infrastructure asset anywhere in Australia.

14. The Application at [1.35.3] erroneously claims as a public benefit that "industry wide issues such as capital expenditure in the Port are matters that are … appropriate to be discussed and negotiated at an industry level".

15. On the contrary, it is important to note that in the absence of any authorisation, PNO is already voluntarily opting into contractual regulation of its prices under the Deed. 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. Those pricing principles would not otherwise apply to PNO given revocation of declaration of the shipping channel service at the Port of Newcastle in September 2019.

16. It is also notable that the contractual negotiation process between PNO and port users is already occurring, and that PNO has been open to reasonable commercial compromise. This is demonstrated by the fact that PNO has updated the Template Producer Deed and Vessel Agent Deeds, available on its website[2] following extensive consultation and constructive feedback received by PNO on earlier drafts from a range of interested parties.

17. PNO notes that a clause in its template Producer Deed published on 13 March 2020 unambiguously commits PNO not to discriminate adversely against any producer on price. Authorisation is not required in order to protect the interests of smaller exporters, contrary to the claimed public benefit at [1.35.2] that "smaller miners… would also have the benefit of collective negotiations and the opportunity for a long term agreement that they may otherwise not be able to negotiate with PNO". There is already a clear non-discrimination regime concerning the subject matter of the Deed.

18. PNO's experience is that port users have widely varied incentives and commercial interests in negotiating the terms of access. It is misplaced to suggest that enabling a large group of port users to collectively negotiate with PNO would deliver "improved commercial outcomes"; in

[2] 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.

reality, it is only likely to deliver commercial outcomes which favour the private interests of larger exporters.

19. 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. The Navigation Service Charge in 2020 as a Standard price for coal vessel (over 600GT), where a bilateral long term price deed does not apply to the vessel, is $1.0424 per GT. This price was determined to be economically justified by the Australian Competition Tribunal in its determination relating to the dispute between PNO and Glencore Coal Assets Australia Pty Ltd (**Glencore**) on 30 October 2019.

20. Contrary to the proposition in the Application at [1.35.4] that authorisation would lead to a "long-term agreement… as to future investment as well as the basis on which any user funded expenditure is included in PNO's cost base", we note that the 'user contributions' issue has already been examined in-depth by the Australian Competition Tribunal, with the Tribunal ultimately concluding that no deduction should be made to the initial capital base for user contributions. It is an illegitimate use of the processes set out in the CCA, to seek to re-open the user contributions issue by way of forming a cartel to conduct a collective negotiation where there is no public interest arising in Australia.

Public detriment and competitive harm

Public detriment arising from the reduction in competitive tension through homogeneity of port user bargaining positons

21. In circumstances where the Applicants (and possibly other port users in the open class of parties who would be able to collectively negotiate under the terms of the authorisation sought) have sought this authorisation for a period of 10 years, the Proposed Collective Bargaining Conduct has the potential to detrimentally alter competitive dynamics in the market for access to port services at the Port of Newcastle.

22. Contrary to the Applicants' contention (at [1.36] of the submission in support of authorisation) that the Proposed Collective Bargaining Conduct "is likely to result in minimal, if any public detriment ", the Proposed Collective Bargaining Conduct is significantly anticompetitive. The NSWMC and the other ten mining companies listed in Schedule One of the Application are seeking to negotiate collectively with PNO for access to the channels and berthing facilities required for the export of coal from the Port. Absent any authorisation, such collaboration would otherwise constitute cartel conduct, amongst other potential serious breaches of the CCA, in relation to the terms of access to one of Australia's most significant infrastructure export gateways.

23. There is clear public detriment arising from the reduction in competitive tension through homogeneity of port user bargaining positons. PNO's experience in the negotiations it has held to date with a range of port users, including Applicant exporters, is that 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 equally as important as price aspects.

24. If authorisation is granted, there will be a tendency for Applicants (and any other members of the open class the authorisation would cover) to negotiate and acquire access to port services collectively. That is to say, negotiations would have to proceed on the basis that all members have the same interest. This is directly contradictory to PNO's experience in negotiations to date.

25. The detriment of the Proposed Collective Bargaining Conduct is that it removes port users' unique interests and creates a single, homogenous interest – that of the negotiating bloc as a

whole. In order to arrive at such a collective interest during negotiations with PNO, the collective negotiation participants would have to arrive at a "lowest common denominator" position; in other words, a position in terms of both price and non-price terms that was acceptable to all participating port users. In practice, it is PNO's strong belief that this position would inevitably favour the interests of the largest exporters, or at the very least a position closely aligned to those exporters' interests. In this scenario, the interests of smaller exporters and other port users are marginalised.

26. 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.

Scope will go beyond the Applicants; Authorisation is likely to freeze all other negotiations between other port users and PNO

27. It is important to note that in practice, the scope of any authorisation will inevitably go beyond the Applicants themselves. The Application states at 3.5 that "the class of parties able to collectively negotiate under the proposed authorisation is not closed. Pursuant to section 88(1) of the CCA, the authorisation is sought on terms that would allow other access seekers / Port users to have the benefit of the authorisation if it chooses to participate in the collective negotiation".

28. Even absent a party formally seeking to participate in the collective negotiation, authorisation is likely to freeze all other negotiations between other port users and PNO. If authorisation is granted, other port users would be unwilling to enter into long term contractual agreements before seeing if the Applicants are able to collectively negotiate an agreement with PNO.

Risk of improper information exchange

29. The Application asserts at [6.2] and [6.3] that information sharing will be restricted to the Proposed Conduct. The Application contends that the Proposed Conduct does not involve the sharing of competitively sensitive information and states that "the companies listed in Schedule One are generally large and sophisticated mining companies which have compliance processes in place to ensure that no information is exchanged that would be problematic under the CCA". As the Commission is well aware, the fact that companies may be 'large and sophisticated' does not diminish the risk of improper information exchange, with serious implications for competition.

30. An authorisation would provide the NSWMC and at least the ten mining companies listed in Schedule One (with potentially others joining), with the ability to collectively discuss and negotiate the terms of access, including price to the Port for the export of coal through the Port. It would be extremely difficult to detect and monitor any improper information exchange through such discussions.

B. CONTENTIONS MADE BY THE APPLICANTS

Factual allegations

An illegitimate rehash of issues the subject of over 4 years of litigation and dispute resolution

31. Many of the contentions put forward throughout the Application (including at [2.20] to [2.21], at [2.33[to [2.36], and at [3.8]) such as the assertion that "PNO's pricing practices of including user funded expenditure in its asset base and charging Port users for it is a clear example of unfettered rent seeking… " are no more than re-agitating issues that have already been extensively considered in 4 years of litigation and dispute resolution and are currently the subject

of Glencore's appeal to the Full Court, and an attempt to circumvent the Australian Competition Tribunal determination of an access dispute arbitration that was unfavourable to Glencore on these issues.

32. As the Commission is aware, the long running dispute between PNO and 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.

33. 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.

34. 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 price terms that Glencore managed to achieve in 4 years of litigation, Glencore is now party to an application for collective bargaining.

35. The Application makes numerous references to the user contributions issue, for example at [3.8] which states that "... after revocation of the declaration, PNO increased its prices significantly once again and in particular, based on the inclusion of user contributions that PNO did not itself actually expend. That expenditure was made by users (including through the coal terminals in respect of which the users are the owners). 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 Commission, 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. Relevantly, at [359] to [361] of the Tribunal's Determination, the Tribunal stated:

> *The Tribunal considers that Part IIIA shines the light of regulation onto what assets are required to provide a declared service. Prices should reflect the cost of those assets, whether through the DORC or some other approach. In this case, that means all the components of the DORC, regardless of their origins. A hypothetical entrant would need all the assets to provide the declared service, and would require a return on all the assets. Disputation over the treatment of user contributed assets cannot be resolved by examinations of past pricing. And nor can it be resolved by simplistic claims that users should not have to pay twice, or assertions that the access provider would be making monopoly profits, or that the NPV=0 criterion would be contravened.*
>
> *Only clear indications of an understanding by the access provider and an expectation by the access user that future pricing would be adjusted in some way for the value of those assets could justify excluding them from the RAB. Even then, the better approach may be to maintain the full value of the RAB and make adjustment to the MAR for the effect of the understanding and expectation. We note the QCA's approach in this regard.*
>
> *Whether there would also be a need for some mechanism for the passing-on to the current access provider and access seeker of past understandings and expectations is not a question that needs to be addressed by the Tribunal. There is no evidence of any such understandings or expectations.*

36. Glencore's dissatisfaction with the outcome of the Tribunal's determination is evident from the Application. However, it should not be permitted to seek to circumvent the Tribunal's determination (made in accordance with the provisions and process set out in Part IIIA of the CCA) and re-ventilate those same arguments with PNO through a collective negotiation authorisation mechanism.

37. 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).

38. 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 authorisation to collectively negotiate the terms and conditions of such access.

A failure to understand the significant concessions offered by PNO under the Deed

39. The Application at [2.22] to [2.27] makes various erroneous allegations with respect to the Deed, for example that "the Deed provides very unclear mechanisms for users to ascertain the data needed to understand such changes or to dispute those charges." These contentious fail to appreciate the significant concessions being made by PNO by voluntarily opting into contractual regulation of its prices under the Deed.

40. 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.

41. As the Commission is aware, on 24 September 2019, the revocation of the declaration of the shipping channel service at the Port of Newcastle became effective in accordance with the NCC's well-reasoned recommendation that the shipping channel service be revoked. The consequences of revocation are that:

    (a) there is no longer any statutory obligation under Part IIIA of the CCA requiring PNO to negotiate with access-seekers to provide the declared services at the Port of Newcastle; and

    (b) an access-seeker will no longer be able to refer any dispute over the provision of the shipping channel service at the Port to the Commission.

42. Notwithstanding that there are no PNO services that are currently declared, and therefore subject to the provisions of Part IIIA, under the terms of the Deed offered to port users, PNO has offered to make the matters taken into account by a mediator and applied by the arbitrator in resolving a 'Permitted Price Dispute' (as that term is defined in the Deed), subject to 'Pricing Principles'. Those pricing principles reflect those found in Part IIIA and the Competition Principles Agreement requirements for an access regime to be certified.

43. The drafting of the Deed is clear. The Pricing Principles apply to the extent that there is a Permitted Price Dispute between the parties to a Deed. A 'Permitted Price Dispute' is a Dispute which is not an Excluded Dispute and relates to:

    (a) the amount of the Navigation Service Charge for Covered Vessels; and

(b) the amount of the Wharfage Charge in respect of Producer Coal loaded onto Covered Vessels.

44. Under the contractual terms set out in 7(b) of the Deed, PNO may only increase the Producer Specific Charges in excess of the Annual Adjustment where any such increase is Material (as that term is defined), and the increased Producer Specific Charges are consistent with the Pricing Principles. Producers are able to raise disputes in respect of such increases under 7(b), and the media or arbitrator must take into account the Pricing Principles. These Pricing Principles provide clear guidance about the pricing guidelines that apply to such increases.

45. In addition, under 7(c) of the Deed, in order to provide the Producer with visibility of and the opportunity to comment on any prospective increases in the Producer Specific Charges on account of capital expenditure proposed to be incurred by PON, PNO is under a contractual obligation to prepare and provide to Producers a forward looking 5 year forecast (covering the period 1 January 2020 to 31 December 2024) of its projected capital expenditure that may impact the Producer Specific Charges and meet with the Producer to discuss those forecasts and any potential associated variations to the Producer Specific Charges. This is to be updated annually on a rolling 5 year basis by no later than 31 March each following Contract Year, and PNO is under a contractual obligation to meet with the Producer to discuss each updated 5 year CAPEX Forecast.

46. Contrary to the assertion in the Application 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 significant benefits to Producers, which the Application wholly fails to recognise.

No material impact on relevant markets

47. As the National Competition Council (**NCC**) noted 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**), 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.

48. The vast majority of coal in Australia is sold on a FOB basis. The customer of the coal engages the vessel operators who are responsible for transporting the coal. In practice, vessel operators appoint vessel agents to engage with PNO on their behalf in respect of a vessel's visit to the port, including the payment of relevant port charges. PNO does not deal directly with vessel operators, but rather 8 to 10 vessel agents who represent vessel operators in their day-to-day engagement with PON. The vessel agent receives the NSC invoice from PON together with details about the vessel's visit and gross coal tonnage loaded, and then pays the invoice to PON on behalf of its principal (the vessel operator).

49. Effectively, apart from the very small minority of cases where the coal producer happens to be the charterer of the vessel, the Applicant's interest in the Navigation Service Charge is limited to the effect of this price on the price of coal on the international market.

50. As the NCC noted at [7.214] of its Revocation Recommendation that export coal miners from the Newcastle catchment are likely to be "price takers", that is, decisions by individual coal miners regarding how much coal they will export in any given period are unlikely to materially affect prices for coal in overseas export markets.

51. 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". It is notable that 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 Australian Competition Tribunal of $1.04/GT in 2020 (which is also well within the range considered by the NCC).

52. It follows that any public benefit that the Applicants claim from being able to collectively bargain with PNO will not arise in Australia. Instead, any reduction in the Navigation Service Charge that may potentially arise from authorisation of the Proposed Collective Bargaining Conduct would simply result in an immaterial reduction in the price of coal in overseas export markets.

Conclusion

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

Yours sincerely

Simon Byrnes
Chief Commercial Officer