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Application for Authorisation by NSW Minerals Council

Yancoal Australia Limited (*Yancoal*) welcomes the opportunity to make submissions to the ACCC in respect of the application made by the New South Wales Minerals Council (*NSWMC*) seeking authorisation for a collective negotiation with Port of Newcastle Operations Pty Ltd (*PNO*) (the *Application*).

Yancoal's previous submission of 18 March 2020 was principally in respect of the grant of urgent interim authorisation. This submission now addresses the substantive application for authorisation.

Yancoal acknowledges that, under section 90 *Competition and Consumer Act 2010* (Cth), for the ACCC to grant the requested authorisation it needs to be satisfied that:

- (a) the conduct would not have effect, or would not be likely to have the effect, of substantially lessening competition; or
- (b) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct.

Yancoal considers that the ACCC can, and should be, so satisfied for the reasons set out below.

1 Background

Yancoal considers that the Application accurately describes the general factual background which has given rise to the proposal for authorisation, such that the background is not restated in detail here.

However, the key point that Yancoal wishes to emphasise is that without any agreement being reached between PNO and coal producers, 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). That uncertainty adversely impacts on future investments in the Hunter Valley coal industry. It also creates traction for potential regulatory change to resolve that position, which in turn creates uncertainty for PNO and its future investment decisions.

Accordingly, it appears to Yancoal there are benefits to be obtained for both PNO and the Hunter Valley coal industry from an agreement that provides a higher degree of certainty. However, bilateral negotiations that have occurred to date (including between Yancoal and PNO) have not yet proven successful.

The conduct sought to be authorised is justified as it maximises the prospects of such an arrangement being reached, and delivering the resulting public benefits.

2 No lessening of competition

The impact on competition needs to be assessed by comparing the likely future state of competition with and without the conduct.

However, there is no real competition for channel services in either case, such that Yancoal considers it is clear that the conduct would not have the effect or likely effect of substantially lessening competition in the market for such services.

In particular, Yancoal holds that view because:

- (a) the Port of Newcastle channel has substantial surplus capacity (such that there is no competition to obtain or secure limited access); and
- (b) coal producers are effectively price takers given PNO's unconstrained charging powers under the *Ports and Maritime Administration Act 1995* (NSW) (such that there is no competition in respect of price).

To the extent it is suggested that coal producers are somehow competing with each other by engaging in bilateral negotiations with PNO, Yancoal suggests that for the reasons set out in section 3.1 below, that competition is very weak at best.

Accordingly, Yancoal submits that the proposed conduct can be authorised on the basis that it will not have the effect or likely effect of substantially lessening competition in a market.

3 Public benefits

Yancoal also agrees with the key points raised in the Application as to why the conduct will result in public benefits.

In particular, Yancoal wishes to emphasise that collective negotiations will have the following critical benefits:

3.1 Improving the prospects of a beneficial negotiated outcome

Yancoal's experience is that the bilateral negotiations have been difficult, principally because:

- (a) individual coal producers are, unsurprisingly, reticent to reach an arrangement with PNO that might be less favourable than an outcome reached by another producer – putting the first producer at a disadvantage in markets for the sale of coal, with that reticence providing a real barrier to a beneficial outcome being reached;
- (b) there is an inequality of bargaining power that exists between an individual coal producer and PNO, where the coal producer is dependent on PNO's services but PNO is not particularly dependent on even the largest users – particularly where it has statutory rights to simply increase its pricing; and
- (c) the proposed agreements relate to issues that are relevant to the port and coal industry as a whole, such as future capital expenditure at the port, and the impact on prices paid by coal producers.

Yancoal submits that a collective negotiation would assist in rectifying each of those issues and materially improve the prospects of a negotiated outcome being reached.

Yancoal also considers the resolution of a negotiated outcome would deliver very clear public benefits.

In particular, such an outcome would create long term certainty for both coal producers and PNO as to the future pricing profile, creating a far more favourable environment for future investment in both coal production and port infrastructure (including in respect of PNO's potential non-coal growth prospects such as the proposed container terminal).

The greater certainty and investment would then deliver numerous and significant public benefits including:

- (a) greater exports, employment, coal royalties for the State and economic growth;
- (b) greater competition for the sale of coal and in related dependent markets (such as the markets for coal tenements, rail haulage, rail access and mining services); and
- (c) more efficient outcomes, given that a common outcome across the industry will ensure that investment incentives in dependent markets are not impacted by inefficient discrimination in relation to the terms of access for users of the channel services.

3.2 Transaction cost savings

In addition, given the significant number of coal producers impacted, it is clear that a single collective negotiation will involve materially lesser negotiation costs and management time for all parties than a series of bilateral negotiations between numerous producers and PNO.

4 Detriment

Yancoal agrees with the key points raised in the Application as to why the conduct will result in minimal (if any) detriment, namely that:

- (a) participation is voluntary for all parties;
- (b) there is no suggestion of a collective boycott of PNO (and evidently no potential for that given the essential nature of PNO's channel services); and
- (c) the exchange of information between coal producers will be limited to that necessary for collectively negotiating the proposed channel services terms, which Yancoal is confident would not include any competitively sensitive information in relation to their future marketing, production plans or coal operations given the non-customer specific pricing model proposed by PNO.

As noted above, Yancoal also considers that a collective negotiation will not substantially lessen competition for the reasons noted in section 2 above.

Accordingly, Yancoal submits that the conduct should be authorised as the public benefit would outweigh any detriment to the public that might result.

Please do not hesitate to contact me on [REDACTED] or via email at [REDACTED] if you wish to discuss any aspect of this submission.

Yours sincerely

[REDACTED]

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Yancoal Australia Limited