Australian Competition Tribunal

Application by Port of Newcastle Operations Pty Limited (No 2) [2022] ACompT 1

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| Review of: | Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020 |
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| File number: | ACT 2 of 2020 |
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| Tribunal: | **JUSTICE O’BRYAN (Deputy President)**  **DR D ABRAHAM (Member)**  **MS D EILERT (Member)** |
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| Date of Determination: | 18 February 2022 |
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| Date of publication of reasons: | 4 March 2022 |
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| Catchwords: | **COMPETITION** –review under s 101 of the *Competition and Consumer Act* *2010* (Cth) of authorisationgranted by the Australian Competition and Consumer Commission – authorisation sought for collective bargaining in respect of terms and conditions of access to the Port of Newcastle – whether collective bargaining would result in public benefits comprising more efficient contract terms and lower transaction costs – whether collective bargaining would result in public detriments comprising increased risk of collusive conduct and marginalisation of individual interests and preferences of coal producers – authorisation refused and determination of the Australian Competition and Consumer Commission set aside |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 88, 90, 91, 101, 102  *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)  *Trade Practices Act 1974* (Cth) s 90(5)  *Trade Practices Amendment Act 1977* (Cth)  Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth)  *Ports and Maritime Administration Act 1995* (NSW) ss 48, 50, 51, 60, 61, 67  *State Owned Corporations Act 1989* (NSW) |
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| Cases cited: | *Application by Concrete Carters Association (Victoria)* (1977) 31 FLR 193  *Application by Flexigroup Ltd (No 2)* [2020] ACompT 2  *Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164  *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4; 361 FLR 24  *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1  *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341  *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720  *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49  *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317  *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194  *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39; 395 ALR 209  *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115  *Re 7-Eleven Stores Pty Ltd* [1998] ACompT 3; ATPR 41‑666  *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357  *Re EFTPOS Interchange Fees Agreement* [2004] ACompT 7; ATPR 41-999  *Re Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7; 309 FLR 358  *Re Glencore Coal Pty Ltd* [2016] ACompT 6  *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281  *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385  *Re Lamont* (1990) 96 ALR 475  *Re Qantas Airways Ltd* [2004] ACompT 9; (2005) ATPR 42-065  *Re* *Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481  *Re Rural Traders Cooperative (WA) Ltd* (1979) 37 FLR 244  *Re VFF Chicken Meat Growers’ Boycott Authorisation* [2006] ACompT 2; ATPR 42-120  *United States v Socony-Vacuum Oil Co* 310 US 150 (1940) |
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ORDERS

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| IN THE AUSTRALIAN COMPETITION TRIBUNAL | |  |
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|  | | ACT 2 of 2020 |
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| re: | Application for authorisation AA1000473 lodged by New South Wales Minerals Council on behalf of itself, certain coal producers that export coal through the Port of Newcastle, and mining companies requiring future access through the Port, and the determination made by the ACCC on 27 August 2020 | |
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| APPLICANT: | PORT OF NEWCASTLE OPERATIONS PTY LIMITED | |

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| DETERMINATION | |
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| TRIBUNAL: | JUSTICE O’BRYAN (Deputy President)  DR D ABRAHAM (Member)  MS D EILERT (Member) |
| DATE: | 18 February 2022 |

THE TRIBUNAL DETERMINES THAT:

1. The determination of the Australian Competition and Consumer Commission dated 27 August 2020 granting authorisation to application AA1000473 made by the NSW Minerals Council on behalf of itself and Glencore Coal Assets Australia Pty Ltd, Yancoal Australia Ltd, Peabody Energy Australia Pty Ltd, Bloomfield Collieries Pty Ltd, Centennial Coal Company Pty Ltd, Malabar Coal Ltd, Whitehaven Coal Mining Ltd, Idemitsu Australia Resources Pty Ltd and MACH Energy Australia Pty Ltd (together, the **authorisation applicants**) be set aside.
2. The interim authorisation granted to the authorisation applicants by the Australian Competition and Consumer Commission on 2 April 2020 in respect of application AA1000473 be revoked.
3. The reasons for determination of the Tribunal in this proceeding are not to be disclosed to any person other than the external legal representatives of the parties in order that any party may make an application to redact or suppress any part of the reasons on the grounds of commercial confidentiality, any such application to be filed and served on or before 4pm on 4 March 2022. If no application is made by that time, the Tribunal will publish its reasons in full. If any application is made within that time, the Tribunal will determine the question of publication in the resolution of that application.

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REASONS FOR DETERMINATION

THE TRIBUNAL:

# A. INTRODUCTION

1. Port of Newcastle Operations Pty Limited (**PNO**) has applied to the Tribunal pursuant to s 101 of the *Competition and Consumer Act 2010* (Cth) (**Act**) for review of an authorisation granted by the Australian Competition and Consumer Commission (**ACCC**) on 27 August 2020 under s 90 of the Act (**ACCC Determination**). PNO became the operator of the Port of Newcastle (**Port**) in 2014, following its privatisation by the State of NSW. PNO controls the terms and conditions of access to the Port, pursuant to the terms of a 98-year lease with the State of NSW.
2. The applicants for the authorisation are the New South Wales Minerals Council (**NSWMC**) and certain of its members. NSWMC is the leading mining industry association in NSW and its members include exporters of coal (and other commodities) from the Hunter Valley region who are major users of the Port. The coal producers on behalf of whom NSWMC sought authorisation from the ACCC are listed in Schedule 1 to the authorisation application and are as follows: Glencore Coal Assets Australia Pty Ltd (**Glencore Coal**), Yancoal Australia Ltd (**Yancoal**), Peabody Energy Australia Pty Ltd (**Peabody Energy**), Bloomfield Collieries Pty Ltd (**Bloomfield Collieries**), Centennial Coal Company Pty Ltd (**Centennial**), Malabar Coal Ltd (**Malabar**), Whitehaven Coal Mining Ltd (**Whitehaven**), Idemitsu Australia Resources Pty Ltd (**Idemitsu**), MACH Energy Australia Pty Ltd (**MACH Energy**), and Hunter Valley Energy Coal Pty Ltd. It should be noted that Hunter Valley Energy Coal, owned by BHP Group Ltd (**BHP**), was one of the coal producers that initially sought authorisation but is no longer seeking to negotiate collectively with PNO. In this determination, the phrase “authorisation applicants” refers to NSWMC and the coal producers on whose behalf the application for authorisation was made (excluding Hunter Valley Energy Coal). While NSWMC participated in this proceeding to contest PNO’s application to review the ACCC Determination, the Tribunal understands that it did so on behalf of itself and the other authorisation applicants.
3. The application for authorisation was filed with the ACCC on 5 March 2020. The authorisation applicants sought authorisation to:
4. 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;
5. discuss amongst themselves matters relating to the above discussions and negotiations; and
6. enter into, and give effect to, contracts, arrangements or understanding with PNO containing common terms which relate to access to the Port and the export of minerals through the Port,

(the **proposed** **collective bargaining conduct**).

1. In the supporting submission attached to the authorisation application, the authorisation applicants stated that the application is in relation to the broad range of contractual arrangements involved in the task of exporting coal from the Port. In that regard, the authorisation applicants described that task as involving vessels entering the Port, transiting the channels in the Port, tying up at the berths to load coal at the coal terminals and then once again transiting the channels before exiting the Port for delivery of the coal to its ultimate destination. While the authorisation applicants sought authorisation for the proposed collective bargaining conduct in respect of all such contractual arrangements at the Port, their submissions focussed solely on Port charges and specifically the navigation service and wharfage charges. As stated by the authorisation applicants in their written submissions in this proceeding, it is the terms of the Producer Pro Forma Long Term Pricing Deed (**Producer Pricing Deed**) (which has been offered by PNO to all coal producers as common terms governing the navigation service and wharfage charges) which the authorisation applicants seek to negotiate collectively with PNO.
2. In the authorisation application, the applicants submitted that, since the revocation of the declaration of the Port under Pt IIIA of the Act, there is no other form of constraint on PNO’s pricing power. They argued that there have been significant increases in the navigation service and wharfage charges since privatisation and there is uncertainty as to future increases. The authorisation applicants submitted that they are seeking to negotiate collectively 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. The authorisation applicants submitted that the key public benefit that would arise from the proposed collective bargaining conduct is increasing certainty for investment in the Hunter Valley, which would facilitate employment and growth in the Hunter Valley region. The application made clear that the applicants hoped that collective bargaining would result in reduced charges at the Port over time. In that regard, the applicants submitted that:

…the authorisation will, *inter alia*, enable users to collectively, as an industry, discuss with PNO the basis on which costs will be allocated by PNO and means for PNO to more efficiently engage in capital expenditure on a transparent basis. It is hoped that such increased transparency on expenditure and how costs are allocated, will lead to more efficient investment and therefore the potential for reduced charges being imposed on the mining industry over time.

1. The authorisation applicants also submitted that collective bargaining would result in transaction cost savings for both PNO and the mining industry, and that the result of the above benefits would be a material increase in competition in a number of dependent markets including the coal export market, the markets for the acquisition and disposal of exploration and/or mining authorities and the markets for services such as geological and drilling services, construction, operation and maintenance.
2. Conversely, the authorisation applicants submitted that the conduct is likely to result in minimal if any public detriment because:
3. participation by the coal mining industry in the proposed collective bargaining conduct is voluntary;
4. there is no obligation on PNO to negotiate collectively;
5. the authorisation will not extend to collective boycott activity; and
6. PNO already publishes its access terms with the result that there is no risk of any information sharing between the authorisation applicants that would be prohibited under the Act.
7. On 2 April 2020, the ACCC granted interim authorisation pursuant to s 91(2)(d) of the Act to enable the authorisation applicants to commence collective discussion amongst themselves and negotiations with PNO in relation to the terms and conditions of access, including price, to the Port (but not enter into collectively negotiated agreements). The interim authorisation commenced immediately and was stated to remain in place until revoked or the ACCC’s final determination comes into effect. Pursuant to the interim authorisation, on 29 April 2020 the authorisation applicants wrote to PNO requesting an initial meeting to commence negotiations around pricing and access principles. In response, PNO wrote to NSWMC on 11 May 2020 declining the request for an initial meeting and indicating that PNO does not support the proposed collective bargaining. The evidence before the Tribunal is to the effect that PNO has maintained that position and that no collective negotiations have occurred between the authorisation applicants and PNO since the grant of the interim authorisation.
8. On 27 August 2020, the ACCC granted authorisation in respect of the proposed collective bargaining conduct for ten years, until 30 September 2030, pursuant to s 90 of the Act. The authorised conduct is voluntary for all parties, including PNO. The ACCC Determination expressly noted (at [5.10]) that certain conduct was not covered by the authorisation:

The authorisation does not extend to permit the Applicants to engage in any collective boycott activity, and does not involve the sharing of competitively sensitive information that relates to customers, marketing strategies, or volume/capacity projections for individual users.

1. In its Determination, the ACCC summarised its conclusions in the following terms:

The ACCC considers that the Proposed Collective Bargaining Conduct is likely to result in public benefits. In particular, the ACCC considers that the bargaining group will have greater input into the terms and conditions of access under the Producer Deed, and increased transparency around capital expenditure plans and cost allocation at the Port. This will provide greater certainty for the delivered price of Hunter Valley coal, more timely resolution of industry-wide issues, and facilitate more efficient investment decisions at the Port and across the Hunter Valley coal industry. The ACCC also considers these outcomes will enhance the international competitiveness of the Hunter Valley coal industry, with investment and employment benefits in Australia.

Further, collective bargaining conduct can result in more efficient contracting, which can benefit both PNO and the bargaining group. The ACCC considers the proposed collective bargaining conduct is also likely to result in public benefits from lower transaction costs.

The ACCC considers there is likely to be minimal public detriment from the proposed collective bargaining conduct because participation in the proposed collective bargaining conduct is voluntary for both coal producers and PNO, and does not include boycott activity. The ACCC considers that there is unlikely to be an impact on competition between the coal producers. Individual coal producers are still free to negotiate terms and conditions of Port access separately through bilateral discussions with PNO if they believe it is in their commercial interests to do so. In addition, the proposed collective bargaining conduct does not involve coal producers sharing individual coal projection volumes, customer pricing information or marketing strategies.

Therefore, the ACCC is satisfied that the proposed collective bargaining conduct is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the proposed collective bargaining conduct.

1. PNO has applied for review of the ACCC Determination on the basis that the Tribunal could not be satisfied that the proposed collective bargaining conduct would be likely to result in a benefit to the public, or alternatively, not one that would outweigh any detriment likely to result from the conduct.
2. As a result of PNO’s application for review, the ACCC’s authorisation has not come into effect: s 91(1A)(b). However, the interim authorisation has remained in effect until the date of this determination by the Tribunal: s 91(2AA).
3. Each of PNO and the authorisation applicants adduced evidence before the Tribunal, largely in the form of affidavits and supporting documents. A number of the witnesses were cross-examined. Each of PNO, the authorisation applicants and the ACCC also tendered expert economic reports. The expert economic witnesses conferred prior to the hearing and produced a joint report and, during the hearing, were cross-examined concurrently.
4. The Tribunal also received a submission, with supporting documents, from the Port Authority of NSW, which the Tribunal addresses below. The Port Authority is a state-owned corporation established under the *State Owned Corporations Act 1989* (NSW) (**State Owned Corporations Act**) and the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**). It is responsible for and manages the navigation, security and operational safety needs of commercial shipping in the Port of Newcastle, as well as the Sydney Harbour, Port Botany, Port Kembla and the ports of Eden and Yamba.
5. The ACCC participated in the proceeding to assist the Tribunal. As the authorities make clear, the ACCC’s role in the review of an authorisation determination made by the ACCC is to assist the Tribunal in an impartial manner and the ACCC ought not act as an advocate for its original decision: see for example *Re* *Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 (***QCMA***) at 485. Given the presence of the authorisation applicants as a (collective) contradictor, it was unnecessary for the ACCC to test all the evidence before the Tribunal or to present opposing points of view on every issue. The ACCC did, however, make submissions in respect of matters of principle. The ACCC also adduced an expert economic report from Dr Rhonda Smith, to which PNO and the authorisation applicants responded by adducing expert reports from Mr Greg Houston and Mr Euan Morton respectively. No objection was taken by PNO or the authorisation applicants to the ACCC adducing Dr Smith’s report. The questions on which Dr Smith was asked to express opinions were framed by the ACCC in a relatively neutral manner and the assumptions of fact she was asked to make by the ACCC were uncontroversial. In those circumstances, the Tribunal received the report.
6. As the Tribunal is conducting a *de novo* review of the grant of authorisation, the Tribunal must decide for itself whether authorisation should be granted.
7. For the reasons that follow, the Tribunal has determined not to authorise the proposed collective bargaining conduct and that the determination of the ACCC should be set aside and the interim authorisation should be revoked.

# B. STATUTORY FRAMEWORK FOR THE TRIBUNAL’S REVIEW

## Nature of the Tribunal’s review

1. Section 88 of the Act, within Div 1 of Pt VII, empowers the ACCC to grant an authorisation to a person to engage in conduct, specified in the authorisation, to which one or more provisions of Pt IV specified in the authorisation would or might apply. While the authorisation remains in force, those provisions of Pt IV do not apply to the conduct to the extent it is engaged in by the applicant for authorisation, any other person named or referred to in the application as a person who is engaged in or who is proposed to be engaged in the conduct and any other particular persons or classes of persons, as specified in the authorisation, who become engaged in the conduct.
2. Section 101 of the Act, within Div 1 of Pt IX, provides that a person dissatisfied with a determination by the ACCC under Div 1 of Pt VII may apply to the Tribunal for a review of the determination. Subject to exceptions that are not presently relevant, a review by the Tribunal is a re-hearing of the matter. Section 102 provides that, on a review, the Tribunal may make a determination affirming, setting aside or varying the determination of the ACCC and, for the purposes of the review, may perform all the functions and exercise all the powers of the ACCC. The Tribunal is expressly permitted to have regard to any information furnished, documents produced or evidence given to the ACCC in connection with the making of the determination (s 102(7)).
3. As the Tribunal observed in *Application by Flexigroup Ltd (No 2)* [2020] ACompT 2 (***Flexigroup***) at [107], a review under s 101 is a *de novo* review, meaning that the Tribunal conducts a fresh hearing and determination of the authorisation. The Tribunal must “make its own findings of fact and reach its own decision as to whether authorisation should be granted or not and, if so, any conditions to which it is to be subject”: *Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164 (***Medicines Australia***) at [135] (French J, Mr G Latta and Prof C Walsh); *Flexigroup* at [135]. That function is not performed by considering “whether the ACCC was right or wrong in the conclusion it reached or whether it could have better formulated its determination”. Rather, the Tribunal must “assess the applications for authorisation on their merits and by reference to the information and evidence given to the ACCC and any material that the parties wish to put before the Tribunal”: *Medicines Australia* at [138].
4. The role of the Tribunal in conducting the review is not confined by the issues raised by the parties to the review and the Tribunal must determine itself whether the statutory test for authorisation is satisfied. However, as observed by the Tribunal (Deane J, Mr J Shipton and Mr J Walker) in *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 at 296, “[t]he published reasons for determination of the Commission may, in an appropriate case, prove a convenient reference point for defining the matters which are truly in dispute between all or any of the Commission, the applicants, and other parties represented, or interested, in the proceedings”. Further, where the parties agree with factual findings made by the ACCC in its determination, ordinarily the Tribunal need not itself examine the facts in detail. As explained by the Tribunal (von Doussa J, Dr B Aldrich, Prof D Round) in *Re 7-Eleven Stores Pty Ltd* [1998] ACompT 3; ATPR 41‑666 at 41,453:

In curial proceedings based on the adversarial system, the role of a court is to determine issues identified by the parties, usually in pleadings. Proceedings before the Tribunal are not adversarial in nature, and the role of the Tribunal is not merely to resolve issues in dispute between the parties. It is an administrative tribunal with a much wider role. It is required to determine whether anti-competitive conduct or anti-competitive provisions in a contract, arrangement or understanding that would otherwise be unlawful, should, in the public interest, be authorised because the public benefit outweighs the detriment constituted by any lessening of competition. Determinations of the Tribunal are likely to impact on the commercial interests of many people who are not participants in the proceedings before the Tribunal.

Notwithstanding the positions taken by the parties in this case, the Tribunal in the exercise of its statutory functions, must consider each of the issues arising under [the applicable statutory provisions] which precede a consideration of the terms and duration of the further authorisation granted by the determinations under review. On these essential steps, the Tribunal must reach its own conclusions. It must make its own assessment of both benefit and detriment.

However, where the applicants and other parties participating in proceedings before the Tribunal agree with findings on factual matters set out in the Commission's published reasons for determination, the Tribunal would ordinarily be justified in treating those findings as common ground which significantly limits the areas of primary fact which the Tribunal is itself required to examine in detail; see *Re Herald & Weekly Times Ltd (Media Council of Australia (No 1))* (1978) ATPR ¶40-058 at 17,601; (1978) 17 ALR 281 at 296 where the Tribunal (Deane J, President, Shipton and Walker, Members) observed that fairness and common sense combine to require that the Tribunal determine an application for review within the context of matters which can properly be seen to be in issue between the parties or which the Tribunal itself raises or indicates that it regards as being at large.

## Statutory preconditions for authorisation

1. The statutory preconditions for authorisation were amended by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**2017 Amendment Act**), broadly adopting the recommendations of the Competition Policy Review chaired by Prof Ian Harper (see Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) at [9.17]). The amended preconditions are stated in ss 90(7) and (8) of the Act in the following terms:

(7) The Commission must not make a determination granting an authorisation under section 88 in relation to conduct unless:

(a) the Commission is satisfied in all the circumstances that the conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition; or

(b) the Commission is satisfied in all the circumstances that:

(i) the conduct would result, or be likely to result, in a benefit to the public; and

(ii) the benefit would outweigh the detriment to the public that would result, or be likely to result, from the conduct; or

(c) [not applicable].

(8) Paragraph (7)(a) does not apply if any of the following provisions would (apart from an authorisation under section 88) apply to the conduct:

(a) one or more provisions of Division 1 of Part IV (cartel conduct);

(b) one or more of sections 45D to 45DB (secondary boycotts);

(ba) one or more provisions of section 45E or 45EA (contracts etc. affecting the supply or acquisition of goods or services);

(c) section 48 (resale price maintenance).

1. The provisions listed in s 90(8) are commonly described as *per se* prohibitions. In contrast to the other provisions of Pt IV of the Act, the provisions listed in s 90(8) do not require proof that the prohibited conduct has the purpose or would have or would be likely to have the effect of substantially lessening competition. The nomenclature “*per se*” derives from the use of that phrase in the United States in which the courts have determined that certain categories of anti-competitive conduct are illegal without proof of anti-competitive effects. The use of the Latin phrase “*per se*” can be traced to *United States v Socony-Vacuum Oil Co* 310 US 150 (1940) in which Douglas J stated (at 218):

… for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful *per se* under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.

1. Thus, the scheme of the Act is that:
2. in so far as the proposed conduct might otherwise contravene a *per se* prohibition in Pt IV of the Act, the ACCC is only permitted to grant authorisation if it is satisfied that the proposed 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; and
3. in so far as the proposed conduct might otherwise contravene a prohibition in Pt IV that depended on proof that the conduct has the purpose or would have or would be likely to have the effect of substantially lessening competition, the ACCC is also permitted to grant authorisation if it is satisfied that the proposed conduct would not have the effect, or would not be likely to have the effect, of substantially lessening competition.
4. In their application to the ACCC, the authorisation applicants acknowledged that the cartel conduct provisions in Div 1 of Pt IV, the secondary boycott provisions in ss 45D to 45DB and the resale price maintenance provisions in s 48 might apply to the proposed collective bargaining conduct. Accordingly, the applicable precondition for the grant of authorisation is that stated in s 90(7)(b), namely 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.
5. While the statutory preconditions for authorisation were amended by the 2017 Amendment Act, the terminology used and underlying concepts in the amended provisions are based on the previous law. In particular, and as observed by the Explanatory Memorandum at [9.41], the precondition for the grant of authorisation stated in s 90(7)(b) is consistent with the tests previously contained in s 90. In respect of conduct that might have contravened a *per se* prohibition, the previous statutory test was to the effect that the conduct would result, or be likely to result, in such a benefit to the public that the proposed conduct should be allowed. That test required consideration of the benefits and detriments likely to result from the conduct, and involved a comparison of the future with, and without, the conduct for which authorisation is sought: *Flexigroup* at [137]; *Medicines Australia* at [117]. As the statutory precondition in s 90(7)(b) requires the ACCC (or the Tribunal on review) to be satisfied that the public benefits likely to result from the conduct outweigh the public detriments likely to result from the conduct, it is convenient to refer to the test by the shorthand “net public benefit”.

### Meaning of public benefit and detriment

1. A benefit to the public includes “anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements (in the context of trade practices legislation) the achievement of the economic goals of efficiency and progress”: *QCMA* at 507-8; *Medicines Australia* at [107]. The relevant “public” is the Australian public: *Re Qantas Airways Ltd* [2004] ACompT 9; (2005) ATPR 42-065 (***Qantas Airways***) at [196] citing *Re Howard Smith Industries Pty Ltd* (1977) 28 FLR 385 (***Howard Smith***) at 392. Similarly, a detriment to the public includes “any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency”: *Re 7-Eleven Stores Pty Ltd* [1994] ATPR 41-357 at 42,683 (Lockhart J, Prof M Brunt and Dr B Aldrich).
2. In *Qantas Airways*, the Tribunal concluded that in assessing whether an increase in economic efficiency constitutes a public benefit for the purposes of the Act, it was appropriate to apply a total welfare or surplus standard of economic efficiency. Accordingly, cost savings (productive efficiency gains) will constitute a public benefit even if the efficiency gain is captured in the first instance by the (private) parties to the proposed conduct. The Tribunal explained at [187]-[189]:

187 We consider that the phrase “benefit to the public” is to be given a broad definition which, in addition to group interests, takes into account (with appropriate weighting) individual interests to the extent that such interests are considered by society to be worthy of inclusion and measurement. This broad approach to public benefit promotes the achievement of both static and dynamic efficiencies.

188 Given the above reasoning, we have formed the view that the “public versus private” dichotomy used by the parties in relation to cost savings is of fairly limited assistance when examining the benefits relied upon for the purposes of s 90. Rather, the enquiry should be directed towards the extent to which the benefit has an impact on members of the community, that is society. Does it fall into the category of “anything of value to the community generally”? If it does, what weight should be given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries of it?

189 It follows that cost savings achieved by a firm in the course of providing goods or services to members of the public are a public benefit which can and should be taken into account for the purposes of s 90 of the Act, where they result in pass through which reduces prices to final consumers, or in other benefits, for example, by way of dividends to a range of shareholders or being returned to the firm for future investment. However, the weight that should be accorded to such cost savings may vary depending upon who takes advantage of them and the time period over which the benefits are received.

1. In relation to public detriments, the Tribunal stated in *Medicines Australia* that (at [108], citations omitted):

108 Although “detriment” covers a wider field than anti-competitive effects in many cases the important detriments will have that character. The relevant detriment will flow from the anti-competitive effect of the conduct to which authorisation is sought. This does not exclude consideration of other detriments which may be incidental to and therefore detract from a claimed public benefit. To that extent such detriment will be relevant in weighing the public benefit.

1. The citation of conclusory statements in previous Tribunal decisions about public benefits is of little assistance in applying the net public benefit test in s 90(7)(b) in a particular case. For example, the authorisation applicants placed reliance on the statement of the Tribunal in *Application by Concrete Carters Association (Victoria)* (1977) 31 FLR 193 (***Concrete Carters***) at 244-245 that:

Authorization in the terms sought by the Applicants would… authorize the participation of the producers, as a group, in negotiations as to such industry-wide rates and conditions. In this sense, the result of the conduct for which authorization is sought is likely to make more even the bargaining power of owner/drivers and producers. This, we see, as a benefit to the public.

1. The Tribunal’s decision in *Concrete Carters* does not stand for the proposition that conduct which makes the bargaining power of traders more even will always constitute a public benefit. As the Tribunal went on to explain, there were particular features of the industrial landscape with which that case was concerned, whereby the owner/driver concrete carters were already represented by the Transport Workers Union in negotiations with concrete producers, and particular features of the proposed collective bargaining conduct that preserved the freedom of individual producers to negotiate individually with concrete carters, that led the Tribunal to conclude that the authorised conduct would be conducive to competition both within the cartage industry and, in consequence, within the pre-mixed concrete industry (at 245).
2. The authorisation applicants also placed reliance on the statement of the Tribunal in *Re Lamont* (1990) 96 ALR 475 (***Re Lamont***) that the achievement of industrial harmony is a public benefit which may appropriately be taken into account in determining whether authorisation should be granted (at 488). That determination concerned an application for authorisation of a private arbitration of cartage rates for premixed concrete as between lorry owner-drivers (acting collectively) on the one hand and the National Readymixed Concrete Association of the ACT (which represented producers of concrete in the ACT) on the other hand. The Tribunal’s conclusion that industrial harmony may constitute a public benefit was qualified by the observation that lorry owner-drivers are more akin to employees than small business operators and that industrial disruption, which creates delays and uncertainty in the delivery of concrete, is one of the limited options available to lorry owner-drivers when seeking changes to their cartage rates (at 488). The Tribunal also observed that industrial harmony is a somewhat nebulous concept and rather fragile and therefore the Tribunal would require clear evidence that the grant of authorisation would be likely to lead to significantly greater industrial harmony (at 489). Ultimately, the Tribunal was not so satisfied and refused authorisation. The authorisation applicants did not address those conclusions of the Tribunal in *Re Lamont*, or explain how the proposed collective bargaining conduct related to industrial harmony in the sense considered in *Re Lamont*.
3. As the Tribunal explained in *QCMA*, in assessing public benefits (and detriments) it is necessary to go beyond labels or catchphrases. The Tribunal observed that its appraisal of claimed benefits must depend upon its appreciation of the competitive functioning of the industry and predictions about market behaviour and performance (at 510(2)). The validity of claimed benefits will rarely be self-evident and “[a] claimed benefit may in fact be judged to be a detriment when viewed in terms of its contribution to a socially useful competitive process” (at 510(2) and (3)).

### Quantification of public benefits and detriments

1. The necessity for authorisation applicants to quantify public benefits claimed to arise from proposed conduct was discussed by the Tribunal in *Qantas Airways*. Citing *Howard Smith*, the Tribunal said (at [201]) that the Act does not require an applicant to quantify, in precise terms, the benefits claimed to arise if authorisation is granted but there must be a factual basis for concluding that the public benefits are likely to result. The Tribunal further explained (at [203]-[209]):

203 An accurate, objective quantification of public benefits is difficult, in part because benefits have to be estimated for some period in the future and so their magnitude becomes a matter not only of empirical estimation based on assumptions but also one of statistical likelihood. Data, assumptions and models can be, and indeed in this proceeding have been, hotly contested.

204 We consider that the nature of public benefits needs to be defined with some precision, a degree of precision which lies somewhere between quantification in numerical terms at one end of the spectrum and general statements about possible or likely benefits at the other end of the spectrum. Whilst the diverse and speculative nature of potential benefits makes it impossible to lay down any definitive test of the degree to which, or manner in which, benefits should be quantified, the following observations should be borne in mind by any party seeking to assert a likely benefit.

205 Benefits must be of substance and have durability…

206 Any estimates involved in benefit analysis should be robust and commercially realistic, in the sense of being both significant and tangible. The assumptions underlying their calculation must be spelled out in such a way that they can be tested and verified. Care must be taken to distinguish between one‑off benefits and those of a more lasting nature. Appropriate weighting will be given to future benefits not achievable in any other less anti‑competitive way, and so the options for achieving the claimed benefits must be explored and presented.

207 Whilst we recognise that public benefits are easy to assert, but are much harder to prove in advance of their creation, that does not deter us from demanding a high standard of commercial and social accountability in the estimates presented to us. Accordingly, we do not believe that there is anything to be gained by fanciful and speculative modelling of benefits where the underlying assumptions are not clearly spelled out, where the estimates have not been subject to rigorous sensitivity analysis, and where the estimating process is not wholly transparent. Further, we observe that point estimates of the estimated dollar value of benefits purport to give the estimates a level of specificity that cannot be justified in most circumstances.

208 All other things being equal, detailed quantification is the best option. However, quantification at all costs is not required by the Act, and has never been sought by the Tribunal. There are diminishing returns to the quantification exercise. Benefits should be quantified only to the extent that the exercise enlightens the Tribunal more than the alternative of qualitative explanation.

209 Where benefits cannot be quantified in monetary terms, they can still be claimed in qualitative terms. The authorisation test is, after all, a balancing exercise that requires judgment over a wide range of tangible and intangible factors. The final result will depend on the relative weight assigned to each of these factors.

1. Subject to one qualification, the Tribunal agrees with the foregoing statements. The qualification concerns the statement that benefits must be “of substance”. When first enacted, the power to grant authorisation was subject to a condition that the proposed conduct would result or be likely to result in a substantial benefit to the public (see s 90(5) of the *Trade Practices Act 1974* (Cth) as originally enacted). In its report to the Minister for Business and Consumer Affairs published in August 1976, the Trade Practices Act Review Committee (otherwise known as the “Swanson Committee”) recommended that the condition for authorisation be amended to remove the requirement of substantiality (see para 11.14). That amendment was made by the *Trade Practices Amendment Act 1977* (Cth). The legislative history indicates that the statutory precondition for authorisation is not subject to an implied requirement of substantiality.
2. A public benefit must, though, rise above the ephemeral and the trivial (see *Re Rural Traders Cooperative (WA) Ltd* (1979) 37 FLR 244 at 262-263, referred to in *Qantas Airways* at [205], and *Medicines Australia* at [128]). As observed by the Full Federal Court in *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341, the need for a benefit to be non-ephemeral can be deduced from the word “benefit” itself and Parliament is unlikely to have intended the Tribunal to concern itself with trifles (at [8]-[10]).
3. In the present case, no attempt was made to quantify either the claimed public benefits or the claimed public detriments. All claims were put on a qualitative basis. As the above passage from *Qantas Airways* makes clear, numeric quantification of benefits is not essential, but there must be a factual basis for concluding that the public benefits are likely to result from the proposed conduct. In the present case, the evidence adduced by all parties in respect of claimed benefits and detriments was largely at the “general statements” end of the spectrum (see *Qantas Airways* at [204]).

### Exercise of discretion

1. The satisfaction of the statutory precondition to the grant of authorisation does not oblige the ACCC, or the Tribunal on review, to grant authorisation: *Medicines Australia* at [106]. Nevertheless, as the Tribunal observed in *Flexigroup*, if the ACCC or the Tribunal on review were to be satisfied that the conduct is likely to result in a net public benefit, ordinarily authorisation would be granted (at [138]).
2. In *Medicines Australia*, the Tribunal considered whether authorisation should be granted in circumstances where the public benefits were assessed as insubstantial. The Tribunal said (at [128]):

Similarly, where the anti-competitive detriment is low to non-existent the ACCC may be entitled to say, as a matter of discretion, that it would only authorise the conduct if the public benefit to be derived from it, beyond that necessary to outweigh the anti-competitive detriment, or satisfy the *per se* conduct test is substantial. That is to say that the ACCC can require, in the proper exercise of its discretion, that the conduct yields some substantial measure of public benefit if it is to attract the ACCC’s official sanction. The Tribunal is in a similar position.

1. It is important to observe that the above statements in *Medicines Australia* concern the exercise of the discretion to grant authorisation once the statutory precondition is satisfied; the statements do not concern the content of the statutory precondition (which, as noted above, does not require the benefits to be substantial).
2. There was no material disagreement between the parties with respect to the foregoing principles. However, the parties disagreed about two aspects of the statutory test: the first concerned the proper approach to the assessment of the public benefits or detriments likely to result from the conduct the subject of the application for authorisation required by s 90(7)(b); and the second concerned the meaning of the word “likely” in s 90(7)(b).

### The conduct the subject of the authorisation

1. The statutory test in s 90(7)(b) requires the ACCC (and the Tribunal on review) to assess whether the conduct the subject of the application for authorisation would be likely to result in public benefits or detriments. In the present case, the conduct the subject of the application for authorisation is the proposed collective bargaining conduct which encompasses the authorisation applicants:
2. collectively discussing and negotiating the terms and conditions of access, including price, to the Port for the export of coal (and any other minerals) through the Port;
3. discussing amongst themselves matters relating to the above discussion and negotiations; and
4. entering into, and giving 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.
5. As can be seen, the proposed collective bargaining conduct contemplates certain actions being undertaken by the authorisation applicants (engaging in collective discussions between themselves, engaging in collective negotiations with PNO and entering into contracts with PNO which contain common terms). However, the conduct also contemplates certain actions being undertaken by PNO (participating in collective negotiations with the authorisation applicants and entering into contracts with common terms). The parties agreed that, in assessing the public benefits and detriments likely to arise from the proposed collective bargaining conduct, the Tribunal must assume, for the purposes of the assessment, that the authorisation applicants will themselves engage in that conduct. However, there was some disagreement whether the Tribunal should assume, for the purposes of the assessment, that PNO would participate in collective negotiations with the authorisation applicants. As discussed below, since the grant of the interim authorisation by the ACCC, PNO has in fact refused to participate in collective negotiations with the authorisation applicants and, in this proceeding, has adduced evidence that that will remain its position into the future.
6. In opening written submissions, the authorisation applicants argued that the statutory test required the Tribunal to assume that the collective bargaining conduct the subject of the authorisation application would occur (including PNO’s participation in collective negotiations). They submitted that such an approach is mandated by s 90(7)(b) which requires an assessment of the *conduct* that is the subject of the authorisation. In the present case, the conduct includes PNO engaging in collective negotiations. In support of that submission, the authorisation applicants relied on the reasoning of the Tribunal in *Medicines Australia* at [120]:

The so called ‘‘future with or without test’’ is not a comparison of a hypothetical future in which the proposal the subject of the application is authorised against a hypothetical future in which it is not authorised. What the test requires is comparison of a future in which the conduct, the subject of the authorisation application, occurs with a future in which that conduct does not occur. …

1. The authorisation applicants submitted that that approach is consistent with the purpose of the authorisation regime in Pt VII of the Act. In that regard, the authorisation applicants referred to the observation of the Tribunal in *Medicines Australia* that the regime provides “an administrative process to remove the risk that proposed beneficial conduct may contravene competition laws” (at [105]). The authorisation applicants further submitted that it would frustrate the purpose of Pt VII of the Act if the target of the proposed conduct (such as PNO) were able to defeat an application for authorisation of collective bargaining simply by asserting that it will refuse to participate in the conduct.
2. PNO did not contest the applicable principle as stated by the Tribunal in *Medicines Australia*. It submitted, however, that the authorisation applicants confuse the authorisation applicants’ conduct, in relation to which authorisation is sought, with PNO’s likely response to that conduct. PNO argued that the Tribunal should assume that the authorisation applicants will seek to engage in collective bargaining, but not that PNO will necessarily take up this opportunity. Instead, in assessing the likely benefits of the conduct, it is relevant to consider, among other factors, PNO’s likely response to that conduct.
3. As to the issue of legal principle, the ACCC adopted a similar approach to PNO (although it differed on the factual assessment of PNO’s likely future response to collective negotiations).
4. In oral submissions during the hearing, the authorisation applicants altered their position from that stated in their written submissions, largely to conform with the approach of PNO and the ACCC. The authorisation applicants submitted that, for the purposes of the statutory assessment, the Tribunal should assume that they would engage in the proposed collective bargaining conduct (ie, they would collectively discuss terms and conditions of Port access and put a collective negotiating position to PNO). However, PNO’s response to that conduct is a factual matter for the Tribunal to assess, not assume, in applying the statutory test.
5. The Tribunal considers that the authorisation applicants may have conceded too much in their oral submissions, although the resolution of the issue does not make a material difference to the outcome of this application.
6. The Tribunal agrees with the applicable principle as stated in *Medicines Australia* that the statutory test requires a comparison of a future in which the conduct, the subject of the authorisation application, occurs with a future in which that conduct does not occur. That comparison is required in order to assess whether the conduct the subject of the authorisation would or would be likely to result in a net public benefit. The statutory test uses a conditional tense (would or would be likely) in which the condition is that the defined conduct is engaged in. As such, the assessment does not require the ACCC (or the Tribunal on review) to form any view about the likelihood of the conduct being engaged in. The statutory requirement can be illustrated by the following example. A company may apply for authorisation in respect of the acquisition of shares in a second company. In applying the statutory test, the ACCC/Tribunal forms an assessment of whether the acquisition, assuming it occurs, would result in a net public benefit. It is irrelevant to the assessment whether a contract has been entered into in respect of the proposed acquisition, or whether the proposed acquisition is hostile and the current owners of the second company have stated that they oppose the acquisition and may be able to prevent the proposed acquisition from occurring. The purpose of the authorisation regime is to exempt the defined conduct from the prohibitions in Pt IV of the Act. The ACCC/Tribunal is empowered to grant that exemption if satisfied that the defined conduct, if it were to be engaged in (the condition), would or would be likely to result in a net public benefit. If the answer is in the affirmative, authorisation can be granted and the applicant is able to engage in the defined conduct without the risk of contravening any provision of Pt IV.
7. In principle, there seems to be no reason why a different approach should be taken in respect of collective bargaining conduct. As defined by the authorisation applicants, the collective bargaining conduct extends to collective negotiation with PNO, and the entering into, and giving effect to, contracts, arrangements or understandings with PNO containing common terms. That is the conduct for which authorisation is sought and in respect of which there is otherwise a risk of contravention of one or more provisions of Pt IV. That is the conduct which forms the condition for the application of the statutory test: whether the conduct would result or be likely to result in a net public benefit.
8. For those reasons, the Tribunal considers that the correct approach is to assess whether the proposed collective bargaining conduct, which includes collective negotiations with PNO and entering into contracts with PNO containing common terms, would result or be likely to result in a net public benefit. In doing so, however, the Tribunal makes no assumptions about the outcome of any such negotiations or contracts. A possible outcome of collective negotiations is a stalemate in which no agreement is reached and no benefits are gained. The statutory test requires the Tribunal to assess whether such collective negotiations, if they were to be engaged in, would or would be likely to result in a net public benefit. That requires the Tribunal to take into account all the surrounding circumstances, including the history of negotiations and commercial dealings between the parties, in order to form an assessment of the likely benefits or detriments of such negotiations, if any.

### The meaning of “likely”

1. PNO submitted that “likely” in the context of s 90(7)(b) should be read to mean “more probable than not”, although it accepted that the Tribunal has consistently taken the view that “likely” refers to a “real chance”: *Howard Smith* at 405; *Re EFTPOS Interchange Fees Agreement* [2004] ACompT 7; ATPR 41-999 at [26]; *Qantas Airways* at [153]**-**[156]; *Re VFF Chicken Meat Growers’ Boycott Authorisation* [2006] ACompT 2; ATPR 42-120 at [83]; and *Medicines Australia* at [109]. PNO submitted, however, that the previously accepted interpretation should not be followed for at least the following reasons:
2. it does not accord with the ordinary meaning of the expression (as confirmed by the Full Court in *Australian Competition and Consumer Commission v Pacific National Pty Ltd* (2020) 277 FCR 49 (***Pacific National***) at [222]);
3. the “real chance” meaning of “likely” comes from decisions interpreting the meaning of the word in the context of other provisions in the Act, which use similar language, but are concerned with a different legal question (namely, the likelihood of harm resulting from a substantial lessening of competition);
4. as observed by the Full Court in *Pacific National* at [223], the reasoning in those cases for rejecting the ordinary meaning of likely, in favour of the “real chance” meaning, involves a conflation between the matter to be proved (“would result”) and the standard of proof (in a civil matter, the balance of probabilities);
5. the balancing test enshrined in s 90(7)(b) suggests an intention that the Tribunal would be weighing something more concrete than a “real chance” of a benefit against a “real chance” of a detriment;
6. as distinct from the Full Court’s decision in *Pacific National* (which concerned the meaning of the word “likely” in s 50), the meaning of “likely” as it appears in the statutory context of s 90 does not appear to have been the subject of previous consideration by the Federal Court; and
7. the decision of the Tribunal in *Howard Smith*, which first adopted the “real chance” construction of the word “likely”, concerned an earlier statutory test for authorisation which did not involve the weighing of benefits and detriments.
8. The authorisation applicants submitted that none of PNO’s arguments withstand scrutiny and PNO’s proposed construction of “likely” should be rejected because it involves a departure from the established interpretation of s 90(7) and its predecessor provisions which has stood for more than 40 years.
9. The Tribunal accepts the authorisation applicants’ submissions and sees no reason to depart from the established interpretation of “likely” in the context of s 90(7). That is for four principal reasons.
10. First, the meaning of the word “likely” as used in many of the prohibitions in Pt IV of the Act has been authoritatively re-affirmed by the Full Federal Court in *Pacific National*. The Full Court (at [245]-[246]) approved the meaning of “real commercial likelihood” as explained by French J in the following passage from *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 (at [348]):

The meaning of “likely” reflecting a “real chance or possibility” does not encompass a mere possibility. ... The assessment of the risk or real chance of a substantial lessening of competition cannot rest upon speculation or theory. To borrow the words of the Tribunal in the *Howard Smith* case, the Court is concerned with “commercial likelihoods relevant to the proposed merger”. The word “likely” has to be applied at a level which is commercially relevant or meaningful as must be the assessment of the substantial lessening of competition under consideration.

1. Second, the Tribunal does not accept PNO’s contention that the context in which the word “likely” is used in s 90(7)(b) (and its predecessor provisions) differs materially from the context in which the word is used in the prohibitions in Pt IV. In the context of the prohibitions in Pt IV, the law is concerned with the likely effect of the impugned conduct on competition. As recently reiterated in *Pacific National*, the legal test requires a comparison between the nature and extent of competition in any relevant market with and without the conduct being engaged in or undertaken (at [103]). In the context of an application for authorisation of particular conduct under Pt VII, the law is concerned with the benefits to the public and the detriments to the public that are likely to result from the proposed conduct. That is expressly the case in respect of the current test as amended by the 2017 Amendment Act, but was also implicitly the case under its predecessor provisions: see *Howard Smith* at 391. The authorisation test requires a comparison between the relevant trading and commercial environment with and without the conduct being engaged in or undertaken, in order to assess whether the conduct is likely to give rise to any public benefits or detriments. The context in which the word “likely” is used in s 90(7)(b) does not require the word to be given the meaning “more probable than not”.
2. Third, there are two contextual reasons why the word “likely” should be given the same meaning in the prohibitions in Pt IV and in the tests for authorisation in Pt VII. The first reason is that the alternative test for authorisation in s 90(7)(a) is the mirror of the prohibitions in Pt IV that depend upon proof that the conduct would have or would be likely to have the effect of substantially lessening competition. The ACCC is empowered to grant authorisation, in effect, if it is satisfied that the proposed conduct would not contravene the relevant prohibition in Pt IV. It follows that the word “likely” in s 90(7)(a) must be construed in the same manner as the underlying prohibition. The second reasons is that there is a close correspondence between the tests for authorisation in s 90(7)(a) and (b) which strongly suggest that the word “likely” should be construed in the same manner in each paragraph. In applying the test under s 90(7)(b), the ACCC (and the Tribunal on review) will usually be concerned to identify and weigh the potential anti-competitive effects of the proposed conduct, as such anti-competitive effects will constitute public detriments. The policy that informs the interpretation of the word “likely” in the prohibitions in Pt IV, to prohibit conduct if there is a real commercial likelihood of the conduct substantially lessening competition, is equally relevant to the application of the authorisation test. It is logically consistent, in the context of determining whether to grant authorisation, to assess whether there is a real commercial likelihood of the conduct harming competition, including the degree of likelihood and the nature and extent of the harm, while weighing those factors against the real commercial likelihood of public benefits.
3. Fourth, and consistently with the view expressed by the Full Court in *Pacific National* (at [243]), the word “likely” in the context of the tests for authorisation has been construed to mean a likelihood that is less than probable for 40 years (from *Howard Smith*) and there is no evidence of widespread inconvenience in the application of the law. Indeed, the law has been amended on numerous occasions, including most recently by the 2017 Amendment Act, without any suggestion that the legal standard should be changed.
4. As a final observation, it necessarily follows that the word “likely” should be given the same meaning in paragraphs (i) and (ii) of s 90(7)(b). In other words, the statutory test requires the ACCC (and the Tribunal on review) to assess whether there is a real commercial likelihood of the conduct resulting in public benefits and in public detriments and to determine whether the anticipated public benefits outweigh the anticipated public detriments. In weighing the benefits and detriments, the decision maker must, as a matter of rationality, take into account not only the nature and extent of the anticipated benefits and detriments to the public but also the degree of likelihood of the anticipated benefits and detriments resulting from the conduct. In some cases, it may be necessary to weigh a large benefit that has a low likelihood of resulting from the conduct with a small detriment that has a high likelihood of resulting from the conduct and *vice versa*.

# C. CONTENTIONS OF THE PARTIES

1. Although PNO is the applicant for review of the ACCC Determination, as the Tribunal is conducting a *de novo* review it is convenient to refer to the contentions of the authorisation applicants in favour of authorisation before considering the contentions of PNO opposing authorisation.

## The authorisation applicants’ contentions

1. The authorisation applicants contend that the proposed collective bargaining conduct would be likely to result in two categories of public benefits.
2. The first category of public benefit was described as facilitating “more economically efficient contracts”. By way of explanation of that phrase, the authorisation applicants referred to an article authored by Prof Stephen King: “Collective Bargaining in Business: Economic and Legal Implications” (2013) UNSW Law Journal 36(1) 107. Prof King’s article is referred to in the expert reports of both Dr Smith and Mr Houston. The parties’ contentions generally adopted Prof King’s categories of potential benefits and detriments of collective bargaining. In that article, Prof King outlined the Australian law on collective bargaining authorisation and notification, developed an economic framework to analyse collective bargaining, against which the ACCC’s approach at the time was compared and contrasted, and described the economic literature concerning transaction costs and contracting.
3. Prof King concluded with the following summary of the ways in which collective bargaining can enhance economic efficiency (at p 119):

1. Authorisation permits bargaining group members to share the costs of negotiation… By sharing negotiation and contracting costs between group members, the collective bargaining group helps parties to negotiate past inefficient take-it-or-leave-it contracts in order to design more complex, mutually beneficial contracts that have fewer economic imperfections. The gains created by more efficient bargaining arise from the economies of scale in negotiations and can be shared by both the collective bargaining group and the counterparty. In other words, both sides to the negotiations can become better off if collective bargaining occurs.

2. Collective bargaining can change the incentives in the contracting process in ways that enhance the ability of parties to undertake non-contractible investments that increase economic surplus. We discussed two channels for this improvement. First, collective bargaining can make delegation desirable where delegation to the group overcomes issues of individual incentives. Second, collective bargaining may alter bargaining power and this can alter incentives to engage in non-contractible investments.

1. In the article, Prof King observed that while increases in bargaining power from collective bargaining may change the incentives for parties to invest in ways that raise the gains from bargaining (and improve economic efficiency), changes in bargaining power may simply change the distribution of the surplus generated from bargaining (which does not affect economic efficiency). Prof King also commented that while collective bargaining can improve the efficiency of contracts in one market, it can also assist the participants to anti-competitively coordinate their behaviour in a functionally separate market, including by means of the information exchanged as part of the collective bargaining.
2. The authorisation applicants’ contentions were exclusively directed to the Producer Pricing Deed which, as noted earlier (and is discussed further below), has been offered by PNO to all coal producers as common terms governing the navigation service and wharfage charges. The authorisation applicants contend that the Producer Pricing Deed in its present form contains inefficient terms. The Producer Pricing Deed contemplates that PNO will separately meet at least twice annually, throughout the 10-year term, with each and every coal producer who has entered into a Deed in relation to issues which are common to all coal producers, including capital expenditures at the Port and price increases. In addition, the Deed contemplates that price increase disputes can only be resolved through a multiplicity of confidential bilateral negotiations, mediations and arbitrations with each and every coal producer, notwithstanding that the dispute will be common to all coal producers and the resolution of any pricing dispute under one of the Deeds (including as a result of arbitration) can only be implemented under the “non-discriminatory pricing” clause if it is applied across all Deeds. The terms of the Producer Pricing Deed, if agreed, would impose inefficient transaction costs on all parties.
3. The authorisation applicants further contend that the proposed collective bargaining conduct will also help to address the imbalance of bargaining power that exists between PNO and individual coal producers. They argued that the imbalance of bargaining power arises from the fact that the Port is a bottleneck facility and PNO, as operator of the Port, is a monopoly service provider where the coal producers have no practical alternative to the Port for the export of their coal. They argued that the imbalance in bargaining power has resulted in the Producer Pricing Deed containing inefficient terms, including the likelihood that the Port charges under the Deed during the 10-year term will exceed efficient prices. They also argued that the price rise methodology in the Deed creates substantial future pricing uncertainty for all parties. Further, the very high transaction cost of price increase disputes under the Deed (including bilateral arbitration) is likely to operate as a substantial disincentive for individual coal producers to dispute PNO’s price increases.
4. The second category of public benefit is a likely reduction in transaction costs of negotiating the terms of the Producer Pricing Deed. In that regard, the authorisation applicants argued that there are normal transaction costs for each coal producer of preparing for and engaging in negotiations and that those costs would likely be less if costs were pooled and shared in collective bargaining. Likewise, there would be significant transaction costs savings for PNO as collective bargaining will allow PNO to deal with the group rather than negotiating with each coal producer individually. Such cost savings generate productive efficiencies. The authorisation applicants argued that the transaction costs of coordination within the bargaining group are likely to be small because the Producer Pricing Deed raises largely common issues for all coal producers.
5. The authorisation applicants contend that the proposed collective bargaining conduct would not be likely to result in any public detriments. They argued that the conduct gives rise to no material risk of collusive conduct between coal producers because the collective bargaining is limited in scope: it relates to PNO’s publicly available Producer Pricing Deed and authorisation is not sought to share competitively sensitive information that relates to customers, marketing strategies or volume or capacity projections. Nor will the conduct marginalise the individual interests and preferences of coal producers: participation in collective bargaining is voluntary and the Producer Pricing Deed has been proffered by PNO to all coal producers in a standard form.

## PNO’s contentions

1. In relation to the first claimed public benefit, more efficient contracting, PNO contends that the evidence does not support the claims made by the authorisation applicants.
2. PNO contends that the fact that PNO operates a bottleneck facility does not mean that it has unfettered market power and the true relationship between PNO and coal producers is one of mutual dependence. A variety of commercial, regulatory and economic factors are likely to constrain PNO’s market power across the medium term including that:
3. coal vessels currently provide the majority of the Port’s revenue;
4. the Port is not capacity constrained and PNO does not have an incentive to set prices in a way that reduces coal production and exports;
5. coal exported through the Port competes against coal from several other countries in a competitive, international market in which coal producers are price takers;
6. for the next ten years, PNO is also constrained in its ability to increase prices by the deeds it has entered with vessel agents; and
7. PNO is also constrained by the threat of declaration under Pt IIIA of the Act.
8. PNO also contends that there is no evidence as to how the proposed collective bargaining conduct would be likely to result in better outcomes for coal producers. PNO is not compelled to participate in collective bargaining, but even if PNO were to participate, there is no basis to consider that the navigation service and wharfage charges would be set at a different level given that PNO is already constrained in the prices it has set.
9. PNO further contends that, even if the proposed collective bargaining conduct resulted in better outcomes for coal producers, there is no evidence to support a conclusion that that would generate a public benefit (in the form of an improvement in economic efficiency) as opposed to a private benefit (in the form of a transfer of surplus from PNO to the coal producers). In particular, PNO contends that there is no evidence to support a conclusion that the conduct would be likely to promote more certain investment conditions in the Hunter Valley and lead to improvements in efficiency and competition in the coal export market and other dependent markets.
10. In relation to the second claimed public benefit, transaction costs savings, PNO contends that the claimed benefit is both incomplete and theoretical. It is incomplete in the sense that it ignores new transaction costs which would not need to be incurred in the absence of collective bargaining, specifically the costs of coordination within the bargaining group. It is theoretical in the sense that the authorisation applicants have made no attempt to quantify or estimate the savings or their significance.
11. PNO contends that there are two categories of public detriments likely to arise from the proposed collective bargaining conduct.
12. First, collective bargaining by coal producers in respect of Port services increases the risk of collusive conduct between coal producers in respect of the acquisition or supply of other goods or services.
13. Second, collective bargaining, which requires the group to reach a collective position on contractual issues, increases the risk that the collective position will reflect the interests and preferences of those members of the group with the loudest voice or deepest pockets, at the expense of the interests and preferences of other, less influential members. PNO contends that the coal producers have different concerns or, at least, prioritise concerns differently. The differences may arise from matters such as differences between coal producers’ size, mine life or operational complexity. PNO contends that the risk in a collective negotiation framework is that no agreement will be reached unless everyone’s concerns can be addressed, or at least not until the concerns of the largest, most influential, members of the negotiating group have been satisfactorily addressed. This may mean that some individual coal producers will not sign a contract even though their own concerns have been satisfactorily addressed, which has the potential for inefficiency.

# D. EVIDENCE AND MATERIAL BEFORE THE TRIBUNAL

## Overview

1. The evidence and material before the Tribunal comprised the following:
2. all of the material that was before the ACCC in making its decision including the original application filed by the authorisation applicants and subsequent submissions, as well as submissions made by other persons;
3. the ACCC’s draft and final determinations;
4. affidavits filed on behalf of PNO comprising industry evidence given by Mr Simon Byrnes, Ms Gabriella Sainsbury and Mr Bruce Lloyd and expert economic evidence given by Mr Greg Houston;
5. affidavits filed on behalf of the authorisation applicants comprising industry evidence given by Mr Michael Dodd, Mr Keiron Rochester, Mr Brett Lewis and Mr Dave Poddar and expert economic evidence given by Mr Euan Morton;
6. expert evidence given by Dr Rhonda Smith which was adduced by the ACCC for the assistance of the Tribunal;
7. the Joint Expert Report dated 29 September 2021 prepared by the economic experts following their conferral (the **Joint Report**);
8. a number of additional documents including particularly PNO’s Producer Pricing Deed and Vessel Agent Pro Forma Long Term Pricing Deed (**Vessel Agent Pricing Deed**) and the Whitehaven Annual Reports for 2020 and 2021; and
9. a submission, with supporting documents, from the Port Authority of NSW.
10. With respect to the material that was before the ACCC in making its decision, the Tribunal was taken to parts of the original application and subsequent submissions filed by the authorisation applicants, but not to any part of the submissions filed by other persons. In those circumstances, and in light of the new evidence filed in this proceeding, it has not been necessary for the Tribunal to refer to the submissions filed with the ACCC by other persons.

## PNO’s witnesses

1. Mr Byrnes affirmed four affidavits, dated 15 March 2021, 25 June 2021, 30 July 2021 and 10 October 2021 respectively. Mr Byrnes is the Chief Commercial Officer and General Counsel for PNO, a role that he has held since April 2019. As General Counsel, Mr Byrnes leads PNO’s legal services division. He is also responsible for overseeing the commercial, property, environment, business intelligence, planning, corporate governance, company secretarial and compliance management functions of PNO. Together with the Chief Financial Officer, Mr Nick Livesey, and the Deputy General Counsel, Ms Sainsbury, he is responsible for leading PNO’s pricing strategy and commercial negotiations from a legal perspective, and was authorised to represent PNO in the course of its dealings with coal producers generally (including in the specific dealings in the period November 2019 to April 2020). Mr Byrnes principally gave evidence about:
2. the relevant charges levied by PNO at the Port, and the relative significance of those charges to coal producers, by reference to recent trends in the coal export market and the volume of coal exported through the Port;
3. vessel movements and the total capacity of the shipping channel at the Port;
4. forecasted coal export volumes through the Port for the period of collective bargaining authorisation to 2030-31;
5. the possible development of a container terminal by PNO at the Port; and
6. negotiations between PNO and coal producers from around November 2019 to 2 April 2020 in respect of proposed long term pricing arrangements for the navigation service and wharfage charges at the Port.
7. Mr Byrnes was cross-examined. There was no challenge to his credit and the Tribunal accepts his evidence as to matters of fact, but matters of opinion are discussed below.
8. Ms Sainsbury affirmed an affidavit dated 15 March 2021. Ms Sainsbury is the Deputy General Counsel and Assistant Company Secretary for PNO. She has worked at PNO since April 2018 and has held her current role as Deputy General Counsel and Assistant Company Secretary at PNO since 1 July 2019. Together with Mr Byrnes, Ms Sainsbury has been responsible for leading PNO’s pricing strategy from a legal perspective. Ms Sainsbury gave evidence about relevant charges and open access arrangements at the Port, and the Vessel Agent Pricing Deeds that have been entered into with ships’ agents representing the operators of coal vessels that use the Port. Ms Sainsbury was not cross-examined.
9. Mr Lloyd affirmed an affidavit dated 15 March 2021. Mr Lloyd is a partner at Clayton Utz, the solicitors for PNO. Mr Lloyd gave evidence of the legal background and history to the present application, including the first declaration of the Port in May 2016, the revocation of that declaration in September 2019, and NSWMC’s application for declaration in July 2020. Mr Lloyd was not cross-examined.
10. Mr Houston prepared an expert report for PNO dated 30 July 2021. Mr Houston holds a BSc(Hons) in Economics, a University of Canterbury post-graduate degree, which he was awarded with first class honours in 1983. He is a founding partner of the economic consulting firm HoustonKemp. He has over thirty years’ experience in the economic analysis of markets and the provision of expert advice and testimony in litigation, business strategy and policy contexts. Mr Houston has filed expert reports and/or given expert evidence on numerous occasions before arbitrators, appeal panels, regulators, the Federal Court of Australia, the Competition Tribunal, the Fair Work Commission, state Supreme Courts, the High Court of New Zealand and other judicial or adjudicatory bodies. Mr Houston was instructed by PNO’s solicitors to review and respond to the 25 June 2021 report of Mr Morton prepared for NSWMC, and the 22 April 2021 report of Dr Smith, prepared for the ACCC. He concludes from his review of these reports that the nature and extent of public benefits and detriments that can be expected to arise from the proposed collective bargaining conduct can be synthesised into three types of economic effect, which he addresses in turn:
11. the potential for more efficient outcomes in primary and/or any dependent markets, or “efficiency effects”;
12. the implications for the cost of negotiating and transacting for port access services, or “transactions costs effects”; and
13. the potential for collusive conduct to cause detriment to outcomes in primary and/or any dependent markets, or “countervailing detriments”.
14. In accordance with directions of the Tribunal dated 14 September 2021, Mr Houston participated in an initial conclave with Dr Smith and Mr Morton, following which the three experts prepared the Joint Report.

## The authorisation applicants’ witnesses

1. Mr Dodd affirmed an affidavit dated 6 May 2021. Mr Dodd is the General Manager of Infrastructure at Yancoal, a member of NSWMC. Yancoal is an Australian coal producer producing a mix of premium thermal, semi-soft coking and PCI coals for export. Yancoal’s New South Wales mines include Moolarben, Hunter Valley Operations, Mount Thorley Warkworth, Stratford-Duralie and Ashton, Austar and Donaldson. Coal from these mines is exported solely through the Port. Mr Dodd gave evidence about Yancoal’s business, charges at the Port, and discussions with PNO in relation to the Port charges. Mr Dodd was cross-examined. There was no challenge to his credit and the Tribunal accepts his evidence as to matters of fact, but matters of opinion are discussed below.
2. Mr Rochester affirmed an affidavit dated 30 June 2021. Mr Rochester is the General Manager of Whitehaven, a member of NSWMC. Whitehaven currently operates four coal mines in the Gunnedah Coal Basin in north-west New South Wales, exporting metallurgical and thermal coal through the Port. Mr Rochester gave evidence about Whitehaven’s business, charges at the Port, and discussions with PNO in relation to the Port charges. Mr Rochester was not required for cross-examination but, as discussed below, senior counsel led some additional evidence from Mr Rochester in chief that resulted in some further questions in cross-examination and from the Tribunal. There was no challenge to Mr Rochester’s credit and the Tribunal accepts his evidence as to matters of fact, but matters of opinion are discussed below.
3. Mr Lewis swore an affidavit dated 30 April 2021. Mr Lewis is the Managing Director and Chief Executive Officer of the Bloomfield Group. Its subsidiary, Bloomfield Collieries, is a member of NSWMC. Bloomfield Collieries operates two coal mines within the Hunter Valley. The Bloomfield Mine is located approximately 20 kms north-west of Newcastle and the Rix's Creek Mine is located 5 kms north-west of Singleton. Bloomfield Collieries exports 100% of its coal through the Port. Mr Lewis gave evidence about Bloomfield Collieries’ business, charges at the Port, and Bloomfield Collieries’ discussions with PNO in relation to Port charges. Mr Lewis was cross-examined. There was no challenge to his credit and the Tribunal accepts his evidence as to matters of fact, but matters of opinion are discussed below.
4. Mr Poddar affirmed three affidavits dated 25 June 2021, 29 July 2021 and 13 October 2021. Mr Poddar is a partner at Clifford Chance, the solicitors for NSWMC. Mr Poddar adduced in evidence public statements made by PNO in relation to its plans for the development of the Port, in particular the development of a container terminal. He also gave evidence about the economic contribution that coal mining makes to the Hunter Valley region (and Australia more generally). Mr Poddar was not cross-examined.
5. Mr Morton prepared an expert report for NSWMC dated 25 June 2021. Mr Morton holds bachelor degrees in Commerce, Law (Honours) and Economics (First Class Honours). He was admitted as a Solicitor to the Supreme Court of Queensland in 1991. Mr Morton has been a Principal of Synergies Economic Consulting (**Synergies**) since 2004. In his role as Principal of Synergies, he advises on a range of economic issues relating to infrastructure and economic policy. Mr Morton was instructed to provide a report on:
6. his view of the report prepared by Dr Smith, particularly in relation to the types of public benefits and public detriments that may be expected to accrue from collective bargaining arrangements; and
7. his view of how PNO may be expected to act in setting prices and negotiating access, given its economic circumstances and incentives.
8. As stated above, Mr Morton also participated in the initial expert conclave and contributed to the preparation of the Joint Report.

## The ACCC’s witness

1. Dr Smith prepared an expert report for the ACCC dated 22 April 2021. Dr Smith holds the degrees of B.Com (Hons), University of Melbourne (1967), MA, Economics, University of Melbourne (1969) and D. Com, Economics, University of Melbourne (2007). She is a Senior Lecturer in the Economics Department and a Senior Fellow in the Law School at the University of Melbourne. From November 1995 to November 1998, Dr Smith was a Commissioner with the ACCC. Dr Smith has published extensively in the area of industrial economics and competition law and regulation and has appeared as an expert witness in a number of competition law cases. Dr Smith was asked to prepare an independent expert report providing her opinion in answer to the following questions:
2. the market(s) relevant to a consideration of the authorisation application;
3. the economic principles, if any, relevant to the identification of public benefits (including when a benefit is “private” rather than “public” and when a benefit is both private and public);
4. the economic principles that apply in relation to collective bargaining conduct generally and, applying those principles, the public benefits and public detriments, if any, that would result or be likely to result from collective bargaining conduct generally;
5. applying the principles identified in (b) and (c), the public benefits, if any, that would result or be likely to result from the proposed collective bargaining conduct, and their magnitude; and
6. the likely harm from the proposed collective bargaining conduct.
7. Dr Smith also participated in the initial expert conclave and contributed to the preparation of the Joint Report.

# E. FINDINGS OF FACT

## Introduction

1. It is uncontroversial that the Port is a bottleneck facility, meaning, in practical terms, that the Port facilities, including particularly the shipping channel and berthing services, are necessary for the export of coal from the Hunter Valley. Coal producers in the Hunter Valley have no practicable alternative to the Port for the export of their coal. It is equally uncontroversial that, at present, coal exports represent a very substantial share of the Port’s throughput and revenues. The Port’s 2020 Trade Report discloses that 80% of ship visits to the Port in calendar year 2020 were visits by coal ships and 96% of total trade through the Port in calendar year 2020 related to coal from which PNO derives more than 70% of its revenues.
2. Since the privatisation of the Port in 2014, the charges levied by PNO for Port services have increased substantially, particularly the navigation service charge which is payable in respect of the shipping channel service. NSWMC and its Hunter Valley coal producer members, and in particular Glencore Coal, have objected to the increases and have sought to have the shipping channel and berthing services at the Port declared under Pt IIIA of the Act which would enable compulsory arbitration of the charges in accordance with the provisions of Pt IIIA. Those services were initially declared by a differently constituted Tribunal in June 2016: see *Re Glencore Coal Pty Ltd* [2016] ACompT 6 (***Re Glencore Coal***) and *Re Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7; 309 FLR 358 (***Re Glencore Coal No 2***). Following the declaration, Glencore Coal sought and obtained an arbitrated determination of the charges for those services at the Port (being the navigation service and wharfage charges). Following amendments to the statutory declaration criteria made by the 2017 Amendment Act, the declaration was revoked in 2019. NSWMC made another application for declaration on 23 July 2020. That application was refused by the Minister, and the Minister’s decision was subsequently affirmed by a differently constituted Tribunal on 4 August 2021: see *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4; 361 FLR 24 (***NSWMC No 3***).
3. The application for authorisation of the proposed collective bargaining conduct has been made in circumstances where the charges levied by PNO for Port services, particularly the navigation service and wharfage charges, are not subject to compulsory arbitration under Pt IIIA or other form of price regulation. The one exception is in respect of the Glencore Coal arbitration determination – the navigation service and wharfage charges determined in that arbitration govern the commercial dealings between PNO and Glencore Coal, but are not applicable to other Port users. As noted below, Port charges are subject to price monitoring under Pt 6 of the PAMA Act, but that does not extend to price regulation. In their application to the ACCC for authorisation, the authorisation applicants submitted that they “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. Thus, in assessing the application for authorisation, it is necessary to have regard to the history of Port charges since privatisation and the dealings between PNO and Port users in that period. The relevant background facts were the subject of evidence in this proceeding and are largely uncontroversial. The background facts were also recently recounted in the Tribunal’s decision in *NSWMC No 3*, in which the Tribunal affirmed the Treasurer’s decision not to declare the shipping channel and berthing services under Pt IIIA. Those background facts have been supplemented in this proceeding with more detailed evidence concerning: the volume of coal exported through the Port over time and current forecasts of volumes into the future; the export price of coal over time and current forecasts of price into the future; PNO’s intentions with respect to the development of the Port, including particularly the development of container facilities; and the history of negotiations between the Port and coal producers with respect to Port charges.

## The Port and the Hunter Valley coal industry

1. Until May 2014, the Port was operated by the State of NSW. The Port was privatised in May 2014 by the grant of a 98 year lease to the joint venture parents of PNO, The Infrastructure Fund managed by Hastings Funds Management and China Merchants Group. The transaction generated gross proceeds of some $1.75 billion to the State of NSW. PNO operates the Port under a 98-year sublease. As the operator of the Port, PNO controls the terms and conditions of access to the Port including, relevantly, the shipping channels and berthing facilities required for the export of coal from the Port. In calendar year 2020, PNO earned total revenues of approximately $115 million of which the navigation service charge accounted for approximately $86.4 million and the wharfage charge accounted for approximately $21.8 million (being in aggregate some 96.4% of its revenues). Total revenues were largely unchanged from calendar year 2019.
2. There are more than 35 operating coal mines operated by 11 coal producers that export coal through the Port, with other coal projects in various stages of exploration and development. The coal producers exporting through the Port are:
3. Glencore Coal, which is New South Wales’ largest coal producer and operates several mines and mining complexes across the Newcastle, Hunter Valley and Western Coalfields;
4. BHP (through its subsidiary Hunter Valley Energy Coal Pty Ltd), which operates the Mt Arthur complex, the largest mine in the Hunter Valley, located near Muswellbrook;
5. Peabody Energy, which operates the Wambo mine in the Hunter Valley and the Wilpinjong mines in the Western Coalfield;
6. Yancoal, which operates several mines in the Hunter Valley, Newcastle and Western Coalfields;
7. Whitehaven, which operates several mines in the Gunnedah Basin;
8. MACH Energy, which operates the Mt Pleasant mine in the Hunter Valley;
9. New Hope Group (through its subsidiary Bengalla Mining Company Pty Ltd), which operates the Bengalla Mine in the Hunter Valley;
10. Bloomfield Collieries, which operates two open cut coal mines in the Hunter Valley: Bloomfield at East Maitland and Rix's Creek at Singleton;
11. Centennial, which operates the Mandalong, Myuna and Newstan mines in the Newcastle coalfield;
12. Idemitsu, which owns the Boggabri mine in the Gunnedah Basin and the Muswellbrook mine in the Hunter Valley; and
13. Delta Coal, which owns the Chain Valley mine approximately 60km south of Newcastle and directly adjacent to the Vales Point Power Station.
14. Other coal projects that may export coal through the Port in the future include Malabar’s Spur Hill and Maxwell projects.
15. There are different grades of coal that are mined in, and exported from, Australia. These include:
16. thermal coal (or steaming coal), which is primarily used as an energy source for electricity generation and, to a lesser extent, as an ingredient in cement; and
17. metallurgical coal, which is used to produce high grade coking coal and is an essential ingredient in the steelmaking industry.
18. Metallurgical coal can be divided into three further sub-categories according to the quality grade of the coal, being hard coking coal, semi-soft coking coal and pulverised coal injection (**PCI**) coal.
19. The majority of coal exported through the Port, and produced in the Hunter Valley, is thermal coal, followed by some semi-soft coking coal and some PCI coal. For the 2020 calendar year, approximately 158 million tonnes (**Mt**) of coal was exported through the Port comprising 131 Mt of thermal coal and 27 Mt of semi-soft coking and PCI coal combined.
20. In February 2020, Lawrence Consulting prepared a report for NSWMC titled “NSW Mining Industry Expenditure Impact Survey 2018/19”. That report stated that, in the 2019 financial year, the Hunter Valley mining sector directly supported 3,282 businesses, directly employed 13,347 people, paid $1.4 billion in wages and salaries and directly spent $4.0 billion on goods and services. In total, about 19.1% of the Hunter Region’s workforce was supported by mining.
21. Many of the coal producers in the Hunter Valley are large multinational companies and conduct Australian coal mining operations that, in financial terms, are far larger than the Port of Newcastle. By way of illustration:
22. BHP Group’s revenues from its New South Wales Energy Coal operations were US$972 million for the year ended 30 June 2020;
23. Centennial’s sales revenues from its total operations in Australia were A$1.107 billion for the year ended 31 December 2019;
24. Glencore plc’s revenues from its thermal coal operations in Australia were US$4.031 billion for the year ended 31 December 2020, with 66.7 Mt of thermal coal produced in Australia during that period;
25. Peabody Energy Corporation sold 19 Mt of thermal coal from Australian mines in the year ended 31 December 2020;
26. Whitehaven’s revenues for thermal coal production were around $1.402 billion for the year ended 30 June 2020; and
27. Yancoal’s total ex-mine revenues for thermal coal production were $2.535 billion for the year ended 31 December 2020.

## Coal demand, supply and prices

1. PNO maintains records of the total volume of coal exported through the Port by coal type (thermal coal or semi-soft coking coal) in each calendar year from 1997 to 2020, which are confidential to PNO. As noted earlier, approximately 158 Mt of coal was exported through the Port in the 2020 calendar year (**CY**). In his evidence and by reference to those records, Mr Byrnes commented that the volume of coal exported through the Port year-on-year very substantially increased in the period from the mid-1990s until 2019 (by almost 300%). During the period CY2014 to CY2015 (during which the increase to the navigation service charge was announced and implemented by PNO), and thereafter, total coal exports through the Port remained at high levels compared to the historical annual coal export volumes. The volume of coal exported through the Port reached a record high of approximately 165 Mt in CY2019.
2. Mr Byrnes also produced a graph which plotted the world coal price on the same graph as the volume of coal exports from the Port in the period CY2006 to CY2020. Mr Byrnes commented that the graph showed that the world coal price does not correlate to volumes exported through the Port. The Tribunal does not accept that Mr Byrnes’ graph negates a correlation between export coal prices and the volume of coal exports, and it would be economically surprising if there were no correlation. In the long run, export coal prices would be expected to drive coal production volumes. Indeed, Mr Byrnes graph shows that a very substantial increase in coal export volumes occurred during periods of high export prices, and the rate of increase in coal production volumes declined (to zero) during a subsequent period of declining export prices.
3. PNO retains Kpler, a leading data analytics service provider which reports data and analytics for various global commodity markets, to provide periodic reports which track export and production trends with respect to world coal markets, including tracking sources of demand from time to time. Based on Kpler’s reports, Mr Byrnes commented that the increase in demand for Australian coal from 2010 onwards was largely as a result of the very significant increase in electricity generation and steel making requirements in China and, to a lesser extent, India, Korea and Japan. According to the Reserve Bank of Australia, China is by far the largest global consumer of thermal coal, accounting for nearly half of annual global consumption, and driving most of the growth in production in recent decades. Thermal coal exports to China have increased rapidly over the past decade, from less than 2% of Australian thermal coal exports in 2008, to around 25% as at 2019. Sustained economic growth over recent decades in India and other Asian economies has also contributed to increased global thermal coal consumption. From around September 2020, there has been a very substantial decline in coal exported through the Port to China. However, exports of coal through the Port to other countries, such as India, have increased substantially.
4. Mr Byrnes also commented that global coal prices (including the benchmark Newcastle thermal coal spot price) are unpredictable and fluctuate on a daily basis and routinely by more than 1%. During the past five years, global thermal coal prices have ranged between approximately US$49 and US$119 per metric tonne and, as at February 2021, were around US$86.7. In his fourth affidavit dated 10 October 2021, Mr Byrnes noted that the Newcastle thermal coal spot price had increased to around A$257.69 on that date (using publicly available data from the World Bank). Mr Poddar’s fourth affidavit exhibited the underlying World Bank data which showed that the coal price had reached a low of US$50.14 in August 2020 and had thereafter increased each month, surging from mid-2021 and reaching US$185.69 in September 2021 (all prices expressed in nominal US dollars). Mr Poddar also reproduced the World Bank forecast (as at 20 April 2021) for Newcastle thermal coal spot prices out to 2035, which were (in nominal US dollars) US$70.6 (2025), US$62.3 (2030) and US$55.0 (2035).
5. PNO also retains Wood Mackenzie, a global commodities research and consultancy business, to provide historical data, and projected forecasts, for domestic and global coal export and production trends. In around January 2021, Wood Mackenzie prepared for PNO a confidential report titled “Scenario Development and Planning” which included forecasts for Port coal throughput and global thermal and metallurgical coal demand to 2035. Wood Mackenzie’s forecast was that thermal coal exported from the Port would increase to a peak of approximately 190 Mt in 2028 and decline to approximately 170 Mt by 2035. The report also commented that on average, the Port’s catchment mines (for thermal coal) have lower production costs than other suppliers which means that, as additional production becomes available, it pushes out other, higher cost production from the seaborne market. Mr Byrnes also gave confidential evidence about PNO’s commercial dealings with the operators of coal terminals at the Port. The evidence supports a conclusion that the operators of coal terminals do not anticipate a decline in coal exports through the Port in the medium term.

## Port capacity and development

1. Under the terms of its lease, PNO is required to prepare a development plan to assist the State, Government agencies, and the local community to understand its intentions in relation to the development of the Port. PNO's current development plan (**Port Master Plan 2040**) was published in 2018 and is available on PNO's website.
2. The Port Master Plan 2040 states (at page 30) that the shipping channel at the Port can accommodate the safe movement of over 10,000 vessels per annum, and that, as at 2018, the shipping channel was operating at less than 50% of its capacity. The Port Master Plan 2040 lists (at page 29) a number of constraints which can limit the size of vessels entering and departing the Port, including:
3. under-keel clearance (distance between the lowest point of the ship’s hull and the channel bottom);
4. channel clearance (distance from ship’s hull to channel boundary); and
5. channel geometry.
6. PNO also publishes annual trade reports on its website which include statistics on ship visits at the Port, coal export destinations and volumes, and the financial performance of the Port. PNO's most recent annual trade report (the 2020 Trade Report) states (at page 2) that:
7. 2,205 ship visits were made at the Port in the calendar year 2020, of which 1,754 (around 80%) were visits by coal ships (with one vessel “visit” comprising approximately two vessel “movements”, being one movement in and one movement out of the Port); and
8. 96% of total trade through the Port in the calendar year 2020 related to coal (from which PNO derives more than 70% of its revenues).
9. PNO has made a number of public statements about its intention to develop a dedicated, high volume container terminal, known as the Multi-purpose Deepwater Terminal (**MDT**), at the Port. In evidence were many public statements made during 2021 about PNO’s plans to proceed with the development, recognising the commercial opportunity to attract cargo container traffic through the Port and to diversify the Port’s revenue streams (and high reliance on export coal trade).
10. However, PNO has also publicly stated that it cannot proceed with the MDT until the obligations imposed on it under a Port Commitment Deed entered into with the State of NSW at the time of privatisation are removed. Mr Byrnes gave evidence that, in May 2013, in connection with the privatisation of Port Kembla and Port Botany, the State of NSW entered into agreements, known as Port Commitment Deeds, with the incoming operator of Port Kembla and Port Botany, NSW Ports Operations Hold Co Pty Limited (and two of its subsidiaries) (together, **NSW Ports**) for a term of 50 years. The Port Botany and Port Kembla Port Commitment Deeds oblige the State of NSW to compensate NSW Ports for containers diverted from Port Botany or Port Kembla to a container terminal at the Port of Newcastle (if one exists) above a specified threshold amount (which the capacity of the MDT substantially exceeds). Separately, in connection with the privatisation of the Port of Newcastle, the State of NSW and PNO entered into a corresponding Port Commitment Deed that requires PNO to reimburse the State of NSW for any compensation paid under the Port Botany and Port Kembla Port Commitment Deeds to NSW Ports in respect of container traffic at the Port of Newcastle.
11. The ACCC has brought proceedings in the Federal Court against NSW Ports alleging that the Port Commitment Deeds contravene s 45 of the Act and are therefore unenforceable. On 29 July 2021, the Federal Court dismissed the proceedings: *Australian Competition and Consumer Commission v NSW Ports Operations Hold Co Pty Ltd* [2021] FCA 720. The ACCC has appealed against that decision, with the appeal yet to be heard and determined.
12. Mr Byrnes said that, if the obligations in the Port Commitment Deeds were to be removed, it would take PNO four to five years to construct the MDT. Mr Byrnes said that, at present (given the existence of the Port Commitment Deeds), PNO does not have a funding plan for the development of the MDT and PNO’s five-year capital expenditure forecast as at March 2021 does not include provision for capital expenditure on any future channel improvements or future berths related to the MDT.
13. The evidence before the Tribunal indicates that the development of the MDT is an important part of PNO’s future business plans and that PNO has been actively seeking to progress that development. At the same time, there is some uncertainty around the project by reason of the Port Commitment Deeds. In this determination, the Tribunal takes into consideration the prospect that the MDT will proceed despite the Port Commitment Deeds.

## Port charges

1. As the port operator in respect of the Port, PNO is empowered under Pt 5 of the PAMA Act to fix and levy three types of charges on the users of Port services:
2. the navigation service charge, which is payable in respect of general use by a vessel of the Port and its infrastructure, and is paid by the owner of the vessel (as defined in s 48 of the PAMA Act) on each entry by the vessel into the Port calculated by reference to the gross tonnage of the vessel (ss 50 and 51 of the PAMA Act);
3. the wharfage charge, which is payable in respect of the availability of a site at which stevedoring operations may be carried out, and is paid by the owner of the cargo at the time immediately before it is loaded or immediately after it is unloaded at the site by reference to the quantity of cargo loaded or unloaded (s 61 of the PAMA Act); and
4. the site occupation charge, which is payable by occupiers of land-side facilities such as stevedoring at terminals (s 60 of the PAMA Act).
5. The two charges that are most relevant to this proceeding are the navigation service charge and the wharfage charge. As noted above, PNO levies the navigation service charge on the vessel owner. As the vast majority of coal exported through the Port is sold on a “free on board” (**FOB**) basis with the coal buyer arranging shipping from the Port, the navigation service charge is a cost borne in the first instance by the coal buyer (as part of the shipping costs) rather than the coal producer. However, the Tribunal accepts that the navigation service charge will indirectly affect the price for coal received by the coal producers because that price is derived from international coal prices and the costs of shipment from Newcastle. In contrast, the wharfage charge is levied on coal producers directly.
6. Section 67 of the PAMA Act empowers PNO, as the port operator in respect of the Port, to enter into an agreement with a person otherwise liable to pay a charge under Pt 5 of the PAMA Act in respect of such charges. It provides as follows:

**67 Agreements in respect of charges**

(1) The relevant port authority may enter into an agreement with a person liable to pay any kind of charge under this Part.

(2) Such an agreement may make provision for or with respect to—

(a) fixing the amount of any charge payable by the person to the relevant port authority, and

(b) any other matter which the relevant port authority is permitted by or under this Part to determine in respect of the charge, and

(c) any right or privilege which by or under this Part accrues to the person liable to pay the charge, or which the relevant port authority may confer on the person.

(3) To the extent that provision is so made, the agreement displaces any determinations of the relevant port authority in relation to the charge or to the matter, right or privilege concerned.

1. Part 6 of the PAMA Act establishes a price monitoring scheme in respect of charges imposed at various ports in NSW including the Port. Section 77 states the objective of the scheme:

The objective of the price monitoring scheme established by this Part (the *scheme objective)* is to promote the economically efficient operation of, use of and investment in major port facilities in the State by monitoring the prices port operators charge users of those facilities, so as to promote a competitive commercial environment in port operations.

1. By s 79, PNO is required to publish, on its website, a list of the Port charges charged by it (other than charges made pursuant to an agreement under s 67). Under s 80, PNO is required to give prior notice of any change in its charges to the Minister (responsible for the administration of the PAMA Act in NSW) and by publication on its website, and must state the reason for the change. Under s 81, PNO must provide an annual report to the Minister in respect of its charges and the revenue received from the charges.
2. As required by the PAMA Act, PNO publishes a “Schedule of Service Charges” that apply to the use of the Port, which includes the navigation service charge and the wharfage charge.
3. Following the privatisation of the Port and PNO’s assumption of the operation of the Port on 30 May 2014, PNO implemented a pricing review of the navigation service charge. Following this pricing review, PNO removed the two-tiered navigation service charge that was previously in place at the Port for coal vessels, which charged rates (up to a cap) depending on the gross tonnage of the vessel, and replaced this with a flat rate per gross tonne with no cap. The new flat rate was announced on 1 July 2014 and was effective from 1 January 2015.The table below compares the old (pre - 1 January 2015) and new (post - 1 January 2015) navigation service charge:

|  |  |  |
| --- | --- | --- |
|  | **Before 1 January 2015** | **After 1 January 2015** |
| NSC (gross tonnage < 50,000) | $0.4292 | $0.6900 |
| NSC (gross tonnage > 50,000 | $0.9656 | $0.6900 |
| Max NSC (cap) | $45,633.68 | None |

1. Since 2015, there have been further increases in the published navigation service charge, as set out in the following table (per gross tonne):

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| **2015** | **2016** | **2017** | **2018** | **2019** | **2020** | **2020** |
| $0.6900 | $0.7169 | $0.7305 | $0.7553 | $0.7809 | $1.0424 | $1.0580 |

1. As discussed below, in around March 2020 PNO entered into pricing deeds with vessel agents in respect of all coal vessels using the Port which apply a lower rate for the navigation service charge (than the published rate) from 1 January 2020. The deeds have a term of 10 years.
2. The navigation service charge is fixed and payable according to the gross tonnage of a vessel that enters the Port and uses the shipping channel. Gross tonnage refers to the capacity of the vessel using the channel, rather than the volume of coal or other cargo which might be loaded onto the vessel during its visit at the Port. The gross tonnage (or capacity) of a vessel is determined by reference to the total internal volume of the vessel, expressed in cubic metres. Mr Byrnes explained that one vessel gross tonne (cubic metre of volume) can accommodate around 1.56 tonnes (mass) of coal, owing to factors including the density of coal. Without descending to the detail, the Tribunal notes that Mr Byrnes’ evidence shows that a number of factors will determine the particular rate of the navigation service charge per tonne of loaded coal in any shipment and it does not rely on the 1.56 tonnes per vessel gross tonnage figure cited by Mr Byrnes. Nevertheless, the Tribunal accepts the general proposition that some adjustment of the rate of the navigation service charge is required in any assessment of its significance in the price per tonne of coal received by coal exporters and that, based on historical averages, the navigation service charge is a smaller dollar amount per loaded tonne than its published dollar amount per gross tonne.
3. The following table sets out the wharfage charge (per revenue tonne) which has been charged by PNO in respect of coal since 2014:

|  |  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- | --- |
| **2014** | **2015** | **2016** | **2017** | **2018** | **2019** | **2020** | **2021** |
| $0.0722 | $0.0682 | $0.0709 | $0.0722 | $0.0746 | $0.0771 | $0.0802 | $0.0814 |

1. Mr Byrnes gave evidence that, since PNO took over the management of the Port in 2014, PNO has not discriminated on price or non-price terms between:
2. coal vessel operators with respect to the navigation service charge payable for the use of the channels and berths at the Port; and
3. coal producers whose coal is exported through the Port in respect of any Port charges, including the wharfage charge payable by coal producers.

## Glencore Coal’s application for the declaration of Port services

1. In May 2015, Glencore Coal applied to the National Competition Council (**NCC**) for the declaration of the shipping channel and berthing service at the Port. In January 2015, the NCC recommended against declaration, and in January 2016 the Treasurer decided not to declare the Port service. Glencore Coal applied to the Tribunal for review of that decision. On 31 May 2016, a differently constituted Tribunal published its reasons for deciding to set aside the Minister’s decision and make an order to declare the Port service for a period of 15 years, commencing July 2016 and expiring July 2031: *Re Glencore Coal*. That order was made on 10 June 2016: *Re Glencore Coal No 2*. The Tribunal’s decision in *Re Glencore Coal* was upheld by the Full Court in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115.

## Glencore Coal arbitration of Port charges

1. In 2016, Glencore Coal notified the ACCC of an access dispute with respect to the navigation service and wharfage charges at the Port under Div 3 of Pt IIIA of the Act. In its arbitral determination made on 18 September 2018, the ACCC set out the following information concerning PNO’s published rates for the two charges, the rates of the charges proposed by each of PNO and Glencore Coal in the arbitration and the ACCC’s determination of the charges (all in 2018 dollars):

|  |  |  |
| --- | --- | --- |
|  | Navigation service charge ($ per gross tonne | Wharfage charge ($ per revenue tonne) |
| PNO 2015 port pricing schedule | 0.7286 | 0.0720 |
| PNO 2018 port pricing schedule | 0.7553 | 0.0746 |
| PNO proposed pricing | 1.3643 | 0.0746 |
| Glencore Coal proposed pricing | 0.4139 | 0.0746 |
| ACCC determination | 0.6075 | 0.0746 |

1. In determining the initial rates for the navigation service and wharfage charges, the ACCC used a building block model to calculate the maximum allowable revenue that PNO could recover from the two charges. The parties agreed to use the depreciated optimised replacement cost (**DORC**) methodology to value the Port assets and establish the regulated asset base upon which the capital components of the allowed revenue were to be calculated. As noted in the NCC Recommendation, the rate for the navigation service charge determined by the ACCC represented a significant decrease below the rate published by PNO as at 1 January 2018. The term of the determination made by the ACCC coincided with the term of declaration of the shipping channel service, expiring July 2031 (with the arbitral prices to apply from the commencement of declaration, July 2016). Under the determination, the initial prices were to be adjusted over the declaration period as follows:
2. The wharfage charge was to be indexed annually by reference to CPI.
3. The navigation service charge was to be reviewed on an annual and five-yearly basis. In the annual review, the inputs to the building block model to be reviewed were limited to the forecast cargo volumes and gross tonnage coal vessels and non-coal vessels for the year. The five-yearly review allowed review of the primary integers of the building block model including the roll forward of the regulated asset base, rates of depreciation and the useful life of assets, the weighted average cost of capital, forecast capital expenditure and forecast operating expenditure. In both categories of review, account could be taken of material change events, being a change in law that was expected to cause an increase in costs that would cause a change in the charges of more than 2.5%.
4. A material area of dispute between Glencore Coal and PNO in the arbitration before the ACCC was the treatment in the regulated asset base of user funded capital contributions, being historic payments made by Port users to the Port owner which funded, amongst other things, channel dredging to allow larger ships to berth at the Port. Glencore Coal argued that user funded contributions should be deducted from the Port's regulatory asset base, upon which the capital components of Port charges were calculated. The deduction of user funded contributions from the regulatory asset base would reduce the amount of capital costs PNO was able to recover through charges for the navigation service charge.
5. PNO applied to the Tribunal for review of the prices that had been determined by the ACCC. In an arbitral determination made on 30 October 2019, a differently constituted Tribunal determined an initial arbitral price for the navigation service charge of $1.0058 per gross tonne (as at 1 January 2018) and the rate of wharfage charge agreed in the ACCC arbitration was maintained: *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 (***Re Port of Newcastle Operations***). In its decision, the Tribunal disagreed with the ACCC’s deduction of historic user funded contributions from the regulatory asset base of the Port.
6. Glencore Coal applied to the Full Federal Court for judicial review of the 2019 arbitral decision of the Tribunal. The application concerned two aspects of the Tribunal’s decision, but it is only necessary to refer to the aspect that concerned the level of the navigation service charge. In August 2020, the Full Court determined that the Tribunal’s decision in respect of the navigation service charge was affected by errors of law, in failing to take into account the value of expansions of capacity to the shipping channels the cost of which was historically borne by Port users, and remitted the arbitral determination to the Tribunal for re-determination: *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194.
7. PNO appealed the Full Court decision to the High Court. On 8 December 2021 (after the hearing of this application), the High Court delivered its judgment on the appeal: *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39; 395 ALR 209 (***Port of Newcastle Operations***). In respect of the navigation service charge, the High Court upheld PNO’s appeal and effectively reinstated the Tribunal’s arbitral determination of the initial navigation service charge of $1.0058 per gross tonne (as at 1 January 2018).

## The revocation of the declaration

1. Under s 44J of the Act, the NCC may recommend to the designated Minister that the declaration of a service be revoked if it is satisfied that, at the time of the recommendation, the declaration criteria would prevent the service being declared. Following amendments made to the declaration criteria by the 2017 Amendment Act, on 2 July 2018 PNO applied to the NCC for a recommendation that the 2016 declaration of Port services be revoked. In July 2019, the NCC made that recommendation to the Treasurer. The Treasurer did not publish a decision on that recommendation within 60 days of receiving it. As a result, he was deemed by s 44J(7) of the Act to have made a decision that the declaration be revoked.
2. The revocation of the 2016 declaration of Port services did not affect accrued rights. Accordingly, the arbitral determination of the navigation service and wharfage charges at the Port made in respect of Glencore Coal remains in force.

## PNO’s pricing arrangements from 2020

1. From around November 2019, PNO (through its Chief Executive Officer, Mr Craig Carmody and Mr Byrnes and Ms Sainsbury) sought to conduct negotiations with a number of coal producers in relation to long-term pricing arrangements for the navigation service charge and the wharfage charge. Mr Byrnes gave evidence that, during the period from around November 2019 to 2 April 2020, he was involved in individual bilateral negotiations with representatives of ten coal producers (being all of the coal producers who form part of the authorisation applicants other than Malabar, as well as Bengalla Mining Company Pty Ltd which is not an authorisation applicant). The negotiations were focussed on the terms of a draft pricing deed proposed by PNO which would govern the level of the navigation service charge and wharfage charge over the proposed 10-year term of the deed. PNO emphasised in its communications with the coal producers that PNO believed that the proposed pricing deed would provide PNO and the coal producers with long term (10 years) price certainty.
2. Mr Byrne gave evidence that, in the course of those negotiations, no coal producer raised a concern about the quantum of the wharfage charge. It is also the case that, in the arbitration between PNO and Glencore Coal conducted under Pt IIIA, the area of dispute concerned the navigation service charge and not the wharfage charge. In that arbitration, the initial level of the wharfage charge was agreed for the purposes of the arbitration.
3. Mr Byrnes also gave evidence about his negotiations with the individual coal producers and the issues raised by different coal producers. The details of the negotiations are subject to confidentiality directions made by the Tribunal, and it is unnecessary to descend to the detail. Nevertheless, the evidence shows that the coal producers raised a number of concerns about the proposed pricing deed, particularly the terms governing annual increases in the navigation service charge, the terms governing variations to that charge (for example, following capital expenditure incurred by PNO), the inclusion of a non-discrimination clause in relation to the level of charges and the term (duration) of the deed. Some of those issues were raised by a number of the coal producers while others were raised by individual coal producers.
4. In oral testimony, Mr Byrnes said that there was a difference between coal producers with respect to their acceptance of the initial level of the navigation service charge. Mr Byrnes said that Glencore Coal was opposed to any charge that was in excess of the level determined by the ACCC in the Glencore Coal arbitration. However, a number of other coal producers were unaware of the current level of the navigation service charge (as it was typically paid by coal buyers who purchased coal on a FOB basis and arranged shipping) and those producers were more concerned with the terms governing increases in the navigation service charge.
5. Although PNO conducted individual negotiations with each coal producer, the evidence showed that PNO was generally seeking to reach agreement with the coal producers on uniform terms and conditions for the pricing deed. The evidence before the Tribunal also indicated that, during the period of negotiations, at least some of the coal producers exchanged views between themselves about the proposed pricing deed. Mr Dodd of Yancoal gave evidence that he discussed the proposed deed with other producers at that time and that, on his understanding, the producers came to similar decisions about the deed. Mr Lewis gave evidence that, in November or December 2019, the proposed pricing deed was discussed by coal producers at a Hunter Valley coal chain producer meeting. Mr Lewis said that the coal producers meet on a bimonthly or quarterly basis to discuss the Hunter Valley coal chain performance. Mr Lewis also gave evidence that, subsequently, coal producers had discussions about the pricing deed through NSWMC.
6. A principal concern of the coal producers was the potential for the navigation service charge to be increased during the term of the deed. A solution to that concern, suggested by a number of producers, was to shorten the term of the pricing deed to three or five years. At the risk of over-generalisation (by ascribing a “collective” view to the coal producers), the evidence indicates that the coal producers also preferred uniform terms and conditions, and a number of coal producers requested the inclusion of a “most favoured nation” clause (which can also be described as a non-discrimination clause) requiring PNO to offer each coal producer the most favourable price offered to other coal producers.
7. In the course of the negotiations, Mr Byrnes provided to each coal producer a pro-forma memoranda of understanding that stated PNO's and the respective coal producer’s mutual intention to negotiate in good faith the terms of a binding pricing deed. Memoranda were signed on behalf of three of the coal producers in December 2019 and early January 2020.
8. In December 2019, in parallel with its negotiations with coal producers, PNO published on its website new “open access” rates for the navigation service and wharfage charges for vessels using the shipping channel service taking effect from 1 January 2020. The “open access” rates published by PNO, available to any coal vessel entering the Port, were a navigation service charge of $1.0424 per gross tonne and a wharfage charge of $0.0802 per revenue tonne. PNO also published, and offered on a standing basis, the “Port User Pro Forma Long Term Pricing Deed”. As discussed below, PNO replaced that deed with the “Producer Pro Forma Long Term Pricing Deed” (which, by way of abbreviation, has been referred to earlier as the Producer Pricing Deed) and the “Vessel Agent Pro Forma Long Term Pricing Deed” (referred to earlier as the Vessel Agent Pricing Deed) (collectively referred to herein as the **Pricing Deeds**) in March 2020.
9. On around 24 January 2020, PNO sent to the coal producers with which it had been conducting negotiations a letter offering to provide an interim discount to the navigation service charge for the period 1 January 2020 to 31 March 2020 to allow additional time for coal producers to consider the pricing deed. PNO further responded to issues raised by coal producers in February 2020. PNO’s negotiations with Yancoal reached an advanced stage in mid-March 2020.
10. Ultimately, PNO was unable to reach agreement with any of the coal producers. The Tribunal infers that two matters were likely to have had some influence on that outcome.
11. First, on 5 March 2020, the authorisation applicants sought authorisation from the ACCC to bargain collectively with PNO in respect of the terms and conditions of access to the Port (the subject of this proceeding for review). It would have been somewhat inconsistent for the coal producers to elect to participate in the application for authorisation of collective bargaining while continuing to negotiate individually with PNO. The Tribunal also infers that discussions amongst NSWMC and the other authorisation applicants about the authorisation application would have commenced many weeks, and possibly months, before the application was filed with the ACCC on 5 March 2020. This would likely have affected the coal producers’ willingness to negotiate individually with PNO. In his first affidavit, Mr Byrnes stated that, since the grant of interim authorisation by the ACCC on 2 April 2020, PNO has not had any further bilateral, or collective, negotiations with any coal producers in relation to the pricing deed. That statement was corrected in a subsequent affidavit to note that PNO had some limited further communications with two coal producers in April 2020 about progressing the pricing deed, but the evidence indicates that the communications did not progress far. Mr Byrnes also expressed the opinion that Glencore Coal’s opposition to the initial level of the navigation service charge in the Producer Pricing Deed was likely to have influenced other coal producers, particularly in the context of the application for authorisation of collective bargaining. The Tribunal considers that that would have likely been an influencing factor, but the evidence suggests that the more significant issue for coal producers were the terms governing future increases in the navigation service charge.
12. The second matter that is likely to have affected the failure of the bilateral negotiations is the entry, by PNO, into the Vessel Agent Pricing Deeds in late March 2020. As noted above, in March 2020, PNO replaced the “Port User Pro Forma Long Term Pricing Deed” with separate deeds able to be entered into by vessel agents (the Vessel Agent Pricing Deed) or coal producers (the Producer Pricing Deed) respectively, with effect from 1 January 2020. Those Pricing Deeds were offered as an agreement in respect of the applicable charges pursuant to s 67 of the PAMA Act. Both Deeds govern the navigation service charge, while only the Producer Pricing Deed governs the wharfage charge. The Deeds have a 10-year term. Under both of the Deeds, PNO offered an initial navigation service charge of $0.8121 per gross tonne and, under the Producer Pricing Deed, PNO offered a wharfage charge of $0.0802 per revenue tonne, subject in both cases to an annual price adjustment (the greater of CPI increases and 4%) and other adjustment terms (discussed below).
13. The Vessel Agent Pricing Deed enables vessel agents to agree the navigation service charge with PNO in respect of “Covered Vessels” which are defined as a vessel that is loaded with coal at the Port in respect of which the vessel agent is named as the vessel’s inward agent in the vessel berthing application lodged with PNO in respect of that vessel’s visit to the Port. The Producer Pricing Deed enables coal producers to agree the navigation service charge and wharfage charge with PNO in respect of “Covered Vessels” which are defined as a vessel that is loaded with and carries out of the Port (a) the producer’s coal (ie, coal mined from one of the producer’s mines) and no other coal or (b) the producer’s coal and other coal in respect of which PNO has agreed that the navigation service charge and wharfage charge are the same for that other coal as for the producer, and no other coal.
14. In late March 2020, PNO entered into Vessel Agent Pricing Deeds with vessel agents for every coal carrying vessel calling at the Port (which deeds have effect from 1 January 2020). There was evidence before the Tribunal that, after learning that PNO had entered into Vessel Agent Pricing Deeds with vessel agents, at least some of the coal producers considered that there was little utility in continuing to negotiate a pricing deed with PNO (believing that the navigation service charge in the Vessel Agent Pricing Deed would apply in any event). Mr Dodd of Yancoal gave evidence that he was, and remains, confused as to the manner in which the Producer Pricing Deed would operate in light of the Vessel Agent Pricing Deeds. Mr Lewis of Bloomfield Collieries gave similar evidence.
15. The Tribunal notes that, in *NSWMC No 3*, the Tribunal concluded (at [218]) that the practical effect of the Pricing Deeds was that, if a coal producer and a vessel agent had entered into Deeds that, on their terms, were applicable to the same shipment of coal and the Deeds contained different rates for the navigation service charge, the rate that would ultimately be charged by PNO would be the lower rate. None of the parties submitted that the Tribunal’s previous analysis of the operation of the Deeds was erroneous. Accordingly, the Tribunal considers that there remains the opportunity for coal producers to seek to negotiate a lower navigation service charge, or different terms and conditions, notwithstanding the Vessel Agent Pricing Deeds. Of course, it is a matter of commercial judgment for coal producers whether, in light of PNO’s publication of the Pricing Deeds and entry into of Vessel Agent Pricing Deeds, further negotiations are likely to result in a change in PNO’s commercial position.

## The terms and conditions of the Pricing Deeds

1. The terms and conditions of the Producer and Vessel Agent Pricing Deeds are materially the same (save in so far as the Producer Pricing Deed also governs the wharfage charge). The following terms and conditions of the Deeds are significant.
2. The Deeds have an initial term of 10 years. Not later than 36 months prior to the expiry of the initial term, either party may issue a written notice to the other requesting that the parties enter into discussions with respect to agreeing pricing arrangements to apply following the expiry of the initial term. The parties must then commence discussions regarding such pricing arrangements and must continue such discussions in good faith for a period of up to six months (or such other period as they agree in writing). Thus, the Deeds contemplate a process by which the parties will commence negotiations of the charges to apply after the expiry of the initial term at least three years before that date.
3. Under the Pricing Deeds, PNO represents that the rate of the navigation service charge levied under the Deeds, including variations, will not adversely discriminate against the producer or vessel agent by comparison with the navigation service charge applicable to like circumstances to other producers or vessel agents (as the case may be) who have entered into materially similar deeds. PNO also covenants that it will not enter into an agreement with any other producer or vessel agent (as the case may be) concerning the navigation service charge to apply over the initial term, or give effect to any variations made to that charge, which are materially dissimilar to the relevant provisions of the Deed. The parties referred to those clauses as “most favoured nation” or “non-discrimination” clauses.
4. The rate of the navigation service charge during the initial term may be adjusted in two ways. First, the rate is adjusted annually by the greater of the applicable annual CPI increase (if any) and 4%. Second, PNO may increase the navigation service charge for other reasons if the resulting increase is material (greater than 5%) and the increase is consistent with the pricing principles defined in cl 4.2 of Sch 3 of the Deeds. PNO must provide written notice of any proposed variations to the navigation service charge not later than 45 days before the proposed date for commencement of the proposed variation. If the proposed variation is made on the second basis, PNO must also issue a copy of a report prepared by an independent, appropriately qualified professional which sets out the opinion of that person, and the material facts (including all relevant cost, capital expenditure and revenue data) on which that opinion was based, as to whether the proposed variation is consistent with the pricing principles. The counterparty may issue a price objection notice to PNO within 14 days and the dispute must be resolved in accordance with the dispute resolution process set out in the Deeds. The dispute resolution process contemplates discussions between senior representatives of the parties, followed by mediation if necessary. If the dispute cannot be resolved by agreement between the parties, either party can refer it to arbitration to be conducted in accordance with the Australian Centre for International Commercial Arbitration (**ACICA**) Arbitration Rules. The arbitrator is required to apply the pricing principles set out in the Deeds.
5. Under the Pricing Deeds, PNO undertakes to prepare and provide to the coal producer or vessel agent (as applicable) on an annual basis a forward looking five year forecast of its projected capital expenditure that may impact the applicable charges and meet with the coal producer or vessel agent to discuss those forecasts and any potential associated variations to the applicable charges. However, PNO is not obliged to implement any comments made by the coal producer or vessel agent.
6. The pricing principles defined in cl 4.2 of Sch 3 of the Pricing Deeds closely follow the mandatory considerations that the ACCC must take into account under s 44X(1) of the Act when conducting an arbitration on terms and conditions of access under Div 3 of Pt IIIA, but they are not identical. The differences were the subject of consideration by the Tribunal in *NSWMC No 3* at [221]-[239]. None of the parties submitted that the Tribunal’s previous analysis of the pricing principles in that decision was erroneous, and this Tribunal believes that the analysis and conclusions expressed in that decision are fair and accurate.
7. The pricing principles in cl 4.2 of Sch 3 of the Deeds are as follows (noting that PNO is designated as PON in the Deeds):

The matters that must be taken into account by a mediator and applied by the arbitrator in resolving a Permitted Price Dispute are:

(a) the provisions in Item 7 of this deed (but only in relation to whether the requirements of Item 7(a) or 7(b)(i) are met (not in relation to the requirement in Item 7(b)(ii) that any proposed increase in the Covered Vessel NSC is consistent with the Pricing Principles, which will be measured solely by reference to the remaining principles below);

(b) PON's legitimate business interests and investment in the Port or Port facilities, including a reasonable opportunity to recover over the Leasehold Period the efficient cost of the service provided at the Port, which recovery shall include:

(i) the value of its Initial Capital Base and any updates thereof, including efficient additional capital investments;

(ii) a reasonable rate of return, commensurate with the commercial risks involved on the value of all assets comprising its Initial Capital Base and any updates thereof, including efficient additional capital investments; and

(iii) the return over the Leasehold Period of the total value of the assets comprising its Initial Capital Base and any updates thereof, including efficient additional capital investments;

(c) the revenue expected to be derived from all users of the service;

(d) the costs to PON of providing the service (including the costs of any necessary modification to, or extension of, a Port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets;

(e) the economic value to PON of any additional investment that the Vessel Agent (or any other user of the service) or PON has agreed to undertake;

(f) the interests of all persons holding contracts for use of any relevant Port facility or otherwise having rights to use the service;

(g) firm and binding contractual obligations of PON or other persons (or both) already using any relevant Port facility;

(h) the operational and technical requirements necessary for the safe and reliable provision of the service;

(i) the economically efficient operation of any relevant Port facility;

(j) the benefit to the public from having competitive markets;

(k) that prices should allow multi-part pricing and price discrimination when it aids efficiency;

(l) that prices should not allow a vertically integrated service provider to set terms and conditions that would discriminate in favour of either its upstream or downstream operations, except to the extent that the cost of providing services to others would be higher; and

(m) that prices should provide incentives to reduce costs or otherwise improve productivity.

1. The “Initial Capital Base” referred to in cl 4.2(b) is defined to mean the value established by reference to the DORC, as at 31 December 2014, of the assets used in the provision of all of the services at the Port and, unless otherwise agreed by PNO, without deduction for user contributions. As observed by the Tribunal in *NSWMC No 3* (at [225]), in context, the reference to “user contributions” in that definition must refer to historic user funded contributions (ie, contributions which pre-date the DORC valuation date of 31 December 2014) and alludes to the dispute in respect of user funded contributions in the Glencore Coal arbitration (which is summarised above). In its 2018 arbitral determination, the ACCC adopted the same capital base (ie, the DORC valuation as at 31 December 2014, indexed to 2018) save that the ACCC deducted its assessment of the value of historic user funded contributions.
2. The evidence shows that the issue of “user funded contributions”, including particularly the manner in which they are treated in the pricing principles in the Pricing Deeds, has remained a major area of disagreement between coal producers and PNO and appears to be one of the primary reasons why the coal producers have been unwilling to agree to the terms of the Producer Pricing Deed, including the level of the navigation service charge stipulated by that Deed. In making that statement, the Tribunal is conscious that the views of the coal producers are unlikely to be uniform and the concerns expressed about the issue of user funded contributions may be held more strongly by some coal producers than others. As referred to earlier, the issue was a material area of dispute between Glencore Coal and PNO in the arbitration of the navigation service charge before the ACCC. Nevertheless, at the risk of generalisation (by ascribing a “collective” view to the coal producers), the concern is that the current level of the navigation service charge enables PNO to recover the costs of historic capital investments made at the Port that were not incurred (directly or indirectly) by PNO but were incurred by Port users. The concern appears to be exacerbated by the pricing principles in the Pricing Deeds because, as set out above, those principles require an arbitrator (when arbitrating a dispute about a future price increase) to take into account the DORC, as at 31 December 2014, of the assets used in the provision of all of the services at the Port without deduction for user contributions (unless otherwise agreed by PNO).
3. Given the significance of the issue of historic user funded contributions as a source of dispute between coal producers and PNO and as a reason why the coal producers seek to bargain collectively, it is relevant to provide further detail about the issue. As set out above, the issue of historic user funded contributions was a material area of dispute between Glencore Coal and PNO in the arbitration of the navigation service charge before the ACCC. The ACCC accepted Glencore Coal’s arguments that such contributions should be deducted from the DORC valuation of the Port assets, upon which the capital components of Port charges were to be calculated. The ACCC determined the optimised replacement cost of the relevant Port assets as $2,169.5 million (as at 1 January 2018). The ACCC adjusted that figure downwards to take account of five instances in which improvements to the Port (specifically various dredging projects) had been funded or undertaken by third parties. The ACCC identified two major tranches of channel upgrades involving user contributions, being the Harbour Deepening dredging works from 1977 to 1983 and the South Arm and berth pocket dredging primarily from 1989 to 2010. On that basis, the ACCC deducted $912 million from the optimised replacement cost valuation of the Port assets, and determined a final DORC value of $1,163.8 million (as at 1 January 2018). Ultimately, the ACCC determined that the navigation service charge should be $0.6075 (as at 1 January 2018). On review of that decision, the Tribunal disagreed with the deduction of historic user funded contributions from the DORC valuation of the Port assets for the purpose of determining the navigation service charge under the provisions of Pt IIIA. The reasons for the Tribunal’s disagreement are explained in detail in its decision: *Re Port of Newcastle Operations* at [263]-[365]. In essence, the Tribunal concluded that the efficient pricing principles in Pt IIIA meant the DORC valuation should not be adjusted, and the associated allowed revenues reduced, without clear evidence of current commercial obligations on the Port to make future price concessions for past user contributions. The Tribunal found no evidence of such obligations, restored the ACCC’s unadjusted DORC valuation and determined a final DORC value of $2,075.8 million and a navigation service charge of $1.0058 (as at 1 January 2018). The disagreement between the parties did not end there. As noted above, Glencore Coal sought judicial review of the Tribunal’s decision by the Full Federal Court which set aside the Tribunal’s decision and remitted the issue to the Tribunal for re-determination in accordance with the reasons of the Court. However, PNO appealed the decision of the Full Federal Court to the High Court which recently set aside the orders of the Full Federal Court (thereby reinstating the determination of the Tribunal).
4. As stated above, following the decision of the Tribunal in *Re Port of Newcastle Operations* (which was handed down on 30 October 2019), PNO published a navigation service charge with effect from 1 January 2020 of $1.0424 (which was equivalent to the Tribunal determination, updated to 1 January 2020). PNO also offered a lower navigation service charge of $0.8121 on the terms of the Pricing Deeds (which have a term of 10 years and annual agreed price increases).
5. Within the framework for price arbitration in Pt IIIA of the Act, the appropriate treatment of historic user funded contributions is a contestable issue which will depend on the available evidence of the size and nature of those contributions and of the agreements and understandings between parties that facilitated them. In respect of the Glencore Coal arbitration of the navigation service charge at the Port, the issue has been finally determined by the recent decision of the High Court. As the shipping channel service at the Port is no longer declared under Pt IIIA, any future negotiation of the issue, and its effect upon the navigation service charge, can only be the subject of private dealings between coal producers and PNO. Given the outcome of the litigation that has occurred in relation to the issue in the context of the Glencore Coal arbitration under Pt IIIA, the Tribunal considers it unlikely that PNO will, in the future, agree to reduce the navigation service charge by reference to historic user funded contributions (with or without collective bargaining).
6. Again at the risk of generalisation (by ascribing a “collective” view to the coal producers), the evidence also shows that many coal producers are concerned that the Pricing Deeds do not provide them with sufficient certainty with respect to future increases in the level of the navigation service charge. It can be accepted that the Pricing Deeds contain provisions that permit PNO to propose an increase in the navigation service charge above the annual increase. However, the Pricing Deeds contain significant constraints on PNO’s freedom to do so, and afford counterparties to the Deeds significant rights. In particular: any such increase must be consistent with the pricing principles defined in cl 4.2 of Sch 3 of the Deeds; PNO must give the counterparty a report prepared by an independent appropriately qualified professional which sets out the opinion of that person as to whether the proposed variation is consistent with the pricing principles (and material facts and data on which that opinion is based); the counterparty may issue a price objection notice, whereupon the objection is referred to the dispute resolution process which includes arbitration (applying the pricing principles set out in the Deeds) if the parties cannot resolve the dispute between themselves. The Tribunal has the view, consistently with that expressed in *NSWMC No 3* at [239], that the dispute mechanisms in the Deeds are consistent with reasonable terms and conditions of access and are reasonable substitutes for arbitration under Pt IIIA of the Act.
7. The authorisation applicants submitted that the dispute resolution process in the Pricing Deeds will be inefficient, because the Deeds contemplate multiple bilateral arbitrations. PNO submitted that the ACICA Arbitration Rules make provision for the consolidation of arbitrations and that the spectre of multiple, overlapping arbitrations is not a realistic possibility. The Tribunal accepts that submission. Article 16.1 of the ACICA Arbitration Rules provides as follows:

**16 Consolidation of Arbitrations**

16.1 Upon request by a party, and after consulting with the parties and any confirmed or appointed arbitrators, ACICA may consolidate two or more arbitrations pending under these Rules into a single arbitration, if:

(a) the parties have agreed to the consolidation;

(b) all the claims in the arbitrations are made under the same arbitration agreement; or

(c) the claims in the arbitrations are made under more than one arbitration agreement, a common question of law or fact arises in both or all of the arbitrations, the rights to relief claimed are in respect of, or arise out of, the same transaction or series of transactions, and ACICA finds the arbitration agreements to be compatible.

1. In circumstances where the Pricing Deeds contain common terms relating to the navigation service and wharfage charges, including with respect to a material increase in the charges, the Tribunal considers that the arbitration of a material price increase dispute would inevitably be consolidated. Given the inevitably of consolidated arbitrations, the Tribunal also considers that the prior negotiation and mediation of a material price increase dispute would almost inevitably be conducted on a collective or consolidated basis.

## The Vessel Agent Pricing Deeds

1. In March 2020, PNO entered into Vessel Agent Pricing Deeds with vessel agents for every coal carrying vessel calling at the Port (which deeds have effect from 1 January 2020). As the Deeds have a 10-year term, the Deeds will continue to determine the charges in respect of navigation services supplied at the Port in respect of the covered vessels for the next eight years. As a result, PNO has been charging all coal vessels calling at the Port the navigation service charge as determined in accordance with the Vessel Agent Pricing Deed. No charges have been levied on any coal vessel under s 50 of the PAMA Act since the beginning of 2020 and PNO does not expect to levy any charges under s 50 of the PAMA Act in relation to any coal vessel for the 10-year duration of those s 67 agreements. In effect, coal producers who export coal through the Port currently have the benefit of the navigation service charge specified in the Vessel Agent Pricing Deeds, as all coal vessels using the Port pay that charge and not the higher published charge.
2. Mr Byrnes gave evidence that the vessel agents who entered into the Vessel Agent Pricing Deeds did not express concern with respect to the level of the navigation service charge in the Deed, although they expressed some concern about the ability of PNO to seek price adjustments under the Deed. To date, PNO has not sought to increase the navigation service charge payable under the Deeds above the annual increase.
3. Clause 10 of the Vessel Agent Pricing Deeds provides that PNO and each vessel agent counterparty will meet at least twice in each contract year to consult on matters including:
4. measures that can be introduced to improve the efficiency of delivery of services by PNO to vessel agents;
5. PNO’s delivery of vessel services, including (as they relate to the delivery of such services) PNO’s capital expenditure, proposed variations to PNO’s fees and charges, PNO’s costs of operations and the future needs of vessel agents; and
6. respective market insights of the parties, including volume forecasts and shipment destinations.
7. Mr Byrnes gave evidence that, since entering into the Vessel Agent Pricing Deeds, PNO has met and consulted with vessel agent counterparties pursuant to cl 10. Mr Byrnes expressed the view that the meetings had been beneficial to PNO, allowing PNO to strengthen its relationships with vessel operators and to understand the individual priorities and matters of concern for each agent counterparty.

## Application for declaration by NSWMC

1. On 23 July 2020, NSWMC lodged an application to the NCC under s 44F of the Act seeking a recommendation that the Treasurer declare the shipping channel and berthing service at the Port for a period of 20 years. On 18 December 2020, the NCC recommended that the service not be declared on the basis that the criteria in paragraphs 44CA(1)(a) and (d) of the Act had not been satisfied. On 16 February 2021, the Treasurer made a decision under s 44H of the Act not to declare the service on the same basis. On 8 March 2021, NSWMC applied to the Tribunal for review of the Treasurer's decision under s 44K(2) of the Act. A differently constituted Tribunal reached the same conclusion that the criteria in paragraphs 44CA(1)(a) and (d) of the Act had not been satisfied, for largely the same reasons as explained in the NCC’s recommendation and, on 4 August 2021, affirmed the Treasurer’s decision not to declare the service (in *NSWMC No 3*).

## Why the authorisation applicants seek to bargain collectively

1. The supporting submission of the authorisation applicants that accompanied their original application to the ACCC sought to address the question of why the authorisation applicants wished to bargain collectively with PNO. However, the answer given by the authorisation applicants was stated at a high level of generality and, in the Tribunal’s view, was based on many assumptions that were not expressly addressed in the submission.
2. A central submission advanced by the authorisation applicants was to the effect that collective bargaining would better provide the industry with certainty for long term investment, particularly with respect to future price increases. The submission did not explain clearly why collective bargaining would better achieve that outcome compared with individual bilateral negotiations between PNO and each coal producer. The submission referred on a number of occasions to the fact that Port charges are presently unregulated, and also referred to an imbalance in bargaining power between the coal producers and PNO. The implicit assumption in the submission, although never articulated clearly, is that collective bargaining would improve the balance of bargaining power in favour of coal producers and that the rebalancing would generate more certain, and presumably lower, prices. The submissions contained the high-level claims that:

… the authorisation will, *inter alia*, enable users to collectively, as an industry, discuss with PNO the basis on which costs will be allocated by PNO and means for PNO to more efficiently engage in capital expenditure on a transparent basis. It is hoped that such increased transparency on expenditure and how costs are allocated, will lead to more efficient investment and therefore the potential for reduced charges being imposed on the mining industry over time.

… the authorisation will facilitate an industry discussion on industry issues relevant to the Port as the only practical export gateway from the Hunter Valley, as to capital expenditure relating to services to be provided by the Port for the mining industry, and as to how user funding should be treated within that framework. Any outcomes from negotiations would apply across the industry and would benefit both PNO's customers and itself in terms of creating certainty for investment and a long term pricing path.

… industry negotiations with PNO would lead to transaction cost savings for both PNO and also the mining industry as they would focus on key industry issues that would otherwise be inefficient if PNO sought to negotiate mining company by mining company – for example, PNO's proposed capital investment program that would affect the coal industry as a whole.

1. As noted earlier, senior representatives of three coal producers, Messrs Dodd, Lewis and Rochester, gave affidavit evidence in the proceeding. Senior counsel for the authorisation applicants asked each of those representatives, at the commencement of their oral testimony, what was the benefit to their company of obtaining future price certainty with respect to Port access charges? The assumption underlying the question was that collective bargaining would in some (unstated) manner contribute to future price certainty. The answers given to that question were unsurprising. Each witness explained that coal production is a commodity business in which the coal producers are price takers; the coal producers therefore focus on cost control to improve profitability; the coal producers seek certainty in respect of future costs so that they can assess future cash flows and make investment decisions based on those cash flows, thereby reducing business risk. None of the witnesses addressed the more significant questions of what degree of price certainty was commercially achievable in the context of an infrastructure asset such as the Port which may require capital investment in the future, how the desirable goal of business certainty could best be achieved in that context recognising the respective interests of the Port and the coal producers, and why collective bargaining would be more likely to produce better commercial outcomes for all parties compared with individual bilateral negotiations between PNO and coal producers.
2. As observed by Mr Houston in oral testimony, business certainty cannot be equated with lower prices or more efficient outcomes. In order to achieve price certainty over the longer term while at the same time recognising the business risks and interests of all parties to a transaction, it may be necessary to increase prices over their previous level; in short, certainty usually has a price (or cost). Different coal producers may have different preferences in respect of price certainty and may be willing to pay different amounts for certainty, reflecting the commercial circumstances of their respective businesses. Further, a contractually fixed price, whilst certain, may harm economic efficiency by being set at a level that inhibits further investment in productive capacity at the Port that is needed by market participants (a proposition which Mr Morton accepted).

## Why PNO opposes collective bargaining

1. Neither PNO’s submissions in chief, nor its evidence in chief, addressed the question of why PNO was opposed to collective bargaining by the coal producers. During the hearing, the Tribunal put that question to PNO’s senior counsel who, in turn, put the question to Mr Byrnes at the commencement of his oral testimony.
2. Mr Byrnes’ response was to the effect that PNO wishes to discuss and reach agreement individually with each of the Port’s customers about a range of issues relating to Port services, particularly Port and trade development, as well as the price for Port services and future price adjustments. With respect to Port development, Mr Byrnes explained that the Newcastle Coal Infrastructure Group’s terminal is at the end of the Port channel and PNO has approximately 250 hectares of land next to that terminal which is vacant. PNO wishes to develop that land in a manner that best improves the businesses of Port users, giving the example of the possible development of a LNG terminal. Mr Byrnes also explained that the Port’s channels are currently at 50% utilisation and the Port wishes to discuss with Port users opportunities for trade development that will see increased utilisation of the channels, giving the example of hydrogen export proposals. Mr Byrnes also said that the Port wishes to improve customer satisfaction with Port services by better monitoring the impact on Port users from delays in vessels accessing the Port and ways in which delays can be reduced. Mr Byrnes expressed the opinion that the Port can only achieve those objectives, designed to improve the efficiency of Port services and the Hunter Valley supply chain, if it can have individual discussions and negotiations with each coal producer. Mr Byrnes said that PNO expected to maintain a uniform price for the shipping channel service at the Port across Port users, but PNO contemplated that individual Port users might negotiate the supply of a particular service that would include a charge to recover the costs of that service.
3. Mr Byrnes expressed the view that, if PNO were to be drawn into collective bargaining with the coal producers, the only issue that would be discussed is Port charges for the shipping channel. Mr Byrnes said that PNO’s view about the likely consequences of collective bargaining arises from two aspects of its history of dealings with coal producers. First, PNO considers that its inability to agree a long term pricing arrangement with coal producers has largely been driven by the ongoing arbitration dispute with Glencore Coal. Mr Byrnes stated that Glencore Coal has told PNO that the navigation service charge offered by PNO under the Pricing Deeds is not acceptable to Glencore Coal (with Glencore Coal indicating that it would not entertain any offer above the navigation service charge determined by the ACCC in the arbitration under Pt IIIA). PNO considers that Glencore Coal’s view of the navigation service charge influences (negatively) the willingness of other coal producers to agree a higher charge with PNO. Second, PNO’s perception is that, since the coal producers were granted an interim authorisation by the ACCC for collective bargaining, the coal producers have been unwilling to engage in bilateral discussions about Port services and the only communications with PNO have been in relation to Port charges. Mr Byrnes agreed in cross-examination that, if the authorisation were granted and the coal producers sent a joint proposal to PNO, then PNO would review the document. However, Mr Byrnes maintained that, notwithstanding the grant of authorisation, PNO would not participate in collective bargaining with coal producers.
4. Mr Byrnes’ evidence concerning Glencore Coal’s position with respect to the navigation service charge, and Glencore Coal’s influence with other coal producers, was corroborated to some extent by the evidence of Mr Dodd of Yancoal. Mr Dodd confirmed that, in late 2019 and early 2020, when Yancoal was negotiating a pricing deed with PNO, he was aware that Glencore Coal did not want Yancoal to enter into the pricing deed with PNO.
5. Mr Byrnes also expressed the opinion that any transaction (bargaining) cost savings that might be made by PNO and the coal producers through participating in a process of collective bargaining would be greatly outweighed by the loss of the opportunity for the parties, through individual negotiations, to discuss issues concerning Port and trade development and the improvement of Port services and thereby add value to each party’s business.

## Materiality of the navigation service and wharfage charges to coal producers’ investment decisions

1. A relevant consideration in this proceeding is whether and to what extent the current or future levels of the navigation service and wharfage charges might influence investment decisions by coal producers. An integer of that consideration is the materiality of the navigation service and wharfage charges relative to the revenues earned and costs expended by coal producers and fluctuations in those revenues and costs.
2. Mr Byrnes undertook calculations in an effort to show the quantum of the navigation service charge and the wharfage charge relative to:
3. the total costs incurred by coal buyers in purchasing and shipping Newcastle thermal coal; and
4. the total costs incurred by coal producers in producing Newcastle thermal coal.
5. The analysis was based on data as at the time of PNO’s 2014 pricing review and the post 1 January 2015 navigation service charge and wharfage charges, and the calculations were based on a number of assumptions including: the average specifications of coal-export vessels calling at the Port during the period 2014-2015; a Newcastle thermal coal spot price of $84.02 per tonne; and an export destination of Japan. The data was confidential to PNO. It is unnecessary to reproduce the data as the ultimate conclusion was not contested in any significant way by the authorisation applicants. PNO’s analysis showed that the navigation service charge, paid by the buyer, represented on average approximately 0.44% of the total costs incurred by coal buyers, while the wharfage charge, paid by the producer, represented on average approximately 0.12% of the total costs incurred by coal producers whose coal is exported through the Port.
6. As set out earlier, global thermal coal spot prices fluctuate on a daily basis and routinely by more than 1%. During the past five years, global thermal coal prices have ranged between approximately US$49 and US$119 per metric tonne. As at February 2021, prices were around US$87 but had surged from mid-2021 to reach approximately US$186 in September 2021 (all prices expressed in nominal US dollars). The World Bank forecast (as at 20 April 2021) is for Newcastle thermal coal spot prices to be approximately US$71 in 2025 and falling to approximately US$55 by 2035.
7. No evidence was adduced by the authorisation applicants that suggested that the present level of the navigation service and wharfage charges was having an adverse effect on investment by coal producers in the Hunter Valley.
8. In response to questions from the Tribunal, Mr Dodd of Yancoal gave evidence that:
9. Yancoal enters into contracts to hedge the price of coal, but Mr Dodd was unable to provide any detail about Yancoal’s hedging arrangements or strategy;
10. Yancoal’s business planning and investment decisions were based on an analysis of expected revenues and costs, with the navigation service charge taken into account in the expected price of coal (as Yancoal sells its coal on an FOB basis) and the wharfage charge taken into account in forecast costs; and
11. Yancoal is not concerned about the current level of the navigation service and wharfage charges, but its concern relates to possible future increases in those charges.
12. Similarly, in response to questions from the Tribunal, Mr Rochester of Whitehaven gave evidence that the current levels of the navigation service and wharfage charges are not a material input into investment decisions, but that significant increases in the charges would impact investment decisions. A copy of Whitehaven’s 2021 Annual Report was in evidence. The report discloses that Whitehaven sells its coal on an FOB basis. The report also discloses the risks relating to Whitehaven’s future prospects. A large number of risks are listed including volatility in coal prices, foreign currency risk, operating risks associated with coal mining, water security for the purposes of dust suppression and coal washing, geology risk, cyber risk, counterparty risk, environmental risks, climate change risks and COVID-19 risks. The report discloses that, despite the volatility in future coal prices, Whitehaven does not currently hedge against that volatility. Notwithstanding the long list of disclosed risks, potential increases in Port charges is not mentioned. In contrast, a risk that is listed is the potential failure of transport infrastructure providers (including the Port) to increase capacity in order to meet future export requirements.
13. The evidence of Mr Lewis of Bloomfield Collieries was to a similar effect. Like Yancoal and Whitehaven, Bloomfield Collieries sells coal from the Port on an FOB basis such that the navigation service charge is incurred in the first instance by the coal buyer through the shipping costs. Bloomfield Collieries sells coal on a contract and spot price basis (with the latter representing approximately 30% of sales by volume). The spot price can fluctuate on a daily basis with very large fluctuations. While contract prices can be fixed for periods of one quarter or up to one year, the contract prices also fluctuate from one contract period to the next (based on movements in international prices). Mr Lewis acknowledged that Bloomfield Collieries makes investment decisions notwithstanding that future coal prices are uncertain and fluctuate in amounts that far exceed the quantum of the navigation service charge. In response to a question from the Tribunal, Mr Lewis acknowledged that there had not been price certainty in terms of Port charges since the Port was privatised in 2014 and also acknowledged that, in that period, there had not been a decision not to proceed with an investment by reason of that uncertainty.

## Transaction costs of collective bargaining

1. A second relevant consideration in this proceeding concerns the transaction costs associated with collective bargaining compared with individual bilateral bargaining in relation to Port charges, and the relative quantum and materiality of such costs. No party adduced firm evidence or estimates of expended and forecast transaction costs, and the submissions of the parties proceeded largely on the basis of assertion and counter-assertion.
2. Mr Dodd gave evidence that NSWMC had formed a working group, comprising representatives of each coal producer, to supervise the conduct of the application for authorisation of collective bargaining. Mr Dodd said that, since the grant of interim authorisation in April 2020, the working group had met approximately once a month. Mr Dodd also gave evidence that NSWMC and coal producers participated in collective negotiations with the Australian Rail Track Corporation (**ARTC**) in respect of use of the rail tracks in the Hunter Valley. In that context, a working group has also been formed with a representative of each coal producer, and the working group has also appointed a smaller negotiating group to conduct the collective negotiations. The negotiating group takes its instructions from the working group and reports back to the working group.
3. Mr Lewis expressed the opinion that collective negotiations, rather than parallel negotiations with individual producers, would reduce time and expense because the range of issues in dispute are relatively narrow (principally concerning future price uncertainty). Mr Lewis also considered that the model of collective negotiations used in dealings with the ARTC was an effective model.

## Future negotiations between PNO and coal producers

1. A third relevant consideration in the proceeding is the likely future behaviour of PNO and coal producers in terms of commercial discussions and negotiations, and the outcome of such discussions and negotiations, with and without the authorisation.
2. Collective bargaining typically involves two forms of conduct: collective discussions within the bargaining group (here, the coal producers) to formulate a common or collective position on issues and then negotiations between the bargaining group and the counterparty (here, PNO). If authorisation is granted, the authorisation applicants would be free to engage in collective discussions between themselves regardless of whether PNO was willing to engage in collective negotiations. However, authorisation does not compel any coal producer to engage in collective discussions on any particular topic; and nor does authorisation compel PNO to participate in collective negotiations. Nevertheless, and as discussed earlier, the Tribunal is required to assess the public benefits and detriments likely to result from the proposed collective bargaining conduct if it were to be engaged in. In doing so, the Tribunal makes no assumptions about the outcome of the collective bargaining: that is a matter for findings (in the nature of predictions) based on the evidence.
3. Since the grant of the interim authorisation in April 2020, coal producers have generally elected not to engage in individual negotiations with PNO and PNO has elected not to engage in collective negotiations with coal producers, resulting in something of a “stand-off”. The evidence of Mr Byrnes is that the stand-off not only applies to the terms governing the navigation service and wharfage charges, but also applies generally to the commercial relationship between PNO and the coal producers. Mr Byrnes considers that the stand-off is inhibiting the parties from having meaningful discussions about aspects of the supply of Port services that may be mutually beneficial to PNO and individual coal producers. Mr Byrnes attributed the stand-off partly to the grant of the interim authorisation, but also to what he described as a “litigation washing machine” that has engulfed the parties since 2016, referring to the various applications made under Pt IIIA in respect of the Port and the litigation that has accompanied those applications.
4. In the Tribunal’s assessment, the interim authorisation (in itself) has had little effect on the willingness of the parties to engage in negotiations concerning Port services. Rather, it has been the unresolved state of the various applications made under Pt IIIA, and now also under Pt VII, that has inhibited commercial discussions. It is apparent that the coal producers have applied to have the shipping channel and berthing services at the Port declared under Pt IIIA in the belief that the rights conferred under Pt IIIA will afford them greater bargaining power and control over the terms governing the navigation service and wharfage charges. While the original declaration of the shipping channel and berthing services was revoked in about September 2019, a subsequent application for declaration was not finally rejected until recently, in August 2021. Further, the Glencore Coal arbitration, which concerns the appropriate quantum of the navigations services charge, was only finally resolved by the High Court in December 2021. For so long as those applications were outstanding, it is understandable that coal producers may have perceived that it was in their interests not to reach bilateral agreement on the navigation service charge, or agree to the terms of the Producer Pricing Deed offered by PNO. Similarly, with this application for authorisation of collective bargaining being unresolved, it is understandable that coal producers may have wished to refrain from concluding bilateral agreements.
5. In his article on collective bargaining (referred to earlier), Prof King expresses the opinion that collective bargaining may affect negotiation outcomes in two ways: first, collective bargaining may help improve contracting by changing the available information and how it can be used in contract design (at p 116); second, collective bargaining may enhance bargaining power for the parties who join the bargaining group which may, in turn, change the incentives for parties to invest in ways that raise the gains from bargaining (at p 118). Those opinions were supported by the economists who gave evidence in this proceeding. Whether a change in bargaining power or the availability of information is likely to result in a change in bargaining behaviour and outcomes, and whether any change in bargaining outcomes is likely to result in a public benefit (or detriment), depends on a consideration of all circumstances, but particularly the nature and number of parties to the negotiations, the alternatives (and constraints) that the parties face and the subject matter of the negotiations.
6. As to the nature and number of parties to negotiations, the authorisation applicants comprise a modest number (nine) of generally large and sophisticated companies. In financial terms, they are generally much larger than PNO. In the Tribunal’s assessment, each of the authorisation applicants would be expected to be able to advance and prosecute their own individual interests with respect to the export of coal through the Port.
7. As to the alternatives (and constraints) presently faced by the parties, at the beginning of 2020 PNO published the Pricing Deeds as a standing offer in respect of the navigation service and wharfage charges. In about March 2020, vessel agents representing all coal vessels using the Port entered into the Vessel Agent Pricing Deed (taking effect from 1 January 2020). Each of PNO and the coal producers have the benefit of the Vessel Agent Pricing Deeds in the sense that, if they are otherwise unable to reach agreement on the terms of the Producer Pricing Deed, the Vessel Agent Pricing Deeds will apply in practice to govern the navigation service charge (being a lower rate than PNO’s published rate that applies on an open access basis). In that sense, the Vessel Agent Pricing Deeds operate as a constraint on PNO’s pricing in that PNO cannot increase the navigation service charge without complying with the requirements of those Deeds. PNO may, however, elect to enter into a Producer Pricing Deed which offers more favourable terms to Port users in comparison to the Vessel Agent Pricing Deeds. If coal producers do not enter into the Producer Pricing Deed, PNO may also seek to negotiate an agreed increase in the navigation service or wharfage charges with coal producers outside the framework of the Vessel Agent Pricing Deed, but the negotiations would only be expected to be fruitful if the outcome was perceived to be more favourable than would be achievable under the Vessel Agent Pricing Deed.
8. As to the subject matter of possible negotiations between the authorisation applicants and PNO in respect of the navigation service and wharfage charges, three primary areas present for consideration:
9. the current level and price path of the navigation service and wharfage charges as proposed in the Producer Pricing Deed (which replicate those set under the Vessel Agent Pricing Deed);
10. the contractual terms governing material increases in the navigation service and wharfage charges proposed in the Producer Pricing Deed (which also replicate those set under the Vessel Agent Pricing Deed); and
11. the resolution of any future dispute arising in respect of a material increase in the navigation service and wharfage charges under the Producer Pricing Deed (if entered into), or under the Vessel Agent Pricing Deed, or negotiated between PNO and coal producers outside of any contractual framework.
12. In relation to negotiations concerning the current level and price path of the navigation service and wharfage charges as proposed under the Producer Pricing Deed, in the Tribunal’s assessment the proposed collective bargaining conduct is unlikely to result in a bargaining change or outcome that differs from bilateral negotiations. In relation to the navigation service charge, the terms offered in the Producer Pricing Deed have already been accepted by vessel agents under the Vessel Agent Pricing Deed. The current level and price path of the navigation service charge specified in the Vessel Agent Pricing Deed is broadly consistent with the level approved by the Tribunal in the Glencore Coal arbitration, which decision was recently upheld by the High Court. In relation to the wharfage charge, the terms offered in the Producer Pricing Deed are broadly consistent with the level as set by PNO on an open access basis, which is also consistent with the level agreed between the parties in the Glencore Coal arbitration. In circumstances where the Vessel Agent Pricing Deeds will remain in force for many years to come, and the level of the navigation service charge is broadly consistent with the Glencore Coal arbitration conducted under Pt IIIA, there is little incentive for PNO to alter the level of that charge. To the extent that there is additional information in relation to coal production and exports that might persuade PNO to alter the current level of the charges, the Tribunal does not accept that collective bargaining is required in order to advance that information. Nor does the Tribunal accept that any increase in the coal producers’ bargaining power through collective negotiation is likely to affect PNO’s incentives in that regard or make any difference to negotiated outcomes in comparison to bilateral negotiations.
13. In relation to the contractual terms governing material increases in the navigation service and wharfage charges in the Producer Pricing Deed, on the evidence before it the Tribunal is not persuaded that the proposed collective bargaining conduct has a prospect of bringing about a bargaining change or outcome that would not be achieved through bilateral negotiations. The evidence shows that the principal (common) concern of the authorisation applicants relates to those terms, including particularly the pricing principles that would govern the resolution of any dispute in respect of a material price increase. The authorisation applicants consider that the terms do not afford coal producers certainty over future levels of the navigation service charge. The evidence indicates that, to date, there has been little negotiation between PNO and the coal producers in relation to the pricing principles in the Producer Pricing Deed that govern material price increases. The Tribunal considers that there is a possibility that future negotiations between PNO and coal producers may bring about changes to the pricing principles. Even though the pricing principles in the Producer Pricing Deed replicate those in the Vessel Agent Pricing Deeds, there is no reason to think that the terms are fixed and unchangeable or cannot be improved in the mutual interests of coal producers and PNO. While a differently constituted Tribunal concluded that the pricing principles closely follow the mandatory considerations that the ACCC must take into account when conducting an arbitration under Pt IIIA, that Tribunal also noted some differences and potential issues of interpretation that may arise under those contractual terms (see *NSWMC No 3* at [221]-[239]). In any event, commercial parties, wishing to specify contractual terms to govern future price increases, are not limited to the adoption of mandatory considerations under Pt IIIA and may be able to devise other terms that mutually afford the parties greater commercial certainty. However, there is nothing in the evidence that suggests that individual coal producers who are members of the authorisation applicants are incapable of negotiating such issues with PNO, or that individual coal producers are at a disadvantage in negotiations that can only be remedied by collective bargaining. To the contrary, the authorisation applicants are large and sophisticated companies and many of the authorisation applicants are financially much larger than PNO. The Tribunal does not find credible the contention, which rises no higher than assertion, that collective bargaining in respect of the pricing principles in the Producer Pricing Deed would result in a different outcome in comparison to multiple bilateral negotiations.
14. In relation to the resolution of a future dispute arising in respect of a material price increase under the Producer Pricing Deed (if entered into) or under the Vessel Agent Pricing Deed, again the Tribunal is not persuaded that the proposed collective bargaining conduct would be likely to result in bargaining outcomes that differ from outcomes without the proposed conduct. That is because, even without authorisation, there is likely to be a high degree of commonality, if not collectivity, in the conduct of any dispute resolution process under the Producer Pricing Deed (if entered into) or under the Vessel Agent Pricing Deed. The Pricing Deeds contain uniform terms governing any material price increase, including in respect of arbitration, and also contain a “most favoured nation” (non-discrimination) clause. Thus, the issues in dispute in respect of a material price increase under the Pricing Deeds will, in all likelihood, be common to all affected Port users. As noted earlier, the Tribunal considers that the arbitration of a material price increase dispute under the Pricing Deeds would inevitably be consolidated and that the prior negotiation and mediation of a material price increase dispute would almost inevitably be conducted on a collective or consolidated basis. No party suggested that the provisions of Pt IV of the Act would prevent coal producers (and vessel agents) from engaging in collective discussions with respect to any such arbitration, or from appointing joint legal and economic advisers and experts in any arbitration. The Tribunal considers that the circumstances of a material price increase dispute under the Pricing Deeds would also require PNO to engage in collective negotiations with all disputing parties. It follows that there is no likelihood of the authorised collective bargaining conduct producing an outcome in respect of a material price increase dispute that would differ from the outcome of negotiations and arbitration conducted without authorisation.
15. The Tribunal recognises the possibility that coal producers may refuse to enter into the Producer Pricing Deed as they currently receive the benefit of the Vessel Agent Pricing Deeds that have been entered into. In that circumstance, the Tribunal has also given consideration to the possibility that, during the term of the Vessel Agent Pricing Deeds, PNO may seek to negotiate a material increase in the navigation service or wharfage charge with coal producers outside of the framework of the Vessel Agent Pricing Deeds. As noted above, such negotiations would only be expected to be fruitful if the outcome was perceived to be more favourable than would be achievable under the Vessel Agent Pricing Deed (as the Vessel Agent Pricing Deed would continue to apply, unless the parties agreed to a different charge). The question that arises is whether, in those circumstances, the proposed collective bargaining conduct might result in a different bargaining outcome compared to bilateral negotiations. The Tribunal considers the prospect to be unlikely. If PNO were to persuade coal producers to negotiate a material price increase outside the contractual framework of the Vessel Agent Pricing Deed, it appears to the Tribunal to be inevitable that PNO would engage with coal producers in a collective manner. That is because the alternative course available to PNO, notifying an increase under the Vessel Agent Pricing Deed, would inevitably involve a form of collective negotiations. For that reason, the Tribunal’s assessment is that there would be no difference in bargaining behaviour or outcome with or without authorisation.

# F. EXPERT EVIDENCE ADDUCED ON THE APPLICATION FOR REVIEW

## Introduction

1. To assist the Tribunal, the ACCC commissioned a report from Dr Smith that addressed the following matters:
2. the markets relevant to the assessment of the proposed collective bargaining conduct;
3. the economic principles relevant to the identification of public benefits (generally);
4. applying economic principles, the public benefits and detriments likely to arise from collective bargaining conduct (generally); and
5. applying the foregoing economic principles, the public benefits and detriments likely to arise as a result of the proposed collective bargaining conduct.
6. In response, the authorisation applicants commissioned a report from Mr Morton that addressed the following two matters:
7. a response to Dr Smith’s report; and
8. how PNO may be expected to act in setting prices and negotiating access, given its economic circumstances and incentives.
9. PNO commissioned a report from Mr Houston that responded to the reports of Mr Morton and Dr Smith.
10. The economic experts conferred prior to the Tribunal hearing and produced the Joint Report. The Tribunal found the Joint Report to be a helpful synthesis of each expert’s opinion on the issues that arise in this proceeding. The economic experts were also cross-examined concurrently. Each of the economic experts gave oral testimony appropriately, being responsive to the questions asked of them. In considering the opinions expressed by the economic experts, it is convenient to adopt the format of the Joint Report.

## Economic framework

### The economic principles relevant to the identification of public benefits and detriments (generally)

1. As noted earlier, a public benefit within the meaning of the Act includes an increase in economic efficiency (and a public detriment includes a decrease in economic efficiency). There was no substantive disagreement between the experts concerning the meaning of economic efficiency. The differences between the experts in the explanation of the underlying concepts can be described as technical. The differences do not have any substantive impact on the issues to be determined in this proceeding and, for that reason, it is unnecessary to note the technical distinctions drawn by the experts. What follows is largely drawn from the Joint Report.
2. As summarised in the Joint Report, the concept of increased economic welfare or surplus is synonymous with increased economic efficiency. Economic welfare or surplus arising in a particular market can be defined as the sum of the producer surplus, as measured by economic profits earned by the firm supplying the relevant goods or services, and the consumer surplus, as measured by the total value less total cost to the purchaser of those goods or services. Any change in economic conduct or outcome that has the effect of increasing total economic welfare or surplus increases economic efficiency (and results in a public benefit). Conversely, any change in economic conduct or outcome that has the effect of transferring economic surplus between a buyer and a seller (without increasing total economic surplus) represents a private benefit to the transferee and, correspondingly, a private detriment to the transferor.
3. The extent of economic welfare or surplus arising in any market – and so the potential for increases (or decreases) thereto – is difficult to measure directly. An alternative indicator of the potential for increased (or decreased) economic welfare to arise from a particular form of conduct is the extent to which output – in either its quantitative or qualitative dimensions – in any market is likely to increase (or decrease), as compared to the counterfactual. Reliance on increased output as an indicator of public benefit involves the presumption that the economic value of any increased output is positive and exceeds the additional cost of its production. Increased output in any market – and the presumptive increase in economic surplus represented by that increased output – may accrue either in a static sense, where productive and allocative efficiency increase by reference to known market conditions, and/or dynamically, where future productive and allocative efficiency will be increased in the face of changing market conditions, such as may arise through more efficient investment in that market.
4. A change in economic conduct or outcomes that enables, in relation to any market, the same output to be produced with fewer resources (ie, a productive efficiency gain) gives rise to a presumptive increase in economic surplus in that market and an increase in economic efficiency (making the standard assumption that the resources saved are able to be redeployed elsewhere in the economy).

### The public benefits and detriments likely to arise from collective bargaining conduct (generally)

1. The experts agreed that the economic efficiency effects of collective bargaining conduct can be organised into the following three categories:
2. the effects of the collective bargaining on the market in which the bargaining occurs and any related market (which, for ease of exposition, will be referred to as **category (a) effects**);
3. the effects of the collective bargaining on the transaction costs associated with the process of bargaining (which, for ease of exposition, will be referred to as **category (b) effects**); and
4. the risk of the collective bargaining conduct facilitating collusive conduct directed at one or more markets beyond the contemplated scope of the approved collective bargaining (which, for ease of exposition, will be referred to as **category (c) effects**).
5. The Tribunal considers that the above three categories provide a useful framework for considering the issues that arise in this proceeding.
6. An unusual feature of the present application is that no attention, by way of submissions or evidence before the Tribunal, was directed to the effect of the proposed collective bargaining conduct on competition in the market to which the conduct is directed, being the market for the supply of the shipping channel and berthing services at the Port. Authorisation is sought for conduct because it is anti-competitive in nature and would or might contravene one or more of the provisions of Pt IV of the Act. Anti-competitive conduct typically generates public detriment. In the present case, the authorisation would allow the authorisation applicants, who each acquire (directly or indirectly) the shipping channel and berthing services, to negotiate the terms of acquisition of those services on a collective basis. Ordinarily, such collective conduct would raise a concern over the reduction in competition between coal producers in respect of the acquisition of those services and whether that reduction would result in public detriments. Despite that, none of the parties, including PNO, submitted that the conduct would result in a public detriment by reason of lessening competition in the market for the acquisition of those services. In its Determination, the ACCC also dismissed the prospect of anti-competitive detriment in a cursory manner, observing that the conduct is voluntary for coal producers and concerns PNO’s published terms for the supply of those services (at [4.63]). The Tribunal proceeds on the assumption that the parties considered the matter and concluded that, in the circumstances of the present application, no such anti-competitive detriments would be likely to arise. That may be because the collective bargaining involves acquirers of the Port services, the evidence indicates that there is no prospect of capacity constraint or scarcity in respect of the acquisition of those services, the negotiations are not expected to address any differentiation in service quality between acquirers (in respect of which the acquirers might otherwise compete) and PNO has proffered uniform terms governing the price of supply in any event. In those circumstances, the effects of the proposed collective bargaining conduct can be analysed by assessing the change in the bargaining power of the coal producers brought about by collective bargaining and whether that change would be likely to change the outcome of the negotiations in a manner that affects economic efficiency. That issue is considered as part of the category (a) effects.
7. There was no substantive disagreement between the experts as to the relevant economic considerations applicable to each of the above categories of effects. What follows is largely drawn from the Joint Report, although the Tribunal has re-ordered some of the considerations.
8. In relation to the potential category (a) effects, collective bargaining will increase efficiency if it results in a change in economic conduct (ie, the form and outcome of negotiations are improved) which increases the sum of consumer and producer surplus (as indicated by an increase in either the quantity or quality of output in the market for the service and/or one or more related markets). Collective bargaining conduct that alters the balance of bargaining power so as to cause only a redistribution of the gains from trade between buyers and sellers represents a transfer of economic surplus, rather than an increase in economic efficiency.
9. Whether a change in price of a service, resulting from collective bargaining, will result in an increase in economic welfare or surplus as opposed to a transfer of economic surplus is affected by the elasticity of demand for the service and the timeframe over which the price change occurs or is sustained. If demand for the service is highly price inelastic, small reductions in price are likely to have little to no effect on output of the service, and so – relative to highly price elastic demand – are more likely to give rise to a transfer of economic surplus than an increase in efficiency. The converse also applies. In general, demand in a market is likely to be more price elastic over a longer time period. Accordingly, changes in price applying over a longer period of time – relative to a shorter period of time – are more likely to give rise to increases in efficiency (as well as involving some transfer of economic surplus).
10. Collective bargaining is more likely to achieve an improved economic outcome in circumstances where a common position in the interests of all buyers can reasonably be expected to be agreed. Conversely, collective bargaining is less likely to achieve an improved economic outcome, and may produce a less efficient outcome, where the requirements and preferences of the bargaining group are heterogeneous. In such a case, collective bargaining may create pressure for individual members of the bargaining group to forgo preferences in favour of a uniform approach and may reduce the incentives for innovation by individual buyers and thereby decrease economic efficiency. The risk of such economic harm is reduced where participation in the bargaining group is voluntary and members are free to pursue individual negotiations to satisfy their individual requirements and preferences.
11. In relation to the potential category (b) effects, collective bargaining can affect transaction costs in two ways:
12. a reduction in the transaction costs of members of the bargaining group (who can pool resources when interacting with a counterparty) and the counterparty (who can deal with the bargaining group rather than the members separately) associated with the negotiation, monitoring and potential dispute resolution over the terms of an agreement; and
13. an increase in the transaction costs of members of the bargaining group because the members must negotiate within the group and agree on a common position.
14. The Joint Report noted that the transaction costs arising in relation to intra-group negotiations are likely to be higher the greater the heterogeneity of circumstances affecting the preferences of the group as to the service being acquired. The Joint Report also noted that, if a service is supplied on terms that include a “most favoured nation” (or non-discrimination) clause, some buyers may benefit from the negotiating effort of others without incurring the same extent of transactions costs.
15. In relation to the potential category (c) effects, collective bargaining increases the risk of collusive conduct between members of the bargaining group in relation to upstream or downstream markets in which the members also compete (but which extend beyond the market for which the collective bargaining is approved). The extent to which collective bargaining increases the risk of collusive conduct depends on the existence of factors that facilitate or discourage collusive conduct in the upstream or downstream markets.

## Applying the economic framework

### The factual and counterfactual

1. As noted earlier, the statutory test for authorisation requires consideration of the benefits and detriments likely to result from the conduct for which authorisation is sought, and involves a comparison of the future with, and without, that conduct.
2. In the Joint Report, the experts agreed that the applicable factual and counterfactual should be described as follows:
3. in the factual (ie, the future with authorisation), coal producers have the ability:
   1. to discuss between themselves the terms and conditions of access to the Port;
   2. to negotiate the terms and conditions of access collectively with PNO, in the circumstance where PNO reconsiders its stance in relation to collective negotiation in the face of reduced coal demand and so profits; and
   3. to negotiate individually with PNO, but to date have chosen not to do so;
4. in the counterfactual (ie, the future without authorisation), coal producers:
   1. do not have the ability to discuss between themselves the terms and conditions of access to the Port;
   2. do not have the ability to negotiate the terms and conditions of access collectively with PNO; and
   3. will be willing to negotiate individually with PNO.
5. Subject to one qualification, the Tribunal generally agrees with the above statement of the factual and counterfactual. As noted above, the proposed collective bargaining conduct would extend to negotiation in respect of a material price increase dispute arising under the Producer Pricing Deed (if entered into). For the reasons given earlier, the Tribunal considers that the arbitration of a material price increase dispute would inevitably be consolidated and that the prior negotiation and mediation of a material price increase dispute would almost inevitably be conducted on a collective or consolidated basis. It follows that the factual (ie, the future with authorisation) and the counterfactual (ie, the future without authorisation) would be materially the same in respect of the negotiation, mediation and arbitration of a material price increase under the Producer Pricing Deed.

### Relevant markets and potential efficiency effects of the proposed collective bargaining conduct

1. The experts agreed that the services and associated charges directly affected by the proposed collective bargaining conduct can be described as those for the provision of:
2. navigation and/or shipping channel access services supplied by PNO at the Port in relation to the export of the producers’ coal, for which the applicable charge is the navigation service charge which is paid by vessel agents but in respect of which the coal producers have an economic interest to the extent they bear its ultimate cost; and
3. the availability of a site at which stevedoring operations may be carried out by PNO at the Port in relation to the export of the producers’ coal, for which the applicable charge is the wharfage charge which is paid by coal producers.
4. In the Joint Report, the experts described the above services as “port access services” although the services acquired from PNO can more accurately be described as shipping channel and berthing services (in respect of which PNO levies the navigation service and wharfage charges). In what follows, those descriptions will be used interchangeably.
5. The experts agreed that the other markets that are relevant to the assessment of the public benefits and detriments of the proposed collective bargaining conduct are the upstream and downstream markets that are dependent on Port access services, particularly what is described as the coal tenements market (which includes the acquisition and development of coal tenements) and the coal export market. Such markets are relevant in three potential ways, reflecting the three categories of potential efficiency consequences of the proposed collective bargaining conduct identified earlier.
6. First (and in respect of category (a) effects), if and to the extent that the proposed collective bargaining conduct is likely to change the price or other terms of supply of Port access services, that has the potential to affect the quantity of Port access services demanded by coal producers or vessel agents and may cause output changes in upstream or downstream markets. In that regard, the experts agreed that public benefits will arise from the proposed collective bargaining conduct if two conditions are satisfied:
7. the conduct results in a reduction in charges for, or improvement in the quality of, Port access services; and
8. the change in price or quality results in a change in the quantity of Port access services demanded by coal producers or vessel agents that, in turn, gives rise to an increase in mine production and coal exports (in the near term) or an increase in efficient investment in mine production capability and future coal exports (in the longer term).
9. In their reports, the experts also considered the possibility that the proposed collective bargaining conduct might cause a coal producer to forgo and not pursue individual negotiations with PNO in respect of supply requirements or preferences of that coal producer (which differ from the requirements and preferences of the majority of the collective group of coal producers). To the extent that occurred, and the effect was to diminish the growth prospects of the coal producer concerned, there would be a decrease in economic efficiency and a public detriment.
10. Second (and in respect of category (b) effects), if and to the extent that the proposed collective bargaining conduct reduces the overall transaction costs of bargaining (being the management, legal and other advisory costs associated with bargaining), there will be a productive efficiency gain in either the upstream or downstream market (if the costs of the coal producers are reduced) or the market for Port access services (if PNO’s costs are reduced).
11. Third (and in respect of category (c) effects), there is the potential for the proposed collective bargaining conduct to facilitate collusive conduct between the coal producers in upstream or downstream markets which may reduce output in those markets and thereby reduce efficiency.
12. The Tribunal considers that the expert’s description of the relevant markets and potential efficiency effects of the proposed collective bargaining conduct is the appropriate framework within which to assess the economic efficiency effects of the proposed conduct.

### Economic considerations relevant to category (a) effects

1. In the Joint Report, the experts expressed their joint opinion in relation to the economic factors that are relevant to the bargaining incentives of PNO and coal producers in respect of Port access services which will impact upon category (a) effects. There was substantial agreement between the experts on those factors. The Tribunal agrees with the joint opinions of the experts, which are as follows.
2. The Port access services involve the use of a natural monopoly facility that all coal producers require in order to reach coal export markets. PNO can be presumed to have an incentive to act so as to maximise its profits, assessed over the term of its lease, subject to the various constraints that it apprehends as applying.
3. The nature of the economic relationship between the coal producers and PNO can be described as one involving mutual dependence in combination with potential for the transfer of economic value between PNO and the coal producers. The coal producers are dependent upon the Port access services provided by PNO to realise the value of export coal revenues, since that coal is transported to overseas markets via the Port. PNO is directly dependent upon the provision of Port access services in relation to export coal being transported to overseas markets for approximately 70 per cent of its revenue, and indirectly dependent on export coal for a yet further proportion of its revenue – such as that derived from its leases of Port land for the purpose of carrying out coal export-related activities. Neither the coal producers nor PNO have any close substitutes available to them for the realisation of their respective revenue streams. Setting aside the negotiation of charges for the Port access services, PNO and the coal producers have a mutual interest in ensuring that there are no unnecessary impediments or disincentives for the export of coal through the Port.
4. PNO’s conduct in bargaining with coal producers in relation to the price and other terms applying to Port access services can be expected to be constrained, to varying degrees, by:
5. PNO’s strong medium term interest in encouraging efficient investment in and ensuring the economic viability of all activities associated with the production of export coal, from which the demand for Port access services is derived;
6. the existence of approximately 50 per cent unused capacity at the Port, PNO’s high dependence on export coal-related revenue and the 98-year lease term over which PNO is entitled to derive Port access service revenues;
7. the terms of the Vessel Agent Pricing Deeds, which establish an upper bound on the navigation service charge that may be agreed between PNO and coal producers; and
8. PNO’s apprehension as to the risks of regulatory intervention in relation to the terms and conditions applying to Port access services, by means of declaration under Pt IIIA and/or the invoking of New South Wales-specific regulatory measures and/or legislative amendments.
9. Dr Smith and Mr Houston also agreed that PNO’s bargaining conduct is likely to be constrained by its economic interest in minimising the extent of uncertainty in relation to the future terms and conditions for Port access services so that efficient future investment in the production of export coal is encouraged. Mr Morton did not agree with that proposition. The Tribunal considers that it logically follows from the preceding factors and agrees with the opinion of Dr Smith and Mr Houston in that regard.
10. The experts agreed that, on the evidence available to date, PNO’s pricing conduct is not consistent with the presence of unconstrained market power.
11. The experts also agreed that, since the navigation service and wharfage charges together represent a relatively small proportion of other coal production costs as well as the market value of export coal, the demand for Port access services is highly price inelastic over a significant range of potential levels for those charges.

### Economic considerations relevant to category (b) effects

1. The experts expressed their joint opinions in relation to the economic factors that will affect the likelihood and extent of transaction cost savings from collective bargaining.
2. The experts agreed that, the more numerous the number of issues or parameters to be negotiated and the more numerous the number of counterparties, the greater the potential for cost savings from collective bargaining. Conversely, transaction costs may be increased by collective bargaining if the negotiations are affected by different circumstances or preferences of coal producers. Such differences might arise from factors such as:
3. mine size, location and quality of coal reserves that cause relative differences in marginal and average costs, thereby affecting the potential for shut down in the face of highly cyclical international coal markets;
4. type and quality of coal produced, which affects its end market value;
5. the nature of the agreements under which export coal is sold, which can vary between a CIF or FOB price basis thereby affecting the incidence of the navigation service charge; and
6. remaining mine life, which may influence the time-related preferences of coal producers.
7. The experts agreed that the extent to which transaction costs may be increased in the context of collective bargaining by reason of the different circumstances or preferences of coal producers depends on the extent to which the diversity of interests as between one coal producer and another can be accommodated within the collective bargaining framework in respect of the potential terms of the Port access services.
8. The Tribunal agrees with the above joint opinions concerning transaction cost savings, whilst noting that the opinions are stated at a high level of generality.

### Economic considerations relevant to category (c) effects

1. The experts agreed, in somewhat anodyne terms, that the economic considerations that are likely to increase the risk of the proposed collective bargaining conduct “spilling over” in the form of collusive conduct directed at upstream or downstream markets include:
2. the existence of markets for the sale of export coal in which the coal producers’ individual interests in those markets are more homogeneous, as distinct from differentiated;
3. the existence of markets for the procurement of inputs in which the coal producers’ individual interests in those markets are more homogeneous, as distinct from differentiated; and
4. in relation to all such dependent markets, the existence of factors that facilitate (or contrarily, reduce) collusive conduct.

## The experts’ opinions on category (a) effects

1. In the Joint Report, each of the experts summarised their opinions on the category (a) effects they consider are likely to arise from the proposed collective bargaining conduct. Their opinions, and the Tribunal’s assessment of those opinions, follows.

### Dr Smith

1. In relation to category (a) effects that may give rise to public benefits, Dr Smith expressed the opinion that collective bargaining may increase the efficiency of the bargaining process by addressing the imbalance in bargaining power between the parties, asymmetry of information concerning supply costs, and any lack of bargaining skill/experience of individual parties. Dr Smith expressed the opinion that:
2. PNO has some market power which affects its bargaining power (by reason that the Port is a bottleneck facility for coal producers and the demand for Port services is relatively inelastic).
3. Market power results in a dead weight loss.
4. To the extent that export demand for coal is relatively elastic, increases in Port charges are likely to be at least partially absorbed by the coal producers and, if this occurs, this reduces the ability of the coal producers to invest.
5. To the extent that the proposed collective bargaining results in reduced Port charges or a slower increase in Port charges, producers’ ability to invest is increased. Further, to the extent that collective bargaining results in a more appropriate risk allocation between coal producers and PNO, and this results in greater certainty and less risk in decision-making in the future, this provides an incentive for more and/or more efficient investment by coal producers. This would be a public benefit.
6. To the extent that the proposed collective bargaining results in more efficient supply of Port services, this may benefit ship owners (giving the example of quicker ship turn-around times) which may help to support exports if export demand is relatively price elastic, which would also be a public benefit.
7. Respectfully, there are many aspects of Dr Smith’s opinions in respect of potential public benefits that the Tribunal does not find persuasive. Most importantly, the Tribunal considers that the evidence before it does not provide a foundation for the assumptions that underpin Dr Smith’s economic conclusions, at least in the short to medium term. The Tribunal notes the following matters about the short to medium term.
8. As discussed earlier, the Tribunal considers that, in the future with authorisation, PNO is unlikely to agree to alter the current level of the navigation service charge as offered in the Pricing Deeds. As a consequence, any potential category (a) effect of authorisation will be muted in the short to medium term.
9. While the Tribunal accepts that PNO may have some market power which affects its bargaining power, the evidence before the Tribunal does not support the conclusion that the current levels of navigation service and wharfage charges have resulted in a dead weight loss. The experts agreed, and the Tribunal accepts, that demand for the relevant Port services is highly inelastic. No evidence has been adduced by coal producers to substantiate a claim that coal production in the Hunter Valley, or investment in future coal production, has been withheld or suppressed by reason of any past increase in, or the current level of, the navigation service and wharfage charges. Further, the conclusion reached by the Tribunal in *Re Port of Newcastle Operations* indicates that the current levels of the navigation service and wharfage charges (as offered under the Vessel Agent Pricing Deed) are equivalent to or less than the economic costs of supply of the relevant Port services and therefore consistent with the charges that would be expected in a competitive market.
10. It follows that, in the Tribunal’s view, any reduction in Port charges as a result of collective bargaining in the short to medium term (which the Tribunal regards as unlikely) will merely effect a transfer of surplus from PNO to the coal producers without any efficiency improvement. There would be no public benefit from such a transfer.
11. The Tribunal does not accept Dr Smith’s further opinion that collective bargaining has any realistic potential to improve the quality of Port services supplied (such as by improving ship turn-around times). The Tribunal considers that the Port and coal producers have a mutual interest in the quality of Port services that maximises the throughput of coal. There was no evidence before the Tribunal that suggested that bilateral negotiations with coal producers were preventing or inhibiting agreement on quality of service issues. For completeness, and as discussed earlier, the Tribunal notes that it does not accept the opposite opinion expressed by Mr Byrnes in his evidence that the interim authorisation has inhibited discussions between PNO and coal producers about quality of service issues; the Tribunal considers that the “impasse” between PNO and coal producers reflects the disputation in respect of the application made under Pt IIIA and also the present application for authorisation.
12. However, different considerations arise over a longer time horizon. PNO has offered to supply, and currently supplies, the Port access services on the terms of the Pricing Deeds which have a term of 10 years from 1 January 2020. Those Deeds permit PNO to seek an increase in the navigation service charge and (in the case of the Producer Pricing Deed) the wharfage charge where the increase is material (an increase of more than 5%) and is in accordance with the pricing principles stated in the Deed. The counterparties to the Deeds have the right to dispute the price increase and the contractual dispute resolution process allows arbitration of the dispute by an independent arbitrator.
13. The Tribunal accepts that, over the term of the Pricing Deeds, there is a possibility that PNO might propose a material increase to the level of the navigation service and wharfage charges. While the Tribunal considers that PNO’s market power is significantly constrained by its dependence on export coal and the threat of regulation, circumstances may arise in the future that require considerable capital expenditure at the Port to be undertaken by PNO, including in respect of the proposed MDT. In the context of infrastructure assets that have multiple categories of use and user, there is always the potential for disputation over matters such as cost allocation in the setting of prices for the different categories. The Tribunal also accepts that, the larger the potential increase in Port charges, the greater the potential for the increased Port charges to affect negatively output in dependent markets, and thereby decrease economic efficiency. However, for the reasons explained earlier, in the resolution of a future dispute in respect of a material price increase, the Tribunal is not persuaded that the proposed collective bargaining conduct would be likely to result in bargaining outcomes that differ from outcomes without the proposed conduct. While PNO has stated that it will not participate in collective negotiations with coal producers, the Tribunal expects that a dispute with respect to a future material increase in the navigation service or wharfage charge would inevitably lead PNO to engage with Port users on a collective basis, regardless of any authorisation. In the Tribunal’s view, the authorisation would not make any noticeable change to the conduct of negotiations, mediation and arbitration over such issues.
14. In relation to category (a) effects that may give rise to public detriments, Dr Smith considered the potential for collective bargaining to disadvantage smaller mining companies and/or companies with different interests from those engaged in collective negotiation. Dr Smith observed that this would give rise to a public detriment if it resulted in a net decrease in demand for inputs and/or a net decrease in exports. The extent of any such detriment would be affected by the extent of the difference between the coal producers in relation to matters relating to Port services. If those differences are small, then any detriment will be small. Dr Smith considered that the risk of such detriment is small.
15. The Tribunal agrees with Dr Smith’s opinion in respect of the risk of public detriments. The focus of the authorisation application is the quantum of the navigation service and wharfage charges, not the quality of Port services nor the requirements and preferences of individual coal producers. The Tribunal considers that PNO and the authorisation applicants are sophisticated entities which will, in the future, adopt a common sense approach to the negotiation of commercial arrangements that are mutually beneficial. The Tribunal does not believe that the pursuit of the proposed collective bargaining conduct will lead to any coal producer forgoing or not pursuing private bilateral negotiations with PNO in respect of the coal producers’ individual requirements and preferences.

### Mr Morton

1. While Mr Morton expressed agreement with the other experts in respect of many of the economic principles and conclusions stated in the Joint Report, Mr Morton’s opinions with respect to the category (a) effects likely to arise from the proposed collective bargaining conduct that may give rise to public benefits were expressed in far stronger terms than the other experts. In large part, this was due to Mr Morton maintaining opinions expressed in his primary report concerning PNO’s market power and its expected behaviour in setting prices and negotiating access, given its economic circumstances and incentives. The report expressed the opinion that the constraints on PNO’s pricing discretion are weak, that PNO would be expected to continue to increase Port charges to maximise profits, and that the Pricing Deeds are ineffective in constraining PNO’s market power. In expressing those opinions, Mr Morton relied upon and made extensive reference to previous reports that he had prepared (through his firm Synergies) on behalf of Glencore Coal and NSWMC in connection with the Pt IIIA applications that have been made in respect of the Port (both declaration and arbitration).
2. In the Joint Report, Mr Morton expressed the following (summary) opinions:
3. While agreeing that the demand for PNO’s Port services are inelastic over a significant range of prices, Mr Morton nevertheless considered that a change in Port prices can potentially have a greater impact on demand for Port services where required investment in additional coal production is not yet sunk or where investment is required as existing mines reach the end of their mine life.
4. While agreeing that there are a range of factors that currently constrain PNO’s market power, Mr Morton considers that the constraints are not strong.
5. Mr Morton considers that the offer of the Pricing Deeds, and the execution of the Vessel Agent Pricing Deeds, will provide only a weak constraint on PNO’s ability to significantly increase its prices. Mr Morton also considers that the Deeds do not provide pricing certainty and permit PNO to significantly increase prices.
6. Mr Morton considers that collective bargaining could assist coal producers in effectively negotiating with PNO for three reasons. First, acting collectively, coal producers have a greater opportunity to seek regulatory intervention in relation to PNO’s pricing practices. Second, collective bargaining can assist in reducing the asymmetry of information between coal producers and PNO in relation to negotiations. Third, collective bargaining can allow a more effective pursuit of issues, through enhancing the negotiating capacity of the coal producers, including as a result of the sharing of the cost associated with appointing expert advisors.
7. The Tribunal did not find Mr Morton’s opinions concerning PNO’s market power and its expected behaviour in setting prices and negotiating access, as expressed in his primary report and summarised in the Joint Report, persuasive. In addition to the matters referred to above in the context of Dr Smith’s opinions, the principal (but not exhaustive) reasons for the Tribunal’s lack of persuasion as to Mr Morton’s opinions are as follows.
8. First, and as stated in his primary report, Synergies (under Mr Morton’s instruction) has previously prepared a range of reports in relation to access to services at the Port including:
9. for Glencore Coal, a report prepared in 2015 in relation to its application for the declaration of the shipping channel and berthing services at the Port;
10. also for Glencore Coal, a series of reports to the ACCC during 2018 in relation to the arbitration between Glencore Coal and PNO of the charges to apply for Glencore Coal’s use of the (then) declared shipping channel and berthing services at the Port;
11. also for Glencore Coal, a series of reports to the NCC over the period 2018-2019 in relation to PNO’s application for the revocation of the declaration of the shipping channel and berthing services at the Port; and
12. for NSWMC, a report to the NCC in 2020 in relation to NSWMC’s application to the NCC for declaration of the shipping channel and berthing services at the Port.
13. Mr Morton attached those previous reports to his primary report in this proceeding and referred to those previous reports extensively.
14. The earlier Synergies reports were the subject of detailed consideration and analysis by, relevantly, the NCC and the Tribunal in connection with the earlier Pt IIIA applications to which the reports were directed. Many of the conclusions reached by the NCC and the Tribunal were contrary to the contentions advanced in the earlier Synergies reports. The Tribunal notes in particular:
15. In the 2018 arbitration between Glencore Coal and PNO, the Tribunal disagreed with the conclusion of the ACCC and approved a navigation service charge of $1.0058 per gross tonne (as at 1 January 2018). Following the recent decision of the High Court in *Port of Newcastle Operations*, the Tribunal’s decision in that regard has been reinstated. In the Tribunal’s view, a navigation service charge of that quantum was consistent with the pricing principles in Pt IIIA of the Act, the object of which is to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets. Subsequently, PNO offered a lower navigation service charge pursuant to the terms of the Pricing Deeds.
16. In the 2019 application to revoke declaration of the shipping channel and berthing services, the NCC concluded that access (or increased access) to the services, on reasonable terms and conditions, as a result of a declaration of the services would not promote a material increase in competition in any market. In that connection, and contrary to opinions expressed in earlier Synergies reports, the NCC concluded that PNO did face material constraints on its pricing discretion (see, by way of summary, para 1.9 of the NCC’s recommendation dated 22 July 2019 titled “Revocation of the declaration of the shipping channel service at the Port of Newcastle”).
17. In the 2020 application to declare the shipping channel and berthing services, both the NCC and the Tribunal again concluded that access (or increased access) to the services, on reasonable terms and conditions, as a result of a declaration of the services would not promote a material increase in competition in any market. In that connection, and contrary to opinions expressed in earlier Synergies reports, the Tribunal concluded that there are a range of factors that are likely to constrain PNO’s market power across the medium term in setting prices for the services and that PNO would be expected to set prices so as to recover long run costs, but not to further increase prices in a manner that would lessen future investment in the coal tenements market or coal production more generally: see *NSWMC No 3* at [199].
18. In his primary report prepared in this proceeding, Mr Morton ignores the consideration given to his earlier reports by the NCC and the Tribunal in the context of the applications to which those reports were addressed, and fails to explain why his opinions should be preferred to the contrary conclusions reached by the NCC and the Tribunal. An expert cannot be criticised for maintaining a particular opinion despite contrary views. However, the approach adopted by Mr Morton, involving repetition of earlier opinions directed to particular regulatory decisions without engagement with contrary conclusions reached by the relevant decision-maker, has the appearance of advocacy. The approach is of no assistance to the Tribunal.
19. Second, Mr Morton’s opinions concerning PNO’s expected pricing behaviour, as expressed in his reports, bear little relationship to PNO’s actual pricing behaviour to date. Mr Morton’s primary report states that Synergies’ previous reports demonstrated that PNO’s profit maximising incentive will be most effectively met by raising access prices (and accepting any likely consequential impact on volume) rather than by maintaining lower prices in order to attract additional volume. Synergies’ modelling in earlier reports purported to show that, by increasing the navigation service charge to $3 per tonne, PNO would increase revenues which would have a strongly positive impact on PNO profits. Further modelling purported to show that PNO’s profit would only start to decline at a charge of $12.50 per tonne. Nowhere does the report attempt to explain why PNO has set the navigation service charge at approximately $1.00 per tonne (on an open access basis) and at a lower rate under the Pricing Deeds when the profit maximising price, according to Synergies’ modelling, is $12.50 per tonne. If Mr Morton were correct as to PNO’s pricing power and the profit maximising price, PNO is voluntarily foregoing vast profits. The Tribunal considers that Mr Morton’s opinions in that respect are not credible.
20. Third, Mr Morton’s opinions in his primary report concerning PNO’s price increases since privatisation are based on a simplistic analysis which fails to engage with relevant economic costs. Mr Morton’s report calculated the percentage increase in the navigation service charge since the privatisation of the Port in respect of vessels of a certain capacity and concluded that the increase for Panamax vessels was up to 120%. Mr Morton’s report also calculated that the percentage price increase at the Port since 2014 far exceeded the percentage increase at other Australian coal ports in that period. While citing percentage price increases over a limited time span may have an emotional appeal, the calculations have little relevance to an informed assessment of whether the current level of the navigation service charge is at an inefficiently high level. In respect of the first percentage calculation, Mr Morton’s unstated assumption appears to be that the navigation service charge at the Port at the time of privatisation was set at a level that enabled recovery of efficient costs. Mr Morton provided no evidence to support that assumption. Further, and as noted above, the conclusion reached by the Tribunal in the context of the Glencore Coal arbitration was that the current level of the navigation service charge (incorporating price increases) enables a reasonable return to be earned on the DORC value of the Port assets. In respect of the second percentage calculation, any comparison between coal ports is economically meaningless without knowing the actual amounts of the charges at each port and the costs incurred by each port in providing the relevant services.
21. Fourth, the Tribunal does not accept Mr Morton’s opinion in his primary report, and as summarised in the Joint Report, with respect to the operation of the Pricing Deeds. In that respect, Mr Morton expressed the opinion that the Deeds offer only limited certainty as to ongoing Port charges and provide considerable opportunity for PNO to continue to exercise market power in the setting of Port charges. The Tribunal does not accept that opinion for the reasons explained in *NSWMC No 3* at [218]-[239]. Mr Morton’s report failed to explain why, if PNO has unconstrained market power as he contends, it should choose to fetter its future pricing freedom by entering into the Pricing Deeds. A firm with unconstrained market power would be free to announce price increases from time to time without submitting its prices to any form of scrutiny or control by a third party. In contrast, the Pricing Deeds, voluntarily offered and entered into by PNO, require PNO to notify Port users of price increases, provide supporting material for the increase and, in the event the increase is disputed, submit the increase to binding arbitration. The Tribunal adopts the earlier conclusion expressed in *NSWMC No 3* at [240], that:

…the Pro Forma Pricing Deeds provide a reasonable degree of pricing certainty to coal producers. While the Deeds allow PNO to propose adjustments to the rate of the navigation service charge, any such adjustment is subject to arbitration applying pricing principles which are similar to those governing arbitrations under Division 3 of Part IIIA.

1. Fifth, Mr Morton’s primary report is critical of the “most favoured nation” (or non-discrimination) clause in the Pricing Deeds, arguing that the clause is likely to inhibit the ability of coal producers to negotiate changes in the pricing related provisions of the Deeds via bilateral negotiations. In advancing that argument, Mr Morton appears to consider that bilateral negotiations between individual coal producers and PNO are preferable, enabling differentiated prices to be agreed with each coal producer. The evidence before the Tribunal, of which Mr Morton is apparently unaware, is that the non-discrimination clause was inserted in the Deeds at the request of coal producers. Further, Mr Morton fails to explain how collective bargaining by the coal producers is consistent with his apparent preference for differential prices through bilateral negotiations.
2. Sixth, Mr Morton’s primary report expresses a very tentative conclusion on the question whether collective bargaining is likely to produce category (a) effects that may give rise to public benefits (at para 79):

While I am unable to predict the extent to which collective bargaining by mining companies will actually achieve more efficient outcomes, I consider that collective bargaining will significantly reduce the transaction costs associated with negotiating the Deed and, more importantly, present the best opportunities for the parties to negotiate a balanced contract that will prevent the emergence of future disputes by better articulating the circumstances triggering future price adjustments, and in that event, quantifying the impact on future prices.

1. Mr Morton does not explain why, in light of his opinion concerning the strength of PNO’s market power, collective bargaining will have *any* effect on the terms of the Producer Pricing Deed. As noted above, Mr Morton sought to address that question in the Joint Report, but the Tribunal again finds his opinions unpersuasive.
2. The first reason given by Mr Morton is that acting collectively, coal producers will have a greater opportunity to seek regulatory intervention in relation to PNO’s pricing practices. The Tribunal does not accept that the coal producers require an authorisation in order to act collectively in seeking regulatory intervention. The history of regulatory intervention since the privatisation of the Port amply demonstrates that such intervention does not require coal producers to act in a collective manner. Further, collective action by coal producers advocating regulatory intervention would not involve any contravention of Pt IV of the Act and therefore would not require authorisation.
3. The second reason given by Mr Morton is that collective bargaining can assist in reducing the asymmetry of information between coal producers and PNO in relation to negotiations. Mr Morton did not explain the content of the asymmetry he was referring to. In any event, for the reasons given earlier, the Tribunal is not persuaded that the proposed collective bargaining conduct in respect of the navigation service and wharfage charges would be likely to result in bargaining behaviour or outcomes that differ from bilateral negotiations.
4. The third reason given by Mr Morton is that collective bargaining can allow a more effective pursuit of issues, through enhancing the negotiating capacity of the coal producers, including as a result of the sharing of the cost associated with appointing expert advisors. Transaction costs savings are considered below as a separate head of claimed public benefit. In relation to negotiating capacity, the evidence shows that the coal producers are large sophisticated companies, many of which are far larger than PNO. The evidence does not suggest that any of the coal producers lack negotiating capacity. Again, and for the reasons discussed earlier, the Tribunal is not persuaded that the proposed collective bargaining conduct in respect of the navigation service and wharfage charges will result in different outcomes.
5. In relation to category (a) effects that may give rise to public detriments, Mr Morton considered that there was a low risk of such detriments arising for three reasons:
6. First, the different circumstances applying to each coal producer are unlikely to result in significant differences in the commonality of the coal producers’ interests in relation to the Producer Pricing Deed.
7. Second, a range of measures can be adopted to accommodate individual interests in a collective bargaining framework, including negotiating a menu of options that could be chosen by individual coal producers or negotiating an agreed pro-forma contract with finalisation of individual contracts managed through bilateral discussions.
8. Third, if any coal producer considered that its interests were not being effectively addressed through the collective negotiation, the coal producer would be free to negotiate bilaterally.
9. The Tribunal largely agrees with Mr Morton’s opinion in respect of the risk of public detriments for the reasons expressed above in relation to Dr Smith’s opinion.

### Mr Houston

1. In relation to category (a) effects that may give rise to public benefits, Mr Houston expressed the opinion that there is limited scope for improvement in the terms of the Producer Pricing Deed to be achieved by means of collective bargaining that could not otherwise be achieved through bilateral negotiations, and any potential improvements that may be achieved are unlikely to give rise to an increase in output in the market for Port access or the dependent markets in either the near or long term. In support of that opinion, Mr Houston referred to the following two principal matters:
2. The evidence shows that PNO is constrained by a number of factors, including its dependence on coal exports as its principal source of revenues, its excess channel capacity and the threat of regulatory intervention.
3. The absence of evidence that: the terms of the Pricing Deeds would induce any loss of output in any market; the proposed collective bargaining conduct would make any material difference to the terms of supply of Port services; and that any changes in the terms of supply of Port services would increase output in any market.
4. The Tribunal agrees with Mr Houston’s opinions for the reasons explained in connection with Dr Smith’s opinions.
5. In relation to category (a) effects that may give rise to public detriments, Mr Houston expressed the opinion that the proposed collective bargaining conduct is likely to restrain the individual preferences of coal producers when negotiating the terms of Port access services, potentially leading to less efficient contractual arrangements. In Mr Houston’s opinion, the interests of coal producers are unlikely to be compatibly aligned on all parameters the subject of negotiation with the result that the individual interests of coal producers must be restrained to reach a unified position for the purpose of collective bargaining and dominant producers are likely to be able to obtain the terms most favourable to them, marginalising smaller producers and reducing non-price competition. Although the proposed collective bargaining conduct is voluntary, it can be presumed that there will be continuing pressure for individual coal producers to conform with the majority.
6. For the reasons explained in the context of Dr Smith’s opinions, the Tribunal considers that the risks identified by Mr Houston are small. The preferences of the coal producers with respect to the navigation service and wharfage charges are likely to be closely aligned if not identical and, being sophisticated commercial entities, PNO and coal producers can be expected to negotiate individually in respect of particular service requirements and preferences.

## The experts’ opinions on category (b) effects

1. In the Joint Report, each of the experts summarised their opinions on the category (b) effects they consider are likely to arise from the proposed collective bargaining conduct. Their opinions, and the Tribunal’s assessment of those opinions, follows.

### Dr Smith

1. Dr Smith expressed the opinion that the proposed collective bargaining conduct is likely to result in a net decrease in transaction costs and so some public benefit resulting from the efficiency gains, although they may be modest. Dr Smith considered that:
2. Collective bargaining is likely to reduce the input of time and resources in the bargaining process relative to numerous individual negotiations with PNO and so reduce transactions costs of the individual coal producers. However, at least some of this saving will be offset by the additional transactions costs incurred due to the coal producers needing to arrive at an agreed bargaining position. Those costs will be affected by the degree of diversity of views of the coal producers with respect to issues relating to Port services. However, it seems likely that their views in relation to Port access services are less diverse (as their aim is to export the desired amount of coal as quickly and as cheaply as possible), reducing the amount of additional costs.
3. Collective bargaining will also result in a saving in transaction costs by PNO to the extent that it will not need to negotiate separately with each coal producer.
4. The extent of the saving in transaction costs (for the coal producers and for PNO) is reduced the greater the degree to which individual coal producers opt out of collective bargaining.
5. Some, though less, cost savings will be available even if PNO refuses to negotiate collectively. This is because the authorisation will enable the coal producers to discuss a common position even if ultimately individual coal producers negotiate separately.

### Mr Morton

1. Mr Morton expressed the opinion that:
2. collective bargaining would provide for potential reductions in transaction costs associated with the negotiation of the Producer Pricing Deed, as a result of reductions in costs for both coal producers (who can pool resources when interacting with PNO) and PNO (who will be able to negotiate with a single collective group of producers, rather than in a series of bilateral negotiations);
3. even if collective bargaining would not reduce transaction costs in relation to the terms of the Producer Pricing Deed, it would be likely to reduce transaction costs in respect of any price increase dispute that may arise under the Deed (because such disputes could be negotiated and even arbitrated collectively, rather than through separate negotiations and arbitrations); and
4. the issues likely to require negotiation in relation to the Producer Pricing Deed, and coal producers’ interests in respect of those issues, are sufficiently common that collective discussions between coal producers are unlikely to give rise to significant additional costs.

### Mr Houston

1. Mr Houston expressed the opinion that there is no clear basis on which to conclude that the proposed collective bargaining conduct will cause either an increase or a decrease in transaction costs. This ambiguity derives from:
2. the additional transactions costs likely to be incurred by consequence of the requirement for intra-group discussions between coal producers that exhibit multiple, relevant heterogeneous characteristics;
3. the potential for duplication of costs in circumstances where coal producers first need to negotiate internally to reach a common position and then subsequently engage in bilateral negotiations with PNO;
4. the relatively limited scope of terms remaining to be negotiated in the Producer Pricing Deed; and
5. the “most favoured nation” (non-discriminatory pricing) clause that is included in the Producer Pricing Deed, which enables coal producers to avoid costly negotiations by relying fully on the actions of others, thereby reducing the transaction cost savings that may arise under collective bargaining.
6. In oral testimony, Mr Houston explained that although the proposed collective bargaining is principally focussed on the navigation service and wharfage charges, there are a number of issues involved in the negotiation including the price escalation path, the existence of price reopeners (the terms governing a material price increase) and the term of any contract. In Mr Houston’s opinion, each coal producer is likely to face heterogeneous business conditions that will affect the coal producer’s preferences on those issues, including the remaining life of the producer’s mines and the profitability of the producer’s mines. Mr Houston also questioned the likely materiality of any such savings.

### The Tribunal’s view

1. The Tribunal accepts the theoretical framework adopted by the experts in considering transaction cost savings. However, the Tribunal is not persuaded that the conclusions expressed by the experts should be afforded any weight in the Tribunal’s assessment of the public benefits and detriments. None of the opinions rose much higher than assertion. None of the experts made any enquiries of the costs incurred by the authorisation applicants in conducting bilateral negotiations prior to the interim authorisation, nor sought to obtain evidence of likely future costs with or without authorisation. In so far as the experts relied on their general experience in expressing conclusions, the Tribunal considers that its members are in as good a position as the experts to form a view about the likelihood of transaction cost savings. The Tribunal’s assessment of the likelihood of transaction costs savings is set out in section H below.

## The experts’ opinions on category (c) effects

1. In the Joint Report, each of the experts summarised their opinions on the category (c) effects they consider are likely to arise from the proposed collective bargaining conduct. Their opinions, and the Tribunal’s assessment of those opinions, follows.

### Dr Smith

1. Dr Smith expressed the opinion that there is a risk that the proposed collective bargaining conduct may result in inappropriate exchanges of information and hence anti-competitive effects in input markets and in the export market for coal. However, Dr Smith considered that the risk of collusive conduct in other markets is small and consequently so is the public detriment. The reasons for that conclusion are as follows:
2. The conduct that was authorised by the ACCC is relatively confined and does not involve the coal producers sharing individual coal projection volumes, customer pricing information or marketing strategies.
3. Any attempt by the coal producers to raise prices in the coal export market would be likely to be unprofitable and hence unsustainable by reason that the Hunter Valley coal producers are competing with other Australian coal mining companies and other coal producers around the world for sales and are price takers on the world market.
4. In respect of domestic sales, the worsening outlook for coal exports is likely to provide an incentive for each producer to compete vigorously for local sales.
5. The Tribunal generally agrees with Dr Smith’s opinion.

### Mr Morton

1. Mr Morton expressed the opinion that, in order to assess whether the risk of collusion is increased from the proposed collective bargaining conduct in any market, it is first necessary to assess the likelihood of collusion in the market under consideration and then assess the incremental impact of the proposed collective bargaining conduct on the likelihood of that collusion. In doing so, it is necessary to have regard to all of the other opportunities that the parties have to plan and interact with one another and any other factors that make collusion less likely (including for example, the risk that collusion would imperil future authorisation applications for collective bargaining).
2. Mr Morton referred to three factors that, in his view, make collusion between the authorisation applicants unlikely. First, collusion is unlikely to be profitable in the coal export market because an output reduction is unlikely to produce a price increase of similar size (in circumstances where producers are unable to reduce cost in the short term in response to an output reduction). Second, the benefits of collusion are unclear where the major coal producers dominate output and several have a significant presence in other markets. Third, the coal producers already interact in multiple forums and rely on collective bargaining for other aspects of their operations, making it less likely that they would use the proposed collective bargaining in respect of Port services as the vehicle for collusion.
3. The Tribunal agrees with Mr Morton’s opinion to the extent it coincides with Dr Smith’s opinion. However, the Tribunal does not agree that participation by coal producers in other collective bargaining arrangements reduces the risk that collective bargaining in respect of Port charges will lead to collusive conduct. The Tribunal considers that the prevalence of collective bargaining arrangements in which the coal producers participate is more likely to result in complacency or misunderstanding about the proper boundaries of the permitted bargaining behaviour and increase the risk that coal producers will contravene the prohibition against collusive conduct.

### Mr Houston

1. In Mr Houston’s opinion, the proposed collective bargaining conduct materially increases the risk of collusive conduct by coal producers in relation to the export market for thermal coal. Mr Houston considers that it is highly likely that a coordinated reduction in supply by a group of infra-marginal producers exporting coal from the Port would affect the world price of thermal coal, giving rise to inefficient outcomes in related markets. Mr Houston also considers that there is a potential risk for the proposed collective bargaining conduct to present opportunities for coal producers to engage in collusive conduct in relation to procurement decisions in local input markets, such as for labour, tenements, and mining equipment.
2. The Tribunal does not accept Mr Houston’s opinion in so far as it relates to the coal export market, for the reasons expressed by Dr Smith and Mr Morton. The Tribunal agrees, though, that the proposed collective bargaining conduct creates some risk of collusive conduct between coal producers in the context of input markets, as identified by Mr Houston. However, the Tribunal considers that the risk is small.

# G. PORT AUTHORITY OF NSW

## Overview

1. The Port Authority of NSW filed a submission with the Tribunal supporting PNO’s application for review and opposing the grant of authorisation. The submission raised discrete issues and it is convenient to address those issues separately in this section.
2. The Port Authority elected not to appear at the hearing of this application. Accordingly, the Tribunal must assess the Port Authority’s contentions solely on the basis of the submission filed with the Tribunal (and the accompanying agreements).
3. The Port Authority’s submission attached two agreements entered into between the Port Authority and PNO, being the Port Services Agreement dated 17 December 2013 (**PSA**) and the Harbour Management System Access Agreement dated 17 December 2013 (**HMSAA**). The contents of the agreements are confidential to the Port Authority and PNO and directions restricting the disclosure of their contents were made by the Tribunal. However, the Port Authority’s submission to the Tribunal (which is not confidential) made reference to certain aspects of those agreements, particularly the PSA, and the reasons that follow are confined to those non-confidential matters.
4. In short, the Port Authority submitted that the proposed collective bargaining conduct would be likely to result in public detriments because:
5. pursuant to the PSA and the HMSAA, the Port Authority provides a range of services at the Port to facilitate safe port operations;
6. a large proportion of its costs in providing those services are fixed;
7. a significant proportion of its revenues earned in providing those services are paid under the PSA and are effectively calculated as a percentage of PNO’s navigation service charge; and
8. the proposed collective bargaining conduct is likely to result in PNO’s navigation service charge being reduced, which will reduce the revenues earned by the Port Authority under the PSA.
9. The Port Authority’s primary contention is that, in the event that PNO’s navigation service charge is reduced, it would need to fund its reduced revenues (in order to cover its costs) in one of two ways. First, it could increase pilotage revenue at the Port, but it submitted that this would constitute an inefficient redistribution of the relative cost burden of the Port Authority’s operations at the Port away from coal exporters and onto other Port users. Alternatively, it could fund the reduced revenues through revenues earned at other ports, but it submitted that this would constitute an inefficient redistribution of the relative cost burden of the Port Authority’s operations at the Port away from coal exporters at the Port and onto users of other ports in NSW.
10. Although not stated expressly in its submission, the Tribunal understands the Port Authority’s contention to be that the above-claimed consequences of the proposed collective bargaining conduct are a public detriment. In that regard, the Port Authority did not submit that any reduction in revenues resulting from the proposed collective bargaining conduct would diminish or detrimentally affect the services provided by it at the Port or the safe operation of the Port. Rather, the submission was confined to a claim that there would be an inefficient cross-subsidy of certain Port costs. That claim is considered below.

## Facts relied upon

1. The facts set out below are drawn from the Port Authority’s submission. Neither PNO nor the authorisation applicants challenged those facts.
2. The Port Authority is a state-owned corporation established under the State Owned Corporations Act and the PAMA Act. It is responsible for and manages the navigation, security and operational safety needs of commercial shipping in the Port of Newcastle, as well as Sydney Harbour, Port Botany, Port Kembla and the ports of Eden and Yamba.
3. Under the PSA and HMSAA, the Port Authority provides services to PNO to facilitate safe operations at the Port including:
4. vessel scheduling functions (facilitating vessel movements);
5. emergency response to incidents in the marine environment;
6. harbour management system access services; and
7. vessel tracking services.
8. Separately, the Port Authority is also responsible for providing pilotage services to Port users, under the *Marine Safety Act 1998* (NSW).
9. The PSA and HMSAA were entered into as part of the Port privatisation process undertaken by the State of NSW between 2013 and 2014. On 13 December 2013, the Treasurer of NSW directed Newcastle Port Corporation (now the Port Authority) to enter into each of those agreements.
10. The Port Authority receives two sources of revenue in respect of its operations at the Port:
11. under the PSA, PNO is required to pay the Port Authority a quarterly fee which is calculated as a fixed proportion (9%) of the “Navigation Charge” that PNO receives from Port users (the “Navigation Charge” being defined as the amount of the navigation service charge imposed by PNO in respect of the entry by vessels into the Port excluding wharfage charges, site occupation charges and port infrastructure charges); and
12. in respect of pilotage services, the Port Authority levies a statutory pilotage charge on all commercial vessels using the Port (subject to limited exceptions).
13. The Port Authority has no contractual or other legal right or entitlement to vary the fee payable by PNO under the PSA or to terminate the PSA.
14. The following table shows the historical revenue ($’000s) earned by the Port Authority from its operations at the Port by category:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **FY15** | **FY16** | **FY17** | **FY18** | **FY19** | **FY20** |
| Proportion of Navigation Charge | 8,000 | 8,000 | 7,196 | 7,150 | 7,488 | 7,846 |
| Pilotage charge | 12,741 | 13,998 | 18,263 | 19,290 | 19,700 | 20,173 |
| Other | 939 | 1,150 | 923 | 960 | 970 | 923 |
| **Total** | **21,680** | **23,148** | **26,382** | **27,400** | **28,158** | **28,942** |

1. The Port Authority incurs costs in respect of its operations at the Port. Overall, approximately 95% of the Port Authority’s operating costs are largely independent of the volume of vessel movements and are fixed. The following table shows the Port Authority’s historic operating costs and allocation of corporate overhead costs ($’000s) in respect of its operations at the Port:

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | **FY15** | **FY16** | **FY17** | **FY18** | **FY19** | **FY20** |
| Operating costs | 20,107 | 20,566 | 21,002 | 21,715 | 22,177 | 23,310 |
| Corporate overheads | 3,467 | 3,602 | 3,748 | 6,050 | 6,438 | 7,136 |

1. The above tables show that the Port Authority’s revenues in respect of its operations at the Port exceed its operating costs but, once the allocation of corporate overheads is taken into account, the Port Authority’s costs in respect of its operations at the Port exceed its revenues.
2. The Port Authority expects its operating costs to continue to increase in future years, to $25.8 million by FY25 and $29.1 million by FY30, driven by increased costs for salary and wages, including anticipated additional pilots and training for those pilots, maintenance and spare parts. The Port Authority also expects to incur $14.9 million in capex costs over the next 10 years. The Port Authority has budgeted to incur $2.3 million of those capex costs in FY22 and $2 million in FY23.

## Consideration

1. In its Determination, the ACCC observed that, by entering into the PSA and agreeing to payments from PNO that are linked to the navigation service charge payments PNO receives, the Port Authority accepted the risk that those payments may go up or down over time. On that basis, the ACCC did not consider that any potential flow on impact on the Port Authority’s revenue from the proposed collective bargaining conduct is a relevant consideration in the assessment of the application for authorisation. The ACCC concluded that the Port Authority’s obligations to operate the Port safely, or to cover future expenditure, are its own separate responsibility and a matter for commercial negotiation between the Port Authority and PNO.
2. The Tribunal does not agree that the matters raised by the Port Authority are irrelevant considerations in the assessment of the application for authorisation. The Port Authority has raised a concern with respect to the efficiency implications of the proposed collective bargaining conduct. As such, the concern is a relevant consideration. However, the Tribunal is not persuaded that the proposed collective bargaining conduct will result in a public detriment by reason of those matters.
3. The initial premise for the Port Authority’s contention is that the proposed collective bargaining conduct is likely to result in a reduction in the navigation service charge levied by PNO, which will flow through in a reduction of the fee payable to the Port Authority under the PSA. For the reasons explained in the next section, the Tribunal assesses that there is a low likelihood that collective bargaining would cause PNO to reduce the current level of the navigation service charge. By itself, that implies collective bargaining is unlikely to cause public detriment through an impact on Port Authority funding. However, even if collective bargaining were to reduce the navigation service charge and the fee payable by PNO to the Port Authority were reduced, the material put forward by the Port Authority is insufficient to establish a public detriment.
4. As noted earlier, the Port Authority did not submit that any reduction in the fee earned from PNO under the PSA would force it to reduce its operations at the Port or decrease safety. The Port Authority submitted that the reduction would require it to fund its operations at the Port from other sources of revenue, being the statutory pilotage charge or revenues earned at other NSW ports. It contended that this would constitute an inefficient redistribution of the relative cost burden of the Port Authority’s operations at the Port.
5. The difficulty with the Port Authority’s contention is that it presupposes that the charges currently levied by the Port Authority to fund its operations at the Port are efficient and that changes in the imposition of those charges will reduce efficiency. However, the Port Authority did not adduce any evidence to support those propositions.
6. As observed by the ACCC, by agreeing to the terms of the PSA and specifically the payment of charges by PNO that are a percentage of PNO’s navigation service charge, the Port Authority accepted the risk that the charges might decrease. The Tribunal accepts the submission of the Port Authority that it has no contractual or other legal entitlement to require PNO to renegotiate the PSA; thus, the risk accepted by the Port Authority is long term (for the duration of the PSA). The Port Authority submitted that it was directed to enter into the PSA by the NSW Treasurer as part of the privatisation of the Port. No explanation was provided for the structure of that charge and why it was set as a percentage of PNO’s navigation service charge. In circumstances where the vast majority of the Port Authority’s costs at the Port are fixed, it is not obvious why the charges imposed on PNO under the PSA would be set as a percentage of PNO’s navigation service charge. Not only might PNO choose to vary that charge, but the charge is in itself a variable charge (based on vessel movements and vessel capacity).
7. As to the efficiency effects of a reduction in PNO’s navigation service charge (the claimed inefficient redistribution of the cost burden), issues concerning the existence of cross-subsidisation of costs between different users or beneficiaries of services, and whether such cross-subsidies are efficient or inefficient, are notoriously difficult to assess. In order for the Tribunal to assess the relative efficiency of different charges levied by the Port Authority, the Tribunal would need detailed evidence relating to:
8. the different services provided by the Port Authority at the Port;
9. the costs incurred in providing those services;
10. the beneficiaries or users of those services;
11. the charges imposed by the Port Authority in respect of those services; and
12. the extent to which the charges reflect the underlying costs and/or the benefits or use of those services.
13. No evidence of that nature was provided by the Port Authority to the Tribunal. In the absence of evidence, it is impossible for the Tribunal to form any conclusion about the relative efficiency of different charges levied by the Port Authority in order to fund its services at the Port.
14. It follows that the Port Authority has failed to persuade the Tribunal that the proposed collective bargaining conduct would or would be likely to result in a public detriment.

# H. THE TRIBUNAL’S ASSESSMENT OF BENEFITS AND DETRIMENTS

## Introduction

1. In this section, the Tribunal sets out its assessment of the public benefits and detriments likely to arise from the conduct sought to be authorised. In doing so, the Tribunal draws on the factual findings and economic conclusions as stated earlier in these reasons.
2. In the Tribunal’s view, many of the contentions advanced by the parties in this proceeding have an air of unreality about them. The contentions were put as a matter of economic theory, but with little regard to the underlying facts and circumstances (which were not the subject of any significant dispute). In the case of the authorisation applicants, the contention that collective bargaining would improve contractual certainty and thereby increase investment was not supported by any information or data concerning investment in upstream markets (particularly relating to coal production) and whether and to what extent the navigation service and wharfage charges impacted investment decisions. The contention that collective bargaining would reduce transaction costs was not supported by any information or data about such costs, whether historical or forecast. In the case of PNO, the contention that collective bargaining would cause the marginalisation of the individual interests and preferences of coal producers ignored the fact that the proposed collective bargaining conduct is directed to the terms governing the navigation service and wharfage charges, which PNO has published as common terms for coal producers (through the Producer Pricing Deed).
3. While the application for authorisation was framed in broad terms, applicable to any and all arrangements between the authorisation applicants and PNO concerning access to the Port, the evidence and submissions of the authorisation applicants were focussed solely on the navigation service and wharfage charges and the terms of the Producer Pricing Deed proffered by PNO. The terms of the Producer Pricing Deed were almost exclusively focussed on the setting of the navigation service and wharfage charges over the term of the Deed. Only one clause was directed to the subject of service quality (cl 10) and that clause merely required the parties to meet twice yearly to consult on service delivery and means to improve the efficiency of service delivery. While the evidence and submissions of the authorisation applicants contained some complaints about the current level of the navigation service charge, the principal concern advanced was the prospect that PNO may make a material increase to that charge in the future. The authorisation applicants argued that that prospect created commercial uncertainty which had adverse efficiency effects. They argued that collective bargaining would result in more efficient contracting and reduce the transaction costs associated with bargaining.
4. The Tribunal observes that the authorisation applicants provided no support for the authorisation of collective bargaining in respect of dealings with PNO beyond the use of the shipping channel and berthing services for the shipment of coal (and the accompanying charges). No evidence was adduced about other commercial dealings or arrangements between the authorisation applicants and PNO. In the absence of such evidence, it is not possible for the Tribunal to make any assessment of the potential public benefits or detriments that may result from collective bargaining in respect of any broader commercial arrangements. In those circumstances, the Tribunal could not be satisfied that collective bargaining in respect of access to the Port generally would be likely to result in a net public benefit. Accordingly, if the Tribunal were to grant authorisation, it would be limited to collective bargaining in respect of the use of the shipping channel and berthing services for the shipment of coal (and the accompanying charges).

## Public detriments

1. In the Tribunal’s assessment, collective bargaining in respect of the use of the shipping channel and berthing services for the shipment of coal (and the accompanying charges) is unlikely to result in any public detriments. The two claimed detriments are the risk of collusive conduct and the marginalisation of the individual interests and preferences of coal producers.

### Risk of collusive conduct

1. With respect to the potential for the conduct to facilitate or encourage collusive conduct, the Tribunal considers that all forums in which competitors meet together increase the risk of collusive conduct. However, the proposed collective bargaining conduct by the authorisation applicants, directed to the terms governing the shipping channel and berthing services at the Port (and particularly the level of the navigation service and wharfage charges levied in respect of those services), creates an immaterial or remote risk of unlawful collusive conduct in other markets. That is for the following reasons.
2. First, the authorisation granted by the ACCC was restricted such that the authorisation applicants were not permitted to share competitively sensitive information that relates to customers, marketing strategies or volume/capacity projections for individual users. If authorisation were to be granted, the Tribunal would impose the same limitation. The limitation would significantly impede the ability of the authorisation applicants to collude.
3. Second, collective bargaining in respect of the navigation service and wharfage charges does not readily create an opportunity for collusive conduct in respect of upstream inputs to coal production which are supplied in entirely different markets.
4. Third, and as observed by Dr Smith, any attempt by the coal producers to raise prices in the coal export market would be likely to be unprofitable by reason that the Hunter Valley coal producers are competing with other Australian coal mining companies and other coal producers around the world for sales and are price takers on the world market.
5. During the hearing, a question arose whether collusive conduct in the coal export market would constitute a relevant public detriment in the sense of being a detriment to the Australian public. The answer to that question is complex. On the one hand, an increase in prices in export markets may benefit producers in Australia and thereby constitute a public benefit. On the other hand, if the export commodity is transformed into, or used in the production of, other products which are imported into Australia, an increase in the price of the export commodity may result in an increase in price of an imported product. No evidence or submissions were advanced on that issue and it is accordingly unnecessary to address it further.

### Marginalisation of individual interests and preferences

1. With respect to the potential for the collective bargaining conduct to marginalise the individual interests and preferences of coal producers, the significance of the issue diminishes when it is appreciated that the authorised conduct is directed to the terms governing the navigation service and wharfage charges. PNO itself has unilaterally proffered uniform terms governing those charges, being the open access terms and the Pricing Deeds. Indeed, there was a high degree of unreality in PNO’s protestations that coal producers have individual requirements and preferences that would be suppressed or inhibited by collective bargaining when PNO seeks to put in place uniform terms.
2. The Tribunal accepts that, in other areas of commercial dealings with PNO, coal producers may have individual requirements and preferences. However, as the Tribunal has noted, the authorisation applicants did not advance submissions or evidence about any such arrangements and the Tribunal would not, therefore, grant authorisation in such broad terms. If authorisation is limited to the terms governing the navigation service and wharfage charges, PNO and coal producers would be expected to conduct individual negotiations in respect of the supply of Port services in which the individual requirements and preferences of the coal producers would be taken into account.
3. In respect of the terms governing the navigation service and wharfage charges, the issues that fall to be negotiated between coal producers and PNO are relatively narrow. The primary points of contention between the parties concern the principles that govern any material increase in the navigation service and wharfage charges and the duration of any agreement governing those charges. The two issues are related. While the Tribunal accepts that individual coal producers may have different views on aspects of those issues, the evidence indicates that any differences are within a narrow compass. To the extent that any coal producer considers that its views are not being recognised through collective bargaining, it is free to cease its participation. Overall, the Tribunal gives this issue no material weight.

### Conclusion

1. In conclusion, the Tribunal considers that the proposed collective bargaining conduct in respect of the use of the shipping channel and berthing services for the shipment of coal (and the accompanying charges) would not be likely to result in any public detriment having any material weight.

## Public benefits

1. On the evidence before it, the Tribunal is not satisfied that the proposed collective bargaining conduct in respect of the use of the shipping channel and berthing services for the shipment of coal (and the accompanying charges) is likely to result in any public benefit. The two claimed public benefits are more efficient contracting and reduced transaction costs.

### More efficient contracting

1. The Tribunal agrees with the theoretical framework advanced by Prof King in assessing whether collective bargaining may result in public benefits, including by resulting in more efficient contracts, being contractual terms that increase economic efficiency. However, whether collective bargaining in a given market context is likely to do so depends on a consideration of the facts and circumstances concerning the goods or services being supplied, including the number and nature of the parties to negotiations, any information asymmetries between the parties to the negotiations, the existence of market power in the supply or acquisition of the goods or services being supplied, the alternatives faced by the parties, and the likely effects in related markets of any change in the terms of supply of those goods or services.
2. Despite the wide range of potential impediments to efficient contracting that might be alleviated by collective bargaining (as discussed by Prof King in his article), in the present case the conduct in which the authorisation applicants wish to engage has a relatively narrow focus: the terms governing the navigation service and wharfage charges. The question to be addressed is: how might collective bargaining result in a more efficient contract governing those charges? It is necessary to consider the current level of charges and the terms governing material increases in those charges. In doing so, it is convenient to adopt the three areas of possible negotiations between the authorisation applicants and PNO in respect of the navigation service and wharfage charges which were considered earlier:
3. the current level and price path of the navigation service and wharfage charges as proposed in the Producer Pricing Deed;
4. the contractual terms governing material increases in the navigation service and wharfage charges proposed in the Producer Pricing Deed; and
5. the resolution of any future dispute arising in respect of a material increase in the navigation service and wharfage charges under the Producer Pricing Deed (if entered into), or under the Vessel Agent Pricing Deed, or negotiated between PNO and coal producers outside of any contractual framework.

#### Negotiations concerning the current charges and price path

1. In relation to the current level and price path of charges, PNO is contractually bound to the level of charges stipulated in the Vessel Agent Pricing Deed for a period of 10 years from 1 January 2020 (being the period of authorisation determined by the ACCC). In those circumstances, the contention that collective bargaining would be likely to result in a public benefit through more efficient contracting depends upon three premises: that the current level of charges has been set at an inefficient level (in other words, at a level that is harming economic efficiency); that collective bargaining would be likely to cause a change (reduction) in the current level of charges (in comparison to bilateral negotiations); and that the reduction in charges would result in a public benefit. None of the premises have been shown to be likely on the evidence before the Tribunal.
2. First, the final determination of the navigation service and wharfage charges in the Glencore Coal arbitration indicates that the current charges are not set at an inefficient level, and there is no evidence before the Tribunal suggesting that the current level of charges has reduced economic output in any market.
3. Second, for the reasons given earlier, the Tribunal considers that the proposed collective bargaining conduct is unlikely to result in a bargaining change or outcome that differs from bilateral negotiations.
4. Third, even if collective bargaining were to result in some reduction in the current level of charges (in an amount that differs from what would be achieved through bilateral negotiations), there is no evidence to support a conclusion that the reduction would improve economic efficiency in any market. The arguments advanced by the authorisation applicants were not supported by any financial or quantitative evidence concerning the coal tenements market (or any other upstream market), its structure, prices or expected returns. There is also a complete absence of evidence before the Tribunal concerning investment decisions in coal production (or any other upstream market) and whether and how Port charges factor into such decisions. On the evidence before it, the Tribunal could only conclude that a reduction in the current level of charges would result in a transfer of surplus from PNO to coal producers, which does not increase economic efficiency and is not otherwise a public benefit.

#### Negotiations concerning the contractual terms governing material increases in charges

1. In relation to the terms governing material increases in the navigation service and wharfage charges, the contention that collective bargaining would be likely to result in a public benefit again depends upon three premises: that the current terms are harming economic efficiency or giving effect to the current terms will harm economic efficiency; that collective bargaining would be likely to cause a change in the terms (in comparison to what would be achieved through bilateral negotiations); and the change would result in a public benefit. Again, the premises have not been shown to be likely on the evidence before the Tribunal.
2. In relation to the first premise, that the current terms are harming economic efficiency, the principal contention advanced by the authorisation applicants is that the material price increase terms in the Producer Pricing Deed are uncertain which has a negative effect on coal producers’ investment decisions. The two components of the contention require consideration: that the material price increase terms in the Producer Pricing Deed are uncertain (and, on the second premise, can be made more certain through collective bargaining); and that the uncertainty is having a negative effect on coal producers’ investment decisions (and, on the second and third premises, which will be remedied by more certain terms).
3. Uncertainty in relation to future input costs is an unexceptional aspect of commerce. The risk of future input cost increases may be able to be reduced by contracts that fix prices and/or price increases over the period of the contract. However, contracts typically involve an allocation or transfer of risk. While the risk of future price increases may be eliminated or reduced for one contracting party, typically a corresponding risk is transferred to the other contracting party. At best, contracts can minimise the overall impact of risk by allocating responsibility or exposure to different sources of risk to the parties best able to control them.
4. Currently, PNO offers the shipping channel and berthing services on two bases. The first is an open access basis where prices are set from time to time and there are no contractual constraints on future price increases. The second is under the Pricing Deeds where increases in price during the term of the Deeds are governed by the provisions of those Deeds.
5. It can be accepted that the material price increase provisions in the Pricing Deeds are uncertain in the sense that they require the application of economic and commercial principles which in turn require the exercise of judgment and about which minds may differ. However, the Tribunal disagrees with the implicit premise of the contention of the authorisation applicants that price uncertainty is only faced by coal producers (and vessel agents). The material price increase provisions also involve uncertainty for PNO. It must bear the risk of increases in costs that, although not insignificant, nevertheless fall below the threshold of materiality set in the Deeds. Further, in the event of a dispute in respect of a material price increase, PNO must abide by the decision of an independent arbitrator as to the application of the pricing principles stated in the Deeds. PNO has no control over the level of any increase approved by an arbitrator.
6. Critically, though, the authorisation applicants have failed to substantiate their contention that uncertainty in the terms governing increases in the navigation service and wharfage charges is having a negative effect on coal producers’ investment decisions. As already noted, the authorisation applicants failed to adduce any evidence concerning investment decisions in coal production (or any other upstream market) and whether and how Port charges factor into such decisions. The evidence that was adduced by the authorisation applicants, through Messrs Lewis, Rochester and Dodd, did not provide any support for the contention. As noted earlier, Whitehaven’s 2021 Annual Report contains an extensive list of business risks faced by Whitehaven, but potential increases in Port charges is not mentioned. In his evidence, Mr Lewis acknowledged that there had not been price certainty in terms of Port charges since the Port was privatised in 2014 and also acknowledged that, in that period, Bloomfield Collieries had not made any decision not to proceed with an investment by reason of that uncertainty.
7. In relation to the second premise, that collective bargaining would be likely to cause a change in the terms which could not be achieved through bilateral negotiations, the Tribunal considers that unlikely for the reasons given earlier. In short, while the Tribunal considers that there is a possibility that future negotiations between PNO and coal producers may bring about changes to the pricing principles in the Producer Pricing Deed, there is nothing in the evidence that suggests that individual coal producers who are members of the authorisation applicants are incapable of negotiating such issues with PNO, or that individual coal producers are at a disadvantage in negotiations that can only be remedied by collective bargaining. The Tribunal does not find credible the contention that collective bargaining in respect of the pricing principles in the Producer Pricing Deed would result in a different outcome in comparison to multiple bilateral negotiations.
8. In relation to the third premise, that a postulated change in the terms governing material increases in the navigation service and wharfage charges would result in a public benefit, again there is a complete absence of evidence to support such a conclusion. First, and as stated above, there is no evidence before the Tribunal concerning investment decisions in coal production (or any other upstream market) and whether and how Port charges factor into such decisions. Second, there is no evidence before the Tribunal that, in the period since privatisation, any investment decisions have been delayed, deferred or otherwise altered by reason of uncertainty over Port charges when, on the case advanced by the authorisation applicants, such uncertainty has existed. Third, the Tribunal has earlier indicated its agreement with the conclusion of a differently constituted Tribunal in *NSWMC No 3* (at [240]) that the terms of the Pricing Deeds provide a reasonable degree of pricing certainty to coal producers, with any price increase subject to arbitration applying pricing principles which are similar to those governing arbitrations under Div 3 of Pt IIIA.

#### Negotiations concerning any future dispute arising in respect of a material increase in charges

1. In relation to future disputes governing a proposed material increase in the navigation service and wharfage charges, the Tribunal is not satisfied that the authorised collective bargaining conduct would be likely to result in a public benefit. For the reasons expressed earlier, the Tribunal is not persuaded that the proposed collective bargaining conduct would be likely to result in bargaining outcomes that differ from outcomes without the proposed conduct. In short, even without authorisation, there is likely to be a high degree of commonality, if not collectivity, in the conduct of any negotiations and dispute resolution process in respect of a material price increase. This is because, as discussed earlier, the Pricing Deeds contain uniform terms governing any material price increase, including in respect of arbitration, and also contain a “most favoured nation” (non-discrimination) clause. The Tribunal considers that the arbitration of a material price increase dispute under the Pricing Deeds would inevitably be consolidated and that the prior negotiation and mediation of a material price increase dispute would almost inevitably be conducted on a collective or consolidated basis. The Tribunal considers that there is no real likelihood of the authorised collective bargaining conduct producing an outcome in respect of a material price increase dispute that differs from negotiations and arbitration conducted without the authorised conduct.

### Reduced transaction costs

1. The Tribunal accepts, at a theoretical level, that collective bargaining may reduce transaction costs. The Tribunal also accepts that a reduction in overall transaction costs improves productive efficiency and is a public benefit. However, collective bargaining also has the potential to increase overall transaction costs (because contracting parties may incur two levels of costs, internally in forming their own views and seeking advice, and externally when participating in collective discussions with members of the bargaining group). Whether transaction costs are likely to increase or decrease and whether any change is more than trivial depends on the specific circumstances in which a particular contract is negotiated, the number of contracting parties involved, the degree of homogeneity of interests of the contracting parties and the extent to which each contracting party will wish to be involved in individual negotiations and collective negotiations.
2. In the present application, almost no evidence was adduced by the authorisation applicants on the question of transaction costs. It would have been possible for the authorisation applicants to adduce evidence as to the collective bargaining procedures implemented by them to date (pursuant to the interim authorisation) and proposed to be implemented in the future, the likely budget for such collective bargaining procedures, the likely budgets for individual costs to be incurred in the course of negotiations, and an estimate of overall cost savings for each authorisation applicant. However, no such evidence was adduced. The contentions with respect to transaction cost savings barely rose above assertion.
3. In the present case, it is not self-evident that collective bargaining in respect of the terms governing the navigation service and wharfage charges would result in transaction cost savings. The evidence of Messrs Dodd, Lewis and Rochester suggests that many, if not all, of the nine coal producers who form part of the authorisation applicants have a strong interest in those terms. It is reasonable to infer that each such coal producer would wish to be represented in collective discussions amongst the bargaining group, but would also wish to consider the contractual terms within their own management teams and potentially take their own advice on the issues raised. Further, the Tribunal accepts the evidence of Mr Byrnes that PNO will engage in individual meetings and discussions with coal producers in the ordinary course of business in relation to the services supplied by PNO including the shipping channel and berthing services. In the absence of collective bargaining, negotiations with respect to the navigation service and wharfage charges would be expected to occur in such bilateral forums. Collective bargaining would require additional forums to be convened for negotiations, but it is unlikely that individual meetings and discussions would cease.
4. Overall, it is not self-evident that collective bargaining with respect to the terms governing the navigation service and wharfage charges would result in transaction cost savings of any significance. In the absence of some evidence concerning expected transaction cost savings, the Tribunal is unable to infer that collective bargaining would be likely to result in a net saving in a more than trivial amount.

### Conclusion

1. In conclusion, the Tribunal considers that the proposed collective bargaining conduct in respect of the use of the shipping channel and berthing services for the shipment of coal (and the accompanying charges) would not be likely to result in any public benefits having any material weight.

# I. DETERMINATION

1. For the reasons given in this determination, the Tribunal is not satisfied that the proposed collective bargaining conduct would result, or be likely to result, in a benefit to the public. Accordingly, the Tribunal’s determination is that the conduct should not be authorised and the determination of the ACCC should be set aside. It also follows that the interim authorisation granted to the authorisation applicants on 2 April 2020 should be revoked.

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| I certify that the preceding three hundred and fifty-two (352) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice O'Bryan, Dr D Abraham and Ms D Eilert. |

Associate:

Dated: 18 February 2022