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**AUSTRALIAN COMPETITION TRIBUNAL**

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**Lodgment and Details**

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| Document Lodged: | Submissions   |
| File Number:     | ACT 2 of 2020   |
| File Title:      | 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 |
| Registry:        | VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL  |



REGISTRAR

Dated: 25/02/2021 10:54 PM

**Important information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.



## ACT 2 of 2020 – Application by Port of Newcastle Operations Pty Limited

### Submission of Port Authority of New South Wales

## 1. Introduction

- 1.1 My name is Lawrence Wing Ming Ho. I joined Sydney Ports Corporation, now Port Authority of New South Wales (**Port Authority**), in October 2011 as its Chief Financial Officer, a role which I continue to hold. I am also the Chief Risk Officer for Port Authority.
- 1.2 I lead Port Authority's businesses finance division and have responsibility for Finance, Corporate Planning, Business Analysis, Procurement, Corporate Services, Internal Audit, Treasury and Company Secretariat. I have 4 direct reports, and 17 indirect reports.
- 1.3 I have 30 years' of senior management experience in business finance in the logistics and transport industry both in Australia and Asia, including at one of the world's largest shipping and terminal operators, P&O Ports/DP World. Before joining Port Authority, I was Regional Finance Director for DP World based in the Philippines.
- 1.4 Port Authority is a state-owned corporation established under the *State Owned Corporations Act 1989* (NSW) and *Ports and Maritime Administration Act 1995* (NSW).
- 1.5 Port Authority is responsible for and manages the navigation, security and operational safety needs of commercial shipping in the Port of Newcastle (**Port**), as well as Sydney Harbour, Port Botany, Port Kembla and the ports of Eden and Yamba.
- 1.6 I have authority to make this submission on behalf of Port Authority.
- 1.7 On 16 April 2020, Port Authority made a submission to the Australian Competition and Consumer Commission (**ACCC**) concerning the NSW Minerals Council's (**NSWMC**) application for authorisation.<sup>1</sup>
- 1.8 Port Authority supports Port of Newcastle Operations Pty Limited's (**PNO**) application for review of the ACCC's final determination made on 26 August 2020.

<sup>1</sup> Port Authority's 16 April 2020 submission replaced its submission of 15 April 2020.

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1.9 This statement sets out matters that Port Authority considers to be relevant to the Tribunal's assessment of PNO's application, but that Port Authority does not expect to be ventilated by any other party. The authorisation, if granted, may affect Port Authority for the reasons I explain below.

## 2. Port Authority's agreements with PNO

2.1 Port Authority is the entity that is party to the following agreements with PNO:<sup>2</sup>

- (a) Port Services Agreement dated 17 December 2013 (**PSA**), provided at **Confidential Attachment 1**;
- (b) a Harbour Management System Access Agreement dated 17 December 2013 (**HMSAA**), provided at **Confidential Attachment 2**.<sup>3</sup>

2.2 Under the PSA and HMSAA, Port Authority is obliged to provide services to PNO, in PNO's capacity as Port manager. Those services facilitate safe Port operations, and include the following:

- (a) Vessel scheduling functions (facilitating vessel movements).
- (b) Emergency response to incidents in the marine environment.
- (c) Harbour management system access services.
- (d) Vessel tracking services.

2.3 Separately, Port Authority is also responsible for providing pilotage services to Port users, under the *Marine Safety Act 1998* (NSW).

2.4 The PSA and HMSAA formed part of the Port privatisation process undertaken by the NSW Government between 2013 and 2014. On 13 December 2013, the Treasurer of NSW directed Newcastle Port Corporation (now Port Authority) to enter into each of the PSA and HMSAA.<sup>4</sup>

2.5 Port Authority has not negotiated any changes to the PSA's terms since.

2.6 Port Authority has no contractual trigger or rights under the PSA or HMSAA to renegotiate the Navigation Charge. The PSA and HMSAA may only be altered by agreement, and in writing signed by each party (i.e. Port Authority and PNO). In practice, Port Authority would consult with NSW Treasury concerning any proposal to seek to amend the PSA or HMSAA.<sup>5</sup>

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<sup>2</sup> Port Authority also provides reports to PNO concerning its performance of pilotage services at the Port, under a Pilotage Agreement dated 17 December 2013.

<sup>3</sup> The HMSAA was varied on 1 December 2014 by a Deed of Variation. The Deed of Variation amends clause 3.2(b) of Schedule 1 to the HMSAA to include the words underlined as follows: "if Port Manager uses the Invoicing System Service to generate invoices, Port Manager will, unless otherwise agreed by the Parties in writing, need to use the same charging structure as used by Port Corporation immediately before Day One (but may use different rates or amounts for each charge); and".

<sup>4</sup> Under the *Ports Assets (Authorised Transactions) Act 2012* (NSW).

<sup>5</sup> Clause 35.1, PSA; clause 27.1, HMSAA.

### 3. Port Authority's financial position and budget

3.1 Port Authority receives the following by way of revenue in respect of its operations at the Port.<sup>6</sup>

- (a) In consideration for the services it provides under the PSA and HMSAA (summarised in paragraph 2.2 above), PNO is required under the PSA contract to pay Port Authority a quarterly fee. For recent and all future years, that fee is calculated as a fixed proportion (9%) of the “**Navigation Charge**” that PNO receives from its customers, i.e. Port users.<sup>7</sup> The Navigation Charge is 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).<sup>8</sup>
- (b) In respect of pilotage services, Port Authority directly levies a statutory pilotage charge on all commercial vessels (subject to limited exceptions), according to Port Authority's published Pilotage Charges at the Port.<sup>9</sup>

3.2 For the purposes of this submission, I have prepared the following table, which allocates Port Authority's historic revenues in respect of its operations at the Port according to the revenue categories identified above.

| Revenue ('000s)  | FY15          | FY16          | FY17          | FY18          | FY19          | FY20          |
|--|---------------|---------------|---------------|---------------|---------------|---------------|
| Revenue from PNO<br>(proportion of<br>Navigation Charge) | 8,000         | 8,000         | 7,196         | 7,150         | 7,488         | 7,846         |
| Revenue from statutory<br>pilotage charge                | 12,741        | 13,998        | 18,263        | 19,290        | 19,700        | 20,173        |
| Other revenue  | 939           | 1,150         | 923           | 960           | 970           | 923           |
| <b>Total Revenue</b>                                     | <b>21,680</b> | <b>23,148</b> | <b>26,382</b> | <b>27,400</b> | <b>28,158</b> | <b>28,942</b> |

3.3 As explained further in section 4 below, the authorisation (if granted) would permit coal exporters to collectively negotiate the Navigation Charge with PNO, which may affect the revenue Port Authority receives from PNO (i.e. the “*Revenue from PNO (proportion of Navigation Charge)*” category in the table above).

<sup>6</sup> In addition, Port Authority also generates limited revenue from other sources, including the rental of an office building in Newcombe Street, Newcastle.

<sup>7</sup> PSA, clauses 12.1(a) and 12.3. Clause 12.1(b) of the PSA provided for a minimum amount required to be paid for any quarter (a “Navigation Services Floor”), but only until 30 June 2016 (see also the definition of Initial Calculation Period). Clause 12.1(b) is therefore not relevant to future payments under Clause 12.1(a). If PNO requests advice from Port Authority under PSA clause 11, PNO must pay or reimburse Port Authority for its reasonable costs (only) of complying with that request (clause 11.2).

<sup>8</sup> Clause 1.1 (Definition of ‘Navigation Charge’), PSA.

<sup>9</sup> As set out in the Schedule of Port Charges (Effective 1 July 2020). [[https://www.portauthoritynsw.com.au/media/4137/port-authority-schedule-of-port-charges\\_fy2021\\_newcastle\\_pil.pdf](https://www.portauthoritynsw.com.au/media/4137/port-authority-schedule-of-port-charges_fy2021_newcastle_pil.pdf)]

3.4 The Port Authority incurs costs in respect of its operations at the Port. Overall, I consider approximately 95% of Port Authority’s operating costs to be largely independent of the volume of vessel movements and fixed.

- (a) As a service provider at the Port, the majority of Port Authority’s costs are in salary and wages (72.6% of total costs in FY2020). The nature of port services provided by Port Authority means that those costs take the form of a “step cost”, by which I mean that Port Authority will incur similar costs from one year to the next, unless there is a substantial reduction (or increase) in Port vessel traffic. In practice, salary and wage cost increases are set under multi-year industrial agreements, and are unlikely to reduce significantly unless there is a prolonged reduction in traffic and those agreements are re-negotiated.
- (b) The second largest cost category is a contract for a third party to provide helicopter transfers to vessels of pilots that undertake pilotage (13.1% of total costs in FY2020), followed by other fixed costs such as asset maintenance, rates, utilities, rent, insurance and statutory training expenses (9.3% of total costs in FY2020).

3.5 Port Authority also makes an allocation of its corporate overhead costs to its Newcastle operations.

3.6 For the purposes of this submission, I have prepared the following table, which identifies Port Authority’s historic operating costs, and allocation of corporate overhead costs, in respect of its operations at the Port.

| Costs ('000s)                 | FY15   | FY16   | FY17   | FY18   | FY19   | FY20   |
|-------------------------------|--------|--------|--------|--------|--------|--------|
| Total Operating Costs         | 20,107 | 20,566 | 21,002 | 21,715 | 22,177 | 23,310 |
| Corporate Overhead Allocation | 3,467  | 3,602  | 3,748  | 6,050  | 6,438  | 7,136  |

3.7 Based on these tables, I conclude that Port Authority’s revenues in respect of its operations at the Port exceed its operating costs. However, once the allocation of corporate overheads is taken into account, I conclude that Port Authority’s costs in respect of its operations at the Port exceed its revenues.

3.8 Port Authority prepares forecasts of its expected costs as part of its annual budget process.

- (a) 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.
- (b) Port Authority also expects to incur \$14.9 million in capex costs over the next 10 years, including \$2.86 million in safety-related upgrades (Vessel Traffic Information System to Vessel Traffic Service) and \$875,000 in oil pollution and Port Safety Operating Licence (PSOL) equipment. Port Authority has budgeted to incur \$2.3 million of those capex costs in FY22, and \$2 million in FY23.

- 3.9 PNO charges Port users a Wharfage Charge, which the authorisation (if granted) would also permit coal exporters to collectively negotiate with PNO. Port Authority does not receive any proportion of PNO's Wharfage Charges.

## 4. Issues Tribunal should take into account

- 4.1 Port Authority submits that the Tribunal should, in making its determination, take the following issues into account.
- 4.2 The principal objectives of Port Authority, as set out in the *Ports and Maritime Administration Act 1995* (NSW), include to promote and facilitate trade through its port facilities, and to ensure that its port safety functions are carried out properly.<sup>10</sup> In the Port Authority's view, the services that Port Authority provides at the Port, including concerning safety, are public benefits.
- 4.3 The current Authorisation, if granted, would permit coal exporters at the Port to collectively negotiate with PNO the price of the Navigation Charge and Wharfage Charge. Any collective negotiations would be expected to result in lower total access charges, including a lower Navigation Charge, and hence a reduction in Port Authority's revenues.
- 4.4 Port Authority will not be a party to any collective negotiations, and has no contractual right or ability to constrain or prevent PNO from agreeing to reductions in the Navigation Charge. Port Authority's interests are not necessarily aligned with PNO's, and PNO will not necessarily protect Port Authority's interests, in any collective negotiations. Port Authority is aware that PNO has previously offered Port users discounted long-term pricing arrangements, subject to agreeing the terms of a Port User Pro Forma Long Term Pricing Deed. The effect of any collective negotiation on Port Authority's revenue is therefore not within Port Authority's control.
- 4.5 As explained in section [3 above](#), the contractual terms of the PSA that set the revenue Port Authority earns are fixed. Port Authority is contractually obliged to continue to supply services at the Port, and those costs are largely fixed. Port Authority also faces ongoing operating cost increases and material investments, including to meet more stringent safety obligations.
- 4.6 To the extent that collective negotiations resulted in a reduction in Port Authority's revenue, Port Authority could in theory seek to renegotiate the PSA, or seek other NSW Government intervention or funding. I consider that that is unlikely to occur for the reasons explained in section [5 below](#).
- 4.7 Accordingly, a reduction in Port Authority's revenue would have the following potential effects (as compared to a situation in which no collective negotiations occurred and Port Authority's revenue did not reduce).
- (a) To the extent that Port Authority funded an increased proportion of its costs at the Port through its pilotage charge revenue, that would constitute an inefficient redistribution of the relative cost burden of Port Authority's operations at the Port away from coal exporters, and onto other Port users. Port Authority reviews and sets the statutory pilotage charge once per year; all else being equal, Port Authority would have a reduced ability to keep pilotage charges low.

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<sup>10</sup> *Ports and Maritime Administration Act 1995* (NSW), sections 9(c) and 10(2)(b).

- (b) To the extent that Port Authority cross-subsidised its costs at the Port from other operations, that would constitute an inefficient redistribution of that cost burden away from coal exporters at the Port, and onto users of other ports in NSW.

## 5. Response to certain statements in the Final Determination

### 5.1 The ACCC made the following statement in the Final Determination.<sup>11</sup>

*Similarly, the contractual relationship between PNO and Port Authority NSW is subject to commercial negotiation between those parties. When Port Authority NSW agreed to payments from PNO that are linked to the navigation service charge payments PNO receives, it accepted the risk that those payments may go up or down over time. The ACCC does not consider that any potential flow on impact on Port Authority NSW's revenue is a relevant consideration in its assessment of this application. Port Authority NSW's obligations to operate the Port safely, or to cover future expenditure, are its own separate responsibility and a matter for commercial negotiation between Port Authority NSW and PNO.*

*As a result, the ACCC considers that the condition of authorisation requested by Port Authority NSW is not necessary for the proposed authorisation to further enhance the likely public benefits, or reduce the likely public detriments.*

### 5.2 The ACCC also summarised the NSWMC's submissions on this issue as follows.<sup>12</sup>

*The Applicants submit that commercial arrangements between Port Authority NSW and PNO are confidential, and that the fees payable between the two service providers is a matter between PNO and Port Authority NSW. The Applicants submit that they would not wish to see the safe operation of the Port compromised. However, the State of NSW by virtue of the sale proceeds of port privatisations, and the charges, taxes and royalties it collects from the mining industry, should have sufficient funds for current and future operations of Port Authority NSW.*

### 5.3 In Port Authority's view:

- (a) Contrary to the ACCCs' view, the potential flow on impact of the authorised conduct on Port Authority NSW's revenue is relevant to the Tribunal's assessment, to the extent it affects the assessment of likely public benefits and detriments.
- (b) Whether or not Port Authority (or rather its contractual predecessor or the NSW Government) accepted commercial risk in the past is not relevant to the counterfactual assessment before the Tribunal. Rather, the Tribunal should make a forward-looking assessment of the likely effects of the authorised conduct, given current circumstances including Port Authority's contractual and practical position.
- (c) The ACCC's Final Determination presented no evidence for the proposition that Port Authority could renegotiate payment terms in the PSA. As explained in section [2 above](#), Port Authority was directed to enter into the PSA, and has no contractual or practical ability to renegotiate those terms.

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<sup>11</sup> ACCC Final Determination, para 4.93-4.94 (page 31).

<sup>12</sup> ACCC Final Determination, para 4.90 (page 31).

- (d) Port Authority does not understand what the ACCC meant by the statement that “*Port Authority NSW’s obligations to operate the Port safely, or to cover future expenditure, are its own separate responsibility*”.
  
- (e) The NSWMC provided no evidence for its submission that the NSW Government is willing or likely to provide additional funding to Port Authority if the Navigation Charge reduced. Further, if the NSW Government were to provide additional funding, that would involve an inefficient redistribution of the cost burden of Port Authority’s operations at the Port away from coal exporters at the Port, and onto taxpayers. If the Tribunal concludes that the NSW Government is likely to provide Port Authority with additional funding in those circumstances, then that is a public detriment that the Tribunal should take into account.

## 6. Conditions proposed by Port Authority

- 6.1 The Tribunal has the discretionary power to impose conditions on authorisation so as to increase the likelihood of the public benefits, or to limit the likelihood of public detriments, arising from the conduct.<sup>13</sup>
  
- 6.2 In its submission of 16 April 2020, Port Authority proposed that the ACCC consider imposing conditions that would either:
  - (a) prevent NSWMC and coal producers from entering into any agreement with PNO that would have the effect of reducing the revenue that Port Authority would otherwise have received under the Navigation Charge; or
  - (b) permit NSWMC and coal producers to collectively negotiate the Wharfage Charge only,

**(Proposed Conditions).**
  
- 6.3 In Port Authority’s view:
  - (a) the Proposed Conditions would limit the likelihood of public detriments arising from the conduct, by ensuring that the collective bargaining does not reduce Port Authority’s future revenue and that no inefficient redistribution of the cost burden of the Port Authority’s services at the Port occurs; and
  - (b) the Proposed Conditions were dismissed by the ACCC in its Final Determination without sufficient analysis, given the matters in paragraph [5.3 above](#).
  
- 6.4 Port Authority was disappointed with the apparent lack of evidence or reasoning supporting the ACCC’s dismissal of its concerns and the Proposed Conditions.

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<sup>13</sup> CCA, section 88(3); *Re Medicines Australia Inc* [2007] ACompT 4 at [129].



6.5 Port Authority did not receive any questions from the ACCC in response to its submission or the Proposed Conditions. Port Authority does not understand on what basis the ACCC reached the conclusion that the terms of the PSA were open to “*commercial negotiation between Port Authority NSW and PNO*”, or that “*any potential flow on impact on Port Authority NSW’s revenue*” was irrelevant to the ACCC’s assessment.

Yours sincerely,

A handwritten signature in black ink that reads "Lawrence Ho". The signature is fluid and cursive, with the first name "Lawrence" written in a larger, more prominent script than the last name "Ho".

**Lawrence Ho**  
Chief Financial Officer

25 February 2021