



PORT WARATAH

COAL SERVICES

26 August 2020

Submission – Port of Newcastle
National Competition Council
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New South Wales Minerals Council application for declaration in relation to the Port of Newcastle

Port Waratah Coal Services Limited (**Port Waratah**) welcomes the opportunity to provide a submission in relation to the application by the New South Wales Mineral Council (**Applicant**) for declaration of certain services provided by the Port of Newcastle (**Port**).

Port Waratah supports the Applicant's submission. We are disappointed that Port of Newcastle Operations Pty Limited (**PNO**) has refused to collectively negotiate with the Applicant and its members over the terms and conditions of access to the Port, as this would support a long-term commercial solution to be reached. In the absence of a collectively negotiated agreement, we consider that a declaration under Part IIIA of the Competition and Consumer Act enabling market participants to seek access to the Port on reasonable terms and conditions is likely to promote a material increase in competition in a number of dependent markets.

1.1 Background

Port Waratah is one of Australia's largest bulk cargo terminal operators. We own and operate the Kooragang and Carrington Coal Terminals at the Port of Newcastle, with a combined capacity of 145 million tonnes per annum.

We work with 35 coal mines and many other service providers in the Hunter Valley Coal Chain – one of the largest and most collaborative coal supply chains in the world – to export coal to over 20 countries.

The Hunter Valley mining industry makes a significant contribution to the economy of New South Wales and Australia, employing around 14,000 people and generating over \$5.4b in economic activity in the Hunter region in [2018/2019] based on the latest NSW Minerals Council annual member Expenditure Survey.

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1.2 The Port has not shown any willingness to provide access on reasonable terms

Port Waratah agrees with the Applicant that the terms and conditions of access offered to users of the Port are unreasonable and are likely to be materially different if the Council recommends declaration in respect of the Services.

The Council has previously accepted that the Port is the only commercially viable option for miners to export coal from the Hunter Valley region.¹ As a private operator of an essential facility in the coal supply chain, PNO is not constrained by any competitors and it has both the incentive and ability to raise prices and/or decrease the quality of services it provides to maximise its profits. PNO's ability to exercise market power is evident by its recent behaviour and the unreasonable and uncommercial terms it is able to extract from the users of the Port, including substantial increases to channel access charges and the requirements for users to disclose potentially strategic and sensitive information.

(a) Inclusion of user funded expenditure in the regulated asset base

Port Waratah has significant concerns with the methodology adopted by PNO to calculate channel access charges to the channel and berthing facilities.

From 1 January 2020, PNO increased its channel access charges by including approximately \$912m of previously completed capital works in their regulated asset base. However, this increase relates to expenditure primarily made by Port Waratah (not the PNO) over several decades to construct the deep-water channel, swing basin, berths and seawalls adjacent to the Kooragang Coal Terminal. Our customers have already paid for the construction costs of this infrastructure via historical Port Waratah terminal access charges and they should not be required to pay twice through PNO's increased channel access charges.

In our view, the inclusion of user funded infrastructure in the regulated asset base artificially increases the price of access without any corresponding benefits for users. The increases are not linked to the provision of additional services or an increase in the quality or efficiency of existing services.

There is also a lack of transparency and consultation with the industry around how the increases to channel access charges will be used, and whether they are linked to further investments PNO intends to make at the Port. We are concerned that users of the Port are being overcharged for costs that are inefficient or unrelated to coal export, for example the subsidisation of a container terminal.²

We agree with the Applicant's submission that PNO's pricing methodology is effectively double charging users and is an unreasonable condition of access to the Port.

¹ For example, see paragraph 4.89 of Declaration of the shipping channel service at the Port of Newcastle, National Competition Council (2015), available [here](#); see paragraph 1.8 of Revocation of the declaration of the shipping channel service at the Port of Newcastle, National Competition Council, available [here](#)

² Newcastle Herald, 'Minerals Council launches new challenge to Port of Newcastle's right to set prices', 6 August 2020, available [here](#).



(b) *PNO requests for cargo information*

Port Waratah agrees with the Applicant that the cargo information requested by PNO under the long-term pricing offer³ is excessive and unreasonable. The long-term pricing offer requires broad information disclosures to PNO, including the nature of the cargo, its destination and demurrage costs. This goes beyond the information PNO needs to charge fees based on gross tonnage of the vessel and may relate to information that is strategic or sensitive to some coal miners.

1.3 The Port's approach to pricing creates significant uncertainty

Port Waratah shares the Applicant's concerns that substantial increases to channel access charges in recent years have created uncertainty for companies operating in the Hunter Valley coal industry, adversely impacting on competition in the dependent markets.

PNO initially increased the channel access charge at the Port by up to 60% (depending on the vessel) after it was privatised in 2014. While this was characterised by PNO as a "one-off pricing restructure and realignment",⁴ a further increase of 35% to the channel access charges from 1 January 2020 suggests the 2014 increase was not a one-off and that there may be further significant price rises in the future. The long-term pricing offer from PNO does not give coal miners adequate price certainty either, as it provides PNO with a mechanism to escalate channel access charges over the life of the agreement. This pricing uncertainty is compounded by challenging market conditions facing the Hunter Valley coal industry due to declining coal prices and the COVID-19 pandemic.

In its application, the Applicant – which represents some of Australia's largest coal miners – highlights that the ad hoc price increases and arbitrary changes to the pricing methodology have significantly increased uncertainty for coal miners who are considering whether to invest or continue investing in the Hunter region. Miners are required to make long-term investment decisions over the life of a mine (30 years or longer), and their inability to forecast channel access charges and future returns with any degree of certainty increases the potential for a hold-up of new investment or cancellation of proposed investments. Channel access charges are a key driver of uncertainty because the cost is unavoidable for Hunter Valley coal miners.

The current price reporting mechanism contained in *Ports and Maritime Administration Act 1995* (NSW) does not provide any greater certainty and is not sufficient because the regulator (NSW Independent Pricing and Regulatory Pricing Tribunal) has no power to determine prices relevant to the Services or to set maximum prices for the Services. Accordingly, this regime does not provide any meaningful regulatory constraint on PNO.

We therefore agree with the Applicant that a declaration will provide market participants with greater certainty to invest in the region. Importantly, PNO will not be permitted to make unreasonable alterations to its pricing methodology and it will be subject to arbitration in the event of a dispute with users of the Port. We therefore agree that declaration will materially increase competition in dependent markets by removing disincentives for investment in the Hunter region, in particular, in the mining tenement market and the specialist services market as outlined in section 9 of the application.

³ See clause 5 of Annexure A and clause 6 Annexure B to the NSWMC Application.

⁴ Page 6, Port of Newcastle Operations submission in response to Glencore's application to the National Competition Council available [here](#).



1.4 Scope of the declared services

Port Waratah supports the Applicant's request that the definition of Services encompasses the terms and conditions of access in relation to all coal being exported from the Port, whether exported on a Free on Board (FOB) or Cost including Freight (CIF) basis. A narrow interpretation of the Services would not be consistent with industry practice.

On a related issue, Port Waratah is currently in negotiations with PNO, its landlord, for the Carrington Coal Terminal. While the Applicant has not sought a declaration in respect of other services provided by PNO, such as property management and port development services, Port Waratah continues to note its concerns about PNO's ability to exercise market power through other means within the Port creating additional uncertainty in the current challenging market conditions. Should a reasonable market-based rent outcome not be achieved through negotiation the Council should consider whether the current definition of services is sufficiently broad to achieve the objectives of the Application – to prevent PNO exerting market power without regulatory constraints to maximise its profits. PNO has obvious incentives to do so. This further highlights a substantial risk that PNO could frustrate an overly narrow definition of the scope of the declared services by increasing the cost of other services at the Port. All costs must ultimately be borne by users of the Port, a fact of which PNO remain acutely aware.

1.5 Additional information

If the Council has any further questions, Port Waratah would be pleased to assist.

Yours sincerely



HENNIE DU PLOOY
CHIEF EXECUTIVE OFFICER

