NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged:	Affidavit
File Number:	ACT 1 of 2021
File Title:	APPLICATION FOR REVIEW LODGED BY NEW SOUTH WALES MINERALS COUNCIL UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) OF THE DECISION OF THE DESIGNATED MINISTER UNDER SUBSECTION 44H(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH).
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 22/04/2021 9:15 AM

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.

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2021

Re: Application for review lodged by New South Wales Minerals Council under subsection 44K(2) of the Competition and Consumer Act 2010 (Cth) of the decision of the designated Minister under subsection 44H(1) of the Competition and Consumer Act 2010 (Cth)

Applicant: New South Wales Minerals Council

AFFIDAVIT

Affidavit of: Sarah Maryjean Proudfoot

Address: 2 Lonsdale Street, Melbourne

Occupation: Public servant

Date: 21 April 2021

Contents

Filed on behalf of	Australian Competition and Consumer Commission		
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5	Annexure 'SMP4', being a copy of the Minister's decision dated 16 February 2021	29	7
6	Annexure 'SMP5', being a copy of the letter from the NCC dated 8 March 2021	31	8

I, **Sarah Maryjean Proudfoot**, of 2 Lonsdale Street, Melbourne, public servant, affirm:

1 I am the Executive General Manager, Infrastructure Regulation Division at the Australian Competition and Consumer Commission (**Commission**). I am authorised to make this affidavit on the Commission's behalf.

2 I make this affidavit in support of the Commission's application to be granted leave to intervene in this proceeding.

3 I make this affidavit from my own knowledge of the facts unless otherwise stated. Where I refer to matters of which I have been informed by another person, I believe those matters to be true.

This proceeding

4 The proceeding before the Australian Competition Tribunal (**Tribunal**) is an application for review brought by the New South Wales Minerals Council (**NSWMC**) of the Minister's decision not to declare a service provided at the Port of Newcastle by Port of Newcastle Operations Pty Ltd (**PNO**).

5 Annexed to my affidavit and marked '**SMP1**' is a copy of the application for review.

The Commission

6 The Commission is an independent statutory authority established by section 6A of the *Competition and Consumer Act 2010* (Cth) (**CCA**). The Commission is a body corporate and may sue or be sued in its corporate name (section 6A(2) of the CCA).

7 The Commission's functions and powers under the CCA include:

(a) arbitrating disputes over terms and conditions of access to declared services under Subdivision C of Division 3 of Part IIIA of the CCA;

(b) determining whether to register contracts for access to declared services under Division 4 of Part IIIA of the CCA;

(c) determining whether to accept access undertakings for access to services under Division 6 of Part IIIA of the CCA;

(d) determining whether to declare a specified telecommunications service as a declared service under Division 2 of Part XIC of the CCA;

(e) making determinations relating to access to declared services under Division 4 of Part XIC of the CCA; and

(f) enforcing Parts IV and XIB of the CCA, which provisions are concerned with protecting and enhancing competition.

Access to services under Part IIIA of the CCA

8 The objects of the access regime set out in section 44AA of Part IIIA of the CCA are to:

(a) 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; and

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

9 The access regime in Part IIIA establishes a two stage process for access to a service through declaration. The first stage of the process is governed by Division 2 of Part IIIA (entitled 'Declared services') (**stage one**). The second stage of the process is governed by Division 3 of Part IIIA (entitled 'Access to declared services') (**stage two**).

10 Stage one is concerned with the process through which a service provided by means of a facility may become a declared service. The focus is on assessing whether the criteria in section 44CA(1) of the CCA (**declaration criteria**) are satisfied in respect of the relevant service. The Minister, on receiving a recommendation from the National Competition Council (**NCC**), must decide to declare a service or not, but cannot declare a service unless satisfied that all of the declaration criteria are met.

11 The declaration criteria include:

(a) **criterion (a)**, which provides:

> *that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service*

(b) **criterion (d)**, which provides:

> *that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest*

12 If a service is declared, stage two of the process comes into operation if required. At stage two, if a third party has been unable to agree with the provider on one or more aspects of access to a declared service, either the provider or the third party may notify the Commission that an access dispute exists (section 44S). The notification of an access dispute will trigger arbitration and determination of the dispute by the Commission (section 44V). The Commission must take into account the matters listed in section 44X(1) of the CCA when making its final arbitration determination. Those matters include the objects of Part IIIA (section 44X(1)(aa)) and the public interest, including the public interest in having competition in markets (whether or not in Australia) (section 44X(1)(b)).

13 If the access seeker and the provider of a declared service negotiate and agree to the terms and conditions of access and enter into a contract of access to the declared services, they may apply to the Commission for that contract to be registered (section 44ZW). If the contract is registered, then the parties may enforce the contract as if the contract was a determination made by the Commission under section 44V (section 44ZY). The Commission must take into account the matters specified in section 44ZW(2) in deciding whether to register a contract. Those matters include the objects of Part IIIA (section 44ZW(2)(aa)) and the public interest, including the public interest in having competition in markets (whether or not in Australia) (section 44ZW(2)(a)).

14 Part IIIA of the CCA also enables a provider of a service to give a written undertaking to the Commission in connection with the provision of access to the service (section 44ZZA(1)). The Commission may accept an undertaking if it considers it appropriate to do so having

regard to the matters specified in section 44ZZA(3) of the CCA. Those matters include the objects of Part IIIA (section 44ZZA(3)(aa)) and the public interest, including the public interest in having competition in markets (whether or not in Australia) (section 44ZZA(3)(b)).

Commission's special interest, knowledge and experience

15 The Commission is a specialist competition regulator which can take a broad and long term perspective in respect of the issue of declaration of services provided by significant infrastructure and the assessment of whether access or increased access to the service would promote a material increase in competition in a dependent market. This proceeding involves issues of public interest and importance upon which the Commission is well placed to assist the Tribunal.

16 The declaration criteria that are likely to be the particular focus of this review proceeding are criteria (a) and (d). This is because the NCC, in making its recommendation to the Minister that the service not be declared, was not satisfied as to these two criteria, and the Minister, in deciding not to declare the service, adopted the NCC's approach to these criteria (see paragraphs 27–28 below).

17 Elements of criteria (a) and (d) are relevant to the matters which the Commission is required to take into account in making arbitration determinations and decisions on access contracts and undertakings under Part IIIA.

18 As noted above, the matters the Commission must take into account in making an arbitration determination under section 44V include the objects of Part IIIA and the public interest, including the public interest in having competition in markets (whether or not in Australia) (section 44X(1)(aa) and (b)). Similarly, the matters the Commission must take into account in determining whether to register a contract for access to declared services under section 44ZW include the objects of Part IIIA and the public interest, including the public interest in having competition in markets (whether or not in Australia) (section 44ZW(2)(aa) and (a)). Further, the matters the Commission must take into account in determining whether to accept an undertaking for access to services include the objects of Part IIIA and the public interest, including the public interest in having competition in markets (whether or not in Australia) (section 44ZZA(3)(aa) and (b)).

19 Similarly to the objects of Part IIIA, criterion (a) is concerned with the promotion of competition in markets, other than the market for the service.

20 The Commission has considerable expertise and experience in applying the requirements to have regard to the objects of Part IIIA which have been referred to above, particularly in the context of its role in accepting undertakings for access to services. For example, the Commission assesses undertakings under Part IIIA for access to rail track services provided by the Australian Rail Track Corporation and assessed access undertakings relating to the export of bulk wheat and other commodities under previous access arrangements for grain port terminal services. Further, in its role as an arbitrator of access disputes under Division 3 of Part IIIA, the ACCC must also have regard to the objects of Part IIIA in its final determination on an access dispute.

21 Further, one of the objects of Part IIIA is to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry. Given this object, and the stated desire of the legislature for a consistent approach to be applied to access regulation, the issues in the proceeding are relevant to the Commission's various functions and powers under Part IIIA.

22 The proper interpretation of criteria (a) and (d) has broad reaching significance beyond future matters under Part IIIA of the CCA. For example, the meaning and application of criterion (a) is also relevant to the Commission's functions and powers in declaring specified telecommunications services under section 152AL of Part XIC of the CCA, having regard to the requirement that the Commission have regard to the extent to which the declaration is likely to result in the achievement of the objective of promoting competition in markets for listed services (section 152AB(2)(c)).

23 As a result of its role in enforcing Parts IV and XIB of the CCA the Commission also has considerable expertise and experience in considering and assessing competition in a market or markets. In particular, the provisions in Part IV of the CCA are concerned with protecting and enhancing competition generally, and many include a 'substantial lessening of competition' test. The provisions in Part XIB of the CCA are concerned with protecting and enhancing competition in the telecommunications industry.

Commission's participation in NCC declaration recommendation process

24 The Commission participated in the process before the NCC with respect to the application by NSWMC for a recommendation that the service at the Port of Newcastle (referred to at paragraph 3 of the Application) (**service**) be declared under subsection 44F(1) of the CCA.

As described below, the Commission lodged two written submissions with the NCC in that process.

25 On 26 August 2020, the Commission made a written submission to the NCC in response to the NCC's invitation for interested parties to make submissions on the application for a declaration recommendation. Annexed to my affidavit and marked '**SMP2**' is a copy of the Commission's submission of 26 August 2020.

26 On 23 November 2020, the Commission made a written submission to the NCC in response to the NCC's invitation for interested parties to make submissions in response to the NCC's draft recommendation. Annexed to my affidavit and marked '**SMP3**' is a copy of the Commission's submission of 23 November 2020.

27 Importantly, in the submissions made to the NCC in connection with its consideration of the NSWMC application asking the NCC to recommend that the service be declared, the Commission indicated that it disagreed with the approach taken by the NCC to the construction of criterion (a), and the application of criteria (a) and (d). This can be seen from the submissions made by the Commission to the NCC at pages 4–14 of the 26 August 2020 submission and pages 1–2 and 7–8 of the 23 November 2020 submission.

28 The approach of the NCC with which the Commission disagreed was adopted by the NCC in its final recommendation and ultimately adopted by the Minister.

29 Annexed to my affidavit and marked '**SMP4**' is a copy of the Minister's decision dated 16 February 2021. The Minister states that he has adopted the NCC's approach to criterion (a) on page 3, and accepts matters relevant to the NCC's assessment of that criterion at pages 4–6. In connection with criterion (d), the Minister indicates on page 7 that he adopts the NCC's approach to criterion (d), and adopts the relevant findings and reasoning of the NCC in its assessment of that criterion, also on page 7.

Commission's application for leave to intervene

30 In its application, the NSWMC identifies the following issues to be determined in the proceeding:

(a) Whether access (or increased access) to the service on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in any dependent market.

(b) Whether access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of the service, would promote the public interest.

(c) Whether the service should be declared.

31 By letter dated 8 April 2021, the NCC gave notice to the Commission informing the Commission of paragraph 4 of the directions made by the Tribunal on 8 April 2021 (**directions**). Annexed to my affidavit and marked '**SMP5**' is a copy of the NCC's letter of 8 April 2021.

32 Pursuant to paragraph 4 of the Directions, the Commission applies to intervene in this proceeding in order to make written and oral submissions regarding the issues raised in the application for review lodged by the NSWMC on 8 March 2021, in particular in connection with the proper construction and application of criteria (a) and (d). The Commission seeks to make submissions regarding the matters the subject of its previous submissions to the NCC, without duplicating the submissions of the existing parties to this proceeding. Having regard to its significant expertise as a competition regulator, the Commission will bring a different perspective to the Tribunal's consideration of the application of those criteria to that of NSWMC, PNO and the NCC.

33 Further, if and to the extent that the Tribunal may seek assistance in relation to related regulatory matters, the Commission is well placed to assist the Tribunal in that regard. The Commission:

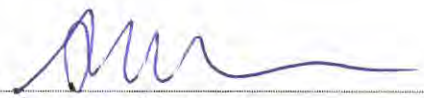
(a) participated in the Full Federal Court proceeding involving the Court's review of the Tribunal's decision to declare the shipping channel service provided by PNO at the Port of Newcastle (*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124; (2017) 253 FCR 115);

(b) arbitrated an access dispute between Glencore and PNO, issuing a determination in respect of that dispute in 2018;

(c) participated in the review of the Commission's determination before the Tribunal and as directed by the Tribunal pursuant to section 44ZP(5) of the CCA (*Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1);

(d) participated in the review of the Tribunal's determination before the Full Court of the Federal Court (which is now the subject of appeal to the High Court) (*Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145; (2020) 382 ALR 331).

Affirmed by the deponent)
)
at Melbourne)
in Victoria)
)
on 21 April 2021)



Signature of deponent

Before me:

Signature of witness

Benjamin David Fisher
2 Lonsdale Street, Melbourne
An Australian Legal Practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2021 Re: Application for review lodged by New South Wales Minerals Council under subsection 44K(2) of the *Competition and Consumer Act 2010* (Cth) of the decision of the designated Minister under subsection 44H(1) of the *Competition and Consumer Act 2010* (Cth)

Applicant: New South Wales Minerals Council

ANNEXURE CERTIFICATE 'SMP1'

This and the following 9 pages is the Annexure marked **'SMP1'** referred to in the affidavit of **Sarah Maryjean Proudfoot** affirmed at Melbourne in Victoria before me on 21 April 2021.

.....

Benjamin David Fisher
2 Lonsdale Street, Melbourne
An Australian Legal Practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

Filed on behalf of	Australian Competition and Consumer Commission		
Prepared by	Fleur Gibbons	Ref	03010528-638095
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NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	Originating Application
File Number:	ACT 1 of 2021
File Title:	APPLICATION FOR REVIEW LODGED BY NEW SOUTH WALES MINERALS COUNCIL UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) OF THE DECISION OF THE DESIGNATED MINISTER UNDER SUBSECTION 44H(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH).
Registry:	VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 8/03/2021 3:15 PM

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FORM JA

(subregulation 20A(1))

APPLICATION TO TRIBUNAL FOR REVIEW

File No. of 2021

APPLICATION FOR REVIEW UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) OF THE DECISION OF THE DESIGNATED MINISTER UNDER SUBSECTION 44H(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH)

Name of applicant: New South Wales Minerals Council

Address of applicant: Level 3, 12 O'Connell Street, Sydney NSW 2000

1. New South Wales Minerals Council (**NSWMC**) applies to the Australian Competition Tribunal under subsection 44K(2) of the *Competition and Consumer Act 2010* (**Act**), for a review of the decision dated 16 February 2021 (**Decision**) by the designated Minister, the Hon. Josh Frydenberg MP, **Treasurer** of the Commonwealth of Australia, under subsection 44H(1) of the Act, not to declare a service, being the service described below, currently being provided by Port of Newcastle Operations Pty Ltd (**PNO**).

2. NSWMC is the person who applied for the declaration recommendation at the Port of Newcastle (**Port**).

Brief description of the service:

3. The service comprises the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct (**Service**).

Facts and contentions on which NSWMC intends to rely:

NSWMC and PNO

4. NSWMC is the peak industry body representing the mining industry in New South Wales.

5. PNO is a 50:50 joint venture between The Infrastructure Fund (**TIF**) and China Merchants Port Holdings Company Limited (**CMPort**). The PNO website states that: "TIF is one of Australia's top performing infrastructure funds with a portfolio of Australian and overseas assets worth more than $2.4 billion. ...CMPort is China's largest and a global leading port developer, investor and operator".

The Port

6. The Port is the largest coal exporting port in the world. Coal is the primary commodity exported through the Port.

7. Shipping channels are the only means by which vessels can gain entry to and exit from the Port. The shipping channels at the Port are the only commercially viable option for the export of coal from the Hunter Valley region in New South Wales.

8. The shipping channels are a natural "bottleneck" monopoly. In practical terms, the Service is necessary for the export of coal from the Hunter Valley.

The Hunter Valley coal industry

9. The Hunter Valley coal industry and associated supply chain are the largest coal export operations in the world. The Hunter Valley/Newcastle coalfields produce approximately 170 million tonnes of saleable coal per year.

10. The Hunter Valley coal supply chain is made up of coal producers (or mines) who export their coal, above rail haulage and below rail (track) providers, three coal export terminals operated by Port Waratah Coal Services and Newcastle Coal Infrastructure Group, port managers and the Hunter Valley Coal Chain Coordinator.

11. There are more than 30 coal mines in the Hunter Valley operated by 11 coal producers as well as other coal projects. Coal is transported by rail haulage providers from the

mines to the three terminals at the Port, and is then loaded onto vessels at one of the loading terminals.

12. The Hunter Valley coal industry and its associated supply chain is responsible for around 90% of New South Wales's coal production and around 40% of Australia's total black coal production.

13. The Treasurer in the Decision accepted that the Port is a bottleneck, with Hunter Valley coal producers having no practical alternative to the Port for the export of coal and that this gives PNO considerable bargaining power over coal producers who have sunk costs in the Newcastle catchment.

Application for Declaration and Treasurer's Decision

14. On 6 March 2020, NSWMC on behalf of itself and certain coal exporters lodged an application for authorisation to the Australian Competition and Consumer Commission (**ACCC**), to collectively negotiate and discuss with PNO terms and conditions of access to the Port, including price with PNO. The ACCC granted authorisation (**Authorisation** AA10000473), but PNO declined (and continues to decline) to enter into negotiations as permitted by the Authorisation. PNO applied to the Tribunal for review of the Authorisation under s 101 of the Act (ACT 2 of 2020).

15. On 23 July 2020, as PNO declined to negotiate with the coal industry, NSWMC applied to the National Competition Council (**NCC**) for a recommendation that the Service be declared under subsection 44F(1) of the Act (**Application**).

16. On 18 December 2020, the NCC provided its final recommendation (**Recommendation**) to the Treasurer. The NCC recommended that the Service not be declared on the basis that the criteria in subsections 44CA(1)(a) and (d) had not been satisfied.

17. On 16 February 2021, the Treasurer published the Decision. The Treasurer decided that the Application did not satisfy the criteria in subsections 44CA(1)(a) and (d) of the Act, and accordingly decided not to declare the Service. The Treasurer's decision makes it clear that the Treasurer relied heavily upon the Recommendation.

Dependent Markets

18. The dependent markets were set out in the Decision, and are as outlined in the Application.

Section 44CA(1)(a) of the Act – criterion (a)

19. Declaration of the Service at the Port would promote a material (or not trivial) increase in competition in one or more dependent markets, in circumstances where:

    (a) PNO has monopoly power as a monopoly infrastructure provider:

        (i) The Port is a bottleneck facility. The Service is a necessary input for effective competition in the dependent coal export market. Hunter Valley coal producers have no practical and realistic commercial alternative to the Port for the export of their coal.

        (ii) PNO is able to exert its monopoly power through the unconstrained and unilateral imposition of access prices. PNO has the ability to impose further material charges for access to the Service in the future.

        (iii) The significant price increases imposed by PNO shortly after taking over the Port in 2016 without consulting users of the Service (as outlined at [4.3] of the Application) were the result of the exercise of monopoly power by PNO. The increased access prices materially impacted the profit margins of coal producers operating in the Hunter Valley. PNO's unconstrained pricing discretion creates costs uncertainties particularly at the present time given the volatilities in the global export coal market.

        (iv) PNO has considerable bargaining power over coal producers who have sunk costs in the Hunter Valley region. Any further cost imposts by PNO will be material to the cost of production and sale of coal for individual coal producers.

(b) The commercial constraints on PNO imposing future increased charging structures are limited:

(i) Whilst PNO has a 98-year lease on the Port and contractual obligations with the State of New South Wales to maintain the Port as a major seaborne gateway, PNO has stated publicly that coal exports from the Port have a limited commercial window of no more than 15 years and it is seeking to transition the Port to use as a container port. PNO's proposed expenditure at the Port on container terminal development and channel dredging is around $2 billion. Users of the Service have no capacity to affect user-funded industry expenditure imposed by PNO through levies for the development of the Port for PNO's long term commercial goals.

(ii) As a monopolist, PNO has a clear incentive to maximise profits from the provision of access to the Port. PNO also has the potential to do so through unconstrained pricing, even if this means reduced volumes or reduced use of the Service. PNO is specifically incentivised to do so in the short to medium term, in light of the 15-year commercial window referred to above.

(iii) PNO is not constrained in the exercise of its monopoly power by its option to enter into collective bargaining negotiations with users of the Service. PNO has declined to meet or collectively negotiate with NSWMC and the coal industry, its future expenditure plans at the Port, even in circumstances where the ACCC had granted authorisation to engage in discussions with PNO.

(iv) PNO is not constrained in the exercise of its monopoly power by its option to enter into bilateral negotiations with users of the Service. Such negotiations only occur at PNOs option and

involve a monopoly infrastructure service provider negotiating with a party that has no choice but to export coal through the Port.

(v) PNO's is not constrained in the exercise of its monopoly power by any effective regulation. There is no meaningful likelihood (or evidence) that the New South Wales Government, or any other regulatory agency, would (or in some circumstances, could) intervene if PNO imposed further excessive price increases on users of the Service.

(vi) PNO is not constrained in the exercise of its monopoly power by the prospect of reputational damage in the coal export industry.

(vii) There is no means for users of the Service to negotiate or arbitrate prices or terms of access imposed by PNO other than through declaration of the Service.

(c) Declaration of the Service would create certainty for investment:

(i) The coal mining industry in the Hunter Valley is facing fragile market conditions, given disruptions in coal exports to China. The uncertainty associated with the unfettered ability of PNO to set and increase prices compounds broader global pressures, threatening the ability of Hunter Valley coal producers to compete in this market.

(ii) Declaration of the Service will allow PNO to obtain a reasonable rate of return while providing the coal industry clarity on a price path that will provide certainty for continued investment and employment in the Hunter Valley coal industry.

(iii) The certainty of access on terms fixed by agreement or by ACCC arbitration under Division 3 of Part IIIA of the Act

would likely remove the risk of PNO imposing terms of access which would or could largely absorb the profit margin otherwise available to coal producers in the Hunter Valley.

(iv) The listing of the Dalrymple Bay coal terminal by Brookfield demonstrates that such a declaration does not inhibit the infrastructure owner realizing both a good price for the asset and also a commercial rate of return.

(d) Derivative markets:

(i) It does not follow that if declaration is unlikely to promote a material increase in competition in the coal exports market, there is unlikely to be a material increase in competition in any derivative market.

Section 44CA(1)(d) of the Act – criterion (d)

20. NSWMC contends that declaration of the Service at the Port would promote the public interest, in circumstances where:

(a) Declaration would impose meaningful constraints on PNO (in particular under an ACCC arbitration). Regulatory constraint of terms and conditions would increase certainty in respect to:

(i) Future cost increases and access issues arising from such investment and expenditure.

(ii) Future exports which will support the more than13,000 people employed in the Hunter Valley in the coal industry.

Issues as NSWMC sees them:

(a) Whether access (or increased access) to the Service on reasonable terms and conditions, as a result of a declaration of the Service would promote a material increase in competition in any dependent market.

(b) Whether access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration of the Service, would promote the public interest.

(c) Whether the Service should be declared.

21. **Address for service of documents:**

Attn: Dave Poddar
Clifford Chance LLP
Level 16, 1 O'Connell Street
Sydney NSW 2000

Dated: 8 March 2021

Signed on behalf of the applicant

.....

Dave Poddar, Partner
Clifford Chance LLP
Solicitor for the applicant

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2021 Re: Application for review lodged by New South Wales Minerals Council under subsection 44K(2) of the *Competition and Consumer Act 2010* (Cth) of the decision of the designated Minister under subsection 44H(1) of the *Competition and Consumer Act 2010* (Cth)

Applicant: New South Wales Minerals Council

ANNEXURE CERTIFICATE 'SMP2'

This and the following 14 pages is the Annexure marked **'SMP2'** referred to in the affidavit of **Sarah Maryjean Proudfoot** affirmed at Melbourne in Victoria before me on 21 April 2021.

.....

Benjamin David Fisher
2 Lonsdale Street, Melbourne
An Australian Legal Practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

Filed on behalf of	Australian Competition and Consumer Commission		
Prepared by	Fleur Gibbons	Ref	03010528-638095
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AUSTRALIAN COMPETITION & CONSUMER COMMISSION

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26 August 2020

Richard York
Executive Director
National Competition Council
GPO Box 250
MELBOURNE VIC 3001

Dear Mr York

Re: NSW Minerals Council application for declaration at the Port of Newcastle

Thank you for the opportunity to submit to the National Competition Council's (NCC) consideration of whether to recommend that the designated Minister declare the shipping channel service at the Port of Newcastle (the Port).

The attached submission considers the reasons the NCC recommended that declaration of the shipping channel service should be revoked, and provides additional information and analysis to help inform the NCC's consideration of the present matter. The ACCC believes that there are a number of points which, if approached differently, may result in a different outcome.

The response attached outlines crucial elements to the assessment of criterion (a) and criterion (d) that did not receive sufficient attention as part of the NCC's recommendation to revoke declaration.

Regarding criterion (a), the NCC should not disregard the inefficiencies, and the resulting cost to the community, caused by PNO's ability and incentive to earn monopoly profits, and the effect this inefficiency will have on competition in related markets. When the detriment caused by monopoly pricing is taken into consideration, the ACCC contends that criterion (a) is satisfied.

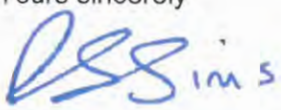
Regarding criterion (d), The ACCC considers the increased investment and efficiency benefits realised from declaration are likely to outweigh any positive longer-term marginal administrative and compliance costs. Therefore, declaration of the Service would be in the public interest, and criterion (d) is satisfied.

We note that on Monday 24 August, the Federal Court handed down its judgment on its judicial review of the Australian Competition Tribunal's arbitrated terms and conditions of access to the Port. We are currently reviewing the reasons for judgment and may shortly make a brief supplementary submission on any matter arising from it.

If you would like to discuss this letter or any issues contained in the attached submission, please contact Matthew Schroder, General Manager, Infrastructure and Transport – Access

and Pricing, on (03) 9290 6924, or Justin Martyn, Director, Regulated Access – Rail, on (08) 8456 3536.

Yours sincerely



Rod Sims
Chair

Introduction

This submission sets out the ACCC's views on a number of matters the National Competition Council (**NCC**) should take into consideration in assessing the New South Wales Minerals Council's (**NSWMC**) application for declaration of certain services (**the Service**) at the Port of Newcastle (**the Port**).

The foundation of Part IIIA is the promotion of economic efficiency in markets characterised by natural monopoly infrastructure service providers. Owners of monopoly infrastructure services have the potential to exercise market power in a way that prevents effective competition in related markets, such as preventing access, charging monopoly prices for services or imposing unreasonable terms and conditions. Part IIIA seeks to address this problem of monopoly market power by the promotion of economic efficiency in markets characterised by natural monopoly infrastructure service providers.[1] Therefore, underlying Part IIIA is the notion that monopolies require some level of economic regulation to address the market failure problem.

The ACCC notes that the declaration criteria, now under section 44CA of the *Competition and Consumer Act* (**the Act**), were amended in 2017 and subsequently applied once by the NCC in its consideration of an application by Port of Newcastle Operations (**PNO**) to revoke declaration of the Service at the Port. In that instance, the NCC was not satisfied that declaration of the Service at the Port satisfied criteria (a) and (d). Therefore it recommended to the Minister that declaration of the Service should be revoked.[2]

In considering whether or not to declare the Service, under subsection 44F(2)(b) of the Act, the NCC is required to have regard to the objects of Part IIIA. Specifically, the ACCC considers the NCC's previous interpretation and application of the amended criteria (a) and (d) to be inconsistent with the first object, which is to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting competition.[3]

This submission addresses criteria (a) and (d). Regarding criterion (a), the ACCC contends that competition in dependent markets is best enabled by the promotion of economic efficiency in the market for PNO's services. The NCC should not disregard the inefficiencies, and the resulting cost to the community, caused by PNO's ability and incentive to earn monopoly profits, and the effect this inefficiency will have on competition in related markets. When the detriment caused by monopoly pricing is taken into consideration, the ACCC contends that criterion (a) is satisfied.

Regarding criterion (d), the ACCC considers the increased investment and efficiency benefits realised from declaration are likely to outweigh any positive longer-term marginal administrative and compliance costs. Therefore, declaration of the Service would be in the public interest, and criterion (d) is satisfied.

Overall, the ACCC submits that the NCC should recommend that these criteria are satisfied with respect to NSWMC's application for declaration. The ACCC submits that declaration of the Service would promote economically efficient outcomes and enhanced competition and investment.

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[1] Petersen, Bull and Dermody, 2016, *Access Regulation in Australia*, p. 27.

[2] NCC revocation recommendation, 11.7.

[3] s 44AA(a) of the Act.

Criterion (a)

Introduction and background

In November 2017, declaration criterion (a) was amended to state:

> *Access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.*[4]

The amendment changed the emphasis in the first part of criterion (a) from assessing the effects of access (or increased access) to assessing the effects of declaration. This has been referred to as a 'with and without declaration' test, as opposed to the previous 'with and without access' test.

In its recommendation to revoke the previous declaration, the NCC approached the assessment of criterion (a) by asking, in regard to the future with and future without declaration scenarios:

> (a) *Does the Council consider that the provider would have the ability and incentive to deny access to relevant service or restrict output and charge monopoly prices? Where a provider of a relevant service has this ability and incentive, it is more likely that it will be able to set terms and conditions of access that are less favourable than those that would be expected in a competitive market for the service;*
>
> (b) *If the provider has that ability and incentive, would such conduct materially affect competition in a dependent market?*[5]

Therefore, the NCC broke the assessment of criterion (a) into two limbs. Applying this approach, the NCC considered it is not enough to find that PNO has market power, or operates a bottleneck facility.[6] Even though the NCC found it is likely that charges for the Service would be higher in a future without declaration, it was not satisfied that criterion (a) was met.[7]

The ACCC disagrees with this framing and application of the assessment of criterion (a). The wording of criterion (a) should not be displaced with another test. Criterion (a) should be interpreted in a manner consistent with the objects of Part IIIA. In accordance with the first object, the focus of the criterion (a) assessment should be on whether declaration would promote economically efficient operation of, use of and investment in the infrastructure by which services are provided, *thereby* promoting a material increase in competition, rather than simply an assessment of the NCC's 'second limb' of whether a scenario without declaration materially affects competition in a dependent market.

However, if the NCC is minded to apply a similar two-stage assessment to the current application, the ACCC's views are set out below.

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[4] s 44CA(1)(a) of the Act.

[5] NCC revocation recommendation, 7.23

[6] NCC revocation recommendation, 1.6.

[7] NCC revocation recommendation, 7.168.

Ability and incentives to exercise market power

The NCC's approach to the recommendation to revoke the declaration of the Service[8] at the Port considered a number of factors that go to PNO's ability and incentive to deny access to the Service on reasonable terms and conditions.[9] As part of this assessment, the NCC considered PNO's incentive and ability to restrict output and charge monopoly prices.[10]

The NCC reasoned that some level of constraint would apply on the 'pricing and output decision[s] of the Port [PNO] with respect to miners of export coal'.[11] Importantly, the Council considered that PNO would be constrained from maximising short-term profits as this may discourage investment in the Newcastle catchment and, in turn, reduce the longer-term profits of PNO as output reduced.[12]

The NCC considered that PNO has:

> *(a) little incentive to deny access to coal miners seeking to use the Service in order to export coal*
>
> *(b) a commercial incentive for dependent markets to be competitive in order to maximise demand for the Service. This is especially the case given export markets for coal are likely to be effectively competitive...and the Port is unlikely to face capacity constraints over the term of the existing declaration.*[13]

While the ACCC agrees that PNO has little incentive to deny access to the Service and that PNO benefits from increased demand for its services, the ACCC considers that PNO is ultimately driven by the goal of profit maximisation over the life of the investment. This goal is not equivalent to the goal of maximising the efficient use of the Port.

Orthodox economic theory is clear that monopolies will seek to maximise profits by charging above its efficient costs, even if this reduces volumes and/or the number of users utilising their service. Additionally, PNO's incentives, risks and future opportunities for revenue will change over time as industries evolve. Under certain circumstances, future revenues may be heavily discounted in favour of current (known) revenue.

The NCC found that PNO is likely to face some degree of competitive constraint from:

- its wariness of developing a reputation for "hold up" given it has signed a 98-year lease[14]
- prospective mining investors having options outside of the Newcastle catchment[15], and
- some limited regulatory constraints on PNO in the absence of regulation[16].

Despite these findings, the NCC appears to acknowledge these constraints to be minimal. The NCC considered it to be likely that:

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[8] Note that we refer again to 'the Service'. The current declaration application relates to the same service, from which declaration was revoked.

[9] NCC revocation recommendation, 7.83 – 7.86.

[10] NCC revocation recommendation, 7.83.

[11] NCC revocation recommendation, 7.91.

[12] NCC revocation recommendation, 7.93.

[13] NCC revocation recommendation, 7.120

[14] NCC revocation recommendation, p. 62.

[15] NCC revocation recommendation, p. 63.

[16] NCC revocation recommendation, p. 64.

> *PNO would charge higher prices for the Service in a future without declaration of the Service than those likely to occur in a future with declaration. However, it is unclear precisely how much higher prices might be in a future without declaration of the Service…a price increase in a future without declaration of the Service may lead to small reductions in the volume of coal being exported through the Port…it might also mean some marginal mining opportunities that would be profitable in a future with declaration may not be profitable in a future without.*[17]

The NCC recognises that PNO is likely to charge higher prices for the Service in a future without declaration, which suggests that PNO does hold significant market power and it is likely to exercise its market power to earn monopoly profits. This in itself is an acknowledgement that PNO has the ability and incentive to exercise its market power to the detriment of dependent markets, and ultimately, community welfare. However, the NCC concluded that PNO does not have incentive to exercise that power.

To the contrary, the ACCC considers that monopoly providers, including PNO, will exercise market power when unconstrained by economic regulation, by setting unreasonable prices and terms of access to a service, to the detriment of economic efficiency (and the interests of users and the Australian economy).

Table 1 shows the change in Navigation Service Charge at the Port from 2014 to 2020. While there have been periods of relative stability in pricing, users have also experienced significant price shocks. For example, between 2014 and 2015, the NSC was increased by 60.8 per cent, and between 2019 and 2020, the NSC was increased by 33.4 per cent.

Table 1 – Change in Navigation Service Charge over time[18,19,20,21]

Year	NSC ($/Gross tonne)	Percentage change (%)
2014	0.4292	
2015	0.6900	60.8
2016	0.7169	3.9
2017	0.7305	1.9
2018	0.7553	3.4
2019	0.7809	3.4
2020	1.0420	33.4

It is noted that large price shocks increase risk and uncertainty for customers. While these impacts are discussed in greater detail below, in the ACCC's view, this clearly demonstrates that PNO has the ability and incentive to exercise market power.

[17] NCC revocation recommendation, 7.168.

[18] 2014 NSC: $0.4292 per gross tonne for the first 50,000 gross tonnes, increasing to $0.9656 for every subsequent gross tonne; NSWMC, *Application for a declaration recommendation in relation to the Port of Newcastle*, July 2020, p. 16.

[19] 2015 to 2018 NSC: PNO, *Application for revocation of declaration*, p. 18.

[20] 2019 NSC: PNO, *2019 Schedule of Service Charges*, p. 3.

[21] 2020 NSC: PNO, *2020 Schedule of Service Charges*, p. 3.

Promoting a material increase in competition in dependent markets

The NCC's assessment

While the NCC acknowledged that PNO is likely to charge higher prices in a future without declaration, it did not consider that this results in a lessening of competition.

The ACCC contends that denial of access is not the only way in which a monopolist can drive inefficient outcomes. Charging monopoly prices also results in inefficiencies and reduced investment and competition in related markets. This in turn undermines the productivity of the Australian economy and the international competitiveness of the Australian economy, and reduces community welfare. In considering the effect of higher prices on competition in the tenements market, the NCC states that it:

> *...does not believe that setting the same higher charges for all miners or investors for a particular tenement opportunity would necessarily amount to a lessening of competition in the market(s) for tenements in the Newcastle catchment...That is, while higher charges for the Service in a future without declaration may reduce the net present value of a mining project to which a tenement relates, this does not mean it would reduce the ability of individual miners to compete against each other for that tenement on their merits.*[22]

The underlying argument is that, provided that miners each face the same inefficient monopoly pricing in making their investment decisions, there is no adverse impact on competition and efficiency in the tenements market. In support of this view, the NCC refers to a report it commissioned from NERA Consulting, which states that:

> *...a competitive tenements market is one in which the tenements are allocated to the most efficient miners/explorers. Even if the value of tenements was reduced because of PNO's pricing, the tenements are likely to be allocated to the most efficient miners/explorers.*[23]

The ACCC disagrees with these conclusions and addresses the efficiency impacts of monopoly pricing in related markets below.

Economic inefficiency resulting from the exercise of market power cannot be disregarded

The ACCC contends that disregarding the economic inefficiencies caused by monopoly pricing is inconsistent with and undermines the objects of Part IIIA, which are to:

> *(a) 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; and*[24] *[emphasis added]*
>
> *(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*[25]

Paragraph (a) of the objects is clear. Effective competition in related markets is promoted by promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided.

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[22] NCC revocation recommendation, 7.330-7.331.

[23] NCC revocation recommendation, 7.335.

[24] s 44AA(a) of the Act.

[25] s 44AA(b) of the Act.

Declaration criterion (a) should be interpreted in a way that best promotes the objects of Part IIIA and, as such, the economic inefficiencies caused by monopoly pricing cannot be disregarded. A failure to give proper weight to the promotion of economically efficient use of monopoly infrastructure is to substantially read down the scope of the regime and materially impairs its ability to have any operation outside of a pure denial of access.

The Hilmer Report considered that economic efficiency comprises three components:

> *Technical or productive efficiency, which is achieved where individual firms produce the goods and services that they offer to consumers at least cost. Competition can enhance technical efficiency by, for example, stimulating improvements in managerial performance, work practices, and the use of material inputs.*
>
> *Allocative efficiency is achieved where the resources employed to produce a set of goods or services are allocated to their highest valued uses (that is, those that provide the greatest benefit relative to costs). Competition tends to increase allocative efficiency, because firms that can use particular resources more productively can afford to bid those resources away from firms that cannot achieve the same level of returns.*
>
> *Dynamic efficiency reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in production opportunities. Competition in markets for goods and services provides incentives to undertake research and development, effect innovation in product design, reform management structures and strategies and create new products and production processes.*[26]

The ACCC considers that promoting effective competition in markets is the best way to maximise economic efficiency. However, competition cannot maximise economic efficiency in markets under a monopoly. The foundation of Part IIIA is the promotion of economic efficiency in markets characterised by natural monopoly infrastructure service providers. The promotion of effective competition in dependent markets relies on the promotion of economic efficiency in the operation of, use of and investment in PNO's infrastructure.

Without declaration, the ACCC considers PNO has the ability and incentive to exercise its market power to the detriment of the economic efficiency and the productivity of the Australian economy. Some of the ways in which this is likely to occur are discussed below.

Declaration would result in an increase in allocative efficiency

In a future without declaration and with monopoly pricing, there will be a reduction in allocative efficiency because PNO's prices will exceed its marginal cost of production. Allocative inefficiency results in a 'deadweight loss', reflecting the distortion of users' behaviour and the subsequent misallocation of resources as a result of the relative price change. This deadweight loss results in a reduction in community welfare.

If PNO were able to perfectly price discriminate, the adverse consequences on allocative efficiency would be reduced. However, in practice, given information limitations and the administrative costs of charging different customers different prices, perfect price discrimination is extremely difficult.

Even if the NCC considers demand for the Service to be relatively inelastic in the short-run such that the increase in price will have little effect on the volume of goods shipped through the Port, the expropriation of resource rents could reduce investment and induce marginal

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[26] Hilmer Report, Independent Committee of Inquiry 1993, p. 4.

mines to prematurely close. Therefore, over the long-run, PNO's exercise of market power will materially reduce allocative efficiency. Further, over the long-run, when all factors of production are flexible, the elasticity of demand will increase, giving rise to a greater resource change and therefore greater allocative inefficiency.

Moreover, the added input price uncertainty faced by users as a result of PNO's exercise of monopoly power would likely increase the likelihood of delays in mining investments, resulting in a decrease in future mining throughput at the Port. Again, in the long-run, the reduced throughput resulting from PNO's exercise of market power will materially reduce allocative efficiency.

Declaration would result in an increase in productive efficiency

The NCC also failed to consider the findings of the mainstream economics literature[27] that monopoly rents result in productive inefficiency.

Productive inefficiency occurs even if PNO is not X-inefficient[28] and could mitigate allocative inefficiency through price discrimination. While price discrimination is permitted under section 44ZZCA(b)(i), as observed by the NCC, it is only permitted when it aids efficiency. Price discrimination where revenues exceed the standalone cost of a service or subset of services gives rise to productive inefficiency.

A natural monopoly exists where total cost of production is minimised when one firm supplies services. However, if PNO engages in any pricing strategy – one which discriminates between customers or not – with the effect that revenues exceeds the standalone cost of any service or subset of services provided, there is productive inefficiency. Productive inefficiency arises because in a contestable market, revenues that exceed the standalone cost of a service or any subset of services, encourage entry and wasteful duplication of the fixed and common costs of bringing those services into production. The result is that the total cost of supplying port services exceeds the efficient total cost. That is, society devotes more resources to obtain these services than the opportunity cost of bringing these services into production.

The productive (in)efficiency argument made above was also observed by the Australian Competition Tribunal (**the Tribunal**) in *Application by Port of Newcastle Operations Pty Ltd*[29] as being 'usually part of the rationale for regulatory oversight'.[30] The Tribunal provided the following explanation of the rationale behind the [standalone] cost test:[31]

> *If prices for a group of services yield revenues in excess of standalone cost', entry occurs, 'inefficiently causing the total costs of production of all services to rise.*[32]

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[27] Perhaps one of the seminal papers on this matter is by Faulhaber (1975) who couched the issue in game theoretic terms. If there are economies of joint production, a single supplier of the service is the most (socially) efficient production arrangement. However, if any one consumer or group of consumers is charged above the standalone cost of the service, it is rational for these consumers to 'go it alone' and supply the service themselves, 'leading to a globally less efficient supply arrangement'. Faulhaber's seminal contribution, including related research into cost allocation games (efficient pricing within the core) and the sustainability of natural monopoly is found in standard regulatory economic texts including Berg and Tschirhart (1988), Brown and Sibley (1989), Courcoubetis and Weber (2003) and Spulber (1989). Gerald Faulhaber (1975), 'Cross-subsidization: Pricing in Public Enterprises', *American Economic Review*, 65(5), pp. 966-977; Sandford Berg and John Tschirhart (1988), *Natural monopoly regulation: Principles and practice*, Cambridge; Stephen Brown and David Sibley (1989), *The theory of public utility pricing*, Cambridge University Press; Costas Courcoubetis and Richard Weber (2003), *Pricing Communications Networks: Economics, Technology and Modelling*, John Wiley and Sons; Daniel Spulber (1989), *Regulation and markets*, The MIT Press.

[28] X-inefficiency occurs when a firm lacks the incentive to control costs causing the average cost of production to be higher than necessary.

[29] Application by Port of Newcastle Operations Pty Ltd [2019] ACompT

[30] Ibid at [552]

[31] Ibid at [550]

[32] Ibid at [552]

When read in context as an explanation of the standalone cost test, the ACCC agrees with this view.

Productive inefficiency may take the form of socially wasteful duplication in a real way. Monopoly rents can give rise to either pressure or the actuality – and in any case an expenditure of real resources – of miners seeking to replicate any activity of PNO if this meant a lower resource cost incurred by the miners in doing so. Any current or future actions of miners as a result of these incentives constitutes a social waste and must be set against the monopoly rents of PNO.

Productive inefficiency may take other forms. Miners may seek to bypass PNO's exercise of monopoly power and monopoly rents by repeatedly seeking declaration. The monopoly rents therefore cannot be conceived as a benign transfer, since expenditure of real resources undertaken to mitigate or eliminate these rents includes social waste and must be set against the monopoly rents of PNO. The social waste arises in the above instances because the resources expended to mitigate or eliminate the monopoly rents could be otherwise spent on productive activities.

Moreover, since any form of price discrimination is unlikely to increase throughput at the Port to competitive levels, a further consideration of PNO's productive inefficiency arises from the inefficient scale and scope of its operations. The supply of Port services is characterised by a natural monopoly. Therefore, even if PNO just broke even in supplying less than competitive (contestable) levels, it will be productively inefficient. This is because, in a contestable market, such charges would encourage entry since the Service can be bought and sold at a lower unit cost. Entry, and the resulting duplication of costs, has the effect of inefficiently increasing the total cost of producing all Port services, which means society must expend more real resources to obtain the services of the Port than the opportunity cost of bringing those services into production.

Declaration would result in an increase in dynamic efficiency

In a future without declaration, PNO's rational strategy would be to increase prices and restrict the volume of services, which may also lead to dynamic inefficiency. Restricting the volume of services results in the employment of fewer capital, labour and intermediate inputs to production. Economic regulation mimics the effects of the competitive market by encouraging socially optimal behaviour of the regulated business. In mimicking these effects, such as pricing discipline and cost minimisation, the regulated business also has an incentive to be dynamically efficient. In this context, declaration would provide the incentive for PNO to increase its volume of services, resulting in the employment of more production inputs, using a cost-minimising input mix to meet this expansion in volume. This would increase the scope for introducing new technology and incurring a lower resource cost of supplying the service. Therefore, declaration would likely result in an increase in the dynamic efficiency of the market.

Declaration would promote investment in dependent markets

In a future without declaration, users will face higher levels of uncertainty with respect to the future path of access prices. This substantially increases the risk associated with making investments in related markets, such as the exploration stage tenements market. As the ACCC stated in its submission to the Productivity Commission's 2013 review of the National Access Regime:

> *Mining exploration is inherently risky as many prospects will be found not to be viable after substantial exploration and initial development expenditures have been incurred. The economic rents made on commercially viable mines allow miners to recover losses on prospects that prove unviable and to achieve at least a*

> *commercially-acceptable risk-adjusted rate of return across their entire operations (including losses on unviable prospects). Expropriation of these economic rents may discourage investments in prospecting for, and developing, new mines - with negative implications for allocative and dynamic efficiency, productivity and export earnings, and in turn, for community welfare.*[33]

Further, the increased risk associated with investing in new mines increases the borrowing costs to finance new investment, which increases the return miners require on investments. This elevated uncertainty also increases the likelihood that miners will delay their investments until the uncertainty is resolved. Therefore the uncertainty caused by PNO's unfettered market power can also distort decisions on otherwise efficient investments, which undermines the productivity of the Australian economy.

Finally, the ACCC contends that PNO's market power increases the 'hold-up' risk of miners' investments. This risk arises when one party makes long-lived investments that are both 'sunk' and are specific to transactions with another party. In these instances, the investing party is locked into a relationship with the second party, and the risk arises that the second party will behave opportunistically to expropriate the value of the first party's sunk investment. Given that miners make significant long-term, location-specific investments that require PNO's service to reach the market, the market dynamics are conducive to the hold-up problem. As above, the perceived risk associated with the hold-up problem increases the risk associated with investments, which increases the rate of return required on otherwise efficient investments which reduces investment in the industry. This ultimately undermines the productivity and competitiveness of the Australian economy and reduces community welfare.

Conclusion: Criterion (a)

The National Access Regime is built on the principle of promoting the economically efficient operation, use of and investment in the infrastructure by which services are provided. This is reflected in the objects of Part IIIA. Competition in dependent markets is best enabled by the promotion of economic efficiency in the market for PNO's services. The ACCC considers that the NCC should not disregard the inefficiencies, and the resulting cost to the community, caused by PNO's ability and incentive to earn monopoly profits and the effects this inefficiency will have on competition and investment in related markets.

Criterion (d)

The ACCC considers that the efficiency gains from declaration of this nationally significant infrastructure are likely to outweigh the long-term marginal increase in administrative and compliance costs. Therefore, the ACCC contends that declaring the Service would be in the public interest.

Introduction and background

Criterion (d) is a positive requirement that, in making its recommendation to the Minister, the NCC be satisfied:

> *That access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.*[34]

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[33] ACCC submission to Productivity Commission Review of the National Access Regime, February 2013, p. 77.

[34] s 44CA(1)(d) of the Act.

As part of its assessment of criterion (d), the NCC must have regard to:

> *(a) the effect that declaring the service would have on investment in:*
>
> *i. infrastructure services; and*
>
> *ii. markets that depend on access to the service; and*
>
> *(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.*[35]

In its final recommendation to revoke declaration, the NCC considered:

> *that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration:*
>
> - *is unlikely to significantly [a]ffect investment in the infrastructure necessary to provide the Service*
> - *has the potential to improve efficient levels of investment in dependent markets; however, it is unlikely that any such consequence of declaration would be material*
> - *is likely to result in material administrative and compliance costs.*[36]

Further the NCC considered that in the event that the removal of declaration did lead to higher prices and that if the increased prices led to a reduction in usage of the Port, this would result in a reduction in allocative efficiency. However the NCC was not convinced that this consequence was certain, or likely to be significant.[37]

While the NCC could not quantify the respective costs and benefits relating to criterion (d) so as to determine whether or not they establish that declaration promotes the public interest, it concluded that the Minister could reasonably form the view that criterion (d) was not satisfied.[38]

ACCC position

The ACCC considers that an assessment which properly takes into account all relevant considerations and latest information will indicate that access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration would promote the public interest. The ACCC contends that declaration is likely to result in:

- an increase in investment in PNO's facility
- an increase in investment in related markets, and
- an immaterial increase in long-run *marginal* administrative and compliance costs.

Further the ACCC contends that the administrative and compliance costs of declaration must not only be set against the allocative efficiency improvements from declaration, but also the productive and dynamic efficiency improvements.

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[35] s 44CA(3) of the Act

[36] NCC revocation recommendation, 10.103.

[37] NCC revocation recommendation, 10.105.

[38] NCC revocation recommendation, 10.107-10.108.

Declaration is likely to result in an increase in investment in PNO's facility and in related markets

The ACCC considers, and the NCC has recognised, that prices will likely be higher in a future without declaration. [39] If it is accepted that prices are likely to be lower in a future with declaration, the lower prices will elicit a demand response from users of the facility through an increase in mining throughput. This improvement in mining investment and the expansion in use of PNO's services under declaration will result in an increase in the demand for labour inputs, increasing employment across the region.

Further, the increase in throughput at the Port would increase the demand for factors of production to service the increase in demand for the Service. This would include an increase in investment in capital inputs.

While the ACCC agrees with the NCC in that declaration is likely to result in an increase in investment in related markets, it disagrees with the notion that this increase is likely be immaterial. As already described under the criterion (a) section of this submission, without declaration, users of the Service are subject to increased uncertainty associated with the future path of access prices, and increased hold-up risk. This increased risk increases the value of the real option to delay investment. The increase in risk can also filter through into an increase in borrowing costs to finance new investment.

Therefore the ACCC considers that, overall, declaration is likely to have a material positive impact on investment in PNO's facility and in related markets.

Over the long-term declaration will have a relatively immaterial impact on administrative and compliance costs

Previously, the NCC contended that declaration will result in a material increase in administrative and compliance costs caused by the costs of negotiating and arbitrating access disputes. The NCC draws on the example of the Glencore-PNO access dispute to make the point that these proceedings can be very costly. While the NCC acknowledges that any future access disputes would likely be relatively less costly than the Glencore-PNO access dispute, it considers that a series of bilateral access disputes may add significant administrative and compliance costs associated with declaration of the Service.

The ACCC considers the NCC's predictions of declaration resulting in costly access disputes to be purely speculative. It is also possible that declaration will result in a shift in negotiating behaviour such that access disputes are avoided, resulting in no increase in administrative and compliance costs. It is not possible for the NCC to predict with any certainty the magnitude of the change in administrative and compliance cost, let alone make a judgement that declaration will result in a material increase in such costs.

Further, the ACCC contends that the NCC should take a long-term view when considering the administrative and compliance costs of declaration. If an access dispute does arise following declaration, this will result in an increase in administrative and compliance costs in the short-run. However, over the long-run, once the initial terms and conditions of access are resolved, the administrative and compliance costs are likely to be immaterial in proportion to the size of the industry.

Moreover, in assessing administrative and compliance costs, the ACCC considers that the NCC should examine the *marginal* administrative and compliance costs. That is, just as the 'with declaration' scenario has such costs, so does the 'without declaration' scenario. While

[39] NCC revocation recommendation, 7.168.

the service remains without regulatory oversight, PNO's exercise of market power will encourage users to continue to devote resources to seek declaration and any subsequent appeals, which can also be costly. Therefore, it is possible that the *marginal* long-run administration and compliance costs of declaration are low or even negative.

The ACCC considers that, over the *long-term*, any positive *marginal* increase in administrative and compliance costs is likely to be relatively immaterial when compared with the likely efficiency gains to a nationally significant supply chain.

The NCC must also consider productive and dynamic efficiency

In its concluding remarks on its previous assessment of criterion (d), the NCC states that revocation of declaration:

> *could result in a loss in allocative efficiency. If so, it establishes a factor in the public interest that weighs in favour of declaration. The Council is unconvinced that a loss in allocative efficiency is certain, or likely to be significant.*[40]

The ACCC contends that the administrative and compliance costs of declaration must not only be set against the allocative efficiency improvements, but must be set against productive and dynamic efficiency improvements of declaration. Under the criterion (a) section of this submission, we have set out different ways in which PNO's exercise of market power undermines the efficiency of the related markets. This includes:

- the long-run reduction in allocative efficiency
- the reduced productive efficiency arising from PNO earning revenue exceeding standalone cost
- the reduced dynamic efficiency arising from higher prices and lower throughput
- the greater risk to investment in related markets caused by the uncertain future path of access prices
- the greater hold-up risk of investing in related markets.

The ACCC contends that all of these impacts must be considered when assessing whether declaration of the Service would promote the public interest.

Conclusion: Criterion (d)

The ACCC considers the increased investment and efficiency benefits realised from declaration are likely to outweigh any positive longer-term marginal administrative and compliance costs. Therefore, declaration of the Service would be in the public interest, and criterion (d) is satisfied.

[40] NCC revocation recommendation, 10.107.

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2021 Re: Application for review lodged by New South Wales Minerals Council under subsection 44K(2) of the *Competition and Consumer Act 2010* (Cth) of the decision of the designated Minister under subsection 44H(1) of the *Competition and Consumer Act 2010* (Cth)

Applicant: New South Wales Minerals Council

ANNEXURE CERTIFICATE 'SMP3'

This and the following 9 pages is the Annexure marked **'SMP3'** referred to in the affidavit of **Sarah Maryjean Proudfoot** affirmed at Melbourne in Victoria before me on 21 April 2021.

.....

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23 November 2020

Richard York
Executive Director
National Competition Council
GPO Box 250
MELBOURNE VIC 3001

Dear Mr York

Re: The National Competition Council's draft recommendation not to declare Services at the Port of Newcastle

Thank you for the opportunity to submit to the National Competition Council's (**the Council**) consideration of whether to recommend that the designated Minister declare the shipping channel Service at the Port of Newcastle.

The attached submission considers the Council's draft recommendation against declaring the shipping channel service (**the Service**) at the Port of Newcastle, and provides additional information and analysis to help inform the Council's final recommendation to the Minister. The ACCC believes that there are a number of points which, if approached differently, may result in a different outcome.

The submission outlines what the ACCC considers are crucial elements to the assessment of criterion (a) and criterion (d). The submission is supplementary to our previous submission in response to the application for declaration and builds on previous submissions the ACCC has made in relation to the revocation of declaration of the Service. If required, the ACCC can provide more detailed supporting information.

If you would like to discuss this letter or any issues contained in the attached submission, please contact Matthew Schroder, General Manager, Infrastructure and Transport – Access and Pricing, on (03) 9290 6924, or Justin Martyn, Director, Regulated Access – Rail, on (08) 8456 3536.

Yours sincerely

Sims

Rod Sims
Chair

Introduction

The ACCC has considered the National Competition Council's (**Council**) draft recommendation against declaration of the shipping channel service at the Port of Newcastle (**Port**). The ACCC has a number of comments about the Council's assessment.

If the Council's draft recommendation is adopted, it would reduce future threats of declaration of essential services, reducing constraints on non-vertically-integrated monopolists, thereby providing them with increased scope to charge monopoly prices to the detriment of the Australian economy. This is at odds with the objects of Part IIIA of the *Competition and Consumer Act 2010* (**Act**) regarding the promotion of the economically efficient operation of, use of and investment in infrastructure.

This submission touches on a number of issues including:

- objects of Part IIIA
- the Council's assessment of, with and without declaration
- the ability and incentive to deny access of charging monopoly prices
- materiality
- the impact on specific industries
- the public interest test.

This submission provides only a summary of our concerns. If the Council requires, the ACCC can provide more detailed supporting information.

This submission is supplementary to our previous submission to the Council (dated 20 August 2020) on this matter. Both submissions on this matter build on previous ACCC submissions relating to Port of Newcastle Operations' (**PNO**) application for revocation of declaration of the Service.

Objects

The Council states in its Draft Recommendation that it disagrees with the ACCC's submission that the objects of Part IIIA require that the assessment of whether criterion (a) is met focuses on whether declaration would promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided.[1] The Council contends that such an approach would be to control the language of criterion (a) or to seek to command a particular outcome based upon an assessment of efficiencies beyond the assessment of the effect of declaration on competition.

The ACCC disagrees with the Council's interpretation of our August 2020 submission. We do not contend that the objects of Part IIIA should replace the statutory language of the declaration criteria. Rather, we consider the declaration criteria should be interpreted in a manner which is consistent with the objects and, as such, an assessment of criterion (a) should give due weight to the increase in competition that economic efficiency in the pricing of the monopoly infrastructure can promote. Indeed, it appears the Council has not given due consideration to the potential benefits to competition in upstream or downstream

[1] NCC Draft Recommendation, paragraph 4.13, page 13.

markets from the efficient operation of the monopoly infrastructure when considering criterion (a).

One of the objects of Part IIIA is to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting competition in upstream or downstream markets. Therefore, it is inherent in the language of Part IIIA that efficiency promotes competition.

Accordingly, we submit that the Council has not given sufficient weight to the potential benefits to competition in related markets that can arise from ensuring economic efficiency in bottleneck monopoly infrastructure.

Assessment of with and without declaration

The ACCC considers the Council's assessment of terms and conditions with and without declaration is based on an inappropriately limited time period and narrow considerations. The ACCC is concerned that undue weight has been placed on the immediate terms of PNO's Deed, an offer which includes terms and conditions with potentially problematic longer term implications for customers.

The ACCC understands that the development of the Deed has not included negotiations with customers, and that customers have indicated that parts of the agreement are not considered to be fair and reasonable.

Appropriate time horizon

The ACCC is concerned that, notwithstanding the Council's statement that it considered longer term issues, it appears that the Council has given considerable weight to 'discounted'[2] navigation service charges (**NSC**) in 2020, and has not considered the broader and longer term implications of the Deed:

> *While the Deed contains clauses that enable PNO to adjust the NSC in certain circumstances, the Council considers that the charges contained within the Deed represent a reasonable indication of the prices likely to be paid by users of the Port in a future without declaration of the Service.*[3]

Critically, the assessment of the effect of declaration against the situation without declaration must have regard to the range of potential market conditions across the entire period in which declaration could apply. Where terms have been put forward by the provider they are required to be assessed over the potential period of declaration (for example 15-20 years). As the Australian Competition Tribunal (**the Tribunal**) makes clear, the assessment is required to take into account a broad range of issues over an appropriate period of time:

> *The understandable commercial incentive to maximise its profitability, and its revenue, may be served in different ways at different times, depending upon the strength of the coal export market.*[4]

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2 Port of Newcastle, *Port User Pro Forma Long Term Pricing Deed*, page 1.

3 NCC Draft Recommendation, paragraph 1.13, page 2.

4 Australian Competition Tribunal, Application by Glencore Coal Pty Ltd [2016] ACompT 6, 31 May 2016, paragraph 166 page 36.

Terms and Conditions

It can be argued that certain terms of the Deed are illustrative of market power. For example, in other regulated industries customers are not compelled to pay twice for contributed assets.[5] Contributed assets are excluded from the electricity industry and water industries. It is unclear why users would be required to agree to pay for contributed assets, already funded by third parties, to gain access to the Port.

The Full Federal Court recently stated:

> *Regard to the three aspects of economic efficiency described above reveals that there is the prospect of economic inefficiency if the provider of an essential facility can appropriate (and charge a price for access to) the value of capacity the cost of which has been borne by others.*
>
> *The result will be that to the extent that the cost of the capacity is still being borne by others, they will make their economic decisions and price their products accordingly. Yet, in addition, the value of that capacity will have to be paid for and borne again by a third party who has to pay for access. By pricing twice the same value into the market, there is allocative inefficiency. The capacity is attributed with more value than it should be and market decisions are distorted in consequence. The cost of access to the capacity to the market as a whole is doubled, thereby distorting economic decisions leading to economic inefficiency.*
>
> *In addition, there will also be productive inefficiency if the double burden is imposed on parties who have already borne the cost of the extension and must now pay again for access to that capacity. However, there is inefficiency even if that is not the case.*[6]

The Federal Court recognises the allocative and productive inefficiencies that arise when user contributions are charged twice and the associated monopoly rents are allowed.

Additionally, the Council appears to have placed considerable weight on the 'discounted' price ($0.81 per gross Tonne (**GT**)) offered to customers, compared to the higher price offered via PNO's open access price ($1.04 per GT)[7]. This discounted price appears to provide a short term incentive for customers to sign, notwithstanding the longer term implications. In the current low-inflation, low cost of debt and low labour cost pressure environment, it is not clear that it should be accepted that customers should agree to a 4 per cent per annum price increase over the next 10 years (for NSC or wharfage charges).

The Council also places some merit on the Deed having a dispute resolution process (Clause 9 of the Deed) but it should be noted that the Deed explicitly excludes disputes relating to certain prices (i.e. the NSC or wharfage charges, (as set in the Deed))[8]. This exclusion seems to diminish the benefits of the dispute resolution process.

By the Council concentrating on prices in 2020 and stating there is no material difference between an outcome with declaration and an outcome without declaration the Council appears to agree with PNO's premise that PNO's offer is reasonable without giving consideration to these longer term factors.

Additionally, there is a risk that the Deed offered by PNO has vague or open ended clauses. Therefore, the Council could also consider issues around incomplete contracting. Incomplete

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5 Port of Newcastle, *Port User Pro Forma Long Term Pricing Deed*, page 13 (Initial Capital Base).

6 Federal Court of Australian, Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal [2020] FCAFC 145, 24 August 2020, paragraph 63, page 17.

7 NCC Draft Recommendation, paragraph 1.14, page 3.

8 Port of Newcastle, *Producer Pro Forma Long Term Pricing Deed*, Schedule 3, Clause 6, Definitions (Excluded Dispute).

contracts allow for the possibility of opportunistic behaviour and hold up through a failure to define terms, reveal costs, specify contingencies, and limit the ability of a party to monitor and enforce contract terms, diminishing the benefits of the agreement to customers. For example, an upfront discounted value may simply result in higher 'catch-up' charges down the track.

In summary, the ACCC believes that the Council's assessment of the Deed's terms and conditions with and without declaration does not fully consider the implications of declaring or not declaring the Service.

It is important to consider pricing, and terms and conditions in periods beyond 2020 and how PNO may act following the expiry of the Deed, given the reduced threat of declaration if the Minister decides not to declare the Service.

Ability and incentive to deny access of charging monopoly prices

The ACCC does not agree with the Council's assessment of potential constraints on PNO's monopoly power by state government intervention, reputational harm, the length of the lease or the current level of capacity at the Port.

Government intervention and reputational harm

The Council indicated that the potential for the NSW Government to intervene in the market presents some level of constraint on PNO's pricing.[9] However the NSW Government has not intervened to date and as noted by the Council, taking steps to obtain redress for PNO's potential future behaviour would entail a significant time and cost commitment.

The Tribunal has previously noted:

> *Nor does the PMAA [Ports and Maritime Administration Act 1995 (NSW)] provide Glencore, or any access seeker in relation to the Service, with any right to negotiate the terms and conditions of access or to provide for any enforcement process if agreement as to the terms of access cannot be reached.*[10]

The ACCC does not consider a price monitoring framework of itself to be an effective constraint on market power unless there is an associated credible threat of regulation.

Further, the Council states:

> *harm to PNO's reputation as the operator of the Port can be expected to impact on its commercial returns*[11]

It is suggested that this will place some constrain on its behaviour. However there seems to be limited evidence that this would be a constraint on PNO's future behaviour.

Lease

The Council also discusses PNO's incentive to maintain its profits over the remaining 92 years of its lease[12]. It is unlikely that the current revenue base for PNO will remain static over

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9 NCC Draft Recommendation, paragraph 7.37, page 43.

10 Australian Competition Tribunal, *Application by Glencore Coal Pty Ltd [2016] ACompT 6*, 31 May 2016, paragraph 15 page 3.

11 NCC Draft Recommendation, paragraph 7.38, page 44.

12 NCC Draft Recommendation, paragraph 7.40, page 44.

the next 92 years. Further, it is difficult for third parties to assume the strategic and financial goals applicable to a private business, especially many decades into the future.

As it is likely that PNO's focus and incentives will change over time, the Council should consider whether any weight should be placed on the length of the lease.

Capacity

The Council also points out that the Port is not currently operating at capacity[13] concluding this will provide some *'level of constraint on PON's future pricing'*[14]. Following this reasoning, PNO should be reducing prices to encourage increased volumes to utilise more of its capacity. However, since establishment of the current pricing structure in 2015 PNO has not reduced the NSC. Further, the Deed sets out PNO's plans to increase prices for the NSC and wharfage charge, in real terms, over the next 10 years.

Monopolists have an incentive to increase profits and these profits are derived from a combination of the price charged and the volume of services. By its nature, a monopolist is able to increase profits and revenue via price increases, which more than offset any reduction in revenue from a reduction in volumes. The precise point where increases in prices result in a net loss of revenue is subject to the specifics of the situation, but this point would always be higher than the efficient price determined by a regulator.

One of the reasons for regulating is that the inelasticity of demand gives rise to market power and the ability and incentive to raise prices significantly above cost to the detriment of efficiency.

In summary, there does not appear to be sufficient basis upon which to determine that state government intervention, reputational harm, the length of the lease, or capacity will be likely to provide sufficient constraints on PNO's behaviour absent regulation.

Materiality

The Council references PNO's previous study of the costs and impacts of the NSC on total revenue / expenditure for the mining industry, setting out that the NSC is a fraction of the total cost[15]. This analysis relies upon PNO's 2018 submission.

The Council then concludes that because the NSC charge is a small fraction of the total cost of coal it is therefore immaterial. The ACCC has concerns with this analysis of materiality. The Council's consideration of materiality would be more comprehensive if it also considered the drivers of investment and business decisions.

Profit focus

The ACCC believes materiality should be assessed based on the profit margin of the business rather than the percentage of total revenue or total cost of the business. Future investment decisions and decisions regarding whether to operate a business or not are not based on revenue or expenditure outcomes but on the resulting profits. For marginal investments, any increase (or threat of future increases) in costs will have a significant and material impact on a business' decisions.

Additionally, while changes in profits impact the annual outcome, these annual impacts are compounded over the life of the investment (i.e. 20 to 30 years). What might initially seem

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[13] NCC Draft Recommendation, paragraph 7.45, page 45.

[14] NCC Draft Recommendation, paragraph 7.59, page 48.

[15] NCC Draft Recommendation, paragraph 7.99, page 58.

small, when compounded over the life of the project may become a material risk and decision point for future investments.

Noting how vigorously the declaration, revocation and arbitration processes have been argued by users of the Port, it would appear that the businesses making the investment decisions consider the charges at the Port to be material.

As an indication of magnitude, the total amount of revenue earned by PNO for NSC was $86 million in 2019[16] based on a price of $0.7809 per GT. The ACCC acknowledges that some of the NSC revenue is derived from other sources, however, the vast majority is from coal.

As a simplified example, changing the price to $0.63 or $1.04[17] results in a revenue outcome ranging from around $66 million per annum to $108 million per annum. A variation of some $40 million per annum (based on 2019 volumes). The difference in price is linked to the value of contributed assets identified by the ACCC during the Glencore arbitration process. The value of contributed assets of over $900 million represents the future value of lost profits from PNO's customers.

Fluctuations in prices over time

The above example is based on a pricing range set out by the Council. It should be noted that prices set by a monopolist (without constraint) will fluctuate over time due to external factors. For example coal from Newcastle has fluctuated in price from a high of $161 to a recent low of $70[18] per tonne.

Under current conditions, it is likely the monopoly price is relatively low but any recovery in coal prices into the future may increase PNO's ability to increase the NSC charge. This is likely to result in a large range of possible pricing outcomes over time.

In summary, the ACCC submits that the impact on the industry without declaration should be assessed against users' profits and in the longer term there is the possibility of a broad range of pricing outcomes.

Impact on specific industries

The ACCC has some concerns regarding the Council's discussion on the impact on the users from uncertainty in terms of scope and timeframe, and the Council's discussion on price discrimination.

The Council has dismissed producers' concerns that not declaring the service increases the uncertainty for users, indicating that this uncertainty is immaterial compared to the other uncertainties faced by users.[19]

Normally businesses will seek to understand all of their risks and find ways to efficiently mitigate these risk (or the potential impacts). Where there are multiple risks faced by a

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16 https://www.portofnewcastle.com.au/about-our-port/#facts-and-figures

17 NCC Draft Recommendation, paragraph 1.14, page 3.

18 Australian Dollars, as per https://www.indexmundi.com/commodities/?commodity=coal-australian&months=60&currency=aud . Coal (Australia), thermal GAR, f.o.b. piers, Newcastle/Port Kembla from 2002 onwards , 6,300 kcal/kg (11,340 btu/lb), less than 0.8%, sulfur 13% ash; previously 6,667 kcal/kg (12,000 btu/lb), less than 1.0% sulfur, 14% ash

19 NCC Draft Recommendation, paragraph 7.103, page 59.

business, these will compound the overall risk of a decision, especially where those risks cannot be mitigated.

It appears that users have identified uncertainty of access to the Port as a significant risk to their business (and future investment decisions) and they have entered into this process as a mitigation strategy.

The ACCC notes that many of the other risks identified in the Council's discussion, while large, can to some extent be mitigated by businesses through contractual opportunities reducing the overall impact of these risks. For example, fluctuations in world coal prices can be reduced by contracting/hedging arrangements. If this service is not declared, then it is unclear how users can hedge or avoid the uncertainty regarding access to the Port.

Additionally, the industry makes investment decisions over a 20 to 30-year time horizon. Having certainty for the next 10 years, via the Deed is unlikely to be sufficient to remove the risks associated with such long-term investments. The NSWMC requested 20 years for declaration[20] as this is presumably their assessment of the minimum time period required to ameliorate Port access risks for users.

Price Discrimination

The Council has dismissed user concerns regarding PNO's ability to price discriminate between users in the future.[21] While the Deed allows for "multi-part pricing and price discrimination when it aids efficiency"[22], consistent with the language contained in the section 44ZZCA pricing principles, the language in the Deed may not necessarily be interpreted and applied in the same way. For example, the term 'efficiency' is not defined in the Deed and therefore its meaning may be subject to PNO's own interpretation. That is, any price discrimination that PNO could engage in under the Deed is not necessarily consistent with that which would occur with regulated prices in accordance with the section 44ZZCA pricing principles.

The ACCC believes that price discrimination provides additional opportunities for PNO to increase is profits beyond efficient levels and may distort associated markets reducing competition. It is noted that the mining industry relies upon profitable mines to fund exploration costs and expenditures and fund investment to improve and maintain the current conditions in the existing mines. Therefore, allowing price discrimination against the most productive mines is likely to result in less exploration, development and investment in the long run.

In summary the ACCC believes that some weight should be placed on the increased uncertainty to the industry from not declaring and that there is the possibility that detrimental price discrimination may occur in the future (without declaration).

Public Interest Test

The ACCC has some concerns regarding the Council's discussion on the cost of declaration, specifically regarding regulatory administration and the possibilities of bilateral disputes.

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20 NCC Draft Recommendation, paragraph 8.2 page 68.

21 NCC Draft Recommendation, paragraph 7.52, page 46

22 Port of Newcastle, *Producer Pro Forma Long Term Pricing Deed*, Schedule 3, clause 4.2(k).

Regulatory administration

The Council states that:

> *declaration of any service (and any consequent access regulation achieved via a negotiate-arbitrate regulatory model under Part IIIA) has the potential to alter a service provider's incentive to efficiently invest in maintaining or improving infrastructure necessary to provide the service; and/or inefficiently distort the timing of those investments.*[23]

However the Tribunal has previously found:

> *Given the terms under which any arbitration by the ACCC under Div 3 of Pt IIIA would be applied, and the applicable pricing principles require that regulated access prices be set to meet the efficient cost of providing access and include a return on investment commensurate with the regulatory and commercial risk, the Tribunal is not satisfied that the declaration would cause any adverse effect on incentives or obligations to invest or discourage efficient investment and costs to PNO as the provider of the Service. It has taken into account the fact that declaration would expose PNO to the processes available under Div 3 of Pt IIIA and the costs associated with that. There is no evidence that those costs would be of particular overall significance.*[24]

Further, the Council references the use of commercial arbitration as set out in the Deed.[25] However, this commercial arbitration specifically excludes arbitration on certain prices, possibly limiting the value of a comparison against the ACCC arbitration under Part IIIA.

Bilateral disputes

The Council states:

> *It can be expected that a series of bilateral access disputes would add to the administrative and compliance cost associated with declaration of the Service, on balance these costs have the potential to be significant.*[26]

PNO's submission that declaration would result in bilateral access disputes is only one of a number of possible outcomes.

While declaration gives users recourse to arbitration in the event that negotiations result in an access dispute, such access disputes can be avoided altogether through genuine negotiation that takes into consideration the likely arbitrated outcome. Further, it is not clear that ongoing bilateral access disputes is a likely outcome given the possibility of collective bargaining.

In summary, the ACCC believes the Council is placing too much weight on the impact of regulation on PNO's future investment decisions and not enough on the benefits of regulation (such as the promotion of efficient investment). Further, the Council should consider a broad range of possible outcomes regarding future agreements between PNO and its users, as access disputes can be avoided altogether through genuine negotiation that takes into consideration the likely arbitrated outcome.

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[23] NCC Draft Recommendation, paragraph 10.23, page 73.

[24] Australian Competition Tribunal, *Application by Glencore Coal Pty Ltd [2016] ACompT 6*, 31 May 2016, paragraph 167, page. 36-37.

[25] NCC Draft Recommendation, paragraph 10.27, page 74.

[26] NCC Draft Recommendation, paragraph 10.42, page 77.

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2021 Re: Application for review lodged by New South Wales Minerals Council under subsection 44K(2) of the *Competition and Consumer Act 2010* (Cth) of the decision of the designated Minister under subsection 44H(1) of the *Competition and Consumer Act 2010* (Cth)

Applicant: New South Wales Minerals Council

ANNEXURE CERTIFICATE 'SMP4'

This and the following 8 pages is the Annexure marked **'SMP4'** referred to in the affidavit of **Sarah Maryjean Proudfoot** affirmed at Melbourne in Victoria before me on 21 April 2021.

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DECISION AND STATEMENT OF REASONS CONCERNING NEW SOUTH WALES MINERALS COUNCIL'S APPLICATION FOR DECLARATION OF CERTAIN SERVICES AT THE PORT OF NEWCASTLE

Competition and Consumer Act 2010, section 44H

BACKGROUND

Statutory provisions

Section 44F of the *Competition and Consumer Act 2010* (CCA) provides that the designated Minister, or any another person, may apply to the National Competition Council (NCC), asking the NCC to recommend that a particular service be declared.

After receiving the application, the NCC must, after having regard to the objects of the Part IIIA of the CCA, recommend to the designated Minister that the service be declared or not be declared (s 44F(2)(b)). The objects of Part IIIA are set out in section 44AA, and are as follows:

(a) 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; and

(b) to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The NCC cannot recommend that a service be declared unless it is satisfied of all the declaration criteria for the service (s 44G). The declaration criteria in s 44CA(1) are:

(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; and

(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

  (i) over the period for which the service would be declared; and
  (ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility); and

(c) that the facility is of national significance, having regard to:

  (i) the size of the facility; or
  (ii) the importance of the facility to constitutional trade or commerce; or
  (iii) the importance of the facility to the national economy; and

(d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

Section 44CA(3) requires the Minister, when considering paragraph 44CA(1)(d), to have regard to:

(a) the effect that declaring the service would have on investment in:

(i) infrastructure services; and
(ii) markets that depend on access to the service; and

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it (s 44H(1)). The designated Minister must have regard to the objects of Part IIIA in making their decision (s 44H(1A)). The designated Minister cannot declare a service unless they are satisfied of all of the declaration criteria (s 44H(4)).

In the present circumstances, the designated Minister is the Commonwealth Treasurer.

Application by New South Wales Minerals Council

On 23 July 2020, the NCC received an application from the New South Wales Minerals Council (NSWMC) under section 44F(1) of the CCA (the Application) requesting that the NCC make a recommendation to declare certain services at the Port of Newcastle (the Service).

The NSWMC defined the Service provided at the Port of Newcastle as:

> the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct.[1]

The provider of the Service at the Port of Newcastle is Port of Newcastle Operations Pty Ltd (PNO).

The NCC undertook public consultation in respect of the Application. On 30 October 2020 the NCC released its Draft Recommendation, which proposed to recommend that the Services not be declared.

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[1] NSWMC Application, p 17.

On 18 December 2020, following further public consultation, I received the NCC's final recommendation (the Recommendation). The NCC recommended that the Service not be declared on the basis that the criteria in paragraphs 44CA(1)(a) and (d) had not been satisfied.

DECISION

I have decided not to declare the Service.

FINDINGS AND REASONS

In making this decision, I have had regard to:

- the objects of Part IIIA;
- the declaration criteria in section 44CA of the CCA; and
- the NCC's Recommendation provided to me on 18 December 2020.

I have considered the findings and reasoning in the NCC's Recommendation, including the NCC's consideration of the submissions it received, and I accept the conclusions reached by the NCC in the Recommendation. Having considered those conclusions, I have independently decided that I am not satisfied that either paragraph 44CA(1)(a) or (d) are met.

Declaration criteria in section 44CA

Paragraph 44CA(1)(a)

Criterion (a) requires that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.

I have considered the NCC's approach to the criterion in paragraph 44CA(1)(a) set out in paragraphs 7.2 to 7.15 of the Recommendation, and I have adopted that approach in making my decision.

I accept that there are likely to be five, functionally distinct dependent markets relevant to access to the Services. These markets are:

- a coal export market (the coal export market)
- markets for the acquisition and disposal of exploration and/or mining authorities (the tenements market)
- markets for the provision of infrastructure connected with mining operations, including rail, road, power and water (the infrastructure market)

- markets for services such as geological and drilling services, construction, operation and maintenance (the specialist services market)
- a market for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are a party (the bulk shipping market).[2]

The NCC also analysed the impact in the container port market.

I consider that the tenements market, the infrastructure market, the specialist services market and the bulk shipping market are derivative markets of the coal export market, taking into account the analysis contained in the NCC's Recommendation. It follows that if declaration is unlikely to promote a material increase in competition in the coal exports market, there would be unlikely to be a material increase in competition in any derivative market.[3]

The Port's ability and incentive to exercise market power

In determining whether criterion (a) is satisfied, I accept the following matters identified by the NCC in its Recommendation:

- The Port is a bottleneck, with Hunter Valley coal producers having no practical alternative to the Port for the export of their coal. This gives PNO considerable bargaining power over coal producers who have sunk costs in the Newcastle catchment (paragraphs 7.33-7.34 of the NCC's Recommendation)
- PNO's incentive to deny access to the Service or otherwise exercise market power is limited:
  - PNO is not vertically integrated into dependent markets in any meaningful way, and has no incentive to deny access to firms operating in dependent markets (paragraphs 7.53 and 7.72)
  - PNO is not capacity constrained at the Port, nor is it likely to become so over the foreseeable future (paragraphs 7.55 and 7.59)
  - PNO has provided an open access arrangement and offered a ten-year Deed to coal exporters wishing to use the Port (paragraph 7.72)

[2] These markets were outlined in NSWMC's Application. The NCC states at paragraph 7.98 that these are the same markets as those previously identified by the NCC, the Minister, the Tribunal and the Full Court of the Federal Court of Australia in relation to Glencore's 2015 Application for Declaration.

[3] The NCC in its Recommendation notes the Tribunal's decision in *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6, at [139] and [157].

- The potential for regulatory intervention by the NSW Government is likely to provide a low level of constraint on PNO's pricing absent declaration (paragraph 7.73)
- Given the importance to PNO of coal mining revenue, and its long lease, where there is the prospect of further investment and continued demand for coal export services, PNO is likely to be mindful of reputational effects caused by its pricing (paragraphs 1.24, 7.49 and 7.73)

Competition in the coal export market

In considering whether declaration would promote a material increase in competition in the coal export market, and having considered the NCC's Recommendation, I accept the following matters:

- the NCC found that the market is likely to be effectively competitive (paragraph 7.125)
- PNO is unlikely to have an incentive to diminish competition in coal export markets or to price discriminate in a way that will inhibit coal exporters' ability to compete (paragraphs 7.116-7.117)
- Port charges are likely to remain a comparatively small component of the cost of production and export of coal, with or without declaration (paragraphs 7.118 – 7.123)
- While there is uncertainty around the price the Tribunal will re-determine for the Navigation Service Charge (NSC) in its re-determination of the Glencore-PNO access dispute, the NCC considered that it is not clear that an NSC set with declaration will be materially different to that offered by PNO absent declaration (paragraph 7.122). In a future without declaration, users are expected to have the option of entering a long-term deed and PNO has also published open access arrangements (paragraph 7.125)
- Coal producers face uncertainty from factors other than port charges that are more likely to influence their ability to compete in export coal markets (paragraph 7.126).

The Tribunal has found that access is unlikely to promote competition in a dependent market if that market is already effectively competitive.[4] Based on findings set out in the NCC's Recommendation, I consider that the coal export market is already likely to be effectively competitive such that access, or increased access, to the Service, on reasonable terms and conditions, as a result of declaration would not promote a material increase in competition in that market (paragraph 7.129).

Competition in other markets

Having found above that the tenements, infrastructure, bulk shipping, and the specialist services markets are derivative of the coal export market, it follows consistent with the

[4] *Fortescue Metals Group Limited* [2010] ACompT 2, at [1068].

NCC's findings at paragraphs 7.151 and 7.164 to 7.167 that declaration would not be likely to promote competition in those markets. I also note the NCC's finding at paragraph 7.147 that the broader coal tenements market is and is likely to remain effectively competitive with or without declaration. Further, for the reasons identified by the NCC at paragraph 7.162 and 7.163 of its Recommendation, I am not satisfied that declaration would promote a material increase in competition in the container port market.

I am not satisfied that access or increased access to the service, on reasonable terms and conditions, as a result of declaration of the Service would promote a material increase in competition in at least one market, other than the market for the Service.

Accordingly, I am not satisfied that the criterion in paragraph 44CA(1)(a) is met.

Paragraph 44CA(1)(b)

Criterion (b) requires that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market over the period for which the service would be declared, and at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility).

I adopt the NCC's findings that this criterion is satisfied, as set out in Chapter 8 of its reasons.

Paragraph 44CA(1)(c)

Criterion (c) requires that the facility is of national significance, having regard to the size of the facility, the importance of the facility to constitutional trade or commerce, or the importance of the facility to the national economy.

I adopt the NCC's findings that this criterion is satisfied, as set out in Chapter 9 of its reasons.

Paragraph 44CA(1)(d)

Criterion (d) requires that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest. Sub-section 44CA(3) states that, in considering whether paragraph 44CA(1)(d) applies, the designated Minister must have regard to:

(a) the effect that declaring the service would have on investment in:

  (i) infrastructure services; and
  (ii) markets that depend on access to the service; and

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

I have considered the NCC's approach to the criterion in paragraph 44CA(1)(d) set out in Chapter 10 of the Recommendation, and I have adopted that approach in making my decision.

With respect to the effect of declaration under Part IIIA on investment in infrastructure services, I adopt the NCC's findings and reasoning at paragraphs 10.22-10.30. I also adopt its relevant reasoning and conclusion at paragraph 10.63 that declaration:

> is unlikely to significantly affect investment in the infrastructure necessary to provide the Service as it is unclear how different (if at all) prices for the Service would be in a future with and without declaration of the Service.

With respect to the effect of declaration on investment, I adopt the NCC's findings and reasoning in paragraphs 10.31 to 10.38 and its conclusion at paragraph 10.63 that declaration is unlikely to significantly affect investment in dependent markets.

With respect to the administrative and compliance costs that would be incurred by the provider of the service if the Service were declared, I adopt the NCC's findings and reasoning in paragraphs 10.39-10.44. I also adopt its finding at paragraph 10.63 that administrative and compliance costs are likely to arise both in the future with, and without, declaration and that, on balance, those costs are unlikely to be materially different.

I adopt the NCC's analysis at paragraphs 10.47 to 10.62 of the impact of declaration on economic efficiency, including on the efficient use of and operation of the infrastructure by which the Service is provided, and on efficiency in dependent markets. In respect of the infrastructure by which the Service is provided, the NCC did not find that declaration was likely to lead to material improvements in productive, allocative or dynamic efficiency relative to the future absent declaration. The NCC also did not find that declaration was likely to materially promote efficiency in dependent markets.

In light of the above analysis and conclusions, I am not satisfied that access, or increased access, to the service on reasonable terms and conditions, as a result of declaration of the service would promote the public interest.

Accordingly, I am not satisfied that the criterion in paragraph 44CA(1)(d) is met.

Objects of Part IIIA of the CCA

In making my decision, I have had regard to the objects of Part IIIA, and in particular the object set out in paragraph 44AA(a). As I have referred to above, the NCC did not find that declaration was likely either to (i) materially improve productive, allocative or dynamic efficiency relative to the future absent declaration or (ii) materially promote efficiency in dependent markets. I have adopted the NCC's analysis in this regard and I am therefore satisfied that my decision is consistent with the objects of Part IIIA which are outlined above.

Conclusion

While I am satisfied that the Port facility meets the declaration criteria set out in paragraphs 44CA(1)(b) and (c), I am not satisfied that access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration of the Service would promote:

- a material increase in competition in at least one market (whether or not in Australia), other than the market for the Service, as required by paragraph 44CA(1)(a); or
- the public interest, as required by paragraph 44CA(1)(d).

Accordingly, I have decided not to declare the Service.

JOSH FRYDENBERG

Treasurer

Dated 16 February 2021

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010 (Cth)

IN THE AUSTRALIAN COMPETITION TRIBUNAL

File No: ACT 1 of 2021 Re: Application for review lodged by New South Wales Minerals Council under subsection 44K(2) of the *Competition and Consumer Act 2010* (Cth) of the decision of the designated Minister under subsection 44H(1) of the *Competition and Consumer Act 2010* (Cth)

Applicant: New South Wales Minerals Council

ANNEXURE CERTIFICATE 'SMP5'

This and the following 1 page is the Annexure marked **'SMP5'** referred to in the affidavit of **Sarah Maryjean Proudfoot** affirmed at Melbourne in Victoria before me on 21 April 2021.

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Benjamin David Fisher
2 Lonsdale Street, Melbourne
An Australian Legal Practitioner
within the meaning of the
Legal Profession Uniform Law (Victoria)

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GPO Box 250 Melbourne 3001 Australia
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Website: www.ncc.gov.au

8 April 2021

Australian Competition Consumer Commission
Level 17, 2 Lonsdale Street
Melbourne VIC 3000
Attn: Justin Martyn

By email: justin.martyn@accc.gov.au

Dear Mr Martyn

Application for review lodged by the New South Wales Minerals Council under subsection 44K(2) of the *Competition and Consumer Act 2010* (Cth) of the decision of the designated Minister under subsection 44H(1) of the *Competition and Consumer Act 2010* (Cth)

This is to give you notice that, on 8 March 2021, the New South Wales Minerals Council lodged an application in the Australian Competition Tribunal (**Tribunal**) for review of the designated Minister's decision of 16 February 2021 not to declare the Service provided by the Port of Newcastle.

You are receiving this notice because you made submissions to the National Competition Council (**Council**) in connection with its recommendation of 18 December 2020 to the designated Minister not to declare the Service provided by the Port of Newcastle.

The Council advises you that the Tribunal has directed that any application for leave to intervene in this proceeding, and any material relied on in support of any application, be filed and served on or before Wednesday, 21 April 2021.

Reference is made to direction 4 of the enclosed copy of the directions made by the Tribunal on 8 April 2021.

Yours sincerely

Richard York
Executive Director