**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: | Ministerial Information |
| 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 2:15 PM

**Important information**

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

# TREASURY MINISTERIAL SUBMISSION

18 December 2020 PDR No. MS20-002839

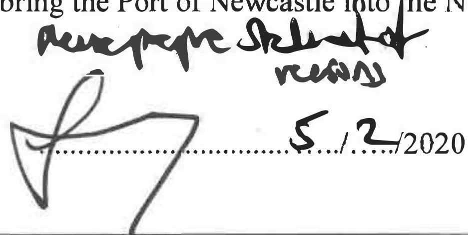
Treasurer cc:

## NATIONAL ACCESS REGIME – PORT OF NEWCASTLE – NATIONAL COMPETITION COUNCIL RECOMMENDATION

**TIMING:** By Thursday, 24 December 2020 to facilitate publishing your final decision and statement of reasons by 16 February 2021 when the statutory 60-day timeframe expires.

**Recommendation**

- That you indicate your disposition on whether to accept or reject the National Competition Council recommendation **not to** bring the Port of Newcastle into the National Access Regime.



**Accept / Not Accept**

Signature: ............................................5../.2../2020

## KEY POINTS

- On 18 December 2020, the National Competition Council (NCC) recommended that you **do not** bring the Port of Newcastle into the National Access Regime (NAR).
- This is because it found that the Port does not meet two of the four criteria for bringing infrastructure into the NAR.
  - The NCC concluded that the 'competition' criterion was not met because, in particular, the Port is not vertically integrated into any upstream or downstream market. For example, it is not vertically integrated into coal production and so has no incentive to limit any coal producer's access to its facilities in a way that might lessen competition between coal producers overall. In any case, the coal export market is likely to be effectively competitive whether or not the Port is brought into the NAR.
  - The NCC concluded that the 'public interest' criterion was not met because any fall in the Port's prices from bringing it into the NAR was unlikely to be large enough to influence investment decisions. Investment in coal mining was more likely to be influenced by coal prices and labour costs. It was unclear whether the risk of reduced investment in the Port's facilities was substantial, particularly given that most of the investments in the Port's facilities had already occurred.
  - The NCC found that the Port meets the 'national significance' and 'natural monopoly' criteria.
- The NCC's recommendation and supporting reasons are at Attachment A.
- The NCC's recommendation follows an application by the New South Wales Minerals Council on 23 July 2020 to bring the Port within the NAR, that is, for the Port to be 'declared'.

- When considering the NCC recommendation, **you should not meet with, or consider submissions from, any stakeholders** including the Australian Competition and Consumer Commission, as this may render your decision legally vulnerable.

**Your decision**

- You may only decide to bring the Port of Newcastle into the NAR once you have considered the same matters as the NCC was required to consider in making its recommendation to you (outlined in Additional Information).
- We consider that the NCC recommendation and reasons provide a rational and justifiable basis for not declaring the Port.
  - The NCC has undertaken extensive consultation with interested parties, prepared a considered analysis of the issues and formed reasonable conclusions on the matters you need to consider, from which its recommendation to not bring the Port into the NAR rationally follows.

**Next steps**

- The following statutory requirements apply to your consideration of the NCC's recommendation:
  - if you do not publish your decision and statement of reasons within 60 days of receiving the NCC's recommendation – that is, by **Tuesday, 16 February 2021** – you will be deemed to accept the recommendation; and
  - **before publishing your decision**, you must provide your proposed decision and reasons to the NSW Minerals Council and the Port of Newcastle for 14 days to enable them to indicate any information that should not be published because it is commercially confidential.
- In light of these requirements, we propose the following timeline:

| Date | Action |
|---|---|
| Thursday 24 December 2020 | Indicate disposition |
| Wednesday 20 January 2021 | Treasury to provide you with a draft decision and statement of reasons |
| Wednesday 27 January | Draft decision and reasons to parties for 14 days |
| Friday 12 February | Treasury to provide you with a proposed final decision and statement of reasons |
| Tuesday 16 February | Publication of final decision and statement of reasons |

**Key risks**

- There is a high risk of legal challenge to your decision by the NSW Minerals Council if you accept the NCC recommendation, or the Port of Newcastle if you do not.
  - Either party may seek merits review of your decision by the Australian Competition Tribunal or review on administrative law grounds by the Federal Court.

- We note the risk that the NSW Minerals Council could appeal straight to the Federal Court if it wishes to test whether the 2017 amendments to the NAR operate as the Government intended.

    : The 2017 amendments were intended to ensure that the NAR only applies to vertically-integrated natural monopolies, consistent with the original policy intention.

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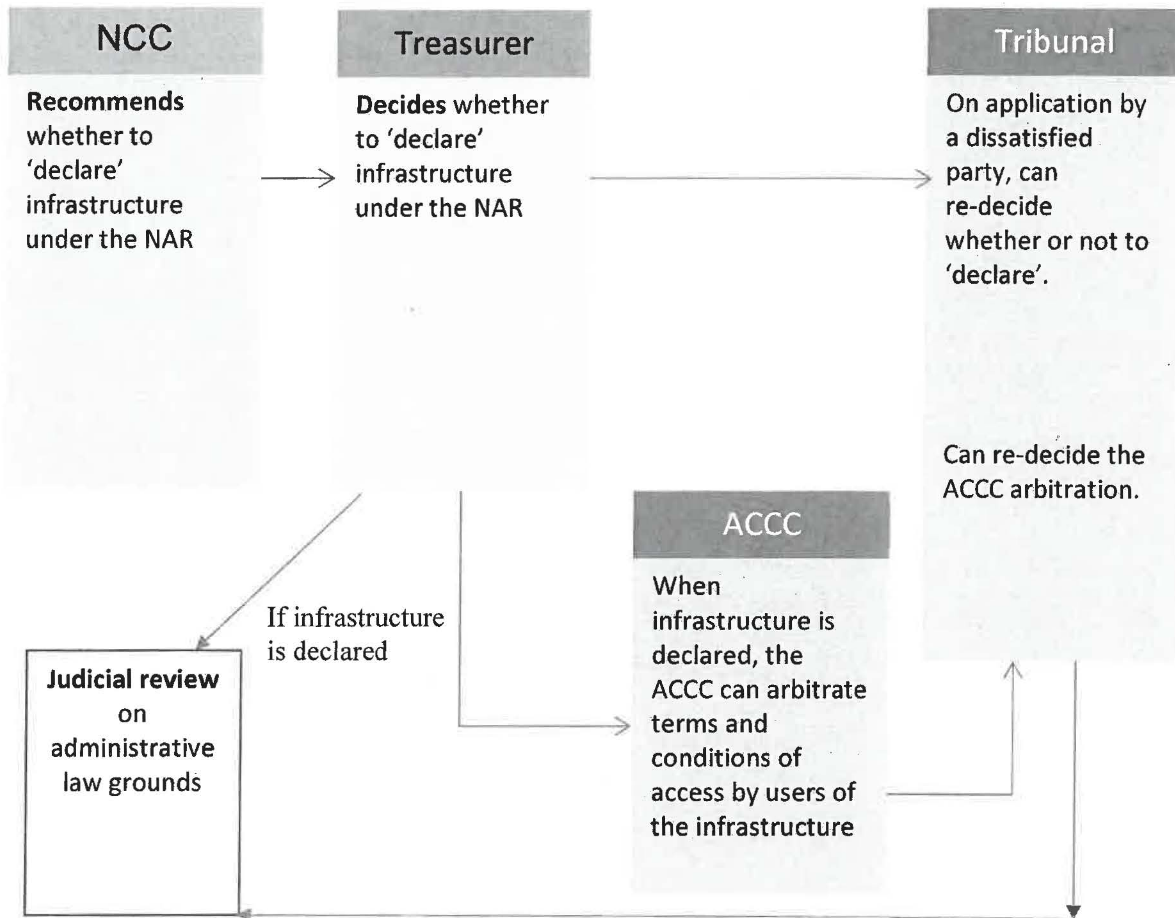
Client legal privilege

## ADDITIONAL INFORMATION

### National Access Regime – declaration process




### National Access Regime

- The NAR is contained in Part IIIA of the *Competition and Consumer Act 2010.*
- The NCC may not make a recommendation to bring the Port of Newcastle – specifically, its shipping and berthing services for coal exports – into the NAR unless:
  - it is satisfied that the Port meets all four of the NAR declaration criteria (outlined below); and
  - it has had regard to the objects of the NAR which include:
    - : promoting 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.
- When making a decision on an NCC recommendation, the Treasurer must consider the same matters as the NCC.

*Objects*

- The objects of the NAR are to:
  - promote the economically efficient operation, use of and investment in infrastructure, thereby promoting effective competition in upstream and downstream markets; and
  - provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry (s44AA).

*Declaration criteria*

- The 'declaration criteria' for infrastructure are as follows:
  - access to the infrastructure must promote *competition* in an upstream or downstream market;
  - the infrastructure in question must be a *nationally significant* and a *natural monopoly*; and
  - declaration must be in the *public interest* having regard to the effect that declaration would have on: (i) investment in infrastructure and in markets that depend on access to the infrastructure; and (ii) the administrative and compliance costs that would be incurred by the infrastructure provider upon declaration (s44CA).
- Both the NCC in making a recommendation, and the Treasurer in deciding whether to accept an NCC recommendation, must have regard to the declaration criteria and the objects of the NAR (s44F(2)(b), s44G, s44H(1A), (4)).

*Process requirements*

- The Treasurer must publish his or her decision and reasons (s44HA(1)).
  - Before publishing the decision and reasons, the Treasurer must give the applicant, the infrastructure owner and any other relevant person the proposed decision and reasons and invite them to identify within 14 days any information that should not be published because it is commercially confidential (s44HA(3)).
  - If the Treasurer does not publish his or her decision and reasons within 60 days of receiving the NCC's recommendation, the NCC's recommendation is deemed to be accepted (s44H(9)).

**2017 amendments to the National Access Regime**

- The *Competition and Consumer Amendment (Competition Policy Review) Act 2017* implemented a range of competition law recommendations from the Harper Competition Policy Review and the 2013 Productivity Commission review of the National Access Regime.
- These amendments changed the 'competition criterion' applying to the NAR, including amending and clarifying the declaration criteria that must be used by the Council and designated Minister, particularly the 'competition criterion'.
- This clarification ensured that the NAR only applied to vertically integrated infrastructure.

- This clarification would have the effect of overturning the interpretation of this criterion adopted by the Federal Court in 2016 in a decision upholding the declaration of Sydney Airport.
  - The Federal Court's interpretation broadened the range of infrastructure that could fall within the NAR.
  - The purpose of the 2017 amendments was to return the scope of the NAR to what was intended when it was first established.

NATIONAL
COMPETITION
COUNCIL

# Application for declaration of certain services at the Port of Newcastle

## Recommendation

18 December 2020

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**Abbreviations and defined terms**

| | |
|---|---|
| 2015 Final Recommendation | The Final Recommendation issued by the National Competition Council on 2 November 2015 regarding declaration of the channel service at the Port of Newcastle |
| 2016 Glencore Declaration | The decision of the Australian Competition Tribunal of 16 June 2016 to set aside the decision of the designated Minister and declare the shipping channel service at the Port of Newcastle from 8 July 2016 until 7 July 2031 |
| 2017 EM | The explanatory memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* |
| 2018 ACCC Arbitration Determination | The Final Determination issued by the ACCC on 18 September 2018 in relation to the Glencore-PNO Arbitration dispute |
| 2019 Tribunal Arbitration Determination | The Determination issued by the Tribunal on 30 October 2019 in relation to the Glencore-PNO arbitration dispute. |
| ACCC | Australian Competition and Consumer Commission |
| ACCC August Submission | ACCC's submission to the Council dated 26 August 2020 |
| ACCC November Submission | ACCC's submission to the Council dated 23 November 2020 |
| Amendment Act | *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) |
| Bloomfield August submission | The Bloomfield Group's submission to the Council dated 26 August 2020 |
| Bloomfield September submission | The Bloomfield Group's submission to the Council dated 3 September 2020 |
| Bloomfield November submission | The Bloomfield Group's submission to the Council dated 19 November 2020 |
| CCA | *Competition and Consumer Act 2010* (Cth) |
| Council | National Competition Council |
| Criterion (a) | The declaration criterion described in section 44CA(1)(a) of the CCA |
| Criterion (b) | The declaration criterion described in section 44CA(1)(b) of the CCA |
| Criterion (c) | The declaration criterion described in section 44CA(1)(c) of the CCA |
| Criterion (d) | The declaration criterion described in section 44CA(1)(d) of the CCA |
| DBCT | Dalrymple Bay Coal Terminal |

| | |
|---|---|
| Declaration Guide | National Competition Council, 'Declaration of Services A guide to declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth)' (April 2018) |
| Deed | Deed is a reference to Producer Deed and/or Vessel Deed as introduced by PNO in 2020 and annexed to the NSWMC Application.<br>(The Port User Deed referred to in the NSWMC Application is superseded). |
| Declaration | The declaration of the shipping channel service at the Port of Newcastle made by the Australian Competition Tribunal on 16 July 2016. |
| Full Court | Full Court of the Federal Court of Australia |
| Glencore | Glencore Coal Pty Ltd; Glencore Coal Assets Australia Pty Ltd |
| Glencore-PNO access dispute | The access dispute between Glencore and PNO, notified by Glencore to the ACCC on 4 November 2016. |
| Glencore 2015 Application | Glencore's 2015 application for declaration of shipping channel services at the Port of Newcastle, submitted to the Council on 13 May 2015. |
| Glencore August submission | Glencore's submission to the Council dated 26 August 2020 |
| Glencore September submission | Glencore's submission to the Council dated 7 September 2020 |
| Glencore November submission | Glencore's submission to the Council dated 24 November 2020 |
| GT | Gross Tonnage |
| Harper Review | Committee of Inquiry comprised of Professor Ian Harper (Chair), Peter Anderson, Su McCluskey and Michael O'Bryan QC, March 2015*, Competition Policy Review Final Report* |
| Hilmer Committee | Committee of Inquiry comprised of Professor Frederick G Hilmer (Chair), Mark R Rayner and Geoffrey Q Taperell |
| Hilmer Report | Report of the Hilmer Committee dated 25 August 1993 |
| IPART | Independent Pricing and Regulatory Tribunal of NSW |
| Malabar | Malabar Coal Ltd; Malabar Resources Ltd<br>On 1 September 2020 Malabar Coal Ltd announced its change of company name from Malabar Coal Ltd to Malabar Resources Ltd. |
| Malabar August submission | Malabar Coal Ltd submission to the Council dated 26 August 2020 |

| Malabar September submission | Malabar Coal Ltd submission to the Council dated 2 September 2020 |
|---|---|
| Malabar November submission | Malabar Resources Ltd submission to the Council dated 20 November 2020 |
| National Access Regime | The mechanism established by Part IIIA of the *Competition and Consumer Act 2010* (Cth) through which an access seeker can gain access to the service or services provided by a nationally significant infrastructure facility. |
| NSC | The Navigation Service Charge levied by PNO on vessels at the time of entry to the Port for the general use of the Port and its infrastructure |
| NCC | See 'Council' |
| NSWMC | New South Wales Minerals Council |
| NSWMC Application | The application made to the Council on 23 July 2020 under section 44F of the CCA by the NSWMC for declaration of certain services at the Port. |
| NSWMC September Submission | NSWMC's submission to the Council dated 5 September 2020 |
| NSWMC November Submission | NSWMC's submission to the Council dated 25 November 2020 |
| PAMA Act | *Ports and Maritime Administration Act 1995* (NSW) |
| PAMA Regulation | *Ports and Maritime Administration Regulation 2012* (NSW) |
| Part IIIA | Part IIIA of the CCA |
| *Pilbara HCA* | *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 |
| PNO | Port of Newcastle Operations Pty Limited, the operator of the Port of Newcastle |
| PNO July 2018 submission | PNO's submission to the Council dated 2 July 2018 |
| PNO August submission | PNO submission to the Council dated 26 August 2020 |
| PNO September submission | PNO submission to the Council dated 7 September 2020 |
| PNO November submission | PNO submission to the Council dated 25 November 2020 |
| *PNO v Tribunal* | *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115; (2017) 346 ALR 669; [2017] FCAFC 124 |
| Port | The Port of Newcastle |
| PWCS | Port Waratah Coal Services |
| PWCS August Submission | PWCS' submission to the Council dated 26 August 2020 |
| Productivity Commission 2013 | Productivity Commission 2013, *National Access Regime*, Inquiry Report |

| | |
|---|---|
| QCA | Queensland Competition Authority |
| *Re Glencore* | *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6 |
| Relevant Term | Fifteen Years |
| Revocation Recommendation | The Council's recommendation dated 22 July 2019 that the designated Minister revoke the 2016 declaration of the Port. |
| Service | The shipping channel service at the Port of Newcastle, which is the service the subject of the NSWMC Application |
| Sydney Airport FCAFC | *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 155 FCR 124; [2006] FCAFC 146 |
| Synergies | Synergies Economic Consulting |
| Synergies Report | The report prepared by Synergies titled 'Port of Newcastle Operations ability and incentive to exercise market power and its impact on competition in Newcastle catchment coal tenements market<br>Dated July 2020 |
| t | Tons/Tonnage |
| Tribunal | Australian Competition Tribunal |
| Yancoal | Yancoal Australia Ltd |
| Yancoal September Submission | Yancoal's submission to the Council dated 4 September 2020 |

# 1 Executive summary

1.1 On 23 July 2020, the National Competition Council (**Council**) received an application under section 44F of the *Competition and Consumer Act* (**CCA**) from the New South Wales Minerals Council (**NSWMC**) for declaration of certain services (**Service**) at the Port of Newcastle (**Port**) (the **NSWMC Application**).

1.2 Under section 44F(2)(b) of the CCA, the Council must recommend to the designated Minister that the service specified within an application be declared or not be declared. Section 44GA of the CCA further specifies that the Council must, subject to certain exceptions, make a recommendation on an application for declaration within 180 days of receiving the application. The 180-day period following the receipt of the NSWMC Application ends on 19 January 2021. The designated Minister in this instance is the Federal Treasurer, the Hon Josh Frydenberg MP.

1.3 Section 44G of the CCA provides that the Council cannot recommend that a service be declared unless it is satisfied that all the declaration criteria set out in section 44CA have been met.

1.4 When making a decision whether to declare a service following a recommendation by the Council, the designated Minister must have regard to the objects of Part IIIA of the CCA and cannot declare a service unless satisfied of all of the declaration criteria.

1.5 The Council's view is that declaration criteria (b) and (c) are satisfied but declaration criteria (a) and (d) are not. Consequently, based on its conclusions, the Council cannot recommend that the designated Minister declare the Service.

1.6 In coming to this view, the Council has considered the NSWMC Application and the submissions it has received, and has had regard to the objects of Part IIIA of the CCA. The Council's reasons for its Recommendation are set out in this report.

**Background**

*Previous considerations of declaration at the Port*

1.7 The NSWMC Application follows previous considerations of whether to declare a service defined in almost identical terms at the Port by the Council; designated Ministers; the Australian Competition Tribunal (**Tribunal**) and the Full Court of the Federal Court of Australia (**Full Court**). This includes:

- On 16 June 2016, the Tribunal made orders giving effect to its decision to declare a shipping channel service at the Port (**2016 Glencore Declaration**).
- On 26 July 2019, the Council recommended to the designated Minister, Federal Treasurer, the Hon. Josh Frydenberg MP, that the 2016 Glencore Declaration should be revoked (**Revocation Recommendation**). This recommendation followed amendments made to the declaration criteria by Federal Parliament in 2017. As the designated Minister did not publish a decision on the Revocation Recommendation within 60 days of receiving it, he was deemed by

section 44J(7) of the CCA to have made a decision that the declaration be revoked.[1]

*Pricing with and without declaration of the Service*

1.8 During the period in which the 2016 Glencore Declaration was in effect, Glencore Coal Assets Australia Pty Ltd (**Glencore**) notified the Australian Competition and Consumer Commission (**ACCC**) of an access dispute it had with Port of Newcastle Operations Pty Ltd (**PNO**) (**the Glencore-PNO access dispute**).

1.9 The Glencore-PNO access dispute considered two access charges levied by PNO in respect of the Service, the Navigation Service Charge (**NSC**)[2] and the Wharfage Charge (**WC**).[3]

1.10 Aspects of the Glencore-PNO access dispute have been considered by the ACCC, the Tribunal, and the Full Court. A key contention in these considerations has been the rate of the NSC to be levied by PNO. In its 2018 arbitral decision,[4] the ACCC determined an initial arbitral price for the NSC of $0.6075 per gross tonne (GT) and, following agreement between the parties, adopted an agreed rate of $0.0746 per revenue tonne for the WC.[5] In the 2019 arbitral determination of the Tribunal,[6] the initial arbitral price for the NSC was determined as $1.0058 per GT, the rate of WC agreed in the ACCC arbitration was maintained.

1.11 The 2019 Tribunal Arbitration Determination was reviewed by the Full Court[7] and in August 2020 the Full Court determined that there had been an error in law and remitted the arbitral determination to the Tribunal for re-determination. At the time of making this Recommendation the Tribunal had not undertaken its re-determination and no arbitral decision was in place at the Port.

1.12 The Council considers it is appropriate to undertake its assessment of criterion (a) without forming a view on the outcomes of any Part IIIA negotiation or arbitration which may be underway or concluded, such as the ongoing Glencore-PNO access

[1] The designated Minister made a statement confirming the deeming of the decision, see https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/port-newcastle

[2] The NSC is payable in respect of general use by a vessel of the Port and its infrastructure, *Ports and Maritime Administration Act 1995* (NSW), sections 50 and 51

[3] The WC is payable in respect of the availability of a site at which stevedoring operations may be carried out. *Ports and Maritime Administration Act 1995* (NSW), section 61

[4] Final Determination issued by the ACCC on 18 September 2018 in relation to the Glencore-PNO Arbitration dispute (the **2018 ACCC Arbitration Determination)**

[5] Ibid, at page 177

[6] Application by Port of Newcastle Operations Pty Ltd [2019] ACompT 1 (the **2019 Tribunal Arbitration Determination**)

[7] *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145;(2020) 382 ALR 331

dispute. That is not to say that these matters are irrelevant to the current assessment. The prior arbitral determinations in the Glencore-PNO access dispute provide an indication of the range within which the final arbitral price at which the NSC *may* be set and are an element of the broader context to this application.

1.13 In light of the Full Court's decision, the Council considers it is likely (but not certain) that the Tribunal will set lower prices for the NSC than those set in the 2019 Tribunal Arbitration Determination (i.e. $1.04 per GT in 2020 dollar terms) when it re-determines the access dispute between Glencore and PNO. At this point, the Council also considers it is likely (but not certain) that the Tribunal will not set a price for the NSC below that set in the ACCC Determination (i.e. $0.63 per GT in 2020 dollar terms). The uncertainty with respect to both these considerations is because the Tribunal must re-hear the matter de novo.

1.14 Subsequent to the 2019 Revocation Recommendation, PNO published new rates for its access charges to take effect from 1 January 2020:

- an NSC of $1.0424 per GT and a WC of $0.0802 per GT as part of an open access arrangement available to any coal vessel entering the Port
- an NSC of $0.8121 per GT and a WC of $0.0802 per GT to any coal producer or (coal) vessel agent that enters into a 10-year Deed from 1 January 2020 (Deed). Under the terms of the Deed, the NSC and WC are subject to annual increase of the greater of 4 per cent or the consumer price index (CPI).[8] PNO states it has entered into a number of Deeds with access seekers whose vessels use the channel and pay the NSC under the Deed to PNO.

1.15 While the Deed contains clauses that enable PNO to adjust the access charges 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.

1.16 A comparison of the range of NSC prices set under arbitration determinations by the ACCC and the Tribunal, with prices set by PNO, is set out in Figure 1 below.

[8] According to PNO, applying a 4 per cent per annum adjustment, the NSC will be $1.1559 per GT in 2029 while the WC will be $0.1142 per GT. See for example https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

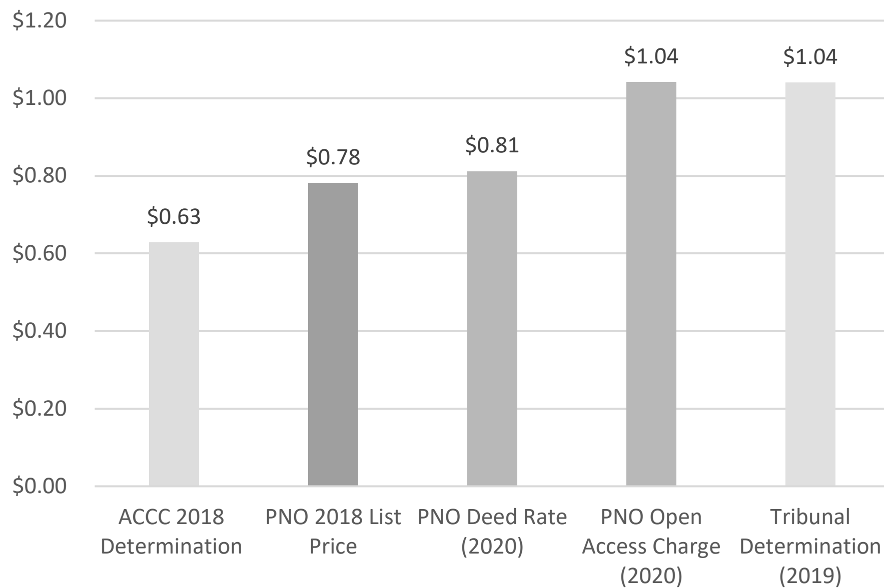



**Figure 1 – Navigation Service Charges set by the ACCC, Tribunal and PNO in $2020 (i.e. adjusted for inflation)**[9]

1.17 Figure 1 shows that the charge presently offered by PNO for the navigation service in 2020 under the Deed is within the range of prices previously determined by the ACCC and the Tribunal in their respective Glencore-PNO arbitration determinations (when those values are adjusted for inflation). Noting these values, PNO's current open access charge (available to any other user that has not entered into a Deed with it) appears almost identical to that previously determined by the Tribunal for its navigation service (when adjusted for inflation).

1.18 While the open access charges set by PNO for the NSC (i.e. $1.04 per GT in 2020 dollar terms) are almost identical to that determined by the Tribunal in the 2019 Tribunal Arbitration Determination, the price offered by PNO in the Deeds (i.e. approximately $0.81 per GT in 2020 dollar terms) is significantly lower.

1.19 Given the uncertainty relating to what price will be set for the NSC by the Tribunal when it re-arbitrates the Glencore-PNO access dispute, the rates offered in the Deed may be less than, equal to or greater than those ultimately determined by the Tribunal.

**Reasons why criterion (a) is not satisfied**

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

[9] The Council has applied the Sydney All Groups Consumer Price Index number published by the Australian Bureau of Statistics (CPI Sydney) and has averaged across 4 quarter periods to determine an annual CPI number. It is noted that the NSC value established by the 2019 Tribunal Arbitration Determination is to be re-determined.

1.21 While a consideration of the declaration criteria, having regard to the objects of Part IIIA, will include considering the extent to which regulated access is likely to improve efficiency or result in a lower price for access to a service, it is important to bear in mind that the central focus of criterion (a) is on competition impacts. Thus criterion (a) is not satisfied merely by showing that regulated access will lead to improved efficiency in the operation of the Service or a lower price for access.

1.22 Criterion (a) requires consideration of the effects on competition in dependent markets (i.e., markets other than the market for the Service), of access or increased access on reasonable terms and conditions as a result of declaration. The Council accepts that when assessing those effects it is relevant to consider the degree of market power PNO has and the fact that it operates a bottleneck facility. But neither the fact that the service provider has market power nor that it operates a bottleneck facility is in itself sufficient to satisfy criterion (a). It is only where a material increase in competition would be promoted in another dependent market as a result of declaration that the criterion is satisfied.

1.23 In this instance, PNO is not vertically integrated in any meaningful way into any markets dependent on the market for the Service. This means it will not have an incentive to deny access to firms operating in dependent markets as they are not competitors to PNO. Nor does it have an incentive to provide access on terms and conditions that inhibit the ability of different users of the Service to compete on the merits in dependent markets. Indeed, PNO is likely to prefer that dependent markets are effectively competitive as this is likely to maximise demand for services at the Port at any given price it charges.

1.24 While the Port is a bottleneck facility and businesses wishing to export coal from the Newcastle catchment must use the Service if they wish to export into overseas coal markets, there are a number of important factors that are likely to provide some level of constraint on PNO in setting the terms and conditions of access to the Port in a future without declaration of the Service:

- PNO entered into a 98-year lease to operate the Port in 2014, and would be likely to act in a way that has regard to its ability to maximise its expected profits over the term of the lease. Revenues from coal mining in the Newcastle catchment are, and will remain for the short to medium term, its most important source of revenue. Opportunistic pricing by PNO that 'holds-up' existing miners today risks sending a signal to future potential users of the Port that PNO will take advantage of them after they make investments, and that they are at risk of not being able to recover sunk costs if they invest in activities (including coal mining) that rely on access to the Port.

- PNO is, in effect, competing to attract coal mining activity to the Newcastle catchment. Charging excessively high prices for the Service is likely to increase the incentive for some potential future miners to invest in other activities (e.g. investing in coal mining activity in other parts of Australia, or overseas) rather than coal mining in the Newcastle catchment.

- The NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in dependent markets, or otherwise harm the public interest. Such intervention might be via the terms of PNO's lease; under the terms of the *Ports and Maritime Administration Act 1995* (NSW) (by referral to IPART); or by introducing new statutory restrictions. The Council considers that the threat of such action by the NSW Government would be likely to provide a low level of constraint.

1.25 None of these factors, in isolation, replicate the constraint that another port in the Newcastle catchment would offer but combined are able to affect PNO's pricing decisions. The Council considers that the 10-year Deed, where entered into, provides a significant constraint on PNO's pricing decisions at the Port. Moreover, the PNO open access arrangements also provide a constraint on its pricing decisions, however this constraint is weaker than that provided by the Deed.

1.26 As has been noted, the access charge, including NSC, presently offered by PNO under the Deed is within the range of prices previously determined by the ACCC and the Tribunal. The Tribunal is yet to re-arbitrate the Glencore-PNO access dispute following the decision of the Full Court and it is unclear what price it will set for the access to the Service such that the rate offered in the Deed (both now and over its term) may be less than, equal to or greater than the access charge ultimately determined by the Tribunal. The Council accepts it is possible that declaration could lead to an access charge, and in particular NSC, which lies below that offered by PNO in the Deed, and closer to that previously set by the ACCC in its 2018 determination of the Glencore-PNO access dispute. However, even if this were to occur, the Council is not satisfied that the difference in price would promote a material increase in competition in any dependent market. In particular:

- The coal export market is likely to be effectively competitive such that declaration would not promote a material increase in competition in that market. Further, PNO is unlikely to have the incentive to diminish competition in this market. Coal export accounts for a substantial portion of activity at the Port and PNO is likely to have a commercial incentive for the coal export market to be effectively competitive in order to maximise demand for its Service.

- The market for coal tenements is derivative of the coal export market, and competition would not be materially promoted by declaration of the Service. While the possibility of higher prices in a future without declaration of Service may lessen investors' expectations of profitability of a tenement in the Newcastle catchment (such that they would be prepared to pay less for tenements), the Council does not consider that this would result in a material impact on the competitive process for those tenements. The Council considers prospective explorers/miners will still be able to compete on their respective merits for tenements in a future without declaration of the Service.

- PNO is not vertically integrated into the provision of container shipping services in any meaningful way that would make it likely to discriminate against any rivals in dependent markets.
- The Council is not satisfied that increased access to the Service, on reasonable terms and conditions, as a result of the declaration, would promote a material increase in competition in the bulk shipping market, the infrastructure market or the specialist services market.

1.27 Additionally, the Council considers that charges for access to the Service at the Port are likely to remain a small proportion of the overall cost of the production and export of coal from the Hunter Valley catchment and that PNO is unlikely to price the Service in a way that materially impacts competition in dependent markets. The Council considers coal producers and exporters face significantly greater uncertainty from other factors that are more likely to influence their future coal mining activities in the Newcastle catchment than the impact of declaration of the Service.

1.28 The Council’s view is that criterion (a) is not satisfied.

**Reasons why criterion (d) is not satisfied**

1.29 Criterion (d) requires that access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration, would promote the public interest. Criterion (d) does not limit the factors that the Council (and the designated Minister) may have regard to. However, it does require that regard be had 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.

1.30 To the extent it is possible that declaration could lead to an access charge, and in particular NSC, that lies below that offered by PNO in the Deed, and closer to that previously set by the ACCC in its 2018 determination of the Glencore-PNO access dispute, the Council is not satisfied the magnitude of any such difference is likely to be so large as to promote the public interest. This is because:

- Regulatory arbitration and commercial arbitration both introduce an element of ‘error risk’ which can affect efficient investment in infrastructure. To the extent that future investment in infrastructure may be required at the Port, the risk of error arises both with and without declaration. On balance, it is not clear that the risk is substantial.
- The preparedness of users of the Service to make investments that would enable them to compete in the coal export market (and therefore derivative markets) is more likely to be influenced by other factors (including coal prices,

labour cost, etc.) than it is by potential differences in the access charge in a future with and without declaration of the Service.

- Administrative and compliance costs are likely to arise both with and without declaration. On balance the Council considers that these costs are unlikely to be materially different in a future with and without declaration of the Service.

### *Other considerations*

1.31 In making this Recommendation, the Council:

- Has had regard to the objects of Part IIIA of the CCA. In addition to the matters considered in its assessment of criterion (d), the Council considers it is unclear whether prices in a future with declaration of the Service would be so materially different to those in a future without declaration such that the economically efficient use of and operation of the infrastructure by which the Service is provided would be promoted by declaration. The Council considers that its Recommendation is consistent with the principles of access regulation.
- Considers criterion (b) in subsection 44CA(1)(b) of the CCA is satisfied. The Council considers that the Port could meet the total foreseeable demand in the market in the Relevant Term and at the least cost compared to any two or more facilities.
- Considers criterion (c) in subsection 44CA(1)(c) of the CCA is satisfied. The Council considers that the Port is of national significance in terms of its importance to constitutional trade and commerce, and to the national economy.

1.32 Having engaged in public consultation and considered the materials put before it, the Council’s Recommendation is that the designated Minister not declare the Service the subject of the NSWMC’s Application for declaration.

## 2 Recommendation

2.1 On 23 July 2020, the National Competition Council received an application under section 44F of the *Competition and Consumer Act 2010* (Cth) by the New South Wales Minerals Council for declaration of certain services at the Port of Newcastle.

2.2 The Council conducted a public consultation on the NSWMC Application, in accordance with the process described in the Declaration Guide.[10] The NSWMC Application and public submissions received by the Council in response to the NSWMC Application were published on the Council's website.[11]

2.3 The Council published its Draft Recommendation on 30 October 2020. Public submissions received from the Applicant and parties responding to the Draft Recommendation have been published on the Council's website and are reflected in this Recommendation report.

2.4 The Council received confidential versions of submissions from PNO. The Council considers that the confidential information in these submissions does not alter its assessment of the NSWMC Application.

2.5 Having had regard to the provisions of Part IIIA of the CCA, the Council recommends to the designated Minister that the Service not be declared. The Council's reasons for this Recommendation are set out in this report.

10 National Competition Council, 'Declaration of Services A guide to declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth)' (April 2018)

11 See https://ncc.gov.au/application/application-for-declaration-of-certain-services-in-relation-to-the-port-of-newcastle/1

# 3 Background

### Applicant

3.1 The NSWMC is the peak industry association representing the NSW mining industry, including explorers, miners and associated service providers. It has sought declaration of the Service in response to access issues it sees arising between PNO and users of the Port.

### The Service

3.2 In its application to the Council, 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.[12]

3.3 A Service defined in almost identical terms has been the subject of a number of different considerations and determinations, as discussed in Chapter 5.

### Consultation Process

3.4 The Council invited parties to make written submissions on the NSWMC Application by 26 August 2020.

3.5 On 27 August 2020, the Full Court published its decision in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal*[13] (see Chapter 6 for further discussion). The Council invited parties to provide submissions on the Full Court's decision by 7 September 2020. Twelve submissions were received. All public submissions are available under the *Submissions on applications* tab on the Council's website.

3.6 The Council also invited submissions commenting on its Draft Recommendation, released on 30 October 2020. Six submissions were received. All public versions are available under the *Submissions on draft recommendation* tab on the Council's website.

### Designated Minister

3.7 Subsection 44F(2)(b) of the CCA provides that the Council must make a recommendation to the designated Minister in respect of an application for declaration. The recommendation must be either:

i. That the service be declared, with an expiry date specified in the declaration; or

[12] NSWMC Application, page 17

[13] *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145

ii. That the service not be declared.

3.8 The designated Minister in the matter of the NSWMC's Application is the Federal Treasurer, the Hon Josh Frydenberg MP.

# 4 Declaration under Part IIIA

### Objective and character of Part IIIA and the National Access Regime

4.1 The National Access Regime, established by Part IIIA of the CCA, was introduced in 1995 following the report of the National Competition Policy Review 1993 [14] (**Hilmer Committee**, **Hilmer Report**), as a means of addressing the 'essential facilities problem'. The Hilmer Committee described the problem as follows.

> Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically… Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus 'essential facilities' in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets.[15]

4.2 Part IIIA has been reviewed and amended on numerous occasions since 1995. The objective and character of the National Access Regime was incorporated into the CCA with the introduction of section 44AA in 2006, which provides that the objects of Part IIIA 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.

4.3 The National Access Regime is not a general scheme for the regulation of monopolies. Rather, it is a statutory mechanism to address an enduring lack of effective competition in markets where access to infrastructure services is required to compete effectively. It does so by providing a statutory mechanism through which an access seeker can gain access or increased access to the services provided by an infrastructure facility that is uneconomical to duplicate and nationally significant, where that access or increased access on reasonable terms and conditions, as a result of declaration of the service, would promote a material increase in competition in dependent markets and is in the public interest. If a service is declared (i.e. made subject to the regime), the regime includes protections, at the arbitration stage, for the legitimate business interests of the provider and their investment in the facility.

### Process

4.4 Obtaining access under the National Access Regime is a two stage process. In the first stage, the designated Minister, on the recommendation of the Council, decides whether a service provided by a particular facility should be subject to access

[14] National Competition Policy Review Report, available at http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf

[15] Hilmer Report, at page 240

regulation. Section 44F(1) of the CCA states that the designated Minister, or any other person, may apply in writing to the Council asking the Council to recommend that a particular service be declared.

4.5 On receiving an application, the Council's practice is to conduct a public consultation, inviting submissions from a range of parties including but not limited to the service provider and publishing a draft recommendation. The Council considers submissions on the draft recommendation before making its final recommendation to the designated Minister. Under subsection 44H(1) of the CCA, the Minister must decide to declare the service or not declare the service. Under subsection 44H(8) of the CCA, if the Minister declares the service, the declaration must specify the expiry date of the declaration.

4.6 The Council cannot recommend and the Minister cannot decide that a service be declared unless satisfied of all of the declaration criteria set out in section 44CA of the CCA.

4.7 If a service is declared, the second stage becomes available. This is a negotiate/arbitrate approach to resolving access disputes between a service provider and an access seeker (who does not have to be the applicant for declaration). Where parties are unable to reach an agreement through private negotiations, affected parties are able to request that the ACCC arbitrate the access dispute.

4.8 Section 44ZP of the CCA provides that a party may seek review of the ACCC's arbitral determination. A review by the Tribunal is a re-arbitration of the access dispute and, for the purposes of the review, the Tribunal has the same powers as the ACCC.

**Requirements for declaration**

4.9 Subsection 44H(4) of the CCA provides that the Minister cannot declare the service unless he or she is satisfied of all of the declaration criteria for the service. The declaration criteria, set out in subsection 44CA(1) of the CCA, 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 [(**criterion (a)**)—see Chapter 7]

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

  (a) over the period for which the service would be declared; and

  (b) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility) [(**criterion (b)**)—see Chapter 8]

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

  (a) the size of the facility, or

(b) the importance of the facility to constitutional trade or commerce, or

(c) the importance of the facility to the national economy

[(**criterion (c)**)—see Chapter 9]

(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 [(**criterion (d)**)—see Chapter 10].

(2) For the purposes of paragraph (1)(b):

(a) if the facility is currently at capacity, and it is reasonably possible to expand that capacity, have regard to the facility as if it had that expanded capacity; and

(b) without limiting paragraph (1)(b), the cost referred to in that paragraph includes all costs associated with having multiple users of the facility (including such costs that would be incurred if the service is declared).

(3) Without limiting the matters to which the Council may have regard for the purposes of section 44G, or the designated Minister may have regard for the purposes of section 44H, in considering whether paragraph (1)(d) of this section applies the Council or 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.

**The role of the objects of Part IIIA**

4.10 Sections 44F(2)(b) and 44H(1A) require the Council and the Minister, respectively, to have regard to the objects of Part IIIA of the CCA before making a recommendation or decision to declare or not declare a service. In *Glencore Coal v ACT 2020*, the Full Court states that:

> Aside from the express incorporation of the economic terminology of efficiency, the task of construing the relevant statutory provisions [of Part IIIA] in the present case is otherwise no different to that which is undertaken in any case where the meaning of legislative provisions is in issue. The task is to ascertain the contextual meaning of the words: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at 368 [14]. Statutory construction involves choosing from the range of possible meanings the meaning which Parliament should be taken to have intended: *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1 at 28 [57]. The range of meanings is itself to be informed by matters of context from the outset and not just when ambiguity is thought to arise: *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; 157 CLR 309 at 315 (Mason J). The statutory language cannot

> be given a meaning which the words used will not bear. For that reason, it is said that the starting point is the text whilst, at the same time, there is to be regard to context and purpose.[16]

4.11 Similarly, in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (Pilbara HCA), the High Court applied the objects clause in construing the declaration criteria, stating (at [97]) that

> criterion (b), like all other provisions of Part IIIA, is to be construed in the light of the objects of the Part as they have been stated, since 2006, by s 44AA.[17]

4.12 In its August submission, the ACCC contends that competition in dependent markets is best enabled by the promotion of economic efficiency in the market for PNO's services and that criterion (a) should be interpreted in a manner consistent with the objects of Part IIIA such that the focus of the criterion (a) assessment should be on whether declaration would promote the economically efficient operation of, use of, and investment in, the infrastructure by which services are provided.[18] In its November submission in response to the Draft Recommendation, the ACCC submitted that, as 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, it is inherent in the language of Part IIIA that efficiency promotes competition. The ACCC submitted that the Council, in its Draft Recommendation, did not give 'sufficient weight to the potential benefits to competition in related markets that can arise from ensuring economic efficiency in bottleneck monopoly infrastructure.'[19]

4.13 As the ACCC has acknowledged in its November submission, the objects of Part IIIA should not replace the statutory language of the declaration criteria. Thus, as the Council has regard to the object of promoting economic efficiency, it does not reformulate criterion (a) in the manner suggested by the ACCC in its August submission. Rather, the Council is required as it applies criterion (a) to assess whether access or increased access on reasonable terms and conditions through declaration would promote a material increase in competition in a dependent market. Any perceived promotion of economic efficiency arising from declaration should not be assumed to necessarily result in that competitive impact in dependent markets. For the reasons set out in this recommendation the Council has concluded that no such impact on competition would result from declaration, despite any efficiency gains that may result from declaration.

16 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145, at 239

17 *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36, at 97

18 ACCC August Submission, pp 3-4.

19 ACCC November Submission, pp 1-2.

**Material changes made to Part IIIA of the CCA**

4.14 Material amendments were made to Part IIIA of the CCA by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (**Amendment Act**). The Amendment Act was passed following reviews of the National Access Regime by the Productivity Commission in 2013 [Productivity Commission 2013][20] and within the ambit of the Competition Policy Review [Harper Review],[21] which reported its findings in 2015.

4.15 The Amendment Act moved the declaration criteria to section 44CA of the CCA and made substantial changes to the wording of criteria (a), (b) and (d). The Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review)* Bill 2017 (**2017 EM**) makes clear that the Amendment Act implemented all of the recommendations of the Productivity Commission's 2013 review of the National Access Regime.[22]

4.16 In its report on that review, the Productivity Commission expressed the view that:

> The only economic problem that access regulation should address is an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets.[23]

4.17 Among other things, the Productivity Commission recommended that three of the declaration criteria be amended:

- Criterion (a) is only satisfied where access (or increased access) to a service on reasonable terms and conditions through *declaration* (rather than access per se) would promote a material increase in competition in a dependent market.[24] The Productivity Commission noted that the decision of the Full Court in *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 155 FCR 124; [2006] FCAFC 146 (***Sydney Airport FCAFC***) 'lowered the hurdle for declaration' because the Court construed the criterion as requiring 'a comparison of the state of competition without access and the state of competition with access'.[24] The Productivity Commission's recommendation reconfirmed criterion (a) as having the meaning applied by the Council, Minister, and Tribunal[25] prior to *Sydney Airport*

[20] Productivity Commission 2013, *National Access Regime*, Inquiry Report no. 66, Canberra.

[21] Committee of Inquiry comprised of Professor Ian Harper (Chair), Peter Anderson, Su McCluskey and Michael O'Bryan QC, March 2015*, Competition Policy Review Final Report, at Chapter 24*

[22] 2017 EM, at paragraph 12.12

[23] Productivity Commission 2013, page 7

[24] Productivity Commission 2013, page 17

[25] See, respectively: NCC, *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport-Final Recommendation* (November 2003); Hon. Ross Cameron MP, *Statement of Decision and Reasons Concerning the Application for Declaration of Airside Services Provided by Sydney Airport Corporation Limited* (29 January 2004); *Re Virgin Blue Airlines Pty Limited* (2006) ATPR 42-092; [2005] ACompT 5.

*FCAFC.* The Productivity Commission considered that the proposed amended criterion better captured the effect of declaration on competition.[24]

- Criterion (b) is satisfied where total foreseeable market demand over the declaration period could be met, at least cost, by the facility.[26] The Productivity Commission recommended amending criterion (b) to clarify that the test imposed under this criterion is a natural monopoly test, not a private profitability test as previously established by the High Court in Pilbara HCA. The Productivity Commission considered that if criterion (b) was amended as it recommended, this would better target the economic problem to which the National Access Regime is directed and better account for the costs of providing the infrastructure service under shared use.[27]

- Criterion (d) is an affirmative test that requires the public interest to be promoted. Prior to amendment, the criterion (which at the time was criterion (f)) required that access (or increased access) was not contrary to the public interest. The Productivity Commission's recommended amendment, was in the context of 'raising the hurdle' to declaration.[28] The Council does not regard that context as requiring the application of a particular threshold for declaration. Rather, criterion (d) requires satisfaction that declaration is 'likely to generate overall gains to the community'.[29]

4.18 Criteria (a) and (d) examine the effects on competition in dependent markets and the public interest of 'access (or increased access), on reasonable terms and conditions, as a result of a declaration'. As explained in the extrinsic materials,[30] the amendments to criterion (a) (and, by extension, criterion (d)) would, in effect, overturn the interpretation adopted by the Full Court in *Sydney Airport FCAFC* and re-establish the interpretation as that which existed prior to 2006. With the addition of the words 'on reasonable terms and conditions, as a result of a declaration' the criteria compare the degree of competition in dependent markets or the public interest (a) where access is on reasonable terms and conditions from declaration, to (b) the terms of access likely without declaration. It is no longer merely assessing whether access (or increased access) would promote competition.[31]

4.19 According to the 2017 EM, in the context of its discussion of criterion (a),

> [t]his requires a comparison of two future scenarios: one in which the service is declared and more access is available on reasonable terms and

[26] Productivity Commission 2013, page 19

[27] Ibid, pages 20, 31 and 250

[28] Ibid, pages 20 and 251

[29] ibid, page 20

[30] Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review)Bill 2017*; and the Australian Government's response on the National Access Regime, 24 November 2015.

[31] 2017 EM, at paragraph 12.19

> conditions, and one in which no additional access is granted. That is a comparison of either: no access without declaration compared with some access as a result of declaration; or some access without declaration to additional access as a result of declaration. In comparing these two scenarios, it must be the case that it is the declaration resulting in access (or increased access) on reasonable terms and conditions that promotes the material increase in competition.[32]

4.20 Through the 'future with and without' test described in the 2017 EM, the Council is able to examine how competition in dependent markets or the public interest will be affected by access (or increased access) on reasonable terms and conditions through declaration. In undertaking this process, the Council does not seek to determine the precise terms and conditions of access with and without declaration in order to assess whether the declaration criteria are satisfied in respect of that service. Its task is to assume that any access would be on reasonable terms and conditions in a future with declaration of a service, without speculating whether particular terms might be imposed by arbitration under Part IIIA. This approach was approved by the Full Court in *Sydney Airport FCAFC*[33] and has been reinforced by the 2017 EM, which states:

> What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the detriment to competition in dependent markets that may otherwise be caused by the exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility.[34]

4.21 The notion of 'access, on reasonable terms and conditions, as a result of declaration' takes its meaning from the statutory context within Part IIIA. The determination of terms and conditions of access for a declared service is governed by Division 3 of Part IIIA. If a party is unable to agree with the provider of a service on one or more terms of access to a declared service and notifies the ACCC of the access dispute, the ACCC is required to determine terms and conditions of access. In determining the dispute, the ACCC has regard to a range of factors including: the objects of Part IIIA, the legitimate business interests of the provider, the direct costs of providing access to the service and the economically efficient operation of the facility.

4.22 The Council therefore considers that the reasonable terms and conditions referred to in criterion (a) can be assumed to be such terms and conditions that would meet or are directed to the mandatory considerations in Division 3 of Part IIIA. The risk of a potential arbitration of a dispute by the ACCC provides an access provider with an

[32] Ibid, at paragraph 12.20

[33] *Sydney Airport* FCAFC, at [82]. See also: *Re Fortescue Metals Group Limited* (2010) 271 ALR 256; (2010) ATPR 41-319; [2010] ACompT 2, at [1061], [1066].

[34] 2017 EM, at paragraph 12.21

incentive to offer access on terms that take into account those considerations or at least approach the terms and conditions that would otherwise be likely to be achieved with declaration followed by an arbitrated dispute.

4.23 The Council considers that when making judgements about likely future conditions and the environment for competition, it is necessary to look beyond short-term static effects. In particular, it is appropriate to consider the effects of declaration on investment incentives in dependent markets and for the service provider, and the effects of foreseeable changes in technology and/or market conditions. However, there can be uncertainty about incentives and/or market conditions in the longer term.

**Reforms implemented since the 2016 Glencore Determination**

4.24 The Council notes that the decision of the Tribunal in the 2016 Glencore Determination was made prior to the 2017 legislative changes to criterion (a).

4.25 The designated Minister (the then Acting Treasurer, Senator the Hon. Mathias Cormann) previously accepted a recommendation from the Council not to declare the Service in 2016. In making this decision, he adopted the Council's 2015 Final Recommendation that considered that all of the declaration criteria (in their pre-amended form[35]) were satisfied, except for criterion (a) (as it was then worded[36]).

4.26 On an application for review from Glencore, the Tribunal set aside the Minister's decision and declared the Service. The Tribunal considered that it was bound by the Full Court's decision in *Sydney Airport FCAFC,*[37] which considered the criterion to require a comparison of the future state of competition in the dependent market with and without 'access (or increased access)' as opposed to with and without declaration. Applying this construction of the criterion, the Tribunal precluded consideration of the existing or likely future access or usage of the Service. In effect, the Tribunal undertook its consideration of criterion (a) by comparing a future with declaration of the Service to a future where no access was provided. This was despite the fact PNO had been providing the Service even without declaration. Under this interpretation, the Tribunal found that criterion (a) was satisfied.

4.27 In its determination, however, the Tribunal stated that:

> If it were wrong about the correct approach to s 44H(4)(a)[38] … it would not be satisfied that increased access would promote a material increase in competition in the coal export market. If that market would not be promoted in that way, it

[35] The pre-amended criteria were set out in subsections 44G(2) and 44H(4) of the CCA respectively.

[36] The previous criterion (a) in subsections 44G(2)(a) and 44H(4)(a) read, 'that access (or increased access) to 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'.

[37] *Sydney Airport* FCAFC

[38] This subsection set out criterion (a) as it was then worded.

> follows that the other four dependent markets would also not be promoted with a material increase in competition in any of them.'[39]

4.28 Following the Tribunal's declaration of the Service, Parliament amended[40] criterion (a) to make clear that the relevant inquiry was into the effects of 'access (or increased access) to the service, on reasonable terms and conditions, *as a result of a declaration* of the service' [emphasis added].

[39] *Re Application by Glencore Coal Pty Ltd [2016] ACompT 6,* at [157].

[40] *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

# 5 Other matters and recent developments

5.1 This Chapter provides an overview of developments that relate to the circumstances and context of the Council's assessment of the NSWMC Application.

**Glencore Coal Assets Australia Pty Ltd 2015 application for declaration**

5.2 On 13 May 2015, Glencore applied to the Council for a recommendation that the shipping channel service at the Port be declared under Part IIIA of the CCA.[41] In its application, Glencore described the Service as:

> The provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at 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.[42]

5.3 On 10 November 2015, the Council provided its recommendation to the designated Minister, the Federal Treasurer, the Hon. Scott Morrison MP. The Council recommended that the Service not be declared. In the Council's view, criteria (a) and (d) were not satisfied. On 8 January 2016 the Acting Treasurer, Senator the Hon. Mathias Cormann, decided not to declare the Service.

5.4 On 29 January 2016, Glencore applied to the Tribunal for a review of the Acting Treasurer's decision not to declare the Service. On 31 May 2016, the Tribunal decided the Service should be declared. On 16 June 2016, the Tribunal made orders giving effect to that decision (i.e. the 2016 Glencore Declaration). The Tribunal set aside the decision of the designated Minister and declared the Service from 8 July 2016 until 7 July 2031.

5.5 On 14 July 2016, PNO applied to the Federal Court of Australia for judicial review of the Tribunal's decision. On 16 August 2017, the Full Court handed down its judgment in the matter, unanimously dismissing the application: *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124.

5.6 On 12 September 2017, PNO applied for special leave to appeal the Full Court's decision to the High Court of Australia. The application was dismissed by the High Court on 23 March 2018.[43]

[41] For materials relating to this application see https://ncc.gov.au/application/application-for-declaration-of-shipping-channel-services-at-the-port-of-new/1

[42] Glencore 2015 Application, page 15

[43] *Port of Newcastle Operations Pty Limited v Australian Competition Tribunal & Ors* [2018] HCA Trans 55 (23 March 2018).

**2019 Revocation of the 2016 Glencore Declaration**

5.7 In July 2018, the Council received a request from PNO that the Council recommend under section 44J of the CCA that the designated Minister revoke the 2016 Glencore Declaration.[44]

5.8 Following this request, the Council sought submissions from and published its Statement of Preliminary Views (December 2018).[45] The Council then sought further submissions to inform its final recommendation.

5.9 On 26 July 2019, the designated Minister, the Federal Treasurer, the Hon. Josh Frydenberg MP, received the Council's recommendation that he revoke the declaration (**the Revocation Recommendation**).

*Summary of Revocation Recommendation*

5.10 The Council considered that while some of the declaration criteria set out in section 44CA of the CCA were satisfied,[46] not all were. It considered that subsection 44CA(1)(a) (criterion (a)) was not satisfied. It further considered that the designated Minister could reasonably form the view that subsection 44CA(1)(d) (criterion (d)) was not satisfied.

5.11 In assessing criterion (a), the Council was not satisfied that 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. In this decision the Council noted:

(a) The Port is a natural bottleneck facility, businesses seeking to export coal from the Newcastle catchment must use the Service in order to export into overseas coal markets.

(b) PNO is not without constraint when setting the terms and conditions of access absent declaration.

(c) It is likely (but not certain) that charges for the Service will be higher in a future without declaration of the Service, although it is unclear precisely how much higher (if at all).

(d) The Council was not satisfied that the possibility of lower prices in a future with declaration of the Service would be likely to promote competition in any dependent markets. In particular:

44 https://ncc.gov.au/application/consideration-of-possible-recommendation-to-revoke-declaration-of-service-a

45 https://ncc.gov.au/application/consideration-of-possible-recommendation-to-revoke-declaration-of-service-a/3

46 The Council considered that subsection 44CA(1)(b) (criterion (b)) and subsection 44CA(1)(c) (criterion (c)) of the CCA were satisfied.

- The coal export market is already likely to be effectively competitive such that declaration is unlikely to promote a material increase in competition in this market.
- The market for coal tenements is 'derivative' of the coal export market, and competition is unlikely to be materially promoted by declaration of the Service. The Council considered prospective explorers/miners will still be able to compete on their respective merits for tenements in a future without declaration of the Service.
- PNO is not vertically integrated into the provision of container shipping services in any meaningful way that would make it likely to discriminate against any rivals in markets for these services.

(e) The Council considered that charges at the Port were likely to remain a small proportion of international spot prices for coal with or without declaration of the Service.

5.12 The Council considered that criterion (b) was satisfied, as it was likely that the Port could meet the total foreseeable demand, at the least cost compared to any two or more facilities. It was noted that the Port was not capacity constrained and that the costs of developing a new port to service the Newcastle catchment would be significant.

5.13 The Council further considered that the Port is of national significance and that criterion (c) was satisfied.

5.14 The Council considered that it was possible (but not certain) that declaration would generate some marginal improvement in the efficient use of and investment in relevant infrastructure. However, this benefit must be set against the considerable administrative, compliance and legal costs associated with declaration (and any subsequent negotiation and arbitration of terms and conditions of access under the Part IIIA access regime). The Council considered that the designated Minister could reasonably form the view criterion (d) would not be satisfied.

*Deemed decision*

5.15 The designated Minister did not publish his decision on the Revocation Recommendation within 60 days of receiving it, so was deemed by section 44J(7) of the CCA:

a) to have made a decision that the declaration be revoked; and

b) to have published that decision in accordance with this section.

5.16 The designated Minister made a statement confirming the deeming of the decision.[47]

[47] https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/port-newcastle

**PNO-Glencore Arbitration**

5.17 During the period while the 2016 Glencore Declaration was in place (i.e. from 16 June 2016 until 23 September 2019), Glencore notified the ACCC of an access dispute with PNO.[48]

5.18 On 18 September 2018, the ACCC issued its determination in the matter (the 2018 ACCC Arbitration Determination).

5.19 Both Glencore and PNO subsequently sought review of the ACCC Arbitration Determination by the Tribunal; and the Tribunal made its determination on 30 October 2019 (the 2019 Tribunal Arbitration Determination).[49]

5.20 Glencore and the ACCC sought review of the 2019 Tribunal Arbitration Determination. On 27 August 2020, the Full Court published its decision setting aside the 2019 Tribunal Arbitration Determination.[50]

5.21 In its November submission, PNO noted that it has filed an application for special leave to appeal the Full Court decision before the High Court of Australia.[51] The grounds of appeal include:

> (a) the Full Court erred in concluding that a person who has merely an economic interest in the terms to be imposed by a determination under Part IIIA of the CCA, or has merely caused a person to access a declared service, is a 'third party' within the meaning of s 44B or can arbitrate the terms and conditions of another party who is physically accessing the service;
>
> …
>
> (d) the Full Court erred in concluding that ss 44X(1)(e) or 44ZZCA of the CCA requires a determination to take into account any user contributions to a facility; and
>
> (e) the Full Court erred in concluding that deductions could be made from the asset base for user contributions without a comprehensive examination of the circumstances in which those contributions were made.[52]

5.22 Chapter 6 of this report provides greater detail on the ongoing PNO-Glencore Arbitration and how the Council has had regard to it when making its Recommendation.

[48] https://www.accc.gov.au/public-registers/access-to-services-registers/determination-of-the-access-dispute-between-port-of-newcastle-operations-and-glencore-coal-assets-australia

[49] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1

[50] *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145

[51] The Council understands that, at the time of making this Recommendation, the application for special leave had not been heard.

[52] PNO November submission, page 10

### Developments at the Port since the Revocation of the 2016 Glencore Declaration

*Vessel Open Access Regime*

5.23 In December 2019 PNO published a number of documents which collectively establish formal terms and conditions of open access arrangements at the Port for any vessel seeking to enter the Port and use its facilities. Relevant to the Council's consideration, the open access arrangements provide:

(a) An initial NSC rate of $1.0424 per GT, with effect from 1 January 2020.

(b) That PNO may vary its schedule of charges from time to time, including varying or introducing any new fees or charges. PNO will publish a notice of the proposed change on its website at least 10 Business Days before the variation is proposed to take effect.

(c) As at 13 March 2020, it was PNO's intention to adjust the NSC and wharfage charge for coal vessels annually by an amount equal to the CPI. PNO intends that these charges may also be increased to reflect additional investment by PNO in port services, any increases in government charges or taxes or changes in law and any material change events.

(d) Established a dispute resolution process (mediation and commercial arbitration).

*Port User Deed*

5.24 In December 2019, PNO published a long term pricing Deed which could be entered into by Vessel Agents, Vessel Operators, Coal Producers and free on board coal consignees involved in the shipment of coal from the Port (the **Port User Deed**).[53] The Port User Deed has now been superseded and is no longer offered by PNO. Its terms included, in part:

(a) An initial term of 10 years.

(b) An initial NSC rate of $0.8121 per GT, with effect from 1 January 2020.

(c) An 'annual adjustment', being the greater of CPI or 4%.

(d) Provided for ad hoc variations to the NSC in response to changes in tax or other law which increased PNO's costs or decreased its revenues.

(e) Provided for ad hoc variations to the NSC in response to material change events (to allow PNO to recover additional costs and to sustain its equity rate of return).

(f) Established a dispute resolution process (mediation and commercial arbitration).

(g) Established 'pricing principles' to be applied in mediation and arbitration. The pricing principles include elements consistent with those the ACCC must take into account when making an arbitration determination under Part IIIA of the CCA.

[53] NSWMC Application, Annexure A

(h) Established 'excluded disputes' which include disputes about the NSC when the NSC does not exceed the value of $0.8121 plus each subsequent annual adjustment.

(i) Established an 'initial capital base' being the value established by reference to the depreciated optimised replacement cost as at 31 December 2014 of the assets used in the provision of all of the services at the Port and, unless otherwise agreed by PNO, without deduction for user contributions.

(j) Established a number of information requirements.

*Producer Deed and Vessel Agent Deed*

5.25 In March 2020, PNO published the Producer Pro Forma Long Term Pricing Deed[54] and Vessel Agent Pro Forma Long Term Pricing Deed[55] (collectively, the **Deed**). The Deed replaced the Port User Deed.

5.26 The Deed maintained the terms described at items 5.23 (a) – (c) and (f) – (j) but removed the specific provisions that permitted variation to the NSC in response to tax and law reform and amended the approach to material change events. The Deed also introduced capital expenditure transparency measures and non-discriminatory pricing provisions.

**Dalrymple Bay Coal Terminal 2020 declaration**

5.27 In 2019-20, the Queensland Competition Authority (**QCA**) undertook a review of the declaration for the handling of coal at the Dalrymple Bay Coal Terminal (**DBCT**). For present purposes, the review criteria applied by the QCA were functionally identical to the declaration provisions of Part IIIA.

5.28 In its draft recommendation, the QCA concluded that all of the declaration criteria were met. However, before the QCA made its final recommendation, DBCT Management executed a Deed poll that included an access arrangement. The QCA subsequently concluded that subsection 76(2)(a) and subsection 76(2)(d) of the QCA Act (which are in the same terms as criteria (a) and (d) in Part IIIA) were not satisfied and recommended that the Minister not declare the Service.

5.29 On 1 June 2020, the Honourable Cameron Dick MP, Treasurer and Minister for Infrastructure and Planning Minister decided to declare the Service, finding that declaration was likely to promote a material increase in competition in the development stage tenements market and would promote the public interest.[56] On 29

[54] https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf

[55] https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020_.pdf

[56] Queensland Government Gazette Vol 384 No 31 (1 June 2020)

June 2020, DBCT Management Pty Ltd lodged an application for review of this decision. The matter is currently before the Supreme Court of Queensland.[57]

5.30 The NSWMC submits that the reasoning and decision in DBCT is relevant to the Council's consideration of its application.[58]

5.31 The facts informing the Minister's decision differ to those that arise in the context of the NSWMC Application. In particular, the Council notes the following material differences:

(a) Existing users at the DBCT have 'evergreen agreements' but users at the Port of Newcastle do not.

(b) DBCT's capacity is fully contracted and likely to remain so without capacity investment. In contrast, the Port of Newcastle has significant excess capacity which can be accessed by Port users.

(c) DBCT Management proposed to treat new and existing users differently, with future users paying more than existing users, thus favouring some producers over others for reasons other than their efficiency. PNO has not set differential access charges and has included non-discriminatory pricing provisions in its agreements with Port users.

(d) As DBCT terminal charges are significantly higher than the Newcastle NSC, they are likely to represent a significantly greater proportion of a coal producer's costs.

5.32 It is the Council's view that the facts in DBCT are materially different to those present at the Port.

**NSWMC Collective Bargaining Authorisation**

5.33 In March 2020, the NSWMC and ten mining companies[59] sought authorisation from the ACCC to collectively bargain with PNO the terms and conditions of access relating to the export of coal from the Port **(NSWMC Collective Bargaining Authorisation)**.

5.34 The ACCC approved the NSWMC Collective Bargaining Authorisation on 27 August 2020.[60] On 17 September 2020, PNO applied to the Tribunal for review of the ACCC's determination. The matter is currently before the Tribunal.

[57] *DBCT Management Pty Ltd -v- Treasurer and Minister for Infrastructure and Planning (Queensland) & Ors*, file 7058 of 2020

[58] NSWMC Application, page 28-29

[59] Glencore, Yancoal, Peabody Energy Australia Pty Ltd, Bloomfield, Centennial Coal Company Limited, Malabar, Whitehaven Coal Mining Limited, Hunter Valley Energy Coal Pty Ltd, Idemitsu Australia Resources Pty Ltd, and MACH Energy Australia Pty Ltd.

[60] See https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/new-south-wales-minerals-council-nswmc

# 6 How the Council has had regard to the ongoing Glencore-PNO access dispute

6.1 As noted in Chapter 5, during the period when the shipping channel Service at the Port was declared, Glencore notified the ACCC of an access dispute it had with PNO. On 18 September 2018, the ACCC's consideration of this dispute concluded with the issue of the 2018 ACCC Arbitration Determination. This had the consequence of setting an access price for Glencore for the NSC of $0.61 per GT, as measured in 2018 dollar terms. The Council estimates this equates to approximately $0.63 per GT in 2020 dollar terms. The rate determined by the ACCC represented a significant decrease below the list price set by PNO for the NSC of approximately $0.76 per GT in 2018 dollar terms (or $0.78 per GT in 2020 dollar terms).

6.2 The 2018 ACCC Arbitration Determination was, however, the subject of two applications for review to the Tribunal, which culminated with the 2019 Tribunal Arbitration Determination. This had the effect of raising the NSC payable by Glencore to PNO to $1.0058 per GT as at January 2018 (or approximately $1.04 per GT in 2020 dollar terms).[61]

6.3 Subsequently, the 2019 Tribunal Arbitration Determination was the subject of two applications for review. On 24 August 2020, the Full Court ordered that the 2019 Tribunal Arbitration Determination be set aside and the matter be remitted to the Tribunal for determination according to law.

6.4 The Full Court was tasked with the judicial review of the Tribunal's determination in respect of two matters, that is, whether the Tribunal erred in law in:

(a) concluding that the Service was, in effect, only provided to those parties in control of a ship and, on that basis, confining the scope of its determination to instances where Glencore was in control of a ship being used to load and export coal; and

(b) the way it treated past user funded contributions[62] when determining the price to be paid by Glencore for the Service.[63]

6.5 The first point was determined in favour of Glencore. On the second point, the Full Court held that the Tribunal fell into legal error when it failed to have regard to the user contributions in determining the appropriate level of efficient costs: section 44X(1) of the CCA required the Tribunal to consider whether there were user contributions of a

[61] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1, at [6.1].

[62] 'User funded contributions' also known to as 'user funded expenditure' or 'user funded assets' refer to historic payments made by Port users to the Port which funded, amongst other things, channel dredging to allow larger ships to berth at the Port.

[63] In this respect, Glencore argues that past user contributions should be deducted from the Port's regulatory asset base (RAB). In turn, this would reduce the amount of costs PNO is able to recover through charges for the NSC over the lifetime of the asset, leading to lower prices for the Service.

character that should be brought to account in determining the price and terms of access.[64]

6.6 Since setting aside the Tribunal's determination and remitting the matter back to the Tribunal, no determination has been made in respect of the Glencore-PNO access dispute and the Tribunal must conduct a *de novo* hearing.

6.7 At the time of making this Recommendation, the Tribunal has not completed its re-determination of this matter.

**Submissions**

6.8 The NSWMC submits that PNO's insistence on seeking a return on an asset base that includes past Port user contributions, given the Decision that PNO should not be able to earn a return on expenditures it did not make, reinforces the legitimacy of the industry's request to *collectively* negotiate reasonable terms with PNO.[65]

6.9 In respect of the Decision, the NSWMC submits[66] that:

(a) The Full Court's purposive approach to Part IIIA is particularly relevant to the NSWMC Application. The NSWMC refers to the Full Court's approach of having regard to the intention behind the declaration being to: (i) assist coal exporters in the economically efficient export of coal from the Port; and (ii) have regard to practical matters in the shipping and export of coal. This '*practical approach*' to the export of coal is what has been requested and submitted by the NSWMC in its Application to the Council.

(b) The Decision should resolve the Service description issue, including the ability of coal producers to nominate to PNO vessels irrespective of the underlying contractual arrangements.

(c) The Full Court requires the Tribunal to take user funded contributions into account, *'i.e. reducing the asset base,'* in setting Glencore's access charge for its arbitration determination under Part IIIA (citing [288] and [289] of the Decision).

[64] Paragraph [294] of the Decision: '*With respect to the Tribunal, it has been demonstrated that there was an error of law by the Tribunal in failing to have regard to the user contributions on the basis that such contributions could not be relevant to the determination of an appropriate level of efficient costs. Various provisions in s 44X(l) required the Tribunal to consider whether there were user contributions of a character that should be brought to account in determining the price and terms of access.'*

[65] NSWMC September submission, at page 2

[66] Ibid, at pages 2 to 3

6.10 The NSWMC submits[67] the implications of the Decision are that:

(a) Industry expenditure needs to be taken into consideration by PNO in setting efficient charges and this is what PNO is refusing to discuss with the NSWMC (i.e., the collective bargaining authorisation).

(b) PNO intends to continue to charge Port users (other than Glencore) a charge derived from a capital base which includes user funded capital expenditure that PNO itself did not spend.

(c) PNO's inclusion of user funded contributions in its asset base is economically inefficient and inconsistent with the pricing principles set out in Part IIIA.

6.11 The NSWMC's submission concludes that:[68]

(a) PNO has refused to collectively negotiate with stakeholders on the issue of inclusion of user funded expenditure in its regulatory asset base.

(b) The Deeds that PNO have put forward to users expressly remove user funded expenditure from any negotiations, allowing PNO to charge users based on the inclusion of that past expenditure.

(c) This conduct highlights PNO's market power and that it will use that market power in relation to the terms and conditions for access to the Port.

(d) Glencore may now enjoy a position that other users do not, demonstrating the consequences of declaration and non-declaration.

(e) Declaration provides a threat of ACCC arbitration, such that reasonable terms and conditions can be negotiated with PNO, failing which declaration will allow the ACCC to impose reasonable terms and conditions on PNO, like those for Glencore.

(f) More reasonable terms and conditions would materially increase competition in relevant markets.

6.12 In its November submission, the NSWMC submits that the Council (in its Draft Recommendation) failed to give the Full Court's decision appropriate consideration. The NSWMC argues that the Full Court's decision is relevant because PNO asserts that it is not possible to question user funding in the Producer Deeds unless PNO agrees and, in any event, that past user funding in PNO's capital base cannot be questioned.[69]

6.13 Glencore says the Full Court found that the Tribunal erred by: (i) misconstruing the declared Service; and (ii) allowing PNO to include user funded contributions in the regulatory asset base when setting the NSC.[70] Glencore then submits the implications

[67] Ibid, at pages 1 to 3

[68] Ibid.

[69] NSWMC November submission, at page 13

[70] Glencore September submission, at page 1

of the Decision for the NSWMC Application are that if the Port is declared coal producers can:

(a) nominate vessels to PNO irrespective of PNO's terms and conditions; and

(b) have the ACCC arbitrate an access dispute to remove user funded contribution expenditure that PNO did not make from the regulatory asset base.[71]

6.14 In its November submission, Glencore argues against the Council's analysis of the Full Court's decision. It considers that the Full Court was very clear on the principle that it is not economically efficient nor consistent with the Part IIIA pricing principles for PNO to charge for assets it didn't pay for.[72]

6.15 Glencore questions whether, given the Decision, PNO should continue with its terms and conditions, which remove the ability of parties to negotiate user funded expenditure and do not provide a mechanism for users to object to PNO's future capital expenditure ('gold plating'), e.g. through user funded contributions to a container terminal.[73]

6.16 Glencore restates its position that declaration: (i) imposes a threat of access disputes arbitrated by the ACCC; (ii) allows users to obtain more reasonable terms and conditions from PNO; and (iii) results in a material increase in competition in dependent markets (referring to the markets identified in the NSWMC Application).[74]

6.17 Yancoal says that the Decision supports a finding that criterion (a) and (d) are met:

(a) The Decision shows that PNO's charges are inefficiently high because they include a return on user funded contributions. Including user funded contributions is described as being evidence of PNO's ability and incentive to engage in monopoly pricing and a lack of constraint on PNO.[75]

(b) The Decision means the Tribunal will determine a lower price for Glencore than that offered by PNO to other Port users (because the Tribunal must take user contributions into account). If only Glencore receives the benefit of the Tribunal's re-determination this asymmetric outcome is not efficient.[76]

(c) *With declaration:* The ACCC Determination (not the Tribunal's findings) represents the reasonable terms and conditions that would apply to all users if the Port Service were declared.[77]

[71] Ibid, at page 2

[72] Glencore November submission, at page 3

[73] Glencore September submission, at page 2

[74] Ibid.

[75] Yancoal September submission, at page 1

[76] Ibid.

[77] Ibid, at page 2

(d) *Without declaration:* PNO can price discriminate against Port users (other than Glencore) and impose a price increase '*well beyond*' the amounts attributable to charging for user funded assets leading to:

- inefficient pricing resulting in inefficient investment decisions; and
- competition in dependent markets being impacted because only Glencore benefits from efficient pricing.[78]

6.18 Yancoal refers to the Revocation Recommendation findings that: (i) PNO had no incentive to engage in monopoly pricing; and (ii) the difference in price without declaration was not sufficiently material to change investment decisions such that declaration would promote competition. It then submits that the Decision requires (i) to be reconsidered. Yancoal reasons that PNO is incentivised to engage in profit maximising behaviour to raise prices because of its customers' sunk costs and existing take or pay commitments and there being no prospect that coal volumes will decrease in the face of monopoly pricing.[79]

6.19 Yancoal submits that if PNO's incentives are reconsidered then this requires a re-consideration of the impact on competition [in dependent markets] and says the difference arising from charging for user funded contributions ($0.40 cents per tonne) is significant to investment decisions.[80]

6.20 Yancoal considers that PNO, absent declaration, is unconstrained from raising prices for non-Glencore users further above efficient levels in the future, which it says gives rise to a significant hold-up problem (the 'key issue'). Non-Glencore users therefore have to take into account substantial future price increases impacting investments in coal tenements. Yancoal then says asymmetric conditions and price discrimination at the Port for different users is akin to the conditions identified by the QLD Treasurer as satisfying criterion (a) at DBCT.[81]

6.21 Malabar refers to the Decision requiring that the Tribunal take into account user funded expenditure. It considers that the underlying economic principle is that the '*Port should not be able to earn a return on expenditures it did not make'* and that absent declaration PNO intends to impose charges based on user funded contributions. Malabar also submits that declaration ensures efficiency, provides regulatory oversight of PNO's terms and conditions, and as a result promotes competition in dependent markets.[82]

6.22 Bloomfield submits that the Decision requires the Tribunal to take into account user funded contributions when setting charges for Glencore by '*reducing*' PNO's asset base

[78] Ibid.

[79] Ibid.

[80] Ibid.

[81] Ibid, at page 3.

[82] Malabar September submission, page 1

by the value of the user contributions.[83] It considers that this supports the NSWMC's Application for declaration, as declaration ensures:

(a) the calculation of access charges will not include user-funded contributions;

(b) efficiency by providing regulatory oversight of the terms and conditions for critical infrastructure; and

(c) a material increase in competition in dependent markets because of (a) and (b).[84]

6.23 In contrast, PNO's position is that the Decision has no relevance to the Council's task, i.e. whether section 44CA is satisfied, and submits that there are five reasons why this is so (copying PNO's submission headings):

(a) *The decision is an irrelevant consideration under the statutory declaration criteria*: PNO refers to the declaration criteria in section 44CA, and notes that the only matters the NCC can take into account are those specified in section 44CA(1)(a)-(d) and submits it would be an '*improper exercise of the NCC's powers under s 44F to take into account irrelevant considerations outside the enumerated statutory criteria in s 44CA*'. Matters relating to the arbitration of an access dispute of a service previously declared are outside the statutory criteria of section 44CA.[85]

(b) *Specific to the parties*: An ACCC Determination or Tribunal decision does not set general terms of access. It is specific to Glencore, and does not extend to any other party.[86]

(c) *No arbitral decision currently in force*: The Full Court remitted the matter for re-determination by the Tribunal under section 44ZP, which is a *de novo* re-hearing of the matter. There is no arbitral determination in force at this time.[87]

(d) *The Council has accepted that the bilateral access dispute is not relevant to its assessment of the declaration criteria*: PNO refers to the Council's Revocation Recommendation conclusion that it is not necessary to form a view whether any ACCC determined terms are reasonable and that, absent a concluded view, the Council can only have regard to an ACCC Determination in broad terms as an example of the type of decision that can result from an arbitration under Part IIIA.[88] This is consistent with the 2017 EM.[89] PNO then submits that:

[83] Bloomfield September submission, page 2

[84] Ibid.

[85] PNO September submission, pages 1-2

[86] Ibid.

[87] Ibid.

[88] Ibid, at pages 2-3

[89] 2017 EM, at paragraph 12.21

- The Decision does not illuminate what might constitute 'reasonable' terms and conditions for the purposes of section 44CA.[90]
- The ACCC Determination provides no insights as it is subject to re-arbitration before the Tribunal (section 44ZO(2)).[91]
- Even if the Decision or ACCC Determination were relevant to the NCC's task, those decisions do not support a finding that declaration promotes a material increase in competition in dependent markets.[92]

(e) *Arbitration of the terms and conditions of access by miners will not have any effect on actual access seekers.* PNO submits that:

- PNO has entered into a number of Deeds with access seekers who acquire the Service from PNO.[93]
- Under section 67 of the *Ports and Maritime Administration Act 1995* (NSW), PNO can enter into an agreement with the persons liable to pay charges at the Port.[94]
- PNO's agreements with coal vessels displaces PNO's NSC (being the charge contained in the 'Schedule of Port Charges' and the subject of Glencore's Tribunal re-arbitration and the NSWMC's Application).[95]
- As PNO agreed a NSC with vessel owners under the PAMA Act for 10 years, the re-arbitration of Glencore's terms and conditions is not likely to promote competition in dependent markets.[96]

**Consideration given to the Glencore-PNO access dispute in relation to criterion (a)**

6.24 Criterion (a) requires the Minister to consider 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 a dependent market.

6.25 The Council considers it is appropriate to undertake its assessment of criterion (a) without forming a view on the outcomes of any Part IIIA negotiation or arbitration which may be underway or concluded, such as the ongoing resolution of the access dispute between Glencore and PNO. That is not to say that these matters are irrelevant to the current assessment. However, the Council does not consider it necessary or appropriate to form a concluded view as to:

- What might definitively represent 'reasonable terms and conditions, as a result of declaration' contemplated in criterion (a).

90 PNO September submission, page 3

91 Ibid, page 4

92 Ibid.

93 Ibid.

94 Ibid.

95 Ibid.

96 Ibid.

- What precise terms and conditions might ultimately be determined by the Tribunal when it completes its remitted determination of the access dispute between Glencore and PNO.
- The value of the regulatory asset base, including any final determination on the value and treatment of user funded contributions, as determined by the Tribunal when it completes its remitted determination of the access dispute between Glencore and PNO.
- Whether the price terms set by the Tribunal in its remitted determination will be less than, equal to or greater than those set by the ACCC in the 2018 ACCC Arbitration Determination.

6.26 The Council's approach to the relevance of the ongoing access dispute between Glencore and PNO when applying criterion (a) is founded on the following analysis of the legislative framework:

(a) Part IIIA prescribes that the negotiate/arbitrate regulatory regime that results from declaration is imposed following a declaration decision by the Minister that is forward-looking.

(b) That declaration decision is: to be made by the Minister on the recommendation of the Council; on consideration of the declaration criteria and having had regard to the object of Part IIIA; and (in the usual course) in the absence of any Part IIIA arbitration decision concerning the service in question.

(c) On its face, the with and without test relating to a consideration of access on reasonable terms and conditions as a result of declaration, is an objective test made without regard to specific arbitration outcomes.

(d) In this matter we are considering whether to recommend declaration of certain services provided at the Port, in circumstances where we have a (partially complete) arbitration process based on an earlier declaration decision. Thus, there is an opportunity to have regard to an ACCC arbitration determination, a Tribunal arbitration determination and a Full Court decision regarding the Tribunal's arbitration determination in making the necessary forward-looking assessment referred to above.

(e) However, that does not change the objective character of the test. Moreover, there are inherent risks in applying too much weight on an arbitration outcome in a specific bilateral dispute, especially when specific issues in other access disputes involving the same or other access seekers may or may not be equivalent. This risk is further compounded where (as here) the arbitration remains incomplete, in the sense that the matter has been remitted to the Tribunal for redetermination.

6.27 This approach is supported by paragraphs 12.20 and 12.21 of the 2017 EM. Paragraph 12.20 of the 2017 EM states that:

> [Criterion (a)] requires a comparison of two future scenarios: one in which the service is declared and more access is available on reasonable terms and conditions, and one in which no additional access is granted. That is a comparison of either: no access without declaration compared with some access as a result of declaration; or some access without declaration to additional access as a result of declaration. In comparing these two scenarios, it must be the case that it is the declaration resulting in access (or increased access) on reasonable terms and conditions that promotes the material increase in competition.

6.28 Paragraph 12.21 of the 2017 EM clarifies how 'reasonable terms and conditions' should be considered, stating:

> What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the detriment to competition in dependent markets that may otherwise be caused by the exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility.

6.29 The 2017 EM reinforces the Council's view that it is not Parliament's intent to require the Council or the Minister to form a view on the specific outcomes of a Part IIIA negotiation or arbitration when determining whether declaration of a service is appropriate.

6.30 Some parties have submitted that the decision of the Full Court means that the asset base used to determine terms and conditions of access at the Port will be reduced to take account of user funded contributions. By implication, this suggests access prices set in reliance of that asset base should be lower than those set in the 2019 Tribunal Arbitration Determination; and therefore lower than the open access price presently set by PNO in the absence of declaration of the Service.

6.31 The Full Court noted that it is within its power to determine an (arbitral) outcome where it considers such outcome to be inevitable. Significantly, however, it also noted that this was not the case in the matter of the PNO-Glencore dispute [318]. The Full Court further noted:

> As to the issue of the user contributions, for Glencore it was contended that, no issue having been taken before the Tribunal as to the extent of the user contributions, if the Tribunal was in error in failing to have regard to those contributions then the consequence was that the accepted value of the contributions had to be brought to account in the manner determined by the ACCC in that determination. Even accepting the premise for that submission as being correct (a matter disputed by PNO), the statutory task to be undertaken by the Tribunal required it to have regard to the user contributions and not simply to bring them to account in the manner reasoned by the ACCC in its determination. It is not for this Court on review to undertake that task which involves regard to matters other than user contributions alone.

> Therefore, the question of user contributions and any consequence for the access price arising from a determination of that issue is a matter for the Tribunal and that aspect must be referred back to the Tribunal. [320-321]

6.32 The Council considers, therefore, it is not a foregone conclusion that the Tribunal will, in its remitted determination of the access dispute between Glencore and PNO, determine an access price for the NSC equal to that set in the ACCC Determination.

6.33 Further, the Full Court decision has not mandated how the Tribunal must take account of user funded contributions when determining an appropriate asset base and calculating a reasonable set of terms and conditions of access for the Service. PNO has also submitted that the Tribunal in the first instance did not consider the factual basis for the user funded contributions or make findings in this respect.

6.34 The Council considers it is likely (but not certain) that the Tribunal will set lower prices for the NSC than those set in the 2019 Tribunal Arbitration Determination (i.e. $1.04 per GT in 2020 dollar terms) when it re-determines the access dispute between Glencore and PNO. At this point, the Council also considers it is likely (but not certain) that the Tribunal will not set a price for the NSC below that set in the ACCC Determination (i.e. $0.63 per GT in 2020 dollar terms). The uncertainty with respect to both these considerations is because the Tribunal must re-hear this matter *de novo*.

6.35 Overall, therefore, the Council considers it likely (but not certain) that the Tribunal will re-determine an NSC within the range of approximately $0.63 - $1.04 per GT. The Council considers that this represents a reasonable indication of the NSC likely (but not certain) to be set in a future with declaration of the Service.

6.36 While the open access charge set by PNO for the navigation service (i.e. $1.04 per GT in 2020 dollar terms), is almost identical to that determined by the Tribunal in the 2019 Tribunal Arbitration Determination, the price offered by PNO in the Deed (i.e. approximately $0.81 per GT in 2020 dollar terms) is significantly lower.

6.37 The Council considers the ongoing Glencore-PNO access dispute to be part of the context of its assessment of the NSWMC Application and illustrates:

- The range of prices that may be considered reasonable by different decision-makers within the meaning of 44X of the CCA.
- Ongoing uncertainty regarding prices that may be set under declaration (but likely within the range noted above), at least in the short-medium term.

**Consideration given to the Glencore-PNO access dispute in relation to criterion (d)**

6.38 Criterion (d) requires the Minister to consider whether 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.

6.39 The Council considers that the future with and without declaration concept embodied in criterion (d) is materially similar to that in criterion (a) and, like criterion (a), does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. As such, in its assessment of criterion (d), the Council has

noted the Full Court decision and the need for the Tribunal to re-determine the access dispute between Glencore and PNO (and the possibility that lower prices might emerge from this compared to those set by PNO, in particular, in its open access arrangements). Even if a lower price emerges, it is uncertain that the Tribunal's price will be materially lower than the price PNO offers under its Deed.

6.40 The Council's considerations at paragraph 6.32 to 6.37 above are equally applicable in its consideration of criterion (d).

6.41 The Council's approach to assessing criterion (d) is set out in Chapter 10 below.

# 7 Material increase in competition in a market, other than the market for the service, as a result of declaration (criterion (a))

7.1 Section 44CA(1)(a) of the CCA (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.

**Council's approach to criterion (a)**

7.2 The words 'on reasonable terms and conditions, as a result of a declaration' focus the assessment on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition. This is undertaken by assessing a future in which the Service is declared and access to the Service is through declaration on reasonable terms and conditions (the 'factual'), and comparing this to one in which the Service is not declared (the 'counterfactual') and terms and conditions of access are set in an alternative way. In this instance, such an alternative is provided by the Deed and open access frameworks presently offered by PNO.

7.3 In assessing criterion (a) the Council has drawn upon these two future scenarios and asked:

(a) what is the extent of the provider's ability and incentive to deny access to the relevant service; or set terms and conditions less favourable than those expected in competitive markets?

(b) if the provider has such ability and incentive, would any resulting conduct be likely to materially affect competition in a dependent market?

7.4 Through this analysis, the Council assessed whether access (or increased access), on reasonable terms and conditions, as a result of declaration of the Service, would promote a material increase in competition.

7.5 In its August submission, the ACCC disagreed with this approach and argued that the wording of criterion (a) should not be displaced with another test. Rather, criterion (a) should be interpreted in a manner consistent with the objects of Part IIIA. The ACCC submitted that the focus of the criterion (a) assessment should be on whether declaration would promote the 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 an assessment of the Council's 'second limb' of whether a scenario without declaration materially affects competition in a dependent market.[97]

7.6 The NSWMC submitted that it does not believe that Part IIIA requires applicants to prove that an infrastructure monopolist has a desire (or incentive) to adversely affect competition. It considers that the relevant question is whether the terms and

[97] ACCC August submission, page 4

conditions of access (including price) have a material impact on competition in dependent markets. It considers that in this matter, the material impact on competition arises from the 'effect' of PNO's conduct and that derives from PNO having unquestioned market power and the ability and incentive to use it.[98]

7.7 The Council considers that the approach set out in paragraph 7.3 is consistent with the language of s44CA(1)(a). It provides an appropriate framework for assessing constraints affecting the conduct of PNO absent declaration. This is an important step in assessing the competitive conditions in the primary market and the likely effects of the infrastructure operator's possible behaviour on competition in a dependent market. The Council considers that this approach reflects that submissions in support of the NSWMC Application have contended that PNO has market power and that the terms and conditions of access contained in PNO's existing pricing arrangements (without declaration) are a reflection of it having market power. Additionally, issues associated with PNO's incentive not to lessen competition in dependent markets are relevant to the assessment of how PNO is likely to set terms and conditions of access in the primary market and, by implication, the extent to which it is likely to take advantage of any market power it might have in this market.

**Promoting a material increase in competition in a dependent market**

7.8 Competition is a dynamic process, and the promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

7.9 According to the Productivity Commission, the only problem the National Access Regime should be directed at is:

> an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets.[99]

7.10 The focus of criterion (a) is on the promotion of competition in markets where the lack or restriction of access to infrastructure services that cannot be economically duplicated would otherwise limit competition.

7.11 Consistent with the objects of Part IIIA, the reference to 'competition' in criterion (a) is a reference to workable or 'effective competition.' This refers to the degree of competition required for prices to be driven towards economic costs. A consequence of this is that, in the long-term, resources are more likely to be allocated efficiently in workably competitive markets. In a workably or effectively competitive market, no one seller or group of sellers is able to exercise a significant degree of market power.

7.12 Criterion (a) is not met merely by establishing that a service provider is a natural monopolist with respect to the provision of a service, possesses market power or is able to charge a price above what would be charged in a competitive market for the

[98] NSWMC Application, pages 42 and 43

[99] Productivity Commission 2013, page 71

service. For instance, even where lower prices for access to a service may arise in a future with declaration of a service, compared to a future without declaration, this does not necessarily mean that competition will be promoted in a dependent market. This might be the case if, for example, a lower price for access would lead to little or no change in consumption or production decisions with respect to the service the subject of a declaration application. In these circumstances, a lower price for access may merely have the effect of redistributing the economic surplus generated within a supply chain. Criterion (a) will not be satisfied by establishing that regulated access will result in a different distribution of rents between access seekers and a provider of a service.

7.13 It is also possible that lower prices for access to a service do not materially impact on the ability of market participants in dependent markets to compete against each other on their merits. This is especially the case if prices in a future with declaration of a service are not likely to be materially lower than those likely to be set in a future without declaration of the service; and are set at broadly equivalent levels for all access seekers.

7.14 Promoting the process of competition is not to be confused with promoting the greatest number of competitors. Competition is a process, not a situation.[100] Competition will lead to the displacement of less efficient rivals by more efficient ones in a market. As noted by the High Court in *Queensland Wire Industries v BHP:*[101]

> Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort … and these injuries are the inevitable consequence of the competition.[102]

7.15 Access regulation is not a means to promote the greatest number of competitors in a market irrespective of their relative efficiencies. Rather, it promotes the process of competition and the consequent improvements in efficient market outcomes that result from it. As noted by the Tribunal in *Re Telstra Corporation Ltd (No. 3):*[103]

> it is important not to confuse the objective of promoting competition with the outcome of ensuring the greatest number of competitors. That is, the Act aims to promote competition because of the benefits that result from the process of competition, such as lower prices for consumers and the displacement of inefficient suppliers by efficient suppliers of services.

[100] *Re Queensland Co-operative Milling Association Ltd – Proposed Merger* (1976) 8 ALR 481 at 515; *Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2017) 262 CLR 207 [2017] HCA 21, at [14].

[101] *Queensland Wire Industries v BHP* (1989) 167 CLR 177.

[102] Ibid, per Mason CJ and Wilson J at page 191

[103] *Re Telstra Corporation Ltd (No. 3)* [2007] ACompT 3, at [99]

**PNO's ability and incentive to exercise market power**

**Submissions received**

7.16 The NSWMC contends that, presently, there is no entitlement or legal right to access the Service,[104] noting the considerations of the Full Court in *Port of Newcastle Operations Pty Ltd v The Australian Competition Tribunal.*[105] The NSWMC further submits the statutory test under section 44CA(1)(a) of the CCA involves a counterfactual analysis taking into account whether there is an existing entitlement or legal right of access, and that it is only through declaration that users of the Port would have such a legal right or entitlement to use the Service on reasonable terms and conditions and, as a result, declaration would promote a material increase in competition in a dependent market.

7.17 The NSWMC acknowledges that the Council may differ in its assessment, but contends that, in such circumstances, the appropriate counterfactual is one in which PNO will use its market power to maximise and protect its own commercial interests.[106] It submits that PNO has the ability to impose unilateral terms on Port users that are not reasonable and contends that this is demonstrated in the terms and conditions of access provided for by the Port User Deed (superseded), and the Deed introduced by PNO in 2020. The NSWMC has argued that the inclusion of user funded contributions in the NSC set by PNO, in both the Deed and open access arrangements, is demonstrative of the lack of constraint.[107]

7.18 The NSWMC has argued that PNO has market power and has the commercial incentive to apply this to maximise profits by seeking to achieve as high a set of access charges as possible. It considers that PNO's conduct since the revocation of the declaration granted in response to Glencore's 2015 application demonstrates the absence of commercial or regulatory constraint.[108] Stakeholders consider that addressing inefficiency through declaration will materially promote competition in dependent markets. It further submits that PNO is not constrained by regulation as the *Ports and Maritime Administration Act* 1995 (NSW) (PAMA Act) and *Ports and Maritime Administration Regulation* 2012 (NSW) (PAMA Regulations) do not allow the NSW Government to intervene and set prices at the Port.[109]

7.19 In its submissions, Glencore noted that absent declaration, or any effective regulatory oversight, there is a real likelihood that PNO will act in an unconstrained manner.[110]

[104] NSWMC Application, page 25

[105] *Port of Newcastle Operations Pty Ltd v The Australian Competition Tribunal* [2017] FCAFC 124, at 88.

[106] NSWMC Application, page 26

[107] Ibid, page 29

[108] Ibid, page 2

[109] NSWMC November submission, page 15-17; Glencore November submission, page 3-4

[110] Glencore August submission, page 2; Glencore November submission, page 3-4

Glencore considers that PNO has acted in this way in the period since revocation in September 2019.[111] Yancoal also noted that in the absence of declaration, PNO will be able to engage in price discrimination between users of the Service.[112]

*Recent developments at the Port*

7.20 As noted in Chapter 6, from March 2020 PNO has offered a 10 year Deed[113] to Port users. The NSWMC and other parties contend that the Deed:

(a) Allows PNO to vary pricing terms to protect and maximise PNO's commercial interest and impose onerous information requirements on coal producers.[114]

(b) Either alone or in conjunction with the threat of declaration, does not sufficiently constrain PNO's ability and incentive to exercise its monopoly power.[115]

(c) Allows PNO to carve out the ability of the counter parties to arbitrate the inclusion of user funded expenditure and provides no mechanism for a user to object to planned future capital expenditure.[116]

(d) Lacks transparency and consultation with the industry around how increases to the channel access charges will be used, and whether they are linked to further investments PNO intends to make at the Port.[117]

(e) May result in users of the Port being overcharged for costs that are inefficient or unrelated to coal export, for example the subsidisation of the container terminal.[118]

7.21 Stakeholders contend that PNO's market power has been demonstrated by its refusal to negotiate or collectively bargain with coal miners and in the inflexibility of the Producer Deeds.[119]

7.22 The NSWMC further notes that it is PNO's intention that activity at the Port will pivot from coal exports to container terminals within a 15 year timeframe. It argues that PNO will have no concerns about any 'hold up' of future investments in the Hunter Valley

111 Ibid.

112 Yancoal September submission, pages 1 and 2

113 Available at https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf; https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020_.pdf

114 NSWMC Application, pages 6 and 26 to 37

115 Glencore August submission, page 3

116 Glencore September submission, page 2

117 PWCS August submission, page 2

118 Ibid.

119 NSWMC Application, page 43; Malabar November submission, page 3; Bloomfield November submission, page 2; NSWMC November submission, page 21

coal sector.[120]The NSWMC and other stakeholders contend that the pivot to container terminals will make PNO a vertically integrated provider and will create an incentive to favour container terminal operations over coal terminal and coal export operations.[121]

7.23 Synergies argued that, given historical rates of excess capacity at the Port, PNO would have an incentive to increase its charges to maximise its profits. It considers that PNO's conduct of increasing its charges is consistent with this incentive.[122] Synergies notes that a monopolist that can price discriminate between users has a strong incentive to do so in order to capture a greater share of the economic surplus.[123] Synergies considers that individual contracts with coal producers will enable PNO to price discriminate between users and appropriate the maximum possible rents available from each producer to maximise PNO's profits.[124]

7.24 The ACCC submitted that without declaration, PNO has the ability and incentive to exercise its market power to the detriment of the economic efficiency and productivity of the Australian economy.[125] Prices set by a monopolist (without constraint) will fluctuate over time due to external factors. 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.[126]It submits that a price monitoring framework (such as that provided for by the PAMA Act and PAMA Regulations) is not an effective constraint on market power unless there is an associated credible threat of regulation.[127]

7.25 The ACCC considers that monopoly providers 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.[128] It notes that such an exercise of market power can lead to allocative, productive and dynamic inefficiency.[129] The ACCC's contention in relation to how PNO's pricing behaviour would be likely to affect each of these forms of efficiency is considered in greater detail in Chapter 10 of this report.

7.26 PNO contended that without declaration, access to the Port is being provided on reasonable terms and conditions. It notes that it offers open access arrangements at

[120] NSWMC November submission, page 5; see also Malabar November submission, page 2

[121] Ibid, see also page 11-12; See also Malabar November submission, page 2; Bloomfield November submission, page 3

[122] Synergies Report, page 8

[123] Ibid, page 11

[124] Ibid, page 12

[125] ACCC August submission, page 8

[126] ACCC November submission, page 5

[127] ACCC November submission, page 4

[128] Ibid, page 6

[129] Ibid, pages 8 to 10

the Port, the terms and conditions for which are published on its website and offered to all vessels.[130] PNO further notes that it also offers all port channel users, including all Hunter Valley coal producers, discounted long-term pricing certainty under the terms of the publicly available, voluntary, non-discriminatory long term pricing Deed which also incorporates the Part IIIA pricing principles.[131] In the event of a permitted price dispute (as defined in the Deed) the parties are bound to conduct mediation, and failing resolution within 28 days, arbitration in accordance with the Australian Centre for International Commercial Arbitration Rules.[132] PNO notes that the Deed provides that the mediator must take into account, and the arbitrator must apply, pricing principles drawn from Part IIIA of the CCA.[133] PNO notes that the Port User Deed has been superseded by the Producer Deed and Vessel Agent Deed issued on 13 March 2020 and submits that the Port User Deed is not relevant to the Council's considerations.[134] PNO has further noted that it has entered into long term access agreements (Deeds) with a number of actual access seekers whose vessels use the channels and pay the NSC contained within the Deed to PNO.[135]

7.27 PNO submits that it has offered all Port channel users terms of access that are transparent and non-discriminatory under the open access arrangements and the Deed. It considers that these arrangements provide more long term certainty for investment decisions in the coal chain than during the period of declaration.[136] It submits:

(a) Under the pro-forma Deed, a variation to the charges covered by the Deed can only be made once a year. A variation can only be made over and above the 4%/CPI increase where it is Material (as that term is defined in the Deed), which is designed to avoid trivial increases.

(b) In addition, under 7(c) of the Deed, in order to provide the Producer with visibility of and the opportunity to comment on any prospective increases in the Producer Specific Charges on account of capital expenditure proposed to be incurred by PNO, PNO is under a contractual obligation to prepare and provide to Producers a forward looking 5 year forecast (covering the period 1 January 2020 to 31 December 2024) of its projected capital expenditure that may impact the Producer Specific Charges and meet with the Producer to discuss those forecasts and any potential associated variations to the Producer Specific Charges. This is to be updated annually on a rolling 5 year basis by no later than 31 March each

[130] PNO August submission, pages 9 to 10

[131] Ibid, page 10

[132] Ibid, page 12

[133] Ibid, page 12

[134] Ibid, page 11

[135] Ibid, page 13

[136] Ibid, pages 5 and 9 to 10

following Contract Year, and PNO is under a contractual obligation to meet with the Producer to discuss each updated 5 year CAPEX Forecast.[137]

7.28 PNO contends that it has and will continue to negotiate terms and conditions of access to the Service with Port users. It notes that during the period following the revocation of the Glencore Declaration it actively negotiated the terms of long term pricing arrangements with Port users.[138]

7.29 In respect of the inclusion of user contributions in the asset base PNO submits:

> In its 30 October 2019 decision, the ACT did not conclude that $912 million of assets in the regulated asset base (RAB) were 'dredging works at the Port which had been paid for in the past by users of the Port'. On the contrary, the ACT did not reach such a conclusion, because the basis on which arrangements had been made and the circumstances as they occurred (including whether there were costs to the State) were not established by the evidence before the ACT. The question of whether users had funded dredging works, and if so which works and to what extent, has never been established before the ACT to date. Even if the source of funding and extent of funding of such works could be established, the evidence which was accepted by the ACT established that there had been very significant cost under-recovery by the State over decades (exceeding $8b).[139]

7.30 PNO argues that its information requirements pertain to basic information that PNO may reasonably require to enable it to verify that a vessel is a 'Covered Vessel' (and therefore entitled to the benefit of the Covered Vessel NSC) and to enable PNO to properly administer the Deed. It further notes that it is bound to keep this information strictly confidential, and as a non-vertically integrated port operator, has no other need or incentive for disclosure of that confidential information other than for that purpose.[140]

**Council's view**

7.31 Unlike a firm with market power, a firm that is subject to effective competition is not likely to have the ability and incentive to deny access to a service or to set terms and conditions less favourable than those expected in competitive markets. As noted by the High Court in *Boral Besser Masonry:*[141]

[137] Ibid, pages 12 to 13

[138] Ibid, page 13

[139] Ibid, pages 13 to 14

[140] Ibid, page 14

[141] *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* [2003] HCA 5

> The essence of market power is absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers.[142]

7.32 The Council considers that there are a number of features of the Port and its users that are relevant when considering whether PNO has market power and whether it has the ability or incentive to set its terms free from constraint. These features are discussed below.

*Market power: the Port is a bottleneck facility*

7.33 The Port is a bottleneck: Hunter Valley coal producers have no practicable alternative to the Port for the export of their coal. While some coal is exported through Port Kembla, that port is not currently an effective competitive constraint on PNO.[143]

7.34 As the Port is a bottleneck, PNO has considerable bargaining power over Hunter Valley coal producers who have already sunk costs in exploration and extraction in the Newcastle catchment, where these producers have no other economically viable means to load coal for export markets. This enables PNO to set terms and conditions of access to these coal producers free from any constraint from alternative nearby providers of coal export terminal services.

7.35 The Council notes that the Port also offers services to a range of other users, including container ships and cruise ships. These other users of the Port may be able to 'switch' to another port such that PNO would have a lesser degree of bargaining power when seeking to provide services to them.

*Ability to exercise market power: current regulation at the Port*

7.36 In considering the market power of PNO, the Council has had regard to the level of constraint that may be provided by other regulatory/government policy actions in the absence of declaration of the Service. In this respect, the Council has previously observed in the Revocation Recommendation report that:

(a) The NSW Government has a clear interest in the continued development and operation of coal mining in the Newcastle catchment, given its significant economic contribution to the State.

(b) To assist in its ability to monitor the activities of PNO at the Port, the PAMA Act and PAMA Regulations provide a degree of transparency over the charges levied by PNO and a price monitoring framework.

7.37 The Council has previously observed, however, that the PAMA Act and PAMA Regulations do not currently act to directly limit or regulate the level at which prices may be set by PNO for services provided to users of the Port; and that these instruments are not certified as effective access regimes under Part IIIA of the CCA.

7.38 Further, while the lease arrangements between the State of NSW and PNO include provisions designed to 'constrain' the behaviour of PNO, these arrangements are

142 Ibid, per Gleeson CJ and Callinan J at [121]

143 NSWMC Application, page 8

effectively private contractual arrangements between the two parties. Any third party with concerns about PNO's behaviour would have to rely on the State of NSW taking action in order to obtain redress. The Council expects that taking such steps would entail a significant time and cost commitment by the State of NSW.

7.39 On balance, the Council expects the NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in dependent markets; or otherwise harm the public interest. Such an intervention might be via the terms of PNO's lease, under the terms of the PAMA Act by referral to IPART; or by introducing new statutory restrictions. The Council considers that the threat of such action by the NSW Government would be likely to provide a low level of constraint on PNO when it sets its terms and conditions of access in a future without declaration of the Service. The Council further considers the effect of this constraint falls well short of that which would result from an access regime capable of certification. The Council considers that these constraints are not a substitute for the type of access regulation contemplated by the National Access Regime.

*Ability to exercise market power: PNO's refusal to participate in collective bargaining*

7.40 The NSWMC and stakeholders argue that, absent declaration, PNO has no incentive to actively engage in negotiation with the coal industry and can act without constraint in relation to negotiating pricing and other matters.[144]

7.41 The NSWMC Collective Bargaining Authorisation permits the NSWMC and ten of its nominated members to collectively negotiate with PNO in relation to the terms and conditions of access, including price, at the Port. The authorised arrangement provides for joint discussion and negotiation of common industry issues. Participation in the collective bargaining is voluntary for all parties; and it does not permit boycotts. As such, PNO may be invited, but is not required, to attend and cannot be compelled to participate in the bargaining process.[145]

7.42 As previously noted, the Council considers that PNO has considerable bargaining power over Hunter Valley coal producers which have sunk costs into exploration and extraction in the Newcastle catchment, where these producers have no other economically viable means to load coal for export markets. The Council has considered the NSWMC's submission regarding PNO having declined to participate in the collective bargaining process but does not consider that that refusal is indicative of market power.

*Incentive to exercise market power: would the risk of reputational harm constrain PNO?*

[144] NSWMC Application, page 43; Malabar November submission, page 3; Bloomfield November submission, page 2; NSWMC November submission, page 21

[145] As noted in Chapter 5, PNO has sought Tribunal review of the ACCC's authorisation decision.

7.43 PNO entered into a 98-year lease over the Port in 2014. The Council considers that PNO would seek to contract with Port users in a way that has regard to its ability to maximise its expected profits over the term of the lease. In this regard, the Council has noted that where PNO prices in a way that reduces future investment in coal mining activity in the Newcastle catchment, this may reduce future profits it can earn from its operation of the Port. This is likely to be an important consideration over the long-term duration of PNO's lease, as future investors who have not made sunk investments yet will have the option to invest in other opportunities, including in developing coal mines in other areas not served by the Port. In this context, harm to PNO's reputation as the operator of the Port can be expected to impact on its commercial returns.

7.44 The Council accepts that the extent to which parties will be prepared to consider investment opportunities outside of the Newcastle catchment may vary; and that there is scope for some potential investors to prefer investing in this area, all else being equal. Nonetheless, pricing today by PNO to maximise its short-term profits (by, for instance, expropriating or 'holding-up' those miners that have already sunk costs in coal exploration/mining) would risk sending a signal to potential future investors that it might act in the same way after they make sunk investments in the future. Where investors fear PNO might act in this way in the future, they may be less likely to invest in coal exploration/mining activity in the Newcastle catchment in a way that would reduce PNO's profits over the longer term.

7.45 In its Draft Recommendation, the Council considered that the desire to attract future investment in the Newcastle coal catchment over the 98-year term of its lease to increase or maintain utilisation of the Port, would deter PNO from developing a reputation for hold-up of miners who have made sunk investments.

7.46 As noted, the NSWMC and other stakeholders have argued that the 98-year term of the lease is not a relevant constraint, as PNO has taken the view that the Port's long term future is in container terminals and not coal exports.[146]

7.47 The Council recognises that revenue sources are not static and that, in particular, the global transition to other forms of energy generation can be expected to affect future coal production and exploration in the Hunter Valley and the future utilisation of the Port.

7.48 Further, the Council accepts that if coal mining activities in the Hunter Valley were to cease well before the end of PNO's lease of the Port, then the nature of any constraint imposed by "reputational effects" on PNO's pricing and setting of non-price terms at the Port would likely change. The Council considers, however, it is not clear that mining activity will dramatically cease in the short-to-medium term. For instance, in its June 2020 *Strategic Statement on Coal Exploration and Mining in NSW*[147] the NSW Government noted that

[146] NSWMC November submission, page 5; see also Malabar November submission, page 2

[147] State of New South Wales (Department of Regional NSW), June 2020, *Strategic Statement on Coal Exploration and Mining in NSW*, available at

> Over the coming decades, the coal mining industry will be directly affected by the global transition to different forms of energy generation.
>
> ….
>
> In the short to medium term, coal mining for export will continue to have an important role to play in NSW. In our immediate region of the world, as elsewhere, there has been a reduction in demand caused by the economic impacts of COVID19. However, in the medium term, demand is likely to remain relatively stable. Some developing countries in South East Asia and elsewhere are likely to increase their demand for thermal coal as they seek to provide access to electricity for their citizens. Under some scenarios, this could see the global demand for thermal coal sustained for the next two decades or more. The use of coal in the manufacture of steel (coking coal) is likely to be sustained longer as there are currently limited practical substitutes available.[148]

7.49 Overall, the Council considers that coal export activities are the major source of revenue at the Port; and are likely to remain so in the short-to-medium term. While PNO may wish to increase the level of container terminal services provided at the Port into the future, it will not wish for demand for coal export terminal services to decline. For so long as there remains the prospect of continued demand for coal export services, and the possibility of further investment in the Hunter Valley catchment to support mining activity, the Council expects PNO will be mindful of reputation effects it may create through its current pricing of terminal services at the Port. The Council accepts the extent of this constraint will become weaker if it becomes clear that coal mining activity in the Hunter Valley were to dramatically reduce in the future; and there was little prospect of attracting new investment to support these activities in the Hunter Valley region.

*Incentive to exercise market power: there is a lack of meaningful vertical integration*

7.50 Where the provider of a bottleneck service is vertically integrated into dependent markets, it may have an incentive to deny access to competitors in dependent markets, or to allow access on terms and conditions that inhibit the ability of rivals to compete in these markets. However, as the Productivity Commission noted:

> [w]here a service provider is not competing in upstream or downstream markets, it will usually have little incentive to deny access. Rather, it will have a commercial incentive to allow competition in dependent markets to maximise its own profits.[149]

7.51 Non-vertically integrated service providers typically benefit from greater levels of competition in dependent markets because demand for their services depends on demand in dependent markets. Where firms in dependent markets have market power of their own, this can lead to higher prices and lower levels of output in dependent

https://www.resourcesandgeoscience.nsw.gov.au/__data/assets/pdf_file/0004/1236973/Strategic-Statement-on-Coal-Exploration-and-Mining-in-NSW.pdf

[148] Ibid, at page 2 and 6

[149] Productivity Commission 2013, page 84

markets. In turn, this can suppress the "derived demand" for the services of the non-vertically integrated firm.[150] In this respect, the Hilmer Committee noted:

> Where the owner of the 'essential facility' is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits.[151]

7.52 In submissions received following the Draft Recommendation, the NSWMC and stakeholders contend that the pivot to container terminals will make PNO a vertically integrated provider due to its involvement in providing container shipping services; and will create an incentive for it to favour container terminal operations over coal terminal and coal export operations.[152]

7.53 The Revocation Recommendation considered the commercial interests of certain of PNO's owners in bulk carrier vessels and container liners and concluded that these interests are indirect and in the (then) circumstances would be unlikely to materially impact PNO's operations at the Port.[153] While noting the submissions of the NSWMC and stakeholders regarding PNO's proposed expansion of container terminal services at the Port, the Council does not consider that PNO is vertically integrated into dependent markets in any meaningful way.

*Incentive to exercise market power: the Port is not capacity constrained*

7.54 Expected changes in the Port's capacity utilisation during the Relevant Term may alter prices charged by PNO (and hence the terms and conditions of access provided to) different categories of users of the Port. For instance, if the Port is not capacity constrained over the Relevant Term, it will be likely to set terms and conditions of access for unrelated groups of users (e.g. coal exporters and container terminal service providers) independently of each other. If, however, the Port were to become capacity constrained over the Relevant Term, its profit maximising set of prices for different groups of users may change. For instance, if container terminal service users generated greater levels of marginal profit than coal exporters, the Port would likely have an

[150] The theory of "double marginalisation" in the economic literature shows how firms with market power in certain stages of a supply chain impose a form of negative externality on firms at other stages of the supply chain if they seek to profit maximise by raising their own prices. This is because if a firm with market power within a supply chain raises it prices – i.e. increases its margin above underlying cost – this will flow through to higher prices for the end-product sold to final consumers. In turn, this will suppress demand for the end-product, and hence derived demand for all other firms in the supply chain. For an exposition of this point, see Motta, M, *Competition Policy – Theory and* Practice, 2004, pages 306 – 309

[151] Hilmer Report, pages 240 to 241

[152] NSWMC November submission, page 11-12; See also Malabar November submission, page 2; Bloomfield November submission, page 3

[153] Revocation Recommendation, pages 67 to 70

incentive to increase the level of container terminal services it provides at the expense of coal export terminal services.

7.55 The Council does not, however, believe the Port is capacity constrained at this point in time; and is not satisfied it is likely to become so over the Relevant Term such that PNO would have an incentive to deny access (or have an incentive to raise prices on account of this factor) to coal exporters acquiring services at the Port. In this respect, PNO has previously provided submissions about forecast capacity at the Port. This data suggests that by 2031 the Port may receive up to 3,666 vessels per annum.[154] In its *Port Master Plan 2040*, PNO has stated that an assessment undertaken to evaluate the capacity of the Port has demonstrated that the Channel can accommodate the safe movement of over 10,000 vessels per annum. The vessel movements in 2017 indicate that the Channel is currently operating at less than 50% of its capacity.[155]

7.56 The provision of terminal services to providers of container shipping services remains a very small proportion of the Port's activities. In 2019, the Port received 2,296 ships, 1,813 of which were coal vessels; the remaining 483 ships providing shipment of other products (including containers).[156] During that period, the Port exported 2,232 twenty-foot equivalent unit (TEUs) containers and received 3,104 TEUs containers.[157] During the same period, Port Botany was visited by 571 container vessels, and received 693,599 TEU containers and exported 684,556 TEU containers.[158] .

7.57 In its November submission, the NSWMC argued that the relevant capacity constraint for coal vessels is loading capacity at the coal terminals. In this respect, it submits that the coal terminal facilities are capacity constrained.

7.58 The Council accepts that the coal terminals may also act as a bottleneck for Hunter Valley coal producers when exporting coal. However, in assessing PNO's incentives, including whether to deny access to Port users, the Council considers that the relevant capacity is that of the channel. This is because coal terminal facilities at the Port are owned by coal miners and are therefore outside the control of PNO. Where coal exporters consider the level of their capacity to export coal is inhibited by their current level of capacity at their own coal terminals, it is open to them to further invest to expand this capacity.

7.59 For its part, PNO is not capacity constrained at the Port, nor is it likely to become so in the foreseeable future, including in response to increased demand for the Service arising from developments in container and cruise terminal services at the Port. The

[154] PNO September 2018 submission, at page 14

[155] See https://www.portofnewcastle.com.au/wp-content/uploads/2019/10/Port-Master-Plan-2040-for-web.pdf page 30

[156] See https://www.portofnewcastle.com.au/wp-content/uploads/2020/05/Port-of-Newcastle-Annual-Trade-Report-2019.pdf page 3

[157] Ibid, page 5

[158] See https://www.nswports.com.au/sites/default/files/Uploads/December-2019-Trade-Report.pdf

Council does not consider that PNO would have an incentive to deny access to Port users, or provide preferential treatment to non-coal export users at the Port, on account of capacity constraint considerations during the Relevant Term.

*Incentive to exercise market power: there has been limited price discrimination between Port users*

7.60 Price discrimination occurs where a firm charges different prices for different units of a good or service, either to the same or different customers, and the difference in charges is not due to differences in the cost of providing these units.[159] The Council notes that price discrimination can, in certain circumstances, improve the efficient use of infrastructure.[160]

7.61 Price discrimination between different users of the Service would allow PNO to favour one group of users over another. In the context of coal producers, a price discrimination strategy could involve charging higher prices for the Service to users exporting coal from existing mines (being those producers that have sunk costs in coal exploration and mining) than the price offered to access seekers intending to export coal from new mines in the future.

7.62 PNO's offerings presently set different charges for different types of user of the Service.[161] The open access arrangements set different prices for different groups of Port users (e.g. coal vessels, non-coal vessels). However, this kind of price discrimination is not likely to inhibit the ability of different coal miners to compete on their merits against each other in dependent markets.

7.63 Further, for coal vessels, the NSC under the Deed is less than that provided for under the open access arrangement. This can mean that some coal producers will pay more for the Service than others. However, the choice to acquire access under either the Deed or the open access arrangement is available to all users at the Port. Users at the Port are, therefore, all able to choose which option best suits their individual circumstances. In that sense, the Council does not consider the availability of these different options for all users at the Port is likely to inhibit the ability of individual miners to compete on their merits in dependent markets.

7.64 It is possible that the arbitrated price in the Glencore-PNO arbitration may, once determined, differ from the NSCs in place at the Port for other users of the Service. The extent to which this may lessen competition in dependent markets is considered in paragraphs 7.159 and 7.160 below.

7.65 It may be that PNO price discriminates between classes of Port users. However this is a limited form of price discrimination and is different in nature to the type of price discrimination contemplated by Synergies in its report and discussed by the ACCC.

[159] See Tirole, J, *The Theory of Industrial Organisation*, 5th edition, 1992, pages 133 to 134.

[160] See section 44ZZCA pricing principles for access disputes and access undertakings or codes.

[161] See https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Schedule-of-Charges-2020-V2-13-March-2020.pdf

*Incentive to exercise market power: do the Deed or open access arrangement affect PNO's behaviour?*

7.66 The NSWMC, stakeholders and PNO have differed in their views of the constraint that the Deed and open access arrangement place on PNO's behaviour.

7.67 Key features of the Deed include:

(a) May be entered into by vessel agents or coal producers.

(b) Are for an initial period of 10 years.

(c) Establish an initial NSC rate of $0.8121 per GT and an initial WC of $0.0802 per GT from 1 January 2020.

(d) Provide for an 'annual adjustment' to the NSC and WC, being the greater of CPI or 4%.

(e) Provide for 'other variations' where such variation is material (being greater than 5%) and is consistent with the 'pricing principles'.

(f) Establish a dispute resolution process that provides for mediation and commercial arbitration.

(g) Establish 'pricing principles' to be applied in mediation and arbitration. The pricing principles include elements consistent with the matters provided for by Part IIIA of the CCA.

(h) Establish 'excluded disputes' which include disputes about the NSC when the NSC does not exceed the value of $0.8121 plus each subsequent annual adjustment.

(i) Establish an 'initial capital base' being the value established by reference to the depreciated optimised replacement cost as at 31 December 2014 of the assets used in the provision of all of the services at the Port and, unless otherwise agreed by PNO, without deduction for user contributions.[162]

7.68 Key features of the open access arrangements include:

(a) Apply to all vessels entering the Port where a Deed is not otherwise in place.

(b) Establish an initial NSC rate for coal users of $1.0424 per GT from 1 January 2020.

(c) Establish the same dispute resolution processes and exclusions as provided for by the Deed.

(d) Provide for variations to the terms and conditions, including the rate of NSC, subject to PNO satisfying certain notification commitments.

[162] See https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf; Schedule 3, clause 6

7.69 It is likely that the Deed will provide a significant degree of certainty, at least for the (ten year) duration of the Deed, and that this contractual certainty would be higher than that provided by the open access arrangements. The pricing principles include matters consistent with those that would be applied by the ACCC in an arbitration process. In this respect the Council notes that the dispute resolution process is governed by the Australian Centre for International Commercial Arbitration (ACICA) rules[163] and the non-derogable provisions of the *Commercial Arbitration Act* (NSW) 2010 (the CA Act). The ACICA rules allow an arbitrator to request information from PNO (rule 32.3) and make a finding binding on the parties (rule 38.2). The non-derogable provisions of the CA Act allow the Court's information powers to be used to address information asymmetries. The Council considers that PNO could not unilaterally withdraw the Deed (outside of an event of default allowing termination) or the open access arrangements and offer materially poorer terms without suffering reputational harm and claims for breach of contract.

7.70 Having had close regard to the Deed's terms and conditions, the Council's view is that terms and conditions pursuant to declaration are unlikely to be so different to those in the Deed such that they would promote a material increase in competition in a dependent market. The Council considers that the Deed and open access arrangements provide a constraint on PNO's behaviour; the Deed provides a materially greater constraint than that of the open access arrangements.

*Overall conclusions*

7.71 The extent to which a firm enjoys market power, and hence the ability to set terms and conditions less favourable to its customers than those one would expect in a competitive market, is typically a matter of degree. As noted by the High Court:

> Market power is the absence of constraint from the conduct of competitors or customers … Matters of degree are involved …[164]

7.72 The Council considers there are a number of factors that impact on the extent to which PNO is likely to have market power when providing services at the Port. There is no material before the Council that PNO has an incentive to deny access to any users of the Port. In the first instance, the Port is not presently capacity constrained and is unlikely to become so over the Relevant Term. Further, PNO is not vertically integrated into coal mining and export activity, and so has no incentive to deny access to coal exporters in order to favour any coal exporting activity of its own. Finally, PNO has no history of denying access to coal exporters; and has provided both an open access arrangement and offered a ten-year Deed to coal exporters wishing to use the Port.

7.73 While PNO would appear to have no incentive to deny access to coal exporters seeking to acquire services at the Port, the Council expects PNO will take into account a number

[163] See https://acica.org.au/wp-content/uploads/2016/02/ACICA_Rules_2016_Booklet.pdf

[164] See *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* [2003] HCA 5

of factors when determining its profit-maximising terms and conditions for services provided at the Port. In this respect, the Council notes that:

(a) The Service is a bottleneck for coal miners wishing to export coal from the Newcastle catchment; and PNO does not face competitive constraints from any alternative nearby providers of the Service

(b) The potential for regulatory intervention by the State of NSW is likely to provide a low level of constraint on PNO's pricing in a future without declaration of the Service, although this is not likely to be as effective as that envisaged under the National Access Regime

(c) PNO is not vertically-integrated and therefore is unlikely to have an incentive to set terms and conditions such that it favours any firms in dependent markets in a way that lessens competition in dependent markets

(d) PNO is likely to be mindful of the harm to its reputation, and consequent effect this may have on deterring future investments in coal mining activity in the Hunter Valley catchment, if it acts in a way that "holds-up" those that have already made sunk investments in reliance on access to the Service. The Council accepts that the strength of any constraint this imposes on PNO will vary depending on the potential for future investments in coal mining activities in the Hunter Valley catchment

(e) PNO has, in effect, voluntarily applied a certain level of constraint on the terms and conditions of access to the Service at the Port by virtue of the ten-year Deed it has offered to access seekers.

7.74 In the absence of declaration PNO can be expected to price services at the Port to maximise its profits over the long term. In this respect, PNO can be taken to have assessed that the pricing provisions contained in the Deed are, in the circumstances, those most likely to achieve the most profit for it over the lifetime of the Deed.

**With declaration, terms and conditions will be negotiated against a backdrop of potential regulatory arbitration**

7.75 In a future with declaration of the Service, access seekers can request to negotiate terms and conditions of access to the Service with PNO. If parties are unable to reach commercial agreement, a party will be able to seek arbitration by the ACCC of terms and conditions of access. This provides a backdrop that will act to help frame negotiations between PNO and users of the Service.

7.76 At the arbitration stage, the ACCC may, but need not, require the provision of access by the service provider. If it does require the provision of access, the ACCC may set terms and conditions of access, and may deal with any matter relating to access to the service. In making its final determination, the ACCC must take account of the factors set out in section 44X(1) of the CCA and any other matters it considers relevant.[165] In

[165] These include, amongst other things, the objects of Part IIIA, the legitimate business interests of

the event a party to the ACCC final determination is dissatisfied with the determination, the party is able to seek review of the determination before the Tribunal.[166]

7.77 Access disputes considered by the ACCC can be bilateral or multilateral. It is open to the ACCC to determine different terms and conditions of access to the Service for different users of the Service. It is also possible under the pricing methodology adopted in the 2018 ACCC Arbitration Determination that different prices could be set for the Service in the future if changes in future events suggest different assumptions may be appropriate to adopt in its pricing approach. If the ACCC's determination is reviewed by the Tribunal, the Tribunal may determine a price for the service that differs to that identified by the ACCC.

7.78 For these reasons, including because the Tribunal and ACCC may reach different views of what are reasonable terms and conditions within the meaning of the CCA, there is ultimately a certain degree of uncertainty regarding precisely what terms and conditions, including price, of access might be set for the Service in a future with declaration of the Service.

7.79 The Council also considers that in a scenario where a service is declared, the threat of arbitration has the potential to provide an access provider with increased incentives to (and a higher likelihood that it will) provide the service on 'reasonable' (or close to reasonable) terms and conditions. A number of parties submitted that the potential for arbitration to influence the conduct of negotiations was acknowledged by PNO during the course of the hearings in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145.[167]

7.80 Further, prices determined via arbitration can frame subsequent negotiations between the facility owner and users of a service, such that users of the service may settle for paying charges that are slightly above those determined via arbitration in order to avoid the costs of access dispute processes and potential re-arbitration by the Tribunal.

**In a future without declaration, terms and conditions will be negotiated against a backdrop of commercial arbitration**

7.81 The Council considers that in the absence of declaration, Port users can obtain access to the Service under the open access arrangements and, by entering into a Deed, vessel agents and coal producers can obtain a long term contractual right of access to the Service. PNO has submitted that a number of vessel agents have already entered into Deeds and, accordingly, have obtained a long term contractual right of access to the Service. As noted at paragraphs 7.66 to 7.70, the Deed and open access arrangements

the provider and the provider's investment in the facility, the public interest, the interests of all persons who have rights to use the service, the costs of access, and the economically efficient operation of the facility.

166 Section 44ZP(1), CCA.

167 See Glencore November submission, at page 9; Malabar November submission, at page 3.

provide some degree of certainty to Port users, and that the Deed provides materially greater certainty than the open access arrangements.

7.82 The NSWMC submits that, because Port users can only obtain an entitlement or legal right to the Service by way of declaration, access to the Service on reasonable terms and conditions as a result of declaration would 'surely' promote a material increase in competition in a dependent market.[168]

7.83 The Council notes that the word 'access' is to be given its ordinary and grammatical meaning and its meaning is not to be restricted to legal right or entitlement.[169] The Full Court[170] described the ordinary meaning of access in the context of access to a service as a 'right or ability' to use a service.

7.84 The Council further notes that, prior to the Amendment Act (see Chapter 4 above), on the basis of the pre-2017 declaration criterion (a) (the 'old' section 44H(4)(a) of the CCA), the Full Court rejected the notion that the word 'access' meant a declaration under Part IIIA, noting that such a meaning would readily lead to the conclusion that a comparison between a 'future with a declaration' and a 'future without a declaration' is to be taken into account.[171] Rather, the applicable test under the pre-2017 declaration criteria (a) required a counterfactual analysis between 'access' and 'no access' and between 'limited access' and 'increased access', and this analysis precluded a consideration of whatever usage or access the service provider does or will provide voluntarily and under which terms in the absence of declaration.[172]

7.85 As set out in Chapter 4 of this Recommendation, the Amendment Act materially changed the wording of declaration criterion (a) in that it now requires that access (or increased access) to a service on reasonable terms and conditions as a result of declaration (rather than access per se) will promote a material increase in competition in a dependent market. This test requires a counterfactual analysis 'with/without' declaration and mandates the Council to consider any existing or likely future access arrangements in a future without declaration, including any contractual access arrangements (such as in the present case, the open access arrangements and the long-term Deed).

[168] NSWMC Application, page 25

[169] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124, at 85-86

[170] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124, at 137, *Sydney Airport Corporation Ltd Australian Competition Tribunal* [2006] FCAFC 146 at 83

[171] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124, at 138

[172] *Sydney Airport Corporation Ltd Australian Competition Tribunal* [2006] FCAFC 146 at 81; *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124, at 88-89

**Likely charges for the Service in a future with and without declaration of the Service**

7.86 As has been noted when undertaking its assessment of criterion (a) the Council does so without forming a concluded view on the potential outcomes of any Part IIIA negotiation or arbitration. In the context of the PNO-Glencore dispute, however, the prior arbitral determinations provide an indication of the range within which the final arbitral price *may* be set. The Glencore-PNO access dispute considered two access charges levied by PNO in respect of the Service, the NSC and the WC. A key contention in these considerations has been the rate of the NSC to be levied by PNO. The WC set during the 2018 ACCC Arbitration Determination was agreed between the parties and adopted by the ACCC.[173] For the reasons discussed in Chapter 6 of this report, the Council considers it likely (but not certain) that the Tribunal will re-determine an NSC within the range of approximately $0.63 - $1.04 per GT. The Council considers that this represents a reasonable indication of the NSC likely (but not certain) to be set in a future with declaration of the Service.

7.87 In contrast, the Council observes that PNO's currently published rates for the access to the Service involve:

- A NSC of $1.0424 per GT and a WC of $0.0802 per GT from 1 January 2020 as part of an open access arrangement available to any coal vessel entering the Port.
- A NSC of $0.8121 per GT and a WC of $0.0802 per GT from 1 January 2020 to any coal producer or (coal) vessel agent that enters into the Deed. Under the terms of the Deed, the access charges would be subject to annual increase of the greater of 4 per cent or the consumer price index (CPI).

7.88 Stakeholders have submitted that PNO's inclusion of user funded contributions in the initial asset base established by the Deed and open access arrangement is economically inefficient and inconsistent with the pricing principles set out in Part IIIA. As noted in Chapter 6, the Council does not consider it necessary or appropriate for it to form a concluded view as to the value of the regulatory asset base, including any final determination on the value of user funded contributions. In considering the likely price to be charged by PNO for the Service absent declaration the Council does not consider it necessary for it to examine the components of that price in assessing the effect of that price on competition in dependent markets.

7.89 While the Deed contains clauses that enable PNO to adjust the access charges in certain circumstances, the Council considers the pricing provisions contained within the Deed, which include an Annual Adjustment,[174] represent a reasonable indication of the access charges, including NSC, likely to be charged at the Port in a future without declaration of the Service. In this regard PNO has identified that in applying a 4 per cent per annum adjustment, the NSC will be $1.1559 per GT in 2029 and the WC will

[173] Final Determination issued by the ACCC on 18 September 2018 in relation to the Glencore-PNO Arbitration dispute, at page 177

[174] See for example clause 7(a) of the Coal Producer Deed.

be $0.1142 per GT. The Council notes that an annual price review was also a feature of the 2018 ACCC Arbitration Determination and 2019 Tribunal Arbitration Determination, including provision for material change events.[175] The Council recognises that access charges under the Deed can also be increased by 'Other Variations'.[176] Whether and if so, when and how such other price variations will be applied is not known. The Council notes that the dispute resolution framework in the Deed allows the coal producer to dispute and seek mediation and/or arbitration of 'Other Variations': see clause 7(b) of the Deed (being a 'Permitted Price Dispute' and clause 6, Schedule 3, of the Deed).

7.90 Given the notice and reporting requirements and the existence of an appropriate dispute resolution framework in the Deed, and the fact that the arbitral determinations established a 'Five-yearly review' process, the Council considers that the ability of PNO to impose price increases through 'Other Variations' during the term of the Deed does not materially increase the uncertainty for coal producers relative to the position with declaration.

7.91 A comparison of the range of prices set under arbitration determinations by the ACCC and the Tribunal with prices set by PNO for its navigation service is set out in Figure 2 below.

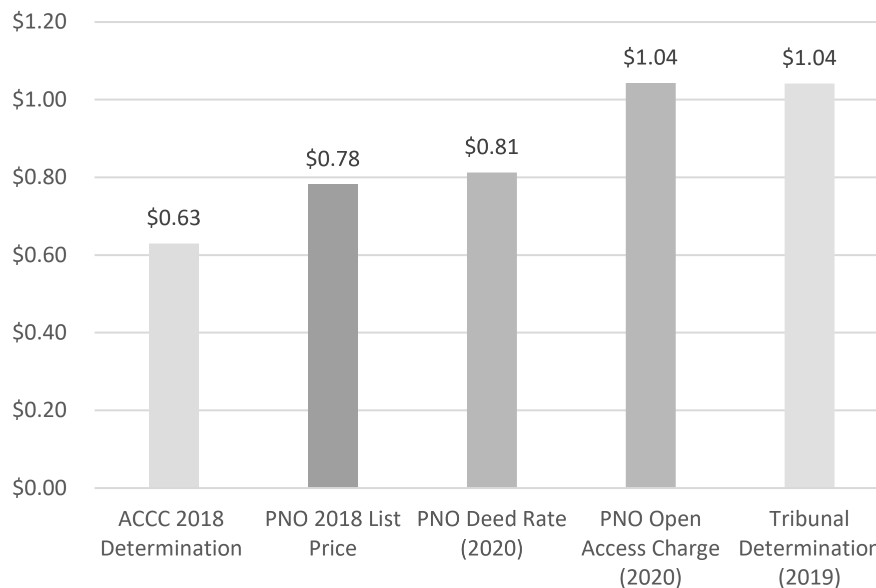



**Figure 2 – Navigation Service Charges set by the ACCC, Tribunal and PNO in $2020 (i.e. adjusted for inflation)[177]**

[175] See for example ACCC, *Final Determination: Statement of Reasons, Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd*, 18 September 2018, Chapter 7, at pages 178 to 186

[176] See for example clause 7(b) of the Producer Deed

[177] The Council has applied the Sydney All Groups Consumer Price Index number published by the Australian Bureau of Statistics (CPI Sydney) and has averaged across 4 quarter periods to

7.92 Figure 2 shows that the NSC presently offered by PNO in 2020 under the Deed is within the range of prices previously determined by the ACCC and the Tribunal in their respective Glencore-PNO arbitration determinations (when those values are adjusted for inflation). Noting these values, PNO's current open access charge available to any other user that has not entered into a Deed with it appears almost identical to that previously determined by the Tribunal for its navigation service (when adjusted for inflation).

7.93 It is unclear whether the terms and conditions offered by PNO for access to the Service in the absence of declaration of the Service will be higher or lower than that set by the Tribunal when it re-determines the dispute between Glencore and PNO. While the open access charge set by PNO for the NSC (i.e. approximately $1.04 per GT in 2020 dollar terms) is almost identical to that determined by the Tribunal in the 2019 Tribunal Arbitration Determination, the price offered by PNO in the Deed (i.e. approximately $0.81 per GT in 2020 dollar terms) is significantly lower. Given the uncertainty relating to what price will be set for the NSC by the Tribunal when it re-hears the Glencore-PNO arbitration, it is not certain whether the rates offered in the Deed will be less than, equal to or higher than those ultimately determined by the Tribunal.

**Markets**

7.94 The Council seeks to identify one or more dependent markets where competition may be likely to be materially affected by an improvement in terms and conditions of access to the service for which declaration is sought. Often these markets will be vertically related to the market for the service for which declaration is sought. That is, they are upstream or downstream of that market in a supply chain.

7.95 In making this assessment, the Council's focus is on the promotion of competition in other markets. The other markets are commonly referred to as 'dependent markets'. Criterion (a) will be satisfied if access (or increased access), on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in one or more dependent markets.

7.96 As has been noted, this assessment is undertaken by comparing competition in a dependent market in a future in which there is access or increased access on reasonable terms and conditions as a result of declaration, against a future in which there is no such access or increased access. If the Council is not satisfied that declaration promotes a material increase in competition in at least one dependent market, criterion (a) is not satisfied.

7.97 In the Application, the NSWMC has identified the following dependent markets:

(a) coal export market (the coal export market)

(b) markets for the acquisition and disposal of exploration and/or mining authorities (the tenements market)

determine an annual CPI number. It is noted that the NSC value established by the 2019 Tribunal Arbitration Determination is to be re-determined.

(c) markets for the provision of infrastructure connected with mining operations, including rail, road, power and water (the infrastructure market)

(d) markets for services such as geological and drilling services, construction, operation and maintenance (the specialist services market)

(e) 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 part (the bulk shipping market).[178]

7.98 These are the same markets as those previously identified by the Council, the Minister, the Tribunal and the Full Court in relation to the 2015 Glencore Application. The bulk shipping market, the tenements market, the infrastructure market and the specialist services market have previously been accepted as derivative markets of the coal export market.

7.99 In the Application, the NSWMC submits that the tenements market should be divided into:

(a) early stage Exploration Licences (ELs)—the market for trading ELs for coal in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield;

(b) advance stage ELs that are likely to be developed into operating coal mines—the market for the supply and acquisition of late stage ELs in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield, and parts of the Western Coalfield catchment (essentially types of tenement developments); and

(c) operating coal mines, typically Mining Licences (MLs)—the market for the supply and acquisition of operating mines in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield.[179]

7.100 The Revocation Recommendation also considered whether declaration would promote a material increase in competition in the container port market. While stakeholders have not addressed this market in responding to the NSWMC Application the Council has considered the container port market at paragraphs 7.162 to 7.163 of this Recommendation report.

**Effect of declaration on competition in the coal export market**

**Submissions received**

7.101 The NSWMC has submitted that the global market for seaborne coal is competitive, with prices determined by international customers, producers, and traders. It notes that as price takers, local producers must absorb the costs associated with access to export infrastructure and transportation. It submits that export infrastructure occupies a very strategic position in the mineral export industry by providing the essential

[178] NSWMC Application, pages 37 to 38

[179] Ibid, page 3

services required to compete in the dependent seaborne markets. As the coal price is derived from the interaction of supply and demand for the commodity, the current economic climate is significantly affected by the significantly decreased demand for coal and other minerals. The NSWMC considers that in such market conditions, ongoing incremental cost increases at the margin may drive coal producers to exit the market, with repercussions for related markets that support the coal export market. It argues that 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 within this market.[180]

7.102 The NSWMC submits that thermal coal prices from Newcastle are currently at the bottom of the price cycle and that the industry is sensitive to any additional costs imposed, even more so when those costs can be potentially increased by further amounts in the future. It considers that such impacts put export competitiveness at risk, and even increases that seem small can become material when accumulated over time.[181]

7.103 The NSWMC contends that a focus on the percentage of the export infrastructure costs compared to the export price for coal ignores both the total amount of infrastructure charges and PNO's unfettered ability to continue increasing access prices.[182]

7.104 The NSWMC submits that declaration of the Service will address uncertainty and create conditions for improved competition. It notes that the right to negotiate will ensure that more reasonable and certain pricing is achieved, providing greater certainty for coal producers when projecting ongoing operating costs and ensuring that related markets continue to be competitive in supporting the coal export chain as well as ensuring their own viability.[183]

7.105 The NSWMC argues that 'light handed' regulation through declaration would create constraints on PNO that do not currently exist as a result of the threat of arbitration by the ACCC. This would lead to materially improved terms and conditions, including safeguards as to the treatment of user funding. Declaration would promote a material increase in competition through the imposition of such a constraint on PNO and the likely resulting increased willingness by PNO to negotiate on future expenditure and pricing paths. In turn, this would give the coal mining industry increased confidence to invest in the Hunter Valley.[184]

[180] Ibid, pages 46 to 47

[181] NSWMC November submission, page 4

[182] NSWMC Application, pages 46-47

[183] Ibid, page 48

[184] NSWMC November submission, page 21

7.106 Malabar Resources[185] and Bloomfield Group[186] contend that, absent declaration, the risk of PNO levying higher NSC charges makes the Hunter Valley an increasingly unattractive market for coal mining investment, decreasing competition in the coal export market.

7.107 The ACCC submits that an assessment of materiality should be based on the profit margin of a business contemplating investing in or operating a coal mine rather than the percentage of total revenue or total cost of the business. It argues that 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.

7.108 PNO has submitted that the coal export market is already likely to be effectively competitive such that declaration is unlikely to promote a material increase in competition in this market.[187]

**Council's view**

*Many findings from previous considerations of declaration of a service at the Port are still relevant*

7.109 In 2015, the Minister was not satisfied that declaring access to the Service would promote a material increase in competition in any of the identified five dependent markets because:

(a) there was insufficient evidence that the identified dependent markets are not effectively competitive

(b) the navigation charges represent a small fraction of the overall cost of producing coal, and even if the charges were to increase significantly in the future, they will remain a minor cost element

(c) coal producers manage a range of uncertainties in their businesses, many of which are likely to be far greater than that which exists in relation to navigation charges

(d) PNO was granted a 98-year lease on the Port and is heavily reliant upon coal as the largest share of its throughput

(e) PNO has contractual obligations with the State of NSW to maintain the Port as a major seaborne gateway

(f) PNO is not vertically integrated into any dependent market in a way that affects its business decisions.

[185] Malabar November submission, page 2

[186] Bloomfield November submission, page 2

[187] PNO August submission, page 15

7.110 The Minister concluded that the terms of access to the Service provided by PNO were not a material factor in determining whether dependent markets will remain effectively competitive in the future. The Minister also observed that PNO is heavily reliant on coal exports for its revenue and does not have an incentive to diminish the long-term output of the Hunter Valley coal industry.

7.111 In *Re Glencore*, the Tribunal stated that it had the same view as the Minister on these points. The Tribunal concluded:

> If it were wrong about the correct approach to s 44H(4)(a) as addressed in Issue 1, it would not be satisfied that increased access would promote a material increase in competition in the coal export market.[188]

7.112 Further, Glencore argued before the Tribunal that the absence of declaration created uncertainty in dependent coal markets arising from PNO's 'unfettered monopoly power to increase prices', and this would have an impact on the state of competition in a way that satisfied criterion (a). It referred to the Hilmer Report (at p 241) in support of this argument. The Tribunal responded:

> … but at that point the Report says that where the essential facility is not vertically integrated, the question of 'access pricing' is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process.[189]

*Coal export markets are likely to be effectively competitive at present*

7.113 In *Fortescue Metals Group Limited*[190], the Tribunal held that access is unlikely to promote competition in a dependent market if it is already effectively competitive (at [1068]). It would follow that, if the coal export market is effectively competitive without declaration of the Service, then the inquiry regarding whether declaration would promote a material increase in competition in this market would end at this point. Notwithstanding this point, the Council has considered a number of factors relevant to whether the state of competition in the coal export market would be materially increased in a future in which access or increased access is on reasonable terms and conditions through declaration.

7.114 In the Revocation Recommendation, the Council considered that the features of the coal export market had not changed significantly since it was considered by the Council in 2015:[191]

> Coal continues to be traded and shipped internationally; and Australian coal exporters participate in this international trade and compete against coal produced and sold through other ports in Australia and overseas. In this respect, there are currently several companies participating in the coal export market

[188] *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6, at [157]

[189] Ibid, paragraph 133

[190] *Fortescue Metals Group Limited* [2010] ACompT 2

[191] Revocation Recommendation, pages 91 to 93

which are supplying coal to a wide range of global purchasers; and that the nature of the competitive interactions between participants in the coal export market has not changed significantly despite PNO's acquisition of the Port, and subsequent increases in the price of the Service since 2015.

The Council has not received any submissions during this consideration that suggest the coal export market is not currently effectively competitive. Instead, a number of interested parties made submissions to the effect that they do not consider there to have been a material change in circumstances since the Declaration was made. The Council takes these submissions to indicate that competitive conditions have not changed significantly in the coal export market since the Declaration was made.

In this context, export coal miners from the Newcastle catchment are likely to be 'price takers' – that is, decisions by individual coal miners regarding how much coal they will export in any given period are unlikely to materially affect prices for coal in overseas export markets.

….

It follows, therefore, that the Council does not consider there is likely to be a difference in the state of competition in the coal export market with or without declaration of the Service in the Relevant Term such that criterion (a) would be met in relation to this dependant market.

Consistent with its view in 2015, the Council considers the geographic scope of the coal export market for Australian exporters extends beyond Australia and into at least the Asia-Pacific region. However, as the Council's current assessment does not turn on the geographic dimension of this market, the Council does not propose to define the geographic boundaries with further precision.

The Council also acknowledges that coal is not a homogenous commodity and the differences in the grade of coal (i.e. thermal vs metallurgical) may impact its suitability and thus substitutability for particular purposes. In the current matter, the Council has focused its consideration of the coal export market on thermal coal, since this represents the significant majority of coal exported from the Port. However, as the Council's conclusions regarding the coal export market do not turn on the product dimension of this market, the Council does not propose to define the product boundaries with further precision.[192]

7.115 The Council has not received submissions in response to the NSWMC Application that the coal export market is not effectively competitive or that the features identified in its Revocation Recommendation are not relevant to its considerations. The Council has had regard to these features and the state of competition in this market when assessing the NSWMC's Application.

[192] Ibid, pages 92 to 93

*PNO is unlikely to have an incentive to diminish competition in coal export markets*

7.116 For the reasons discussed in paragraphs 7.50 – 7.59, Council considers that PNO is unlikely to have an incentive to diminish competition in coal export markets.

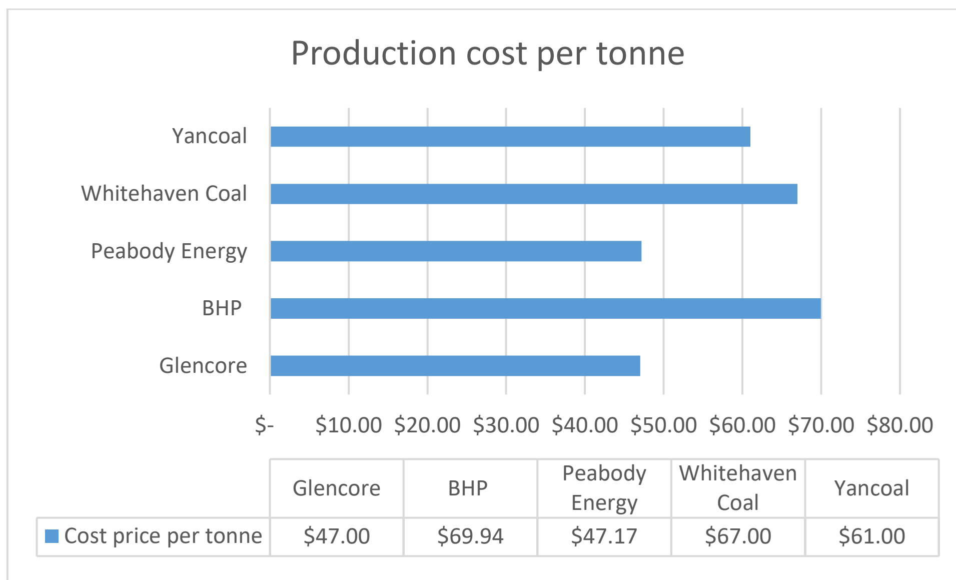
7.117 The Council considers this incentive is unlikely to change even if PNO is able to price discriminate between coal producers seeking to export coal through the Port. To the extent that PNO is able to price discriminate between different coal producers, the Council considers that PNO will not wish to price to individual producers in a way that inhibits their ability to compete in the coal export market.

*Port charges likely to remain a comparatively small component of cost in exporting coal*

7.118 The Council has previously noted that the NSC represents only a very small component of the overall cost of the production and sale of coal for export from the Hunter Valley.[193]

7.119 In its 2018 submission, PNO sought to analyse the relative impact of its NSC.[194] At that time, PNO estimated a coal producers' average cost to be approximately $43.02 per tonne and submitted that port charges are a small component of the total delivered cost of coal, accounting for less than 1%.

7.120 The Council recognises that costs of production vary across coal producers. Figure 3 (below) depicts publicly available information about the production cost disclosed by Hunter Valley coal producers.




| | Glencore | BHP | Peabody Energy | Whitehaven Coal | Yancoal |
|---|---|---|---|---|---|
| Cost price per tonne | $47.00 | $69.94 | $47.17 | $67.00 | $61.00 |

**Figure 3: Cost of production, 2019 reporting period**[195]

[193] Ibid, pages 94 to 96

[194] PNO July 2018 submission, pages 25 to 28

[195] Sourced at: https://www.glencore.com/dam/jcr:4d7231e8-f5eb-4da6-904d-6c2d95d49ade/Glencore-Investor-Update-2019.pdf; https://www.bhp.com/-/media/documents/investors/annual-reports/2020/200915_bhpannualreport2020.pdf;

7.121 The Council recognises that there is a range of financial data that will inform a decision to produce or a decision to invest. The Council also considers that expectations of cost are a material consideration that inform expectations of profitability. Notwithstanding that the cost of producing coal will vary from mine-to-mine within the Newcastle catchment, the Council considers that Port access charges are likely to represent only a small proportion of the cost of production and sale of coal.

7.122 Further, as noted earlier, the Council considers it is likely (but not certain) that the Tribunal will re-determine an NSC somewhere between $0.63 and $1.04 per GT (in 2020 dollar terms), and that this represents a reasonable indication of the NSC likely (but not certain) to be set in a future with declaration of the Service. The NSC set out in the Deed lies at roughly the mid-point of this range (i.e. approximately $0.81 per GT) and the charge set in the open access arrangement is at the top of this range. It is not clear that an NSC set with declaration would be materially different to that offered by PNO absent declaration. The possible difference between these outcomes will represent an even smaller fraction of the cost of producing coal in the Newcastle catchment.

7.123 As has been noted the Council considers the pricing provisions contained within the Deed represent a reasonable indication of the access charges likely to be levied on coal vessels at the Port in a future without declaration of the Service. A number of stakeholders have raised concerns regarding PNO's ability to increase prices and how this may affect the materiality of the access charges over the Relevant Term. As noted, the Council considers that the Deed establishes binding commitments on PNO regarding the pricing of services at the Port. Based on the information before it, the Council does not consider that Port charges will be a material component of the cost of production and sale of coal during the Relevant Term.

*Uncertainty and investment incentives*

7.124 It has been argued that the risk of increases in Port charges adds an extra element of uncertainty for miners in the Newcastle catchment which will likely lead to less investment in the future.

7.125 The Council acknowledges that uncertainty associated with the price of using the Service can affect the willingness of users to make future investments that would enable them to compete in markets that relied upon access to the Service. However, the Council considers that there is a range of factors that mean declaration would not materially address uncertainty in a way that will lead to a promotion of competition in the coal export market. In this respect, the Council notes that:

https://www.peabodyenergy.com/Peabody/media/MediaLibrary/Investor%20Info/Annual%20Reports/2019Peabody10-K.pdf?ext=.pdf; https://www.yancoal.com.au/page/en/investors/; https://whitehavencoal.com.au/wp-content/uploads/2019/09/20190815-ASX-Announcement-FY2019-Results.pdf)
Where applicable, conversion from USD to AUD applying a 12 month average https://www.rba.gov.au/statistics/tables/xls-hist/f11hist.xls

(a) The coal export market is already likely to be effectively competitive; and it is not in PNO's long-term interests for Port users to experience such uncertainty around access charges at the Port if this risks significantly less investment in coal mining activity in the Newcastle catchment or investment by other Port users.

(b) In a future with declaration of the Service, there is no guarantee of certainty over access charges in the short-to-medium term. In this respect, the Council notes the Glencore-PNO access dispute (still ongoing two years after it was notified to the ACCC) is set to be re-determined by a different regulatory body (i.e. the Tribunal) and the Tribunal's re-determination may ultimately be the subject of further reviews. While the finalisation of this dispute might, in the long-term, provide greater certainty for access seekers and PNO regarding the terms and conditions likely to be set in a future with declaration of the Service, it may be some time before this greater level of certainty is achieved.

(c) In a future without declaration of the Service, users of the Port will have the option of entering a long-term Deed. PNO has also published open access arrangements that set out terms and conditions of access for any user that has not entered into a Deed with it. Both the Deed and open access arrangements make provision for dispute resolution. The ACICA rules and the non-derogable provisions of the CA Act apply to the resolution of disputes under the Deed. The Council considers that the pricing provisions of the Deed assist coal producers in mitigating the risks that may otherwise arise from pricing and other uncertainties at the Port.

7.126 More broadly, the Council considers that coal producers and exporters seeking access to the Port face significant uncertainty from other factors that are more likely to influence their ability to compete in export coal markets. For instance, they face considerable uncertainty resulting from the magnitude and timing of potential future changes in a number of other factors including coal prices, labour costs and taxes. Relative to these factors, charges for the Service are likely to remain a small proportion of the cost of production and sale of coal for export in a future with or without declaration of the Service. Accordingly, the Council considers that the risks associated with uncertainty over access charges for the Service would not contribute significantly to an investor's expected valuation of future mining projects in the Newcastle catchment.

*Promotion of efficiency leading to a material increase in competition*

7.127 The ACCC has argued that in assessing criterion (a), the Council should give due weight to the increase in competition that can be promoted by economic efficiency in the pricing of the monopoly infrastructure.

7.128 For the reasons set out in this chapter and in Chapter 10 of this Recommendation report, the Council considers that the difference between the efficiency of operation of, use of, and investment in the Port infrastructure in the futures with and without

declaration will not be sufficient to conclude that declaration would promote a material increase in competition in dependent markets.

**No material increase in competition in the coal export market**

7.129 Taking into account the factors outlined above, the Council is not satisfied that access or increased access to the Service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in the coal export market.

**Effect of declaration on competition in the tenements market**

7.130 A 'tenement' or 'exploration authority' is the right under licence to carry out prospecting, exploration or mining activity in respect of a specific piece of land. Such licences are required because all mineral resources in Australia are owned by the Crown.

7.131 In NSW, all exploration and mining activity must be conducted in accordance with an authority issued under the *Mining Act* 1992 (NSW).[196]

7.132 Acquiring rights to mineral deposits generally begins with acquiring an 'exploration licence', which grants an exclusive right to search for specific resources in a defined area. An exploration licence enables the licence holder to explore areas where mineral and petroleum resources may be present, to establish the quality and quantity of those resources, and to investigate the viability of extracting the resource.[197] If valuable minerals have been discovered, the owner of the exploration licence may then apply for a production/mining lease.[198] A mining lease permits the business to mine for minerals over a specific area of land.[199] The grant of an exploration licence does not guarantee the grant of a mining lease. As part of the process of applying for a mining lease, the applicant (the exploration licence holder) must go through a separate assessment process (including an environmental impact assessment and extensive public consultation).[200] Further information about the acquisition of exploration licences in New South Wales is set out in the Council's Revocation Recommendation at paragraphs 7.244 to 7.255.

[196] Resources and Geoscience NSW https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/applications-and-approvals/mining-and-exploration-in-nsw/coal-and-mineral-titles

[197] Resources and Geoscience NSW 'Exploration licences and regulation' https://resourcesandgeoscience.nsw.gov.au/landholders-and-community/minerals-and-coal/exploration

[198] NSW Department of Planning and Environment, *Exploration Licences and Regulation,* https://www.resourcesandgeoscience.nsw.gov.au/landholders-and-community/minerals-and-coal/exploration

[199] Resources and Geoscience NSW 'Mining leases and regulation' https://resourcesandgeoscience.nsw.gov.au/landholders-and-community/minerals-and-coal/mining

[200] Resources and Geoscience NSW https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/programs-and-initiatives/strategic-release-framework-for-coal-and-petroleum-exploration

**Submissions received**

7.133 In its Application the NSWMC has argued that potential acquirers of tenements in the Newcastle catchment face both significantly higher charges for the Service at the Port and significant uncertainty in relation to future price increases that PNO may impose, whether it be on a yearly basis through its schedule of charges or via the pricing re-openers contained in the Producer Deed/Vessel Agent Deed, together with uncertainty over pricing terms after ten years.[201]

7.134 The NSWMC considers that, as a consequence of this, potential acquirers of tenements are either prepared to bid less for them or in the case of certain mining opportunities that are likely to involve higher costs, not be prepared to bid for them at all. This is particularly the case for the acquisition of development stage tenements, where users face greater uncertainty, asymmetry and higher access prices for the export of coal, compared to buyers of coal tenements in circumstances where the Port is declared.[202] It argues that the incentives to invest are materially diminished in the face of prospective buyers having any future returns/profits eroded by PNO's increased prices for exporting coal through the Port.[203]

7.135 The NSWMC has noted the decision of the Treasurer of Queensland in the matter of DBCT and argues that declaration would remove the risk of hold-up for new users, or at least do so to an extent such that it would lead to access or increased access that would promote a material increase in competition.[204]

7.136 The NSWMC considers that the greater number of people willing to bid for something generally means that the level of competition will be higher. It considers that in its Revocation Recommendation the Council failed to undertake qualitative analysis of the likely effect and did not give proper weight to the evidence and submissions from the mining industry that an unconstrained PNO will be problematic for competition in the Tenements Market.[205] It argues that PNO’s pricing practices have a direct flow on effect in the tenements market, particularly the market for development stage tenements, of reducing the number of investors who could viably compete for tenements, and also the level of commercial interest in developing projects in that catchment area.[206] The NSWMC further submits that the Council’s previous position (that there is substitutability between coal tenements) is not correct, noting that the approach it took in considering the relevant geographic market in reaching its Revocation Recommendation differed from the approach it took in the Pilbara matter.[207]

[201] NSWMC Application, page 39

[202] Ibid.

[203] Ibid, page 45

[204] Ibid, page 41

[205] Ibid, page 42

[206] Ibid, page 43

[207] Ibid, at pages 44-45

7.137 The NSWMC further argues that the coal tenements market is not derivative of the coal export market as it involves considerable investments and the consideration of likely future costs and returns before making an investment decision, which is different to situations where investments have already been made.[208]

7.138 The NSWMC considers that declaration of the Service will materially increase competition in the tenements market and in particular the tenements development market as:

(a) Owners of tenements will have increased incentive to invest in the exploration of their tenement, either for the purpose of developing the tenement itself or obtaining more information about the tenement to improve its prospective value.

(b) Sellers will enjoy greater competition amongst buyers when selling their tenements, both due to the greater information available about tenements, as well as to the removal of a key area of uncertainty in relation to Port access prices, thereby driving price and activity in the tenements market.

(c) The NSW Government, as the originating seller of tenements, will benefit from increased competition in the bidding for licences, underpinned by pricing certainty in relation to Port access prices.[209]

7.139 While submitting that the tenements market should be divided into three separate and functionally distinct markets, the NSWMC did not provide further submissions identifying how declaration of the Service would promote a material increase in competition in these (sub)markets as distinct from how declaration would promote a material increase in competition in the tenements market.

7.140 In its report, Synergies has noted that PNO's incentive is to maximise profits and, accordingly, to engage in behaviour consistent with this incentive. It argues that the offer of bilateral contracts that will support price discrimination between coal producers demonstrates that PNO is not constrained by a need to prevent reputational harm. It considers that the risk to coal producers that their significant sunk investments in coal mining will be expropriated will lead to a material adverse effect on competition in the tenements market in a future without declaration. For example, existing customers or potential entrants into a market might either delay, or forgo, new investment that would otherwise be economically efficient.[210]

7.141 Glencore submits that the differential between the NSC determined by the ACCC (being $0.61 per GT) compared to the current NSC being offered by PNO [of $1.0424 per GT or $0.8121 per GT] is likely to give rise to a risk of hold-up of investment in development stage coal tenements in the Hunter Valley region.[211]

[208] NSWMC November submission, page 20

[209] Ibid, page 45

[210] Synergies, page 14 to 17

[211] Glencore August submission, page 3

7.142 Malabar Coal's sole assets are a number of coal tenements in the Hunter Valley. It considers that the Deed and open access arrangements offered at the Port do not constrain PNO's ability and incentive to exercise its monopoly power. It considers that declaration is necessary to provide Port users with long-term certainty as to the relevant terms and conditions of access and that this will drive competition in the tenements market.[212]

7.143 PWCS argues that the inability to forecast channel access charges and future returns with any degree of certainty increases the potential for hold-up of new investments or cancellation of proposed investments.[213]

7.144 The ACCC considers that the added 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. It considers that PNO's market power increases the 'hold-up' risk of coal producers' investments.[214]

7.145 In its submission, PNO contended that the NSWMC and other parties have not provided any evidence that PNO's terms and conditions of access are actually having an impact on their investment decisions, nor articulated any such concerns by reference to the pricing principles adopted by PNO. It further argues that:

(a) The conclusions reached by Synergies are flawed as they fail to take into account the non-discrimination provisions contained in the long term Deed.

(b) There are factual differences between the Port and the DBCT which make it erroneous to rely on the decision of the Queensland Treasurer, in particular DBCTM proposes to treat new and existing coal mines differently (including future users paying more than existing users) and, therefore, will be favouring some producers over others for reasons other than efficiency. PNO maintains that it has no intention to do this. It further notes that terminal charges at DBCT are significantly higher than channel charges at the Port and are likely to represent a significantly greater proportion of the price of coal in the export market.[215]

**Council's view**

7.146 Having regard to NSWMC's Application and the submissions received, the Council considers that the relevant facts are not materially different to those that were before the Council in its Revocation Recommendation. On this, the Council notes:

(a) While it is possible that the geographic scope of the tenements market extends beyond the Newcastle catchment, it is not necessary to precisely determine the

212 Malabar August submission, pages 2 to 3; Malabar November submission, page 2

213 PWCS August submission, page 3

214 ACCC August submission, at pages 9 to 11; ACCC November submission, page 7

215 PNO August submission, pages 17 to 18

geographic scope in order to assess whether declaration would be likely to promote a material increase in competition in this market. The Council considers that if declaration would not promote a material increase in competition where a narrow geographic view of the market is applied, it is even less likely that declaration would promote a material increase in competition in a more broadly defined geographic market. As such, the Council proposes to analyse whether declaration would be likely to promote a material increase in competition in a more narrowly defined market for tenements in the Newcastle catchment.

(b) The nature of the competition problem identified by users of the Service is that prospective investors in mining tenements will face a higher NSC in a future without declaration of the Service; and have less confidence regarding future charges that may be set by PNO. They consider this will lead to fewer prospective investors that are prepared to bid for tenements that may become available for acquisition in the future, thereby reducing competition for these tenements. For this reason, while the Council has continued to assess the geographic dimension of the tenements market as covering the Newcastle catchment, it has also focussed attention on whether declaration would be likely to promote a material increase in competition for individual tenements when they become available for acquisition in the future.

(c) The product scope of the tenements markets should not include tenements for other forms of minerals. The Council proposes to take a narrow view of the relevant product dimension and focus on thermal coal, which is the prevalent type of coal in the Newcastle catchment area.

7.147 The Council is also of the view that the broader coal tenements market is, and is likely to remain, effectively competitive with or without declaration of the Service:

(a) There are a large number of licence holders. This suggests that the holding of tenements in the Newcastle catchment is not significantly concentrated in the hands of only one or two market participants. There appears to also be a number of holders of existing licences that have significant market capitalisations, including multi-nationals with diversified operations.

(b) Reforms to how coal tenements can be acquired from the State of NSW can be expected to improve the transparency of tenement acquisition and enable greater competition amongst a large pool of potential investors seeking to acquire tenements in the Newcastle catchment (which will not necessarily be limited to existing investors in the Newcastle catchment).

7.148 Further, as noted by the Tribunal in *Re: Glencore*, the market for the acquisition and disposal of exploration and/or mining authorities is a derivative of the coal export market:

> It was accepted that, in a practical sense, the coal export market (using the Service as the gateway means of shipping coal from the Hunter Valley) was an

> appropriate starting point. The other markets are, in turn, derivative from that market.[216]

7.149 The Tribunal also observed that, if it found that declaration would be unlikely to promote a material increase in the coal export market, it was difficult to see how declaration would be likely to promote a material increase in competition in the market for the acquisition and disposal of exploration and/or mining authorities. The Tribunal said it

> does not consider it necessary to address the impacts asserted in relation to derivative markets. If the impact of increased access on the coal export market is not such as to satisfy the Tribunal that it would promote a material increase in competition in that market, it is difficult to see how there would be the flow-on effects on the derivate markets.[217]

7.150 Further, the Tribunal found that if it were wrong about the correct approach to section 44H(4)(a) (criterion (a), as it then stood), which is to say the correct approach was effectively in line with the current criterion (a) test, the Tribunal would not be satisfied that access or increased access would promote a material increase in competition in the coal export market. The Tribunal found that, if competition in the coal export market would not be promoted, 'it follows that the other four dependent markets would also not be promoted with a material increase in competition in any of them.'[218]

7.151 The Council agrees with this view. Given its findings in relation to the coal export market set out above, the Council considers that declaration would not promote a material increase in competition in the market(s) for thermal coal tenements in the Newcastle catchment.

7.152 Notwithstanding this conclusion, the Council has opted to address a number of specific issued raised in submissions in relation to the tenements market(s) below.

*Uncertainty and hold-up*

7.153 As noted in its assessment of the coal export market, a number of parties have submitted that, in the absence of declaration, there is significant uncertainty as to the terms and conditions of access and that this uncertainty gives rise to a risk of hold-up. They consider that the hold-up risk is likely to lead to less competition in the coal tenements market.

7.154 Investors (or potential investors) in coal tenements in the Newcastle catchment face a range of significant uncertainties which bear upon their investment decisions. In its recent Study Report examining regulation of the resources sector, the Productivity Commission noted that:

> Beyond resources specific regulation, there is a range of factors that can affect business investment in the resources sector. These include a number of other

[216] *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6, at [126]

[217] Ibid, at [139]

[218] Ibid, at [157]

policy areas (including energy and foreign investment policy), workforce issues, taxes and royalties, safety regulations, infrastructure and pre competitive data.[219]

7.155 The Council notes the reasons set out in paragraph 7.126 of this report, and considers that there are a range of commercial and regulatory uncertainties that will impact on decisions of investors or potential investors in coal tenements in the Newcastle catchment. The Council considers that declaration would not materially address uncertainty with respect to the price of access to the Service in a way that will lead to a promotion of competition in the coal tenements market. Further, the Council considers it is not in PNO's long-term interests to create uncertainty for Port users about future access charges at the Port if this uncertainty leads to significantly less investment in mining activity in the Newcastle catchment.

*The consequence of any pricing differences with and without declaration of the Service*

7.156 For the reasons set out in this Recommendation report, it is not clear whether prices for the Service in a future with declaration will be less than, equal to or higher than those likely to arise in a future without declaration. To the extent the access charges are not materially different in a future with and without declaration of the Service, declaration would not promote a material increase in competition in the market(s) for coal tenements in the Newcastle catchment.

7.157 To the extent the NSC in a future with declaration of the Service were closer to that set in the 2018 ACCC Arbitration Determination, the Council accepts this may improve expectations of profitability for some coal exploration/mining activities relative to expectations that may be held in a future absent declaration. It may also mean that some additional investors may choose to participate in bidding for certain individual tenement opportunities in a future with declaration of the Service, thereby increasing the number of bidders for these tenements. However, the Council is not satisfied that such an outcome would represent a material promotion of competition in the market(s) for coal tenements in the Newcastle catchment. This is because:

(a) A higher price for the Service would not necessarily result in a lessening of competition in a dependent market *per se*. In this respect, the Council does not believe that PNO setting the same higher input prices (i.e. the NSC and WC) for all miners or investors competing to acquire a particular tenement opportunity would necessarily amount to a lessening of competition in the market for tenements in the Newcastle catchment. To the extent individual miners or investors face the same higher charge, it would not influence their ability to compete with each other on their merits for an individual tenement opportunity. That is, while higher charges for the Service in a future without declaration may reduce the expected net present value of a mining project to which a tenement relates, this does not mean it would reduce the ability of

[219] Productivity Commission 2020, *Resources Sector Regulation, Study Report,* at page 68.

individual miners to compete against each other for that tenement on their merits.

(b) A reduction in the number of competitors for a tenement *is not the same as a decrease in competition for that tenement*. This is especially the case if those parties no longer seeking to bid for the tenement due to higher access charges are less efficient, or higher cost explorers/miners of coal. Further, the Council does not consider this effect is likely to be significant given the extent of any likely differences in charges for the navigation service; and the extent to which the access charge represents only a small proportion of the costs of producing export coal in the Newcastle catchment.

7.158 The Council notes that while the Deed and open access arrangements have led to different prices for groups of users at the Port, PNO's offers of access have been made to the entire market and, as such, do not amount to price discrimination in the manner identified by stakeholders. The Council notes that the NSC of $0.8121 per GT and WC of $0.0802 per GT set by the Deed is equally available to both existing and new coal producers seeking to access the Port.

7.159 Some parties have noted concern that Glencore's arbitrated price, once determined, may differ to the access charge in place at the Port for its rivals. As has been noted, the Council considers that there is ongoing uncertainty regarding prices that may ultimately be set in the PNO-Glencore arbitration.

7.160 To the extent Glencore may be afforded a different price for the Service than its rivals, this may mean that the value of particular tenements that come up for sale in the future are affected slightly differently by the access charge for Glencore than its rivals. As has been noted, the Council considers that the Service charges at the Port are a small proportion of the production cost for such any cost benefit to Glencore is also likely to be small.

**No material increase in competition in the coal tenements market**

7.161 Taking into account the factors outlined above, the Council is not satisfied that access or increased access to the Service, on reasonable terms and conditions, as a result of declaration, is likely to promote a material increase in competition in the tenements market.

**Effect of declaration on competition in container port market**

7.162 As noted, the Revocation Recommendation considered whether declaration would promote a material increase in competition in the container port market.[220] Stakeholders have not addressed this market directly in responding to the NSWMC Application. The Council considers that the assessment remains relevant to its current considerations. In this regard, the Council notes:

[220] Revocation Recommendation, pages 130 to 138

(a) the market for containerised shipping services should be considered separately to the bulk shipping market.

(b) a narrow geographic market, being the Port of Newcastle and Port Botany competing to receive vessels carrying containerised freight originating from, or destined for, areas within their overlapping catchment areas, is appropriate in this matter.

(c) given PNO is not meaningfully vertically integrated into the provision of container freight transport services, it is unlikely to deny access to different container freight service providers at the Port; or to act in a way that discourages competition in any downstream container freight services.

(d) PNO will effectively become a new entrant into the provision of container port services, and will be seeking to attract custom away from alternative container port service providers, such as Port Botany; PNO is unlikely to price in a way that decreases competition in the container port market; and PNO's commercial incentives will be to price competitively to win market share.

(e) the Container Terminal at the Port is unlikely to be capacity constrained. PNO has estimated that container trade at the Port in 2031 will result in 438 vessel visits per year (or less than 10% of channel capacity at the Port), transporting 408,057 TEU in containerised freight (or less than 25% of the proposed Container Terminal's capacity).

(f) PNO already imposes separate charges for containers and is likely to set fees applicable to containerised freight competitively with or without declaration so as to win market share from Port Botany in order to support the development of its container trade.

7.163 In light of these considerations, the Council is not satisfied that increased access to the Service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in the container port market.

**Effect of declaration on competition in other markets**

7.164 In reaching its Revocation Recommendation, the Council considered that the bulk shipping market, the infrastructure market and the specialist services market are closely tied and substantially depend on the coal export market. The Council considered that it was difficult to see how there might be flow-on effects in these markets leading to a material increase in competition in any of these markets where declaration of the Service does not lead to a material increase in competition in the coal export market.[221]

7.165 Having reached the conclusion that declaration of the Service was unlikely to materially increase competition in the coal export market, the Council was not satisfied that increased access to the Service, on reasonable terms and conditions, as a result of

[221] Ibid, page 138

declaration would promote a material increase in competition in the bulk shipping market, the infrastructure market or the specialist services market.[222]

7.166 In its submission, the NSWMC has noted that it is unclear why the Council did not re-examine the specialist services market in greater detail in reaching its revocation recommendation. It noted that if there was a substantive increase in competition in the tenements market, then it is likely that there would have been a similarly positive increase in competition in the specialist services market. The NSWMC submission did not otherwise expand on this market or the bulk shipping or infrastructure markets.

7.167 For the reasons set out in this Recommendation report, the Council does not consider that declaration of the Service is likely to materially increase competition in the coal export market or the derivative coal tenements market. Accordingly, the Council is not satisfied that increased access to the Service, on reasonable terms and conditions, as a result of the declaration, would promote a material increase in competition in the bulk shipping market, the infrastructure market or the specialist services market.

**Council's assessment of criterion (a)**

7.168 Based on the information before it, the Council's view is that access or increased access to the Service, on reasonable terms and conditions, as a result of a declaration of the Service, would not promote a material increase in competition in any dependent market.

7.169 The Council's view is that criterion (a) is not satisfied.

[222] Ibid

# 8 Service could meet the total foreseeable demand in the market (criterion (b))

8.1 Section 44CA(1)(b) of the CCA (criterion (b)) stipulates that the facility 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 two or more facilities.

### Submissions

8.2 The NSWMC has sought declaration for a period of 20 years.

8.3 The NSWMC submits that it is practically impossible to develop another facility that would allow vessels to use the existing Port terminals at the Port. It notes that the existing coal terminals at the Port have been designed and constructed so as to be capable of loading vessels which approach using the established channel. It contends that there is no route through any existing waterway which could be used to approach the existing coal terminals even with dredging activities.

8.4 In its *Port Master Plan 2040*, PNO has stated that an assessment undertaken to evaluate the capacity of the Port has demonstrated that the Channel can accommodate the safe movement of over 10,000 vessels per annum. The vessel movements in 2017 indicate that the Channel is currently operating at less than 50% of its capacity.[223]

### Council's view

8.5 As noted in Chapter 12 of this Recommendation report, the Council considers that, should the Service be declared, the appropriate duration for declaration would be fifteen years (the Relevant Term).

8.6 Based on the information before it, the Council considers that the Port could likely meet the total foreseeable demand in the market in the Relevant Term and at the least cost compared to any two or more facilities.

8.7 The Council's view is that criterion (b) is satisfied.

[223] See https://www.portofnewcastle.com.au/wp-content/uploads/2019/10/Port-Master-Plan-2040-for-web.pdf at page 30

# 9 The facility is of national significance (criterion (c))

9.1 Section 44CA(1)(c) of the CCA (criterion (c)) stipulates that the facility providing the service is of national significance, having regard to:

(a) the size of the facility, or

(b) the importance of the facility to constitutional trade or commerce, or

(c) the importance of the facility to the national economy.

**Submissions**

9.2 The NSWMC has submitted that coal exports from the Port via the shipping channels are of national significance. It notes PNO's 2018 Trade Report which reports that in 2018 the Port handled 158.6 million tonnes of coal with a value of approximately $23.6 billion. It further submits that in 2018/19, the Hunter Valley mining sector directly supported 3,282 businesses; directly employed 13,347 people; paid $1.4 billion in wages and salaries; directly spent $4.0 billion on goods and services; paid $55.0 million to local government; and provided $4.0 million to 397 community groups. In total, about 19.1% of the Hunter Region's workforce was supported by mining. Mining made up 22.8% of Gross Regional Product, a total of $11.5 billion. [224]

9.3 Submissions from Glencore [225] and Malabar Coal [226] also noted the importance of mining activity in the Hunter Valley and in New South Wales more broadly to the local and State economies.

**Council's view**

9.4 The Council considers that the facilities are of national significance in terms of their importance to trade and commerce (specifically, trade or commerce between Australia and places outside Australia) and their importance to the national economy, noting, in particular, the mass and value of trade through the facilities each year, and the economic activity generated by industries that are reliant upon the facilities.

9.5 The Council's view is that criterion (c) is satisfied.

[224] NSWMC Application, page 49

[225] Glencore August submission, pages 3 to 4

[226] Malabar August submission, page 3

# 10 Promoting the public interest due to access or increased access to the service (criterion (d)).

10.1 Section 44CA(1)(d) of the CCA sets out declaration criterion (d), which is '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'.

**Submissions**

10.2 The NSWMC submits that the current terms of access at the Port create considerable uncertainty for Port users. It considers 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.

10.3 The NSWMC considers that the current terms of access at the Port are wholly one-sided and shift all material commercial and legal risks onto Port users. It considers that the terms grant PNO an unfettered ability to increase access prices through various re-openers.

10.4 The NSWMC also considers that by including user funded expenditure in its cost base, PNO has decreased allocative efficiency. The NSWMC believes that the costs incurred by the industry as a whole in seeking to obtain reasonable terms and conditions of access in the absence of a declaration far outweigh any compliance and administrative costs PNO may incur.

10.5 The NSWMC argues that declaration of the Service will improve competition in the dependent markets, resulting in economic growth and efficiencies, bringing about public benefits.[227]

10.6 The NSWMC further considers that it is in the public interest that PNO, having been found by the Council to have market power, faces a 'light handed' form of regulatory constraint through declaration.[228]

10.7 Glencore submits that there is a 'real likelihood PNO will act in an unconstrained manner', which they consider would have a 'chilling effect' on investment in the coal export industry in the Hunter Valley region.[229]

10.8 Glencore submits that the difference in price between a future with declaration versus without is liable to cause a 'risk of hold-up of investments in developmental stage coal tenements in the Hunter Valley region', which Glencore submits would have 'material impacts in competition in other markets', such as that for specialist services.[230]

10.9 Glencore further submits that 'declaration is necessary to provide users with long-term certainty as to the terms and conditions of access to the Port'. It considers that, in a

[227] NSWMC Application, pages 51 to 53

[228] NSWMC November submission, page 25

[229] Glencore August submission, page 2

[230] Ibid, page 3

situation where PNO is otherwise seeking to force the Hunter Valley coal industry to accept its producer Deeds on a take it or leave it basis, the imposition of such reasonable constraints (as provided by declaration), in the absence of any other constraints on PNO, is in the public interest.[231]

10.10 PWCS submits that PNO initially increased channel access charges at the Port by up to 60% (depending on vessel) after its privatisation in 2014, which they characterised at the time as a 'one-off pricing restructure and realignment' and then further increased channel access charges by 35% from 1 January 2020.[232] PWCS cited this as an example of potential future price instability in a future without declaration, which they submit would significantly increase uncertainty for access seekers and potential investors.

10.11 PWCS also submits that the current price reporting mechanism contained in the *Ports and Maritime Administration Act 1995* (NSW) is not sufficient, as the Independent Pricing and Regulatory Tribunal 'has no power to determine prices relevant to the Services or to set maximum prices'.

10.12 The ACCC submits that the efficiency gains from declaration are likely to outweigh the long-term marginal increase in administrative and compliance costs and they therefore contend that declaring the Service would be in the public interest.[233]

10.13 The ACCC submits that declaration is likely to result in:

- a material increase in investment in PNO's shipping facility
- an increase in investment in related markets, and
- an immaterial increase in long-run marginal administrative and compliance costs.[234]

10.14 The ACCC further submits that PNO's potential exercise of market power undermines efficiency in related markets, which should be considered when assessing NSWMC's Application against criterion (d).[235]

10.15 PNO submitted that it has planned future investments which are relevant to the Service including a program to widen the channel at the Port. It argues such investments may be more difficult to fund in a future with declaration if there is a perceived risk of regulatory error.[236] PNO contends that it has no incentive to deliberately act to reduce efficient investment in dependent markets and that, in a future with declaration, a series of bilateral access disputes involving PNO and a series of access seekers is likely

231 Glencore November submission, page 8

232 PWCS August submission, page 3

233 ACCC August submission, page 11

234 Ibid, page 12

235 Ibid, page 14

236 PNO August submission, page 18

to add significant additional administrative and compliance costs associated with declaration of the Service.[237]

**Council's view**

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

10.17 In considering criterion (d), regard must be had to the matters identified in subsection 44CA(3)(a) and (b). Subsection 44CA(3) provides that '…in considering whether [criterion (d)] applies the Council or 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.'

10.18 Paragraph 12.40 of the 2017 EM provides that:

> criterion (d) does not call into question the results of subsections 44CA(1)(a), (b) and (c). It accepts the results derived from the application of those subsections, but it enquires whether, on balance, declaration of the service would promote the public interest. It provides for the Minister to consider any other matters that are relevant to the public interest.

10.19 In Pilbara HCA the High Court considered the previous public interest criterion. It found that:

> It is well established that, when used in a statute, the expression 'public interest' imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*[238], when a discretionary power of this kind is given, the power is 'neither arbitrary nor completely unlimited' but is 'unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view'. It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not

[237] Ibid, page 4

[238] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

> in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.[239]

10.20 As has been noted, the words 'on reasonable terms and conditions, as a result of a declaration' in criterion (a) and (d) focus the assessment on the effect of declaration. This is achieved by assessing a future in which the Service is declared and access to the Service is through declaration on reasonable terms and conditions, and comparing this to one in which the Service is not declared and any access to the Service is on the terms and conditions offered by PNO, including the Deed and the open access framework proposed by PNO.

10.21 The Council considers that in the absence of declaration, Port users can obtain access to the Service either via the open access regime or the Deed offered by PNO. Under the Deed, coal producers can obtain a long term contractual right of access to the Service. The Council considers the pricing provisions contained within the Deed represent a reasonable indication of the access charges likely to be levied on coal vessels at the Port in a future without declaration of the Service. The access charge, in particular the NSC, offered by PNO under the Deed (and over its term) is within the range of prices previously determined by the ACCC and the Tribunal and may be less than, equal to or greater than the access charge (and NSC) ultimately determined by the Tribunal when it re-arbitrates the PNO-Glencore dispute. As has been noted, the Council considers that PNO could not unilaterally withdraw the Deed (outside of an event of default allowing termination) or the open access arrangements and offer materially poorer terms without suffering reputational harm and claims for breach of contract.

**Effect of declaration on investment in infrastructure services**

10.22 In considering section 44CA(3)(a)(i), and consistent with the Hilmer Report,[240] the Council is primarily concerned with whether declaration would undermine the viability of efficient investment decisions; and hence risk deterring future efficient investment in important infrastructure projects.

10.23 The Council considers 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. This might occur, for instance, if regulated terms and conditions of access set via an arbitration determination unintentionally prevent a service provider from recovering the efficient costs of its past and future investments in the infrastructure necessary to provide a declared service. As noted by the Productivity Commission:

[239] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36, at 42

[240] Hilmer Report, p 251

> Prices that are set too low can lead to delayed investment, or the non-provision of some infrastructure services[241]

10.24 The Council considers that while access regulation under Part IIIA via arbitration can allow for a risk adjusted commercial return on investment, it is impossible to completely remove all risks of unintentional regulatory error when setting reasonable terms and conditions of access to a service. This was acknowledged by the Productivity Commission:

> Given that regulators are unable to set optimal access prices (prices that would maximise overall economic efficiency) with precision, there is scope for regulatory error in the setting of access terms and conditions. As Allan Fels acknowledged, 'setting the appropriate price requires much detailed, difficult to obtain information about industry cost and demand conditions, making some degree of regulatory error inevitable'[242]

10.25 The Council has considered whether declaration of the Service would be likely to have a materially negative effect on PNO's incentive to efficiently invest in the infrastructure necessary to provide the Service. In this regard, where the majority of costs necessary for investment in a particular access service have already been 'sunk' (i.e. incurred, and can no longer be avoided by the service provider), any distortion to investment decisions associated with declaration of a particular service is likely to be muted. In its submission, PNO has noted that it has planned future investments, including a program to widen the channel at the Port. PNO considers that this risk is substantial, noting the reluctance of investors to fund future projects in circumstances were future revenues and returns could be affected by a potential error following declaration.[243]

10.26 The Council accepts that there is some risk that independently determined terms and conditions of access for the Service via arbitral determination may unintentionally involve regulatory error that distorts these future investment decisions. In this respect it is noted that the 2018 ACCC Arbitration Determination and the 2019 Tribunal Arbitration Determination reached different conclusions in setting the price for the Service. This illustrates that there can be uncertainty with respect to pricing outcomes determined through regulatory processes; and that different decision makers can reach different views on appropriate prices when arbitrating a dispute under Part IIIA.

10.27 The Council considers that regulatory error can take the form of over estimation or under estimation of charges for access to the Service; and as such represents a risk to both PNO and users of the Service. The Council makes no finding regarding for whom the risk of regulatory error is more significant. The Council notes, however, the findings of the Productivity Commission:

> …the consequences for efficiency from setting access prices too low are, all else equal, likely to be worse than setting access prices too high. This is because

[241] Productivity Commission 2013, at page 104

[242] Ibid, page 103

[243] PNO November submission, page 6

> deterring infrastructure investment (from setting access prices too low) is likely to be more costly than allowing service providers to retain some monopoly rent (from setting access prices too high)[244]

10.28 It is noted that, pursuant to the open access arrangements and the Deed, PNO has implemented a dispute resolution process which provides for commercial mediation/arbitration. The mediation/arbitration process is governed by the ACICA rules which include allowing an arbitrator to request information from PNO (rule 32.3) and make a finding binding on the parties (rule 38.2)[245] and the non-derogable provisions of the CA Act. The Council considers that the mediation/arbitration process is comprehensive. Furthermore the pricing principles established by the Deed and open access arrangement are incorporated from section 44ZZCA of the CCA and/or the Competition Principles Agreement. PNO has also introduced measures to provide for transparency of capital expenditure.[246]

10.29 The Council considers that error risks may arise in both regulatory arbitration and in commercial arbitration. While it is possible that declaration of the Service could have an adverse effect on efficient investment in the infrastructure necessary to provide the Service, it is possible that this risk is also present absent declaration.

10.30 On balance, it is not clear that the risk is substantial, due to the fact that significant investments necessary to provide the Service have already occurred. While PNO may seek to make significant future additional investments in infrastructure in order to provide the service in the future; it is unclear how different (if at all) prices for the Service would be in a future with and without declaration of the Service. Further, it is unclear whether the risk of 'regulatory error' for prices determined via arbitration in a future with declaration of the Service is likely to be significantly different to the risk of prices being set at inefficient levels via commercial arbitration under the Deed in a future without declaration of the Service.

**Effect of declaration on investment in dependent markets**

10.31 While it is possible that declaration of a service can have a negative effect on incentives for efficient investment in the infrastructure necessary to provide the service, access regulation may conversely lead to more efficient investment in dependent markets. For instance, if declaration prevents an access provider from setting charges for a service at inefficiently high levels, it can encourage other entities to efficiently invest in infrastructure which complements (or is reliant on access to) the service.[247]

10.32 As has been noted, in the absence of declaration, PNO can be expected to price services at the Port to maximise its profits over the long term. The 10-year Deed offered

244 Revocation Recommendation, page 104

245 See https://acica.org.au/wp-content/uploads/2016/02/ACICA_Rules_2016_Booklet.pdf

246 See for example https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf, at item 7 (c)

247 See also Productivity Commission 2013, at page 82

by PNO to coal producers and (coal) vessel agents, where entered into, provides a significant constraint on PNO's pricing decisions at the Port.

10.33 If PNO was unable to price discriminate between different coal producers seeking to export coal through the Port in a future without declaration of the Service, it would likely seek to set a uniform charge that it believed would maximise its long term profits. As has been noted, however, it is unclear if an access charge (including NSC) set with declaration would be materially lower than the access charge rate set by the PNO Deed.

10.34 The Council accepts that a higher uniform price for the Service in a future without declaration may dampen expectations of profitability for some coal exploration/mining activities relative to expectations that may be held in a future with declaration. This suggests that declaration has the potential to bring levels of investment closer to their efficient level in the market(s) for coal tenements. However, due to the uncertainty regarding whether prices with declaration would be lower than those set without, it is unclear whether declaration will be likely to bring levels of investment closer to efficient levels in the market(s) for coal tenements. Further, even if prices were lower, the extent of any price difference is unlikely to be material and it is unclear the extent to which any possible price differences might affect the level of investment in this market.

10.35 In the absence of declaration, the PNO Deed provides a right of access for both new and existing Port users. The Deed is for an initial period of 10 years and establishes a process for annual adjustments to the access charge. The Council considers that it is likely that the Deed and open access arrangements will provide some certainty to Port users, and that the Deed provides materially greater certainty than the open access arrangements.

10.36 Investors (or potential investors) in coal tenements in the Newcastle catchment will likely face a range of significant uncertainties which will bear upon their investment decisions. In its recent Study Report examining regulation of the resources sector, the Productivity Commission noted that

10.37 Beyond resources-specific regulation, there is a range of factors that can affect business investment in the resources sector. These include a number of other policy areas (including energy and foreign investment policy), workforce issues, taxes and royalties, safety regulations, infrastructure and pre-competitive data.[248]

10.38 The Council considers that there is a range of commercial and regulatory uncertainties that will impact on decisions of investors or potential investors. Relative to these, the Council is not satisfied that uncertainty arising from the pricing of the access charge absent declaration would be material. This is because the access charge, including NSC, is a small component of coal production cost, and because the difference between the NSC with declaration and the NSC without declaration is likely to be an even smaller component of this cost.

[248] Productivity Commission 2020, *Resources Sector Regulation, Study Report,* at page 68.

**Administrative and compliance costs of declaration**

10.39 The Council considers that the administrative and compliance costs of declaration include the costs of negotiating and arbitrating access disputes and, where sought, review of arbitral decisions. The level of such costs may differ depending on factors such as: the likely number of access disputes that may arise in relation to the declared service; the number of parties to these disputes and the complexity of the issues likely to arise.

10.40 PNO has submitted that it has incurred significant costs associated with the previous declaration of the shipping channel service. It considers that even if future access disputes arbitrated by the ACCC are relatively less costly than the Glencore-PNO access dispute, a series of bilateral access disputes involving PNO and a series of access seekers is likely to add a significant additional administrative and compliance cost, particularly if further review of the ACCC determinations (or Tribunal re-arbitrations) is sought.[249]

10.41 In its submission, the NSWMC has argued that the administration and costs incurred by the industry as a whole, in seeking to obtain reasonable terms and conditions of access in the absence of a declaration, far outweigh any compliance and administrative costs PNO may incur should declaration be granted.[250]

10.42 In a future with declaration of the Service, parties may seek arbitration of terms and conditions of access to the Service by the ACCC. The number of access disputes that may be referred to the ACCC, and their complexity, is uncertain.

10.43 It is noted that the ACCC can conduct multi-party arbitrations. While this has the potential to streamline an arbitration process relative to a series of bi-lateral arbitrations with multiple access seekers, it would not be without its own complexity and administrative and compliance costs. The Council considers that arbitrated access disputes will add to the administrative and compliance cost associated with declaration of the Service.

10.44 It can be expected that the PNO open access arrangements and the Deed will also give rise to administrative and compliance cost for PNO and industry participants. On balance the Council considers that these costs are unlikely to be materially different in a future with and without declaration of the Service.

**Other matters**

10.45 In considering an application for declaration, the Council also has regard to the effect of declaration on economic efficiency. This is because the achievement of economic efficiency is, in most cases, likely to be in the public interest. Further, promoting the economically efficient operation of, use of and investment in the infrastructure by

[249] PNO August Submission, at page 20

[250] NSWMC Application, page 53

which services are provided is an important element within the objects of Part IIIA of the CCA.

10.46 The ACCC submits that monopoly providers 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. It notes that such an exercise of market power can lead to:

(a) Allocative inefficiency – absent declaration PNO's prices will exceed its marginal cost of production, this distorts the behaviour of users of the Service, resulting in a 'deadweight loss' due to the misallocation of resources in response to PNO's price signal. PNO cannot correct this inefficiency as it is unable to engage in perfect price discrimination (information limitations and the administrative cost of perfect price discrimination will prevent this from happening).

(b) Productive inefficiency – absent declaration, pricing by PNO that results in revenues exceeding the standalone cost of a service or subset of services will give rise to productive inefficiency. In a contestable market such pricing encourages entry and, in some circumstances, wasteful duplication. In the context of the Port this could take the form of coal producers seeking to replicate any activity of PNO if this meant they would incur a lower resource cost or seeking to bypass PNO's exercise of monopoly power and monopoly rents by repeatedly seeking declaration.

The ACCC argues that monopoly rents cannot be conceived as a benign transfer, since expenditure of real resources undertaken to mitigate or eliminate these rents includes social waste.

(c) Dynamic inefficiency – absent declaration, PNO's rational strategy would be to increase prices and restrict the volume of services, resulting in the employment of fewer capital, labour and intermediate inputs to production. 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.[251]

**Council's view**

**The efficient use of and operation of the infrastructure by which the Services is provided**

10.47 Allocative efficiency requires that available resources be used to produce the goods and services that consumers value most. For any given good or service, allocative efficiency is achieved where marginal benefit is equal to marginal cost (adjusting for social costs/benefits that accrue to buyers and sellers external to the transaction).

10.48 The Council accepts that material allocative inefficiency (and deadweight loss) can arise where prices for a service are significantly in excess of their marginal cost of production *and* such prices lead to materially reduced consumption of the service relative to what

[251] ACCC August submission, pages 7 to 10

would occur if prices equalled marginal cost. As noted by the Productivity Commission, this can occur even where declaration of a service would not materially promote competition in a market dependent on access to this service. The Productivity Commission observed that

> there can still be allocative efficiency costs from monopoly pricing even where this has no effect on competition in a downstream market, because less of the infrastructure service is produced.[252]

10.49 In order to be satisfied that declaration would be likely to materially promote allocative efficiency, with respect to the use of infrastructure by which the Service is provided, the Council would need to be satisfied that declaration would lead to:

(a) A decrease in the price of the Service closer to its marginal cost of production; and

(b) Such a decrease in price would lead to a material increase in use of the Service.

10.50 Importantly, if a difference in price did not lead to a difference in the use of the Service, such a difference in price would not affect allocative efficiency.

10.51 With respect to the first point, it is unclear whether prices for access to the Service, including the NSC, in a future with declaration are likely to be materially lower than prices that will be set in a future without declaration of the Service. While it is likely that an NSC set with declaration would be lower than the open access price currently offered by PNO, it is unclear if an NSC rate set with declaration would be lower than the NSC rate contained within the Deed.

10.52 Further, even if declaration of the Service were to result in a materially lower price for the Service, it is unclear whether this would lead to a material increase in consumption of the Service. This is because demand for the Service at the Port is driven by demand in the world market for coal exported from the Hunter Valley catchment, and the willingness of miners to supply into this market. With respect to these two factors, the Council notes:

(a) For the reasons expressed elsewhere in this Recommendation, the Council is not satisfied that declaration is likely to materially promote competition in the coal export market, or any of its derivative markets, such that demand for coal exported from the Hunter Valley catchment is unlikely to be different with and without declaration of the Service.

(b) The access charge represents a small proportion of the costs of supplying Hunter Valley coal into export markets. While differences in the price of access to the Service, including the NSC, with and without declaration of the Service may impact on the profitability of some marginal coal exploration/mining activities, the Council has no basis to conclude this would be likely to materially affect overall demand for (and hence usage of) the Service at the Port. To the extent it

[252] Productivity Commission 2013, at page 79

did, however, the Council accepts this may involve some level of allocative inefficiency.

10.53 Productive efficiency requires that goods and services be produced at the lowest possible cost. For a natural monopoly market, it will be less costly for one firm to serve demand than two or more firms.[253]

10.54 The Council agrees with the ACCC's submission that, in contestable markets, pricing in excess of the stand-alone cost of providing a service may motivate entry by a rival producer of a service, and that this can lead to inefficient duplication of services and productive inefficiency. However the Service is not provided in a contestable market, nor is there any evidence that any difference in the access charge in a future with and without declaration of the Service is likely to generate inefficient duplication of the Services provided by PNO at the Port. This is not to say that the Council assumes that PNO is productively efficient with respect to its provision of the Service, rather, that it is not persuaded that declaration of the service will be likely to improve productive efficiency at the Port.

10.55 In the first instance, and as previously noted, it is not clear that the access charge, including that of the NSC, in a future with declaration of the Service will be materially lower than that set in a future without declaration.

10.56 Second, even if the access charge was higher in a future without declaration of the Service, it is highly unlikely to elicit entry by a rival producer of services at the Port. This is because new entry would involve largely (or substantially) sunk investment in circumstances where PNO has already made such investment and, as noted in the Council's assessment of criterion (b), is not capacity constrained. The Council notes that a key condition for a market to be contestable is that there are zero (or low) costs of entry and exit from a market.[254] The need to incur substantial sunk costs in order to commence providing port services in competition with PNO represents a substantial barrier to entry for any firm contemplating duplicating investment in infrastructure at the Port; and is unlikely to be overcome by any likely differences in the access charge, and in particular the NSC, with and without declaration of the Service.

10.57 The Council notes the ACCC's contention that wasteful duplication could occur with respect to any of the activities of PNO if prices are higher in a future with declaration than a future without. The Council accepts that activities undertaken by users at the Port to bypass particular elements of the Service could involve productive inefficiency. However, the Council has been provided with no material to indicate what specific activities associated with the provision of the Service users of the Port might seek to bypass in a future without declaration of the Service, nor how likely this would be,

[253] Ibid, page 77

[254] Baumol, William J.; Panzar, John C. and Willig, Robert D. *Contestable markets and the theory of industry structure*. New York: Harcourt Brace Jovanovich, 1982, at pages 349-350.

given the likely differences in the terms and conditions of access to the Service with and without declaration of the Service.

10.58 The Council accepts that the pursuit of opportunities to attain lower prices for access to the Service via statutory processes permitted under Part IIIA of the CCA may represent 'rent seeking' activities. The Council also notes that the present application by the NSWMC represents the third time the Council has considered whether the declaration of a service at the Port meets the requirements set out in Part IIIA of the CCA since 2015. However, the Council does not believe it would be appropriate to declare a service merely to prevent users of it repeatedly lodging applications for declaration in the future, and any consequent resource usage this might involve. There can also be no guarantee that if the Service were declared that PNO would not subsequently again seek a recommendation for revocation of the Service. Further, the ongoing processes with respect to the Glencore-PNO access dispute suggests declaration can also lead to significant expenditure by stakeholders as they seek to avail themselves of statutory processes available under the Part IIIA access regime. The Council is not persuaded that declaration of the Service is likely to lead to a substantial improvement in productive efficiency on account of a reduction in 'rent seeking' activities.

10.59 Dynamic efficiency requires the optimal allocation of resources over time as technology, the availability of inputs and consumer preferences change.[255] For the reasons noted in this Recommendation, the Council does not consider it likely that, absent declaration, the investment decisions of PNO would be materially different to those that may be made should declaration be granted. Accordingly it is not clear that the potential loss of dynamic efficiency absent declaration would be material.

**Efficiency in dependent markets**

10.60 Even if declaration is unlikely to materially improve the efficient use of and operation of the Services provided at the Port, it is possible it could lead to improved efficiency in dependent markets if it leads to a material improvement in competition in these markets. As noted in *Re: Telstra (No. 3)*, there is an important causal link between increased competition and improved economic efficiency:

> … competition between firms … is desirable from a consumer perspective because it creates incentives for firms:
>
> - To lower their prices towards their costs of production in order to attract more consumers to their businesses so that they can expand their market share; and
>
> - To seek greater productive efficiencies (now and over time) so that they may lower their costs of production. In turn, this enables them profitably to lower prices for consumers in ways that will attract more consumers to their business in order to increase their share of the market.[256]

[255] Productivity Commission 2013, at page 77

[256] *Re: Telstra (No. 3)* [2007] ACompT 3 at [97].

10.61 If third party access to infrastructure services increases competition in upstream or downstream markets, prices and output in those markets should tend toward their allocatively efficient levels.[257]

10.62 As noted in its consideration of criterion (a), however, the Council considers that it is unlikely declaration of the Service would promote a material increase in competition in any of the dependent markets. Given the muted effect that declaration is likely to have on competition in these markets, it also makes it unlikely that declaration would materially promote efficiency in any of these markets.

**Council's assessment of criterion (d)**

10.63 In respect of the mandatory considerations in subsection 44CA(3), the Council considers that access (or increased access) to the service, on reasonable terms and conditions, as a result of 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.
- Is unlikely to significantly affect investment in dependent markets.
- Administrative and compliance costs are likely to arise both with and without declaration. On balance the Council considers that these costs are unlikely to be materially different in a future with and without declaration of the Service

10.64 The Council's view is that criterion (d) is not satisfied.

[257] Productivity Commission 2013, page 77

## 11 Conclusion and recommendation

11.1 The Council's view, having regard to the objects of Part IIIA, is that criterion (a) and criterion (d) are not satisfied.

11.2 The Council considers that the requirements for declaration are not satisfied. Accordingly the Council is recommends to the designated Minister that declaration not be granted.

## 12 Duration of declaration

12.1 Although the Council's assessment is that the Service not be declared, consideration has been given to the duration for which the Service should be declared, in the event that the designated Minister decides to declare the Service.

12.2 Section 44H(8) of the CCA requires that where a service is declared, the declaration must specify an expiry date for the declaration. The expiry date determines the duration of declaration, which can vary according to the circumstances of each application.

12.3 In considering the appropriate duration of declaration, the Council has regard to the importance of long term certainty for business—including access seekers, service providers and other affected parties. It also considers that a declaration should apply for long enough to ensure that the benefits expected from access are able to be realised. This requires that the rights granted by declaration be in place long enough to influence the pattern of competition in relevant dependent markets.

12.4 Against these considerations must be balanced the potential for technological development, reform initiatives (such as changes in legislation governing access to the relevant service) and future market evolution. Further, the Council considers that access regulation governing services, including the right granted by declaration, should be reviewed periodically. The expiry of a declaration provides such an opportunity. The Council notes that any declaration can be revoked on the recommendation of the Council (s 44J of the CCA). The Council may make such a recommendation if it considers that the declaration criteria are no longer met. This would allow the Council to reconsider a declaration recommendation in the event of a significant development that had an impact on the basis of its recommendation.

12.5 The NSWMC has sought declaration for a period of twenty years or longer given the long term nature of coal mines and the significant investment involved.

12.6 The 2016 Glencore Declaration was granted for a period of fifteen years. In lodging its application Glencore noted that this period was appropriate given the long term notice of projects in the coal industry in the Hunter Valley.[258]

12.7 The Council considers that should the shipping channel services at the Port of Newcastle be declared, a period of fifteen years would be appropriate. The Council considers that this term would provide certainty for parties and be sufficient to allow access seekers to realise the benefits of declaration. It would also be a sufficient period for declaration to influence the pattern of competition in dependent markets.

12.8 As was noted in Chapter 8, the Council considers that the Port could meet the total foreseeable demand in the market in the Relevant Term.

[258] Glencore 2015 Application, page 33

# Appendix A List of application materials and submissions

| A.1 Application |
|---|
| New South Wales Minerals Council, Application for a declaration recommendation in relation to the Port of Newcastle dated 23 July 2020. |
| Annexure A: Port of Newcastle Operations Pty Limited - Port User Deed. |
| Annexure B: Port of Newcastle Operations Pty Limited - Producer Deed. |
| Annexure C: Port of Newcastle Operations Pty Limited - Vessel Agent Deed. |
| Annexure D: Port of Newcastle Operations Pty Limited - 2019 Schedule of Charges. |
| Annexure E: Port of Newcastle Operations Pty Limited - 2020 Schedule of Charges. |
| Annexure F: Plan of channel. |
| Annexure G: Synergies Economic Consulting, 23 July 2020, Port of Newcastle Operations ability and incentive to exercise market power and its impact on competition in Newcastle catchment coal tenements market dated July 2020; Provided to the Council with the NSWMC's Application. |
| **A.2 Submissions in response to application** |
| Australian Competition and Consumer Commission, submission to the Council dated 26 August 2020. |
| Bloomfield Group, submission to the Council dated 25 August 2020. |
| Bloomfield Group, submission to the Council dated 3 September 2020. |
| Glencore Coal Assets Australia Pty Ltd, submission to the Council dated 25 August 2020. |
| Glencore Coal Assets Australia Pty Ltd, submission to the Council dated 7 September 2020. |
| Malabar Coal Limited, submission to the Council dated 24 August 2020. |
| Malabar Resources Limited, submission to the Council dated 2 September 2020. |
| New South Wales Minerals Council, submission to the Council dated 5 September 2020. |
| [C-i-C] Port of Newcastle Operations Pty Limited, submission to the Council dated 26 August 2020 [C-i-C]. |
| [C-i-C] Port of Newcastle Operations Pty Limited, submission to the Council dated 7 September 2020 [C-i-C]. |
| Port Waratah Coal Services, submission to the Council dated 26 August 2020. |
| Yancoal Australia Ltd, submission to the Council dated 4 September 2020. |
| **A.3 Submissions in response to Draft Recommendation** |
| Australian Competition and Consumer Commission, submission to the Council dated 23 November 2020. |
| Bloomfield Group, submission to the Council dated 19 November 2020. |
| Glencore Coal Assets Australia Pty Ltd, submission to the Council dated 24 November 2020. |
| Malabar Resources Ltd, submission to the Council dated 20 November 2020. |
| New South Wales Minerals Council, submission to the Council dated 25 November 2020. |

[C-i-C] Port of Newcastle Operations Pty Limited, submission to the Council dated 25 November 2020 [C-i-C].


## A.4 Declarations and determinations


Australian Competition and Consumer Commission, 18 September 2018, Final Determination: Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd.

Australian Competition and Consumer Commission, 18 September 2018, Final Determination: Statement of Reasons - Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd.

Australian Competition and Consumer Commission, 27 August 2020, Determination: Application for authorisation AA1000473 lodged by NSW Minerals Council and mining companies.

Glencore Coal Pty Ltd, May 2015, Application for a declaration recommendation in relation to the Port of Newcastle.

Annexure A – Schedule of Pricing.

Annexure B – Calculation of Impact of Price Increase.

Annexure C – Plan of Channel.

Annexure D – Letter from Dr Rob Yeates dated 6 May 2015.

Hon. Ross Cameron MP, 29 January 2004, Statement of decision and reasons concerning the application for declaration of airside services provided by Sydney Airport Corporation Limited.

Hon. Josh Frydenberg MP, 24 September 2019, Statement confirming the deeming of the National Competition Council Recommendation.

National Competition Council, 22 July 2019, Revocation of the declaration of the shipping channel service at the Port of Newcastle: Recommendation.

National Competition Council, 2 November 2015, Declaration of the shipping channel service at the Port of Newcastle: Final recommendation.

National Competition Council, November 2003, Application by Virgin Blue for declaration of airside services at Sydney Airport: Final Recommendation.

Port of Newcastle Operations Pty Ltd, 2 July 2018, Request that declaration at the Port of Newcastle be revoked.

Queensland Competition Authority, March 2020, Final recommendations: Declaration reviews: Aurizon Network, Queensland Rail and DBCT.

Queensland Competition Authority, March 2020, Part C: DBCT declaration review.


## A.5 Reports


Australian Government, 24 November 2015, Australian Government response to the Productivity Commission and Competition Policy Review recommendations on the National Access Regime.

Committee of Inquiry comprised of Professor Ian Harper (Chair), Peter Anderson, Su McCluskey and Michael O'Bryan QC, 31 March 2015, Competition Policy Review: Final Report.

Committee of Inquiry comprised of Professor Frederick G Hilmer (Chair), Mark R Rayner and Geoffrey Q Taperell, 25 August 1993, National Competition Policy Review Report.

National Competition Council, April 2018, Declaration of Services: A guide to declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth).

Productivity Commission, 25 October 2013, National Access Regime - Inquiry Report.

Productivity Commission, November 2020, Resources Sector Regulation - Study Report.

## A.6 Texts


Baumol, William J, Panzar, John C and Willig, Robert D., Contestable markets and the theory of industry structure, New York: Harcourt Brace Jovanovich, 1982.

Motta, M, Competition Policy – Theory and Practice, 2004.

Tirole, J, The Theory of Industrial Organisation, 5th edition, 1992.


## A.7 Tribunal and court decisions


*Air New Zealand Ltd v Australian Competition and Consumer Commission; PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2017) 262 CLR 207.

*Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1.

*Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* [2003] HCA; (2003) 215 CLR 374.

*Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145; (2020) 382 ALR 331.

*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124; (2017) 253 FCR 115.

*Port of Newcastle Operations Pty Limited v Australian Competition Tribunal & Ors* [2018] HCA Trans 55 (23 March 2018).

*Queensland Wire Industries v BHP* (1989) 167 CLR 177.

*Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6.

*Re Fortescue Metals Group Limited* (2010) 271 ALR 256.

*Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481.

*Re Telstra Corporation Ltd (No. 3)* [2007] ACompT 3; (2007) ATPR 42-160.

*Re Virgin Blue Airlines Pty Limited* [2005] ACompT 5; (2006) ATPR 42-092.

*Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146; (2006) 155 FCR 124.

*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; (2012) 246 CLR 379.

*Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492.


## A.8 Acts and other instruments


Commercial Arbitration Act 2010 No 61 (NSW).

Competition and Consumer Act 2010 (Cth) (Vol 1).

Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017.

Ports and Maritime Administration Act 1995 (NSW).

Ports and Maritime Administration Regulation 2012 (NSW).

Queensland Government Gazette Vol 384 No 31, 1 June 2020.


## A.9 Other materials


Australian Centre for International Commercial Arbitration, 1 January 2016, Incorporating Clauses for Arbitration and Mediation.

| |
|---|
| BHP, February 2020, Annual Report 2020. |
| Glencore plc, 3 December 2019, "2019 Investor Update". |
| Peabody Energy Corporation, Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended 31 December 2019. |
| Port of Newcastle Operations Pty Limited, 2018, Port Master Plan 2040. |
| Port of Newcastle, 13 March 2020, Schedule of Service Charges. |
| Port of Newcastle, April 2020, Port of Newcastle 2019 Trade Report. |
| State of New South Wales (Department of Regional NSW), June 2020, Strategic Statement on Coal Exploration and Mining in NSW. |
| Whitehaven Coal Limited, 15 August 2019, Full Year Result FY2019. |
| Yancoal, 2020, Investors: 2019 Full Year Results Highlights. |

# TREASURY MINISTERIAL SUBMISSION

12 February 2021 PDR No. MS21-000210

Treasurer

## NATIONAL ACCESS REGIME - PORT OF NEWCASTLE - DECISION AND STATEMENT OF REASONS

**TIMING:** Urgent, by noon on Tuesday 16 February 2021 to facilitate publishing your final decision and statement of reasons by 16 February 2021 when the statutory 60-day timeframe expires.

**Recommendation**

- That you confirm that you have decided to accept the NCC's recommendation **not to** declare the Service at the Port of Newcastle.

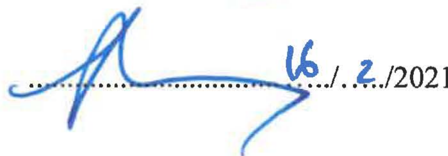
**Agreed/Not Agreed**

- That you approve the document at Attachment C containing your decision and statement of reasons.

**Approved/Not Approved**

- That you sign the letters to the President of the NCC, the New South Wales Minerals Council and Port of Newcastle Operations at Attachments D, E and F informing them of your decision.

**Signed/Not Signed**

Signature:  16/2/2021

## KEY POINTS

- On 23 July 2020, the NSW Minerals Council applied to the National Competition Council (NCC) for the declaration of the right to access and use the following services (the Service) at the Port of Newcastle under the National Access Regime (NAR):

  '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.'

- Where a service is declared under the NAR, and an access seeker and service provider is unable to reach commercial agreement about access to the service, a party may notify the Australian Competition and Consumer Commission (ACCC) about the access dispute and seek arbitration by the ACCC.

- On 18 December 2020, the NCC provided you with its final recommendation that you not declare the service, because it found that the service does not meet two of the four declaration criteria in section 44CA of the *Competition and Consumer Act 2010* (CCA).
  - The NCC found that the Port meets the 'natural monopoly' and 'national significance' criteria in paragraphs 44CA(1)(b) and (c). However the NCC found that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration would not meet the 'competition' and 'public interest' criteria in paragraphs 44CA(1)(a) and (d).
  - The NCC's letter and final recommendation are at Attachments A and B.
- As the designated Commonwealth Minister, you are required to decide whether or not to declare the service, and to publish your decision and reasons by the end of Tuesday 16 February 2021. If you do not publish your decision by that date, you will be deemed to have decided not to declare the service.

**Your decision**

- In response to MS20-002839, you indicated your disposition to accept the NCC's recommendation not to bring the Port of Newcastle into the National Access Regime (i.e. not to declare the Service).
- You should make a decision based on the NCC's recommendation without any further information from the NCC. You should not look behind the NCC's recommendation, including by reviewing the submissions made to the NCC. You should also **not meet with, or consider representations from, any stakeholders** including the ACCC on your decision while it is under consideration.
- You may only decide to bring the Port of Newcastle into the NAR once you have considered the same criteria as the NCC was required to consider in making its recommendation to you.
- We consider that the NCC recommendation and reasons provide a rational and justifiable basis for not declaring the Port.
  - The NCC has undertaken extensive consultation with interested parties, prepared a considered analysis of the issues and formed reasonable conclusions on the matters you need to consider, from which its recommendation to not bring the Port into the NAR rationally follows.
- A proposed decision and statement of reasons (draft statement) for your consideration and signature is at Attachment C.
  - **Client legal privilege**
  - The draft statement follows the NCC's reasoning (on the assumption that your reasons for decision reflect the reasons in the NCC recommendation).
  - You should personally consider the draft statement and make any changes that are necessary to ensure that it accurately reflects the reasons for your decision.

- If you agree with the proposed decision and statement of reasons, we will arrange for that document to be published on the Treasury website. Publishing your decision and statement of reasons document is necessary to give effect to your decision.
  - A letter to the President of the NCC, Ms Julie-Anne Schafer, requesting publication of your decision and statement of reasons in parallel on the NCC website is at Attachment D.
- You are also required to give a copy of your decision and statement of reasons to the applicant NSW Minerals Council and the provider of the Service, Port of Newcastle Operations (PNO).
  - Draft letters to the NSW Minerals Council (and copied to their legal representative) and PNO to advise them of your decision are at Attachments E and F.
- A draft media release for your consideration is at Attachment G.
  - As the matter may be subject to review processes, we strongly recommend that you do not provide any additional comment on this matter.
  - The draft media release contains reference to separate work you have asked the Treasury to undertake on the timeliness of processes related to the NAR. We will work with your office on settling policy authority to announce that work.

**Review Process**

- Parties may apply for review of your decision by the Australian Competition Tribunal and/or the Federal Court of Australia.
  - In the event of an application to the Tribunal, the CCA requires the decision-maker to provide the Tribunal all of the information taken into account in making the decision. This would include all material provided to you by the NCC and Treasury.
- Given the interests involved in this matter and the history of litigation about a declaration over the Port of Newcastle, we consider there is a reasonable likelihood of a party seeking review of your decision. Client legal privilege
- The declaration criteria in Part IIIA of the CCA were amended by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*. If a party seeks review of your decision, this would be the first case in which there has been review of a declaration decision made under the amended criteria.

Tom Dickson
Assistant Secretary, Market Conduct Division
Ext: 02 6263 2868

Contact Officer:

Client Legal Privilege

18 December 2020

The Hon Josh Frydenberg
Treasurer
Parliament House
Canberra ACT 2600

Via email josh.frydenberg@treasury.gov.au

Dear Treasurer

**Application for declaration of certain services at the Port of Newcastle – Recommendation**

The National Competition Council (Council) has formed its Recommendation in response to the application (Application) made under section 44F of the *Competition and Consumer Act* (CCA) by the New South Wales Minerals Council (NSW Minerals Council) on 23 July 2020 for declaration of certain services (Service) at the Port of Newcastle (Port).

Having had regard to the declaration criteria and the objects of Part IIIA of the CCA, the Council recommends that you do not declare the Service.

The Council cannot recommend that a service be declared unless it is satisfied that all of the declaration criteria set out in section 44CA of the CCA have been met. In the current Application, the Council is not satisfied that declaration criteria (a) and (d) are met.

The Council's full reasons for its recommendation are set out in the enclosed report.

***Summary of the Council's process***

The Council has engaged in public consultation to inform its Recommendation.

This has involved:

- publication of the Application on the Council's website shortly after it was received. The receipt of the Application was also advertised in *The Australian* newspaper on 3 August 2020.
- inviting written submissions on the Application and in response to the Full Court of the Federal Court of Australia's decision in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145. The Council received 12 submissions in response to these invitations.
- publication of a Draft Recommendation responding to the Application. The Council invited written submissions responding to the Draft Recommendation; six submissions were received.

***Your Decision***

Under subsection 44H(1) of the CCA, you must decide to declare or not declare the Service. Under subsection 44H(8) of the CCA, if you declare the Service, the declaration must specify the expiry date of the declaration. In making this decision, you must be satisfied of all of the declaration criteria set out in section 44CA of the CCA and you must have regard to the objects of Part IIIA as set out in section 44AA of the CCA.

Section 44HA of the CCA requires that you publish, by electronic or other means, your decision and your reasons for your decision, and provide copies to the applicant and the service provider. Section 44H(9) provides that, if you have not published your decision within 60 days after receiving the Council's recommendation, you are taken to have made a decision in accordance with the Council's recommendation. Applying section 36 of the *Acts Interpretation Act 1901* the Council understands that the 60-day period ends on Wednesday, 17 February 2021.

The Council must publish its Recommendation on the day you make your decision or as soon as practicable thereafter. If you do not make a decision within the 60-day period, the Council must publish its Recommendation on the day or as soon as practicable after that period ends.

If you have any questions regarding this matter, or if there is any way in which the Council can assist you further in deciding the Application, your officers are welcome to contact Richard York, Executive Director of the Council, on 03 9290 1993.

Yours sincerely,

Julie-Anne Schafer
President

Enclosure

1. Application for declaration of certain services at the Port of Newcastle – Recommendation

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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.

[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

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Ms Julie-Anne Schafer
President
National Competition Council
GPO Box 250
MELBOURNE VIC 3001

Dear Ms Schafer

Thank you for your letter of your letter of 18 December 2020 advising of the final recommendation of the National Competition Council (NCC) regarding the application by the New South Wales Minerals Council for declaration of a service at the Port of Newcastle.

Following consideration of the NCC's final recommendation, I have decided not to declare the service. A copy of my Decision and Statement of Reasons is attached.

I would appreciate you making my Decision and Statement of Reasons available on the NCC's website.

Yours sincerely

THE HON JOSH FRYDENBERG MP
16 / 2 / 2021

Enc. Decision and Statement of Reasons

Cc Mr Richard York, Executive Director, NCC

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Mr Andrew Abbey
Policy Director
New South Wales Minerals Councils
Level 3, 12 O'Connell Street
SYDNEY NSW 2000

Dear Mr Abbey

I write to you in relation to the New South Wales Minerals Council's application, dated 23 July 2020, for a recommendation that certain services at the Port of Newcastle be declared under the National Access Regime in Part IIIA of the *Competition and Consumer Act 2010* (Cth).

The National Competition Council provided its final recommendation in relation to that declaration application to me on 18 December 2020.

I have decided not to declare the services. Please find enclosed a copy of my Decision and Statement of Reasons.

Yours sincerely

THE HON JOSH FRYDENBERG MP
16 / 2 / 2021

Enc. Decision and Statement of Reasons

Cc Mr Dave Poddar, Partner, Clifford Chance

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

**THE HON JOSH FRYDENBERG MP**
**TREASURER**

Mr Simon Byrnes
Chief Commercial Officer
Port of Newcastle Operations Pty Ltd
Level 4, 251 Wharf Road
NEWCASTLE NSW 2300

Dear Mr Byrnes

I write to you in relation to the New South Wales Minerals Council's application, dated 23 July 2020, for a recommendation that certain services at the Port of Newcastle be declared under the National Access Regime in Part IIIA of the *Competition and Consumer Act 2010* (Cth).

The National Competition Council provided its final recommendation in relation to that declaration application to me on 18 December 2020.

I have decided not to declare the services. Please find enclosed a copy of my Decision and Statement of Reasons.

Yours sincerely

THE HON JOSH FRYDENBERG MP
6 / 2 / 2021

Enc. Decision and Statement of Reasons

Parliament House Canberra ACT 2600 Australia
Telephone: 61 2 6277 7340 | Facsimile: 61 2 6273 3420

[Insert date] 2021

# DECISION ON APPLICATION TO DECLARE A SERVICE AT PORT OF NEWCASTLE

On 23 July 2020, the New South Wales Minerals Council applied to the National Competition Council (NCC) requesting that it recommend that certain services at the Port of Newcastle be declared under the National Access Regime. The NCC's recommendation not to declare the service was received on 18 December 2020.

I have decided not to declare the service.

The NCC's final recommendation, my decision and reasons are available on the [insert website].

As a separate matter, I am aware that processes relating to Australia's National Access Regime have the potential to take many years. It has become apparent that the National Access Regime could benefit from an examination to ascertain whether the length of time that processes under the Regime can take is appropriate. I have tasked the Department of the Treasury with undertaking that examination and reporting to me in the second half of this year.

**Ends**