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:	Submissions
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: 3/06/2021 9:00 AM

Important information

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

COMMONWEALTH OF AUSTRALIA

***Competition and Consumer Act 2010* (Cth)**

File No: ACT 1 of 2021

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

Applicant: New South Wales Minerals Council

SUBMISSIONS OF THE NEW SOUTH WALES MINERALS COUNCIL

A. INTRODUCTION

1. The applicant, New South Wales Minerals Council (**NSWMC**), seeks review of the decision of the Hon Josh Frydenberg, the Commonwealth Treasurer (**Minister**), not to declare the service provided by Port of Newcastle Operations Pty Ltd (**PNO**) at the **Port** of Newcastle.

2. On 23 July 2020, NSWMC made an **Application** to the National Competition **Council** under s 44F(2)(b) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) for a recommendation in respect of the following **Service**:

> 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.

3. On 18 December 2020, the Council published its **Final Recommendation** together with reasons pursuant to s 44GC(1) of the CCA. The Council recommended that the Service not be declared on the grounds that it did not meet the declaration criteria in s 44CA(1)(a) and (d) of the CCA.

4. On 16 February 2021, the Minister published his **Decision** together with reasons pursuant to s 44HA(1) of the CCA. Consistent with the views of the Council, the Minister decided not to declare the Service on the basis that declaration criterion (a) and (d) of s 44CA(1) were not met. The Minister was otherwise satisfied that declaration criterion (b) and (c) were satisfied.

5. On 8 March 2021, NSWMC made an application to the Tribunal under s 44K(2) of the CCA for review of the Decision.

6. Under s 44K(4) of the CCA, the review of the Decision by the Tribunal is a "re-consideration of the matter". The matter is the Decision not to declare the Service. The Tribunal's task is to conduct its reconsideration by reference to the material referred to in s 44ZZOAA: s 44K(4). Where the designated Minister has decided not to declare a service, as in the present case, s 44K(8) provides that the Tribunal may either affirm that decision or set it aside, and declare the service. For the purposes of a review, s 44K(5)

provides that the Tribunal has the same powers as the designated Minister. The Tribunal must reach its decision as to the declaration by reference to the criteria set out in s 44H(4).

7. In circumstances where there is no dispute that declaration criterion (b) and (c) are satisfied in respect of the Service for the reasons identified by the Minister, these submissions are confined to declaration criterion (a) and (d) of s 44CA(1) of the CCA.

B. BACKGROUND

The Hunter Valley Coal Industry

8. The Hunter Valley coal industry, including its associated supply chain, is one of the largest coal export operations in the world: *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145; 382 ALR 331 at [11] (***Glencore v Tribunal***). The Hunter Valley/Newcastle coalfields produce around 170 million tonnes of saleable coal per year: *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [8] (***Application by Glencore***). In 2018-19, 96% of the 168 million tonnes of coal (both metallurgical and thermal) exported from New South Wales was exported through the Port of Newcastle (Application, pp 8-9).

9. The Hunter Valley coal supply chain is made up of: 11 coal producers who export their coal; the rail track provider; four rail haulage operators; three industry-owned coal export terminals; and the Hunter Valley Coal Chain Coordinator. Coal mining in the Hunter Valley region is also supported by a significant array of mining services and contractors, such as exploration services, geotechnical specialists, drill and blast contractors, and machinery manufacturing, repair, and maintenance (Application, pp 13-14).

10. There are around 35 operating coal mines in the Hunter Valley operated by the 11 coal producers as well as other coal projects at various stages of exploration, approval, and development (Application, p 9-10).

11. The coal mines exporting through the Hunter Valley employ the vast majority of the 22,000 people directly employed by the New South Wales coal mining industry. That industry directly spent $13.7 billion in the New South Wales economy in 2018-19. About 39.5% of that expenditure came from coal mining in the Hunter Valley region (Application, p 8).

Port privatisation

12. In May 2014, the joint venture parents of PNO – Hastings Funds Management and China Merchants Group – entered into a long-term lease arrangement with the New South Wales **State** Government for the privatisation of the Port assets, including the shipping channels (that is, the Service). The transaction generated gross proceeds of approximately $1.75 billion to the State. PNO subsequently revised its valuation of the Port in its accounts to $2.4 billion: *Application by Glencore* at [12].

13. Currently, the two shareholders in PNO are The Infrastructure Fund (**TIF**) and China Merchants Port Holdings Company (**CM Port**) which has extensive container operations (Application, p 15).

Port charges and price increases

14. As the new port operator from May 2014 onwards, PNO controls the terms and conditions of access to the Service. PNO relies on the statutory powers conferred under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (**PMAA**) in order to levy charges on the vessels which use the Service. On each occasion a vessel enters the shipping channels, it incurs liability to pay usage charges for use of the Service at rates determined by PNO. PNO has the express entitlement under the lease of the Port from the State to exclude access to the Service if the shipping charges are not paid (*Application by Glencore* at [13]-[15]), and the PMAA does not provide any access seeker with any right to negotiate the terms and conditions of access or to provide for any enforcement process if agreement as to the terms of access cannot be reached (*Application by Glencore* at [15]).

15. PNO publishes a **Schedule** of Service Charges that apply to the use of the Port, pursuant to the PMAA, which includes a Navigation Service Charge (**NSC**) and a Wharfage Charge (**WC**) for use of the Service:

    a. The NSC is imposed on vessels which enter the Port, and is payable in respect of general use by a vessel of the Port and its infrastructure (PMAA s 51); and

    b. The WC is imposed on the owner of the cargo at the time it is loaded or unloaded in respect of the availability of a site at which stevedoring operations may be carried out (i.e. berthing facilities) (PMAA s 61).

16. PNO may vary the Schedule charges from time to time, including varying or introducing new fees without consultation with Port users (see *Application by Glencore* at [43]).

17. After PNO assumed the role of port operator, PNO increased the NSC at the Port, by between approximately 40% and 60% for some vessel types – particularly the larger more efficient vessels. Price increases also occurred for non-coal vessels. Those price increases were not accompanied by any change in the nature or quality of the Service and were imposed by PNO without significant consultation with users of the Service (*Application by Glencore* at [16]).

18. PNO has further increased the NSC. For example, between 2019-20, PNO increased the NSC by 33.5%. That price increase followed the deemed revocation of the declared service at the Port by the Minister on 24 September 2019 (s 44J(7) of the CCA). Again, these increases were not accompanied by any change in the nature or quality of the Service, and were imposed by PNO without significant consultation with users of the Service (Application, p 16).

19. In all events, the price of the NSC has increased 142.9% between privatisation in 2014 to 2020, and the WC has increased 21.6% over the same period.

C. LEGISLATIVE FRAMEWORK: PART IIIA

20. The National Access Regime established by Part IIIA of the CCA (following the report of the National Competition Policy Review in 1993) provides a regime to facilitate third

parties obtaining access or increased access to services provided by means of significant infrastructure facilities of national significance (known in the United States as "essential facilities"): *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2 at [3] (***Pilbara Tribunal Remitter***). The rationale underlying the regime is that access or increased access to certain facilities with natural monopoly characteristics is required to encourage competition in related markets: *Re* ***Virgin Blue*** *Airlines Pty Ltd* [2005] ACompT 5; 195 FLR 242 at [2].

21. The background to the introduction of Part IIIA was set out by the Full Court in *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 155 FCR 124 at [2]-[21] and in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 at [91]-[110]: ***Pilbara*** *Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at [61].

22. When considering the meaning and application of each criterion in s 44CA, the Tribunal must also have regard to the objects in s 44AA of the CCA, being the: (1) efficient use of, operation of, and investment in infrastructure; and (2) promotion of effective competition in dependent markets: *Re* ***Fortescue*** *Metals Group Ltd* [2010] ACompT 2; 271 ALR 256 at [796].

23. The objects clause in s 44AA was introduced following a recommendation of the Productivity Commission that a new objects clause be inserted in Part IIIA and that it should "incorporate an explicit efficiency objective reflecting both short term and long term considerations — in particular, recognising legitimate user/consumer interests and long term investment dimensions" (Productivity Commission, *Review of the National Access Regime*, 28 September 2001, at 129-130).

24. In *Fortescue* at [797], the Tribunal set out its understanding of the objects clause in the following terms:

> If there is efficient investment in infrastructure and competition in dependent markets, welfare is maximised. At a simple level, both efficient use of infrastructure and competition maximise welfare because they result in lower prices, better products and greater choice. More technically, competition in particular ensures efficient market outcomes. When competition is not inhibited by exclusionary practices or anti-competitive agreements, firms' rivalry for customers by offering lower prices, superior quality or new functions requires them to adopt more efficient means of doing business. There are different types of efficiencies, some more important than others.

25. In *Glencore v Tribunal*, the Full Court (Allsop CJ, Beach and Colvin JJ) emphasised the relationship between *efficiency* (technical or productive, allocative, and dynamic) and "effective competition" at [31]-[44]. The Court stated at [34]:

> … establishing an access regime is not directed at the problem of monopoly pricing per se, it is concerned with the wider efficiencies that might be delivered in other markets if there is access on price and terms that are established by an independent process guided by the public interest, principles of economic efficiency and the interests of the owner of the facility and other users.

Criterion (a)

26. Central to this application is the requirement in criterion (a) of s 44CA(1) which reads:

> (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.

27. Criterion (a) was amended by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), which came into effect in November 2017. The amendments followed the recommendations of the Productivity Commission as part of its response to the Harper Review (Explanatory Memorandum, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) (**EM**), [12.9]-[12.12]). There amendment was intended to "clarify" the declaration criteria (**EM** at [12.12].

28. Criterion (a) as amended requires an assessment of whether access (or increased access) on reasonable terms and conditions would promote a material increase in competition in a market other than the market for the service (**dependent market**). That is, the amendments focus the test on the effect of declaration (EM at [12.19]).

29. This requires a comparison of two future scenarios – one in which the service is declared and access (or increased access) to the declared service is available on reasonable terms and conditions (**with declaration**) (referred to as the "factual"), and one in which the service is not declared (**without declaration**) (referred to as the "counterfactual"). 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 (EM at [12.20]).

30. On one view, that test is not unfamiliar to the Tribunal, as it was applied by the Tribunal in *Re* ***Sydney Airports Corporation*** *Ltd* (2000) 156 FLR 10; *Re* ***Duke Eastern Gas*** *Pipeline Pty Ltd* [2001] ACompT 2; 162 FLR 1; and *Virgin Blue*.

Access (or increased access) on "reasonable terms and conditions"

31. What is access (or increased access) on "reasonable terms and conditions" is not defined in the legislation. The EM explains at [12.21]:

> 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.

32. On a proper construction, the question of reasonable terms and conditions of access (or increased access[1]) must be informed by Division 3 of Part IIIA, which provides for access to a declared service by way of negotiation and arbitration before the ACCC. This regime is designed to give access seekers sufficient certainty that they will be able to obtain access on reasonable terms.[2]

33. This does not mean that the Tribunal necessarily needs to come to a view on the "outcome" (Final Recommendation, [1.12]) or the "*precise terms and conditions*" (Final Recommendation, [4.20]) of negotiation and arbitration under Division 3 of Part IIIA but (at least in the circumstance of this case) the Tribunal does need to come to a view as to whether the terms and conditions of access to the Service without declaration are "reasonable terms and conditions". To this end, if the terms and conditions of access to the service without declaration are repugnant to Division 3 of Part IIIA, they will not be "reasonable terms and conditions" as a result of declaration for the purposes of criterion (a).

Promote a material increase in competition

34. Competition, in the context of the CCA, is a process, rather than a static state of affairs, and is understood to refer to the nature and extent of rivalry in a given market: *Virgin Blue* at [145].[3] In considering the meaning of competition, there is a distinction between, on the one hand, the process of competition and, on the other, the extent of competition, which is the outcome of that process: *Fortescue* at [1049].

35. The concept of "promote" competition in the criterion does not correspond to measuring quantifiable increases in competition or the state of competition, but expresses a more flexible idea of creating the conditions or environment for improving competition from what it would be otherwise: *Sydney Airports Corporation* at [106]-[107]; *Duke Eastern Gas* at [75]; *Virgin Blue* at [146]; *Fortescue* at [1060].[4]

36. In *Sydney Airports Corporation*, the Tribunal said at [106]:[5]

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[1] Increased access will occur if a declaration is made because the terms and conditions of access will change and the right of access will be enhanced*: Virgin Blue* at [144].

[2] See, in this regard, the Queensland Competition Authority's Final Decision: DBCT 2019 Draft Access Undertaking March 2021 at 9, stating: "We consider that having regard to the matters in section 120 of the QCA Act in an arbitration, including the value of the service to an access seeker or class of access seekers or users, provides access seekers with sufficient certainty that they will be able to obtain access to DBCT on reasonable terms"; and at 105: "Overall, we consider that having regard to the matters in section 120 of the QCA Act in an arbitration provides access seekers with sufficient certainty that they will be able to obtain access to DBCT on reasonable terms". Section 120 of the *Queensland Competition Authority Act 1997* (Qld) substantially mirrors s 44X of the CCA.

[3] See also *Re Queensland Co-operative Milling Association Ltd* (1976) 8 ALR 481 at 515; *Adamson v West Perth Football Club (Incorporated)* [1979] FCA 122; 39 FLR 199 at 224-5; *Outboard Marine Australia Pty Ltd v Hecar Investments (No 6) Pty Ltd* [1982] FCA 285; 66 FLR 120 at 123-4; ***Universal Music Australia*** *Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529 at [242]; *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2013] FCA 909; 310 ALR 165 at [3013].

[4] See also *Re Services Sydney Pty Ltd* [2005] ACompT 7; 227 ALR 140 at [132]; *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 at [224]-[225].

[5] *Sydney Airports Corporation* at [106].

> The Tribunal does not consider that the notion of "promoting" competition in [criterion (a)] requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of "promoting" competition … involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.

37. Put another way, the enquiry emphasises evaluative or qualitative judgments about the future conditions and environment for competition, and is not confined to quantitative effects.[6] In this respect, the existing state of competition in the market may be relevant to establishing the likely future state of competition in the market (with and without declaration), but this is not always the case because the enquiry is forward looking: *Sydney Airports Corporation* at [108]; *Fortescue* at [1048].

38. In *Re Virgin Blue*, the Tribunal said at [151]-[156]:

> [151]…one should ask whether past or present conduct of the service provider informs us as to the likely future conduct of the service provider and the effect on competition in the dependent market of such conduct. If such conduct has, or is likely to have, an adverse effect on competition, then one looks at declaration and asks whether that will enhance competition in the dependent market by creating opportunities and an environment in which the impact of such conduct and its effect on competition may be lessened or diminished.
>
> [152] When one considers the counterfactual, the current scenario may be used as a benchmark, taking into account past and current events and circumstances and extrapolating them into the future. A consideration of the factual involves an assessment of whether increased access on different terms and conditions would enhance the environment for competition in the dependent market and create or open up more opportunities for competitive conduct in the dependent market.
> …
> [154] This comparison is assisted by any evidence of monopolistic behaviour, or of a capacity and willingness on the part of the monopolist to engage in conduct which significantly disrupts or affects competition in the dependent market.
> …
> [156] Whether competition will be promoted depends upon the extent to which a service provider has the ability, in the absence of declaration, to use market power to affect adversely competition in the dependent market. If a service provider has market power and the ability to use it in a way that adversely affects competition in a dependent market, and if the service provider has a history of so acting, declaration involving increased access to the service (in the sense of access on different terms and conditions with the ability to negotiate and, if necessary, have independent arbitration

[6] See *Australian Competition and Consumer Commission v Australian Medical Association Western Australia Branch Inc* [2003] FCA 686; 199 ALR 423 at [339], in the context of substantially lessening competition, referring to *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) 30 FCR 385 at 421 and Donald and Heydon, *Trade Practices Law*, vol 1, p 42; *Universal Music Australia* at [242].

> of those terms and conditions), would be likely to improve the environment for competition in the dependent market.

39. In *Fortescue*, the Tribunal said at [1061]:

> Often the inquiry will come down to this: Will the act (eg an alteration to an aspect of market structure or a change in a firm's conduct) increase the constraints on the market power of sellers or, more directly, will it increase their rivalry in a way that will produce greater efficiency? If the answer is in the affirmative, the act will promote an increase in competition.

40. The words "material increase" were inserted in criterion (a) by the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth). The Explanatory Memorandum states that this is intended to ensure that declarations are sought only where increases in competition are not trivial or marginal.[7]

41. As to the degree of certainty required in determining the effects of declaration, it need simply be shown that there is a significant, finite probability that an enhanced environment for competition and greater opportunities for competitive behaviour – in a non-trivial sense – would arise in a dependent market: *Virgin Blue* at [162].

42. In making judgments about the future conditions and environment for competition, being the enquiries required by Part IIIA (including criterion (a)), the Tribunal necessarily must look to an extended period in the future. The decision to declare a service under Part IIIA must hold good for the whole of the period of the declaration: *Pilbara* at [99].

Criterion (d)

43. 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.

44. Section 44CA(3) of the CCA provides that, in considering whether criterion (d) is satisfied, regard must be had to: (a) the effect that declaring the service would have on investment in infrastructure services and 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.

D. THE DECISION

45. As indicated above, the Minister determined that the Service should not be declared. Based on the Final Recommendation, the Minister found that declaration satisfied criterion (b) and (c) but did not satisfy criterion (a) and (d).[8]

46. The Minister accepted that: there are five, functionally distinct dependent markets, being (i) the coal export market; (ii) the tenements market; (iii) the infrastructure market; (iv) the specialist services market; and (v) the bulk shipping market (Decision, pp 3-4; Final

[7] Explanatory Memorandum, *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth), [5.21].
[8] The Minister considered the findings and reasoning in the Final Recommendation, including the Council's consideration of the submissions it received. See Decision, p 3.

Determination at [7.97]). The Minister also accepted that PNO provides a bottleneck service and coal producers have no practical alternative to the Port to export their coal, and that PNO has considerable bargaining power over Hunter Valley coal producers who have significant sunk costs in exploration and extraction in the Newcastle catchment (Decision, p 4; Final Recommendation, [7.33]-[7.34]).

47. In assessing the terms of criterion (a), the Minister adopted the approach set out in the Final Recommendation (Decision, p 3; Final Recommendation, [7.2]-[7.15]). In that regard, the Council addressed the following questions – *first*, 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; and *second*, if the provider has such *ability and incentive*, would any resulting conduct be likely to materially affect competition in a dependent market (Final Recommendation, [7.3]).

48. Based on the Council's approach, the Minister reasoned on criterion (a) as follows:
    a. PNO's incentive to deny access to the Service or otherwise exercise market power is limited (Decision, p 4);
    b. the coal export market is likely to be effectively competitive (Decision, p 5); and
    c. as to the other dependent markets, declaration would be unlikely to promote competition in those markets as they are derivative of the coal export market (Decision, pp 5-6).

49. In relation to criterion (d), the Minister adopted the Final Recommendation and concluded that 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; is unlikely to significantly affect investment in dependent markets; and that administrative and compliance costs are unlikely to be materially different in a future with and without declaration of the Service (Decision, p 7).

E. CRITERION (A)

50. The Minister's analysis of criterion (a) was vitiated by a number of errors.

51. *First*, the Minister's competition analysis in respect of the "derivative" dependent markets such as the tenements market was entirely theoretical and ignored the facts (Decision, p 4).

52. *Secondly*, and relatedly, the Minister concluded that "*the broader coal tenements market is and is likely to remain effectively competitive with and without declaration*" (Decision, p 6). There is no foundation for that proposition in the facts.

53. *Thirdly*, the Minister did not give proper consideration to whether declaration would "promote" a material increase in competition in the "derivative" dependant markets such as the tenements market.

54. *Fourthly*, the Minister wrongly regarded PNO's *ability and incentives to exercise market power* without declaration as the controlling or determinative consideration (Decision, pp 4-5).

55. *Fifthly*, the Minister's approach to the assessment of PNO's market power was theoretical and failed to engage with the facts (Decision, p 5; Final Recommendation, [7.116]-[7.117]).

56. *Sixthly*, the Minister adopted an erroneous counterfactual. There is no basis for the Minister's conclusion that the counterfactual without declaration would be provided by the "*Deed and open access frameworks presently offered by PNO*" (Final Determination, [7.2]; Decision, p 5).

57. *Seventhly*, the Minister failed to grapple with PNO's past conduct and erroneously concluded that PNO's NSC charge would not be materially different with and without declaration (Decision, p 5).

Minister's erroneous approach to competition in the dependent markets

58. No proper competition analysis was undertaken by the Minister for the "derivative" dependent markets. That is because the Minister took the approach that, if declaration would not promote a material increase in competition in the coal export market, declaration would be unlikely to promote a material increase in the "derivative" dependent markets (Decision, pp 5-6). This approach is not justified by criterion (a) or the facts.

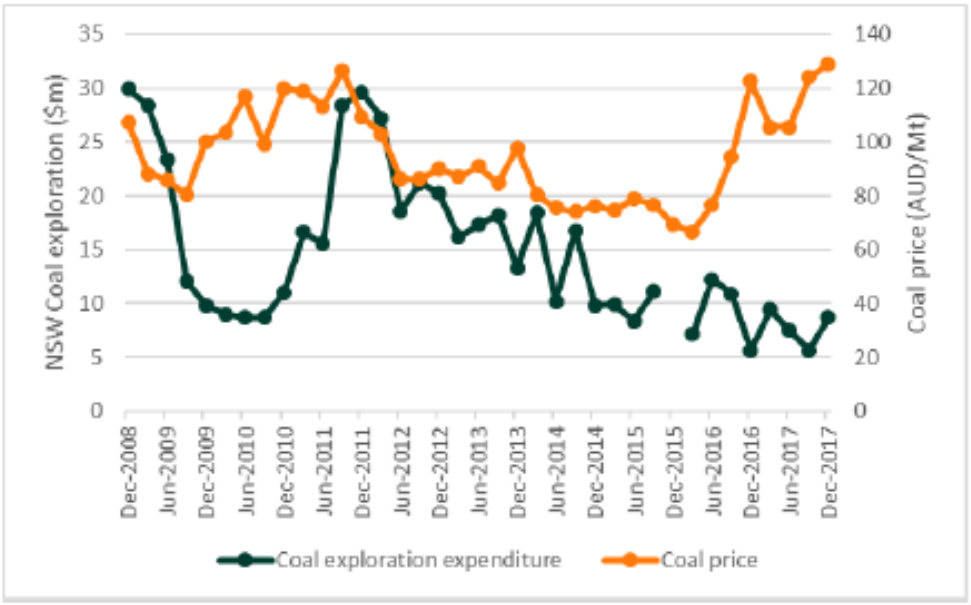
59. The Minister's competition analysis as to the "derivative" dependent markets was entirely theoretical and ignored the facts. The only economic evidence before the Council in that regard was Synergies' Reports of 8 August 2018 and July 2020. Synergies explained the extent of competition in the tenements market as follows:[9]

> In recent years there have been significant concerns raised about the extent of competition in the exploration tenements market in NSW…
>
> However, in 2014, the NSW Government commenced a major reform program aiming at improving transparency in the process by which licences are allocated and promoting competition in the sector for access to and commercialisation of the state's coal assets. As a result, the NSW Government introduced changes to the Mining Act in 2017 to provide for competitive tendering for coal exploration permits. While the NSW Government is yet to release new exploration permits under this process, it is anticipated that the market will evolve similarly to that in Queensland, where the Queensland Government periodically releases exploration areas for tender. A competitive process is held for the allocation of those permits, with allocations based on established criteria including the bidder's technical credibility and planned exploration program.
>
> Within this same timeframe, actual investment in coal exploration in NSW has declined substantially, notwithstanding that the output of Newcastle coal mines has doubled in the last ten years. While coal prices have increased significantly since 2016,

[9] Synergies, *Port of Newcastle: Assessment of revocation application by Port of Newcastle Operations,* 8 August 2018, pp 63-64 (footnotes omitted) (**Synergies 2018 Report**).

coal companies have largely used this price increase to restore profitability, and there has been only limited commensurate increase in investment in coal production (as discussed in section 3.3.1) and even less commensurate increase in coal exploration. It is only in 2018 that there have been reports that investment in coal exploration may have 'bottomed out'. This can be seen in Figure 20 below which shows the trend in coal exploration expenditure levels in NSW.

Figure 20 NSW coal exploration expenditure, coal price (AU$/t)



Note: December 2015 exploration expenditure data was not available for publication.

Source: Australian Bureau of Statistics, Catalogue 8412.0, Mineral and Petroleum Exploration, New South Wales

Because future supply of coal exports from the region will rely on the development of new reserves, it is important that appropriate incentives for investment in coal exploration are maintained.

60. Synergies concluded that, in the absence of declaration, "there would be lower and less competitive prices for tenements and lower quality and quantity of traded tenements reflecting a material reduction in competition in the tenements market." Synergies explained the competition analysis in this regard as follows: [10]

- first, the higher cost and risk profile that emerges for the industry from the unregulated port monopolist means that the prospective economic viability of new mines deteriorates. This is significant because tenements will typically hold less attractive resources than existing coal production areas, even before the uncertainty surrounding future port charges emerged;
- second, as a consequence, there will be a reduction in the number of parties who are willing to bid on tenements, either at initial allocation or for subsequent sale, and less rivalrous behaviour amongst those that do bid. In particular:
  - small companies, as well as those with a relatively lower risk appetite, are less likely to be vigorous and effective competitors for the acquisition of these tenements;

[10] Synergies 2018 Report, pp 68-69.

  - the reduction in interest in tenements is likely to be felt most strongly in regions that are likely to have the highest incremental costs;
  - the combination of these factors is likely to particularly affect the tenements market in the Gunnedah basin, which is subject to the highest incremental transport cost and where tenements are generally held by smaller companies;
  - in terms of likely consolidation of the ownership of tenements, Glencore will have a particular advantage, as the only producer who will have long term certainty of access and price at Port of Newcastle;
- third, owners of tenements will have less 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. Again:
  - this impact is likely to be particularly strong in the Gunnedah basin, where the tenements are usually considered to be more marginal in nature and where they are generally held by smaller companies;
- fourth, there is a material risk that the sellers of tenements will face less competition amongst buyers when selling their tenements, thereby impacting adversely on price and activity in the tenements market. However, although the extent of trading in tenements may be less, suggesting a smaller market, there will be lost value from an economic efficiency perspective;
- fifth, the NSW Government, as the originating seller of tenements (typically for more marginal deposits than those already held), faces the risk of less competition in the bidding for licences and a materially lower price than could be achieved in a workably competitive tenements market unaffected by the prospect of being undermined by future port price increases.

61. Put simply, in the future without declaration market participants in the tenements market will face higher levels of uncertainty with respect to the PNO's charges (such as the NSC), which increases the risk associated with making investments in tenements, as compared to the future with access (or increased access), on reasonable terms and conditions, as a result of declaration. As the ACCC correctly stated in its submission to the Productivity Commission's 2013 review of the National Access Regime:[11]

> Mining exploration is inherently risky as many prospects will be found not to be viable after substantial exploration and initial development expenditures have been incurred. The economic rents made on commercially viable mines allow miners to recover losses on prospects that prove unviable and to achieve at least a commercially-acceptable risk-adjusted rate of return across their entire operations (including losses on unviable prospects). Expropriation of these economic rents may discourage investments in prospecting for, and developing, new mines—with negative implications for allocative and dynamic efficiency, productivity and export earnings, and in turn, for community welfare.

62. Further, the increased risk associated with investing in new tenements increases the borrowing costs to finance the investment, which increases the return required on investments. This elevated risk also increases the likelihood that investors will delay their

[11] ACCC, Submission to the Productivity Commission's 2013 Review of the National Access Regime, p 77.

investments until the uncertainty is resolved. This reduces allocative efficiency and the productivity of the Australian economy.

63. The above analysis is entirely orthodox as a matter of economic principle. It is referred to as the "hold-up" risk of investment. This risk arises when one party makes long-lived investments that are both "sunk" and are specific to transactions with another party. In these instances, the investing party is locked into a relationship with the second party, and the risk arises that the second party will behave opportunistically to expropriate the value of the first party's sunk investment. Given that investors in tenements make significant long-term, location-specific investments that ultimately depend for viability on access to the Service, the tenements market is apt to produce "hold-up" risk.[12]

64. In contrast, by comparison, access to the Service on reasonable terms and conditions as a result of declaration would materially reduce the level of risk associated with investments in the tenements market. Ensuring that PNO's access terms and conditions are reasonable would likely promote efficient entry (and efficient participation) such that there would be a non-trivial, material improvement in the environment for competition in the tenements market (Synergies 2020 Report, at 7, 14 and 16).

65. In this case, the material before the Minister compels the conclusion that access (or increased) access on reasonable terms and conditions as a result of declaration would, in comparison to the future without declaration, promote competition in the coal tenements market – that is, regardless of the impact it might have on the coal export market (see also *Fortescue* at [1126]-[1128]). However, the Minister failed to grapple with any of the above matters.

Minister's erroneous finding about competition in tenements market

66. Rather, the Minister asserted that "*the broader coal tenements market is and is likely to remain effectively competitive with and without declaration*" (Decision, p 6).

67. The Minister based this finding on the Council's view at [7.147] of the Final Recommendation. But that does not withstand scrutiny. The Council provided two matters in support of its view: (a) there are a large number of licence holders; and (b) the State reforms designed to improve transparency and enable greater competition. However, those matters do not make good the point.

68. They fail to grapple with any of the Synergies analysis about the extent of competition in the tenements market. As Synergies explained, there are concerns about the extent of competition in the tenements market – that is, despite the number of licence holders, and the State reforms brought about to address those concerns, the extent of competition in the tenements market (evidenced by investment) has substantially declined (Synergies 2018 Report, pp 63-64).

[12] Synergies, *Port of Newcastle Operations ability and incentive to exercise market power and its impact on competition in Newcastle catchment coal tenements market,* July 2020, pp 13-16 (**Synergies 2020 Report**).

Minister's failure to focus on promoting competition

69. Relatedly, the Minister failed to consider whether a reduction in the uncertainty of PNO's future charges, with reasonable terms and conditions of access with declaration (compared to without declaration), would promote the environment and conditions for competition in the "derivative" dependent markets in a non-trivial way (Decision, p 6).

70. The Council dismissed the point for two reasons. Both of them miss the point.

71. *First*, the Council reasoned that there are a range of commercial and regulatory uncertainties that will impact on decisions of investors or potential investors in the tenements market (Final Recommendation, [7.155]). This can be accepted, but it does not follow that reduced uncertainty in PNO's future Port charges with or without declaration would not promote a material increase in competition in the tenements market, particularly in light of the Synergies analysis about competition in the market.

72. As reasoned by Synergies (Synergies 2018 Report, p 61):

> We note that the risks identified by PNO are general market risks that are faced by coal producers regardless of location. As reasoned by Synergies: and will be faced irrespective of whether investing in the Newcastle catchment area or elsewhere. However, it is the increased risk that arises as a result of the uncertainty over future port price increases that is the valid consideration when assessing the impact of revocation of the declaration.
>
> … a number of the risks to input costs identified by PNO (e.g. shipping rates, labour costs) may be correlated with demand (and therefore with price), such that higher costs are incurred when demand (and prices) are high. To the extent that some costs are correlated with higher coal export prices, the risks are diminished.

73. The risk caused by PNO's ability to increase prices absent the declaration will be specific to coal exporters in the Newcastle catchment area and is not correlated with demand (and therefore price). To reiterate, the critical issue is that, in the face of significant industry wide risks, an additional risk specific to the Newcastle catchment area will detract from the attractiveness of investing in that area, in comparison to other projects.[13]

74. *Secondly*, the Council said that "*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*" (Final Recommendation, [7.155]). However, the relevant question is one of comparison – that is, the level of uncertainty about PNO's future Port charges with and without declaration. This question is answered from the perspective of investors or potential investors in the tenements market; and not from the perspective of PNO as reasoned by the Council. In

[13] It may be observed that coal producers are price takers and must absorb the costs associated with access to export infrastructure. The Decision wrongly ignored this fact and failed to recognise that increases in Port charges therefore reduce coal producers' profit margins, and accordingly the attractiveness of producing coal in the Newcastle catchment area: Synergies 2018 Report, p 54.

any event, the Council's analysis of PNO's incentives does not withstand scrutiny, as outlined below.

Minister's erroneous approach to PNO's ability and incentives to exercise market power

75. Contrary to the Council's approach (adopted by the Minister), criterion (a) does not require demonstration that the service provider has the ability and incentive to deny access to the Service or to otherwise exercise market power (Final Recommendation, [7.3] and [7.7]; Decision, p 4).

76. Rather, criterion (a) requires the Tribunal to compare the opportunities and environment for improving competition in the dependent market: (a) with reasonable terms and conditions of access (or increased access) as a result of declaration; and (b) without declaration.

77. At most, the incentive for the service provider to exercise market power without declaration may assist this comparison, but it is not a controlling nor determinative evaluation in the way the Minister (and the Council) approached the matter (Final Recommendation, [7.7]; Decision, p 4).

78. Yet, the Minister (and the Council) confined the analysis to theoretical questions of PNO's *incentives* to exercise market power. The consequence of the Minister's unduly narrow approach was that he failed to engage with any of the facts relating to the promotion of competition in the dependent markets, and particularly the tenements market, as referred to above.

Minister's erroneous assessment of PNO's market power

79. The above errors are compounded by the Minister's erroneous assessment of PNO's ability and incentive to exercise market power without declaration.

80. The starting point for any assessment of PNO's market power must be that PNO is a monopolist. The Port is a bottleneck facility. Hunter Valley coal producers have no practical alternative to the Port for the export of their coal (Final Recommendation, [7.33]).

81. As such, PNO is able to set terms and conditions of access to the Service free of any competitive constraint (Final Recommendation, [7.34]); and is not constrained from exercising its market power by the availability of substitute facilities, by the countervailing power of users, or by the threat of a new facility (Synergies 2020 Report, p 8). In those respects, PNO has the ability to exercise market power in the provision of the Service (Synergies 2020 Report, p 8).

82. However, the Council attempted to downplay the extent of PNO's market power. It did so by focussing on a point of limited relevance at best: whether PNO has an incentive to "*deny access*" to any users of the Port (Final Recommendation, [7.72]). This overlooks the critical point for present purposes as explained above – that is, PNO's unconstrained market power to set the terms and conditions of access, including Port charges.

83. The Council's view (adopted by the Minister) was that there were other factors that would likely act as a constraint on PNO in setting the terms and conditions of access in a future without declaration of the Service, being: (i) that PNO is likely to be mindful of harm to its reputation; (ii) the potential for regulatory intervention by the State of NSW; (iii) that PNO is not vertically integrated; (iv) that PNO has offered terms to Port users through the Producer and Shipping Deeds (**Deeds**); and (v) the Port is not capacity constrained (Final Recommendation, [7.73]).

84. These arguments do not withstand scrutiny. As a commercial entity and monopolist infrastructure provider, PNO has an incentive to maximise profits (Synergies 2020 Report, p 3).

85. As previously stated by the Tribunal in respect of PNO's market power (*Application by Glencore* at [166]):

> The understandable commercial incentive to maximise its profitability, and its revenue, may be served in different ways at different times, depending upon the strength of the coal export market. The fact remains…that coal miners supplying coal into that market from mines in the Hunter Valley have no real practical alternative to using the Service, and in more profitable times (accepting what has been said about the present state of that industry) be vulnerable to charging changes imposed by PNO for access to the Service to absorb to a significant degree the profitability of exporting coal produced from the Hunter Valley.

86. PNO's conduct since the Council's Revocation Recommendation (22 July 2019) attests to its unconstrained market power to set the terms and conditions of access. Since that time, PNO has released its Schedule and the Deeds, which incorporate very substantial increases in access prices (dealt with above at paragraphs [17]-[19]).

Reputational restraints

87. PNO's dealings with coal producers belies the Council's proposition that PNO is likely to be mindful of the harm to its reputation. PNO's failure to participate in collective bargaining is contrary to the conclusion reached by the Council (Final Recommendation, [7.42]).

88. In the absence of declaration, coal producers will be unable to avail themselves of the compulsory arbitration regime and PNO's discretion to set the terms and conditions for access to the Port will remain at large.

Lack of regulatory intervention

89. The Minister erred in concluding that regulatory oversight by the State is likely to provide any level of constraint on PNO's pricing in a future without declaration of the Service. The State has not intervened in relation to PNO's setting of new terms and conditions in relation to the Service to date despite the coal industry's concerns. There is nothing to suggest this would likely change in the future (Synergies 2018 Report, pp 29-31).

90. PNO is not constrained by regulation as the PMAA and *Ports and Maritime Administration Regulation 2012* (NSW) do not allow the State to intervene and set prices at the Port. While the prices levied by PNO are subject to price reporting to the relevant

Minister of the State under Part 6 of the PMAA, and the Minister may refer the pricing for investigation to IPART, this does not allow IPART to set maximum prices or determine prices relevant to the Service and it is "common ground that the IPART regime is not a certified or effective access regime: if it were, s 44G(2)(e)(ii) of the Act would mean that the NCC could not recommend the Service": *Application by Glencore* at [14].

PNO's vertical integration

91. The Minster's view that PNO is not vertically integrated into any dependent market is contrary to the facts as it is clear that PNO's 50% shareholder, CM Ports, does have ownership of operations in the shipping market and an incentive to favour itself (Synergies 2018 Report, p 15). CM Ports' portfolio includes container terminal operations (Application, p 15). If PNO develops a container terminal, as is its stated intention, issues are likely to arise regarding whether its shareholding, and its 50% shareholder's interest in container terminals globally, could see the coal industry comparatively disadvantaged.

Producer and Shipping Agent Deeds

92. The Deeds will not constrain PNO's ability to set the terms and conditions of access as, among other things, PNO is not required to offer the Deeds and is entirely free to withdraw or change the terms of those arrangements at any time.[14]

Port capacity

93. The Council's analysis in respect of capacity at the Port was simplistic and superficial. Whilst it can be accepted that the Service is not capacity constrained, nor is likely to be so over the foreseeable future (Decision, p 4; Final Determination, [7.55] and [7.59]), this does not constrain PNO's ability to set the terms and conditions of access, including by way of discriminating on access terms and conditions (including price) between users through bilateral negotiations (which PNO is pursuing).[15]

94. The Minister's analysis does not properly consider PNO's ability and incentive to price discriminate. The Council recognised that PNO may be able to price discriminate (Final Recommendation, [7.117]). For example, PNO could charge each mine a different price for the use of Port services. If it is able to do this effectively, PNO could achieve an outcome in which there is no reduction in throughput. It is incorrect to conclude, as the Minister implicitly did, that because there is no reduction in volume, there is no detrimental impact on competition.

95. As Synergies explain (Synergies 2020 Report, pp 11-12):

> A monopolist that is able to price discriminate has a strong incentive to do so to capture as much of the economic surplus as is available. In the limit, a monopolist will seek to "perfectly" price discriminate to effectively capture all of the economic surplus available to others in a supply chain.

[14] It does not appear the Council had any meaningful regard to the terms of the Deeds. By way of example only, it failed to observe that PNO is entitled to materially increase the charges agreed under the Deeds.

[15] The incentive to exercise its market power by price discriminating arises from the incentive for a monopolist to price on the elastic part of the demand curve in order to maximise profit. It is reinforced by the ability of a monopolist to increase utilisation through non-uniform pricing.

> Moreover, in the circumstances where a uniform price is not charged, there is greater likelihood that a monopolist will increase utilisation. However, even here, the objective is not maximising capacity utilisation; rather it is maximising profit. Maximising capacity utilisation will only occur if it also allows profit maximisation.
>
> …
>
> It is clear that PNO has the ability to price discriminate – this simply arises from the lack of alternatives available to Hunter Valley producers – there are simply no substitutes available to use the Port.
>
> The NCC was not convinced that PNO will be able to separately identify different miners in order to charge different amounts to them. The NCC had noted that a key requirement in order for a firm to be able to successfully price discriminate is that it must be able to identify different customers (or customer groups) in order to set different prices for them. Since then and in contrast to the view held by the NCC, PNO has been seeking to enter into individual contracts with coal miners seeking to use the Service. PNO has also refused to negotiate collectively with coal producers. This conduct shows that PNO has the ability to separately identify coal producers, and so would be able to set different prices for them to extract the maximum possible economic surplus when the opportunity arises. This is exactly as a profit maximising monopolist would be expected to behave where the value from investing in coal mining derived by a coal producer is specific to each user (for instance, due to coal miners not having uniform costs of production, transportation cost would vary depending on the location of their mine, and quality or grade of coal produced could vary between mines (as is the case for the Hunter Valley coal producers).
>
> These events demonstrate that PNO's conduct and commercial incentives are not aligned with what the NCC had assumed in its previous assessment. Through its conduct PNO has demonstrated that it has the ability and incentive to negotiate individually with coal miners.
>
> Individual contracts with coal producers will enable PNO to price discriminate between users and appropriate the maximum possible rents available from each producer which will maximise PNOs profits.

Minister's erroneous counterfactual

96. There is no basis for the Minister's position that the counterfactual without declaration is comprised of the Deeds and "open access arrangements" presently offered by PNO (Decision, p 5; Final Determination, [7.2], and also [7.81]).

97. It cannot be concluded that it is likely that PNO would continue to offer the Deeds in the future without declaration. PNO is under no obligation to do so. There is nothing preventing PNO from seeking to offer the Deeds in the future. Likewise, the "open access arrangements" presently offered by PNO.

98. Further, as to charges under the PMAA, there is no basis for the proposition they will remain as "presently" set. As explained below, it is likely that PNO will substantially increase the PMAA charges in future without declaration.

The Minister's failure to grapple with PNO's past conduct and terms and conditions

99. In the present case, since privatisation of the Port, PNO imposed substantial price increases – including sudden and significant price spikes – without any improvement to the quality of the service. On any fair view, this conduct indicates an ability and incentive to use its market power to extract prices that are supra-competitive.

100. In *Virgin Blue*, the Tribunal observed that the terms and conditions effectively sought by Virgin Blue was the opportunity for arbitration in default of commercial agreement. The Tribunal noted that (at [157]):

> … the relevant comparison is the future with declaration (involving an assessment of what impact the opportunity for arbitration will have, such that future commercial negotiations would be conducted in the context whereby arbitration would be available to the parties as a circuit-breaker in the absence of reaching an agreement), and the future without declaration (this being understood by reference to the current conditions of access and the current and past behaviour of the service provider projected into the future).

101. The ability to arbitrate would have the effect of promoting competition in the dependant markets, particularly the tenements market, by ensuring that reasonable terms and conditions of access will be imposed. Yet, the Minister ignored this point entirely.

102. In that regard, as explained above, the significant price increases implemented by PNO (that is, PNO's exercises of its market power) are likely to continue (based, in part, on PNO's past behaviour) in the future without declaration. By contrast, in the factual, PNO would be constrained by reasonable terms and conditions of access as a result of declaration (that is, by negotiation or arbitration under Division 3 of Part IIIA).

103. As to the Deeds, the Minister adopted the Council's position that "*it is not clear that an NSC set with declaration will be material different to that … absent declaration*" (Decision, p 5). This is erroneous for at least the following reasons.

104. *First*, the NSC price under the Deeds is unreasonable, as it includes a return on user funded assets which is repugnant to Division 3 of Part IIIA: *Glencore v Tribunal* at [178].[16] PNO is also able to unilaterally increase these charges on an annual basis (Producer Deed, Item 7).

105. In *Glencore v Tribunal*, the Full Court held that (at [294]):

> 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

[16] As a matter of general principle, the Tribunal should determine a matter before it on the basis of the law as it exists at the time of its determination. It is inappropriate to anticipate or speculate as to alterations in the law that may occur in the future: see Ramsey v Aberfoyle Manufacturing Company (Australia) Pty Ltd (1935) 54 CLR 230 Starke J, said at 253

> consider whether there were user contributions of a character that should be brought to account in determining the price and terms of access.

106. The ACCC indicated that while the arbitration determination was between Glencore and PNO, it would apply the principles of the determination to other access disputes:[17]

> Further, while any potential future dispute between an access seeker an PNO in relation to access to the Service would need to be decided on its merits, the ACCC considers that the approach taken in the current dispute provides a useful framework and guiding principles in the parties negotiations.

107. Accordingly, at present, and in circumstances where PNO has not demonstrated any countervailing considerations, the inclusion of a return on user funded assets in the NSC price under the Deeds is not a reasonable term and condition of access to the Service as a result of declaration in the sense that it is repugnant to Division 3 of Part IIIA.

108. *Secondly*, the dispute mechanisms in the Deeds are not reasonable terms and conditions of access (Items 8 and 9). They are no substitute for arbitration under Part IIIA.

109. *Thirdly*, there are other unreasonable terms and conditions of access in the Deeds. For instance, the Producer Deed requires PNO to provide capital expenditure forecasts to coal producers on a rolling five-year basis. Coal producers have an opportunity to comment on PNO's forward capital expenditure plans; however, PNO is not obliged to implement any comments (Producer Deed, Item 7).

110. More generally, contrary to the Minister's approach, the Deeds and "open offer arrangements" are not properly characterised as an open access regime. They are an offer to enter into bilateral negotiations with PNO and its terms reflect PNO's unconstrained power to set the terms and conditions of access. Conformably, no coal producer has entered into the Producer Deed.

Conclusion

111. Access (or increased access) to the Service on reasonable terms and conditions as a result of declaration, by comparison to the counterfactual without declaration under Part IIIA, would promote a material increase in competition in the dependant tenements market. In this regard:
    a. There will be greater certainty for investment in tenements, as market participants will have the assurance of reasonable terms and conditions of access (or increased access) to the Service against future likely price increases by PNO.
    b. Absent declaration, substantial price increases are likely given PNO's unconstrained market power and its stated views as to the limited time period for operation of coal mining in the Hunter Valley and because of PNO's major shareholders interest in container terminal operations.

[17] ACCC, Statement of Reasons: Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, 18 September 2018, p 2.

c. In addition, the continued or increased participation of smaller coal producers would result in an increased demand for mining licences and result in a material increase in competition in the bidding for the award of mining licences.
d. Declaration is consistent with the objects of Part IIIA as it is likely to lead to greater efficiency in the operation of, use of, and investment in supply chain infrastructure, and will cause a reduction in competition in dependent markets with the effect being material in at least the tenements market.

F. CRITERION (D)

112. The Minister's approach to criterion (d) was derivative of its answer to criterion (a).

113. In reaching the view that criterion (d) was not satisfied, the Minister failed to identify the significant benefits flowing from a material increase in competition in the dependant tenements market arising from declaration of the Service, as outlined above at [58]-[68].

114. In addition, access (or increased access), on reasonable terms and conditions, as a result of declaration, would have the following further public benefits:
    a. The continued or increased participation of major and smaller coal producers would result in an improvement in the opportunities and environment for competition in the provision of the infrastructure (including coal terminal) required for the development of coal projects, including in particular in relation to the development and output from smaller more marginal projects.[18]
    b. The continued or increased participation of major and smaller coal producers would also result in further demand in the markets for specialist services in the Hunter Valley region.[19]
    c. Declaration would address the prospect of discrimination by a vertically integrated shareholder in PNO (CM Port) which has coal vessels and a possible ability to influence the nature and type of vessels and cost of those vessels accessing the Port.
    d. Further, if the Service were declared, PNO would not be able to refuse to meet coal industry representatives in collective bargaining without the threat of arbitration. Such collective bargaining would give rise to public benefits, and accordingly is in the public interest.

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Counsel for NSWMC **2 June 2021**

[18] Synergies 2018 Report, pp 56-57.
[19] Synergies 2018 Report, pp 56-57, 65.