NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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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: 21/06/2021 9:30 AM

Important information

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

COMMONWEALTH OF AUSTRALIA

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

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

SUBMISSIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD

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Introduction

1. The present proceeding involves a reconsideration of the Minister's decision, pursuant to s 44H(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), not to declare certain services at the Port of Newcastle (**Port**). In exercising its powers to reconsider the Minister's decision, the Tribunal cannot declare the relevant service unless it is satisfied of all the declaration criteria for the service. In the present case, Port of Newcastle Operations Pty Ltd (**PNO**) submits that, having regard to the NCC's recommendation, and the supplementary material requested by the Tribunal, there is no basis for the Tribunal to be satisfied in relation to two of these criteria, namely s 44CA(1)(a) (**criterion (a)**) and s 44CA(1)(d) (**criterion (d)**). Accordingly, the Tribunal should exercise its power to affirm the Minister's decision not to declare the service.

2. This is not a case where declaration is necessary to ensure access to a facility. The Port is already open to any vessel. The only impact that declaration could conceivably have is on the terms and conditions of access, particularly the price charged by PNO, and more specifically, the quantum of the navigation service charge (**NSC**). The present application requires the Tribunal to compare the NSC that is likely to prevail in the future without declaration, with the NSC that might be set as a result of declaration. In this regard, the ongoing arbitration in relation to the previous declaration at the Port provides an indication of the likely quantum of the NSC that may be set by Pt IIIA arbitration. Even if one assumes a figure at the bottom of the range, i.e., assumes that the current arbitration is resolved on the most favourable terms to Glencore, it appears that the difference in price is likely to be modest (approx. $0.18 per gross tonne for the NSC). There is no evidence that the Port's charges, let alone such a modest difference in those charges, hold any significance to competition in the coal export markets, or any dependent market. In those circumstances, the Tribunal could not be satisfied of criterion (a) or that declaration would be in the public interest (criterion (d)).

The Tribunal's task

3. The nature of the Tribunal's task has already been the subject of consideration by the Tribunal in this proceeding. The Tribunal's task is a "re-consideration of the matter based on the information, reports and things referred to in s 44ZZOAA": s 44K(4). In

the present case, the matter is the Minister's decision not to declare the following service under Div 2 of Pt IIIA of the CCA:

> 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.

4. The material on which the Tribunal's re-consideration is to be based consists of the following:

   (a) the material given to the Tribunal by the Minister under s 44ZZOAAA(3), pursuant to the Tribunal's direction of 8 April 2021.[1] This material consists of a Treasury Ministerial Submission dated 18 December 2020, attaching the NCC's recommendation, and a further Treasury Ministerial Submission dated 12 February 2021, attaching a proposed decision and statement of reasons, together with correspondence to the NCC, NSWMC and PNO notifying them of the Treasurer's decision;[2]

   (b) the three PNO deeds annexed to NSWMC's application for declaration (described as Annexures A, B and C to NSWMC's application), which the Tribunal, by its direction of 16 June 2021 and pursuant to s 44K(6A), directed the NCC to provide;[3] and

   (c) paragraphs [41] to [45] and [50] of PNO's confidential submission to the NCC dated 26 August 2020, which PNO provided in response to the Tribunal's direction of 16 June 2021, pursuant to s 44ZZOAAA(4).[4]

5. Several paragraphs of NSWMC's submissions refer to NSWMC's application for declaration.[5] This is not part of the material before the Tribunal, and submissions that rely on material in the application should be disregarded.

6. On the basis of the material before it, the Tribunal must determine if it is satisfied of the declaration criteria in s 44CA. As this Tribunal has previously observed, in order to be

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1 See Hearing Book (**HB**), Part A, tab 2.

2 See HB, Part C, tabs 6 to 8.6

3 See Supplementary Hearing Book (**SHB**), Part F, tabs 1 to 3.

4 See SHB, Part F, tab 4.

5 See NSWMC submissions (**NS**), [8] – [10], [12], [13], [14], [16], [17].

satisfied of the criteria, there must be a degree of satisfaction of certain objective facts and on qualitative assessments.[6]

Port of Newcastle

7. PNO operates the Port of Newcastle under a 98-year sublease which commenced on 30 May 2014. The Port is the largest coal exporting port in the world.

8. Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (the **PMA Act**) permits PNO to fix and levy three types of port charges without approval from the Minister: (i) the NSC, which is payable in respect of general use by a vessel of the Port and its infrastructure; (ii) the wharfage charge (**WC**), which is payable in respect of the availability of a site at which stevedoring operations may be carried out, and is paid by the owner of the cargo at the time it is loaded or unloaded; and (iii) the site occupation charge, which is payable by occupiers of land-side facilities such as stevedoring at terminals.

Criterion (a) – Meaning

9. Criterion (a) requires the Minister (or the Tribunal on a review) to consider whether access (or increased access), on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in dependent markets. It requires a comparison of the future in which the service is declared against a future in which the service is not declared, and an assessment of whether the former would promote a material increase in competition in at least one dependent market. This was the approach undertaken by the NCC[7] and adopted by the Minister.[8]

10. This test can be contrasted with the approach adopted by this Tribunal in its previous review of the Minister's decision not to declare an almost identical service at the Port: *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 (***Application by Glencore Coal***).[9] In that case, the Tribunal held, following the Full Court's decision in *Sydney*

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6 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [53], citing *Re Telstra Corporation Ltd* (2006) ATPR 32-121 at [20, [46], [172]

7 NCC Recommendation, [7.2] – [7.15].

8 Minister's decision, p 3.

9 In NSWMC's application, the following amendments have made been to the service definition under the previous declaration: "The provision of the right to access and use the shipping channels ~~(including berths next to wharves as part of the channels) at~~ and berthing facilities required for the export of coal from the Port,

Airport Corporation Ltd v Australian Competition Tribunal (2006) 155 FCR 124 (***Sydney Airport***), that the relevant future comparison was between access to the service and no access. On this basis, the Tribunal found that criterion (a) was satisfied. This interpretation was subsequently upheld by the Full Court.[10] Since then, however, criterion (a) has been amended (and moved to s 44CA), to make it clear that criterion (a) is directed to the effect of declaration.[11]

11. NSWMC does not contend for a different construction of criterion (a), or that the Minister failed to construe (as opposed to apply) the criterion appropriately.

12. In NSWMC's amended submissions (**NS**) at [30], NSWMC submits that the test is the same as applied by the Tribunal in decisions before the Full Court's decision in *Sydney Airport.* While the Tribunal's approach to criterion (a) in those decisions was closer to the present test than that applied by the Tribunal in *Application by Glencore Coal*, it is also important to recognise that the legislation has been amended since those decisions.

13. The concept of "reasonable terms and conditions" reflects the fact that terms and conditions are not determined through declaration but rather are determined through a subsequent process of negotiation, or failing that, arbitration by the ACCC. Accordingly, the Tribunal does not need to come a view on the precise terms and conditions likely to result from declaration.[12] At NS [33], NSWMC submits, however, that the "Tribunal does need to come to a view as to whether reasonable terms and conditions of access to the Service without declaration are 'reasonable terms and conditions'". That adopts the wrong analysis: the Tribunal's task is to assume 'reasonable terms and conditions' in the future with declaration, and then compare access under those conditions with access without declaration (on whatever terms are likely to prevail, reasonable or unreasonable).

14. The Tribunal must be satisfied that access or increased access on reasonable terms "would promote a material increase in competition". At NS [35], NSWMC submits that the concept of "promoting" competition does not require a quantifiable increase in

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by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals within the Port precinct and then depart the Port precinct."

10 *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124.

11 *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), Schedule 12 – Access to service, Part 1 – Declared services, items 2 and 10.

12 See explanatory memorandum to the 2017 amendments, [12.21], quoted at NS [31].

competition. Declaration must, however, promote "a material increase". As noted at NS [40], the words "material increase" were inserted in criterion (a) by the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth). The explanatory memorandum confirmed that the amendment was intended to ensure that access declarations "are only granted where the expected increase in competition in an upstream or downstream market is not trivial". With the exception of *Re Fortescue Metals Group Ltd* [2010] ACompT 2, the Tribunal decisions referred to at NS [34] to [39] were all concerned with the previous, less onerous test, namely whether "access (or increased access) to the service would promote competition in at least one market".

Criterion (a) – Application

15. The starting point for the Tribunal's analysis is that the present case does not raise a question of access. The Port is, and always has been, open to everyone, and there is no suggestion that this is likely to change without declaration. Accordingly, the application involves "increased access", and requires a comparison of the future with the type of access that is likely to be offered without declaration, versus the type of access that is likely to be offered with declaration.

16. In the present case, the only way in which it has been suggested that declaration would alter the terms and conditions of access so as to promote a material increase in competition is by leading to a reduction in the price that PNO charges, and an improvement in price certainty. NSWMC has not identified any other aspect of the terms or conditions on which PNO provides access which it asserts is likely to differ as a result of declaration. The fact that declaration is only likely to give rise to the application of Division 3 of Pt IIIA to a dispute under s 44S on price (and more specifically, the NSC) is also borne out by the experience when the Port was previously declared. During that period of declaration, only one dispute under s 44S was notified to the ACCC (by Glencore). Putting to one side the dispute as to scope (i.e. whether the arbitrated terms applied where Glencore does not own, operate or charter vessels accessing the service), that dispute was confined to the quantum of the NSC. The WC was not the subject of dispute, and was agreed in the arbitration.[13]

13 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1, [145]

17. Therefore, in determining whether criterion (a) is satisfied, and comparing the future with declaration against the future without declaration, the only likely relevant difference (if any) could be the outcome of an arbitration of a dispute in relation to the quantum of the NSC.

18. In the present case, the future without declaration should be understood by reference to PNO's current pricing arrangements, as these will continue into the future. Those arrangements can be summarised as follows:

(a) PNO operates an open access regime. Subsequent to the 2019 revocation, PNO published new rates for its access charges to take effect from 1 January 2020. Those rates provide (as at 1 January 2020) an NSC of $1.0424 per GT and a WC of $0.0802 per GT. The open access arrangements also provide for variation by PNO of its charges from time to time, an annual CPI adjustment to both the NSC and WC, and a dispute resolution process.[14]

(b) PNO has offered to enter into long term pricing deeds to vessel agents, and coal producers, which in 2020 offered a 28% discount to the price offered under the open access regime. The original draft version of the pricing deed is found behind tab 1 of the Supplementary Hearing Book. Following consultation and feedback,[15] the deed was amended and split into a deed offered to coal producers (setting out charges for the NSC and WC for vessels carrying the producer counterparty's coal) and a deed offered to vessel agents (setting out charges for the NSC for the counterparty's vessels). The current versions of those deeds are the versions found behind tabs 2 and 3 of the Supplementary Hearing Book.

(c) Pursuant to the producer and vessel agent deeds now offered, PNO has agreed to charge an NSC of $0.8121 per GT and a WC of $.0802 per GT (as at 1 January 2020), annually adjusted to the greater of CPI or 4%. Any other increase to the charge is not permissible except where such increases are consistent with the pricing principles set out in the Deed (such as relevant capital investment by PNO). The vessel agent deeds operate for an initial period of 10 years, with provision the parties to negotiate a further extension from three years prior to its

14 NCC recommendation, [1.14], [5.23(a)], [7.68(b)], [7.87].

15 See PNO submission to the NCC in relation to NSWMC application for declaration, [50] (SHB, tab 4).

expiry. The deeds are agreements for the purpose of s 67 of the PMA Act, which provides that a port authority (i.e., PNO) may enter into an agreement with a person liable to pay any kind of charge under Part 5 of the PMA Act (including the NSC and WC), to the exclusion of the statutory PMA Act charges which the port authority otherwise levies.

(d) The deeds provide for a dispute resolution process (mediation and arbitration), including in relation to the permissible price adjustment consistent with the pricing principles described in (c) above. Those pricing principles, which must be applied in mediation and arbitration, are consistent with those that must be take into account when making a determination under ss 44X. The deeds also provide non-discriminatory terms between counterparties to the deeds.

(e) Following negotiations from December 2019 to late March 2020, PNO has entered into deeds with [redacted][17]

(f) Although to date no coal producers have entered deeds, PNO has made it clear by way of open offer on its website that the same s 67 agreement is available to any producer who wishes to enter an agreement.[18]

19. Any coal producer, even if it does not enter into a separate agreement with PNO (and even in the scenario postulated by NSWMC of PNO retracting its offer to enter into producer deeds on the current terms) has the benefit of the prices in the vessel agent

16 NCC recommendation, [1.14]; [7.26]; [redacted]

17 See vessel agent deed (SHB, tab 3), Annexure, clause 2; [redacted]

18 NCC recommendation, [7.26].

deeds, because all coal vessels attending the Port have the contractual ability to obtain access to the shipping channels (i.e. the service for which the NSC is charged) at that price until 1 January 2030.

20. Having regard to these futures, the Tribunal can proceed with a reasonable degree of confidence that the NSC without declaration is likely to be as per the vessel agent deeds (i.e., $0.8121 in 2020, subject to an annual increase from 1 January 2020 of 4% or CPI or other variations permitted under the deed), for the reasons set out above.

21. The position that is likely to pertain under declaration is more difficult to predict. Although the previous declaration, and the arbitration conducted pursuant to that declaration, provides a precedent, that arbitration is yet to be finalised. The position can be summarised as follows:

(a) Under the previous arbitration, the ACCC set an NSC of $0.6075 per gross tonne.[19] This was on the basis of a $912 million deduction from the asset base for user contributions.

(b) The Tribunal determined that this deduction should not be made, and set a rate of $1.0058 per gross tonne for the NSC as at 2018.[20]

(c) This decision was subsequently set aside by the Full Court, and remitted the matter to the Tribunal for further determination.[21]

(d) PNO subsequently sought and obtained special leave to appeal the Full Court's decision. Submissions have been filed by the parties in the appeal, but the High Court is yet to advise a hearing date.

22. As a result, there is significant uncertainty about the price that will be set:

(a) If the High Court overturns the Full Court's decision, the Tribunal's price could potentially be reinstated.

(b) If the High Court upholds the Full Court's decision, the matter will be remitted for further hearing. It cannot be assumed that this would lead to a similar decision

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19 NCC recommendation, [1.10].

20 NCC recommendation, [1.10]; *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1

21 NCC recommendation, [1.11]; *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (***Glencore Coal***)

as the ACCC's original determination. The Full Court held that s 44X(1)(e) requires regard to be had to the value to the provider of extensions whose cost is borne by someone else: [288]. The Full Court was careful to state, however, at [289]-[290] that it "did not wish to be taken to accept the proposition advanced for Glencore that it was enough to show that there had been contributions in the past", and observed that any remitter hearing would need to consider whether there are aspects of the past that bear upon the conclusion as to whether the cost of an extension "is borne" and the value to the provider of any such extension, as well as the competing considerations in s 44X(1), in particular the pricing principle in s 44ZZCA(a)(ii), which requires the Tribunal to have regard to the principle that the provider be able to earn a rate of return commensurate with the regulatory and commercial risks involved.

(c) The question is further complicated by the question of scope. If the High Court determines that Glencore is not an access seeker, then even if the service is re-declared, it is only the vessel operators who would be access seekers. Having entered vessel agent deeds, it is uncertain whether they could notify a dispute under s 44S, even if they were inclined to do so. In this case, in all situations when coal producers sell coal on a 'free on board' basis (FOB) (which represents the majority of coal sold by Glencore[22]), the price will be the price under the deed, and declaration will make no difference.

(d) From Glencore's perspective, the most favourable outcome of its arbitration would be one in which the High Court affirms the Full Court's decision, both on the question of scope and user extensions. This would result in a remitter to this Tribunal, which would determine a price for navigation services at the Port that coal vessels which carry coal sourced from Glencore mines could utilise ([redacted]).

(e) Even in this scenario, remitter to the Tribunal for re-arbitration of the Glencore dispute notified in August 2016 is likely to produce a higher NSC than the ACCC's original determination (in present terms), having regard to: (i) the Full Court's decision (and in particular the matters described above at (b) above); (ii)

22 *Glencore Coal* [2020] FCAFC 145, [135].

subsequent increases in inflation; and (iii) subsequent adjustments for capital expenditure, operating expenditures, and coal volumes since the original determination.[23] Certainly, the remitter is very unlikely to produce a figure lower than the original figure determined by the ACCC.

23. Thus, in respect of any NSC that could be the subject of an arbitration, the ongoing arbitration in relation to the previous declaration suggests that the price is likely to be in the range of around $0.63 (the ACCC's $0.61 figure in 2020 terms[24]) to $1.04. It follows that, with declaration, if an "access seeker" member of the NSWMC were to get the best possible outcome on any further arbitration of NSC pricing, such an NSWMC member is likely to face NSC charges of no more than $0.18/GT lower than that under the deeds (in 2020).

24. There is no material before the Tribunal which would suggest a difference of this modest amount would promote a material increase in competition in any dependent market.

25. In its application for declaration, and in its application for review by this Tribunal, NSWMC identified the following five dependent markets:[25] (i) a coal export market (the **coal export market**); (ii) markets for the acquisition and disposal of exploration and/or mining authorities (the **tenements market**); (iii) markets for the provision of infrastructure connected with mining operations, including rail, road, power and water (the **infrastructure market**); (iv) markets for services such as geological and drilling services, construction, operation and maintenance (the **specialist services markets**); (v) a market for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port are a party (**the bulk shipping market**).[26]

26. In considering the effect, if any, of a possible reduction in the NSC on coal producers, it is important to bear in mind that:

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23 See ACCC's Final Determination, cl 7 (*Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1, Annexure A)

24 NCC Recommendation, [1.17].

25 NCC Recommendation, [7.97]; NSWMC SOFIC, [43].

26 The NCC also considered the container port market, but was not satisfied that declaration would promote a material increase in competition in this market: [7.162] – [7.163]. For the reasons identified by the NCC, the Minister reached the same conclusion. NSWMC does not challenge this aspect of the Minister's decision.

(a) PNO's charges represent a very small proportion of the price of coal.[27] The NCC's finding refers to 2018 analysis by PNO of the relative impact of the NSC on the cost of coal. At that time, and estimating a coal producers' average cost to be approximately $43.02 per tonne, PNO estimated that port charges accounted for less than 1% of the total delivered cost of coal. This analysis over-estimates the significance of port charges: as the NCC recommendation observes, more recent information indicates that the cost of production per tonne is significantly.[28] The possible difference between the price in the deeds and price likely to result from declaration represents an even smaller fraction of the cost of producing coal.

(b) Coal producers face a range of much more significant uncertainties. These include the price of coal, which is extremely volatile. For Australian coal producers, this volatility is exacerbated by variations in the exchange rate (as coal prices are set in USD). Producers also face much greater uncertainty in relation to much more significant costs, such as labour and freight costs. This uncertainty is exacerbated by producers' susceptibility to changes in government policy (including changes to energy policy, taxation, and safety regulation).[29]

(c) For new investments, potential coal producers face a range of additional uncertainties, including the difficulties of obtaining finance or government approval in a world shifting decisively away from coal consumption.

27. When one has regard to these matters, it is inherently improbable that a difference in the Port's charges would promote a material increase in competition in any of the dependent markets.

28. In addition, when one considers the effect of declaration on the coal export market, it must also be kept in mind that the market is already one which is effectively competitive, and extends beyond Australia and into at least the Asia-Pacific region.[30] (An earlier contention to the contrary by NSWMC (SOFIC, [45]) appears to have been abandoned.)

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27 NCC Recommendation, [7.118] – [7.119].

28 NCC Recommendation, [7.120], quoting a range of producer costs per tonne from $47 to $69.94, using publicly available 2019 figures.

29 NCC Recommendation, [1.27], [4.23], [10.37]-[10.38].

30 NCC Recommendation, [7.113] – [7.115].

While this does not preclude the possibility that there could be a material increase in competition, it makes it even less likely that a small change in a small cost could promote such an increase.

29. NSWMC makes various contentions as to why criterion (a) is satisfied but none properly grapple with the facts before the Tribunal, and in particular the operation of the vessel agent deeds, which will be in place for a period of at least 10 years. NSWMC's submissions concentrate on the effect of declaration on competition in the mining tenements market. NSWMC says that the Minister's analysis of the effect of declaration on competition in this market, which adopted the NCC's findings, was vitiated by a number of errors: NS [51] to [52].

30. In circumstances where declaration is unlikely to promote a material increase in competition in the coal export market, the NCC found that it was unlikely to promote a material increase in the coal tenement market, or any other derivative market. This approach is consistent with the approach adopted by the Tribunal in *Re Application by Glencore Coal* [139]. However, contrary to the suggestion at NS [58], the NCC did not stop its analysis of the tenements market there. At [7.153] to [7.160], the NCC considered each matter raised by NSWMC, before concluding at [7.161], taking into account all these factors, that it is not satisfied that increased access on reasonable terms and conditions as a result of declaration is likely to promote a material increase in competition in the tenements market.

31. NSWMC submits that increased Port charges, and uncertainty with respect to those charges, will affect the economic viability of new mines, which in turn will discourage investment in mining tenements: NS [62]. This argument is problematic. *First*, it assumes, contrary to the fact, that in a future without declaration there are likely to be significant price increases, and significant uncertainty about such increases. The vessel agent deeds guard against both of these risks.

32. *Secondly*, it is unsupported by evidence, and instead relies entirely on assertion and theory. There is no material before the Tribunal indicating that Port charges have deterred investment, or may do so in the future. Indeed, and importantly, there is no material before the Tribunal indicating that Port charges are even a relevant consideration in investment decisions. The absence of such material is unsurprising when one has regard to the size of the relevant Port charges. Coal investment decisions

are much more likely to be driven by factors such as the quantity and quality of coal at a coal site, the strip ratio (i.e., the amount of waste rock that needs to be removed for ore to be extracted), environmental and community constraints on mining at the site, the availability of finance, and predictions as to future coal prices. Port charges are no more than a component of the transport costs for the coal mined for a site.

33. *Thirdly,* NSWMC seeks to elevate the importance of Port charges by relying on the economic principle of 'hold-up', that is, when one party has made a prior commitment to a relationship with another, the latter can 'hold-up' the former for the value of that commitment: NS [63]. This can lead to under-investment. NSWMC submits that the tenements market is "apt to produce 'hold-up'", because investors make significant, long-term investments, and will remain dependent on the Port to export coal. Again, however, there are no facts to support the theory. There is no evidence indicating that the risk of "hold-up" by PNO has factored in the consideration of any investor. And even at the level of theory, it is difficult to understand how Port charges could influence decisions, given their relative (un)importance, and the degree of certainty the current arrangements provide.

34. There is a further significant problem with NSWMC's hold-up theory. For hold-up to work, a party needs to be able to engage in price discrimination. Without this ability, it is not possible to extract each counter party's economic surplus. NSWMC's theory ignores the fact that PNO has no ability to engage in effective price discrimination. As explained above, the deeds contain non-discriminatory pricing clauses. Further, all coal producers have the ability to access the pricing arrangements available under the vessel agent deeds. [redacted]. This leaves no room for PNO to engage in the sort of price discrimination that is an important prerequisite for any hold-up strategy to succeed. Nor, in light of the vessel agent deeds, can PNO can extract the value of the commitment of any producer.

35. The lack of evidence supporting NSWMC's contentions was reflected in NSWMC's original written submissions, which sought to refer extensively to material that was not before the Tribunal. This material consisted of economic opinion, rather than factual material, but in any event the Tribunal refused to allow NSWMC to rely upon it.

NSWMC's revised submissions have recast this material as submission only, which only highlights the absence of any supporting evidence.

36. In addition to having no ability to engage in 'hold-up' behaviour, PNO also has no incentive to do so. Any opportunistic pricing by PNO that 'holds-up' existing miners risks sending a signal to potential miners in the future 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 coal mining activities in the Newcastle catchment. As revenues from coal mining in the Newcastle catchment will likely remain its most important source of revenue in the near future, and it will be heavily reliant on future investment in coal mining activity in the region, PNO is likely to act in a way that has regard to its ability to maximise its expected profits over the term of the lease. Charging excessively high prices for the service is likely to increase the incentive for potential future miners to invest in other activities, to PNO's detriment.

37. At NS [66] to [68], NSWMC challenges the Minister's finding (which adopted the NCC's recommendation) that the broader coal tenements market is and is likely to remain effectively competitive with and without declaration. As NSWMC notes, the findings by the NCC were based on the number of licence holders and State reforms designed to improve transparency and enable greater competition. NSWMC says these matters "do not make good the point", but does not explain why, other than citing unsubstantiated "concerns about the extent of competition in the tenements market": NS [68]. Again, the Tribunal has no reason to adopt any different approach from that recommended by the NCC. In any event, regardless of the state of competition in the tenements market, in the absence of any explanation as to how Port charges could make any impact on competition in this market, the Tribunal could not be satisfied that increased access would promote a material increase in competition in the coal tenements market.

38. Finally, in relation to the tenements market, NSWMC also seeks to distinguish PNO's charges from the other risks faced by coal producers, on the basis that the risk posed by PNO's ability to increase prices "will be specific to coal exporters in the Newcastle catchment area": NS [73]. Even assuming for the moment that producers did face such a risk, the fact that it is specific to coal exporters in the Newcastle catchment area does not make it any more significant than other risks. As explained above, coal producers,

and potential coal producers, face a range of risks, some of which are specific to the area, and some of which are more general, but all of which are more significant than the Port's charges. The balance of NSWMC's submissions address what NSWMC describes as errors in the Minister's analysis of PNO's market power in the future without declaration: NS [54] to [57].

39. NSWMC submits that the starting point for any analysis of PNO's market power "must be that PNO is a monopolist", and the Port is a "bottleneck facility": NS [80]. That may be the starting point, but it does not take the analysis very far. As noted above, the Port has not ever denied access, and there is no suggestion that it is likely to do so absent declaration. Further, to the extent that the Port's essential role in the export of coal from the Hunter Valley confers on it a degree of market power, that power is constrained by the deeds into which the Port has entered with vessel agents. In describing the Port as a bottleneck facility, it should also be noted that, unlike most bottlenecks, there is no issue about the capacity of the Port to deal with the volume of coal exported through the Port. On the contrary, there is substantial spare capacity at the Port.

40. At NS [83] – [95], NSWMC takes issue with the various constraints identified by the NCC, namely: (i) reputational restraints; (ii) lack of regulatory intervention; (iii) PNO's lack of vertical integration; (iv) producer and shipping (vessel agent) deeds; and (v) spare Port capacity.

41. The NCC was correct to identify each of these matters as constraints. As to the constraint imposed by the vessel agent deeds, NSWMC submits (at [92]) that 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". A similar submission is made at NS [97]. This overlooks that PNO has already voluntarily entered into deeds with vessel agents, and accordingly, even if it wished to do so, is not in fact at liberty to withdraw or change the terms of those arrangements. NSWMC can only be referring to the producer deeds, which PNO has offered to producers, but to date, no producer has taken up. Entry into the producer deeds is not necessary to provide certainty about future prices [redacted].

42. At NS [98] to [102], NSWMC refers to price increases by PNO. PNO submits that these increases were appropriate. Prior to privatisation in 2014, the Port had not been operated on a cost-recovery basis. In this Tribunal's re-arbitration of the dispute between Glencore and PNO, the Tribunal made findings about the very substantial under-recovery by the State over many years: *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1, [329] – [336]. That PNO would re-set its prices post privatisation to more closely align with cost recovery is hardly surprising. But regardless of the view one takes of price increases previously implemented by PNO, the vessel agent deeds constrain PNO's ability to increase prices in the future.

43. Finally, at NS [104] to [110], NSWMC makes various criticisms of the deeds. At [104], NSWMC submits that the NSC price under the deeds is unreasonable, as it includes a return on user funded assets which is repugnant to Division 3 of Pt IIIA. There are several difficulties with this submission. *First*, as analysed above, the relevant question is not whether the deeds are unreasonable, but whether declaration is likely to produce different terms that will have a material impact on competition in a relevant market.

44. *Secondly*, NSWMC cites as authority for the submission that a return on user funded assets is repugnant to Division 3 of Pt IIIA the Full Court's decision in *Glencore Coal*, at paragraph [178]. However, no such statement appears at that paragraph, or indeed anywhere else in the judgment.

45. *Thirdly*, as set out above, the Full Court's decision is the subject of a pending appeal in the High Court. NSWMC encourages the Tribunal to proceed on the basis that the Full Court's decision is correct. In support of this approach, NSWMC refers to the High Court's decision in *Ramsay v Aberfoyle Manufacturing Co (Australia) Ltd* (1935) 54 CLR 230, where Starke J observed, "Courts of law … can only act upon the law as it is, and have no right to, and cannot speculate upon alterations in the law that may be made in the future". But that observation was made in a different context, namely whether it was appropriate to restrain the defendant from proceeding with the building of a factory on the basis that this action would breach a by-law which had not been made at the time the injunction was sought. The present situation is quite different – where the very decision NSWMC seeks to rely upon is under appeal.

46. In any event, the NCC analysis on which the Minister relied, and which is set out above, assumes against PNO that Glencore and/or NSWMC is correct, and an arbitrated price

is one which does not include a return on $912 million of the Port asset base, and consequently a future arbitration would set a price similar to the price set by the ACCC. For the reasons explained above, it is unlikely that the price would be this low, but even if it were, it would be unlikely to promote a material increase in competition in any dependent market.

47. At NS [108], NSWMC submits that the dispute mechanisms are not reasonable terms and conditions of access and are no substitute for arbitration under Pt IIIA. In PNO's submission, the terms of the dispute resolution provisions of the Deed[31] are not inferior to those under Div 3 of Pt IIIA, but in any event, this approach adopts the wrong analysis, as discussed above in relation to NS [33]. The question is not whether the dispute mechanism under the deeds constitutes "reasonable terms and conditions", or whether the dispute mechanism is better or worse than arbitration under Pt IIIA. The question is whether the availability of arbitration under Pt IIIA, as opposed to the dispute processes under the deeds, would promote a material increase in competition in any dependent market.

48. NSWMC makes a similar mistake at NS [109]. Whether or not terms of the deeds are reasonable or unreasonable does not answer the question of whether criterion (a) is satisfied. NSWMC's specific complaint concerns the provision of the deeds that require PNO to provide capital expenditure forecasts. NSWMC complains that PNO is not obliged to implement comments it receives (which would not be imposed as a condition of access following a Division 3, Pt IIIA arbitration in any event). Critically, however, PNO is only able to pass on the costs associated with any capital expenditure where the charge is consistent with the pricing principles: cl 7(b)(ii).

49. At NS [111(d)], NSWMC refers to the objects of Pt IIIA in s 44AA. Although it is appropriate for the Tribunal to consider the objects of Pt IIIA in determining whether the criteria are met,[32] that does not derogate from the need for the Tribunal to be satisfied of each of the criteria. In particular, it would not be sufficient to demonstrate that declaration would promote the economically efficient operation of, use of, and

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31 Particularly the pricing principles at Schedule 3, clause 4.2 which mirror ss 44X(1) and 44ZZCA.

32 The Minister is required to do so (s 44H(1A)), and on review, the Tribunal is exercising all the powers of the Minister: s 44K(5).

investment in supply chain infrastructure, without showing the resulting benefit to competition in a dependent market.

Criterion (d) – Meaning

50. 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". The criterion in its current form was introduced by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

51. This test can be contrasted with the equivalent previous criterion (criterion (f)) which provided that "access (or increased access) to the service would not be contrary to the public interest". As confirmed by the explanatory memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017,* at [12.39], the new criterion (d) "constitutes an additional positive requirement which must be met before a service can be declared". According to the explanatory memorandum (at [12.37]), the decision-maker must be satisfied that "declaration is likely to generate overall gains to the community". Criterion (d) does not limit the matters to which the Minister may have regard in considering the public interest, but does identify factors that must be taken into account: see s 44CA(3)(a) and (b).

52. The High Court's decision in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (***Pilbara***) indicates that the Tribunal should exercise a degree of deference to the Minister's judgment as to what is, or what is not, in the public interest. As the judgment of the plurality observed in *Pilbara,* at [42], "the expression 'public interest' imports a discretionary value judgment to be made by reference to undefined factual matters". Their Honours went on to observe at [42], that "conferring the power to *decide* on the Minster (as distinct from giving to the NCC a power to *recommend*) is consistent with the legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office": see also [108]. Accordingly, the plurality held (at [112]): "In neither case [that is a decision to declare, or not to declare] is it to be expected that the Tribunal, reconsidering the Minister's decision, would lightly depart from a ministerial conclusion about whether access or increased access would not be in the public interest.

In particular, if the Minister has not found access would not be in the public interest,[33] the Tribunal should be slow to find to the contrary. And it is to be doubted that such a finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits." These comments were made in relation to the old criterion (criterion (f)) but remain apt in relation to the new, higher threshold.

Criterion (d) – Application

53. In the present matter, the Minister decided that he was not satisfied that criterion (d) was met. There is no basis to depart from the Minister's conclusion in this regard. If anything, the Minister's decision understated the detrimental effects that declaration would have.

54. Turning first to consider s 44CA(3)(a)(i), the effect that declaring the service would have on investment in infrastructure services. In its consideration of this factor, the NCC concentrated on 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, concluding that any effect was likely was to be "muted", given that the majority of costs have already been incurred.[34]

55. However, for the purposes of s 44CA(3)(a), it is also relevant to consider how declaration may affect investment in other infrastructure services. The explanatory memorandum confirms (at p. 103) the legislative intention that the costs and benefits relevant to the assessment of criterion (d) may include, "the potential for incentives to undertake investment in other significant infrastructure to decline because of a (real or perceived) risk that such infrastructure will be declared". There is a real risk that declaration in the present case would reduce the incentive to make investment in other Australian infrastructure. If the Tribunal were satisfied that criterion (a) is satisfied in the present case on the flimsy basis relied upon by NSWMC, it would create a precedent for the declaration of other infrastructure services that would give pause to any investor. Acceptance of NSWMC's contentions would indicate to investors that it is enough for a person seeking declaration to raise theoretical possibilities without demonstrating any actual impact on competition.

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33 It appears that there may be an error in this sentence, and the word "contrary" should replace the word "in" so that the sentence reads, "In particular, if the Minister has not found access would not be contrary to the public interest, the Tribunal should be slow to find to the contrary".

34 NCC recommendation, [10.25].

56. Moreover, this cost of declaration is not offset by any benefit to investment on markets that depend on access to the service: s 44CA(3)(a)(ii). For the reasons explained above, there is no basis to conclude that declaration would have a positive impact on investments in market that depend on access to the service. There is no material indicating Port charges are a relevant factor in investment decisions by coal producers, or the investment decisions in related markets, much less that the sort of modest differences declaration may make to those charges would have an influence on any investment decision.

57. Section 44CA(3)(b) directs attention to the administrative and compliance costs that would be incurred by the provider of the service. The NCC found that both declaration and the open access arrangements that currently apply at the Port are likely to give rise to administrative and compliance costs for PNO and industry participants, and on balance, "these costs are unlikely to be materially different in a future with and without declaration of the Service". In PNO's submission, this assessment both overstates the compliance costs associated with the Port's current arrangements and understates the compliance costs associated with declaration under Pt IIIA. One key difference between the two worlds is that the vessel agent deeds represent a contractual bargain that has been agreed to by both vessel agents and PNO. There is no evidence to suggest that these arrangements have given rise to disputation. This can be contrasted with the only arbitration conducted under the previous declaration, which is still ongoing, some years, and many millions of dollars later.

58. Of course, there is always the possibility that a dispute could arise in the future (for example, in relation to a proposed price increase), but even then, the dispute would be determined in accordance with a framework and in accordance with principles that have been agreed between the parties. This has the effect of narrowing any possible dispute. For example, one aspect of the ongoing dispute between Glencore and PNO as noted above is whether a deduction should be made from the asset base for user funded contributions. This matter has been dealt with under the pricing principles (which make clear that no deduction is to be made[35]).

59. NSWMC's contentions for why declaration is in the public interest principally rely on the benefits that they say would follow from declaration in terms of an improvement in

[35] See Pricing Principles at [4.2] and the definition of Initial Capital Base: SHB, pages 52 and 54

investment conditions in the tenements market (NS [113]), and other derivative market (NS [114]). These benefits have not been established. Further, NSWMC's position does not address the wider range of considerations that bear upon an assessment of the public interest, including the mandatory considerations discussed above.

60. Finally, NSWMC submits (at NS [114(d)]) that PNO would be likely to agree to participate in collective bargaining if declaration is granted. However, NSWMC has not explained how the threat of arbitration would drag PNO to the collective bargaining table, or why collective bargaining would constitute a public benefit, particularly in circumstances where PNO has already reached agreement with the actual users of the navigation service provided at the Port.

Conclusion

61. For the reasons explained above, the Tribunal should affirm the Minister's decision, pursuant to s 44K(8)(a) of the CCA.

62. PNO also submits that the present application is an appropriate case for the exercise of the Tribunal's discretion, under s 44KB(1), to order that NSWMC pay PNO's costs of the proceedings. The central question in this proceeding – whether declaration would affect competition in a dependent market – has been the subject of consideration by the NCC (on three separate occasions), by the Minister, by the Tribunal and by the Full Court, and on each occasion the same conclusion has been reached. The decision under review was based on a carefully reasoned recommendation by the NCC, and NSWMC has not identified any matter which would justify the Tribunal reaching a different one. In the circumstances, an order for costs is appropriate.

DATED: 20 June 2021

Declan Roche

Peter Strickland

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