NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

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Lodgment and Details

Document Lodged:	Statement of Facts, Issues and Contentions
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: 19/05/2021 11:15 AM

Important information

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

COMMONWEALTH OF AUSTRALIA

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

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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

STATEMENT OF FACTS, ISSUES AND CONTENTIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD

Provided pursuant to the direction of the Tribunal made 8 April 2021

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A. FACTS

A1. Port of Newcastle Operations

1. Port of Newcastle Operations Pty Limited (**PNO**) operates the Port of Newcastle (**Port**) under a 98-year sublease which commenced on 30 May 2014.[1]

2. The Port is the largest port on the East Coast of Australia. It services the Hunter Valley coal fields and is the world's largest coal export port. Coal export activities are the major source of revenue at the Port, and will remain so in at least the short-to-medium term.[2]

3. Not all functions at the Port are performed by PNO. In particular:

   (a) the NSW Government and the Port Authority of NSW retain regulatory oversight of the Port and have responsibility for a range of maritime safety and security functions at the Port, including emergency response, the Harbour Master, as holder of the Port Safety Operating Licence, and pilotage functions;

   (b) the Minister has power under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (the **PMA Act**) to fix and levy port cargo access charges and berthing charges at the Port; and

   (c) the pilotage services operator has power under Part 5 of the PMA Act to fix and levy pilotage charges.

4. The functions for which PNO is responsible, as Port operator under the PMA Act and under the terms of the sublease, include the fixing and collection of port charges, and the making of directions for the purpose of maintaining or improving safety and security at the Port.

5. In particular, Part 5 of the PMA Act permits PNO to fix and levy three types of port charges without approval from the relevant Minister:

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1 National Competition Council, *Application for declaration of certain services at the Port of Newcastle - Recommendation*, 18 December 2020 (**Recommendation**), [7.43].

2 Recommendation, [7.49].

(a) the navigation service charge (**NSC**), which is payable in respect of general use by a vessel of the Port and its infrastructure (the navigation service charge is described in more detail below at paragraphs 28 to 33);

(b) the wharfage charge (**WhC**), which is payable in respect of the availability of a site at which stevedoring operations may be carried out (wharfage charge), and is paid by the owner of the cargo at the time it is loaded or unloaded; and

(c) site occupation charges, which are payable by occupiers of land-side facilities such as stevedoring at terminals.

6. Part 5 of the PMA Act permits PNO, concurrently with the Minister, to fix and collect port infrastructure charges from port users, subject to to the terms of the sublease.

7. PNO admits paragraphs 1 – 6, 9 and 15 of NSWMC's Statement of Facts, Issues and Contentions (**SOFIC**).

8. The form adopted by NSWMC's SOFIC otherwise departs from the requirement that the Tribunal's review is to be conducted on the material before the Minister. NSWMC's SOFIC does not reference its various factual assertions to the material which was before the Minister (being the NCC's recommendation). Rather, it improperly seeks to plead facts at large. PNO will not respond to such facts at large, because that would misapprehend the nature of the process. Further, many paragraphs of NSWMC's SOFIC involve tendentious allegations rather than mere factual assertions.

A2. The application for (re-)declaration

9. This proceeding concerns the decision of the designated Minister (the **Treasurer**) of 16 February 2021 not to declare certain services at the Port under s 44H(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (the **Decision**). The Decision was made by the Treasurer following a recommendation under s 44F(2)(b) by the National Competition Council (**NCC**) not to declare the relevant services at the Port on 18 December 2020 (the **Recommendation**), in response to an application lodged by the New South Wales Minerals Council (**NSWMC**) on 23 July 2020 for a declaration recommendation under s 44F(1) (the **Application**).

10. The Application sought a recommendation from the NCC to the Treasurer that the following service at the Port be declared under Part 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*[3]

(the **Service**).

11. A Service defined in almost identical terms has been the subject previous applications, recommendations and decisions by the Minister, and by this Tribunal.[4] Specifically:

(a) on 13 May 2015, Glencore Coal Pty Ltd (**Glencore**) applied to the NCC for a recommendation that the shipping channel service at the Port be declared under Part IIIA. The service the subject of that application was described as:

> *The provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.*

(In this Statement of Facts, Issues and Contentions, the term **Service** is used interchangeably to refer to the service the subject of Glencore's application for a declaration, and the service the subject of NSWMC's subsequent application for a declaration.);[5]

(b) on 10 November 2015, the NCC recommended that the Service not be declared, on the basis that neither declaration criteria (a) nor (d) in the former s 44G(2) of the CCA were satisfied. (Subsequent amendments to the declaration criteria are discussed at paragraphs 12 to 15 below.) On 8 January 2016, the Acting Treasurer decided not to declare the Service;[6]

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3 Recommendation, [3.2].
4 Recommendation [1.7], [3.3].
5 Recommendation, [5.2].
6 Recommendation, [5.3].

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

(d) in July 2018, PNO applied to the NCC for a recommendation under section 44J of the CCA that the Treasurer revoke the Glencore Declaration. On 26 July 2019, the NCC recommended to the Treasurer that the Glencore Declaration be revoked. This recommendation followed the amendments made in 2017 to the declaration criteria. As the designated Minister did not publish a decision on the Revocation Recommendation within 60 days of receiving it, he was deemed by s 44J(7) of the CCA to have made a decision that the declaration be revoked, with effect on and from 24 September 2019.[8]

A3. Relevant amendments to the declaration criteria

12. Following the Glencore Declaration (and prior to the revocation of the Glencore Declaration in 2019), amendments to the statutory declaration criterion which presently appears at s 44CA(1)(a) of the CCA were enacted by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**2017 Amendments**). The 2017 Amendments inserted the words "*on reasonable terms and conditions, as a result of the declaration of the service*" to criterion (a), which now requires that the NCC and the Treasurer (and the Tribunal on review) be satisfied that (emphasis added):

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

13. The new test requires an assessment of whether and the extent to which access on reasonable terms and conditions from declaration is likely to have an effect on

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7 Recommendation, [5.4].
8 Recommendation, [5.7]-[5.9], [5.15].

competition in dependent markets, when compared to the terms of access likely without declaration.[9]

14. These additional words "*focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition*".[10] This requires a comparison of two future scenarios: one in which the Service is declared and access to the Service is granted on reasonable terms and conditions, and one in which the Service is not declared and the terms and conditions on which any access to the Service would be granted without declaration.[11] The NCC and the Treasurer (and the Tribunal on review) are required to look at how the nature and extent of access will change as a result of the declaration before considering the possible impact of this change on the state of competition in dependent markets.

15. The meaning of the term 'reasonable terms and conditions' is clarified by paragraph 12.21 of the explanatory memorandum to the 2017 Amendments, which states:

> *What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the* [NCC] *or* [Treasurer] *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.*

16. A similar amendment was made to criterion (d), which now also requires an assessment of whether and the extent to which access on reasonable terms and conditions from declaration is likely to have an effect on the public interest, when compared to the terms of access likely without declaration.

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9 Explanatory memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), [12.18].

10 Recommendation, [12.19].

11 Recommendation, [12.20].

A4. The Recommendation and the Decision

17. In the Recommendation, the NCC concluded that, in relation to the Service:

(a) criterion (a)[12] was not satisfied, including because the coal export market is already likely to be effectively competitive, and coal producers face uncertainty from factors other than Port charges that are more likely to influence their ability to compete in export coal markets;[13]

(b) criterion (b)[14] was satisfied, including because the Port could meet the total foreseeable demand in the market in the relevant term of 15 years and at the least cost compared to any two or more facilities;[15]

(c) criterion (c)[16] was satisfied, that is, the Port is of national significance in terms of its importance to constitutional trade and commerce, and to the national economy, having particular regard to the mass and value of trade through the facilities each year, and the economic activity generated by industries that are reliant upon the facilities;[17] and

(d) criterion (d)[18] was not satisfied, that is, that access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration of the Service would not promote the public interest, in circumstances where Port users can obtain access to the Service either via the open access regime or the long term pricing deeds offered by PNO, which are discussed at paragraphs 34 to 41 below.[19]

18. The NCC also concluded that it is unclear whether prices in a future with declaration of the Service would be so materially different to those in a future without declaration such that the economically efficient use of and operation of the infrastructure by which

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12 CCA s 44CA(1)(a).
13 See Recommendation, [1.22] - [1.23], [1.26], [7.12], [7.36] - [7.39], [7.43] -.[7.65], [7.118] - [7.123], [7.153] - [7.155].
14 CCA ss 44CA(1)(b), (2).
15 See Recommendation, [8.5] - [8.7].
16 CCA s 44CA(1)(c).
17 See Recommendation, [9.4] - [9.5].
18 CCA ss 44CA(1)(d), (3).
19 See Recommendation, [10.21] - [10.44].

the services are provided would be promoted by declaration, and that this decision is consistent with the principles of access regulation.[20]

19. On 16 February 2021, the Treasurer issued a decision under s 44H together with a statement of reasons not to declare the Service.

20. The Treasurer adopted the NCC's reasoning and finding that neither criteria (a) nor (d) were met and noted that he gave particular regard to the object in s 44AA(a), being to:

> *promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.*

21. The Treasurer accepted the NCC's conclusions that criteria (b) and (c) were satisfied.

A5. Global coal market in which Hunter Valley coal producers participate

22. Coal continues to be traded and shipped internationally; and Australian coal exporters participate in this international trade and compete against coal produced and sold through other ports in Australia and overseas. In this respect, there are currently several companies participating in the coal export market which are supplying coal to a wide range of global purchasers; and the nature of the competitive interactions between participants in the coal export market has not changed significantly despite PNO's acquisition of the Port, and subsequent increases in the price of the Service since 2015.[21]

23. Export coal miners from the Newcastle catchment compete with each other and other suppliers.[22]

24. The geographic scope of the coal export market for Australian exporters extends beyond Australia and into at least the Asia-Pacific region.[23]

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20 Recommendation, [1.31].
21 Recommendation, [7.114] to [7.115].
22 Recommendation, [7.114] to [7.115].
23 Recommendation, [7.114] to [7.115].

25. Coal is not a homogenous commodity and the differences in the grade of coal (i.e. thermal vs metallurgical) may affect its suitability. Thermal coal represents the significant majority of coal exported from the Port.[24]

26. PNO estimates that, by 2031, the Port may receive up to 3,666 vessels per annum. In its *Port Master Plan 2040*, PNO has stated that an assessment undertaken to evaluate the capacity of the Port has demonstrated that the shipping channel at the Port can accommodate the safe movement of over 10,000 vessels per annum. The vessel movements in 2017 indicate that the channel is currently operating at less than 50% of its capacity.[25]

27. The provision of terminal services to providers of container shipping services remains a very small proportion of the Port's activities. In 2019, the Port received 2,296 ships, 1,813 of which were coal vessels; the remaining 483 ships providing shipment of other products (including some vessels carrying containers). During that period, the Port exported 2,232 twenty-foot equivalent unit (**TEU**s) containers and received 3,104 TEUs containers.[26] During the same period, Port Botany received 693,599 TEU containers and exported 684,556 TEU containers.[27]

A6. PNO's charges for navigation services at the Port

28. By contrast to the fluctuations in global coal prices, PNO's charges for navigation services at the Port are not unpredictable, and do not fluctuate regularly.[28]

29. Pursuant to s 50 of the PMA Act, PNO charges a navigation service charge for vessels (including coal vessel) which enter the Port. This charge is imposed on vessel owners or charterers (**vessel operators**) of vessels which enter the Port.[29]

30. Each time a vessel enters the Port, the vessel operator enters into a contract by conduct with PNO for use of the shipping channels containing PNO's published standard terms

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24 Recommendation, [7.114] to [7.115].
25 Recommendation, [7.55].
26 Recommendation, [7.56].
27 Recommendation, [7.56].
28 Recommendation, [7.114].
29 Recommendation, [1.9] (fn 2).

and conditions including the applicable navigation service charge.[30] This contract is a single visit contract that covers the duration of the vessel's visit to the Port.[31]

31. On a day-to-day basis, PNO does not deal directly with vessel operators, but rather deals with agents, known as ships' agents, that act on behalf of vessel operators. Before vessels enter the Port, the relevant ships' agent submits details pertaining to the visit to the Port. After vessels leave the Port, PNO issues invoices to the ships' agents, on behalf of vessel operators, for the payment of charges at the Port payable by those vessel operators. Those ships' agents pay the invoiced charges on behalf of the vessel operators.[32]

32. The NSC payable by vessel operators of coal vessels is fixed and payable according to the gross tonnage of a vessel that enters the Port and uses the channels, referred to as "Vessel Gross Tonnage" (**GT**). GT refers to the capacity of the vessel using the channel, rather than the volume of coal or other cargo which might be loaded onto the vessel during its visit at the port. A vessel operator is charged through its agent the same amount for navigation services on a visit to the Port whether or not it loads or how much coal it loads during its visit. The charge is in respect of the aspect of its use of the port and its infrastructure as prescribed in s 50 of the PMA Act.[33]

33. The NSC fixed under s 50 of the PMA Act under PNO's published schedule of Port charges as at 1 January 2020 was $1.0424 per GT.[34]

A7. Open access regime and contractual access arrangements at the Port

Open access regime

34. In December 2019, PNO established formal terms and conditions of open, non-discriminatory access at the Port for any vessel seeking to enter the Port and use its channel and berthing facilities. These open access terms have been published on PNO's website since that time.[35]

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30 Recommendation, [5.23].
31 https://www.portofnewcastle.com.au/what-we-do/port-open-access-arrangements/vesselopenaccess/.
32 Recommendation, [7.26]; PMA Act s 50(4).
33 PMA Act ss 50, 51.
34 Recommendation, [1.14]. PNO's current published schedule of Port charges is available at: https://www.portofnewcastle.com.au/wp-content/uploads/2020/12/Schedule-of-Charges-2021-FINAL-.pdf
35 See https://www.portofnewcastle.com.au/what-we-do/port-open-access-arrangements/vesselopenaccess/

35. Relevantly, the open access arrangements provide for:[36]

(a) an initial NSC of $1.0424 per GT for coal vessels (as at 1 January 2020);

(b) variation by PNO of its schedule of charges from time to time, including varying or introducing any new fees or charges on 10 business days' notice;

(c) adjustment to the NSC and WhC for coal vessels annually by an amount equal to the consumer price index (**CPI**). PNO intends that these charges may also be increased to reflect additional investment by PNO in port services, any increases in government charges or taxes or changes in law and any material change events; and

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

Bilateral access arrangements

36. In December 2019, PNO published on its website and offered to vessel agents and coal producers pro-forma long term pricing deeds (respectively, **Vessel Agent Deed** and **Producer Deed**; together, **Deeds**).

37. The Deeds relevantly provide for:[37]

(a) an initial term of 10 years;

(b) a discounted NSC, initially of $0.8121 per GT, and a WhC, initially of $0.0802 per GT (as at 1 January 2020), annually adjusted to the greater of CPI or 4% (subject to certain 'triggers', including capital investment by PNO);

(c) a dispute resolution process (mediation and commercial arbitration), including in relation to the price adjustment 'triggers' described in sub-paragraph (b) above;

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[36] Recommendation, [5.23].

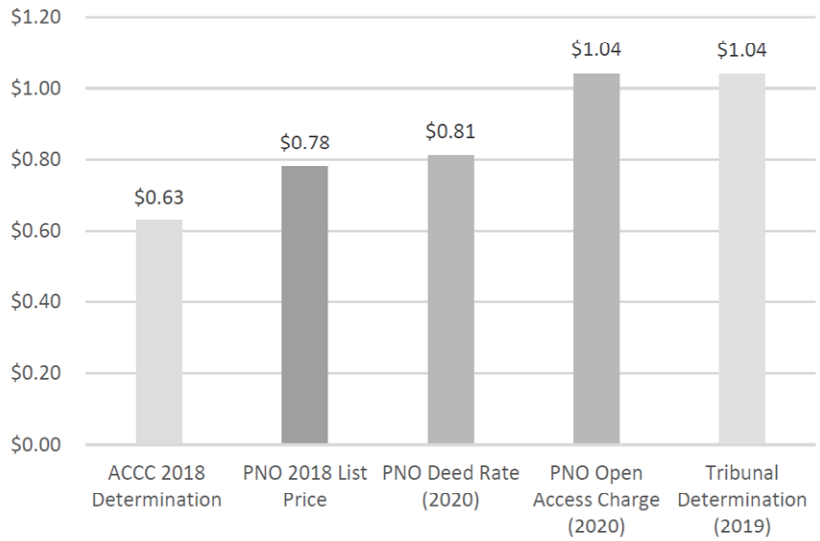
[37] Recommendation, [5.24], [5.26], [7.27], [7.67].

(d) pricing principles to be applied in mediation and arbitration consistent with those the ACCC must take into account when making an arbitration determination under s 44ZZCA of the CCA;

(e) capital expenditure transparency measures, by including provision to counterparties by PNO of rolling 5-year capital expenditure forecasts at the Port (which capital expenditure can trigger adjustments to the charges under the Deed as discussed at sub-paragraph (b) above); and

(f) non-discriminatory terms between counterparties to the Deeds.

38. A comparison of the range of prices set under the arbitration determination of the ACCC (being the only arbitration initiated while the Glencore Declaration was in force) and the Tribunal with prices set by PNO for the NSC is set out below.[38]



39. Section 67 of the PMA Act allows the port operator to enter into agreements with any person liable to pay charges under the PMA Act. The persons liable to pay the NSC under s 50 of the PMA Act are vessel owners.

40. Following negotiations from December 2019 to late March 2020, PNO has entered into, with effect from 1 April 2020, Vessel Agent Deeds under s 67 of the PMA Act with shipping agents representing coal vessels calling at the Port for the next 10 years in equivalent terms setting the charges in respect of navigation services supplied at the

[38] Recommendation, [7.91] (Figure 2).

Port. That is, absent declaration, PNO has voluntarily entered into contractual regulation of prices levied at, and the terms of access to, the Port in terms acceptable to the access seekers.[39]

41. As a consequence of the matters pleaded in [36] to [40] above, ships which carry coal from the Port are, for the next 10 years, able to obtain a NSC which is governed by the terms of the Vessel Agent Deeds, including an initial charge of $0.8121 per GT and subsequently regulated by the terms of the Vessel Agent Deeds (including the dispute resolution processes and the pricing principles). Therefore, coal producers have the option for the next 10 years of obtaining carriage of coal on terms regulated by the Vessel Agent Deeds, and PNO does not have any unfettered ability to raises prices for coal producers.

B. ISSUES

42. PNO agrees with paragraphs 38 and 39 of NSWMC's SOFIC.

43. The Tribunal cannot set aside the decision of the Treasurer and decide to declare the Service under s 44K(8)(b) unless it is satisfied of all of the declaration criteria for the Service in s 44CA for the Service (s 44H(4)).[40]

44. In making its determination, the Tribunal must have regard to the objects of Part IIIA of the CCA in making its decision (s 44H(1A)), namely to:[41]

    (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

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

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39 Recommendation, [7.26].
40 CCA s 44K(5).
41 CCA s 44AA.

C. CONTENTIONS

C1. No material increase in competition in dependent markets (criterion (a))

45. Access (or increased access) to the Service, on reasonable terms and conditions, as a result of a declaration would not promote any material increase in any of the dependent markets identified by NSWMC at paragraph 43 of its SOFIC.

(a) Coal exports market

46. A key aspect of the reasoning in the NCC recommendation, and the Minister's decision, was (a) that port charges were likely to remain a comparatively small component of the cost of production and export of coal, (b) that the possible difference between the price in the Deeds and the price set with declaration represents an even smaller fraction of the cost of producing coal in the Newcastle catchment, and (c) that coal producers and exporters face significant uncertainty from other other factors that are more likely to influence their ability to compete in export markets, including coal prices and labour costs (NCC Recommendation at 7.118 – 7.122, 7.126, expressly adopted by the Minister).

47. NSWMC has failed to grapple with this aspect of the decision. In particular, NSWMC has failed to explain why declaration would have any impact on competition in any relevant market in light of the comparatively trivial quantum of port charges (and even more so, the quantum of port charges in issue) to the overall commercial viability of coal production and export.

48. The Minister's decision was not dependent upon any conclusion that a reasonable range of NSC values included a return on user funded assets. Even if (contrary to the position of PNO) a reasonable charge for the NSC was $0.63 per GT, that is only 18 cents less than the price under the Deeds. The NSWMC has failed to explain why that 18 cents would matter, particularly in circumstances where the coal price may vary by tens of dollars per tonne over a short period. NSWMC instead makes vague statements about "unreasonable terms and conditions of access" (e.g. at [63]).

49. In any event, NSWMC does not identify a proper basis for concluding that a reasonable charge of the NSC is below the charge in the Vessel Agent Deeds. In NSWMC SOFIC [67(b)], reference is made to the decision of the Full Court of the

Federal Court in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 at [223]. However:

(a) the reference given ([223]) is to a paragraph of the Full Court decision summarising an argument but not expressing any conclusion;

(b) the Full Court's decision has been the subject of a grant of special leave, including on the relevant point concerning user contributions;

(c) as was correctly observed in the NCC Recommendation (at [6.33]), the Full Court did not itself determine the terms and conditions of the arbitration (but rather remitted that matter to the Australian Competition Tribunal), and expressly rejected the suggestion that its conclusions on matters of law necessarily meant that user contributions were to be excluded.[42] Rather, they were to be considered by the Tribunal in accordance with a proper understanding of the relevant provisions; and

(d) in respect of the inclusion of user contributions in the asset base used to calculate the charges under the Deed, in its 30 October 2019 determination of the access dispute between PNO and Glencore, the Tribunal did not conclude that $912 million of assets in the regulated asset base (RAB) were 'dredging works at the Port which had been paid for in the past by users of the Port'. On the contrary, the Tribunal did not reach such a conclusion, because the basis on which arrangements had been made and the circumstances as they occurred (including whether there were costs to the State) were not established by the evidence before the Tribunal. The question of whether users had funded dredging works, and if so which works and to what extent, has not been determined by the Tribunal to date. Even if the source and extent of user funding for such works could be established, the Tribunal accepted on the evidence before it that there had been very significant cost under-recovery by the State over decades (exceeding $8b).[43]

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42 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 at [289], [320]-[321].

43 Recommendation, [7.29].

A necessary plank underpinning the NSWMC's contentions is therefore missing.

50. NSWMC's SOFIC fails to recognise that coal producers can obtain the benefit of existing Vessel Agent Deeds to constrain the terms and conditions applicable to the NSC and the WhC in relation to coal passing through the Port, including by reason of the arbitration provisions. Thus NSWMC's SOFIC [67(a)] is incomplete and misleading, and [68] is incorrect.

51. As the NCC concluded, the coal export market is effectively competitive at present.

52. Further, PNO does not have any incentive to diminish competition in coal export markets because, *inter alia*:

    (a) PNO is not meaningfully vertically integrated. In this regard, NSWMC's suggestions (at [66] of its SOFIC) that PNO may *become* vertically integrated is not based on any proper assessment on the material before the Minister; and

    (b) the Port is not capacity constrained and is not likely to become so over the 15-year period of declaration sought in the Application, such that PNO would have an incentive to deny access (or have an incentive to raise prices on account of this factor) to coal exporters acquiring services at the Port.[44]

53. PNO otherwise relies upon matters relied upon by the NCC in recommending, and the Minister in making, the decision in question.

(b) Other markets

54. The contentions of the NSWMC in relation to the other markets fail for the same reasons that they fail in relation to the coal export market.

(c) Tenements market

55. In addition, additional reference may usefully be made to the tenements market.

    (a) The tenements markets is a derivative of the coal export market, and is already effectively competitive without declaration.

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44 Recommendation, [7.55].

(b) PNO has no incentive to provide uncertainty around access charges for users at the Port in circumstances where these lead to significantly less investment in mining activity in the Newcastle catchment.

(c) The relatively trivial nature of the Port charges in the context of the business of coal production has no impact on competition for tenements. There is no basis for the contention of NSWMC at [72] that there would be "material improvement in the environment for competition in the Tenements Market".

(d) For the reasons set out above at [46], [50] and [55(b)], there are no "uncertainties" in relation to forecasting the relevant cost component, in circumstances where coal producers can obtain, indirectly, the benefit of the 10 year arrangements in place with shipping agents.

56. NSWMC contends in this proceeding that "[t]*here is no effective regulation of the NSC or [WhC] charges. Both charges can be increased by PNO at any time at its sole discretion*".[45] This statement is incorrect and should be rejected for the following reasons:

(a) Under the Deeds, a variation to the charges covered by the Deed can only be made once a year. A variation can only be made over and above the 4%/CPI increase where it is material, which is designed to avoid trivial increases.[46]

(b) In the event of a Permitted Price Dispute (as that term is defined in the Deed) arising, the parties are bound to conduct mediation and, failing the resolution within 28 days, arbitration in accordance with the Australian Centre for International Commercial Arbitration Rules. Relevantly, the mediator must take into account, and the arbitrator must apply, the pricing principles set out in the Deed, which are substantially the same at those set out in the Competition Principles Agreement. These arrangements cannot be said to give rise to a degree of uncertainty that is materially different from that applying to services provided by any significant infrastructure asset anywhere in Australia.[47]

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45 NSWMC, Statement of Facts, Issues and Contentions, [27].
46 Recommendation [7.27(a)].
47 Recommendation, [7.26].

(c) In addition, in order to provide users with visibility of and the opportunity to comment on any prospective increases in the charges under the Deed on account of capital expenditure proposed to be incurred by PNO, PNO is under a contractual obligation to prepare and provide to Deed counterparties a forward looking 5 year forecast (covering the period 1 January 2020 to 31 December 2024) of its projected capital expenditure that may impact the charges under the Deed, and to meet with the Deed counterparty to discuss those forecasts and any potential associated variations to the charges under the Deed. This is to be updated annually on a rolling 5 year basis by no later than 31 March each year, and PNO is under a contractual obligation to meet with the Producer to discuss each updated 5 year capital expenditure forecast.[48]

C2. No public interest supporting declaration (criterion (d))

57. NSWMC's contentions in relation to criterion (d) are brief and rely substantially on its contentions in relation to criterion (a).

58. NSWMC also contends (at [86]) that declaration would permit collective bargaining, which confers public benefits. NSWMC does not elaborate on the public benefits of collective bargaining. PNO notes that this issue is contested, and the subject of the separate proceedings in the Tribunal due to be heard in October.

59. At no point during the declaration process has the NSWMC provided any factual evidence demonstrating which particular efficient investments in mining tenements would not occur in a future without declaration of the Service. Contentions such as "*declaration would promote greater investment*" in dependent markets are unfounded and should be rejected.[49]

60. Further, if a different view was taken about the promotion of competition, then it would be necessary to consider the potential harmful effects of declaration on compliance costs and the efficient investment in infrastructure.

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48 Recommendation, [7.27(b)].

49 NSWMC, Statement of Facts, Issues and Contentions, [71].

61. Contrary to paragraph 87, NSWMC is not entitled to rely on its submissions to the Council in the Tribunal's review of the Minister's decision.

C3. Relief sought by PNO

62. PNO seeks the following relief:

(a) a determination by the Tribunal affirming the Treasurer's decision not to declare the Service under s 44K(8)(a); and

(b) an order under s 44KB(1) that NSWMC pay PNO's costs of this proceeding.

63. PNO notes that costs orders before the Tribunal in proceedings of this kind are discretionary: s 44KB(1). However, PNO submits that, in circumstances where:

(a) the Service has been the subject of six draft and final recommendations of the NCC, and three decisions (or deemed decisions) of the Treasurer not to declare (or revoke declaration) within around five years; and

(b) NSWMC applied for a declaration recommendation in respect of the Service less than 12 months after the Glencore Declaration was revoked, and has applied for review of the Treasurer's decision not to declare before the Tribunal,

this proceeding has resulted in unnecessary and unreasonable costs for PNO (as well as the NCC, the Commonwealth and the Tribunal).

64. In all the circumstances, PNO seeks an order pursuant to s 44KB that NSWMC pay all of PNO's costs, or alternatively, such part as the Tribunal considers appropriate.

DATED: 19 May 2021