

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: 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: 4/05/2021 4:13 PM

Important information

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



NEW SOUTH WALES MINERALS COUNCIL'S STATEMENT OF FACTS, ISSUES AND CONTENTIONS

A. FACTS

A1. The Applicant

1. New South Wales Minerals Council (**NSWMC**) is the peak industry association representing the New South Wales minerals industry, including explorers, miners, and associated service providers.
2. NSWMC has over 80 members, including Bloomfield Collieries Pty Ltd, Centennial Coal Company Limited, Yancoal Australia Limited and Glencore Coal Assets Australia Pty Ltd.

A2. The application for declaration

3. NSWMC applied under section 44F of the *Competition and Consumer Act 2010* (**CCA**) to the National Competition Council (**Council**) asking the Council to recommend that the following service (**Service**) at the Port of Newcastle (**Port**) be declared under Division 2 of 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.

4. The Council published its recommendation (**Declaration Recommendation**) together with reasons on 18 December 2020 pursuant to section 44GC. In its reasons, the Council expressed the view that the declaration criteria in sections 44CA(1)(b) and (c) were satisfied but the declaration criteria in sections 44CA(1)(a) and (d) were not. On that basis, the Council recommended to the designated Minister (the **Treasurer**) that the Service not be declared.
5. On receiving the Declaration Recommendation, the Treasurer decided not to declare the Service pursuant to section 44H(1). The Treasurer published his decision (**Decision**) together with reasons on 16 February 2021 pursuant to section 44HA(1). In his reasons, the Treasurer accepted the views of the Council that the declaration criteria in sections 44CA(1)(b) and (c) were satisfied but the declaration criteria in sections 44CA(1)(a) and (d) were not.
6. On 8 March 2021, NSWMC applied to the Tribunal for review of the Treasurer's Decision pursuant to section 44K(2).

A3. The Hunter Valley coal industry

7. The Hunter Valley coal industry and associated supply chain are the largest coal export operations in the world. The Hunter Valley/Newcastle coalfields produce around 170 million tonnes of saleable coal per year. In 2018-2019, 96% of the 168 million tonnes of coal exported from New South Wales was exported through the Port of Newcastle. Both metallurgical and thermal coal products are produced in the region.
8. The Hunter Valley coal supply chain is made up of: 11 coal producers who export their coal (see paragraph 9); the rail track provider, Australian Rail Track Corporation (**ARTC**);

four rail haulage operators - Pacific National, Aurizon, One Rail Australia and Southern Shorthaul Railroad; three industry-owned coal export terminals, two operated by Port Waratah Coal Services (**PWCS**) and one by Newcastle Coal Infrastructure Group Terminal (**NCIG**) which stockpile, and load coal onto vessels for export; port managers 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.

9. There are around 35 operating coal mines in the Hunter Valley operated by 11 coal producers as well as other coal projects at various stages of exploration, approval and development. The coal producers exporting through the Port include:
 - a. BHP Group Ltd (on behalf its wholly owned subsidiary, Hunter Valley Energy Coal Ltd), which operates the Mount Arthur Mine, the largest mine in New South Wales located near Muswellbrook in the Upper Hunter Valley;
 - b. Bloomfield Collieries Pty Ltd, which operates two open cut coal mines at East Maitland and in the Hunter Valley;
 - c. Centennial Coal Company Ltd, which operates the Mandalong, Myuna and Newstan mines in the Newcastle coalfield;
 - d. Great Southern Energy Pty Ltd (trading as Delta Coal), which owns the Chain Valley mine approximately 60km south of Newcastle;
 - e. Glencore Coal Assets Australia Pty Ltd, which operates several mines and mining complexes across Newcastle, Hunter Valley and Western coalfields;
 - f. Idemitsu Australia Resources Pty Ltd, which owns the Boggbari mine in the Gunnedah Basin and the Muswellbrook mine in the Upper Hunter Valley;
 - g. MACH Energy Australia Pty Ltd, which operates the Mt Pleasant mine in the Upper Hunter Valley;
 - h. New Hope Group / Bengalla Mining Company Pty Ltd, which operates the Bengalla mine in the Upper Hunter Valley;
 - i. Peabody Energy Australia Pty Ltd, which operates the Wambo mine in the Hunter Valley and the Wilpinjong mine in the Western Coalfield;
 - j. Whitehaven Coal Mining Limited, which operates several mines in the Gunnedah Basin;
 - k. Yancoal Australia Limited, which operates several mines in the Hunter Valley, Newcastle and Western Coalfields.
10. New South Wales Hunter Valley mining operations produce employment for around 22,000 people. In 2018-2019, the New South Wales mining industry directly spent \$13.7 billion in the New South Wales economy, which included \$2.5 billion in wages and salaries, \$8.9 billion in goods, services and community contributions, and \$2.3 billion in

state government payments, such as royalties and taxes. The majority of this expenditure came from coal mining, with the Hunter Valley region accounting for 39.5% of the total direct spend for New South Wales.

A4. The export of coal from the Hunter Valley

11. The Port is located at the end of a multi-user export supply chain that involves multiple mines, an extensive rail network and coal loading terminals located at the Port.
12. Coal is transported from mines by rail haulage providers to three terminals at the Port. It is then loaded onto vessels at one of the loading terminals. The task of exporting coal from the Port involves vessels entering the Port, transiting the channels in the Port, tying up at the berths to load coal at the coal terminals and then once again transiting the channels before exiting the Port.
13. Coal from Newcastle is exported through the Port to around 20 countries primarily in the Asia, including Japan, China, South Korea, and Taiwan.
14. The Hunter Valley coal industry has recently experienced volatile market conditions. China unofficially banned Australian coal in mid-2020. Coal exports to China of thermal coal and metallurgical and exports to China were down 83% and 85% respectively between November 2019 and November 2020.

A5. The Port

15. The Port is the largest coal exporting port in the world.
16. The Port is the only commercially viable means of exporting coal from the Hunter Valley. The facilities used to provide the Service include the shipping channels and berthing infrastructure (which include berths next to walls as part of the channel). The shipping channels are the only way vessels can enter and exit the Port. The shipping channels are a natural "bottleneck" monopoly. Access to and use of the shipping channels and berthing facilities are essential for the export of coal from the Hunter Valley.

A6. Port of Newcastle Operations Pty Ltd

17. Until May 2014, the Port was operated by the **State** of New South Wales (specifically, the **Port Authority** of New South Wales). In the decade or so prior to May 2014, NCIG paid very significant sums to the State for dredging the shipping channels at the Port and a further very substantial payment is anticipated from PWCS for dredging the shipping channels associated with a proposed terminal T4 when it is developed.
18. In May 2014, the joint venture parents of PNO, (Hastings Fund Management and China Merchants Group (**China Merchants**)) entered into a long-term lease arrangement with the State for the Port assets, including the shipping channels. The transaction generated gross proceeds of some \$1.75 billion to the State. PNO subsequently revised its valuation of the channels in its accounts to \$2.4 billion.
19. PNO is now jointly owned by The Infrastructure Fund (**TIF**, an Australian wholesale investment fund under the trusteeship of Gardior Pty Ltd) and China Merchants.
 - a. TIF has Australian and overseas assets worth more than \$2.4 billion. TIF's portfolio is managed by Macquarie Infrastructure and Real Assets.

- b. China Merchants is headquartered in Hong Kong with business sectors which extend beyond infrastructure to property development and financial investment. In 2018, China Merchants had total assets in the value of 8 trillion RMB, with 649 billion RMB in revenue. Currently, China Merchants operates 53 ports in 20 countries and districts, and in 2017, its container throughput exceeded over 100 million twenty-foot equivalent unit (**TEU**) for the first time.
 - c. China Merchants Port Holdings Company is part of China Merchants, and is a global port developer, investor and operator, with a ports network portfolio spanning across 18 countries and regions.
20. Since May 2014, PNO has been responsible for the operation of the Port including the scheduling of vessels using the Service and carrying out the activities necessary for the provision of the Service such as the dredging and surveying of the channel and the provision of aids to navigation.

A7. Port charges

21. As the Port operator since May 2014, PNO controls the terms and conditions of access to the Service. In that regard, PNO has the statutory powers conferred under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (**PMAA**) in order to levy charges.
22. 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;
 - 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).
23. PNO may vary the charges in the Schedule from time to time, including varying or introducing new fees without consultation with Port users.
24. PNO has the power to exclude access to the Service if the charges are not paid.
25. Shortly after assuming the role as port operator, PNO increased the NSC at the Port, by between 40% and 60% for some vessel types and re-valued the Port assets from \$1.75 billion to \$2.4 billion. Those price increases were not accompanied by any change in the nature or quality of the Service and were imposed by PNO without any real consultation with users of the Service.
26. In addition, PNO has subsequently further increased the NSC. For example, between 2019 and 2020, PNO increased the NSC by 33.5%. PNO's Schedule effective 1 January 2020 (16 December 2019 version) records an NSC for standard coal vessels of \$1.0424 per GT and a WC of \$0.0802.
27. There is no effective regulation of the NSC or WC charges. Both charges can be increased by PNO at any time at its sole discretion.

28. The PMAA and *Ports and Maritime Administration Regulation 2012* (NSW) (**PMA Regulations**) do not allow the State to intervene and set prices at the Port.
29. 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 the Independent Pricing and Regulatory Tribunal (**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, section 44G(2)(e)(ii) of the Act would mean that the Council could not recommend the Service."¹
30. The State has not intervened in relation to PNO's setting of new terms and conditions in relation to the Service. There is no suggestion that the State has any intention to put in place any form of regulatory oversight for cost increases or importantly for any future fixing of price increases for the channels or any associated infrastructure at the Port. This creates considerable uncertainty for the operation and commercial viability of existing and future coal mines in the Hunter Valley region.
31. PNO has available on its website a Producer Pro Forma Long Term Pricing Deed (**Producer Deed**). The Producer Deed includes a variety of price and non-price terms. The Producer Deed is expressly stated by PNO to be non-binding unless and until PNO and the relevant coal producer have "each agreed executed and delivered the final form of the deed".
32. Under the terms of the Producer Deed, in respect of the price of the NSC, PNO may earn a "reasonable rate of return...on the value of all assets comprising its Initial Capital Base", meaning that they permit PNO to earn a return on user funded contributions that are factored into the Initial Capital Base.

A8. PNO's ability and incentive to exercise market power

33. The Port is the only means by which coal producers in the Hunter Valley can export coal into overseas markets, and PNO controls that natural bottleneck facility. PNO has substantial market power in relation to the provision of the Service at the Port.
34. As a monopoly provider of the Service, PNO has the ability and incentive to exercise market power to maximise profits. In this regard, PNO has the incentive and ability to behave opportunistically to expropriate the maximum available rents from coal producers, who are locked in to using the Port. This includes discriminating on access terms and conditions (including price) between users.
35. PNO is not constrained from exercising its market power by the availability of substitute facilities, the countervailing power of users, or the threat of a new facility being built:
 - a. there are no reasonably available substitute facilities, or any threat of a new port facility being built;
 - b. coal producers cannot cease to use the Service. In this regard, PNO has considerable bargaining power over coal producers.

¹ *Application by Glencore Coal Pty Ltd [2016] ACompT 6* (31 May 2016) at [14].

36. As previously stated by the Tribunal in respect of PNO's market power:

...[t]he 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.²

37. PNO's conduct since the Council's Revocation Recommendation (22 July 2019) attests to its market power. Since that time, PNO has released its Schedule of Service Charges for 2020 and the Producer Deed (and Vessel Agent Deed), which incorporate material increases in access prices.

B. ISSUES

B1. Issues for determination by the Tribunal

38. The primary issue in this proceeding is whether to set aside the Treasurer's Decision and declare the Service pursuant to section 44K(8)(b) of the CCA.

39. In this regard, and in circumstances where there does not appear to be any controversy that the declaration criteria in sections 44CA(1)(b) and (c) are satisfied, the key issues for consideration by the Tribunal in this proceeding are:

a. section 44CA(1)(a): whether access (or increased access) to the Service, on reasonable terms and conditions, as a result of a declaration of the Service would promote a material increase in competition in at least one market, other than the market for the Service (**criterion (a)**);

b. section 44CA(1)(d): whether access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration of the Service would promote the public interest (**criterion (d)**);

c. section 44K(8)(b): whether the Tribunal should declare the Service.

C. CONTENTIONS

40. The criteria for declaration of a service are set out in section 44CA of the CCA.

41. Whilst the Tribunal's task in this proceeding is a "re-consideration" of the matter pursuant to section 44K(4), NSWMC refers below to the reasons of the Council and the Treasurer in order to illustrate its contentions.

C1. Criterion (a)

42. The statutory test under criterion (a) requires the Tribunal to determine whether access (or increased access) to the Service, on reasonable terms and conditions, as a result of a declaration of the Service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the Service.

² *Application by Glencore Coal Pty Ltd [2016] ACompT 6 at [166].*

C3. Dependent markets

43. Criterion (a) falls to be determined in this case by reference to any one or more of the following dependent markets:
- a. A coal export market (**Coal Export Market**).
 - b. Markets for the acquisition and disposal of exploration and / or mining authorities (**Tenements Market**).
 - c. Markets for the provision of infrastructure connected with mining operations, including rail, road, power and water (**Infrastructure Market**).
 - d. Markets for services such as geological and drilling services, construction, operation and maintenance (**Specialist Services Market**).
 - e. Markets for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are a part (**Bulk Shipping Market**).³
44. Contrary to the Council's analysis, criterion (a) can be satisfied even if the dependant market is "likely to be effectively competitive".⁴ There is still scope for satisfaction of criterion (a) even if the dependant market is "effectively competitive".
45. In this regard, the Council and the Treasurer erroneously concluded that the Coal Export Market and Tenements Market are "likely to be effectively competitive" with or without declaration.⁵ There is no solid foundation for these propositions. The Council's analysis (adopted by the Treasurer) was based merely on its own assertions and that it had (in its view) not received any contrary submissions.⁶
46. Having regard to the recent volatile market conditions, it is not apparent that the Coal Export Market is effectively competitive.
47. In addition, the Council and the Treasurer approached the matter on the erroneous premise that if the Coal Export Market is effectively competitive then declaration is not likely to promote a material increase in competition in the other dependent markets.⁷ This approach is not supported by criterion (a).
48. Even if declaration would not promote a material increase in competition in the Coal Export Market, there is still scope for satisfaction of criterion (a) by reference to one or more of the other dependent markets.

C4. The future with declaration

49. In the future with declaration, users of the Service would be assured of access (or increased access) to the Service on reasonable terms and conditions.

³ Each of these markets were identified in the 2016 Glencore Application. See *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [37]-[38].

⁴ Council's Reasons for Recommendation (18 December 2020), [1.26]. See also [7.113].

⁵ Treasurer's Reasons for Decision (16 February 2021), p. 5; Council's Reasons for Recommendation, [1.26], [7.147].

⁶ Council's Reasons for Recommendation, [7.114]-[7.115].

⁷ Treasurer's Reasons for Decision, p. 6; Council's Reasons for Recommendation, [1.26].

50. In this regard, users of the Service would have a right to seek arbitration before the Australian Competition and Consumer Commission (**ACCC**) in the event of a dispute as to the terms and conditions of access that is not resolved by negotiation.
51. With declaration, negotiations (bilaterally or collectively) would be conducted between PNO and Port users in the knowledge that, in default of agreement, arbitration is available to Port users to have the ACCC determine reasonable terms and conditions.
52. In that way, declaration would require PNO, a monopoly service provider, to behave as if the market for the Service was a competitive marketplace.
53. In this case, declaration would likely result in PNO having to engage in collective bargaining with Port users (as authorised by the ACCC). PNO's refusal to do so would be likely to give rise to arbitration before the ACCC.
54. In the future with declaration, PNO's ability and incentive as a monopoly provider of the Service to set unreasonable terms and conditions of access would be constrained by the regulatory regime. Under this regime, PNO would not likely be able to price discriminate in setting the NSC and WC with declaration.
55. With declaration, and by comparison to the likely future without declaration, there would be substantially greater price certainty for Port users. In a future with declaration, the NSC and WC would be constrained by the regulatory regime to reasonable levels. In the future without declaration, there would be no such constraint.
56. In addition, with declaration, and by comparison to the likely future without declaration, the future prices for NSC would likely be substantially lower. Contrary to the Council's conclusion,⁸ the reasonable terms and conditions of access (or increased access) with declaration do not likely include a return on user funded assets.⁹ In comparison, in the future without declaration, the NSC and WC imposed by PNO would incorporate a return on user funded assets – whether by the Schedule rate or the Producer Deeds.
57. Thus, with declaration, the Port would not likely be able to include \$912 million in user funded expenditure in its NSC charge.

C5. The future without declaration

58. In the future without declaration, and by comparison to the future with declaration, there would be no assurance for Port users of access (or increased access) to the Service on reasonable terms and conditions.
59. Without declaration, the terms and conditions of access to the Service would remain unregulated. The Council erroneously concluded that the “NSW Government would be likely to intervene if PNO imposed excessive prices or other access limitations that had the potential to have a material impact on competition; or otherwise harm the public interest”.¹⁰ This proposition has no solid foundation.

⁸ Council's Reasons for Recommendation, [7.86].

⁹ *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145.

¹⁰ Council's Reasons for Recommendation, [7.39].

60. Without declaration, and by comparison to the future with declaration, PNO as a monopoly service provider would not behave as if the market for the Service was a competitive marketplace.
61. Without declaration, PNO would not likely engage in collective bargaining with Port users (as authorised by the ACCC).
62. In the future without declaration, there is a real likelihood that PNO would price discriminate in setting the NSC and WC with respect to Port users. For instance, PNO could price discriminate against coal and container Port users.¹¹
63. Absent declaration, as a monopoly provider of the Service, PNO would likely have the incentive and ability to set unreasonable terms and conditions of access (or increased access) in order to maximise profits. This would in turn lead to allocative, productive and dynamic inefficiencies.¹²
64. Contrary to the view taken by the Council, PNO's incentive and ability in this regard would not likely be constrained in the future without declaration by fear of reputational harm,¹³ because PNO is not vertically integrated,¹⁴ the presence of spare capacity in the shipping channels at the Port,¹⁵ or the current Producer Deed (or Agent Deed).¹⁶
65. PNO's refusal to negotiate with NSWMC as part of the ACCC collective bargaining authorisation process demonstrates PNO's lack of concern of reputational harm.
66. As to vertical integration, there is a real likelihood that PNO will be vertically integrated in the future. PNO is jointly owned by TIF and China Merchants, which is a global port developer, investor and operator, with a global ports network portfolio. The China Merchants portfolio includes container terminal operations which are part of the Chinese Government Belt and Road Initiative.
67. As to the Producer and Agent Deeds, the Council erroneously concluded that there is not likely to be a material difference between the terms of the Deeds and the terms and conditions with declaration.¹⁷ This proposition is erroneous for a number of reasons:
 - a. 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 offer the Deeds. It could cease offering the Deeds at any time.¹⁸

¹¹ PNO's proposed expenditure at the Port on container terminal development and channel dredging is understood to be around \$2 billion. Users of the Service have no capacity to affect user-funded industry expenditure imposed by PNO through levies for the development of the Port.

¹² Council's Reasons for Recommendation, [7.25].

¹³ Council's Reasons for Recommendation, [7.43].

¹⁴ Council's Reasons for Recommendation, [1.23], [1.26], [5.11(d)], [7.72], [7.73(c)], [7.109(f)].

¹⁵ Council's Reasons for Recommendation, [7.54]-[7.59].

¹⁶ Council's Reasons for Recommendation, [7.69].

¹⁷ Council's Reasons for Recommendation, [7.70]. See also [7.93] and [7.122].

¹⁸ Cf. Council's Reasons for Recommendation, [7.81].

- b. The NSC price under the Deeds is substantially higher than would likely exist under reasonable terms and conditions with declaration, as it includes a return on user funded assets which would not likely prevail with declaration.¹⁹
 - c. 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).
68. In the future without declaration, and by comparison to the likely future with declaration, there would be substantially less pricing certainty for Port users. In terms of price certainty, the Deeds are an ineffective substitute for declaration of the Service. The Deeds are not an open access regime. They are an offer to enter into bilateral negotiations with PNO and their terms reflect PNO's market power. It does not appear any coal producer has entered into the Producer Deed. Other than the Deeds, Port users must pay the Schedule charges which can be changed by PNO in its sole discretion.

C6. Promotion of competition in Tenements Market

69. NSWMC contends that, in satisfaction of criterion (a), declaration of the service would promote a material increase in competition in the Tenements Market.
70. Contrary to the position taken by the Council,²⁰ the future with declaration would likely involve substantially less price uncertainty in respect of PNO's Port access charges in comparison to the likely future without declaration.
71. As such, declaration would promote greater investment in the Tenements Market. The future with declaration will provide market participants the assurance that access (or increased access) will be provided on reasonable terms and conditions that will mitigate the risk of hold-up of investment.
72. Further, by mitigating the risk of hold-up, declaration 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.
73. In deciding that declaration would not promote a material increase in competition in the Tenements Market, the Council proceeded on the basis that Port charges would not likely be materially different with and without declaration.²¹ This proposition should be rejected for the reasons outlined above.

¹⁹ See *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 at [223], as articulated by Glencore and the ACCC regarding the alleged error of law by the Tribunal concerning user contributions.

²⁰ Council's Reasons for Recommendation, [7.155].

²¹ Council's Reasons for Recommendation, [7.156].

74. In this regard, the higher charges imposed by PNO in the likely future without declaration would have a detrimental effect on market participants because:
- a. it would increase transportation costs which cannot be reasonably passed to coal customers, which means that these costs will need to be absorbed by the coal producers in an already high cost environment where there is a negative outlook on commodity prices; and
 - b. it would negatively impact investment in tenements in the Hunter Valley region because of the uncertainties associated with forecasting the higher cost component. This uncertainty differs from the 'business as usual' risks associated with operating a coal mine, which do not arise from an individual supply chain participant's unilateral decision-making and control. PNO is unique in being able to appropriate the surplus created by other parties.

C7. Criterion (b)

75. Criterion (b) stipulates that the facility used to provide the service could meet the total foreseeable demand in the market over the period for which the service would be declared, and at the least cost compared to any two or more facilities.
76. The coal terminals at the Port have been built to be capable of loading vessels which approach using the existing channel and associated facilities. There is no route through any existing waterway which could be used to approach the existing coal terminals even with dredging activities. It is not possible to develop another facility that would allow vessels to use the existing Port terminals at the Port. There is capacity to increase operations at the Port.²²
77. The Council concluded that criterion (b) was satisfied.²³ The Treasurer adopted this conclusion. NSWMC contends that criterion (b) is satisfied.

C8. Criterion (c)

78. Criterion (c) stipulates that the facility providing the service is of national significance, having regard to: (a) the size of the facility, or (b) the importance of the facility to constitutional trade or commerce, or (c) the importance of the facility to the national economy.
79. NSWMC contends that criterion (c) is satisfied. Coal exports from the Port are of national significance.
80. The Council determined that criterion (c) was satisfied.²⁴ The Treasurer adopted this conclusion. The Council relied on the following submissions of NSWMC:

The NSWMC has submitted that coal exports from the Port via the shipping channels are of national significance. It notes PNO's 2018 Trade Report which reports that in

²² In its Port Master Plan 2040, PNO has stated that an assessment undertaken to evaluate the capacity of the Port has demonstrated that the Channel can accommodate the safe movement of over 10,000 vessels per annum. The vessel movements in 2017 indicate that the Channel is currently operating at less than 50% of its capacity.

²³ Council's Reasons for Recommendation, [8.7].

²⁴ Council's Reasons for Recommendation, [9.5].

2018 the Port handled 158.6 million tonnes of coal with a value of approximately \$23.6 billion. It further submits that in 2018/19, the Hunter Valley mining sector directly supported 3,282 businesses; directly employed 13,347 people; paid \$1.4 billion in wages and salaries; directly spent \$4.0 billion on goods and services; paid \$55.0 million to local government; and provided \$4.0 million to 397 community groups. In total, about 19.1% of the Hunter Region's workforce was supported by mining. Mining made up 22.8% of Gross Regional Product, a total of \$11.5 billion.

81. The Council also relied on submissions from Glencore and Malabar Coal and noted the importance of mining activity in the Hunter Valley and in New South Wales more broadly to the local and State economies.²⁵

C9. Criterion (d)

82. 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'.

83. In making this assessment, consideration must be given to: (a) the effect that declaring the service would have on investment in (i) infrastructure services; and (ii) markets that depend on access to the service; and (b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared: section 44CA(3) of the CCA.

84. The Council concluded that criterion (d) was not satisfied for the same essential reasons as criterion (a).²⁶ The Treasurer agreed with that conclusion.

85. NSWMC contends that criterion (d) is satisfied. As explained above, declaration would promote a material increase in competition in the Tenements Market. It would also promote economic efficiencies in the Coal Export Market. It would also promote employment and efficient investment in the Infrastructure Market, the Specialist Service Market and the Bulk Shipping Market. Declaration would therefore be in the public interest.

86. Further, if the Service were declared, PNO would not be able to refuse to meet coal industry representatives in collective bargaining. Such collective bargaining would give rise to public benefits, and accordingly is in the public interest.

87. NSWMC otherwise relies on its submissions put before the Council.

D. RELIEF

88. NSWMC seeks the following relief:

- a. The Decision be set aside.
- b. The Service be declared.

Dated: 4 May 2021

²⁵ Council's Reasons for Recommendation, [9.3].

²⁶ Council's Reasons for Recommendation, [10.63].