



Submission to the National Competition Council

**Re: Application by Port of Newcastle Operations Pty Ltd for
revocation of declaration of the shipping channel service at the
Port of Newcastle**

Anglo American Metallurgical Coal Pty Ltd

8 August 2018

1. Executive Summary

Anglo American Metallurgical Coal Pty Ltd (**Anglo American**) makes this submission to the National Competition Council (**NCC**) in response to the application by Port of Newcastle Operations Pty Ltd (**PNO**) dated 2 July 2018 (**Application**) for revocation of the declaration of the shipping channel service (**Service**) at the Port of Newcastle (**Port**).

Anglo American submits that the NCC should not make a recommendation to the designated Minister that the declaration of the Service at the Port be revoked under s 44J of the *Competition and Consumer Act 2010* (Cth) (**CCA**), for the following reasons:

- (a) without regulation under Part IIIA of the CCA, access to critical export infrastructure may be restricted or prevented by infrastructure monopolists such as PNO. This can drastically affect the ability of coal producers and miners to remain competitive in Australia and in the dynamic global industry, and deter potential investment. Glencore, as the largest coal producer in the Hunter Valley, brought the declaration proceedings back in 2015. While Anglo American has exited its New South Wales operations, PNO's approach to pricing and terms and conditions of access were and are a real concern to all coal providers dealing with monopoly infrastructure operators. PNO was, and remains, a bottleneck infrastructure monopoly and the declaration and ability to have the ACCC arbitrate access terms and conditions, provides a meaningful constraint on infrastructure operators such as PNO;
- (b) PNO's approach in the Application to the legal framework for a revocation recommendation under the CCA is misconstrued. The NCC's evaluation of whether to recommend that the service be revoked is not limited by the legislation to the non-satisfaction of 'declaration criteria' at the time of the recommendation as suggested by PNO. Rather, the correct construction of the legislation demonstrates that the NCC has a discretionary power to determine whether or not to recommend that a service be revoked. Anglo American does not believe that there has been a change in circumstances warranting the revocation in terms of PNO's monopoly infrastructure power at the Port, whether in pricing or terms and conditions of access. Anglo American also believes that the existing declaration is consistent with the objects of Part IIIA of the CCA as set out in s 44AA of the CCA; and
- (c) the NCC and other interested parties, including Anglo American, are not able to properly assess the effect that the declaration has on competition in the relevant markets prior to the Australian Competition and Consumer Commission's (**ACCC**) publication of the arbitration determination between Glencore Coal Assets Australia (**Glencore**) and PNO in relation to the Service at the Port.

Anglo American, as with other coal providers, have been closely watching and anticipating the ACCC arbitration determination and how the ACCC determines a regulated cost base for the Service. Both the pricing and terms and conditions of access that Glencore achieves will be relevant to other coal providers.

2. Background to Anglo American

Anglo American has operated in Australia since 2000. Anglo American's primary activities are the mining and export of metallurgical coal from its five mining operations in central Queensland, with exploration interests across commodities and other joint venture equity interests in

Australia Anglo American is the third largest seaborne exporter of metallurgical coal and Australia's largest underground coal producer.

In February 2018, Anglo American completed the sale of its interest in the Drayton thermal coal mine and the Drayton South project in the Hunter Valley Region. Although we no longer have coal mining operations in the Hunter Valley, we remain a stakeholder in the regulation of infrastructure access arrangement for the coal industry in Australia

Anglo American is particularly concerned that the issues raised by PNO's revocation application may have bearing on how other access regulation regimes in Australia operate.

3. Regulation under Part IIIA of the CCA

There are a variety of rationales which have been used to justify government intervening in the operation of the market by regulating either the price of the product supplied by a natural monopolist or regulating entry into a market in which a natural monopolist supplies products. The most common rationale for the regulation of natural monopolies is that industries with natural monopoly characteristics will exhibit poor economic performance and regulation will improve this performance.¹ Poor economic performance commonly arises from the ability of the natural monopolist to charge monopolistic prices² or from a lack of any incentive to increase productive efficiency or engage in innovation. This rationale is reflected in the objects of the Part IIIA regime as described in s 44AA of the CCA, which prescribe the regime is intended to 'promote the economically efficient operation of, and use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets'.³

In the case of mining export infrastructure, such as the Port, the current declaration is essential in ensuring that access seekers can obtain reasonable commercial terms and conditions under the context of ACCC arbitration. This ensures the economic efficiency of the domestic coal market for the purposes of promoting international competitiveness which, in turn, increases gross domestic product and therefore the living standards of Australians.⁴

Without government regulation, industry monopolists may obstruct or limit access to critical export infrastructure. This could harm existing coal producers and exporters and affect their ability to operate competitively within the domestic and international markets. It also has the likely effect of dissuading future investors from participating in the coal industry in Australia due to the lack of certainty of their investment.

4. Application of the Declaration Criteria

Pursuant to s 44J(1), the NCC may recommend to the designated Minister that the service be revoked. Section 44J(2)(b) provides that a revocation recommendation cannot be made unless the NCC is satisfied that s 44H(4) would prevent declaration.

¹ Paul Joskow, 'Regulation of Natural Monopolies' (Working Paper, Center for Energy and Environmental Policy Research, 2005) 33.

² Richard Schmalensee, *The Control of Natural Monopolies* (1979) 6.

³ Section 44AA, CCA.

⁴ Stephen King and Rodney Maddock, *Unlocking the Infrastructure - The Reform of Public Utilities in Australia* (1996) 3.

Section 44J(2)(b) provides that the NCC cannot recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation that the Minister could not be satisfied that all of the declaration criteria are satisfied in respect of a service.

However, it is important to note that:

- (a) the legislation does not prescribe that the NCC must make a recommendation for revocation if it is satisfied that the declaration criteria are not satisfied in respect of a service – only that it may;
- (b) the legislative intent of the revocation power must therefore extend to the NCC retaining a discretion to recommend or refuse to recommend revocation the declaration of a service to the Minister;
- (c) s 44J(1) provides that the NCC must have regard to the objects of Part IIIA of the CCA in making a decision about its recommendation; and
- (d) it is therefore consistent with the legislation for the NCC to determine that declaration promotes the economically efficient operation of, and use of and investment in the infrastructure by which the shipping channel service is provided, and refuse to make a revocation recommendation on that basis.

This analysis demonstrates that the NCC's evaluation of whether to recommend that the declaration of a service be revoked is not to be determined by any alleged non-satisfaction of the 'declaration criteria' at the time of the recommendation. Rather, the power to recommend revocation is a more open discretion, subject to mandatory consideration of the objects of Part IIIA of the CCA (which do not reference the declaration criteria). Satisfaction on the part of the NCC that s 44H(4) would prevent declaration is therefore necessary, but not sufficient, for a revocation recommendation.

In other words, the NCC must undertake a two-step inquiry:

- First, the NCC must first decide under s 44J(1) whether to recommend revocation, having regard to the objects of Part IIIA of the CCA. If the NCC decides against revocation the matter goes no further.
- Second, if the NCC decides to recommend revocation, s 44J(2) is engaged. If the declaration criteria are still satisfied, there can be no revocation recommendation. Any non-satisfaction of the declaration criteria does not, however, compel the NCC to recommend revocation.

Anglo American therefore believes that the declaration should remain as it provides an important constraint on PNO.

4.2 There has been no relevant material change in circumstances

Continuing satisfaction or non-satisfaction of the declaration criteria may be relevant to evaluating whether to recommend revocation. The relevance lies in any change in the facts or market conditions that originally supported declaration.

In Anglo American's view, there has been no material change in facts or market conditions since the declaration was made in respect of the Port which support a revocation recommendation in this case.

PNO remains an infrastructure monopoly that previously sought to act in an unconstrained manner in how it increased prices. Anglo American only sees that position returning if the declaration was revoked. Significantly, PNO did not seek any industry consultation before seeking the revocation that a business would normally undertake with its customers to provide

them with any comfort as to how it would operate or to explain its plans. Prior to declaration there was no meaningful consultation with coal industry customers prior to the significant price increases that PNO imposed. If the declaration was revoked, Anglo American anticipates this approach would recur.

In any event, the NCC should not recommend revocation of the declaration in this case as the declaration and opportunity to have terms and conditions of access arbitrated by the ACCC provides a meaningful constraint on PNO. Accordingly, any revocation would lead to substantial public detriments in the form of reduced investment and economic activity and reduced employment in the Hunter Valley and reduced exports.

4.3 The declaration criterion is satisfied in any case

Even if the NCC forms a view under s 44J(1) that it should recommend revocation of the declaration, it should not be satisfied under s 44J(2)(b) that the declaration criteria are not satisfied. Accordingly, the NCC cannot recommend revocation of the declaration.

Anglo American also notes that the declaration has not been in place long enough to have established a meaningful counterfactual for the purposes of assessing criterion (a) of the declaration criteria. More particularly, as criterion (a) requires a consideration of the state of the relevant markets with and without declaration, it is important to allow the terms of the declaration to be finalised before it is revoked so that consideration of this criterion can be supported by informed analysis. This would require a final arbitration determination in relation to the access dispute between Glencore and PNO, which is not yet available.

5. The NCC and interested parties should have the opportunity to consider the ACCC's publication of the final determination of the arbitrated access dispute between Glencore and PNO

Anglo American submits that its ability to make considered further submissions in respect of the revocation application is inhibited in the absence of a final arbitration determination in relation to the access dispute between Glencore and PNO.

In order to properly evaluate PNO's application for revocation of the declaration, the NCC should require PNO to provide the NCC with the material filed in the arbitration together with the relevant communications from the ACCC. Absent this material, the NCC is lacking critical facts relevant to PNO's application and should postpone their recommendation until the ACCC publishes its final determination. This will ensure that the NCC and any interested parties are able to consider the effect that the arbitrated terms and conditions will have on competition in the coal export market. Anglo American submits that it is not possible to assess the impact on competition in the absence of the final determination. The determination is relevant to the promotion of a material increase in competition arising from the terms and conditions under the declaration, in satisfaction of criterion (a).

Any recommendation by the NCC to revoke the declaration of the service in the absence of the consideration of the arbitrated terms and conditions would be premature and fail to take into account the objects of Part IIIA of the CCA.