NATIONAL
COMPETITION
COUNCIL

Declaration of the shipping channel service at the Port of Newcastle

Draft recommendation

30 July 2015

Contents

Abbreviations and defined terms

ACCC	Australian Competition and Consumer Commission
Bloomfield	The Bloomfield Group
CCA	*Competition and Consumer Act 2010* (Cth)
CFA	Capacity Framework Arrangements
CPA or Competition Principles Agreement	Competition Principles Agreement – 11 April 1995 (as amended to 13 April 2007) – agreed by the Council of Australian Governments
Council or NCC	National Competition Council
Declaration Guide	*Declaration of services—A guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)* (NCC 2014)
FOB	free on board
Glencore	Glencore Coal Pty Ltd, the applicant
HVCCC	Hunter Valley Coal Chain Coordinator
IPART	Independent Pricing and Regulatory Tribunal of NSW
mtpa	million tonnes per annum
National Access Regime	The mechanism established by Part IIIA of the *Competition and Consumer Act 2010* (Cth) through which an access seeker can gain access to the service or services provided by a nationally significant infrastructure facility on commercial terms and conditions
NCC	See 'Council'
NSWMC	New South Wales Minerals Council
NSW Treasury	New South Wales Department of Treasury
Part IIIA	Part IIIA of the CCA
PAMA Act	*Ports and Maritime Administration Act 1995* (NSW)
PAMA Regulation	*Ports and Maritime Administration Regulation 2012* (NSW)
Peabody	Peabody Energy Australia Pty Ltd
Pilbara HCA	*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36
PNO	Port of Newcastle Operations Pty Limited, the operator of the Port of Newcastle
SAL	Shipping Australia Limited
shipping channel service	The service for which Glencore is seeking declaration (see paragraphs 2.2 to 2.5)
Tribunal	Australian Competition Tribunal
VTF	Victorian Department of Treasury and Finance

1 Draft recommendation

1.1 Glencore Coal Pty Ltd (Glencore) has applied for declaration of the shipping channel service at the Port of Newcastle[1] pursuant to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA).

1.2 Based on its consideration of Glencore's application, together with the submissions and other information available, the Council proposes to recommend to the designated Minister that the service not be declared. The Council's reasons for this draft recommendation are set out in this report.

1.3 In the Council's view the designated Minister in respect of this application is the Commonwealth Minister (see chapter 2 for discussion of this issue). The Council understands that the Commonwealth Minister in relation to this application is the Hon Bruce Billson MP, the Federal Minister for Small Business.

1.4 The Council now seeks further submissions in response to this draft recommendation. **The deadline for such submissions is 5pm, Monday 31 August 2015.**

[1] This service is more fully described in paragraphs 2.2 to 2.5 of this report.

2 Application, service and process issues

Application

2.1 On 13 May 2015 Glencore applied to the Council for a recommendation that the shipping channel service at the Port of Newcastle be declared under Part IIIA of the CCA. Glencore's application is available on the Council's website.

Service

2.2 In its application Glencore describes the service for which it seeks declaration as comprising:

> 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 (Application, p. 15).

2.3 It is the provision of this service at the Port of Newcastle for which declaration is sought.[2] The Council considers that the service is provided by Port of Newcastle Operations Pty Limited (PNO) (see further sections 2.12 to 2.33 below regarding the designated Minister). The facilities used to provide this service are described as "the shipping channels and vessel berth areas" at the port as identified in Annexure C to Glencore's application. This Annexure appears as Appendix A to this report.

2.4 PNO acknowledges that the service comprises "access to the channel and berthing boxes at the coal terminals at the Port of Newcastle" (PNO submission, p. 1).

2.5 In this report the service for which declaration is sought is referred to as the shipping channel service at the Port of Newcastle.

2.6 The Victorian Department of Treasury and Finance (VTF) submits that it is questionable whether shipping channels and berths are "facilities" within the meaning of the CCA. It submits that the shipping channels and berthing areas are essentially tracts of water through which ships navigate, and over which the Port of Newcastle exercises a statutory power to levy charges, but it "does not enter into agreements for the provision of access" (VTF submission, p. 4). The Council considers that by entering the channel a ship incurs the liability to pay usage charges for use of the channel at the price determined by PNO. This is akin to, for instance, cars using a toll road. It seems to the Council whether that liability is purely contractual or backed by a statutory power is immaterial.

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[2] The application specifies that declaration is not sought in respect of other services provided by PNO such as property management and port development services, or for services provided by the Port Authority NSW such as pilotage or harbour master services at the port (Application, p. 15).

2.7 In the Council's view use of the shipping channel service is the use of a service provided by a facility. While some elements of that facility may be naturally occurring, critical elements are manmade and the facility as a whole requires ongoing dredging and other maintenance to remain serviceable. In the Council's view Glencore's application involves a service for which declaration is available. To conclude otherwise would fail to give effect to the objectives of the National Access Regime.

2.8 More generally, the Council notes that Regulation 6A of the *Competition and Consumer Regulations 2010* (Cth) requires that an application for declaration provide a description of the service(s) for which declaration is sought and the facility that provides the service(s). A principal purpose of describing a service for which declaration is sought is to enable an application to be assessed against the declaration criteria and other requirements of Part IIIA. A service must be defined with sufficient specificity for this to occur, but it is not necessary that an applicant for declaration particularise the service or exhaustively list all the elements of the facility which produces the service. Indeed, in many cases, it will be beyond an applicant to do so. An undue requirement for detail in respect of the service or facility would frustrate the operation of Part IIIA.

2.9 It should also be remembered that declaration of a service is not specific to the applicant or any specific access seeker and not all access seekers will necessarily require an identical service. In some cases access seekers may only require access to some parts or elements of a more broadly described declared service. This suggests that relatively all-encompassing service descriptions are acceptable.

2.10 The Council is of the view that it is generally for an applicant to identify and describe the service(s) it wishes considered for declaration. If an applicant unduly or artificially narrows a service description it runs the risk that the effect of access on competition in a dependent market is also narrowed, perhaps to a point that criterion (a) is not met.

2.11 The Council considers that the service for which declaration is sought in the application is a service within the definition provided for in s 44B of the CCA. The Council is also satisfied that the services are not subject to any access undertakings, approved tender processes or ineligible service decisions such that they could not be declared.

Designated Minister

2.12 The Council is required to provide its recommendation to the "designated Minister".

2.13 Section 44D(2) provides that "the designated Minister" is the Commonwealth Minister unless, relevantly, the provider of the service is a "State or Territory body",[3] in which case, the responsible Minister of the State or Territory is the designated Minister. In the case of a State, the responsible Minister is the Premier of that State. "State or Territory body" is defined as a State or Territory or an authority of a State or

[3] The State or Territory must also be a party to the Competition Principles Agreement.

Territory. "Provider" is defined in s 44B as "the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service".

2.14 Glencore in the application submits that the relevant responsible Minister should be the Federal Treasurer. It notes that the Crown in right of New South Wales owns the tidal areas of the Port of Newcastle and is the ultimate owner of the areas of land leased to PNO occupied by the facilities that may be used to provide the service. It submits that PNO holds a long term lease over the port so is "for all intents and purposes" the owner of the facilities (Application, p. 6).

2.15 In a submission dated 3 June 2015, PNO submits that there may be more than one "provider". It submits that the facility used to provide the service is owned by Roads and Maritime Services and provides title searches in support. Roads and Maritime Services is, PNO submits, a New South Wales "body politic" and thus an "entity" for the purposes of s 44B. As the owner of the facility is a State body, PNO submits that the Premier of New South Wales is the designated Minister (PNO 3 June submission, pp. 3-5).

2.16 Given the differing views as to the application of s 44D in these circumstances, the Council sought the advice of counsel. Counsel advised that "the provider is the entity which makes the relevant decisions in respect of the service/facility, including who will be allowed access to the facility and what, if anything, the entity allowed access will have to pay for that access." On this basis, counsel advised that the provider is PNO and, as PNO is not a State or Territory Body, the designated Minister is the Commonwealth Minister. Counsel's advice is available on the Council's website.

2.17 On 16 June 2015, the Council notified interested parties that it had come to a provisional view that the Commonwealth Minister is the designated Minister for this matter, released the advice from counsel, and invited interested parties to respond. The Council received submissions on this issue from Glencore, the VTF, the New South Wales Department of Treasury (NSW Treasury) and PNO.

Glencore

2.18 In a submission dated 29 June 2015, Glencore submits that it is clear from PNO's submissions "that [PNO] make the relevant decisions in respect of the service/facility and the price on which the entity allowed access will have to pay for that access." Glencore submits that PNO makes clear that charges for access to the service "are not subject to NSW Ministerial approval" as PNO "*has the power to fix and collect the state operational charges, wharfage charges, and navigation services charges*" (Glencore submission, p. 5, citing PNO's 18 June submission at p. 77). Glencore submits that these submissions by PNO assist in conclusively determining that the designated Minister is the Commonwealth Minister.

VTF

2.19 The VTF submits that the "designated Minister" is the Premier as a matter of statutory construction "provided that the relevant State/Territory (or an authority

thereof) is either the 'owner' or 'operator' of the facility that is used (or is to be used) to provide the relevant service." The VTF submits that this construction "arises from a plain reading of section 44D(2), read together with the definition of 'provider' in section 44B". The VTF adds that it may "reasonably be inferred that the legislature considered it right and appropriate that the 'designated Minister' come from the relevant State/Territory where that jurisdiction retained a material interest in the relevant facility (other than the facility's physical location within the jurisdiction)" (VTF submission, pp. 2-3).

NSW Treasury

2.20 NSW Treasury did not make a submission as to the identity of the designated Minister. Rather, it refers to legal advice it had obtained in this regard and outlined factors that it considers relevant to determining the provider for the service. (NSW Treasury submission, pp. 22-23).

2.21 NSW Treasury provided that legal advice to the Council together with its submission on the basis that it would not be made public. Given the differing submissions on the identity of the designated Minister, the Council considered that it ought not have regard to the advice without giving other interested parties the opportunity to consider and respond to it. The Council communicated this view to NSW Treasury. NSW Treasury confirmed it did not wish that the advice be made public and withdrew the advice from its submission. Consequently, the Council has not had regard to that advice.

PNO

2.22 PNO's submission of 2 July 2015 consisted of legal advice obtained by PNO from counsel. That advice refers to the prior submissions of PNO, Glencore, VTF and NSW Treasury, and to the advice obtained by the Council. PNO's legal advice concludes that the designated Minister is the Premier of New South Wales. The advice gives consideration to the text of the relevant provisions and the consideration by the Victorian Court of Appeal of similar provisions in the then *Gas Industry Act 2001* (Vic)[4] and respectfully disagrees with the advice obtained by the Council on a number of points. To put those points very briefly, PNO's advice was that:

(a) There can be more than one provider of a service because:

(i) The use of "owner or operator" in the definition of "provider" does not suggest a singular focus;

(ii) S 23 of the *Acts Interpretation Act 1901* (Cth) provides that "words in the singular include the plural";

(iii) Control of a facility "can be shared in various regards in myriad ways";

[4] *Alinta Assets Management Pty Ltd v Essential Services Commission* (2008) 22 VR 275.

(iv) Declaration will affect the value (to the owner) of a facility and an owner is therefore likely to be afforded procedural fairness in relation to declaration of a service provided by that facility; and

(v) No practical problem in application of the arbitration provisions of Part IIIA arises from there being more than one provider of a service;[5]

(b) If the view expressed in the advice obtained by the Council that PNO, as the operator of the facility used to provide the service, satisfied the definition of "provider" whether or not it can also be characterised as the owner, had been Parliament's intention, the word "operator" would have been sufficient: meaning must be given to the use of the words "owner" and "or";

(c) The meaning of "provider" cannot be determined by having regard to the defined term itself (i.e., by considering "who is the provider of the service"');

(d) A determination under s 44V requiring the provider to extend a facility would not be effective if it were only to apply to the operator where the facility is owned by another party; and

(e) The purpose of s 44D is to enable a State or Territory to retain some degree of control over decision-making with respect to the subjection of their infrastructure to the Commonwealth's regulatory regime and there is no purposive reason why that policy should be limited to where the State or Territory is the operator and not the owner of the facility.

2.23 PNO's advice, observing that the shipping channels and berths are ultimately owned by the State of New South Wales, concludes that the designated Minister is the Premier of New South Wales.

Council's view

2.24 The Council notes that its recommendation is not affected in any way by the identity of the designated Minister and that it has no preference to which Minister it will provide its recommendation. The Council's interest in this question is confined to ensuring that it provides its recommendation to the correct Minister.

2.25 While the CCA may in some contexts envisage more than one provider, there can be only one designated Minister. In order to identify the designated Minister, it is necessary for the Council to identify *the* provider in the context of s 44D.

2.26 There is no substantive dispute as to the facts going to the ownership and operation of the facility. It is clear that a New South Wales entity is the ultimate owner of the land on which the facility is located and that PNO operates the facility and will be the counterparty to any contractual arrangement for access. It is not in dispute that PNO is not a State body.

[5] Referring to recommendations by the Council in relation to the Robe, Hamersley, Goldsworthy and Mt Newman railways in the Pilbara in 2008.

2.27 The Council accepts that the provision in s 44D for a State or Territory Minister to be the designated Minister may reflect concerns on the part of the States and Territories at the time of the implementation of the National Access Regime that they should retain some control over decision making in relation to their infrastructure. However, the Council does not accept that it necessarily follows that this provides the States and Territories with an effective veto where they hold any interest in a facility. It does suggest however that the circumstances around the ownership and operation of a facility require careful consideration, particularly in the context of privatised assets. Further, the Council notes that an effective veto power for the States and Territories would limit the utility of the provision in Part IIIA for a State or Territory to preclude a service from declaration by implementing an access regime and having that regime certified as effective.

2.28 Regarding PNO's submission that there may be more than one provider, the Council accepts that the arbitration provisions in Part IIIA may not prevent there being two providers. However, it does not follow that there are in fact two providers where the owner and operator of a facility are different. Rather, the right in the arbitration provisions of a bare owner to be notified of and participate in an arbitration of an access dispute provides the owner with an opportunity to seek to protect its interest in the facility but any determination by the ACCC must affect the terms of access in order to result in access or increased access. The Council considers that an approach whereby the provider is the party who controls access to a service is most consistent with achieving the objects of Part IIIA.

2.29 This approach is also consistent with that taken by the Council in its recommendation on the application for declaration of the Tasmanian Railway Network in August 2007.[6] In that case, the facility was owned by the State of Tasmania but was operated by Pacific National. The Council considered that the provider was the Tasmanian Department of Industry, Energy and Resources, which in addition to being the owner, also determined the primary matters relating to the policy, principles and terms of access.

2.30 Once it is accepted that the provider is the party who controls access or the terms and conditions of access, it is clear that PNO is the provider of the service for which Glencore seeks declaration. The land and channels are owned ultimately by the State of New South Wales but the State has granted to PNO for 98 years exclusive rights to provide channel and berth access services. While there is a price monitoring regime in place under the *Ports and Maritime Administration Act 1995* (NSW) (PAMA Act), it is apparent to the Council that the State of New South Wales plays almost no role in determining the terms of access. PNO, on the other hand, fixes the charges payable for the service by users of the port and controls access to the facility by which the service is provided.

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6 NCC, *Application for declaration of a service provided by the Tasmanian Railway Network, Final Recommendation*, 14 August 2007, pp 8-9.

2.31 Accordingly, the Council is of the view that the Commonwealth Minister is the designated Minister in relation to Glencore's application.

2.32 All parties have had full opportunity to make submissions on this point and to respond to the Council's provisional view. The Council's request for submissions in response to this draft recommendation does not extend to further submissions on the issue of the designated Minister.

2.33 The Council understands that the Commonwealth Minister in relation to this application is the Hon Bruce Billson MP, the Federal Minister for Small Business.

Process

2.34 On 19 May 2015 the Council published notice of the application in *The Australian* newspaper. Between receiving the application and publishing notice of the application the Council wrote to PNO advising of the application. The Council also wrote to other likely interested parties advising them of the application.

2.35 The Council sought submissions from interested parties in response to the application. The deadline for submissions on the application was 5pm on 18 June 2015. The Council also specifically requested coal producers operating in the Hunter Valley to include in any submissions information on whether and how increased access to the shipping channel service would promote competition in another market. The Council asked that producers provide as much specific detail and relevant financial information as possible.

2.36 The Council received 11 submissions in response to the application. These included submissions from PNO, a number of coal exporters, the two Newcastle coal terminal operators, industry representative associations, the NSW Treasury and the VTF. A list of submissions is contained in Appendix B to this report and the submissions are available on the Council's website.

2.37 In its application Glencore set out in detail its arguments for declaration of the service. Submissions from coal producers operating in the Hunter Valley expressed general support for Glencore's application. The submissions from the terminal operators (Port Waratah Coal Services and Newcastle Coal Infrastructure Group), as well as the New South Wales Minerals Council (NSWMC) and Shipping Australia Limited (SAL) were supportive of the application. PNO provided a detailed submission arguing against declaration of the service, and Ports Australia also opposed declaration.

2.38 The Council has considered Glencore's application and these submissions in preparing this draft recommendation. Given that Glencore's application and PNO's submission address the key issues in the most detail, these materials are most frequently cited in the subsequent assessment. In addition, the Council undertook its own inquiries and research which has informed the draft recommendation.

2.39 The draft recommendation reflects the information available to the Council as at the date of the recommendation and the Council's preliminary conclusions in relation to the declaration criteria and other relevant issues.

2.40 The Council now seeks further submissions in response to the draft recommendation. **The deadline for such submissions is 5pm, Monday 31 August 2015.**

2.41 Section 44GA of the CCA requires the Council to make a recommendation to the designated Minister within 180 days of receiving the application.[7] This application was received by the Council on 13 May 2015, therefore the Council must provide its recommendations to the designated Minister by 9 November 2015.

[7] This period may be extended in specified circumstances, see s 44GA of the CCA.

3 Declaration under Part IIIA

Objective and character of Part IIIA (the National Access Regime)

3.1 The National Access Regime established by Part IIIA of the CCA provides a statutory mechanism through which an access seeker can gain access to the services provided by an infrastructure facility. It is available when attempts at commercially negotiated access are unsuccessful.

3.2 The regime provides a means of promoting competition in markets where the ability to compete effectively is dependent on being able to use on reasonable terms and conditions an infrastructure service provided by a facility that is uneconomical to duplicate. At the same time, the regime ensures that infrastructure owners receive a commercial return on investment and that incentives for efficient investment are not adversely affected.

3.3 Declaration is the first step towards regulated access under one of the mechanisms[8] provided by the National Access Regime. Declaration is the means for determining whether a service provided by a particular facility should be subject to access regulation and depends on whether the five declaration criteria, specified in sections 44G(4) and 44H(4) of the CCA, are satisfied.

3.4 Should a service be declared, the second step becomes available. This involves a negotiate/arbitrate approach to access. The second step sees a service provider and access seeker[9] negotiate the terms and conditions upon which access may be granted. Where negotiations are unsuccessful, recourse is available to the ACCC to arbitrate an access dispute.

Requirements for declaration

3.5 Under s 44G(2) of the CCA, the Council cannot recommend that the designated Minister declare[10] a service(s) unless it is satisfied of all of the following matters:

(a) access (or increased access) to 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 (**criterion (a)**)—see Chapter 4

(b) it would be uneconomical for anyone to develop another facility to provide the service (**criterion (b)**)—see Chapter 5

(c) the facility is of national significance, having regard to:

(i) the size of the facility, or

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8 Part IIIA provides for regulated access through declaration, certified State or Territory access regimes and voluntary access undertakings approved to the ACCC.

9 The access seeker at step 2 does not need to be the party which sought declaration of a service at step 1.

10 Similarly the Minister may not declare a service under s 44H(1) unless he or she is satisfied in relation to the same criteria which are repeated in s 44H(4).

(ii) the importance of the facility to constitutional trade or commerce, or

(iii) the importance of the facility to the national economy

(**criterion (c)**)—see Chapter 6

(d) [repealed]

(e) that access to the service:

(i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), or

(ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB), but the Council believes that since the Commonwealth Minister's decision was published there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement (**criterion (e)**)—see Chapter 7

(f) access (or increased access) to the service would not be contrary to the public interest (**criterion (f)**)—see Chapter 8.

3.6 Section 44F(4) of the CCA requires that the Council also consider whether it would be economical for anyone to develop another facility that could provide *part* of the service. The Council considers s 44F(4) alongside criterion (b) in Chapter 5.

3.7 Where the Council recommends that a service be declared the Council must also recommend an expiry date for any declaration (see Chapter 9).

3.8 Further information on declaration and the Council's assessment of declaration applications is available in the Council publication *Declaration of services—A guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)* (NCC 2014) (Declaration Guide).

Increased access

3.9 Criteria (a) and (f) require an examination of the effects of "access (or increased access)" to the service for which declaration is sought on competition and the public interest respectively. The words "access (or increased access)" mean that these criteria contemplate situations both where there is currently no access to the service sought to be declared, and where access is, in some form, already available. In situations where access is already available, consideration needs to be given to what "increased access" would entail.

3.10 In the present case, coal exporters and other parties wishing to use the shipping channel service at the Port of Newcastle have access to the service. The assessment of criteria (a) and (f) therefore requires examination of the effects of increased access.

3.11 PNO argues that Glencore is not seeking access or increased access to the service in order to enter any of the dependent markets. It also argues that the application is distinguishable from a previous matter involving "increased access", where Virgin Blue sought declaration of "airside facilities" at Sydney Airport in order to overcome discriminatory effects of a change in pricing arrangements (PNO submission, p. 18).

3.12 In its application Glencore's particular complaints regarding access to the shipping channel service focus on what it sees as excessive prices for the service, and the unconstrained nature of PNO's ability to determine such prices into the future and the consequent uncertainty this creates for channel service users (and their financiers and similar third parties). In this context increased access would involve lower prices and greater certainty as to how prices will be set into the future.

3.13 In the Council's view it is reasonable to assume that were the shipping channel service declared, the actuality or threat of the ACCC determining shipping channel service prices as part of an access dispute will result in prices that are "reasonable" and in greater certainty as to how prices are determined. By "reasonable" prices the Council means prices consistent with those that might result from arbitration of a relevant access dispute.

3.14 The Council believes that such an approach is consistent with the view of the Full Court of the Federal Court of Australia in *Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* (2011) 193 FCR 57, where the Full Court held that "access"

> is access on such reasonable terms and conditions as may be determined in the second stage of the Pt IIIA process. (at [112]).[11]

3.15 As part of considering the effect of increased access on competition the Council has assumed a scenario where "reasonable terms and conditions" of access entails prices that are lower than those otherwise charged by PNO [12] and which would rise at a more predictable rate than would otherwise be the case. The prices that might flow from declaration may not, however, be as low as those which were in place prior to PNO assuming operation of the Port and may exceed those proposed by PNO.[13]

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[11] The High Court in *Pilbara HCA* did not consider this aspect of the Full Court's decision.

[12] This is an assumption for analytical purposes, as under the National Access Regime any determination of prices for a declared service would only occur as part of an arbitration of an access dispute by the ACCC.

[13] PNO made submissions on the approach for calculating charges for the service, including the range of possible regulatory outcomes (see PNO submission, section 7). In considering an application for declaration the Council is not in a position to undertake a detailed analysis of likely access prices. This consideration would be undertaken by the ACCC should a dispute proceed to arbitration under Part IIIA following declaration.

Not a mechanism for price regulation

3.16 Declaration under the National Access Regime is not a mechanism for imposition of price regulation and was never intended to be such. “Excessive”, “monopolistic” or “gouging” pricing *per se* is not the focus of Part IIIA. Where such pricing in one market merely transfers income or value from one party in a supply chain to another without materially impacting competition in any other market, Part IIIA does not provide a remedy. The focus of the Regime is on promotion of competition in markets where the lack or restriction of access to infrastructure services provided by facilities that cannot be economically duplicated would otherwise limit competition.

3.17 Where a service is declared and access is determined through arbitration, there may be a determination as to price. The opportunity for the ACCC to determine prices for infrastructure services under Part IIIA only arises where all five declaration criteria are satisfied and when arbitration of an access dispute requires determination of the price for a declared services (and this can be done consistently with the requirements imposed on the ACCC in undertaking arbitrations under Part IIIA—for example the requirements of ss 44V and 44W of the CCA).

3.18 Not all, indeed possibly only a small subset of, price disputes or situations where prices may appear or be “excessive”, “monopolistic” or “gouging” will fall within the ambit of Part IIIA. The declaration criteria, in particular criteria (a) and (b), limit the ambit of the National Access Regime to situations where services are provided by facilities that are uneconomic to duplicate and where the price or other terms and conditions of access are such that competition is restricted in a market other than the market for the infrastructure service.

3.19 A classic example of such a situation is where a vertically integrated business controls a monopoly facility as well as competing in a dependent market which is otherwise open to competition. Where such a business tries to advantage its position in the dependent market through how it prices access to the monopoly facility, regulatory intervention may be necessary to promote competition in the dependent market.

3.20 Here there is no vertical integration between PNO’s operation of the Port of Newcastle and other activities in the Hunter Valley coal chain.

3.21 Glencore notes that the catalyst for its application was an increase in prices published by PNO which took effect on 1 January 2015. This occurred after PNO assumed the role of port operator from a government authority of the State of NSW. PNO characterises Glencore’s concerns as a pricing dispute. Price and future price uncertainty certainly appears at the core of Glencore’s concerns, however this does not preclude declaration. Some disputes that are essentially price disputes will arise in situations where the declaration criteria can be satisfied. In these cases regulation by way of ACCC arbitration may be available as a consequence of the relevant service being declared. The satisfaction of criterion (a) in particular is likely to determine whether a price dispute comes within the ambit of Part IIIA.

4 Material promotion of competition (criterion (a))

4.1 Section 44G(2)(a) of the CCA (criterion (a)) provides that the Council cannot recommend that a service be declared unless it is satisfied that access (or increased access) to the service would promote a material increase in competition in at least one market other than the market for the service, whether or not that market is in Australia.

4.2 The markets in which competition might be promoted are commonly referred to as "dependent markets". The issue is whether access (or increased access) would improve the opportunities and environment for competition in a dependent market such as to promote materially more competitive outcomes.

4.3 The purpose of criterion (a) is to limit declaration to circumstances where access (or increased access) is likely to materially enhance the environment for competition in at least one dependent market.

4.4 As noted, in relation to this application consideration needs to be given to the effects of increased access on competition in dependent markets.

Glencore's application

4.5 Glencore notes that promoting a material increase in competition in a market can occur by improving the opportunities and environment for competition from what they would be otherwise. Glencore argues that granting access to the shipping channel at the Port of Newcastle will "unlock a bottleneck" and "remove an inhibition on competition in several dependent markets". Consequently, the conditions or environment for competition will be improved, and there is a likelihood of increased competition which is material and not trivial (Application, pp. 18-20).

4.6 Glencore notes that it and other coal producers operating in the Hunter Valley export their product into a highly competitive global market. It notes that coal is a globally traded commodity with prices determined by international markets, and that coal producers can be regarded as price-takers. As such, there is limited scope for Hunter Valley producers to recover any increases in transportation costs from customers, and producers must instead absorb any such increases through a corresponding reduction in the price they receive from end-users. Glencore states that this "will result in a decrease in the returns available to coal miners in the Hunter Valley region and the current or future operation of mines in the region" (Application, p. 20).

4.7 Glencore suggests a number of markets that are dependent on the service, and in which competition would materially increase. These are:

- a coal export market;
- a market for the financing of coal mining projects (including the expansion of existing projects);
- markets for the acquisition and disposal of exploration and/or mining authorities

- markets for the provision of infrastructure connected with mining operations, including rail, road, power and water;
- a market for services such as geological and drilling services, construction, operation and maintenance; and
- markets for the provision of shipping services, involving shipping agents and vessel operators (Application, pp. 20-21).

4.8 Glencore notes that global demand for coal and other minerals has decreased, while other factors have impacted the competitiveness of the Australian resources sector, including the relative costs of Australian mines, as well as increases in taxation, energy, transportation and labour costs. Glencore notes that mines in the Hunter Valley have closed or been put into care and maintenance. In such conditions, Glencore argues that even incremental cost increases at the margin may drive coal producers to exit the market. According to Glencore, PNO initially justified the charge increase on the basis of robust predictions of the growth and profitably of Hunter Valley exports. Glencore submits that these predictions were optimistic and are no longer tenable in the current climate. Glencore argues that efficient and effective regulation of export infrastructure is essential for reducing supply side impediments to exporting (Application, pp. 21-22).

4.9 Glencore submits that while declaration will materially increase competition in each identified dependent market, it is likely to be most relevant in the market for financing coal mining projects. In its Application Glencore describes the process for financing coal mining projects and the factors it considers financiers take into account in deciding to fund a project. Relevantly, Glencore submits that financiers require comfort that long term arrangements are in place for the transportation of coal from mine to port. Where there is no certainty over price, Glencore argues, financiers build conservative assumptions into their financial models which in turn impact the bankability of the project (Application, p. 23).

4.10 Glencore argues that PNO does not offer long term contracts, and as such, in the absence of declaration of the service, there is no certainty with respect to the navigation service charge, and it is impossible to be certain that the service will be available at a predictable price for the life of a coal mining project. Glencore argues that this pricing uncertainty is likely to lead to a lack of investor confidence and support for new Hunter Valley mining projects, and an unavailability or reduced availability of financing for new and existing coal mines (that is, availability at a higher price and on terms more favourable to the financier). Glencore acknowledges that some larger producers may be able to take a view on the quantum and timing on future price increases. The lack of certainty is however likely to impact smaller producers and result in their exclusion from the relevant markets, and the raising of barriers to entry to those markets for those smaller producers. Glencore argues that this would diminish competition, including because smaller producers tend to carry out more marginal coal projects that do not attract the attention of the major producers (Application, pp. 23-24).

4.11 Glencore argues that the impacts of the cost increases and future pricing uncertainty will be felt in the dependent markets outlined above, with the effect particularly acute in the current environment of lower international coal prices. Glencore submits that while the FOB cost of the current shipping charge is less than 1% of the FOB costs of export coal, this might represent between 10% and 100% of the sale margin in current market circumstances. This may impact the utilisation of other infrastructure in the Hunter Valley (coal terminals, rail track, maritime, bulk handling and storage facilities), and lead to decreasing demand for specialist mining services. Further, Glencore argues that the increased charges discriminate between different vessel types, which will impact competition between vessel owners, as well as coal producers that use different vessel sizes (Application, pp. 25-26).

4.12 Glencore submits that declaration of the service on reasonable terms will result in an improvement of the conditions for competition in the various dependent markets. Glencore argues that this is because export costs will "include more reasonable pricing for the Service cost component that is able to be predicted for the long periods during which the financing of coal projects will be amortised" (Application, p.24). Glencore states that:

a) "the continued or increased participation of smaller coal producers will result in an increased demand for mining authorities and result in a material increase in competition in the bidding for the award of mining authorities;

b) the continued or increased participation of major and smaller coal producers will result in an improvement in the opportunities and environment for competition in the provision of the infrastructure required for the development of coal projects, including in particular in relation to the development and output from smaller more marginal projects; and

c) the continued or increased participation of major and smaller coal producers will also result in further demand in the markets for specialist services in the Hunter Valley region." (Application, p. 24)

PNO's arguments

4.13 PNO submits that access (or increased access) will not promote a material increase in competition in any relevant market, and consequently criterion (a) is not satisfied.

4.14 PNO submits that the changes to the service charges were part of a "one-off pricing restructure and realignment" that sought to make charges more cost-reflective. PNO notes that this included removing a two-tiered navigation service charge and replacing it with a flat rate per gross tonne charge for coal vessels. PNO submits that the previous two-tier structure was not reflective of operational or commercial realities, and that there is "no efficiency or other basis to provide discounted or capped fees for larger vessels while relatively disadvantaging smaller vessels". PNO submits that prior to the restructure, port charges were "well below market rates and had not been subject to annual price reviews", and that there had been "a 20 year period of substantial under recovery" (PNO submission, pp. 6-7).

4.15 PNO submits that port charges represent less than 1% of the total delivered cost of coal from the Hunter Valley. PNO argues that the impact of port charges on the delivered cost of coal is negligible and is not material to decisions to close or mothball mines, or to open new mines or expand existing operations. PNO submits that, whilst including port prices on a due diligence list or report may be prudent, port prices are not material to the factors that result in a final investment decision in respect of a coal mine. PNO submits that none of the seven coal mines in the Hunter Valley which were closed or mothballed from 2013 to the present have referenced port charges as a factor influencing those decisions (PNO submission, pp. 13-14).

4.16 PNO submits that irrespective of how the dependent markets are defined, access or increased access to the service would not increase competition in any market. PNO submits that each of the dependent markets proposed by Glencore is already workably competitive. PNO notes that seven of the eight dependent markets identified by Glencore are supported by precedent, but submits that there is no precedent, or proper basis, for defining a separate market for the financing of coal projects, either in the Hunter Valley or generally. In any case, PNO submits that there is no credible evidence that the price changes at the Port of Newcastle have had any effect on the availability of financing for new or existing coal mines in the Hunter Valley (PNO submission, pp. 13-14; 19; 33).

4.17 PNO also submits that it is currently subject to regulatory oversight. It submits that the port is regulated under the PAMA Act, *Ports and Maritime Administration Regulation 2012* (NSW) (PAMA Regulation) and the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW). PNO submits that the threat of heavy-handed regulation is "real and effective" (PNO submission, p. 13).

4.18 PNO further notes that it owes contractual obligations to the State of NSW under the transaction documents executed in connection with the privatisation of the assets. PNO argues that these obligations prevent it from unfairly discriminating against users of the port. PNO notes that the State of NSW also has the right to terminate the lease or to exercise step-in powers in certain circumstances (PNO submission, pp. 60-61).

4.19 PNO also submits that it has a commercial objective of maximising trade volumes through the port. It argues that to recover its efficient costs of providing the service, it needs to provide "open and competitively priced access" to port users. PNO also notes that there is excess capacity at the port, and as such PNO seeks to encourage growth to benefit from increased volumes and revenues (PNO submission, p. 16).

Council view

4.20 The Council acknowledges that Glencore's concerns regarding the charges levied by PNO for the service (including the uncertainty around those charges into the future) could be characterised as a pricing dispute. Even so, this does not rule out the possibility of there being an impact on competition in a related market, and the prospect that criterion (a) could be satisfied.

4.21 For instance it is conceivable that, in the absence of declared access, the pricing increases imposed by PNO, and the largely unfettered ability of PNO to impose future price increases, will impact competition in a number of markets associated with the production and sale of coal for export from the Port of Newcastle. This may occur because increases in charges for the service will add to the costs of producers, potentially making operations unprofitable, particularly for higher cost mines. This may lead to producers ceasing mining operations (either outright or by putting mines into care and maintenance), or cancelling or postponing mine expansions. It may contribute to making coal sourced from the Hunter Valley less competitive in global markets. These effects would also flow through to other markets related to the production and sale of coal from the Hunter Valley, including infrastructure services, specialist mining services and the acquisition of mining authorities. Declaration, and increased access to the service by way of 'reasonable' terms and conditions, could mitigate these effects, constraining PNO's ability to impose 'unreasonable' prices and providing certainty over future pricing decisions. These outcomes would enhance the conditions for competition in respect of the production and sale of coal, and in respect of the various other markets associated with that activity. Increased access could therefore promote a material increase in competition in various dependent markets, and criterion (a) could be satisfied.

4.22 While such a scenario is conceivable, in the Council's view it cannot be demonstrated in the present circumstances.

4.23 Critically, the Council considers that the charges for the service represent only a very small component of the overall cost of the production and sale of coal for export from the Hunter Valley. The price increases imposed by PNO necessarily represent a still smaller proportion of this cost. While producers are undoubtedly sensitive to the charges, it is difficult to conclude that changes to those charges would have a material impact on decisions that would affect competition in any relevant market. Consequently, it is difficult to conclude that increased access to the service would materially promote competition in a relevant market.

4.24 Glencore submits that the aggregate impact of the changes to prices introduced by PNO in January 2015 is "an increase in prices for coal vessels of approximately 60% for Handymax, Panamax and Post Panamax vessels and 26% for Capesize vessels" (Application, p. 14). The Council notes that these percentages reflect increases to the navigation service charge only. The shipping channel service for which declaration is sought encompasses access to both the shipping channel and the berthing boxes at the port. The percentage increase in the charge for the shipping channel service for which declaration is sought for Handymax, Panamax and Post Panamax vessels is in the range of 15-20%, and for Capesize vessels 10-15%. The Council also notes that one effect of PNO's pricing changes was to remove a cap on charges for larger vessels, thus removing potentially discriminatory treatment for different vessel sizes and the mining companies using them.

4.25 PNO estimates that the current port charges comprise less than 1% of the total delivered cost of coal at the Port of Newcastle. Glencore in its application

acknowledges that the charges are less than 1% of the FOB cost. Even at their greatest, the Council considers that the charges for the service represent only a very small component of the cost of coal delivered FOB at the Port of Newcastle and the changes in these charges amount to a 10-20% increase. While the exact cost breakdown for each producer and buyer will vary, it is nonetheless likely that charges for the service would remain a very small proportion of overall costs, and it is difficult to see how such a small proportion of total costs would make a material difference to the cost profile of a producer, let alone to competition in any relevant dependent market.

4.26 Material provided in submissions suggests that such a small component of the overall cost is unlikely to influence decisions to cease mining operations. While a number of mines in the Hunter Valley have been either closed or put into care and maintenance in recent years, port related charges appear to have had no bearing on these decisions. Rather, these decisions appear to have been made on the basis of broader economic factors, such as changes in international coal prices and the value of the Australian dollar. Price is the largest cost component for buyers of coal, and is critical to the margins and profitability of producers. PNO provided figures indicating that, since 2002, Newcastle benchmark thermal coal prices have ranged from US$20/t to US$180/t, and since 2011, Newcastle coal benchmark prices have been trending downwards (PNO submission, p. 46). Changes of this magnitude, in relation to such a critical commercial factor (price), can clearly impact producer decisions about mining operations and investment. This is a clear contrast to the charges for the service and the likely impact of changes in those charges.

4.27 The Council notes that the shipping channel at the port is not capacity constrained. PNO notes that Hunter Valley coal export volumes have grown from 67.8 million tonnes per annum (mtpa) in 2000 to 159.4 mtpa in 2014, and are forecast to be 164 mtpa in 2015. PNO submits it has modelled channel capacity in excess of 325 mtpa. Further, terminal capacity is 211 mtpa and below-rail/track capacity is 182.9 mtpa. Existing infrastructure, including the shipping channel, therefore has capacity significantly in excess of the volumes of coal currently exported, and forecast to be exported.

4.28 The Council notes that Glencore and other Hunter Valley producers have highlighted the uncertainty around future price increases as an additional factor supporting declaration. While the Council acknowledges this concern, it remains the case that any uncertainty that exists is in relation to charges that are a very small component of the overall cost of delivered coal. The Council does not consider that removing that uncertainty (assuming that declaration would in fact remove that uncertainty) is likely to materially promote competition.

4.29 The Council acknowledges that the PAMA Act and PAMA Regulations provide a degree of transparency over the charges levied by PNO. This occurs via the obligations on PNO to publish its charges and to notify the Minister and publish notice of any changes to port charges. PNO is also required to annually report certain information to the Minister. These requirements may provide some very limited

constraint of PNO's pricing practices. However, the PAMA Act and PAMA Regulations are not certified as an effective regime under Part IIIA and it is highly unlikely that these arrangements would meet the requirements for certification as such. Therefore, while the PAMA legislation may provide some constraint on PNO's behaviour, such constraint falls short of that which would result from an access regime capable of certification and it is not a substitute for the type of regulation contemplated by the National Access Regime. The PAMA Act does not, for instance, provide for access seekers to lodge a dispute with an independent arbitrator, or provide for any other mechanism to resolve access disputes.

4.30 The Council also acknowledges the submissions from PNO and the NSW Treasury that the lease arrangements between the State of NSW and PNO include provisions designed to "constrain" the behaviour of PNO. The Council considers that these are effectively private contractual arrangements between the two parties, and that any third party with concerns about PNO's behaviour would have to rely on the State of NSW taking action in order to obtain redress. The Council would expect that taking such steps, including via the State enforcing the provisions against PNO or terminating the arrangements, would entail a significant time and cost commitment by the State. This could include litigation and may raise concerns around sovereign risk. Therefore, again while the Council acknowledges that the lease arrangements may allow for some influence over PNO by the State, they are not a substitute for the access arrangements contemplated by the National Access Regime, and would not limit any effects on competition from PNO actions.

4.31 The Council acknowledges that coal producers are highly conscious of all costs, particularly in an environment where global coal prices have declined. This is reflected in Glencore's application and in a number of submissions from producers and other infrastructure service providers in the Hunter Valley. Further, the Council notes that a number of other services provided in the Hunter Valley are provided under long term contracts, which provide a degree of certainty over prices into the future. Coal producers may enter into long term contracts with the below-rail provider (Australian Rail Track Corporation) and with the port terminal operators. Long term arrangements are not however available for other costs including port services. Spot prices for coal of course also vary significantly over short periods.

4.32 Nonetheless, charges for the service remain only a very small component of the overall delivered cost of coal at the Port of Newcastle. Further, although the PAMA legislation and the lease arrangements between the State of NSW and PNO are not a substitute for the effective regulation contemplated by the National Access Regime, they would have some influence on PNO's pricing discretion. The Council is not satisfied that access or increased access on reasonable terms and conditions would have any material impact on competition in a dependent market.

Counterfactual

4.33 The Council notes that PNO put forward a counterfactual analysis as part of its submission, comparing scenarios with and without declaration of the service. The

Council does not propose to undertake a detailed counterfactual analysis for this matter. Again, this is because under either a "with" or "without" declaration scenario, charges for the service will remain a very small proportion of the overall cost of coal. Increased access would not therefore significantly alter the proportion of port charges to overall cost such as to lead to a materially different scenario.

Dependent markets

4.34 Glencore proposed eight markets as relevant to the assessment of this matter (noted above), focussing on a market for the financing of coal projects in the Hunter Valley as that most likely to be impacted. PNO acknowledged that seven of these markets are supported by precedent, but did not consider that there was a separate market for the financing of coal projects, "let alone coal projects in the Hunter Valley of New South Wales" (PNO submission, p. 33).

4.35 The Council considers that, regardless of the market definition adopted, access (or increased access) is unlikely to promote a material increase in competition. In the Council's view, any impact from a change in charges for the service (or uncertainty around future charges), would be seen in relation to the primary activity of the production and sale of coal from the Hunter Valley. That is, coal producers would make different operational and/or investment decisions as a result of changes in the shipping channel charges. Alternatively, coal producers would make different operational and/or investment decisions as a result of the uncertainty as to what these charges would be in the future. Any such decisions would have flow-through effects for the other activities that occur in connection with the production and sale of coal from the Hunter Valley; for instance, a mine closure may reduce demand for specialist mining services or infrastructure services. Given the Council's view that changes in the charges for the service are unlikely to impact these activities, the Council also considers that there would not be any flow-through effects in any related market.

4.36 The Council does not therefore consider it necessary to precisely define markets in this matter, but makes the following observations.

4.37 As noted by the parties, coal is an internationally-traded commodity with prices set by reference to international spot prices, and with physical trade flows occurring between international destinations. There are a large number of buyers and sellers of coal, and prices are influenced by overall supply and demand. The Council does acknowledge that coal is not a homogenous commodity, and there are differences in use and grade/quality etc that would influence substitutability. Similarly, while coal is traded internationally, there may be regional factors that impact the precise geographic boundaries of the market depending on the circumstances. Nonetheless, the Council considers that the geographic scope of markets for buying and selling coal extend beyond Australia, and would, as the parties suggest, be at least workably competitive. The Council cannot see how changes in charges for the service would materially impact competition in these markets, or how declaration would promote a material increase in competition.

4.38 Similarly, any relevant market for commercial coal-carrying shipping services is likely to have a geographic scope that extends well beyond Australia. Commercial ship owners and agents operate in international markets which are likely to exhibit substitutability between destinations. Again, the Council acknowledges that there may be some limits to substitution (for instance, particular ports may have limitations on ship sizes), but it is difficult to conclude that declaration of the service in this matter would promote a material increase in competition in any relevant shipping market.

4.39 Other markets may have a smaller geographic scope, either nationally or possibly focused on the Hunter Valley coal chain. These are markets for specialised services, mining authorities and infrastructure services. Markets for infrastructure services (rail, port terminals) are likely to be localised to the Hunter Valley, given the limited scope for parties to substitute alternative infrastructure facilities to export Hunter Valley coal. Providers of specialist services may be able to work in different mining regions around Australia, and parties seeking mining authorities may likewise consider a number of different locations. The Council does not consider it necessary to reach concluded views on the scope and precise definition of these markets, as regardless of the market definition it would be necessary to demonstrate that there would be a material effect on the fundamental underlying activity of coal production and sale before changes to the shipping channel charges would impact these related markets. For the reasons outlined above, the Council does not consider this is the case, and therefore is not satisfied that access (or increased access) would promote a material increase in competition in these related markets.

4.40 Glencore has argued that a market for the financing of coal projects is the market in which competition is most likely to be promoted by declaration. The Council is not satisfied that there is a separate market for the financing of coal projects in the Hunter Valley. The Council acknowledges that financing for coal projects is likely to be available from a range of international sources, and that financiers are likely to service a range of minerals and resources projects (that is, rather than confine their activities to coal projects). The Council also acknowledges that, theoretically, an increase in the risk associated with Hunter Valley coal projects could increase the cost of finance for those projects. This could raise barriers to entry for new entrants (or to expansion for existing producers), which may have an effect on competition that could be improved via declaration. Nonetheless, the Council again considers that the negligible significance of the service charges to the overall costs of development and operation of a coal mining project mean that such an outcome is unlikely. The Council therefore does not consider that access (or increased access) would promote competition in a market for the financing of coal projects.

Conclusion on criterion (a)

4.41 The Council considers that the charges for the service represent only a very small component of the overall cost of the production and sale of coal for export from the Hunter Valley. This is the case with or without declaration of the service. As such, it is

unlikely that changes in those charges would materially impact competition in any relevant market.

4.42 The requirement set by Part IIIA is an affirmative test, in that the Council must be satisfied that the criteria are met before it can recommend declaration. On the basis of the foregoing reasons, the Council is not satisfied that increased access to the service would materially promote competition in a market other than the market for the shipping channel service.

4.43 Criterion (a) is not satisfied.

5 Uneconomical to develop another facility (criterion (b))

5.1 Section 44G(2)(b) of the CCA (criterion (b)) requires that the Council be satisfied that "it would be uneconomical for anyone to develop another facility to provide the service" sought to be declared.

5.2 Prior to the decision of the High Court of Australia in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (*Pilbara HCA*), the Council (and the Tribunal and a number of court decisions) had interpreted this criterion in a way that was concerned with the waste of Australian society's resources associated with duplication of facilities that exhibit natural monopoly characteristics, i.e., where a single facility could meet all likely demand for a service at lesser cost than two or more facilities. However, in *Pilbara HCA* the High Court determined that the test is one of profitability. It said that criterion (b):

> uses the word "uneconomic" to mean "unprofitable" [and] is to be read as requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility (at [77]).

5.3 The Court went on to say that:

> the central assumption informing and underpinning this construction of criterion (b) is that no one will develop an alternative service unless there is sufficient prospect of a sufficient return on funds employed to warrant the investment. And criterion (b) is read as directing attention to whether there is "anyone" for whom it would be economical (in the sense of profitable, or economically feasible) to develop another facility to provide the service (at [82]).

5.4 In considering criterion (b) in relation to this application the Council has sought to determine whether there is anyone (including PNO[14]) who might find it profitable or economically feasible to develop another shipping channel to provide the service Glencore has sought to be declared.

5.5 In its application Glencore identifies significant physical impediments to developing an alternative facility to provide the service. It notes that the existing coal terminals at the Port of Newcastle have been designed and constructed to be capable of loading vessels which approach using the existing channel, and that there is no alternative route through any existing waterway which could be used to approach the coal terminals. As such, Glencore argues that to develop an another facility it would be necessary to construct an alternative, artificial channel, through the city of Newcastle, and to also reconstruct the existing coal terminals to service vessels arriving via this alternative route. Glencore characterises this task as "virtually impossible" (Application, pp. 27-28).

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14 In its *Pilbara HCA* decision the High Court also said that "anyone" in criterion (b) "includes existing and possible future market participants", including the incumbent operator a facility (at [105]).

5.6 Glencore also argues that, even if such an alternative were possible, PNO would by statute be entitled to impose navigation service charges on vessels using the channel. Section 50 of the PAMA Act provides that a navigation service charge is payable in respect of the general use by a vessel of a designated port and its infrastructure. Glencore argues that PNO would be the body to levy this charge pursuant to the PAMA Act. Further, Glencore submits that construction of this alternative would require approvals from PNO in its capacity as landlord of the Port of Newcastle. It also argues that such approvals would be necessary for the construction of a jetty and coal conveyors to transport coal to a point outside the boundaries of Newcastle harbour (Application, p. 28).

5.7 In its application Glencore explores an option of developing a new port precinct as an alternative to the Port of Newcastle. It submits though that there is no alternative port site sufficiently proximate to the Hunter Valley coal region that could be used, and as such, it would be impossible to economically develop another facility to provide the service (Application, p. 28).

5.8 Glencore also notes a number of other steps that would need to be taken to develop an alternative port precinct, assuming a suitable site could be identified. These include attaining appropriate consents under both State and Commonwealth planning, development and environmental laws, and incurring significant capital expenditure on channel dredging and the construction of new rail and port terminal infrastructure (Application, pp. 28-30).

5.9 PNO did not make submissions on criterion (b).

5.10 The Council considers that no party (including PNO) has outlined a scenario that overcomes the significant physical and structural impediments to developing another facility to provide the service, let alone the profitability or economic feasibility of such a task. As such, it would appear that the cost of undertaking such an activity would likely be far in excess of any likely income received from the facility.

5.11 The Council therefore considers that criterion (b) is satisfied.

5.12 In conjunction with its consideration of criterion (b), the Council has considered whether it would be economic for anyone to develop another facility to provide part of the service for which declaration is sought. While it is inconceivable that the shipping channel might be duplicated, there appears to be some possibility that berthing facilities might be developed in the conjunction with construction of additional coal terminal facilities which could provide part of the service. At this point in time it seems unlikely that development of terminal facilities beyond those already contemplated is sufficiently certain as to timing and profitability to require more detailed consideration of s 44F(4).

6 National significance (criterion (c))

6.1 Section 44G(2)(c) of the CCA (criterion (c)) requires that the Council be satisfied that the facility providing the service for which declaration is sought is nationally significant. Criterion (c) is designed to ensure that only those facilities that play a significant role in the national economy fall within the scope of Part IIIA.

6.2 Criterion (c) is an assessment of the national significance of the facility providing the service, as opposed to the service itself. National significance is to be determined having regard to:

(i) the size of the facility, or
(ii) the importance of the facility to constitutional trade or commerce, or
(iii) the importance of the facility to the national economy.

6.3 Glencore submits that the facilities used to provide the service are the shipping channels and vessel berth areas (Application, p. 15). The facilities are integral to the operation of the Port of Newcastle, which itself is a key component of the Hunter Valley coal chain. Glencore states the Port of Newcastle is essential to the Hunter Valley supply chain because it is the only commercially viable option for the export of coal from the Hunter Valley region (Application, p. 16).

6.4 In respect of the size of the facility, Glencore identifies that the Port of Newcastle is one of the largest coal export ports in the world (Application, p. 16). It handles more than 25 different cargoes and 4,600 ship movements per annum, and can accommodate capesize vessels. Glencore identifies that the total land holdings of the port are 792 hectares (Application, p. 13).

6.5 In respect of the importance of the facility to constitutional trade and commerce, Glencore states that the port handled 159.6 million tonnes in trade throughput, with a value of approximately $15.5 billion, in 2013-14. Of this, coal comprised 154.4 million tonnes, with a value of $13.6 billion (Application, p.30, quoting Port of Newcastle website). Glencore notes that "the Hunter and Newcastle coalfields produce over 170 million tonnes of saleable coal per year. This is around 90% of New South Wales production and 40 per cent of Australia's black coal production" (Application, p. 3). Glencore submits that coal was Australia's second most valuable export after iron ore, and accounted by 28.4 per cent of Australia's exports by value (Application, p. 31).

6.6 Glencore notes that there are in excess of 35 customers from 16 countries for coal mined from the Hunter Valley. Approximately 70% of exports go to Japan, Korean and Taiwan with a further 20% going to China (Application, p. 4).

6.7 In respect of the importance of the facility to the national economy, Glencore highlights the economic importance of the Hunter Valley mining sector, both directly and indirectly in terms of employment and wealth creation. Glencore notes that the "coal mines in the Hunter Valley employ approximately 11,078 people directly (and

58,904 indirectly) and contribute almost $5.9 billion to the New South Wales economy" (Application, p. 4).

6.8 A number of submissions support Glencore's position that the facilities are of national significance. These include submissions by NSWMC, SAL, Whitehaven Coal and Peabody. Peabody submits that the port has supported and aided in the development of a diverse range of industries over a significant period of time (Peabody submission, p. 2). NSWMC highlights the economic significance of coal mining and exports through the Port of Newcastle (NSWMC submission, p. 8).

6.9 The Council did not receive any views that the facilities were not of national significance.

6.10 The Council considers that the facilities are of national significance in terms of their importance to constitutional trade and commerce (specifically, trade or commerce between Australia and places outside Australia) and their importance to the national economy, noting, in particular, the mass and value of trade through the facilities each year, and the economic activity generated by industries that are reliant upon the facilities.

6.11 In the Council's view criterion (c) is satisfied.

7 Certified access regime (criterion (e))

7.1 Under s 44G(2)(e) of the CCA (criterion (e)), the Council may not recommend declaration unless satisfied that access to the service is not subject to an access regime that is currently certified under s 44N of the CCA, or if certified, there have been substantial modifications of the access regime or of the relevant principles in the Competition Principles Agreement (CPA).

7.2 As part of the declaration process this criterion recognises that State or Territory governments may develop an industry specific access regime which, when certified, applies to the exclusion of the National Access Regime. Services subject to a certified State or Territory access regime cannot be declared or made subject to an access undertaking.

7.3 The services for which Glencore seeks declaration are not subject to any certified access regime. The issue of substantial modification does not arise.

7.4 Criterion (e) is satisfied.

8 Not contrary to the public interest (criterion (f))

8.1 For criterion (f) to be met it is necessary that access (or increased access) to the channel services provided by PNO not be contrary to the public interest.

Application and submissions

8.2 Glencore submits that access or increased access to the service will not be contrary to the public interest, as it will bring about public benefits such as improvements in competition in the dependent markets, and resulting economic growth and efficiencies (Application, p. 32). Several submissions support Glencore's position, including those from Peabody and Whitehaven Coal Ltd.

8.3 SAL submits that access will provide public benefit through increased price certainty for shipping lines and their agents (SAL submission, pp. 3-4). Peabody identifies benefits such as a greater level of trade and competition, which it believes will serve the public interest. Bloomfield in general concurs with the arguments presented by Glencore.

8.4 Conversely, PNO and Ports Australia submit that criterion (f) is not satisfied. Submissions by the VTF and NSW Treasury encourage the Council to carefully consider a number of matters in assessing whether access (or increased access) would not be contrary to the public interest.

8.5 A number of parties raise the cost and/or uncertainty of regulation (following declaration) as factors relevant to the Council's consideration of criterion (f). PNO submits that access (or increased access) would unduly increase the regulatory burden on port users (PNO submission, pp. 57, 62) and would increase costs for port users other than coal producers which would more than offset any promotion of competition in dependent markets (PNO submission, p. 57). Ports Australia submits that a declaration would "feasibly generate substantial increase in costs", and could "interfere with port efficiencies" and operations, create a burden for port customers and lead to an increase prices (Ports Australia submission, p. 1).

8.6 In relation to incentives to invest, the VTF submits that careful consideration must be given to the "need to encourage the private sector to invest in infrastructure of national significance, without which improvements and expansions to such infrastructure may not occur" (VTF submission, p. 7). Ports Australia submits that regulation could discourage investment in port assets.

8.7 Risks to the current operation of the Hunter Valley coal chain have been raised by NSW Treasury, including a risk of disrupting the Capacity Framework Arrangements (CFA) (and ACCC's authorisation of the CFA), vessel scheduling, and operations of the HVCCC (NSW Treasury, p19). NSW Treasury states that the Council should give careful consideration to such matters (NSW Treasury, pp. 19-20).

8.8 Some submissions, including PNO's, raise concerns about the implication of declaration for price monitoring arrangements. PNO makes the point that declaration

would “create an unwarranted precedent for effective light-handed regulatory regimes presenting no barrier to the introduction of heavy-handed regulation. This would unnecessarily reduce credibility of light-handed regulation” (PNO submission, p. 64). The VTF raises related arguments, submitting that careful consideration must be given to the potential for declaration to upset or unbalance current arrangements, noting in particular the price monitoring arrangements in place. NSW Treasury also raises the need for stable regulatory frameworks, “which are only changed in response to a demonstrated need” (NSW Treasury submission, p. 20).

Approach to assessing criterion (f)

8.9 The *Pilbara HCA* decision had implications for the Council’s approach to assessing criterion (f).

8.10 As outlined from paragraph 5.2 above, in the *Pilbara HCA* decision the High Court overturned the previous interpretation of declaration criterion (b) which had linked the word “uneconomical” to the presence of natural monopoly characteristics in the supply of a service. Instead the High Court held that “uneconomical” meant “unprofitable”.

8.11 As a result of the High Court’s interpretation, the scope of potential benefits under criterion (b) is narrower than it would have been under the previous interpretation, where avoidance of the costs from the unnecessary duplication of infrastructure facilities would likely have resulted in a significant public benefit from access.

8.12 Accordingly, if declaration criterion (f) is to involve a fully developed cost benefit analysis, a fuller examination of the benefits of access would be required. However, this seems inconsistent with other statements by the plurality of the High Court in the *Pilbara HCA* decision. In considering the application of criterion (f), the High Court plurality stated:

> … It is well established that, when used in a statute, the expression "public interest" imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*, when a discretionary power of this kind is given, the power is "neither arbitrary nor completely unlimited" but is "unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view". It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with 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 (at [42], footnotes omitted).

8.13 In considering the role of Tribunal in reviewing a Minister's decision on criterion (f), the High Court plurality later said:

> Because so many different kinds of consideration may be relevant to an assessment of what is "contrary to the public interest", many if not all of those matters which can be described as "social costs" *could* be relevant to that assessment. And the significance to be attached to such social costs would, no doubt, be affected by the existence of any countervailing social benefits (at [111]).

8.14 The Council considers that it flows from *Pilbara HCA* that its role is to identify anything that is contrary to the public interest and that a detailed technical examination of the costs and benefits of access is inconsistent with the High Court's view of the judgment involved in considering declaration criterion (f). Furthermore, in circumstances where access would not promote competition, declaration would not be available simply because the criterion that addresses that issue (criterion (a)) would not have been satisfied. In the Council's view it is unnecessary and inappropriate to also find that criterion (f) is not satisfied, only because criterion (a) is unable to be satisfied.

8.15 The Council considers that the preferable approach to criterion (f) is to seek generally to identify any matter that could mean access (or increased access) might be contrary to the public interest and then assess whether the likelihood and consequences of that matter make access contrary to the public interest. The Council considers that this approach is more consistent with the *Pilbara HCA* decision in that it involves a judgment that the Council is able to advise on, and a Minister is well placed to make, rather than a detailed technical examination of costs and benefits for which only partial information is likely to be available.[15]

Council view

8.16 Parties raised matters that they consider would make access or increased access contrary to the public interest, or which they encouraged the Council to consider carefully. These encompassed the:

- potential adverse effects of regulation (such as cost and uncertainty, and reduced incentives to invest);
- potential impact on the Hunter Valley coal chain including the potential to disrupt the authorised CFA; and
- existence of price monitoring arrangements[16] and potential to reduce the credibility of such regimes.

8.17 In the Council's view, submissions largely made general statements about the costs or risks associated with regulation that are, of themselves, unlikely to prevent

[15] The Council also took this approach in relation to similar provisions in the National Gas Law when considering an application for the revocation of coverage of the Dawson Valley Pipeline.

[16] In this case with the ability of the Minister to refer matters to IPART.

criterion (f) being satisfied. The Council itself has not identified any other matter which might mean access or increased access to the shipping channel service would be contrary to the public interest. The Council acknowledges that regulation involves costs and risks that are not otherwise present in the absence of regulation. In relation to the potential costs of regulation, there is no information before the Council to suggest the costs of regulating shipping channel services would be unusual or remarkable. Further, costs to a service provider that can be compensated for through access charges are generally unlikely to lead to the finding that access is contrary to the public interest.

8.18 Similarly, in relation to the potential impact of declaration on incentives to invest, the Council notes that Part IIIA provides protections to service providers and access seekers in governing the assessment of an access dispute. In particular, the pricing principles under Part IIIA require that regulated access prices be set to meet the efficient costs of providing access and include a return on investment commensurate with the regulatory and commercial risks involved.[17] The Council does not therefore consider that the prospect of access or increased access will discourage efficient investment.

8.19 As noted above, the Council was encouraged to consider the risk that access or increased access could disrupt the current arrangements, including the Hunter Valley coal chain and CFA. The potential to disrupt the Hunter Valley coal chain was a particular matter the Council also identified and raised in discussion with the coal terminal operators and the HVCCC. However, no specific information was provided to the Council to suggest that the performance of the existing arrangements would be jeopardised, and that access or increased access would be contrary to the public interest.

8.20 The Council further notes that the ACCC's role in making an access determination under Part IIIA is governed by a range of provisions. Part IIIA allows for the ACCC to take into account any matters that it thinks are relevant, asides from those matters which must be taken into account. Some of these provisions are similar to the factors that the ACCC must take into account when assessing an access undertaking pursuant to s 44ZZA of Part IIIA. The Council notes that in its assessment of the Hunter Valley access undertaking proffered by Australian Rail Track Corporation, the ACCC explicitly considered the operation of the overall coal supply chain as a relevant factor. The ACCC noted that consideration of 'supply chain alignment' was also likely to be relevant to the public interest and other factors under section 44ZZA. The Council notes that under section 44X it would be open to the ACCC to take such factors into account if conducting an arbitration.

8.21 In relation to the submissions suggesting that declaration poses a risk to the existing price monitoring arrangements and to the credibility of price monitoring arrangements in general, the Council does not consider this matter to be relevant to

[17] Section 44ZZCA of Part IIIA of the CCA - Pricing principles for access disputes and access undertakings or codes.

its consideration of the public interest. The prospect of declaration is present where no certified access regime is in place and, as noted above, the PAMA regime and price monitoring regimes generally are not a substitute for access arrangements as contemplated by the National Access Regime. Also, the negotiate-arbitrate model, which is what is contemplated under Part IIIA, is typically viewed as a light-handed approach.

8.22 In the Council's view, the costs and risks of regulation are not such that assuming the other declaration criteria were satisfied it would be contrary to the public interest for the channel services provided by the port to be declared.

8.23 The Council's view is that criterion (f) is satisfied.

9 Duration of declaration

9.1 Glencore has sought declaration for a period of 15 years or longer given the long term nature of coal mining projects in the Hunter Valley. Glencore notes that a 15 year declaration period would match the term for which the ACCC authorised capacity framework arrangements applying to the Hunter Valley coal chain.

9.2 The Council accepts that should shipping channel services at the Port of Newcastle be declared, a period of 15 years for such a declaration would be appropriate.

9.3 The Council notes that any initial determination in relation to the duration of a declaration can be altered by a successful application to revoke a declaration or to extend the declaration period.

Appendix A Map of Port of Newcastle

Appendix B List of application materials and submissions

B.1 **Application**

Glencore Coal Pty Ltd, May 2015, *Application for a declaration recommendation in relation to the Port of Newcastle*

- Annexure A: Schedule of Port Pricing Effective from 1 January 2015
- Annexure B: Price increase – calculation of impact
- Annexure C: Plan of channel
- Annexure D: Letter from Dr Rob Yeates dated 6 May 2015

B.2 **Submissions**

Port of Newcastle Operations, 3 June 2015, *Application for declaration of shipping channel services at the Port of Newcastle – Submission on Designated Minister*

Port Waratah Coal Services, 10 June 2015, *Application for a declaration recommendation in relation to the Port of Newcastle*

NSW Minerals Council, June 2015, *Submission in support of Glencore's application for declaration of shipping channel services at Port of Newcastle under Part IIIA of the Competition and Consumer Act 2010*

The Bloomfield Group, 16 June 2015, *Application for declaration of the shipping channel service at the Port of Newcastle*

Shipping Australia Limited, 18 June 2015, *Declaration of Shipping Channel Services at the Port Of Newcastle (PoN) – Glencore Application*

Port of Newcastle Operations, 18 June 2015, *Port of Newcastle Operations – Submission in response to Glencore's application to the National Competition Council*

Peabody Energy Australia Pty Ltd, 18 June 2015, *Peabody Energy Australia Pty Ltd: Application for the declaration of shipping channel services at the Port of Newcastle*

Whitehaven Coal Ltd, 22 June 2015, *Application for a declaration recommendation in relation to the Port of Newcastle*

Newcastle Coal Infrastructure Group, 23 June 2015, *Submissions – Application for declaration of shipping channel services at the Port of Newcastle*

Victorian Department of Treasury and Finance, 25 June 2015 (date received), *National Competition Council: Application by Glencore Coal Pty Ltd for a declaration recommendation under Part IIIA of the Competition and Consumer Act 2010 (Cth)*

Glencore Coal Pty Ltd, 29 June 2015, *Response to the submission by Port of Newcastle Operations in relation to Application to the National Competition Council under Part IIIA of the Competition & Consumer Act 2010 (Cth) in relation to the Port of Newcastle*

NSW Treasury, June 2015, *NSW Treasury Submission to the National Competition Council: Glencore's application for Declaration of Shipping Channel Services at the Port of Newcastle*

- Attachment A: Comments in relation to the rail component of the Hunter Valley Coal Network
- Attachment B: (withdrawn)

Ports Australia, 1 July 2015 (date received), *Application by Glencore Coal Pty Ltd for Declaration of the shipping channel at the Port of Newcastle: Ports Australia submission*

Port of Newcastle Operations, 2 July 2015, *Application for declaration of shipping channel services at the Port of Newcastle – Further submission on Designated Minister*