NATIONAL
COMPETITION
COUNCIL

Declaration of the shipping channel service at the Port of Newcastle

Final recommendation

2 November 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 2013)
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 FCA	*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58
Pilbara HCA	*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36
Pilbara Tribunal	*Re Fortescue Metals Group Limited* [2010] ACompT 2
PNO	Port of Newcastle Operations Pty Limited, the operator of the Port of Newcastle
RBA article	"Developments in Thermal Coal Markets", Reserve Bank of Australia Bulletin, June Quarter 2015
SAL	Shipping Australia Limited
shipping channel service	The service for which Glencore is seeking declaration (see paragraphs 2.2 to 2.5)

Sydney Airport FCA	*Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) FCAFC 146
Sydney Airport Tribunal	*Virgin Blue Airlines Pty Limited* [2005] ACompT 5
Tribunal	Australian Competition Tribunal
VTF	Victorian Department of Treasury and Finance

1 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 recommends to the designated Minister that the service not be declared. The Council's reasons for this 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 Scott Morrison MP, the Federal Treasurer.

[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 2.15 to 2.38 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). In its submission to the draft recommendation, PNO notes the submission made by VTF and states that PNO wishes to reserve all of its rights in respect of "the proper characterisation of the statutory navigation service and berth age [sic] charges" (PNO DR submission, p.1).

[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).

The Council is however unclear as to what such rights might amount to given PNO has offered no further evidence or submissions on this issue.[3]

2.7 In its response to the Council's notice requesting information (see paragraph 2.49), PNO included a further submission which likened charges for at least some elements of the service for which declaration is sought to taxes. PNO contended that as such these were not amendable to orders as the result of any arbitration of an access dispute should the service be declared and such a dispute arise (PNO Response to Notice, Attachment E).

2.8 The Council does not accept the contention that elements of the charges for the service are appropriately viewed as taxes. In any event the issue of whether any element of a charge for a declared service is amendable to arbitration is a matter that arises at the second stage of the process for determination of third party access under Part IIIA and then only if it is an issue that arises in a particular access dispute.

2.9 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.

2.10 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.

2.11 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.

2.12 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

[3] The Council does not consider that such a general claim can suggest some ability to adduce additional material in any Tribunal review of a declaration decision given the limitations on the introduction of new material at that stage (see s 44K(4) of the CCA).

some parts or elements of a more broadly described declared service. This suggests that relatively all-encompassing service descriptions are acceptable.

2.13 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.

2.14 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

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

2.16 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",[4] 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 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".

2.17 The Council received divergent views as to the identity of the designated Minister in relation to Glencore's application. These views are summarised below. After careful consideration, the Council came to the view in its draft recommendation that the designated Minister is the Commonwealth Minister. The Council's view on this matter has not changed, and its reasons are set out below.

Initial views

2.18 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).

2.19 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 NSW and provides title searches in support. Roads and Maritime Services is, PNO submits, a New South Wales "body politic" and thus an

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

"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).

Council's approach

2.20 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.

2.21 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

2.22 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, emphasis in original). Glencore submits that these submissions by PNO assist in conclusively determining that the designated Minister is the Commonwealth Minister.

VTF

2.23 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

2.24 NSW Treasury did not make a submission to the application 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).

2.25 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.

2.26 In its submission to the draft recommendation NSW Treasury expresses support for the NCC's view that the designated Minister is the Commonwealth Minister. NSW Treasury notes this is consistent with legal advice it had received on this matter (NSW Treasury DR submission, p. 1).

PNO

2.27 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)[5] 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) Section 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";

(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

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

(v) No practical problem in application of the arbitration provisions of Part IIIA arises from there being more than one provider of a service;[6]

(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.

2.28 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.

2.29 In its submission to the draft recommendation PNO states that it maintains its position that the correct identity of the designated Minister is the Premier of New South Wales. PNO notes that it "wish[es] to reserve all of [its] rights in that regard" (PNO DR submission, p.1), though again it is unclear what such purported rights might be (see paragraph 2.6 and footnote 3).

Council's view

2.30 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.

2.31 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.

2.32 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

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

counterparty to any contractual arrangement for access. It is not in dispute that PNO is not a State body.

2.33 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.

2.34 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.

2.35 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.[7] 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.

2.36 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

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

for the service by users of the port and controls access to the facility by which the service is provided.

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

2.38 The Council will therefore provide the recommendation to the Treasurer, the Hon. Scott Morrison MP.

Process

2.39 The Council received Glencore's application for declaration on 13 May 2015.

2.40 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.

2.41 The Council sought submissions from interested parties in response to the application.[8] 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.

2.42 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.

2.43 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.

2.44 The Council published its draft recommendation on 30 July 2015. The Council's draft recommendation was that the service not be declared. The draft recommendation is available on the Council's website.

2.45 The Council sought submissions on the draft recommendation, with a deadline of 5pm Monday 31 August 2015. The Council received 9 submissions in response to the draft recommendation. Submissions were received from Glencore, PNO, a number of

[8] In this document, references to submissions to the application are in the form (<Submitting party> submission, page xx). References to submission to the draft recommendation are in the form (<Submitting party> DR submission, page xx).

coal exporters, NSW Minerals Council, one coal terminal operator (PWCS), Virgin Australia Airlines and NSW Treasury.

2.46 A list of submissions received in response to the application and draft recommendation is contained in Appendix B to this report. The submissions are available on the Council's website.

2.47 Submissions to the draft recommendation largely reinforced positions previously expressed. Submissions from coal exporters including Glencore, the NSW Minerals Council, PWCS and Virgin Australia focused on the Council's assessment of criterion (a) in the draft recommendation, generally disagreeing with the approach taken by the Council. Glencore submitted some new material, including consultancy reports from Synergies Economic Consulting and RBB Economics. The Council also sought and received a clarification from Glencore on aspects of its submission.

2.48 The Council received a late submission from the Australian Airlines Association on 30 September 2015. Given it was received well beyond the original deadline of 31 August 2015, the Council has disregarded the submission pursuant to s 44GB(3)(b) of the CCA.

2.49 On 18 September 2015, the Council issued a notice under s 44FA(1) of the CCA to PNO requesting it provide information to the Council in response to specified questions. The Council requested PNO provide that information by 5pm Friday 2 October 2015. PNO provided its response on 2 October 2015, and in addition to responding to the Council's questions, also submitted consultancy reports by HoustonKemp Economists and Castalia Strategic Advisors, and a further submission on the characterisation of the port charges. PNO also claimed confidentiality over aspects of this material, which claims the Council accepted. The confidential information provided has not been of significance in the views which the Council has formed. Accordingly, no party's interests would be adversely affected by its non-disclosure. The Council's notice and PNO's non-confidential response are available on the Council's website.

2.50 Section 44GA of the CCA requires the Council to make a recommendation to the designated Minister within 180 days of receiving the application. This period may be extended in specified circumstances,[9] one of which is if the Council issues a notice under s 44FA(1). The application was received by the Council on 13 May 2015. Therefore, the Council was originally required to provide its recommendation to the designated Minister by 9 November 2015. The notice issued under s 44FA(1) extended the period by 14 days, to 23 November 2015.

2.51 The Council has considered Glencore's application, submissions received and PNO's response to the information request in preparing its recommendation.

[9] 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[10] 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(2) 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[11] 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[12] 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

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

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

[12] 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 2013) (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 The Full Court of the Federal Court of Australia in *Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* (2011) 193 FCR 57 (*Pilbara FCA*) 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]).[13]

3.14 As part of considering the effect of increased access on competition in a market, the Council has assumed for analytical purposes a scenario where "such reasonable terms and conditions as may be determined in the second stage of the Part IIIA process" entails prices that are lower than those otherwise charged by PNO,[14] 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.[15] Further discussion of the jurisprudence around criterion (a) is set out in chapter 4.

Not a mechanism for price regulation

3.15 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

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[13] The Full Court was there considering the phrase "access (or increased access)" in the context of criterion (f), but the Council does not consider that there is any reason why that phrase should have a different meaning in criterion (a). The High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 did not consider this aspect of the Full Court's decision.

[14] 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.

[15] 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.

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.

3.16 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).

3.17 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.

3.18 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.

3.19 Here there is no material vertical integration between PNO's operation of the Port of Newcastle and other activities in the Hunter Valley coal chain. In its submission responding to the draft recommendation, Glencore raised the possibility of vertical integration issues arising due to China Merchant Group's half interest in PNO and its involvement in shipping activities. In response to the notice from the Council, PNO provided further details of the relationship between PNO and any shipping interests of China Merchants Group (PNO Response to Notice, pp. 3-5 and paragraph 4.35 below). This information identified only very limited and indirect links. It seems highly unlikely that these interests would give rise to concerns of the kind mentioned in paragraph 3.18. It is difficult to envisage a scenario in which it would be in the interests of China Merchants to allow higher port charges for vessels linked to other of its interests in order to advantage a business in which it has a half interest. Nor has any material been provided to the Council to show the circumstances in which such a scenario would be likely to arise. Equally it is unlikely that Hastings Funds Management, the other co-owner of PNO, would allow any subsidy to interests linked to China Merchants. Furthermore, there are likely to be significant prudential and legal barriers to engaging in such arrangements.

3.20 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))

Introduction

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 Glencore's application and allied submissions argue that criterion (a) is satisfied in this case, while PNO's submissions argue it is not. In the draft recommendation the Council stated its view that criterion (a) was not satisfied. A number of submissions responding to the Council's draft recommendation focus on criterion (a), in particular on how the Council approached the question of whether the criterion was satisfied.

4.3 This section of the report outlines the submissions made on criterion (a), both before and after the Council's draft recommendation. The Council's approach to assessing criterion (a) is then set out, followed by the Council's view on whether the criterion is satisfied for the service the subject of Glencore's application.

Submissions on criterion (a)

Glencore's application

4.4 In its application 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).

4.5 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).

4.6 Glencore suggests a number of markets that are dependent on the shipping channel 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).

4.7 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, and 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 1 January 2015 increase in prices (see paragraph 3.20) on the basis of robust predictions of growth in 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).

4.8 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. 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).

4.9 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 of 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).

4.10 Glencore argues that the impacts of the cost increases and future pricing uncertainty will be felt in the dependent markets, 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).

4.11 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 submission on the application

4.12 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.

4.13 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).

4.14 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).

4.15 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 all but one of the markets identified by Glencore are supported by precedent, and 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).

4.16 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).

4.17 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).

4.18 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).

Other submissions on the application

4.19 Peabody Energy Australia Pty Ltd, Whitehaven Coal Limited and The Bloomfield Group express support for Glencore's application. Peabody submits that competitive pricing will assist Hunter Valley coal producers competing globally (Peabody submission, p. 2), and Whitehaven submits that declaration of the service will provide greater certainty for existing and future producers in relation to price (Whitehaven submission, p. 3). The NSWMC submits that monopoly pricing of shipping channel access will impact the ability of Hunter Valley coal producers to compete internationally, whereas regulating access will help ensure producers have a "predictable and fair" cost base that enhances their ability to compete globally (NSWMC submission, pp. 6-7). Regulated access would also then promote competition in other dependent markets related to coal production (NSWMC submission p. 7). SAL also supports declaration, suggesting it will establish price certainty and permit more effective competition in the global coal market (SAL submission, p. 2).

4.20 Ports Australia submits that it strongly opposes the application, in part because it fails to provide a rigorous case in support of key criteria. Ports Australia submits that, in particular, the contention that the application would promote a material increase in competition is "tenuous at best". Ports Australia also submits that it is difficult to objectively conclude, "given all the other dynamics of the industry, that the price of channel services, representing 1 percent of FOB cost, would have a 'material' impact on competition" (Ports Australia submission, pp. 1-2).

4.21 NSW Treasury provides details of the legislative and contractual arrangements that PNO is subject to, and which are discussed further below (NSW Treasury submission, pp. 7-14). The VTF notes that it is important that the boundaries of the dependent markets are appropriately satisfied, and that access or increased access must promote a material increase in competition (VTF submission, pp. 5-6).

Glencore's submission on the Council's draft recommendation

4.22 Glencore provided a submission in response to the Council's draft recommendation, focussing solely on criterion (a). As part of this submission Glencore provided:

- a report from Synergies Economic Consulting that estimates, based on publicly available information, PNO's cost base, revenue requirements and possible future price increases;
- a report from RBB Economics that considers the potential for access charges for the shipping channel to have an adverse effect on competition in the export coal market; and
- an article from the June Quarter 2015 Reserve Bank of Australia Bulletin entitled *Developments in Thermal Coal Markets* ("RBA article").

4.23 Glencore submits that there were "a number of issues" with the Council's approach to criterion (a) in the draft recommendation. Glencore submits that the Council's

draft recommendation "focuses on the impact of the single price increase which PNO has imposed and the relatively small proportion of overall cost that the charges for the navigation service represent", and that the Council "reasoned that the insignificant proportion of the navigation service charges to the overall FOB coal production costs prevented it from giving any close consideration to how competition would be affected in each of the dependent markets ". Further, Glencore is critical of counterfactual analysis in the draft recommendation (Glencore, DR submission, p. 3).

4.24 Glencore submits that its application:

> …was not based upon a single price increase, but the unfettered ability of PNO as the monopoly bottleneck infrastructure owner to ***increase charges in the future*** because it has the ability and incentive to do so to recover the very high price it paid for the Port Assets from the State of New South Wales and whether access or increased access on reasonable terms would materially increase competition in dependent markets (Glencore DR submission, p. 3; emphasis in original).

4.25 Glencore refers to the application by Virgin Blue Airlines for declaration of services provided by Sydney Airport, and the consideration of the Minister's decision by the Australian Competition Tribunal in *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 ("*Sydney Airport Tribunal*") and by the Full Federal Court in *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) FCAFC 146 ("*Sydney Airport FCA*"). Glencore submits that the approach of the Council in that matter contrasts with that of the Tribunal and the Full Court, who it submits determined that criterion (a) "was satisfied by focusing on the monopolistic characteristics of the relevant infrastructure as well as any relevant constraints on the monopoly power of the service provider" (Glencore DR submission, p. 4).

4.26 Glencore restates the list of dependent markets it had put forward in its application and reiterates its view that there is a market for financing coal mining operations in the Hunter Valley (Glencore DR submission, p.6). Glencore also includes a lengthy extract from a speech by ACCC Chairman Rod Sims that discusses how the threat of expropriation of rents by a monopoly service provider in an export supply chain – such as coal mining – can limit investment and innovation by firms in dependent markets. Glencore submits that this is a clear statement of the issues the Hunter Valley coal industry is facing (Glencore DR submission, p. 8).

4.27 Glencore reiterates that the channel is a bottleneck facility. Glencore submits that Hunter Valley coal producers are operating on minimal margins, and in some cases are loss making. Glencore submits that the current and future price increases by PNO will have a material impact on the Hunter Valley coal industry, and not just "high cost" mines. Glencore provides figures to support this view, based on its own assessment of the Hunter Valley coal industry. Glencore submits that the ability of PNO to extract a profit from Hunter Valley coal producers impacts the incentives and risks of producing coal in the Hunter Valley (Glencore DR submission, p. 9).

4.28 Glencore submits that the relevant considerations for criterion (a) include the ability of the service provider to impose charges, the opportunities of users to meaningfully

negotiate with the provider, and the underlying cost drivers for the charges. Glencore submits that "the better approach" to criterion (a) is to look at the likely price increases by PNO over time. In discussing the likely pricing strategy of PNO, Glencore submits that there is considerable scope for a monopolist to raise prices before existing operations would be the subject of closure, but that this would preclude investment in new mines or mine expansions, and related infrastructure (Glencore DR submission, pp. 10-11).

4.29 Glencore notes that only the NSW Government may trigger a review by the Independent Pricing and Review Tribunal (IPART) of the charges, and that users of the service could not seek redress from IPART (Glencore DR submission, p. 12).

4.30 Glencore submits that, based on calculations by Synergies Economic Consulting, PNO will seek to recover at least an additional amount of between $60m per year and up to $180m per year, representing between 3-6% of the total exported coal price. Glencore submitted that Synergies' analysis indicates that, in order to earn a commercial return on its investment, PNO may seek additional increases in navigation services in the range of 70-84% in future years. According to Synergies' assessment, if PNO were to seek full recovery of its published value of its trade assets of $2.398bn, it is possible that it may seek additional increases in navigation services of up to 211% in subsequent years (Glencore DR submission, p. 12).

4.31 Glencore submits that the impact of the unregulated navigation service charge, whether as a less than 1% proportion or as a 3-6% component of the total cost, will add to the costs of producers, making operations further unprofitable and may lead to producers ceasing mining operations and/or cancelling or postponing mine expansions (Glencore DR submission, p. 13).

4.32 Under the heading of "non-pricing considerations", Glencore makes a number of further statements in relation to the application. Glencore submits that "arbitration is likely to result in a material improvement in the conditions for competition in the dependent markets given that there will be an opportunity for the pricing for the service to be both more reasonable and certain, particularly in the current environment where there is no opportunity". Glencore refers to statements about the privatisation of infrastructure assets without effective regulation, and suggests that the Tribunal and the Full Federal Court considered the privatised status of Sydney Airport as relevant to findings that it would use its monopoly power to derive revenue from its asset. Glencore submits that this reasoning applies in relation to the current application, and that "the very large purchase price paid for Port of Newcastle by PNO, the substantial value increase in a little over six months and the refusal to provide any analysis of the cost base upon which PNO is charging suggests that the initial price increase is just one of several to occur" (Glencore DR submission, pp. 14-16).

4.33 Glencore submits that one of the 50% shareholders in PNO, China Merchants Group, has a bulk carrier fleet which includes bulk coal carriers, and that PNO is therefore vertically integrated (Glencore DR submission, p. 17).

PNO's submission on the Council's draft recommendation

4.34 PNO submits that, for the reasons set out in its earlier submission, it agrees that criterion (a) is not satisfied (PNO DR submission, p. 1).

4.35 In response to a notice issued by the Council under s 44FA, PNO submits there is no vertical integration between PNO and shipping services provided by China Merchant Group (CMG) or its subsidiaries or affiliates. PNO states that:

- CMG is not a direct shareholder in PNO. Rather, China Merchants Union (CMU) directly holds 50% of the issued shares in PNO. CMU is equally owned and governed by CMG and an unaffiliated company Guoxin International (GX);
- CMU and The Infrastructure Fund (TIF) have equal governance rights in relation to PNO and therefore CMU does not have control over PNO;
- CMG does not have any direct interests in bulk carrier fleets and that its only indirect interest is via its ownership stake in China Merchant Energy Shipping Co Ltd (CMES). CMG is the largest shareholder in the listed CMES. CMES and its subsidiary Ming Wah Shipping company (Ming Wah) control a fleet of LNG carriers, oil tankers and 21 bulk carrier vessels;
- since it began operating the Port of Newcastle on 30 May 2014, no ships owned by CMES or Ming Wah have called at the port. Prior to that, only one vessel operated by CMES or Ming Wah had visited the port since 1 January 2014;
- there is no ability for CMU to influence priority, given the shareholders agreement, and that PNO has no visibility of vessel owners or operators in conducting its vessel scheduling function. PNO schedules vessels having regard to the requirements of coal export terminals and scheduling rules issued by the Port Authority NSW (PNO, Response to Notice, pp. 3-5).

4.36 In respect of the approach to criterion (a), PNO submits that:

- the precedential value of the *Sydney Airport FCA* case has diminished in light of the High Court's decision in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (the *Pilbara HCA* case);
- the *ratio decidendi* of the *Sydney Airport FCA* case is narrow and only stands for the proposition that it is not necessary to show a denial of access before criterion (a) can be satisfied;
- the facts of the Virgin Blue's application for declaration at Sydney Airport are distinguishable from the current facts;
- the correct counterfactual test is a comparison of the future state of competition in the dependent market with access on reasonable terms and conditions (but not an assessment of what the outcome of any ACCC arbitration would be) with the future state of competition in the dependent without access on such terms, and that the status quo should be used as a proxy for this factual scenario;

- the introduction of a materiality threshold to criterion (a) supports the view that the criterion should not be easily satisfied;
- the Council's approach to criterion (a) in the draft recommendation is not erroneous (PNO, Response to Notice, Attachment D).

4.37 PNO also provided a report from HoustonKemp Economists commenting on aspects of Glencore's application and submissions, with particular attention on observations drawn by RBB Economics and Synergies Economic Consulting, and a report from Castalia Strategic Advisors commenting on the report from Synergies Economic Consulting.

Other submissions on the Council's draft recommendation

4.38 Virgin Australia Airlines Pty Ltd (VAA) submits that the Council's approach to criterion (a) did not accord with the approach adopted by the Full Federal Court in the *Sydney Airport FCA* case (VAA DR submission, p. 2). VAA submits that the Full Federal Court held that the assessment of criterion (a) should not be performed by reference to the current factual circumstances of the applicant. Rather, criterion (a) applies to the service provided by the facility, not whether any particular access seeker has or has not been granted a particular level of access to the facility (VAA DR submission, p. 1). VAA also states that the Full Federal Court determined in *Sydney Airport FCA* that "access (or increased access)" is not to be equated with "declaration", but rather that section 44H(4)(a) requires a comparison of the future state of competition in the dependent market with access, and the future state of competition in the dependent market without access, or with restricted access (VAA DR submission, p. 2). VAA also submits that judicial consideration of Part IIIA subsequent to *Sydney Airport FCA* has not dealt with criterion (a), and that subsequent legislative amendment to criterion (a) has not affected the approach set out by the Full Federal Court (VAA DR submission, p. 2).

4.39 The NSWMC submits that there is sufficient material available for criterion (a) to be met (NSWMC DR submission, p. 1). NSWMC submits that the pricing conduct of PNO impacts the ability of competitors to compete in dependent, global markets, and the terms and conditions offered by PNO do not reflect what might result from an arbitration process under Part IIIA; as such "access" is not currently being provided (NSWMC DR submission, p. 2). NSWMC submits that the test is whether regulating those terms and prices would promote a material increase in competition in a dependent market (NSWMC DR submission, p. 2). NSWMC submits that the Council should place greater weight on the incentives of PNO with and without declaration, noting that the prospect of ACCC arbitration would remove any incentives PNO has to price excessively or offer unreasonable terms (NSWMC DR submission, p. 3). NSWMC also submits that it is the ability of PNO to impose significant price increases that gives rise to the need for regulation, and that Part IIIA cannot have been intended to provide for regulation once monopoly rents have been extracted, or to require an applicant to re-apply for declaration as further price increases occur (NSWMC DR submission, p. 4). NSWMC also submits that the Council should place more weight on

the very small margins available to Australian coal producers in current market conditions, and on how the price increases to date (and potential price increases into the future) erode those margins further (NSWMC DR submission, p. 4). NSWMC submits that even incremental improvements to coal producers' cost base will improve their competitiveness in international markets, thus regulating the service would more likely create opportunities and the environment for competition than not regulating it (NSWMC DR submission, p. 4).

4.40 The Bloomfield Group (Bloomfield) submits that its support for Glencore's application was in the context of PNO increasing charges without consultation with coal producers as to the impact on their business, or how such increases were to be levied (Bloomfield DR submission, p. 1). Bloomfield states that while the recent price increases may be problematic, the manner in which the increases were undertaken by PNO may be indicative of future, likely larger price increases (Bloomfield DR submission, p. 1). Bloomfield submits that the ability of PNO to increase charges materially impacts Bloomfield's profit margins from the sale of coal, which affects Bloomfield's "perspectives and decisions in relation to mine operation, expansion and development and associated financing and therefore our ability to supply coal into the global market" (Bloomfield DR submission, p. 1). Bloomfield also submits that an appropriate regulatory process would assist in providing some constraints on PNO, and at the very least a process for PNO to engage with coal producers before levying charges (Bloomfield DR submission, p. 2).

4.41 Peabody Energy Australia Pty Ltd (Peabody) states it does not support the Council's draft recommendation in relation to criterion (a). Peabody submits that while the charges for the service are only a small component of costs for coal producers, the proper consideration is that there has been a material increase in those charges relative to the service provided (Peabody DR submission, p. 1). Peabody submits that this can have implications for shipping services and the value chain, including decreasing demand and competition (Peabody DR submission, p. 2). Peabody also submits that, due to the nature of the increase, "it is possible that the long term market for access to channel services by [PNO] may be diminished" (Peabody DR submission, p. 2).

4.42 Whitehaven Coal Limited (Whitehaven) submits that it agrees with and adopts the facts and submissions in section 8 of Glencore's application regarding the promotion of competition (Whitehaven DR submission, p. 1). Whitehaven submits that the "component of the charge or its increase against overall cost" are not relevant to assessing whether criterion (a) is met. In any event, Whitehaven submits, the quantum of the increase imposed by PNO should not be seen as immaterial (Whitehaven DR submission, p. 2). Whitehaven also submits that the only avenue available to PNO to increase returns is via price increases, and given current coal market conditions an increase in costs of any magnitude may force companies to close low margin mines (Whitehaven DR submission, p. 2). Whitehaven argues that in the absence of declaration there may be further price increases, leading to additional

mine closures and further reductions in competition (Whitehaven DR submission, p. 2).

4.43 Port Waratah Coal Services Limited (PWCS) submits that it does not agree with the Council's application of criterion (a). PWCS submits that the draft recommendation focussed on the materiality of a specific price increase relative to the cost of producing coal, and that this is not the legislative test (PWCS DR submission, p. 1). PWCS submits that the approximately $20 million increase in navigation charges in 2015 will have a material impact on the Hunter Valley coal industry, and that the unconstrained ability of PNO to increase prices in the future is of greater concern (PWCS DR submission, p. 1). PWCS submits that, given the purchase price PNO paid for the Port of Newcastle lease, further price increases are likely. PWCS also submits that the ability of PNO to impose further price increases would be harmful to the competitiveness of dependent markets, particularly in the context of the challenging market conditions producers are facing (PWCS DR submission, p. 1). PWCS also expresses concerns with substantial increases in land lease rentals at the Port of Newcastle (PWCS DR submission, p. 1).

4.44 NSW Treasury agrees with the Council's draft view that criterion (a) is not satisfied, and that the charges represent only a very small component of the overall cost of production and sale of export coal from the Hunter Valley (NSW Treasury DR submission, p. 1). NSW Treasury also submits that the Port of Newcastle is not capacity constrained, and that access to the channel is "effectively a function of the ACCC-authorised landside arrangements that are in place for the Hunter Valley coal chain, both in terms of parties' access to the coal chain and the management of any emergent physical capacity constraints" (NSW Treasury DR submission, p. 2). NSW Treasury also notes that the price monitoring regime to which PNO is subject was not intended to operate as an access regime, but was put in place to ensure the State of NSW met its obligations under the Competition and Infrastructure Reform Agreement (CIRA) (NSW Treasury DR submission, p. 2). Further, NSW Treasury submits that the state government analysed potential competition issues that the long-term lease of the Port may entail, and gave regard to relevant matters from clause 4 of the Competition Principles Agreement (NSW Treasury DR submission, p. 2). NSW Treasury notes that the objective of the price monitoring regime is to promote the economically efficient operation and use of, and investment in, major port facilities in the State of NSW by monitoring the prices port operators charge users of those facilities (NSW Treasury DR submission, p. 2).

Council view

4.45 In the draft recommendation the Council was of the view that each of the criteria for declaration were satisfied other than criterion (a). Submissions in response to the draft recommendation not surprisingly focussed on the Council's assessment of criterion (a). As set out above, some of these submissions offered differing views on the Council's assessment of criterion (a) in the draft recommendation, as well as on

the law governing criterion (a) and on the approach to assessing whether it is satisfied.

4.46 The Council remains of the view that criterion (a) is not satisfied. In response to the submissions the Council has, however, chosen to set out its reasoning in more detail and with greater reference to the jurisprudence relating to criterion (a) than in the draft recommendation. The Council has also addressed new material put forward in submissions on the draft recommendation and in response to requests for information.

Market definition

4.47 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. The markets in which competition might be increased are commonly referred to as "dependent markets".[16]

4.48 In *Re QCMA*[17] the Trade Practices Tribunal (the predecessor to the Australian Competition Tribunal) described a market as being "the area of close competition between firms" or "the field of rivalry between them" (at [23]). The Tribunal said that within a market there is substitution between products or sources of supply in response to price changes. It said that a market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long run, if given a sufficient price incentive (at [190]).

4.49 As is generally the case with consideration of markets in competition law matters, the Council takes a purposive approach to market definition. Conventionally, markets are identified or defined in terms of:

- a product or service dimension;
- the geographic area;
- the functional level; and (if relevant)
- the temporal dimension.

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[16] Section 4E of the CCA provides that:

> For the purposes of this Act, unless the contrary intention appears, "market" means a market in Australia and, when used in relation to any good or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services.

Criterion (a) expands the definition of a market in section 4E in that the dependent markets in which competition is to be promoted need not be in Australia.

[17] *Re Queensland Co-Op Milling Association Limited and Defiance Holdings Limited* (1976) 8 ALR 481 ("Re QCMA").

4.50 The **product/service dimension** of a market delineates the products and/or services that are sufficiently substitutable to be considered to be traded within a single market. The **geographic dimension** of a market identifies the area within which substitution in demand or supply is sufficient for the product(s)/service(s) traded at different locations to be considered to be in the same market.

4.51 Where products or services pass through a number of levels in a supply chain, the market can be described in terms of the function being considered. The **functional dimension** identifies which of a set of vertically related markets are being considered. Defining the relevant functional market requires distinguishing between the different vertical stages of production and/or distribution and identifying those that comprise the field of competition in a particular case (Declaration Guide, [3.12]).

4.52 In respect of criterion (a), what must be determined is whether any dependent market is distinct from the market for the service, and the effect access will have on the conditions for competition in that dependent market. In practice, it may be unnecessary for the Council to examine more than the one or two most likely and significant dependent markets in relation to an application for declaration. Also, although the Council generally identifies dependent markets in terms of the dimensions set out above, an assessment of criterion (a) may not always require a precise delineation of the boundaries of the market for the service.

Markets in this matter

4.53 Glencore proposes a number of dependent markets as relevant to the assessment of its application, focussing on a market for the financing of coal projects in the Hunter Valley as that most likely to be impacted. The other markets proposed by Glencore are:

- a coal export market;
- markets for the provision of shipping services, involving shipping agents and vessel operators;
- 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; and
- a market for specialist services such as geological and drilling services, construction, operation and maintenance.

4.54 Glencore's submissions provide descriptions of these activities as they occur in connection with coal mining, but do not provide detailed analysis of the product, geographic or functional dimensions, nor of the field of substitutes. For instance, in proposing a "specialist services market", Glencore submits:

> Specialist services market: Coal mining exploration and mining requires specialist services including geological and drilling services, construction services and operation

and maintenance services. There are markets for the provision of these services (Application, p. 21).

4.55 PNO acknowledges that most of the markets suggested by Glencore are supported by precedent, but does not consider that there is 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). PNO's submission provides more detail on the possible markets, including factors relevant to the different dimensions and the possible substitutes (PNO submission, Attachment 3).

4.56 As a starting point, the Council accepts that each of the markets Glencore has proposed are likely to be functionally separate from the market for the service. Glencore's application arises in the context of an export supply chain involving a range of different though vertically-related activities. The shipping channel service is distinct from other activities involved in the production and sale of coal, and the Council has received no evidence to suggest that there is integrated competition across levels of the chain that would make distinct functional markets inappropriate. On this basis, the Council considers that the markets proposed are markets other than the market for the shipping channel service.

4.57 In respect of the specific markets Glencore has proposed, the Council accepts that coal is traded and shipped internationally and that Australian coal exporters participate in this international trade. Glencore submits that coal produced at Newcastle competes in the same market with coal produced and sold through other ports throughout the Pacific (Application, p. 17). The RBA article notes that, due to high transport costs, global trade in thermal coal has historically segmented between an Atlantic market and a Pacific market, the former encompassing exports from the Americas to Europe, the latter largely encompassing exports from Australia and Indonesia to the rest of Asia (RBA article, p. 20). The RBA article notes that, given their location, Russia and South Africa tend to supply both markets depending on price differentials. Nonetheless, market dynamics such as low freight costs, relative price differentials and fluctuations in supply can result in trade between the two geographical regions overlapping (RBA article, p. 20).

4.58 The Council acknowledges that there are factors that impact the scope for geographic substitution, but no party has suggested that there are material distinctions to be made in respect of this application. The Council considers that for this matter, the geographic scope of the market for Australian exporters is likely to extend at least beyond Australia and into the Asia-Pacific region. As the Council's view in this matter does not turn on the geographic dimensions of this market, the Council does not propose to define the geographic boundaries with further precision.

4.59 The Council also acknowledges that coal is not a homogenous commodity, and as pointed out by PNO, both Australian and international authorities have found separate product markets for the supply of steaming (thermal) coal and the supply of coking (metallurgical) coal (PNO submission, p. 70). As noted in the RBA article, differences in grade or quality may also influence substitutability in certain

circumstances (for instance, the Reserve Bank notes that Japanese power plants tend to value higher quality coal and price stability (RBA article, p. 20)). No party has however suggested that there is any material distinction to be made in respect of this application. Again, as the Council's view does not turn on the product dimensions of this market, the Council does not propose to define the product boundaries with further precision.

4.60 Nonetheless, there are a significant numbers of participants in these markets, however defined. Coal from the Hunter Valley is predominantly exported, and Glencore submits that there are in excess of 35 customers from 16 countries for Hunter Valley coal (Application, p. 4). Glencore estimates that approximately 70% of exports go to Japan, Korea and Taiwan, and a further 20% to China (Application, p. 4). Glencore also submits that in the Hunter Valley there are more than 30 operating coal mines, operated by 11 coal producers, as well as other coal projects in various stages of exploration and development (Application, p. 4). Glencore also estimates that Hunter Valley coal production accounts for around 40% of Australia's black coal production (Application, p. 3). As noted by the parties, coal is an internationally-traded commodity, and prices are set by reference to international spot prices (Application, pp. 17, 21; PNO submission, p. 46).

4.61 Glencore argues that a market for the financing of coal projects is the market in which competition is most likely to be promoted by declaration. Glencore's submission on the draft recommendation appears to argue that, given the coal mining operations are in the Hunter Valley, and that coal producers require finance, financiers will "look in the aggregate" at the risks faced by Hunter Valley based borrowers, thus effectively creating a market for "…the finite aggregate exposure to such risks to which financiers are willing to be exposed" (Glencore, DR submission, p. 7).

4.62 PNO makes extensive submissions in support of a view that there is not a market for financing of Hunter Valley coal projects. PNO submits that "financing for any business, including coal projects", can come from a range of global sources and in different forms, such as equity, debt and hybrid instruments (PNO submission, p. 34). PNO submits that there are a large number of multinational financiers who compete to provide finance for coal mines in the Hunter Valley, but who also provide financing services to a "vast array" of business (PNO submission, 41). PNO submits that coal mines in the Hunter Valley "do not have sufficiently unique characteristics from other coal mines, worldwide, in their need for finance on which to found a separate market" (PNO submission, p. 41). PNO submits that:

> At its narrowest, the market is a market in Australia for the supply of finance to resources and infrastructure projects. There are a large number of global participants in that market – too many to count or list – on both the demand and supply sides of the market" (PNO submission, p. 41).

4.63 The Council is not satisfied that there is a separate market for the financing of coal projects in the Hunter Valley, as the material before the Council does not enable it to conclude that the relevant market is as narrowly defined as Glencore submits. To

reach a contrary view the Council would have needed material to demonstrate how this was the case. For instance, evidence has not been provided to suggest that, on the demand side, coal producers have only a specified group of substitutable financiers from whom to obtain funds for coal projects, or that these financiers solely supply projects geographically situated in the Hunter Valley. Similarly, evidence has not been provided to suggest that, on the supply side, financiers lack an ability to finance alternative projects in substitution for Hunter Valley coal projects whether they be substitute coal projects, substitute resources or other projects, or substitutes geographically situated elsewhere than the Hunter Valley. While in its application Glencore outlines a number of factors that are considered in the financing of a coal project, this does not necessarily illuminate the field of substitutes or lead to a conclusion that the market is as narrowly defined as Glencore submits (Application, pp. 22-24).

4.64 In contrast, the position put by PNO is consistent with publicly available material about financing markets. PNO submits that international debt raisings by companies with operations in the Hunter Valley have taken place in the United Kingdom, Switzerland, Brazil and the United States (PNO submission, p. 36). It also submits that lenders to companies operating in the Hunter Valley include those domiciled in Australia, Asia, Europe and North America (PNO submission, p. 38). This would suggest a far wider field of geographic substitutes that simply the Hunter Valley in New South Wales, or indeed only Australia. In addition, Glencore notes that large coal mining projects in Australia tend to be financed on a limited or non-recourse basis using debt capital markets, while smaller mining projects are often financed using shareholder loans, capital raisings and/or debt capital markets (Application, p. 22). This suggests some substitution options around the type of financing, at least for some projects.

4.65 In relation to the other markets put forward by Glencore, the Council accepts that there are markets for commercial shipping services. Glencore's information in support of this market is that there are "[s]hipping agents and vessel operators calling at the terminals within the Port of Newcastle precinct", and asserting that there are markets for commercial shipping services (Application, p. 21). PNO submits that regulatory authorities have previously drawn a distinction between bulk shipping and containerised shipping, given limited substitution between these two types of vessels (PNO submission, p. 75). PNO also submits that previous matters indicate that the geographic dimension of shipping markets is based on shipping routes (PNO submission, p. 76).

4.66 The Council agrees that there are limits to substitution between bulk and containerised shipping services, and considers that in this matter the relevant product dimension is for bulk shipping services (that is, not solely coal bulk shipping services). The Council considers though that any relevant market for commercial bulk coal-carrying shipping services is likely to have a geographic scope that extends well beyond Australia. The Council acknowledges that there may be some limits to substitution (for instance, particular ports may have limitations on ship sizes) in some

circumstances, but nothing has been put forward in this matter as providing a basis for a conclusion on any of those factors.

4.67 Glencore proposes a number of other possible markets under broad groupings of "specialist services", "infrastructure services" and "authorities". In its application Glencore provides details of mining operations in the Hunter Valley, including numbers of producers and mines, and of related infrastructure (such as rail services, port terminal loading services) and other services (such as geological surveying and mining safety services) (Application pp. 3-13). These activities occur in connection with, or derive from, the primary activity of the production and sale of coal. Glencore provides descriptions of the activities that occur under these headings, but does not provide detailed analysis of the product, geographic or functional dimensions, nor of the field of substitutes. PNO provides some more material to suggest a basis for these markets, including references to where such markets have been found in other cases (PNO submission, Attachment 3).

4.68 Given the range of activities that occur in connection with the production and sale of coal, the Council accepts that there are likely to be markets for other products and services that are related to or derive from the core production and sale activities. In terms of the geographic scope, these markets may not have the same supra-Australian dimensions as those outlined above. For example the markets for infrastructure services are those most likely to be localised to the Hunter Valley, as given that coal mined in the region must be transported and loaded onto ships for export at the Port of Newcastle, infrastructure services in other geographic locations (for example, above or below rail assets, port loading terminals) will not be substitutable. This also appears to be consistent with publicly available material referred to by PNO regarding the geographic dimension of infrastructure markets in previous matters (see PNO submission, p. 73).[18]

4.69 Other of these markets may however have a geographic scope that extends beyond the Hunter Valley. For instance, providers of specialist services may be able to work in different mining regions around Australia, and parties seeking coal mining authorities may likewise be able to consider different locations (for instance, coal regions located in the Hunter Valley in NSW or coal mining regions in Queensland), thus expanding the field of substitutes.[19] PNO notes that a number of ACCC informal merger reviews of mining services transactions have found a national market for the supply of relevant specialist services (PNO submission, p. 75).

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[18] For instance, PNO refers to *Re Fortescue Metals Group Limited* [2010] ACompT 2, where the Tribunal found that the geographic dimension for provision of rail haulage services for iron ore was the corridor around each rail line (at [1144]).

[19] In *Re Fortescue Metals Group Limited* [2010] ACompT 2, the Tribunal found that the geographic scope of a market for iron ore tenements was "most likely" Pilbara-wide and not global (at [1119]). The Tribunal noted though that there was little detailed evidence on the subject (at [1118]).

4.70 While the Council does not have material before it to define these markets with great precision, it nonetheless considers that if access or increased access to the shipping channel service were to have an impact on the "primary" activities of the production and sale of coal from the Hunter Valley, it would also likely impact these other markets. This is discussed further below at paragraph 4.106.

4.71 The Council has therefore considered each relevant market presented (including those suggested by Glencore). The Council considers that in most cases the relevant markets have a geographic scope broader than simply the Hunter Valley. The Council is also not satisfied that some of the relevant markets are limited only to coal. The Council does not need to precisely define the relevant markets at this stage—the key question posed by criterion (a) is whether access (or increased access) for the shipping channel service will promote a material increase in competition in any dependent market. This is discussed below.

Access (or increased access) to the service

4.72 Having identified the relevant dependent markets, the Council cannot recommend that the shipping channel 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 of those markets. As discussed at paragraphs 3.9 to 3.14 above, coal exporters and other parties have access to the shipping channel service, hence this matter concerns whether *increased* access to the service would promote a material increase in competition in a dependent market.

4.73 The Full Federal Court considered aspects of criterion (a) in *Sydney Airport FCA*. Criterion (a) was amended subsequent to this decision, including to introduce a requirement that access (or increased access) promote a "material increase in competition" rather than "promote competition". Implications for the approach to criterion (a) also come from the Full Federal Court decision in *Pilbara FCA*, and the High Court decision in *Pilbara HCA*. The approach in these later cases may not necessarily be entirely reconcilable with the matters articulated by the Full Federal Court in *Sydney Airport FCA*. Consequently, the implications of these later developments need to be taken into account in considering the approach to criterion (a), and in considering *Sydney Airport FCA*.

4.74 The phrase "access (or increased access)" was considered by the Full Federal Court in *Sydney Airport FCA*. The question on appeal to the Full Court was whether it was necessary to establish a denial or restriction of access before criterion (a) could be considered. The Full Court held that it was not necessary to establish such a denial or restriction (at [76]).

4.75 The Full Court also made other observations on criterion (a). It stated that the relevant inquiry for criterion (a) is a comparison between access and no access (or limited access and increased access), and not between "declaration under Part IIIA" and "no declaration under Part IIIA" (at [81]-[82]).

4.76 The Full Court also stated that the relevant "counterfactual" comparison for criterion (a) is a comparison of the future state of competition in the dependent market with a right or ability to use the service, and the future state of competition in the dependent market without any right or ability (or with a restricted right or ability) to use the service (at [83]). Subsequent developments have however occurred on this point. As noted at paragraph 3.14, in *Pilbara FCA*, the Court held that "access" means access on such reasonable terms and conditions as may be determined in the second stage of the Part IIIA process (at [112]). This question was not addressed by the High Court when the case was appealed, and as such the statement of the Full Court is authoritative. The Council considers that this approach allows for consideration of the effect of access (or increased access) on such reasonable terms and conditions as may be determined via the arbitration stage of Part IIIA (the second stage), but does not require the specific terms of access that might result from an arbitration to be predetermined.

"Promote a material increase in competition"

4.77 The Council's approach therefore involves considering whether increased access to the shipping channel service on such reasonable terms and conditions as may be determined via the second stage of the Part IIIA process would promote a material increase in competition in a dependent market.

4.78 In an economic sense, a promotion of competition is different from the allocation of gains from specific transactions. In a vertical chain of production, parties may argue about the division of the total gains from production and trade; producers at each stage of the production chain will prefer to get more of the gains, leaving less for other parties. This behaviour will be limited by the need for other parties to participate in the production process and actions by one party to seize more of the gains may, but need not, impact on competition in a downstream market. As such, while attempts by one party in the vertical chain to increase its returns may provide evidence of a *potential* impact on competition in a dependent market, such attempts, by themselves, do not show an actual impact on competition. Similarly, while access or increased access may change the distribution of gains between parties to a vertical production process, this is not what is required to satisfy criterion (a). Rather, the criterion looks at whether access or increased access will promote a material increase in competition in a dependent market.

4.79 In respect of the application of criterion (a), the criterion is not met merely by establishing that a service provider is a bottleneck monopoly or possesses market power. As noted earlier (from paragraph 3.15 onwards), the focus of the National Access Regime is on the promotion of competition in markets where the lack or restriction of access to infrastructure services that cannot be economically duplicated would otherwise limit competition. The declaration criteria, specifically (a) and (b), limit the ambit of the Regime to situations where services are provided by facilities that are uneconomic to duplicate and where access would promote competition in a dependent market.

4.80 The market power of the service provider is relevant to the assessment of criterion (a) insofar as it is part of the Council's assessment of the ability and incentive of the service provider to adversely affect competition in a dependent market. The existence of market power is not of itself sufficient to satisfy criterion (a), as there may be circumstances where the service provider lacks either the ability or incentive to adversely affect competition in the dependent market. This could occur where, for instance:

- the service provider is constrained from exercising market power in the dependent market(s), perhaps by competitive conditions in the dependent market(s) and/or the market power of other participants in the market(s); or
- the incentives faced by the service provider are such that its optimal strategy is to maximise competition in the dependent market(s). It may be profit maximising, for example, for a service provider to promote increased competition in the dependent market(s) and maximise demand for the services provided by its facility; or
- the dependent market is effectively competitive.

4.81 A number of past applications for declaration under Part IIIA have illustrated circumstances in which there is unlikely to be an effect on competition in a dependent market. For instance, in the *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2, the Tribunal considered a range of factors in assessing whether Duke, the service provider, could exercise market power to hinder competition in the relevant dependent markets, including:

- the commercial imperatives on Duke, as the owner of a newly developed pipeline, to increase throughput, given the combination of high capital costs, low operating costs and spare capacity;
- the countervailing market power of other participants in the dependent markets;
- the existence of spare pipeline capacity; and
- competition faced by Duke from alternatives to the use of the Eastern Gas Pipeline in the dependent markets [116]-[124].

4.82 Following its consideration of these factors the Tribunal concluded that Duke did not have sufficient market power to hinder competition in the dependent markets.

4.83 In *Re Services Sydney Pty Limited* [2005] ACompT 7, the Tribunal referred to the Council's assessment of an application by "Lakes R Us" for declaration of water storage and transport services provided by Snowy Hydro (at [166]). In that matter the Council concluded (at [6.45]) in relation to criterion (a) that there were significant barriers to the dependent market such that a promotion of competition was unlikely:

> For declaration to have any practical affect New South Wales would need to fundamentally change the nature and scope of property rights relating to water. In addition, because declaration could alter water releases to the Murray River, governments would likely need to renegotiate intergovernmental agreements to clarify

> the water sharing arrangements for the river. These changes would appear to go far beyond those required to remove impediments to competition. Even if the water storage and release services were declared, therefore, it is unlikely that competition would be promoted. [20]

4.84 The Tribunal also made a number of observations on what is required for a promotion of competition in *Fortescue Metals Group Limited* [2010] ACompT 2 (the *Pilbara Tribunal case*). The Tribunal noted that access is unlikely to promote competition if the dependent market is already effectively competitive (at [1068]), and consequently found that a material increase in competition would not be promoted in the relevant global markets.

4.85 The circumstances of Virgin Blue's application for declaration of airside services at Sydney Airport contrast with these examples. In that case there were essentially two users for the airport services for which declaration was sought. Evidence was available (at least before the Full Court) that a proposed change in the level and basis for charging for the services would impact differentially on these users, advantaging one user at the expense of the other, thus distorting competition in the domestic air services market.

4.86 A further consideration arises in respect of the requirement that the increase in competition be "material". The current formulation of criterion (a) was introduced in 2006, following a review of the National Access Regime by the Productivity Commission.[21] Prior to this amendment criterion (a) was expressed to require that access (or increased access) to the service would "promote competition" in at least one market, other than the market for the service. As a number of parties have noted, the requirement that any increase in competition from access must be "material" postdates *Sydney Airport FCA*. As the Productivity Commission noted in its 2013 National Access Regime Inquiry Report, the addition of this requirement was in part a response to a concern that the Sydney Airport decision set too low a threshold for declaration.[22] Consistent with a view that criterion (a) does not set a low threshold, the Council considers that where access would have no material impact on the actions of market participants, then this may be an indicator that access would not promote an increase in competition that is material, and thus criterion (a) would not be satisfied.

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[20] National Competition Council, *Final Recommendation: The Lakes R Us application for declaration of water storage and transport services* (November 2005).

[21] See Productivity Commission, *Review of the National Access Regime – Inquiry Report* (Report No. 17, 28 September 2001). The Productivity Commission had recommended that criterion (a) be amended such that access (or increased access) promote a *substantial* increase in competition in at least one market (other than the market for the service). The enacted amendment used the word "material" instead of "substantial".

[22] Productivity Commission, *National Access Regime – Productivity Commission Inquiry Report* (No. 66, 25 October 2013), p. 171.

4.87 Glencore in its submission referred to a speech by ACCC Chairman Rod Sims in which Mr Sims expressed concerns with the ability of a monopoly service provider to extract "quasi-rents" from other firms in the supply chain (Glencore DR submission, pp. 7-8). Mr Sims said the threat of expropriation of rents by the monopoly provider can limit future investment and innovation by firms in upstream markets. Mr Sims suggested that, as such, monopolies "generally require effective economic regulation". Glencore submitted the ACCC Chairman had "issued a clear statement of the issues that Glencore and the Hunter Valley coal industry face in the absence of declaration". As has been discussed above, the Council notes that third party access under Part IIIA is not *per se* a mechanism for price control or for seeking to limit monopoly prices. Rather, Part IIIA (and therefore the Council) is concerned with the way in which any high prices (or other conduct) may affect competition in a dependent market.

4.88 The Council's approach in respect of Glencore's application is therefore to consider the ability and incentive of PNO to exert market power to adversely affect competition in a dependent market, and to consider whether increased access to the shipping channel service will promote a material increase in competition in any of the identified dependent markets.

Incentive and ability of PNO

4.89 The Council accepts that PNO occupies a bottleneck position in the Hunter Valley export coal supply chain. As set out in chapter 5 of this recommendation the Council's view is that criterion (b) is satisfied in relation to this application.

4.90 In respect of PNO's incentives, Glencore submitted material in response to the Council's draft recommendation on PNO's likely pricing strategy into the future, supported by a report from Synergies Economic Consulting on the likely revenues PNO would need to obtain to earn a return on its investment in the Port of Newcastle facility (the "Synergies Report"). The Synergies Report analysis indicated that in order to earn a commercial return on its investment, PNO may seek further increases in navigation service charges anywhere from 70% to 211%, depending on the valuations and asset life assumptions adopted. Glencore submitted that PNO could seek to increase prices and capture economic rents from coal producers, which may not necessarily lead to producers exiting the market, but which may preclude investment in mines or related infrastructure (Glencore DR submission, p. 11).

4.91 As noted at paragraph 3.19, the Council considers that PNO is not vertically integrated in any material sense into any of the dependent markets, and consequently would not have an incentive to use its position as a provider of shipping channel services to favour a related operation in another market, as is usually the case in access matters involving vertically integrated service providers.

4.92 As a commercial entity, PNO nonetheless has an incentive to maximise profits. PNO submitted that its commercial objective is to recover its efficient costs of providing the service, and that its commercial imperative is to maximise trade volumes through the port (PNO submission, p. 16). PNO pointed to the excess capacity in the port as according it with an incentive to encourage growth, submitting 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 submitted 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 (PNO submission, pp. 4-5).

4.93 The Council accepts that coal producers have limited ability to pass on increases in port charges, and the demand for the shipping channel service is relatively inelastic. Consequently, PNO could raise prices to recover its costs rather than rely on volume increases. However, some constraint may exist given that coal producers supply into a highly competitive market. That is, if price rises imposed by PNO made some coal producers uncompetitive globally, and led to some operations ceasing in the Hunter Valley, this could reduce volumes and revenues for PNO. While it is possible that this may not constrain PNO if other producers were to remain that could absorb the price increases, it is more likely that PNO would have an incentive to maximise the flow of coal through the port so as to capture as much of the benefits from this trade as possible. PNO may have some ability to price discriminate, for example, by setting different prices for different types of vessel. PNO could therefore price (or aim to price) its services in a way that maintains throughput volumes *and* maximises profits, for instance by bargaining directly with producers with mines at risk of closure, or their shippers. Consequently, it does not necessarily follow from an ability to increase prices that there will be a reduction in coal production that impacts competition in a market.

4.94 PNO and NSW Treasury have submitted that the ability of PNO to increase prices is constrained by legislative price monitoring arrangements, specifically the PAMA Act and PAMA Regulations, and the IPART Act. 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 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.

4.95 The Council acknowledges also the submissions from PNO and 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 (such as litigation). Therefore, again while the Council acknowledges that the lease arrangements may allow for some influence over PNO by the State, the material before the Council does not enable it to conclude that they would limit any effects on competition by reason of steps taken by PNO under those arrangements.

4.96 The Council does note though that 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.[23] While producers are undoubtedly sensitive to the charges, it is difficult to conclude that changes to those charges (even changes materially above those that have been imposed to date) would have a material impact on decisions that would affect competition in any relevant market, thus limiting the ability of PNO to adversely affect competition in a dependent market.

4.97 PNO estimates that the current port charges comprise less than 1% of the total delivered cost of coal at the Port of Newcastle, and Glencore in its application acknowledges that the charges are less than 1% of the FOB cost. PNO provided an estimated cost breakdown for coal exported from Newcastle in its submission, demonstrating the materiality of the various cost components. Glencore did not seek to challenge these estimates in its submission on the draft recommendation. 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. 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 such as to have an effect on competition in any of the dependent markets.

4.98 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

[23] 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.

economic factors, such as changes in international coal prices and the value of the Australian dollar. As PNO stated, "[p]articipants in the coal supply chain regularly consider and absorb much more substantial changes in operation and market conditions when making operating and investment decisions" (PNO, Response to Notice, p. 6). The Council also notes that a reduction in production is an efficient response to a decline in demand. The coal 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.[24]

4.99 Glencore's submission on the draft recommendation encourages the Council to consider the impact of the prices on the margins of the coal producers rather than their costs. Glencore submits that its own assessment of the Hunter Valley coal export industry is that approximately 30% of the region's mines are operating at zero or negative cash margin, while a further 30% are making cash margins of less than USD5/t (Glencore DR submission, p. 9). In response to a request from the Council, Glencore clarified what it meant by "cash margin":

> The assessment is of the operating cash margin generated by each mine. i.e. Revenue less operating cash costs, including an allowance for sustaining capital. The analysis does not include interest or tax costs and non-cash items such as depreciation. It approximates an estimate of the EBITDA, less a deduction for sustaining capital. (Glencore, Submission, 2 October 2015).

4.100 The Council acknowledges the sensitivity of coal producers to costs (and increases to costs) in an environment where global coal prices have declined and margins have reduced. While the impact on costs and margins is relevant, price increases at the Port of Newcastle may impact mines or producers differently depending on their costs (and related margins), and this may not necessarily affect competition in the relevant markets. For instance, margins may fluctuate depending on coal prices at a point in time, and while this may have more significance for high cost, low margin operations, it may not necessarily have a bearing on the competitive dynamics within the relevant markets.

4.101 The Council also notes that, while it does not consider that the current regime for regulatory oversight of PNO's pricing imposes a strong constraint, it is reasonable for the Council to proceed on the basis that a regulatory regime imposed by the State

[24] PNO also cited the following other "material factors" that could impact coal mining production: supply chain constraints (particularly rail and terminal capacity); global demand and supply; forecast price and volatility; foreign exchange rates; financing; operating costs; shipping costs (PNO Response to Notice, p. 7).

will be administered fairly and in accordance with its terms. It is therefore highly unlikely that an attempt by PNO to impose price increases that result in the closure of a non-trivial proportion of the Hunter Valley's coal producers would fail to prompt a response from the relevant government agencies. In any case, as discussed at 4.93, there may be incentives for, and the means of, PNO to minimise the impact of any price increases on mining production.

4.102 The Council notes that Glencore and other Hunter Valley producers have stressed the uncertainty around future price increases as a 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. Coal producers also face significant uncertainty from changes in the price of coal, ongoing costs (for example labour costs) and changes in regulation, such as those dealing with carbon emissions. Compared to these other sources of uncertainty, any uncertainty about charges at the Port of Newcastle is likely to be relatively small. The Council does not consider that removing that uncertainty is likely to promote a material increase in competition in a dependent market.

Impact in dependent markets on a "with" and "without" basis

4.103 In light of the foregoing discussion the Council has considered whether, on a future with and without basis, increased access (on such reasonable terms and conditions as may be determined in the second stage of the Part IIIA process) to the shipping channel service would promote a material increase in competition in each of the identified dependent markets. The Council is not satisfied that this is the case.

4.104 The Council has noted that the charges for the shipping channel service represent a minor component of FOB cost of coal at the Port of Newcastle, and as such are unlikely to have an effect on production or investment decisions such as to promote a material increase in competition in a market, with or without increased access on such reasonable terms and conditions as may be determined in the second stage of the Part IIIA process. This is likely to be the case regardless of the dependent market identified.

4.105 The Council also notes the comments by the Tribunal in *Pilbara Tribunal* that criterion (a) is not concerned with markets that are already effectively competitive, and that if a dependent market is already effectively competitive, then intervention is not called for (at [1068]). In this matter the Council considers that a number of the dependent markets proposed are likely to be effectively competitive – those described earlier involving coal export, bulk commodity shipping, and financing. Adopting the Tribunal's approach from *Pilbara Tribunal*, a finding that these markets are effectively competitive would be sufficient to end the inquiry in relation to those markets. Even with further consideration, the Council considers that the markets described above involving coal export, shipping services and financing are likely to have a geographic scope beyond Australia, not necessarily be limited to coal, and to include large numbers of supply and demand side participants. Given this, on a future with and

without basis, increased access to the service will not promote a material increase in competition in any of these markets.

4.106 In respect of the other markets described above, the Council also considers that many of these markets are broader than the Hunter Valley and there is not material before the Council on which it can be affirmatively satisfied that the changes which the Council has assumed will result from increased access will promote a material increase in competition in these markets. In any case, the Council considers that any impact from increased access to the service would be seen in relation to the primary activity of the production and sale of coal from the Hunter Valley. For example, 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 primary activities, the Council also considers that there would not be any flow-through effects in any related market. As such, on a future with and without basis, the Council does not consider that increased access to the shipping channel service would promote a material increase in competition in any of these markets.

Conclusion on criterion (a)

4.107 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 promote a material increase in competition in a market other than the market for the shipping channel services.

4.108 The Council therefore considers that 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 *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[25]) 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).

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.

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[25] 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]).

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 volume 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 to the application

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 to the application 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 the 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).

Submissions on the draft recommendation

8.9 Two submissions on the draft recommendation make reference to matters concerning the Council's consideration of criterion (f).

8.10 NSW Treasury submits that it would welcome a more detailed consideration by the Council of matters put forward by interested parties in submissions to the application. NSW Treasury submits that "[g]iven the Council's conclusion under criterion (a) that there is likely no benefit associated with declaring shipping channel services at the Port of Newcastle, and given that there are costs and risks associated with regulation, then it would imply that it is not in the public interest to declare the service" (NSW Treasury DR submission, pp. 2-3).

8.11 NSW Treasury identifies lease obligations which it indicates currently apply to PNO, including stewardship-related obligations to provide access as well as obligations to develop the port to the extent feasible. NSW Treasury indicates it would be concerned if PNO was impeded from complying with the obligations under its lease, for example if investments were curtailed by regulated rates of return (NSW Treasury DR submission, p. 3).

8.12 NSW Treasury suggests the Council consider the potential risks associated with establishing an external regulatory regime on non-coal ships that use the Port of Newcastle. NSW Treasury submits that allowing access could potentially create constraints on non-coal shipping (NSW Treasury DR submission, p. 3).

8.13 PNO reiterates its view that it would be contrary to the public interest to declare the service. PNO wishes to reserve all of its rights in that regard (PNO DR submission, p.1) (see paragraph 2.6 and footnote 3).

Approach to assessing criterion (f)

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

8.15 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".

8.16 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.

8.17 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).

8.18 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]).

8.19 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.

8.20 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.[26]

Council view

8.21 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;
- existence of price monitoring arrangements[27] and potential to reduce the credibility of such regimes; and
- potential constraints on non-coal shipping.

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

8.23 NSW Treasury expresses a view that because criterion (a) is not satisfied, it is implied that declaration and regulation is not in the public interest. The Council reiterates its approach to assessing criterion (f) is not to seek to identify and weigh up all of the potential benefits (and costs) of access. Rather it is an assessment of the likelihood and consequences of matters which could mean that access is contrary to the public interest, assuming all other declaration criteria are met (see above).

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[26] 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.

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

8.24 In relation to the potential impact of declaration on incentives or obligations 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.[28] The Council does not therefore consider that the prospect of access or increased access will discourage efficient investment.

8.25 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.

8.26 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 the ACCC's 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.[29] The Council notes that under section 44X it would be open to the ACCC to take such factors into account if conducting an arbitration.

8.27 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 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.

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

[29] See, ACCC, *Decision: In relation to the Australian Rail Track Corporation's Hunter Valley Rail Network Undertaking* (29 June 2011), s 1.2.3.1.

8.28 The Council has considered NSW Treasury's statement that access could "potentially create constraints on non-coal shipping that currently do not exist". However, no illustration of how such a situation could occur has been presented by any party, including non-coal shippers and shipping agents or vessel operators.

8.29 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 shipping channel service provided by the port to be declared.

8.30 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 (Application, p. 33).

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 in response to the application**

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*

- Attachment 1: Historical port prices applicable to the coal trade FY91 to CY15 (ex GST)
- Attachment 2: Total port charges by vessel size and per tonne of coal pre and post pricing restructure and realignment 1 January 2015
- Attachment 3: Port of Newcastle Operations' approach to defining the dependent markets
- Attachment 4: The PAMA regime

- Attachment 5: The building blocks model
- Attachment 6: Other factors that affect the availability of finance for coal projects
- Attachment 7: Report from Ms Cecilie Naess dated 17 June 2015

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*

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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*

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- 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*

B.3 **Submissions in response to the Council's draft recommendation**

Port of Newcastle Operations, 31 August 2015, *Submission in response to the National Competition Council's draft recommendation*

Virgin Australia Airlines Pty Ltd, 31 August 2015, *Declaration of the shipping channel service at the Port of Newcastle - Draft Recommendation*

New South Wales Minerals Council, 31 August 2015, *Submission on NCC's Draft Recommendation – Application for Declaration of the Shipping Channel Services at the Port of Newcastle*

Peabody Energy Australia Pty Ltd, 31 August 2015, *Peabody Energy Australia Pty Ltd Submission: Declaration of shipping channel service at the Port of Newcastle*

New South Wales Treasury, 2 September 2015 (date received), *NSW Treasury Submission to the National Competition Council – Draft Recommendation on the Access to Shipping Channel Services at the Port of Newcastle*

The Bloomfield Group, 2 September 2015, *Submission on Draft Recommendation – Application for Declaration of the Shipping Channel Services at the Port of Newcastle*

Port Waratah Coal Services, 3 September 2015, *Submission on the draft recommendation in relation to the Port of Newcastle*

Whitehaven Coal Limited, 4 September 2015, *Submission on National Competition Council (NCC) Draft Recommendation in relation to declaration of the Port of Newcastle*

Glencore Coal Pty Ltd, 9 September 2015, *Submission to the National Competition Council – Applicant's response to the draft recommendation not to declare the shipping channel service at the Port of Newcastle*

- Annexure A: Synergies Economic Consulting, 1 September 2015 (received 7 September), Potential for increase in navigation services charges at Port of Newcastle
- Annexure B1: Simon Bishop, RBB Economics, 10 September 2015 (received 11 September 2015), *An Economic Assessment of NCC's Draft Recommendation not to declare the Shipping Channel at the Port of Newcastle*
- Annexure B2: Trent Saunders, Reserve Bank of Australia, Bulletin, June Quarter 2015 (received 11 September), *Developments in Thermal Coal Markets*

B.4 **Submissions in response to Council requests for information**

Port of Newcastle Operations, 2 October 2015, letter, *Application for declaration of shipping channel services at the Port of Newcastle*

- Attachment A: PNO's response to the Notice
- Attachment B: HoustonKemp Report
- Attachment C: Castalia Report
- Attachment D: submission by PNO on the correct approach to the assessment of criterion (a)
- Attachment E: Characterisation of port charges

Glencore Coal Pty Ltd, 2 October 2015, *Submission to the National Competition Council – Response to the National Competition Council's draft recommendation not to declare the supping channel service at the Port of Newcastle*