

**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**

June 2015

NSW MINERALS COUNCIL



About the NSW Minerals Council

The NSW Minerals Council (NSWMC) is the peak industry association representing the NSW minerals industry. Our membership includes around 100 members, ranging from junior exploration companies to international mining companies, as well as associated service providers.



Executive summary

The NSW Minerals Council is pleased to provide this submission in support of Glencore's application to the National Competition Council for a recommendation to declare shipping channel services at the Port of Newcastle under Part IIIA of the *Competition and Consumer Act 2010*.

The coal mining industry in Australia, including in the Hunter Valley, is facing fragile market conditions. This has already seen some Hunter Valley mines closed permanently or suspended indefinitely. The high Australian dollar and costs facing Australian miners make it harder and harder for them to be competitive in the international coal export market. Cost increases by service providers in the coal supply chain could be enough to accelerate the closure of some coal mines or the exit of some coal producers from the market.

Port of Newcastle Operations has recently introduced substantial increases to charges for using shipping channels at the Port of Newcastle. It is the only provider of this service, which coal miners in the Hunter Valley must use to be able to export their coal. There is no alternative to using the shipping channels at the Port of Newcastle. Port of Newcastle Operations is unconstrained in its ability to increase prices for this service further. This has created uncertainty around future pricing for this access, and threatens the viability and competitiveness of Hunter Valley coal mines and coal producers.

Regulated access to this service will allow prices and access terms to be negotiated on reasonable terms, with a right to ACCC arbitration based on clear cost-recovery pricing principles. This would ensure certainty and fairness in the price for access to the shipping channels at the Port of Newcastle. The costs of exporting coal could not be unnecessarily inflated and it would be more likely that Hunter Valley coal producers remain competitive and viable.

The NCC should therefore recommend declaration of this service, as it will materially increase competition in upstream and downstream markets, relating to facilities which are natural monopoly bottlenecks of national significance and which are not otherwise subject to an effective access regime. The NSW Minerals Council fully supports Glencore's application and commends it to the NCC.



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Introduction

About the NSW Minerals Council

The NSW Minerals Council represents the minerals industry in NSW, including explorers and producers of minerals and coal in NSW, as well as suppliers to the industry. Many of NSWMC's members are active in the coal mining industry in the Hunter Valley, either as producers, explorers or service providers.

NSWMC provides a single, united voice on behalf of around 100 member companies and works closely with government, industry groups, stakeholders and the community to foster a dynamic, efficient and sustainable minerals industry in NSW.

A full list of NSWMC members is provided in Annexure A to this submission.

Glencore's application

Glencore is a full member of NSWMC and has made an application to the National Competition Council under Part IIIA of the Competition and Consumer Act for a recommendation to the responsible minister that the shipping channel services provided at the Port of Newcastle should be declared.

Declaration would require the access provider to negotiate access to the service with access seekers in accordance with the requirements of Part IIIA, including the possibility of arbitration of any access disputes by the ACCC. A key element of the access regime is that the price of any access to the declared service can be regulated by the ACCC (either through acceptance of access undertakings or determination of access arbitrations). The regime provides pricing principles that guide the ACCC's determinations of access arbitrations and acceptance of access undertakings.

Structure of submission

NSWMC's submission will address the following matters in turn:

- the proposed service definition and identification of the access provider
- the key declaration criteria
 - increased upstream or downstream competition
 - it is uneconomical to duplicate the facility to provide the Service
 - the facility is of national significance
 - access is not already subject to an effective access regime
- the appropriate duration of the declaration

The Service and the Access Provider

The Service

Glencore has sought a recommendation for declaration of a service consisting of the provision of the right to access and use the shipping channels (including the berths next to the wharves as part of the channels) at the Port of Newcastle, which allows vessels to enter a Port of Newcastle precinct and load and unload at the relevant terminals within the Port of Newcastle precinct, and then depart from the Port of Newcastle precinct (Service).

NSWMC supports this definition of the Service as encompassing what must be declared for NSWMC members to be able to seek fair terms of access to bottleneck shipping channels at Port of Newcastle.

Access Provider

The Service is currently provided by Port of Newcastle Operations Pty Ltd as trustee for the Port of Newcastle Unit Trust, trading as Port of Newcastle (PNO).

NSWMC confirms that it considers PNO to be the provider of the Service.

Declaration criteria

Increased competition in upstream or downstream markets

The NCC must not recommend declaration unless it is satisfied that access or increased access to the Service will promote a material increase in competition in at least one market (other than the market for the Service): section 44G(2)(a).

This requires a comparison between the counterfactuals of how competitive other markets would be with and without increased access to the Service.

As Glencore points out in its submission in support of its application, in this context, 'access or increased access' means regulated access under Part IIIA.¹ It is irrelevant that most or all potential access seekers already have 'access' to the Service. Rather, what is relevant is whether regulation of access to the Service under Part IIIA would materially increase competition in an upstream or downstream market compared to unregulated access.

Glencore further points out that a material increase in competition can be found where regulated access to the Service would 'creat[e] the conditions or environment for improving competition from what it would be otherwise'.²

The key point is that monopoly pricing behaviour in the pricing of access to the shipping channels at the Port of Newcastle presents the real possibility that coal producers in the Hunter Valley will not be able to supply coal at competitive prices internationally (because of the added Port costs) or will not produce coal (because they cannot afford to absorb supra-competitive Port prices and will not proceed with projects, will mothball mines, or will go out of business). Any of those outcomes would result in less competition than where regulated access was available to the Service (including pricing in accordance with the pricing principles in Part IIIA), even on the most cursory analysis of there potentially being fewer mines and fewer producers under those outcomes.

NSWMC confirms Glencore's submission that price increases for access to the shipping channels at the Port can materially affect the competitiveness and viability of coal mining operations in the Hunter Valley. Coal is an internationally traded commodity with prices set by the international market. To be competitive, Australian coal producers must have a cost base that allows them to meet that international price profitably, despite the shipping costs of exporting the coal from Australia and the impact of currency fluctuations. In this environment, monopoly pricing behaviour in the supply chain could materially affect the competitiveness and viability of Australian coal producers by increasing their cost base to unprofitable levels.

It is true, as Glencore has submitted, that some mine closures have already been announced and other mines have had operations suspended. For example:

- Glencore has announced that it will be bringing forward the closure of its West Wallsend mine because of tough market conditions³
- Vale's Integra mine had mining operations suspended in July 2014 because it was considered unviable in current economic conditions⁴

¹ Glencore Coal Pty Ltd, Application for a declaration recommendation in relation to the Port of Newcastle, p.19 (citing *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at [74] (Australian Competition Tribunal)).

² Glencore, p.19 (quoting *Re Sydney International Airport* [2000] ACompT 1 (1 March 2000) [106]).

³ <http://www.abc.net.au/news/2015-03-27/hundreds-of-jobs-to-go-in-early-closure-plans-for-west-wallsend/6352254>



- Centennial Coal's Newstan mine was put into care and maintenance in July 2014 due to the strong Australian dollar and low coal prices⁵
- Glencore's Ravensworth Underground operations ceased in September 2014 "due to a combination of lower prices, high production costs at the mine, a strong Australian dollar and geological constraints in future mining areas"⁶

Comparing the counterfactuals with and without regulated access, it is therefore clear that regulated access creates the conditions for improved competition from what it would be otherwise.

Competition would be materially increased directly in the international markets for the supply of coal and in the Australian coal export market. Regulated access would help to ensure that Hunter Valley coal producers faced a cost base that was both predictable and fair, giving them the best possible chance of remaining competitive and viable. As Glencore notes in its submission, uncertainty about these costs and the possibility of even incremental (but unfettered) cost increases by PNO could be enough in the current fragile market conditions to force coal producers to exit the market.⁷

Regulated access to the Service would also materially increase competition in those markets that depend on Hunter Valley coal mines. If regulated access is more likely to ensure that Hunter Valley coal producers remain viable and keep their mines operational, this will mean that regulated access will also be more likely to ensure that participants in these dependant markets will also remain viable and continue to compete in their respective markets. On the other hand, without regulated access, if coal miners are driven to exit the market, this would have flow on repercussions for those markets that rely on coal mining for their viability.

These dependant markets include:

- the market for financing or refinancing coal mining projects and expansions to coal mining projects
- the market for the acquisition or disposal of mining authorities under the *Mining Act 1992* (NSW)
- the various markets for infrastructure services that comprise the Hunter Valley coal chain: above rail haulage services, road haulage services, electricity and water
- the various markets for specialist mining consultancy services: geographical and drilling services, construction services and operation and maintenance services
- commercial shipping markets.

Facility is uneconomical to duplicate

The shipping channels at the Port of Newcastle exhibit natural monopoly characteristics. There is no route through any existing waterway other than these shipping channels that would allow a commercial coal ship to travel between the open sea and the coal-loading facilities at the Port of Newcastle.

NSWMC does not consider that there is any other solution that could economically replicate or avoid having to use the present shipping channels.

⁴ <http://www.vale.com/australia/en/business/mining/coal/integra/pages/default.aspx>

⁵ <http://www.theherald.com.au/story/2412325/newstan-mine-closure-to-wipe-hunter-jobs/>

⁶ <http://www.theaustralian.com.au/business/mining-energy/glencore-to-close-ravensworth-coal-mine-in-nsw/story-e6frg9df-1226866370046>

⁷ Glencore, p.22



Facility is of national significance

The NCC should find that the facilities used to provide the Service are of national significance. The Port of Newcastle is the world's largest coal export port⁸. Coal is Australia's second largest export, providing Australia with \$40 billion in export income during 2013-14⁹. During 2014, \$14 billion of coal was exported through the Port of Newcastle alone¹⁰. It is clear that the facilities are economically significant at both the state and national levels.

NSWMC conducted a survey of 22 NSW mining and exploration companies' expenditure to identify the economic contribution of the mining industry throughout NSW in 2013/14, including specifically in the Hunter Valley. The results of this survey are contained in the Economic Impact Assessment 2013/14 available from the NSWMC website¹¹.

Key findings of this survey include:

- NSW mining companies spent \$5.9 billion in the Hunter Valley in 2013/14, including \$1.8 billion in Newcastle and \$1 billion in Maitland
- 21.5% of the workforce in the Hunter Valley is supported by mining: 11,078 people directly employed in mining and 58,904 employed in supporting industries
- Mining made up 28% of the Gross Regional Product for the Hunter Valley region, contributing some \$12.2 billion of value to the region
- This value and investment in the Hunter Valley is close to half of the total value and investment added by mining companies to the whole of New South Wales.

The facilities used to provide the Service are essential to the Hunter Valley coal industry, which is a fundamental component of the region's economy.

Service is not already subject to an effective access regime

As Glencore has pointed out in its application,¹² pricing of the Service is currently subject to price monitoring under the NSW *Ports and Maritime Administration Act 1995*.

The price monitoring regime requires PNO to publish its prices and to notify the Minister of any increases to the charges including the reason for the price change. Nothing in the legislation limits any prices or price increases. The Minister does not have any price control powers (other than to refer matters to IPART).

Importantly, the price monitoring regime (even in conjunction with an IPART referral), does not have many of the key elements of the Part IIIA access regime, and so should not be considered an effective access regime:

⁸ <http://www.portofnewcastle.com.au/>

⁹ <http://dfat.gov.au/about-us/publications/trade-investment/australias-trade-in-goods-and-services/Documents/fy2013-14-goods-services-top-25-exports.pdf>

¹⁰ <http://www.portofnewcastle.com.au/Resources/Documents/PON-Annual-Trade-Report-2014-FINAL.pdf>

¹¹ http://www.nswmining.com.au/getmedia/f6d5951c-89ca-4dcb-b39a-674da571aa0f/Economic-Impact-Report_2014

¹² Glencore, p.31

- there is nothing in the price monitoring regime that prevents PNO from hindering access
- there is nothing that requires the prices to be determined in accordance with pricing principles that balance the legitimate commercial interests of the access provider and the interests of access seekers, taking into account the efficient costs of providing the service
- there is no right to arbitration before an independent regulator
- there is no provision for negotiated access agreements and prices.

On that basis, NSWMC supports Glencore's submission that the price monitoring arrangements under the NSW Ports and Maritime Administration Act are not an effective access regime.

Duration of declaration

NSWMC supports Glencore's submission that the NCC should recommend declaration for at least 15 years.

The benefits of increased competition will be best achieved through certainty and predictability of access to the Service and its pricing. Given the long life of mining projects, that certainty and predictability has to be long-term for it to achieve those benefits.

Annexure A List of NSW Minerals Council members

Full Members

Alkane Resources Ltd
Anchor Resources Limited
Anglo American Metallurgical Coal Pty Ltd
Argent Minerals Limited
Barrick Gold of Australia
BHP Billiton
The Bloomfield Group
Centennial Coal Company Ltd
China Molybdenum Co
Coalpac Pty Ltd
Cristal Mining Limited
Downer EDI Mining
Glencore Coal (NSW) Pty Limited
Gloucester Resources Ltd
Kimberly Diamonds Ltd
Hillgove Mines Pty Ltd
Idemitsu Australia Resources Pty Ltd
Iluka Resources Pty Ltd
Jodama Pty Ltd
Kepco Bylong Australia Pty Ltd
Newcrest Mining - Cadia Valley Operations
NuCoal Resources NL
Peabody Energy Australia
Port Waratah Coal Services Limited
Regis Resources Limited
Rio Tinto Group
Shenhua Watermark Coal Pty Limited
Spur Hill Management Pty Ltd
Thiess Pty Ltd
Vale Australia - Integra Coal Operations Pty Ltd
White Rock Minerals Ltd
Whitehaven Coal Limited
Wollongong Coal Limited
Wyong Areas Coal Joint Venture
Yancoal Australia Limited

Associate Members

Commissioners Gold Ltd
DG Engineering International Pty Ltd
GFA and Associates
Global Mineral Resources Limited
Gold and Copper Resources Pty Limited
Golden Cross Resources Ltd
Golder Associates
Helix Resources Ltd



Hill End Gold Limited
Jervois Mining Limited
L McClatchie Pty Ltd
Malachite Resources Ltd
NSW Aboriginal Land Council
Quarry Mining & Construction Equipment P/L
Rimfire Pacific Mining NL
Silver City Minerals Limited
Silver Mines Ltd
Strategic Materials Pty Ltd
Sydney Marine Sands Pty Limited
Thomson Resources Ltd
TRIAUSMIN Ltd
Unity Mining Limited
Ashurst
Herbert Smith Freehills
McCullough Robertson
Sparke Helmore Lawyers
Aecom Australia Pty Ltd
Ampcontrol Pty Ltd
Aurizon Holdings LTD
BIS Industries Limited
Coal Services Pty Ltd
Corporate Air (Vee H Aviation Pty Ltd)
Emeco International Pty Ltd
EMGA Mitchell McLennan
Hunter Business Chamber
Jennmar Australia
Civeo Pty Ltd
Mitsubishi Development Pty Ltd
Orica Australia Pty Ltd
PricewaterhouseCoopers
Rangott Mineral Exploration Pty Limited
Resource Strategies Pty Ltd
RW Corkery and Company
Sada Pty Limited
Total Coal Processing Pty Ltd
Umwelt (Australia) Pty Limited
Centre for Mined Land Rehabilitation
School of Mining Engineering – UNSW
TAFE NSW – Illawarra Institute
Hansen Bailey Pty Ltd
Pacrim Environmental Pty Ltd
University of Wollongong
XCoal Energy and Resources

