Department of **Treasury and Finance**

National Competition Council

Application by Glencore Coal Pty Ltd

for a declaration recommendation under Part IIIA of the *Competition and Consumer Act 2010* (Cth)

State Government Victoria

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1. Introduction

1.1 The National Competition Council (**the Council**) has sought submissions in response to an application by Glencore Coal Pty Ltd (**Glencore**) for a declaration recommendation under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**).

1.2 The Department of Treasury and Finance of the State of Victoria (**DTF**) wishes to make a submission on several matters relevant to the Council's consideration of Glencore's application, noting that the views formed by the Council on the matters raised in this submission may be of significance for the application of Part IIIA to non-vertically integrated ports in Australia generally.

1.3 The matters which DTF would like to raise are as follows:

a) the identity of the 'designated Minister';
b) the meaning of 'service' in Part IIIA;
c) the material increase in competition criterion; and
d) the public interest criterion.

2. Executive summary

2.1 The key points in DTF's submission are as follows:

a) Under Part IIIA, the 'designated Minister' is the person who decides whether or not to declare a service following a recommendation from the Council. DTF submits that where a State has leased assets to a private operator but has been careful to retain ownership, the designated Minister is the Premier of that State and not the Commonwealth Treasurer. DTF submits that this conclusion flows from the proper interpretation of the Act, having regard to the plain words of the Act but also the intention that may be inferred as lying behind legislative provision for the identity of the Minister to vary depending on the circumstances.
b) A declaration can only be made in respect of a 'service', which is defined in a particular way. DTF submits that where a port operator is merely exercising a statutory power to charge for access to and use of a shipping channel, it is not apparent that it is providing a service within the meaning of Part IIIA.
c) The Council cannot make a declaration recommendation unless satisfied that increased access would promote a material increase in competition in a market other than the market for the service that is the subject of the application (**the competition criterion**). DTF submits that the competition criterion is not necessarily easily satisfied and requires careful consideration. In particular, DTF submits that the definition of the market in which it is alleged that competition will increase requires close scrutiny, as defining the market incorrectly will lead to a misjudgement as to the competitive effect of increased access.
d) The Council cannot make a declaration recommendation unless also satisfied that increased access would be in the public interest (**public interest criterion**). DTF submits that particular care needs to be taken in relation to the public interest criterion in circumstances in which a State has carefully designed the regulatory regime under which a declaration application is made. DTF submits that, in designing a regulatory regime, a State pays careful attention to balancing the various and conflicting factors that inform the public interest, and this needs to be taken into account. DTF also submits that the effect on private investment of declaring a service is relevant to the public interest question, and therefore requires careful consideration.

3. Designated Minister

3.1 The Council has stated that it is giving consideration to the issue of whether the designated Minister is the Premier of New South Wales or the Commonwealth Treasurer (or a Minister nominated by him), and has stated that it will advise interested parties when it has reached a view. DTF requests that it be advised once the Council has reached a view.

3.2 For the reasons that follow, DTF submits that the designated Minister in the present circumstances is the Premier of New South Wales.

3.3 Section 44B of the Act provides that 'designated Minister has the meaning given by section 44D'. Section 44D(1) provides: 'The Commonwealth Minister is the designated Minister unless subsection (2), (3), (4) or (5) applies.' In the present circumstances, it is subsection (2) that is relevant. Subsection (2) provides:

In relation to declaring a service in a case where:

a) *the provider is a State or Territory body; and*

b) *the State of Territory concerned is a party to the Competition Principles Agreement;*

the responsible Minister of the State or Territory is the designated Minister.

3.4 As New South Wales is a party to the Competition Principles Agreement, subparagraph (b) is satisfied in the present circumstances.

3.5 With respect to subparagraph (a), 'State or Territory body' is defined to mean either a State or Territory or an authority thereof. 'Provider' is defined in section 44B as follows:

***provider**, in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service.*

3.6 When the definition of 'provider' is read with section 44D(2), the result is as follows:

In relation to declaring a service in a case where:

a) *[the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service] is a State or Territory body; and*

b) *the State or Territory concerned is a party to the Competition Principles Agreement;*

the responsible Minister of the State or Territory is the designated Minister.

[Emphasis added.]

3.7 As a matter of statutory construction, therefore, the 'designated Minister' will be the Premier/Chief Minister of the relevant State/Territory 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.

3.8 Applying this to circumstances in which the operator of the relevant facility is a private entity, so long as the owner of the relevant facility is a State/Territory (or an authority thereof), the 'designated Minister' is the Premier/Chief Minister of the relevant State/Territory.

3.9 The construction set out above arises from a plain reading of section 44D(2), read together with the definition of 'provider' in section 44B. But the same conclusion may be reached by drawing inferences as to the rationale for framing the definition of 'designated Minister' in such a way as to provide for the individual so described to come from a State/Territory in one set of circumstances and from the Commonwealth in a different set of circumstances. DTF submits 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) – whether by way of ownership or by virtue of a State or Territory authority being the operator.

3.10 Applying the foregoing to the present circumstances, Glencore has identified the relevant facilities as being certain shipping channels and vessel berth areas (see section 5.4 of its application) in the Port of Newcastle. Glencore has also stated, in section 6.1 of its application, that the 'Crown in right of New South Wales is the owner of the tidal areas of the Port of Newcastle including the channels and the berths' [emphasis added]. Assuming for the moment that Glencore is correct to identify the channels and berths as 'facilities' within the meaning of the Act (about which more is said below), given the owner of these facilities is admitted to be the State of New South Wales, as a matter of statutory construction the 'designated Minister' is the Premier of New South Wales.

3.11 Glencore states that the private operator is 'for all intents and purpose of the Act the owner of the facilities' (see section 6.2 of its application). However, the Act speaks of 'owner or operator' (see section 44B), clearly distinguishing between ownership and operation of a facility; and it is therefore incorrect, in DTF's submission, to assert that because a private entity is the operator of the relevant facility it is thereby also the 'owner' for the purposes of the Act – to do so is to conflate ownership and operation where the Act draws a distinction.

3.12 DTF submits that the 'owner' of the relevant facility is simply the entity which, as a matter of law, is the owner of the facility.

4. ‘Service’ within the meaning of Part IIIA

4.1 ‘Service’ is defined in section 44B to mean a ‘*service provided by means of a facility*’. Glencore has identified the relevant service as being ‘the provision of the right to access and use the shipping channel (including berths next to wharves as part of the channel) at the Port [of Newcastle]’ (see section 5.1 of its application) [emphasis added]. As noted, Glencore has identified the relevant facilities as being certain ‘shipping channels and vessel berth areas’. However, in identifying the service Glencore appears to state that the berths form part of the channel (see above), so it is not clear whether the shipping channel and berths are being put forward as distinct facilities.

4.2 DTF invites the Council to consider carefully two aspects of the definition of ‘service’ in Part IIIA, namely:

a) whether the shipping channels and vessel berth areas are ‘facilities’ within the meaning of the Act; and
b) if so, whether the service as identified by Glencore is a service ‘provided by means of’ the shipping channels and the berths.

4.3 Given the physical characteristics of the shipping channels and berthing areas, being essentially tracts of water through which ships navigate, DTF submits that it is questionable whether shipping channels and berths are ‘facilities’ within the meaning of the Act.

4.4 If the Council does consider channels and berths to be facilities, DTF notes that the Port of Newcastle relies on powers conferred on it by the *Ports and Maritime Administrative Act 1995* (NSW) to levy charges on vessels for use of the shipping channels and ‘does not enter into agreements for the provision of access’. DTF understands that, in substance, vessels enter the channel and the Port of Newcastle proceeds to exercise a statutory power to levy a charge for doing so. In such circumstances, DTF submits that there is a serious question as to whether the identified service is being ‘provided by means of’ the identified facilities. It appears that the Port of Newcastle is merely levying a fee for access to and use of the channels pursuant to a statutory power, rather than ‘providing’ a service.

4.5 DTF further notes that Glencore’s application raises certification of the Victorian Access Regime for Commercial Shipping Channels in 1997 in support of its contention that the granting of access to a shipping channel is a service within the meaning of Part IIIA. However, it is not apparent from the Council’s reasons for decision in that matter, dated 12 May 1997, or the Treasurer’s statement of reasons, dated 1 August 1997, that the question of whether the use of a shipping channel was a service within the meaning of Part IIIA was ever considered.

5. Competition criterion

5.1 Under section 44G(2) of the Act, the Council cannot make a declaration recommendation unless satisfied of various matters. DTF submits that consideration of these matters ought to be informed by the circumstances in which an application has been made. DTF understands that Glencore is an existing user of the relevant service whose complaint is as to price alone.

5.2 One matter of which the Council must be satisfied is 'that 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' (section 44G(2)(a)).

5.3 With respect to this requirement – criterion (a) – the Council has observed:

> *Where a dependent market is already workably or effectively competitive, access is unlikely to promote a material increase in competition and an application for declaration of a service that seeks to add to competition in such a market is unlikely to satisfy criterion (a).* [1]

5.4 Put another way, it is not sufficient to identify that the service provider in question may – by virtue of the facilities at its disposal – have the ability or incentive to exercise market power. Rather, the evaluation of criterion (a) requires the Council to be satisfied that any market power could be exercised so as to hinder competition to a material extent in a relevant dependent market.

5.5 The assessment of the state of competition in relevant dependent markets is therefore a critical element of the Council's deliberations in making its recommendation. Glencore identifies six potential dependent markets and notes that one in particular – the market for the financing of coal export projects – is likely to be 'most relevant' for the purpose of satisfying criterion (a) (see section 8.6 of Glencore's application).

5.6 In making its assessment of the application against this criterion, DTF encourages the Council to have particular regard to two matters.

5.7 First, it is important to be satisfied that the boundaries of relevant dependent markets have been carefully and appropriately established. For the purpose of competition analysis, the boundaries of markets are usually defined by reference to four distinct dimensions:

a) the specification of the product or service in question;
b) the functional attributes of that product or service, relative to activities occurring at adjacent levels within a supply chain;
c) the geographic reach over which competition takes place; and
d) the 'time dimension'.

5.8 As a matter of principle, if markets are defined too narrowly, there is a risk of under-estimating the extent to which competition in a market may already be effective and, correspondingly, of over-estimating the potential effect on competition from access or increased access to the service. By way of example, unless the Council is satisfied that the market for the financing of coal projects has a strong regional or mine-specific dimension, the seemingly narrow geographic dimension of the postulated dependent market may cause the apparent effects on competition of access or increased access to the Port of Newcastle shipping channel services to be overstated.

[1] National Competition Council, *Declaration of Services: a Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, version 4, February 2013, paragraph 3.37.

5.9 Secondly, in order for criterion (a) to be satisfied, access or increased access must promote competition to a material extent. Given, as DTF understands it, that the Port of Newcastle does not participate in any relevant vertical elements of the coal mining and export supply chain, this will require the Council to have regard to factors such as:

a) the extent of any commercial imperatives by the service provider to increase throughput, given the combination of high capital costs and low operating costs that are likely to characterise the shipping channel service;
b) the extent of spare capacity in relation to the existing shipping channels service, and (in light of the answer) the extent to which increased demand may be accommodated without incurring (or bringing forward) significant investment or operating costs; and
c) the countervailing power of users in relevant dependent markets.

6. Public interest criterion

6.1 Under section 44G(2), another matter of which the Council must be satisfied before making a declaration recommendation is *'that access (or increased access) to the service would not be contrary to the public interest'.*

6.2 The High Court has indicated that the assessment of the public interest encompasses a very wide range of matters.[2] Consistent with this, DTF submits that a mere assertion of a likely pro-competitive effect in a dependent market is not sufficient to demonstrate that the public interest criterion is satisfied.

6.3 The following observation of the Council in relation to the public interest criterion is also of particular relevance in the present circumstances:

> *A decision to declare or not declare a service goes to the scope of regulation. Declaration decisions are akin to decisions taken by the Parliament or the Government to regulate specific industries, and hinge on an assessment of whether declaration/coverage is in the public interest and whether the benefits from regulated access outweigh the costs. They require the decision maker to balance the potentially conflicting goals of promoting competition in related markets and ensuring appropriate investment incentives, and to consider the likely effectiveness of regulation and its costs.* [3]

6.4 Drawing on these observations of the Council, DTF makes two points.

6.5 First, bearing in mind the parallel the Council draws between declaration decisions and the decisions of governments or parliaments regarding regulation of industries, DTF understand that the current arrangements under which the services in question are provided represent the outcome of considered decisions of the State of New South Wales, taken after lengthy periods of consultation and analysis. These decisions no doubt reflected a balancing by the State of various and potentially conflicting public interest considerations. In particular, DTF understand that the State put in place a system of price monitoring, which comprises:

a) annual reporting of port service pricing and other commercial information to the relevant Minister; and
b) the granting of power to that Minister to refer port pricing matters to the State's independent economic regulator, the Independent Pricing and Regulatory Tribunal.

6.6 Thus, as DTF understand it, Glencore's complaint arises under a regulatory regime the design of which involved a careful consideration and balancing of the various matters informing the question of the public interest, including the pricing of the new port operator. In such circumstances, DTF submits that careful consideration must be given to the potential for declaration to upset or unbalance such a regime, and whether declaration is therefore truly in the public interest.

6.7 As the Council also observed in the passage set out above, 'ensuring appropriate investment incentives' is one of the various factors to be considered in assessing the public interest. DTF 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 – a result plainly contrary to the public interest.

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[2] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [42].

[3] National Competition Council, *Declaration of Services: a Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, version 4, February 2013, paragraph 7.6

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