

**APPLICATION BY THE
PORT OF NEWCASTLE
PTY LTD FOR
REVOCAION OF THE
DECLARATION OF THE
SHIPPING CHANNEL
SERVICE AT THE PORT
OF NEWCASTLE**

**NSW MINERALS COUNCIL
SUBMISSION TO NCC**

8 August 2018

NSW MINERALS COUNCIL





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Executive Summary

The NSW Minerals Council (NSWMC) is the peak industry association representing the NSW minerals industry, including explorers, miners and associated service providers.

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

NSWMC, on behalf of its members, strongly opposes the revocation application by the PNO.

The declaration of the Service at the Port came about in response to the privatisation of the Port of Newcastle (**Port**) by the New South Wales Government in circumstances where NSWMC believes that there were inadequate regulatory safeguards imposed on the privatised Port to protect mining industry exporters. In the absence of those safeguards, PNO imposed significant price increases on coal customers with no meaningful consultation with the mining industry. Tellingly, PNO has again not engaged in any consultation on its revocation application to the NCC nor sought to explain to customers how the Port charges would operate going forward without declaration.

In these circumstances, NSWMC is of the belief that were it not for regulatory constraints imposed by the declaration or the ability for mining companies to have recourse to arbitration, PNO would again seek to impose unfair access terms on coal exporters. Accordingly, NSWMC submits that the NCC should not recommend revocation of the declaration, as the declaration and the opportunity to have terms and conditions of access arbitrated by the Australian Competition and Consumer Commission (**ACCC**) provides an essential constraint on PNO.

In this respect, NSWMC is aware that there is an ongoing arbitration administered by the ACCC in relation to PNO and Glencore and NSWMC believes that the findings of that arbitration and the ACCC's views of PNO's regulated asset base are highly relevant to a consideration of what access terms would be like with and without declaration. On behalf of our members we request that the arbitration be taken into consideration in the NCC's assessment of PNO's revocation application.

NSWMC submits that to recommend a revocation of the declaration would lead to substantial public detriments in the form of reduced economic activity, which would harm future investment and employment in the Hunter Valley region. Further, the NCC's recommendation has significant ramifications for NSWMC members exporting in the Hunter Valley region and members that have operations in Queensland, as there are similar provisions to the declaration criterion under Part IIIA of the Competition and Consumer Act (Cth) (2010) (**CCA**) in Queensland's state-based access regulation.

The NCC's analysis of PNO's application to revoke the declaration of the Service at the Port is a matter of critical importance to NSWMC and the coal industry in Australia. NSWMC encourages the NCC to take into account industry's concern as to the danger of unregulated and unconstrained multi-user export infrastructure monopolists.

It is for these reasons that NSWMC submits that the NCC should not make a recommendation for revocation to the Commonwealth Treasurer. There are more than 19,000 people employed across the Hunter Valley, Gunnedah, Newcastle and Western coalfields, all of which export through Newcastle Port. The ACCC oversight under the declaration provides the industry with additional certainty to invest and create jobs and growth and the revocation of the declaration will be viewed negatively for investment and employment in this region of New South Wales.

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1 Background to the Port, the declaration of the Service and the access dispute between PNO and Glencore

The NSW Minerals Council (NSWMC) is the peak industry association representing the NSW minerals industry, including explorers, miners and associated service providers.

NSWMC submits that in making its recommendation to the designated Minister, the NCC needs to carefully consider the background to the privatisation of the Port and why it is essential that the Service remain declared.

In May 2014, the NSW government privatised the Port and granted a 98-year lease to PNO. The lease includes a licence for PNO to operate the shipping channel at the Port. This shipping channel forms a part of the multi-user coal export supply chain and is essential to a large number of coal producers and exporters in the Hunter Valley region. PNO is the only provider of the bottleneck shipping channel service which coal companies operating in the Hunter Valley must use to export coal.

On privatising the Port, the State secured approximately \$1.75 billion in gross proceeds. However, in our view, the State did not take reasonable steps to put in place any form of access regulation in respect of the Port. As a result, PNO was unconstrained in its ability to operate the Port and impose terms of access as it saw fit. The Victorian State Government has included a regulatory package in the privatisation of the Port of Melbourne and we note this does not appear to have affected the privatisation purchase price for the State.

In 2015, PNO restructured its port charges and introduced substantial increases to charges for use of the Service at the Port. This was of particular concern to industry as coal miners and providers had previously contributed to the dredging of the shipping channel at the Port and were now required to "double pay" under the increased charges. In proceedings relating to the declaration of the Service, the Australian Competition Tribunal (Tribunal) found that:

After PNO assumed the role of Port operator, the price for coal ships using the channels to enter and exit the Port was increased by between approximately 40% and 60% for some vessel types - particularly the larger more efficient vessels. Price increases also occurred for non-coal vessels. It is said, without demur, that those price increases were not accompanied by any change in the nature or quality of the Service. It is also said, again without demur, that the price increases were imposed by PNO without significant consultation with users of the Service.¹

The Tribunal's findings support the position that PNO engaged in monopoly pricing at a time when the coal mining industry was experiencing a significant downturn and fragile market conditions. In contrast, other infrastructure providers in the Hunter Valley such as Port Waratah took steps to reduce charges. The high Australian dollar and costs of export made it increasingly difficult for Australian miners to be competitive in the Australian and international coal export market. As a result of that downturn, a number of Hunter Valley mines were forced to close permanently or suspend their operations indefinitely.

In May 2015, Glencore made the original application to the NCC under Part IIIA of the CCA for a recommendation to the designated Minister that the Service provided at the Port be declared. This application was strongly supported by NSWMC and the industry. Glencore was at the time and remains a full member of NSWMC.

¹ *Application by Glencore Coal Pty Ltd [2016] ACompT 6 [16].*

While Glencore was successful in the Tribunal it appears to have been unsuccessful in reaching a commercial agreement for access to the channel, despite being one of the largest exporters from the Port. Indeed, on 4 November 2016 Glencore notified the ACCC of an access dispute with PNO in respect of the declared Service and requested that the ACCC arbitrate.

The ACCC then commenced the arbitration. Under section 44ZNB, the ACCC must publish its arbitration determination. Given the statutory timeframe under the CCA, it is likely that a determination may be given shortly.

As that determination will be public it will be of significant interest to the mining industry exporting through the Port. In particular, the regulated asset base as determined by the ACCC will be of interest due to the NSW coal industry's contribution to channel dredging at the Port.

2 Access to the Service under declaration under Part IIIA of the CCA

Access to the Service under declaration allows terms and conditions of access to be reasonably negotiated, with a right to arbitration facilitated by the ACCC based on clear cost-recovery pricing principles in the absence of agreement. This promotes certainty and fairness in commercial terms of access and gives exporters the opportunity to ensure that coal exports are competitive in the Australian and global market.

NSWMC believes that PNO's approach to pricing and terms and conditions of access are of real concern to any coal producers dealing with monopoly infrastructure operators and in particular having regard to the nature of this privatisation. This privatisation was at the bottleneck of the NSW coal industry's Hunter Valley export supply chain. Without government regulation, industry monopolists may arbitrarily restrict or refuse access to critical multi-user export infrastructure. In this respect NSWMC notes that Glencore's access application and the declaration is not over an exporter's own infrastructure – it is over a "must use" infrastructure bottleneck being the channel that was privatised at the end of an industry supply chain (without adequate industry safeguards).

Part IIIA of the CCA was always intended to be a constraint on infrastructure monopolists due to the threat of ACCC arbitration and its implications for service providers. The access dispute that has arisen between Glencore and PNO is exactly the scenario the legislation was intended to cover. To recommend a revocation of the declaration at the current time or at all, would allow PNO to operate unconstrained and impose charges on coal producers that once more act as a significant disincentive to invest in the Hunter Valley. NSWMC believes that the NCC should take this opportunity to encourage PNO to reassess its relationship with industry, to promote greater commercial relationships and economic efficiency.

Further, PNO's application for revocation is in itself instructive, as it was done without any consultation with its customers. This is symptomatic of PNO's power as a monopoly bottleneck infrastructure provider to operate without restriction and in particular without regard to its customers. NSWMC therefore strongly believes that nothing has changed in PNO's approach and therefore the Service should remain declared. Indeed, even with the declaration, Glencore had to seek intervention by the ACCC as arbitrator as to its access dispute with PNO. This demonstrates that in the absence of the declaration, no user would have been or will be able to obtain reasonable terms and conditions of access (whether as to price or length of access rights).

3 Declaration criteria

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

NSWMC submits that the NCC should exercise its discretion to recommend that the declaration of the Service should not be revoked. The NCC's discretion is subject to the consideration of the objects of Part IIIA of the CCA.

On the proper construction of the CCA, the NCC's evaluation of revocation is not dictated by satisfaction or non-satisfaction of the declaration criteria as PNO claims. Rather, satisfaction on the part of the NCC that section 44H(4) would prevent declaration is necessary, but not sufficient, for a revocation recommendation.

Put simply, the NCC must first decide under section 44J(1) whether to recommend revocation. If the NCC decides against revocation the matter goes no further. If the NCC decides to recommend revocation, section 44J(2) is engaged. This operates as a potential override, if the declaration criteria are still satisfied, there can be no revocation recommendation.

NSWMC believes that having regard to the circumstances of PNO's application for revocation, the NCC should decline the application at the first hurdle.

3.1 No material change in circumstances

In NSWMC's view, there has been no material change in market conditions or in facts since the declaration was made in respect of the Port to support a revocation recommendation by the NCC. This is relevant to the continuing satisfaction or non-satisfaction of the declaration criteria in evaluating whether to recommend a revocation.

PNO remains a bottleneck infrastructure monopoly infrastructure operator that refuses to engage in meaningful consultation with industry. Prior to declaration, PNO was unconstrained in its ability to increase prices for this Service. It now seeks to have that declaration revoked through its application to the NCC and did so without any consultation with industry. NSWMC submits that it is highly likely that PNO will seek to return to its previous position of monopoly pricing and pricing without heed to industry considerations if the declaration is revoked.

Accordingly, in the view of NSWMC, the NCC should not recommend revocation of the declaration as this would result in substantial public detriment. In allowing PNO to impose unfair terms on its customers would threaten coal providers economic activity and competitiveness, and as a result harm employment and job security, in the Hunter Valley region.

3.2 Declaration criteria still satisfied

Even if the NCC decides that it should recommend revocation of the declaration under section 44J(1), it should not be satisfied that the declaration criteria are not fulfilled under section 44J(2)(b).

In satisfaction of criterion (a) in respect of the mining tenements market:

- PNO has monopoly power in the market for the Service;
- PNO has engaged in monopoly behaviour in the past such as setting the Port charges to obtain monopoly rents and refusing to negotiate with access seekers;

- PNO is likely to continue to engage in monopoly behaviour in the future without declaration, including in increasing Port charges; and
- PNO's monopoly behaviour in the future without declaration is likely to damper incentives to invest in the new mines in the Hunter Valley and materially reduce competition in the market.

Therefore, the NCC should not recommend revocation of the declaration.

4 Interested parties must be allowed to consider the ACCC's final determination prior to any recommendation

NSWMC submits that it is unable to make a fully informed submission to the NCC on this matter in the absence of a final arbitration determination by the ACCC in relation to the access dispute between Glencore and PNO.

NSWMC believes that the ACCC's final determination is highly relevant to any recommendation by the NCC to the Minister in respect of the Service. To make any recommendation in the absence of considering the final determination would be premature and would not give exporters an opportunity to consider matters relevant to the revocation process.

NSWMC submits that the outcome of the Glencore and PNO arbitration is essential to any recommendation made by the NCC as it affects the views of the industry. NSWMC anticipates that it will demonstrate the necessity for declaration and likely produce a regulated asset base and a price path that will promote certainty for investment in the Hunter Valley coal industry. These facts will inform the terms and conditions of access with and without declaration and the promotion of a material increase in competition. To advance the revocation in the absence of this factual matter would, in NSWMC's view, give rise to a flawed process.

If the NCC does make a recommendation for revocation without considering the final determination, NSWMC submits that the Minister should not accept the NCC's recommendation. The Minister must turn his mind to views of Australian coal producers and the economic interests of their employees.

4.1 Conclusion

Finally, the NCC's approach to consideration of the Part IIIA criteria will have a potentially significant impact on the manner in which other access regulations are assessed in the energy and resources sectors. We believe that careful consideration needs to be given to the factual situation that has arisen at the Port and the importance of the ACCC's reasoning in the arbitration once that becomes public.

Annexure A - NSW Minerals Council members

Full Members

Alkane Resources Ltd
Anchor Resources Limited
Australian Pacific Coal Limited
BHP Billiton
Bengalla Mining Company Pty Ltd
The Bloomfield Group
Centennial Coal Company Ltd
China Molybdenum Co
Clean Teq
Evolution Mining
Fortescue Metals Group Ltd
Glencore Coal (NSW) Pty Limited
Gloucester Resources Ltd
Heron Resources Limited
Hillgrove Mines Pty Ltd
Idemitsu Australia Resources Pty Ltd
Iluka Resources Pty Ltd
Kepco Bylong Australia Pty Ltd
Mach Energy Australia Pty Ltd
Newcrest Mining - Cadia Valley Operations
New South Resources Pty Ltd
Peabody Energy Australia
Regis Resources Limited
South 32 Illawarra Coal Holdings
Shenhua Watermark Coal Pty Limited
Shoalhaven Coal Pty Ltd
Silver Mines Ltd
Spur Hill Management Pty Ltd
Thiess Pty Ltd
Whitehaven Coal Limited
Wollongong Coal Limited
Wyong Areas Coal Joint Venture
Yancoal Australia Limited

Associate Members

Aecom Australia Pty Ltd
Ampcontrol Pty Ltd
ARTC - Australian Rail Track Corporation
Ashurst
Aurizon Holdings LTD
Baccus Resources Pty Ltd
B Marheine Holdings Ltd
Cancer Council NSW
Centre for Mined Land Rehabilitation
Civeo Pty Ltd
Coal Services Pty Ltd
ElectraNet
Emeco International Pty Ltd
Emmerson Resources
EMM Consulting
EMS Group Pty Ltd
Genesee & Wyoming Australia Pty Ltd
Gold and Copper Resources Pty Limited
Golden Cross Resources Ltd
Helix Resources Ltd
Herbert Smith Freehills
Hunter Business Chamber
Hughes Mining Services
Hansen Bailey Pty Ltd
Jodama Pty Ltd
Jervois Mining Limited
Sydney Mining Club
Jennmar Australia
Johnson Winter Slattery
L McClatchie Pty Ltd
McCullough Robertson
Mitsubishi Development Pty Ltd
MRS Services Group Pty Ltd
NuCoal Resources Ltd
NSW Aboriginal Land Council

Niche Environment & Heritage
Newcastle Coal Infrastructure Group
Orica Australia Pty Ltd
Pacific National Pty Ltd
Paradigm Resources Pty Ltd
Peel Mining Ltd
PricewaterhouseCoopers
Port Waratah Coal Services Limited
Hetherington Exploration and Mining Title Services Pty Ltd
Hughes Mining Services
Rangott Mineral Exploration Pty Ltd
Quarry Mining & Construction Equipment P/L
Rimfire Pacific Mining NL
Resource Strategies Pty Ltd
RW Corkery and Company
Seyfarth Shaw Australia
Silver City Minerals Limited
Sparke Helmore Lawyers
Sada Pty Limited
UNSW Mining Engineering
TAFE NSW – Illawarra Institute
TEC-C Investments Pty Ltd
Thomson Resources Ltd
Toptung Limited
Umwelt (Australia) Pty Limited
University of Wollongong
XCoal Energy and Resources