
NSW Treasury Submission to the National Competition Council

Draft Recommendation on the Access to Shipping Channel Services at the Port of Newcastle

NSW Treasury welcomes the National Competition Council's draft recommendation on Glencore's application for declaration of the shipping channel services at the Port of Newcastle. Included below are comments on some specific matters raised in the draft recommendation.

Designated Minister

Treasury supports the finding that the designated Minister is the Commonwealth Minister. This finding is consistent with legal advice we received on this matter. We also agree with the Council's view that the provider is the party that controls access to the service.

Given stakeholders have had the opportunity to express their views on the question of the designated Minister, Treasury supports the Council's intention to not accept any further submissions on this matter.

Criterion (a)

Treasury also supports the Council's finding that criterion (a) is not satisfied. It is clear that the charges for the service represent only a very small component (less than one per cent) of the overall cost of production and sale of coal for export from the Hunter Valley. As such, the recent price increases would not have had a material impact on decisions that would affect competition in any relevant market. This stands regardless of the definition that is adopted of the relevant dependent markets.

It is also clear that the Port of Newcastle is not currently capacity constrained. The channel has a capacity of 325 million tonnes a year, which is nearly double the volume of freight forecast for 2015, of 164 million tonnes. Further, access to the channel is effectively a function of the ACCC-authorized 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.

The Draft Recommendation notes that the light-handed price monitoring regime currently in place "falls short of" and "is not a substitute for the type of regulation contemplated by the National Access Regime" (paragraphs 4.29, 4.32 and 8.21).

Treasury notes that the price monitoring regime was never intended to operate as an access regime. It was put in place to ensure the State met its obligations under the Council of Australian Governments Competition and Infrastructure Reform Agreement (CIRA) in the most efficient way and in light of the prevailing circumstances. The light-handed price monitoring regime currently in place under the *Ports and Maritime Administration Act 1995* is consistent with the CIRA's central principal that the terms and conditions of access to nationally significant infrastructure should be agreed through commercial negotiation in the first instance, and economic regulation should only be used where necessary.

As part of the lease of the Port of Newcastle, the Government took a principled approach to analysing the potential competition issues that the long-term lease of the Port and considered the unique competitive dynamics applying to the Port. That analysis included relevant matters from clause 4 of the Competition Principles Agreement regarding the potential separation of different elements of Newcastle Port Corporation's assets, rights and obligations, and the price and service obligations to be imposed on the port industry.

The price monitoring scheme that was put in place after the comprehensive competition analysis has the statutory objective of promoting the economically efficient operation and use of, and investment in major port facilities in the State by monitoring the price port operators charge users of those facilities. The objective of the price monitoring scheme is to promote a competitive commercial environment in port operations.

Criterion (f)

The Council acknowledges that there are costs and risks associated with regulation that are not otherwise present in the absence of regulation (paragraph 8.17). The Council also concludes that it is not satisfied that increased access to the service would materially promote competition in a market other than the market for the shipping channel service (criterion (a), paragraph 4.42).

Given 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 as this would impose regulatory costs and risks that are not otherwise present.

Treasury notes that the lease structure under which the Port of Newcastle currently operates puts certain obligations on the lessee, including:

- stewardship-related obligations to provide access for shipping, road and rail transport and
- to develop the port to the extent feasible.

Non-compliance with the stewardship obligations can result in termination of the lease. While the terms of the port lease do not constitute an official access regime for the purposes of the *Competition and Consumer Act 2010* (Cth), the potential sanctions for default events almost certainly exceed the financial risks that an external regulatory regime would impose on the port operator.

The State went to considerable effort to ensure good stewardship of the Port would continue under a private operator, and Treasury would expect those arrangements have a significant influence on the port operator's behaviour.

Treasury would be concerned if imposing an external regulatory regime created an impression that the port manager was impeded from complying with the good stewardship provisions in the port lease, for example, if investments were curtailed because the regulated rates of return do not appropriately reflect commercial risks.

Treasury notes that the Draft Determination includes a very high level analysis of issues stakeholders identified in submissions as matters the Council should consider when assessing whether criterion (f) is satisfied. Issues raised include the:

- adverse effects of regulation, including costs, uncertainty and reduced incentives to invest
- potential impact on the Hunter Valley coal chain and the potential to disrupt the Capacity Framework Arrangements, and
- potential to reduce the credibility of the price monitoring arrangements that are currently in place.

Treasury would welcome a more detailed consideration of these matters when the Council is making its final recommendation.

In addition, Treasury would suggest that the Council consider the potential risks associated with establishing an external regulatory regime on non-coal ships that use the Port of Newcastle. Allowing access could, perversely, potentially create constraints on non-coal shipping that currently do not exist.