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Submissions – PON
National Competition Council
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Submission on NCC's Draft Recommendation – Application for Declaration of the Shipping Channel Services at the Port of Newcastle

The NSW Minerals Council appreciates the opportunity to provide this submission on the NCC's Draft Recommendation relating to Glencore's application for declaration under Part IIIA of the *Competition and Consumer Act 2010* of the Shipping Channel Services at the Port of Newcastle.

NSWMC notes that the NCC has reached a preliminary view that is satisfied that criteria (b) to (f) under section 44G(2) are met. However, the NCC's preliminary view is that it is not satisfied that access (or increased access) to the service will promote a material increase in competition in at least one other market (criteria (a)) and so it proposes to recommend to the designated Minister not to declare the service.

NSWMC respectfully submits that the NCC has sufficient material before it to be satisfied that criterion (a) is also met, and therefore that the NCC must recommend to the designated Minister that he declare the service.

Price regulation

In its draft recommendation (at page 13), the NCC states that Part IIIA is not intended to operate simply as a mechanism for price regulation to prevent monopolists from extracting monopoly prices. Instead, there must be a material increase in competition in a dependant market, not just a transfer of value from one part of the supply chain to another.

While that may be the case where the dependant market is entirely supplied by the monopolist (so that there is a bare transfer of value), it is not the case where those affected by the monopolist's prices compete in a much broader market where the monopolist's prices impede their competitiveness in that market.



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The pricing conduct of Port of Newcastle Operations has a direct impact on competitors in dependant markets who must compete in global markets. An inability to obtain access to shipping channel services at reasonable prices means that those competitors are at a competitive disadvantage to other competitors in that market who can (because they are not required to use Port of Newcastle Operations' service).

With respect, it is not therefore appropriate to suggest that what is being sought is mere price regulation.

Access

The shipping channel services are currently being provided on terms and prices that are not predictable and certain. There is essentially an unfettered ability for Port of Newcastle Operations to increase the price of its shipping channel services and it is not prepared to enter into long-term arrangements with coal producers.

As the NCC notes (at page 12 of its Draft Recommendation), the Full Court of the Federal Court of Australia has held that 'access' in criterion (a) means access 'on such reasonable terms and conditions as may be determined in the second stage of the Pt IIIA process' (*Pilbara Infrastructure v Australian Competition Tribunal* (2011) 193 FCR 57 [at 112]).

Therefore, where access is not currently being provided on terms that are comparable to what might be expected to result from the negotiate/arbitrate model of the second stage of the Part IIIA process, then no 'access' is currently being provided for the purposes of criterion (a).

NSWMC submits that the current arrangements offered by Port of Newcastle Operations do not reflect the terms and conditions that might be expected to result from that process. In a sense, this is evident merely from Glencore having sought declaration to allow for this process to apply and from other coal producers having supported its application. There is clearly an expectation from the takers of the current service that the terms on offer would be improved by being regulated under Part IIIA.

On that basis, the test is not whether the terms and prices currently being offered by Port of Newcastle Operations are materially reducing competition, but whether regulating those terms and prices would promote a material increase in competition in a dependant market.



In reaching its view on this issue, the NCC made an assumption that prices would be lower and more predictable if the service were declared for the purpose of analysis (while noting that the ultimate analysis of an appropriate price and access terms would fall to the ACCC). It notes that the ACCC might ultimately determine a dispute with prices that fall anywhere on a continuum from being as low as they were before Port of Newcastle Operations assumed operation of the Port to being higher than Port of Newcastle Operations is currently offering.

While NSWMC agrees that it is not for the NCC to do detailed price analysis of what a likely regulated price might be in order to consider whether criterion (a) is met, NSWMC does submit that the NCC should place greater weight on the different incentives Port of

Newcastle Operations faces where the service is declared compared to when it is not. The possibility of ACCC arbitration and determination of the terms and price of access to the shipping channel services will remove any incentives Port of Newcastle Operations may currently have to price the service excessively or to offer access terms that are unreasonable.

On the assumption then that declaration is likely to lead to negotiated or arbitrated terms of access that are more predictable and at lower, more transparent prices, with a flow-through impact on the cost base of coal producers competing in a global market where they are price takers, this can only improve the competitive position of those coal producers in that market.

The issue can only then be whether that improvement in their competitive position amounts to promotion of a material increase in competition in that market.

Material improvement in competition

The NCC appears to have reached its view on whether there will be any material improvement in competition primarily based on the small proportion that the fees for the shipping channel services make up of the overall coal price. In essence, the NCC appears to consider that even if Port of Newcastle Operations charged an outrageous monopoly price, it would still make up only a small part of the overall downstream price and could still have no impact on competition in the downstream market.

If instead the NCC's position is that the current price only makes up a small part of



the overall cost, but it does not rule out that Port of Newcastle Operations might in the future increase prices to a level that made them more material as an overall proportion of price, then NSWMC submits that the NCC should therefore be satisfied that criterion (a) is met, because regulated access would remove that possibility. It is the fact that this sort of increase is possible that gives rise to the need for regulation. It cannot be the case that Part IIIA is intended only to provide for regulation once a monopolist has extracted monopoly rents from bottleneck infrastructure (and already caused a material lessening of competition), rather than to prevent this from occurring. Nor should it be the case that an applicant must reapply as further price increases occur to test whether the NCC is now satisfied that criterion (a) is met.

In any case, NSWMC believes that the NCC is placing insufficient weight on the very small margins that are available to Australian coal producers in current market conditions. As Glencore argued in its original application (and the NCC notes at p.15 of its Draft Recommendation), 'even incremental cost increases at the margin may drive coal producers to exit the market'. Glencore also submitted that while the current shipping charge may be less than 1% of the FOB costs of export coal, that represents 10% to 100% of the available sale margin in current market circumstances (p.16 of the Draft Recommendation). NSWMC respectfully submits that the NCC must take greater account of how much the price increases to date (and the potential price increases in the future) erode the margin for Hunter Valley coal producers trying to compete on world markets where they are price takers.

Given the current market conditions, any improvement in the cost base of Australian coal producers is unlikely to be absorbed by them, but lead to them being able to take a more competitive position in the global market. Because of the benefits arising from even incremental improvements to their cost base, regulating the service is more likely to create the opportunities and environment for the coal producers to act competitively than without. On the basis of the Australian Competition Tribunal's decision in *Re Sydney Airport Corp Ltd* [2000] AComptT 1, this is sufficient to demonstrate that criterion (a) is met.

The NCC has previously made clear that criterion (a) does not require the promotion of a *substantial* increase in competition: *Re Australian Cargo Terminal Operations* [1997] ATPR (NCC) 70-000.

Given the impact even a 1% price can have on the cost base and margins of Australian coal producers, NSWMC submits that the only way the NCC could find that this promotes a trivial or no increase in competition rather than a material increase is if it considers that Hunter Valley coal producers make up only a trivial



part of the global market for coal. Given the material NSWMC has already provided about the value of coal shipped through the Port of Newcastle, it is unlikely that the NCC could reach that view.

Conclusion

NSWMC therefore submits that the NCC has sufficient material before it to be satisfied that criterion (a) is also met and should therefore recommend to the designated Minister that the service be declared.

Sincerely

A handwritten signature in black ink, appearing to read "Greg Sullivan".

Greg Sullivan
Director Policy