Submission to the National Competition Council

Revocation application for the Port of Newcastle shipping channel service

8 August 2018

Newcastle Coal
INFRASTRUCTURE GROUP

Newcastle Coal Infrastructure Group (**NCIG**) is pleased to provide this submission to the National Competition Council (the **NCC**) in connection with the NCC's consideration of the application from Port of Newcastle Operations Pty Ltd (**PNO**) seeking revocation of the declaration of the shipping channel service at the Port of Newcastle.

NCIG submits that the NCC should recommend against revocation of the existing declaration of the shipping channel service.

1 Newcastle Coal Infrastructure Group

NCIG owns and operates the Newcastle Coal export terminal (the ***terminal***) on Kooragang Island at the Port of Newcastle, providing coal handling services for approximately 66 million tonnes per annum (**Mtpa**) of coal exports.

The terminal is a critical link in the Hunter Valley coal supply chain and was developed for mines located in Newcastle, the Hunter Valley, Gunnedah, Gloucester and the western coalfields of New South Wales.

NCIG's shareholders are coal producers from those regions including BHP Billiton, Centennial Coal, Peabody Energy, Whitehaven Coal, Yancoal, with some other producers having contracted capacity at the terminal without being shareholders.

All vessels exporting coal from the terminal require access to the PNO shipping channel services. It is evidently therefore critical to NCIG, and ultimately its customers and shareholders, that the channel services are provided on reasonable terms and conditions (including pricing).

2 Context to the declaration and revocation

2.1 Background to the channel services becoming declared

PNO's revocation application concerns the declaration in 2016 by the Australian Competition Tribunal[1] of the following service:

> *The provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port [of Newcastle], by which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct*

(referred to throughout NCIG's submission as the **channel services**). The channel services were declared by the Tribunal for 15 years until 7 July 2031.

The channel services are used by vessels transporting coal produced in the Hunter Valley and Gunnedah region to export customers, as well as a range of other vessels that use the port.

NCIG understands that a chronology of some of the key events leading up to and following declaration is as follows:

Date	**Decision**
2 November 2015	NCC's Final Recommendation (the **NCC Recommendation**)
8 January 2016	Acting Treasurer's Decision (the **Ministerial Decision**)
31 May 2016	Tribunal decision in *Application by Glencore Coal Pty Ltd*[2] (the **Tribunal Declaration Decision**) – which provided the reasoning behind the declaration.

[1] Application by Glencore Coal Pty Ltd (No. 2) [2016] ACompT 7

[2] [2016] ACompT 6

16 June 2016	Tribunal decision in *Application by Glencore Coal Pty Ltd (No. 2)*[3] which formally made the declaration.
4 November 2016	Australian Competition and Consumer Commission (**ACCC**) notified by Glencore of an access dispute with PNO in relation to the terms of the channel services. To the best of NCIG's knowledge, that arbitration has not reached a final determination at the date of this submission. However, based on the statutory time period for such a determination being made, must be due in the near future
16 August 2017	Full Federal Court determines to uphold the Tribunal's declaration decision[4]
23 March 2018	Special leave application to appeal from the Full Federal Court decision denied[5]
2 July 2018	NCC receives request for revocation from PNO

2.2 Why revocation is unusual in these circumstances

NCIG understands it is highly unusual for the NCC to be receiving a revocation application so soon (just over 2 years) after such a long term declaration has been made. What makes this situation even more unusual, is that the circumstances in which the services are being provided have not materially changed since the declaration.

Instead, PNO is seeking revocation principally based on a change to declaration criterion (a) (and to a lesser degree criterion (d)) made pursuant to the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (the **CCA Amendment Act**).

The key question confronting the NCC is therefore, from NCIG's perspective, whether it is really appropriate for a service declared for a long period to be opportunistically revoked based on a subsequent change in law where:

(a) there has been no underlying change in circumstances; and

(b) the businesses that operate in the dependent markets impact (coal producers, and other infrastructure providers like NCIG) have to make long term investment decisions – such that certainty and stability of the regulatory and commercial framework is critically important.

3 Section 44J – Making a decision on whether to revoke

3.1 The NCC has a discretion in respect of revocation that does not exist in declaration

(a) Wording of section 44J

The NCC is considering the potential revocation of an existing declared service under section 44J *Competition and Consumer Act 2010* (Cth) (the **CCA**).

As the NCC Guide on Declaration of Services (the **NCC Guide**)[6] notes, there is no statutory procedures the NCC must follow when considering whether to recommend revocation,[7] but the

[3] [2016] ACompT 6

[4] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124

[5] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2018] HCATrans 55 (23 March 2018)

[6] NCC, *Declaration of Services: A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018

[7] NCC Guide at [7.9]

NCC 'intends to generally follow a similar process' as to when it considers declaration applications,[8]

Yet, the way in which section 44J CCA provides for revocation decisions to be made is quite different to some aspects of how declaration recommendations and decisions are made under section 44F and 44H respectively.

Consequently, even though declaration and revocation applications will necessarily consider very similar matters (and will both be concerned with whether the declaration criteria are satisfied in respect of the relevant service), to understand the NCC's distinct role in relation to potential revocation decisions, the starting point is section 44J CCA itself – not the law as it has developed in relation to declaration decisions.

Section 44J(1)-(2) CCA provides the following:

> *(1)* *The Council may recommend to the designated Minister that a declaration be revoked. The Council must have regard to the objects of this Part in making its decision.*
>
> *(2)* *The Council cannot recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation:*
>
> *(a)* *subsection 44F(1) would prevent the making of an application for a recommendation that the service concerned be declared; or*
>
> *(b)* *subsection 44H(4) would prevent the service concerned from being declared.*
>
> (NCIG emphasis added).

It is clear from the ordinary meaning of section 44J that it has two key parts:

(i) a wide discretion – (*the Council may recommend … that a declaration be revoked*) - as to whether a revocation should be recommended (or not) – with that discretion to be exercised having regard to the objects of Part IIIA CCA; and

(ii) a restriction on that wide discretion (the Council *cannot recommend revocation of a declaration unless*) – namely that revocation cannot be recommended unless the NCC is satisfied that the preconditions in either section 44J(2)(a) or (b) are met.

(b) Why the position is different from in declaration decisions

NCIG acknowledges that the High Court has previously determined that a residual discretion did not form part of whether a service should be declared under section 44H CCA.[9] However, that decision was not precedent for there being no discretion in the context of a revocation decision.

Section 44F and 44H CCA (in relation to declaration) and section 44J CCA (in relation to revocation) are worded differently. In accordance with the usual rules of statutory interpretation, differently worded provisions (particularly in the same legislation) should be assumed to have been intended to have had different meanings.

Section 44F CCA (for the NCC) and 44H CCA (for the Minister) do not contain, in respect of declaration recommendations or decisions, any equivalent of the discretionary 'may' wording in section 44J CCA that applies in respect of revocation decisions. Rather, sections 44F and 44H

[8] NCC Guide at [7.9]

[9] The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal [2012] HCA 36

CCA oblige the NCC and Minister to make a decision and then simply list the declaration criterion as preconditions for a decision to recommend declaration or declare respectively.

Finally, one of the reasons given for rejecting a residual discretion in respect of declaration by the High Court was the lack of criteria by reference to which such a discretion would be exercised. However, section 44J(1) provides the criteria for the discretion which exists in respect of revocation decisions – the objects of Part IIIA.

NCIG therefore sees no inconsistency between the High Court's decision in the Pilbara proceedings and NCIG's interpretation of section 44J CCA.

In addition, the context of a revocation decision is materially different to the context of declaration.

In particular, it seems highly likely the legislature intended to set a higher threshold for demonstrating why reversing a declaration would be appropriate (relative to the threshold for declaration occurring in the first place) given:

(i) it the point of a revocation application, the issue of declaration will have been considered extensively (in this case by the NCC, the Minister, the Tribunal and courts) such that caution should be exercised in departing from the outcomes of such a rigorous process – at least where there has been no material change in the circumstances in which the services are being provided;

(ii) if revocation occurs prior to a final determination in an access dispute that is on foot (as the Glencore access dispute with PNO is based on public information), it appears a legitimately commenced access dispute could be frustrated by the revocation; and

(iii) if there is discretion in a revocation decision, it creates the potential for absurd results like the NCC revoking a declaration that has been decided by the Tribunal (where the NCC and Tribunal take different views on whether the access criteria are met based on their reading of the facts) – which completely undermines the finality of the Tribunal's decisions in the declaration process.

Each of those issues weighs strongly in favour of an interpretation that the NCC has a discretion in relation to its recommendation (particularly given how disruptive they would be to the interest in allowing infrastructure owners and users to make long term investment decisions with certainty about the applicable regulatory and commercial arrangements).

(c) Why the position is different from NGL coverage revocations

NCIG appreciates that the NCC has previously considered revocation of pipeline coverage under the National Gas Laws (**NGL**). However, the structure and wording of section 105 NGL contrasts with section 44J CCA described above.

The NGL provides a clear mandatory test (with no discretion) based on whether the NCC is satisfied of the pipeline coverage criteria in respect of the pipeline. This can be seen clearly in the wording of section 105(2) NGL as set out below:

(a) if the NCC is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline – the recommendation must be in favour of the pipeline continuing to be a covered pipeline;

(b) if the NCC is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline – the recommendation must be in favour of the pipeline no longer being a covered pipeline.

Whereas the contrasting combination of the discretionary wording with the preconditions to a particular recommendation in section 44J CCA (and their evident difference to the NGL wording),

clearly suggest that even if the preconditions are met (so that the NCC has the power to recommend revocation under section 44J(2) CCA), it must still go on to determine whether it should exercise its discretion to do so under section 44J(1) CCA – having regard to the object of Part IIIA.

Any other conclusion is inconsistent with the clear wording of section 44J(2) CCA.

3.2 The precondition requires NCC to be positively satisfied that the declaration criteria are not met

As discussed above, as a threshold issue, the NCC cannot recommend revocation unless it is satisfied that section 44H(4) CCA would prevent the designated Minister from declaring the service (section 44J(2) CCA). Section 44H(4) CCA prevents a declaration decision unless the Minister is satisfied that each of the declaration criterion was met.

That is, before it can make a revocation recommendation, *the NCC must be positively satisfied that one or more of the access criteria in section 44H CCA is not satisfied* (i.e. positively satisfied or a negative result). This submission therefore addresses how each of the declaration criterion apply in respect of the service.

In other words PNO bears the onus of satisfying the NCC. If the NCC is uncertain about whether a declaration criterion is met, but not positively *satisfied* that it is not met, the pre-condition would not be met, and revocation could not be recommended on that basis.

That contrasts to the declaration context where the NCC must be positively satisfied that the declaration criterion *are met* – such that uncertainty about a declaration criterion in the context of declaration results in the service not being declared.

Given the context of the previous significant time and cost that will have been incurred in NCC, Ministerial, Tribunal and court processes to reach a declaration (as aptly demonstrated by the chronology earlier in this submission) – it is not a particularly surprising outcome that the legislature has set the hurdle for revocation higher than it was for the initial declaration.

3.3 Conclusions on the statutory framework concerning revocation

It follows from the above, that the NCC should recommend not revoking the declaration where:

(a) it is positively satisfied each of the four access criterion in section 44H CCA are met;

(b) for any access criteria which it is not positively satisfied are met, it is not positively satisfied that they are not met; or

(c) despite being positively satisfied that one or more of the declaration criteria are not met, it considers that it should exercise the discretion provided by section 44J(1) CCA to not recommend revocation having regard to the objects of Part IIIA.

Each of those issues is considered in NCIG's submissions below.

4 Declaration criterion that are not contested are clearly satisfied

Given PNO has not put any submissions or evidence before the NCC in respect of criterion (b) or (c) in its application for revocation of declaration, NCIG considers that the NCC cannot be satisfied that those criterion are not met.

In any case, for the reasons set out below, NCIG considers that it is absolutely clear, including through the findings of the NCC, Minister and Tribunal in the decisions in the initial declaration processes, that criterion (b) and (c) are both satisfied in respect of the channel services.

4.1 Criterion (b) – meeting foreseeable demand at least cost

Criterion (b) requires:

> *that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:*
>
> *(i) over the period for which the service would be declared; and*
>
> *(ii) at the least cost compared to any 2 or more facilities (which could include the first mentioned facility);*

The explanatory memorandum to the CCA Amendment Act (the ***Amendment Act EM***), which recently amended criterion (b), notes the intention of the new criterion (b) as follows:

> *[t]he amendment to this paragraph is intended to refocus the test to a 'natural monopoly' test instead of a 'private profitability' test.*

That materially lowers the threshold for criterion (b). If a service met the previous criterion (b) – which the channel services were determined to – there is no doubt they meet the revised criterion (b).

The channel service is a service which has clear natural monopoly characteristics – such that criterion (b) is still clearly satisfied. In particular, the capital costs of dredging to produce an alternative channel, and the environmental and resulting regulatory challenges to doing so are very significant.

Glencore made submissions in its original declaration application about the impossibility of economically developing another facility to provide the service – noting PNO's valuation of the existing shipping channel at $2.4 billion at the time and other costs for related rail, conveyor and jetty infrastructure. Whereas, PNO made no submissions on criterion (b), and each of the NCC, Minister and Tribunal accepted that criterion (b) was satisfied.

For example, the NCC stated in its final recommendation to the Minister:[10]

> *The Council considers that no party (including PNO) has outlined a scenario that overcomes the significant physical and structural impediments to developing another facility to provide the service, let alone the profitability or economic feasibility of such a task. As such, it would appear that the cost of undertaking such an activity would likely be far in excess of any likely income received from the facility.*

Consequently, NCIG considers it is clear that, demand is met at least cost by the channel rather than two or more facilities – such that criterion (b) is clearly satisfied.

4.2 Criterion (c) – national significance

Criterion (c) requires:

> *That the facility is of national significance, having regard to:*
>
> *(i) the size of the facility;*
>
> *(ii) the importance of the facility to constitutional trade or commerce; or*
>
> *(iii) the importance of the facility to the national economy.*

Criterion (c) was not amended by the CCA Amendment Act and there is no suggestion that the channel has become any less significant in the last 2 to 3 years. Consequently, the consistent findings that criterion (c) was satisfied by each of the NCC Recommendation, the Ministerial Decision and the Tribunal Declaration Decision remain applicable.

[10] NCC Recommendation at [5.10] – [5.11]

Each of those decisions referenced:

(a) the Port of Newcastle being one of the largest coal ports in the world;

(b) coal being Australia's second most valuable export; and

(c) the significant economic contributions of the Hunter Valley coal industry, which relied entirely on exporting from the Port of Newcastle.

The significant coal exports through the Port of Newcastle and the coal royalties that are generated result in significant benefits for both state and federal gross domestic product. For example, coal royalties accounted for $1.776 billion in the 2018 New South Wales state budget.

The significance of the channel is only likely to increase with the potential for further developments at the Port of Newcastle, such as a major container terminal.

Consequently, NCIG considers it is clear that the channel infrastructure is of national significance and criterion (c) continues to be satisfied.

5 Criterion (a) – Interpretation

5.1 What is required for there to be a promotion of a material increase in competition

Criterion (a) has been amended by the CCA Amendment Act so that it now provides:

> *that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of 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*

The CCA Amendment Act EM provides that:[11]

> *the amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition*

NCIG acknowledges that that wording, and therefore the interpretation of criterion (a) is now different from the previous wording for criterion (a) that was interpreted by the Tribunal in *Application by Glencore Coal Pty Ltd*.[12] However, the 'promotion of competition' wording in the revised criterion (a) remains the same. While the focus is now on declaration rather than access, what is required is that declaration:

> *would promote a material increase in competition*

Consequently, previous law in relation to the meaning of that phrase remains just as relevant to the current criterion (a) and revocation application as it was to the previous criterion (a).

The materiality requirement has been interpreted to mean merely a non-trivial increase (as per the explanatory memorandum to the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth)).

In relation to what constitutes a promotion of competition, NCIG notes that the NCC Guide was updated following the amendments to the declaration criteria and continues to describe the NCC's view that the promotion of a material increase in competition involves:[13]

[11] CCA Amendment Act EM at [12.19]

[12] [2016] ACompT 6

[13] NCC Guide at [3.23]

an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

NCIG considers that is correct and reflects the interpretation adopted in Australian Competition Tribunal's decision in *Re Virgin Blue Airlines Pty Ltd*[14], in which the Tribunal stated (our emphasis added):

> *The Tribunal does not consider that the notion of 'promoting' competition in a 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather,* ***the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise.*** *That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration*

In reaching this decision, the Tribunal referred to submissions by Virgin Blue, which suggested that:

(a) the requirement that access or increased access *would* promote competition meant *realistically could* and was not to be interpreted as *will* promote competition; and

(b) that the degree of certainty required by the phrase 'would promote competition' was a *significant finite probability*, rather than such a consequence being m*ore probable than not*.[15]

There has not been any judicial consideration in any of the subsequent proceedings concerning criterion (a) which suggest that that interpretation has changed.

Rather in the Tribunal Declaration Decision, the Tribunal referred to that interpretation with approval,[16] and similarly, the Full Federal Court in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal*[17] stated that:

> *The decision-maker is required to make a prediction or forecast of the conditions or environment for improving competition in a dependent market*

While PNO appears to acknowledge this legal interpretation in its submission, it does not pay sufficient attention to the fact that an *'enhanced environment for competition and greater opportunities for competitive behaviour*', is something that can occur through resolving uncertainty, ensuring efficient pricing and removing the potential for differential pricing to distort competition in at least some dependent markets as a continuation of the declaration would do – even if those things would not see an immediate change in competition.

5.2 Defining the dependent markets

(a) Markets identified in the declaration decisions

PNO's revocation application refers to the 5 dependent markets referred to in the previous declaration proceedings (and subsequent court proceedings), being:

(i) A coal export market;

[14] [2005] ACompT 5 at [162]

[15] [2005] ACompT 5 at [160].

[16] Tribunal Declaration Decision at [107]

[17] [2017] FCAFC 124 at [86]

(ii) Markets for the acquisition and disposal of exploration and/or mining authorities;

(iii) Markets for the provision of infrastructure connected with mining operations, including rail, road, power and water;

(iv) Markets for services such as geological drilling services, construction, operation and maintenance; and

(v) A market for the provision of shipping services including shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are part.

(b) Likely narrower markets need to be assessed

For the purposes of these submissions, NCIG is willing to assume the markets outlined above may be appropriate product market definitions, subject to the following.

NCIG considers there are definitely different markets for coal authorities as distinct from non-coal mineral authorities. That follows as the demand, supply and valuation for such coal authorities will be based on the outlook for coal, whereas other minerals tenements would reflect the price outlook for entirely different commodities. In addition, authorities for coal exploration or mining are issued, and provide rights for exploration or extraction, in relation to coal (not other minerals). The market participants in the coal authorities market are also different – due to including vertically integrated coal customers and pure coal play companies such as Yancoal, Whitehaven, Peabody Energy, Centennial Coal. Consequently the impact with and without declaration needs to be considered in this narrower coal authorities market.

In addition, the geographic boundaries of some of those dependent markets are important and were not considered in any detail in PNO's application (or for that matter any of the previous decisions in the declaration process).

In particular, NCIG considers the exploration and/or mining authorities market (the **Authorities Market**) is clearly a more narrowly geographically bound market.

NCIG acknowledges that the NCC Recommendation speculated that *'parties seeking coal mining authorities may likewise be able to consider different locations*',[18] the NCC did not consider it previously necessary to precisely define the geographic market boundaries.

NCIG considers the Authorities Market is clearly confined to the Hunter Valley or, at the widest, Port of Newcastle region for a range of reasons which indicate that a coal tenement in the Port of Newcastle region (primarily the Hunter Valley region) is not substitutable for a coal tenement in other regions, and that is important to the satisfaction of criterion (a) where the direct impact of the pricing issues arising from revocation will impact on investment in projects in that region.

Those reasons include:

(a) there are material coal quality differences between coal basins – the Hunter Valley for example has significant thermal and semi-soft coking coal resources (whereas other basis have more of other types of metallurgical coal);

(b) significantly different infrastructure costs (for example even accessing the nearest Gunnedah region coal mines costs significantly more in term of rail access and haulage charges);

(c) different regulatory environments for mining development and approvals (particularly between Queensland and New South Wales), making development time frames, costs and risks materially different; and

[18] NCC Recommendation at [4.69]

(d) for existing producers within the Port of Newcastle region (particularly those with a portfolio of mines), coal authorities in the region will be far more attractive than coal authorities elsewhere due to the ability to:

(i) use existing contracted capacity, both at the NCIG coal terminal and in relation to ARTC's Hunter Valley rail network – where capacity is contracted on a long term evergreen basis (so that the producer can continue to utilise the capacity by a new project ramping up as an existing project reaches the end of its mine life);

(ii) transfer employees and contractors between mines; and

(iii) obtain other economies of scale benefits from closer location.

As a result of those issues, NCIG anticipates that most coal producers would not consider an authority in a different region a close substitute to which it would switch investment decisions in response to a small but significant non-transitory increase in price of a coal authority proximate to the Port of Newcastle.

5.3 Impact on dependent markets

(a) Flaws in PNO's key assertion

PNO's position in relation to criterion (a) is principally based on the assertion that irrespective of whether the price for channel services will be higher without declaration, because of the small proportion of the costs of coal producers the channel services charges represent, and the other uncertainties coal producers are exposed to, any lower price which applies as a result of declaration will not promote a material increase in competition in any dependent markets.

NCIG considers that assertion does not stand up to serious scrutiny, principally for the following reasons:

(i) the charges for the channel service are more material to the investment decisions of coal producers than represented by PNO;

(ii) it is not just the materiality of the current level of charges that is relevant, but the future uncertainty about the long term pricing of the channel services (and how material they may become to coal producers' profitability, particularly in periods of more depressed coal prices);

(iii) in the absence of declaration, there will be a distortion of competition in a number of dependent markets as it is likely that Glencore will have the benefit of ACCC arbitrated terms (which will continue to apply provided a final determination is made prior to revocation), which will make (for example) coal authorities more valuable to Glencore and place them in an advantageous position compared to other potential acquirers in the Authorities Market; and

(iv) the NCC cannot be positively satisfied that declaration will not promote a material increase in competition – when it does not currently know the terms which would apply in the event of declaration continuing (for which the outcome of the Glencore ACCC arbitration is likely to be the best proxy), such that any with or without comparison by the NCC without that information is speculative at best.

(b) Materiality of the channel charges

In relation to the materiality of the channel services charges, NCIG considers that it is misleading to characterise the channel charges as immaterial (as PNO does) by suggesting that:

(i) the navigation service charges do not impact on coal producer investment decisions because they are typically paid by the vessel owner – when PNO

acknowledges that some coal is sold delivered with users chartering the vessel, and the prices that producers receive for FOB sales clearly take into account that the customer has to pay navigation service charges; and

(ii) the channel service charges are immaterial as a proportion of current coal prices – when:

(A) coal prices are at a very high level currently (above consensus long term prices) and coal producers make investment decisions based on long term coal prices not current spot prices; and

(B) it is really the proportion of a coal producer's profit margin that should be relevant (as that is what will impact on their investment decisions).

To properly assess the materiality channel services charges to coal producers (including NCIG shareholders), there are three issues which need to be considered further.

First, the issue is not only about the current price, but the uncertainty about what the price will become in the absence of declaration. The channel is such a clear natural monopoly that in the absence of declaration, PNO will be incentivised to raise prices well above current levels to the point that maximises profit instead of throughput. Coal producers doubt the channel services prices would undergo any corresponding reduction during a coal market downturn.

That sort of uncertainty alone deters significant investment in coal exploration and production as mines are long term investments and need to be profitable over the longer term (including in low coal price environments given the cyclical nature of commodity prices) for investments to be made.

PNO claims there will not be future price uncertainty (with the 2015 changes being alleged to be a one-off 'restructure and realignment'), but there is nothing which prevents PNO from continuing to make substantial price increases in the future (as there was nothing that prevented the major 2015 increases).

As a monopolist, PNO has very clear economic incentives to increase prices and earn monopoly rents (even to the extent that there is some loss of volume). In particular, the price monitoring provisions involve reporting, not regulation, and did not see the government respond in any way to the significant price increases that had occurred prior to declaration.

It is true that there are other uncertainties faced by coal producers. However, changes in coal prices and foreign exchange rates are market driven and coal producers can reach informed views of the long run prices and exchange rates applicable over a mine's life or investment horizon. While at first glance they might seem similar to channel services in being beyond coal producers' control – they are distinctly different because a similar analysis, cannot occur in relation to channel charges. Other than knowing that PNO has strong economic incentives to reap monopoly profits, there is no way of coal producers (or NCIG for that matter) understanding the likely future pricing movements.

The asserted threat of future regulatory intervention as a constraint on future pricing increases is hollow. Where the NCC makes a decision that the declaration should be revoked, PNO would have the benefit of a recent finding that Part IIIA should not apply to the channel services and will have reason to be supremely confident that it is not a risk of suddenly becoming re-declared.

Second, PNO's view that if there is no impact on competition in coal markets there cannot be any impact on competition in dependent markets is premised on the assumption that price rises will be equal in how they apply to coal producers.

However, even if that was true at the time of declaration it is no longer the case because:

(i) Glencore is known to be having its terms of access arbitrated by the ACCC following an access dispute with PNO;

(ii) based on the statutory time frames for an arbitration decision to be made by the ACCC, NCIG understands that such a determination must be very close to being made (if it has not been made already);

(iii) there is nothing in Part IIIA which would mean the terms determined by the ACCC would cease to apply in the hypothetical event of a revocation where the determination occurs prior to the declaration being revoked; and

(iv) NCIG considers it is highly like that those arbitrated terms will last for the period of declaration (until 7 July 2031).

Consequently, NCIG considers that the counterfactual or likely state of dependent markets without declaration is in fact now:

(i) Glencore is able to obtain access to the service on the ACCC arbitrated terms (i.e. the very terms that are reasonable terms and conditions as a result of declaration); and

(ii) all other users have the disadvantageous position of less favourable and certain pricing until at least 7 July 2031.

The likelihood that other coal producers (and their customers) will continue to face uncertain and unfavourable unregulated terms of access if the declaration is revoked (with high prospects of material future prices rises and no further access disputes being able to be brought before the ACCC) will materially distort competition in at least the authorities market (and potentially the related markets for coal terminal services and rail haulage). That is effectively price discrimination which will impact on competition in the relevant dependent markets.

In terms of practical outcomes in dependent markets - when an authority is available for acquisition, it will be of much greater value to Glencore than to other producers and Glencore will therefore be willing to pay more than other producers, making the competition for coal authorities in the Hunter Valley significantly less. Similarly Glencore will have more incentives to explore for and develop coal resources than other producers in the region.

Finally, it is difficult to see how the NCC can be satisfied that access on reasonable terms as a result of declaration would not promote a material increase in competition in a dependent market when it is very hard to assess what those reasonable terms will be in the absence of the results of the current arbitration between PNO and Glencore.

While PNO alleges that it sets its terms of access by reference to a conventional building blocks model with 'an appropriate return' and that future port charges will continue to be based on those principles:

(i) no evidence or modelling has been provided to substantiate those assertions;

(ii) using a building blocks model is not the same as the asset base being calculated appropriately (that is particularly the case where there are important issues about the treatment of past contributions by coal producers to that asset base); and

(iii) using a building blocks model is not the same as providing an efficient and appropriate return of the type that would be ordered by the ACCC in an arbitration for a declared service.

Under section 44J(2) CCA the NCC cannot make a revocation recommendation unless it is satisfied that declaration would not promote a material increase in competition in a dependent market – and it is hard to see how it could be satisfied in the absence of knowing the ACCC

decision so that it could consider the likely state of the dependent market with the new terms arising from that decision.

(c) Conclusion on criterion (a)

Given:

(i) the materiality of the charges to the profitability of at least more marginal producers;

(ii) the uncertainty about future pricing which cannot be predicted or managed; and

(iii) the differential impact that will actually be continued following revocation (if such an occasion arose) as a result of the arbitrated outcome for one user,

will create a non-trivial impact on investment decisions (particularly in the Hunter Valley coal authorities market) and consequently on the environment and opportunities for competitive outcomes, NCIG considers that criterion (a) is met.

Even if (contrary to NCIG's position) the NCC is not absolutely confident that is not the case, under section 44J(2) CCA the NCC cannot make a revocation recommendation unless it is positively satisfied that declaration would not promote a material increase in competition in a dependent market – and it is hard to see how it could be satisfied of that in the absence of knowing the ACCC's decision in the arbitration so that it could properly consider the likely state of the dependent market with the new terms arising from that decision.

6 Criterion (d) – Public Interest

6.1 Key issues in respect of criterion (d)

PNO alleges that criterion (d) is not satisfied in reliance on the following arguments:

(a) declaration has a chilling effect on investment in infrastructure services;

(b) there is a lack of evidence that continued declaration is likely to have a positive impact on investment in markets that depend on access to the service; and

(c) PNO has incurred significant administrative and compliance costs as a result of declaration.

NCIG considers it is clear that the first of those two arguments do not withstand scrutiny, and that PNO's costs to date are not reflective of the likely future costs if the declaration continues. Consequently, none of these points evidence that criterion (d) is not met.

6.2 Interpretation of criterion (d)

NCIG agrees with PNO's analysis regarding the very wide nature of the matters that can be taken into account in assessing the public interest, but notes that PNO's submission then seems to confine its analysis to merely the mandatory factors to be considered.

(a) Lack of materiality threshold

While the wording in criterion (d) was changed by the CCA Amendment Act from a 'not contrary to the public interest' test to a 'promote the public interest' test' – the threshold for satisfying criterion (d) remains a low one.

In particular, the new criterion (d) continues to not contain any materiality threshold. In that regard, the wording of criterion (d) can be contrasted, to that of criterion (a) which expressly provide for a materiality threshold:

> *that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would* ***promote a material increase*** *in competition in at least one market …*

As explained earlier in these submissions in respect of criterion (a), the reference to 'material' is understood to mean 'not trivial' – such that even for the criterion which has a materiality threshold, it sets a low threshold. As stated in the Amendment Act EM,[19] the central question associated with this criterion is whether the declaration is likely to generate overall gains to the community.

Consequently it follows that the extent of overall gains required in order for criterion (d) to be satisfied are very limited.

(b) Promotion

Similarly while the reference to promotion is new to criterion (d), the requirement for a 'promotion' of competition in the context of criterion (a) (as discussed earlier in this submission) requires merely:

(i) an enhanced environment for competition; and

(ii) a significant finite probability that competition would be promoted.[20]

Consequently, whilst the new construction of criterion (d) requires that the NCC (and ultimately Minister) is positively satisfied that declaration of the service promotes the public interest, this is clearly an assessment of whether declaration would be likely (in the sense of there being a significant finite probability) to generate overall gains (without any materiality requirement being applied to those gains).

7 Criterion (d) – alleged detriments

7.1 Effect of declaration on investment in infrastructure services

NCIG considers that PNO cannot reasonably argue that declaration of the channel service may have a chilling effect on investment in infrastructure services.

Clear evidence to the contrary exists in the 6 February 2018 announcement by China Merchants Port Holdings Company Limited (**CMPort**) of acquiring 50% of the total interest in the Port of Newcastle for a price of AUD$607.5 million.

Specifically, the Hong Kong Stock Exchange announcement stated:

> *Given the unique position of the Port of Newcastle with precincts containing land resources, the Acquisition will bring opportunities for the Company to further achieve its "Port and Park" development under the "Port-Park-City" ("PPC") model, which aims to operate its core port businesses together with the park development and infrastructure support, thereby achieving a port-centred ecosystem with port operations as its core*,

and in respect of the expected financial returns to be generated by the acquisition:

> *The Company believes that the Acquisition, which represents a fair and reasonable price, will generate positive long-term financial return to the Group.*

That transaction occurred when there was very clearly a very material prospect of the service continuing to be declared. The announcement should be considered in the context of the

[19] Amendment Act EM at [12.37]

[20] *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [160].

transaction being announced after the Tribunal Declaration Decision, while the ACCC arbitration of the access dispute with Glencore was on foot, and before the revocation application had been made.

There has also continued to be significant interest from PNO in developing a container terminal at the Port of Newcastle.

As stated on PNO's website:

> *The Port of Newcastle remains ready to move on the development of a world class container terminal to service regional Australia.* [21]

That continued interest is also clear from the submission PNO made in March 2018 to the New South Wales Government on the Draft NSW Freight and Ports Plan which described the terminal as a key economic development opportunity.[22]

The interest in, and commercial momentum for that development have not in any way been dampened by the existing declaration. NCIG understands, from publicly available information, that the main impediment to that terminal's development is the existing contractual arrangements which result in subsidising other ports (which the ACCC is now understood to be investigating).

Additionally, PNO has not provided any examples of investment at the Port of Newcastle which were planned or alleged to have been necessary and have not been carried out because of the existing declaration.

Consequently, NCIG considers that PNO's statement that declaration of the Service '*may have a chilling investment in infrastructure services… because declaration may curb the returns that would otherwise be achieved by those investing in infrastructure services*' is speculative and unsubstantiated and clearly inconsistent with PNO's own actions and that announced intentions of one of its major shareholders.

7.2 Effect of declaration on investment in dependent markets

PNO asserts that there is no evidence to suggest that:

(a) continued declaration of the service is likely to have a positive impact on investment in markets that depend on access to the service; or

(b) that investment decisions are influenced by port charges.

PNO asserts that investment decisions are more likely to be influenced by more significant sources of uncertainty.

However, PNO does not offer any evidence to demonstrate that declaration does not have an impact on investment in markets that depend on access to the service.

As discussed in respect of criterion (a) above, NCIG does not accept that the pricing of the channel services is immaterial, particularly for marginal mines and producers. NCIG understands from its shareholders and users (that are actually the coal producers who are impacted) that the uncertainty around future channel charges is a factor taken into account in investments in coal exploration and production decisions.

Declaration and the certainty it provides regarding long term access on reasonable terms and conditions is a significant public benefit because such long term certainty encourages:

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[21] https://www.portofnewcastle.com.au/News-and-Media/Items/2018/INDUSTRY-OPINION-A-competitive-and-efficient-container-terminal-alternative.aspx

[22] https://www.portofnewcastle.com.au/Resources/Documents/2018-03-25-Port-of-Newcastle-Freight-and-Ports-Plan-Submission.pdf

(a) investment in the Hunter Valley (and Gunnedah) coal exploration, development and production markets, which in turn facilitates investment in coal terminal capacity and rail haulage and rail access capacity; and

(b) investment in other uses of the port, such as the proposed container terminal, where the costs may represent a higher proportion of the operating costs, such that certainty of the channel charges is critically important.

That sort of investment generates very significant economic growth, both through direct spend and indirect spend by employees and contractors involved in those businesses, as well as through employment in the region and significant coal royalties for the NSW government which, in turn, are used for public services and other community benefits.

7.3 Administrative and compliance costs

NCIG considers that PNO's administrative and compliance costs are not indicative of the likely future costs that would be incurred if the service remains declared.

The Minister specifically found in the Ministerial Decision that:[23]

> *There was no persuasive evidence that the costs and uncertainties of access regulation at the Port of Newcastle are greater than those usually resulting from an access declaration, and which go beyond what is contemplated by Part IIIA and its negotiate-arbitrate model.*

PNO has failed to substantiate the level of costs it has actually incurred.

In addition, any costs incurred by PNO as a result of declaration arise because of PNO's own decision to strategically and vigorously oppose declaration, including through the previous court challenges and current request for revocation of declaration which has the effect of significantly increasing any alleged administrative and compliance costs. Once the revocation has been determined (one way or the other) these type of costs will not be ongoing.

Thirdly, Aurizon Network's costs do not provide an appropriate benchmark for considering likely administrative and compliance costs arising from the declaration. Aurizon Network operate in a completely different regulatory context – where there is heavier regulation (with approved reference tariffs, regulated access terms and a regulated access undertaking), in part due to Aurizon Network's regulated nature. That will involve a higher level of costs that the negotiate-arbitrate model which operates under Part IIIA.

NCIG considers that there are a number of factors which indicate the costs of complying with declaration are not as significant as asserted by PNO, including that:

(a) the nature of the channel service being a single common service for all users (like coal handling services) results in synergies and simplicity of price regulation which would be anticipated to reduce the costs incurred; and

(b) once pricing structures are set by arbitration, PNO is able to realise efficiency savings in subsequent negotiations and arbitrations by having close regard to the previous determination and minimising the management time and legal and expert costs incurred throughout that process.

In addition, whilst PNO may consider its compliance costs would decrease in the absence of declaration, the price of access would significantly increase such that NCIG is confident that there would be a significant increase in costs when considered in aggregate or from society's perspective.

[23] Ministerial Decision at 7.

As such, NCIG considers that:

(a) PNO has significantly overstated the costs it allegedly incurs as a result of declaration (and in any case, offers no evidence in support of its assertion); and

(b) even in the absence of declaration, the aggregate incremental costs incurred by users of the service would be significantly greater than the efficient costs of administering and complying with the current declaration.

7.4 Public benefits and overall gains from arising from declaration

It is unclear how PNO have reached the conclusion that there are no other matters that would provide a basis for the Minister to be positively satisfied that maintaining declaration of the channel service would promote the public interest.

NCIG considers that there are a range of wider public benefits that arise from declaration, including:

(a) efficient use of infrastructure – the NCC has previously recognised that shipping channels are a natural monopoly such that even if the impossibilities of duplicating the channel were overcome, there is no question that the use of a single channel is the more efficient use of infrastructure;

(b) ecologically sustainable development – similarly, even if the impossibilities of duplicating the channel as part of developing a new port precinct were overcome, the use of one larger port and the channel servicing it is far more ecologically sustainable, involving less need for dredging and confining the areas of the coastline which have been developed and through which shipping occurs;

(c) promotion of further investment – efficient pricing of the channel service (and certainty about declaration continuing to provide a pathway to obtain such efficient pricing) will promote further investment in:

  (i) coal production and exploration in the Port of Newcastle region, including the Hunter Valley region (and related services provision to coal producers);

  (ii) a possible future container terminal at the Port of Newcastle; and

(d) higher government royalties – both through the certainty of efficient and reasonable pricing providing increased incentives to invest in production of coal and reducing the deductions that would apply from coal royalty calculations (where channel access costs are permitted deductions) due to the lower costs provided by declaration. Those higher royalties result in a stronger state budget which can be used to provide public and community services.

7.5 Criterion (d) – Conclusion

It is clear from all of the above, that on any cost / benefit analysis (or any other form of overall gains analysis), declaration produces overall gains and the public benefits of declaration clearly outweigh any public detriment that may arise from declaration continuing.

Consequently, NCIG considers it is clear that access (or increased access) on reasonable terms and conditions, as a result of a declaration of the service promote the public interest and that criterion (d) is therefore satisfied.

8 Exercise of NCC's Discretion

Based on the analysis set out above, NCIG considers that each of the access criteria are satisfied.

Consequently, the precondition for a revocation recommendation is not met, and the NCC is required to recommend that revocation not be granted.

However, if the NCC is not satisfied that was the case, under section 44J(1) CCA, the NCC retains a discretion as to whether to recommend revocation and would then need to go on to consider how it should exercise that discretion.

The NCC's discretion in this context is required to be exercised having regard to the object of Part IIIA CCA, being (relevantly) to:

> *promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets;*

NCIG considers that object weighs strongly in favour of recommending against revocation.

Given the clear importance of providing long term regulatory certainty to investors in, and users of, significant infrastructure, it seems clear to NCIG that the object of Part IIIA weighs in favour of recommending against revoking a 15 year declaration after approximately only 2 years of its operation.

Similarly, as set out in the detailed submissions in respect of criterion (a) above, there are numerous issues which would be resolved by continuing the declaration, such as:

(a) removal of uncertainty;

(b) removal of the distorting impact on competition of only Glencore receiving efficient pricing; and

(c) the negotiate-arbitrate model which would exist in declaration constraining PNO's ability to engage in monopoly pricing,

such that it would promote effective competition in upstream and downstream markets for the declaration to continue.

In addition, while the object is the only mandatory factor to which the NCC must have regard in exercising its discretion under section 44J(1) CCA, NCIG considers there are a number of other relevant factors that weigh in favour of exercising the discretion to recommend against revocation.

In particular, the lack of time since the initial declaration and the lack of any change in the circumstances or markets in which the service is provided which would justify the change – should clearly weigh against a revocation recommendation being made.

Similarly, the public benefit factors arising from declaration (discussed in respect of criterion (d), and risks of public detriment in relation to investment and economic activity in coal terminal capacity, the Hunter Valley coal industry and related markets, also weigh against revocation being appropriate.

9 Conclusion

For the reasons set out in its submission above, NCIG considers that

(a) under section 44J(2) CCA the NCC cannot recommend revocation as each of the declaration criterion are satisfied in respect of the service; and

(b) even if, contrary to NCIG's view, the NCC is satisfied that one or more of the access criteria are not satisfied, the NCC should exercise its discretion to not recommend revocation under section 44J(1) CCA.