

29th October, 2018

By email

PON Revocation
National Competition Council
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Melbourne VIC 3001
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Dear Sir / Madam

Port of Newcastle – application for revocation of declaration

We are writing in response to the email from the National Competition Council (**NCC**) on 15 October 2018. This email invited parties to make further submissions as to whether and how the NCC should have regard to the ACCC's Final Determination of the access dispute between Port of Newcastle Operations (**PNO**) and Glencore Coal Assets Australia (**Glencore**) when considering whether to make a revocation recommendation.

The ACCC's determination

The ACCC published its Final Determination on 8 October 2018.¹ In the Final Determination, the ACCC rejected PNO's submitted position of a navigation service charge of \$1.3543 and instead found that an appropriate charge was \$0.6075. In reaching this outcome, the ACCC made a number of findings as to the appropriate manner in which to calculate the service charge, most of which were contested between the parties, including:

1. that a building block model (**BBM**) should be used to calculate PNOs maximum allowable revenue;
2. that the depreciated optimised replacement cost methodology should be used to value the assets used to provide the declared service;
3. the specific approach to valuing the assets having regard to matters such as construction costs, valuation date and treatment of user funded contributions to assets;
4. the method for calculating the components of the **BBM**, including initial RAB value, weighted average cost of capital (**WACC**), and regulatory tax allowance;
5. initial prices and review mechanism; and
6. non-price terms and conditions.

¹ <https://www.accc.gov.au/public-registers/access-to-services-registers/determination-of-the-access-dispute-between-port-of-newcastle-operations-and-glencore-coal-assets-australia>

Implications of the ACCC determination for the NCC's analysis

In NCIG's response to PNO's further submission, NCIG argued that in order to assess of the impact of declaration on dependent markets the NCC should have regard to the terms of access that would be available following arbitration by the ACCC, as this would provide an insight into the future state of the world with declaration.²

There are two important aspects of the ACCC's Final Determination that are relevant to the NCC's assessment of the relevant counterfactual:

- 1. Pricing of the service is likely to be substantially lower with declaration.** In its initial submission, PNO submitted that "*criterion (a) is not satisfied because there is no basis to conclude that the terms and conditions will vary materially as between the future with declaration and the future without declaration.*"³ This submission cannot be accepted in light of the information contained in the ACCC's Final Determination.

In its Final Determination, the ACCC found that the appropriate navigation service charge was less than 45% of the charge proposed by PNO. PNO clearly considered that the service charge it submitted was reasonable in the context of the arbitration, and should be expected to set its charges at least at this level over time in the absence of declaration.

Indeed NCIG is concerned that, in the absence of declaration, PNO may seek to impose charges even higher than what it sought in its submissions to the ACCC. Even though PNO's submission was materially higher than the ACCC's Final Determination, the charge proposed by PNO in its submission was still calculated according to a bottom-up cost-based methodology that was broadly consistent with the approach adopted by the ACCC. In the absence of declaration, PNO would not have any commercial need to calculate prices according to such a methodology, and could be expected to price at a level that was at least consistent with what it submitted to the ACCC was reasonable, and potentially much higher.

NCIG therefore considers that PNO's submitted access charges should be regarded by the NCC as the lower bound for the access charges that may be expected to prevail over time in the absence of declaration. In other words, one effect of declaration is that access charges may be expected to be less than half what they would be without declaration.

- 2. Users will have much greater certainty in relation to the terms of access with declaration.** As well as determining the initial charges for wharfage and navigational services, the ACCC also specifies a clear process for periodic review and updating of these charges. This periodic review process is closely modelled on the price review processes which apply in many regulated industries, and involves updating a well-defined price methodology. This provides the parties to this arbitration with a high degree of clarity and certainty around how access charges will be determined over the term of the declaration. This clarity and certainty will in turn support efficient investment decisions.

The clarity and certainty provided by the ACCC determination will also support efficient investment and business decisions by other participants in the Hunter Valley supply chain – including other current users of the Port and potential future users – for so long as the declaration remains in force and arbitration continues to be available to these other parties. The Final Determination clearly outlines the ACCC's views in relation to the large number of issues that were contested between PNO and Glencore in the arbitration, many of which are likely to be common issues in any future dispute (e.g. issues relating to asset valuation and the appropriate WACC). In the absence of a material change in

² NCIG, Submission in response to PNO further submission, 5 October 2018, p 9.

³ PNO, Application for revocation of declaration, 2 July 2018, p 17.

circumstances, it would be reasonable to assume that the ACCC would adopt substantially the same approach to determining the terms of access in any future arbitration. Therefore, for so long as declaration remains in force, users are likely to have a significant degree of clarity around likely outcome of any arbitration, providing a clear basis on which to plan future investment decisions.

The fact that declaration is likely to lead to significantly lower access prices and increased investment certainty supports NCIG's submission that declaration will provide for a material increase in the competitive conditions in the relevant dependent markets.

In addition, NCIG submits that the NCC should reject the arguments made by PNO in its reply submission that the complexity associated with arbitration of access disputes mean that it is unable to "adopt" the results of a determination in setting charges for other access seekers.⁴ The ACCC's decision is clear, and based on objective factors relating to the valuation of the assets in question. The non-price terms of access were largely agreed to between the parties, and where there were differences in position between PNO and Glencore, the ACCC made a clear determination as to what it considered a reasonable term of access would be. As a result, NCIG continues to submit that the NCC should regard the ongoing administrative and compliance costs associated with declaration as low, which is relevant to the NCC's assessment of whether declaration meets criterion (d).⁵

Conclusion

The ACCC's Final Determination demonstrates that declaration is likely to lead to significantly lower access prices and increased investment certainty, which will in turn support a material increase in competition and promote the public interest. The ACCC's Final Determination thus provides further support for NCIG's view that criteria (a) and (d) (as well as criteria (b) and (c)) are clearly satisfied. NCIG therefore maintains its view that the NCC should recommend against revocation of the existing declaration of the shipping channel service.

NCIG thanks the NCC for the opportunity to provide this further information to the NCC. Please do not hesitate to contact me if the NCC requires further information or has any questions regarding this letter.

Yours Sincerely,

Aaron Johansen
Chief Executive Officer

⁴ PNO, Further submission in response to letter from the NCC dated 4 September 2018, 17 September 2018, pp 9 – 10.

⁵ *Competition and Consumer Act 2010* (Cth), s 44CA(3)(b).