NATIONAL
COMPETITION
COUNCIL

Revocation of the declaration of the shipping channel service at the Port of Newcastle

Recommendation

22 July 2019

Contents

Abbreviations and defined terms

2015 Final Recommendation	The Final Recommendation issued by the National Competition Council on 2 November 2015 regarding declaration of the channel service at the Port of Newcastle
2017 EM	The explanatory memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*
ACCC	Australian Competition and Consumer Commission
ACCC Determination	The Final Determination issued by the ACCC on 18 September 2018 in relation to the Glencore-PNO Arbitration
ACCC's August 2018 Submission	ACCC's submission to the Council dated 8 August 2018
ACCC's Arbitration Submission	ACCC's submission to the Council dated 29 October 2018 (provided to the Council on 30 October 2018)
ACCC's SOPV Submission	ACCC's submission to the Council dated 6 February 2019
Amendment Act	*Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)
Anglo American	Anglo American Metallurgical Coal Pty Ltd
Anglo American's August 2018 Submission	Anglo American's submission to the Council dated 8 August 2018
BBM	The building block model relied upon by the ACCC in the Glencore-PNO Arbitration
Bloomfield	The Bloomfield Group (Big Ben Holdings Pty Ltd ABN 63008434562, Northern Waggons Pty Ltd ABN 38000082075, Boomfield Collieries Pty Ltd ABN 76000106972, Rix's Creek Pty Ltd ABN 25003824244, Four Mile Pty Ltd ABN 62000407803 and PWG King & Sons Pty Ltd ABN 73120223047).
Bloomfield's SOPV Submission	Bloomfield's submission to the Council dated 4 February 2019.
Bloomfield's NERA Submission	Bloomfield's submission to the Council dated 26 April 2019
CCA	*Competition and Consumer Act 2010* (Cth)
CMG	China Merchants Group Limited
CMIDC	China Merchants Investments Development Company Limited
CM Port	China Merchants Port Holdings Company Limited
CMU	China Merchants Union (BVI) Limited
Container Restraint	Arrangements made when the NSW government privatised Port Botany, Port Kembla and the Port of Newcastle through which PNO would be required to pay compensation to the State of NSW for any container trade in the Port that exceeds a set cap, see paragraph 7.355, below.
Council	National Competition Council
Criterion (a)	The declaration criterion described in section 44CA(1)(a) of the CCA

Criterion (b)	The declaration criterion described in section 44CA(1)(b) of the CCA
Criterion (c)	The declaration criterion described in section 44CA(1)(c) of the CCA
Criterion (d)	The declaration criterion described in section 44CA(1)(d) of the CCA
Declaration	The declaration of the shipping channel service at the Port of Newcastle made by the Australian Competition Tribunal on 16 July 2016.
Federal Court	The Federal Court of Australia
Glencore	Glencore Coal Pty Ltd
Glencore-PNO Arbitration	The ACCC's arbitration of the Service access dispute between Glencore and PNO notified by Glencore on 4 November 2016 and determined on 18 September 2018.
Glencore's 2015 Application	Glencore's 2015 application for declaration of shipping channel services at the Port of Newcastle, submitted to the Council on 13 May 2015.
Glencore's Arbitration Submission	Glencore's submission to the Council dated 29 October 2018
Glencore's August 2018 Submission	Glencore's submission to the Council dated 8 August 2018
Glencore's NERA Submission	Glencore's submission to the Council dated 26 April 2019
Glencore's October 2018 Submission	Glencore's submission to the Council dated 5 October 2018
Glencore's SOPV Submission	Glencore's submission to the Council dated 4 February 2019
GT	Gross Tonnage
HoustonKemp	HoustonKemp Economists
HoustonKemp's Arbitration Report	The report prepared by HoustonKemp titled 'Relevance for revocation application of ACCC's determination' provided to the Council with PNO's Arbitration Submission
HoustonKemp's Incentives Report	The report prepared by HoustonKemp titled 'Effect of Declaration on incentives to invest in coal mines' provided to the Council with PNO's September 2018 Submission
HoustonKemp's Tenements Report	The report prepared by HoustonKemp titled 'Effect of declaration on competition for coal authorities' provided to the Council with PNO's September 2018 Submission
IPART	Independent Pricing and Regulatory Tribunal of NSW
Malabar	Malabar Coal Limited
Malabar's NERA Submission	Malabar's Submission to the Council dated 26 April 2019
mtpa	million tonnes per annum
National Access Regime	The mechanism established by Part IIIA of the *Competition and Consumer Act 2010* (Cth) through which an access seeker can gain

	access to the service or services provided by a nationally significant infrastructure facility.
Navigation Service Charge	A charge levied by PNO on vessels at the time of entry to the Port for the general use of the Port and its infrastructure
NERA	NERA Economic Consulting
NERA Report	The report prepared by NERA titled 'Declaration of the shipping channel service at the Port of Newcastle' and dated 8 April 2019
NCC	See 'Council'
NCIG	Newcastle Coal Infrastructure Group
NCIG's Arbitration Submission	NCIG's submission to the Council dated 29 October 2018
NCIG's August 2018 Submission	NCIG's submission to the Council dated 8 August 2018
NCIG's October 2018 Submission	NCIG's submission to the Council dated 5 October 2018
NCIG's SOPV Submission	SCIG's submission to the Council dated 4 February 2019
NSWMC	New South Wales Minerals Council
NSWMC's Arbitration Submission	NSWMC's submission to the Council dated 29 October 2018
NSWMC's August 2018 Submission	NSWMC's submission to the Council dated 8 August 2018
NSWMC's NERA Submission	NSWMC's submission to the Council dated 26 April 2019
NSWMC's SOPV Submission	NSWMC's submission to the Council dated 4 February 2019
OHC	Orienture Holdings Company Limited
Pacific National	Pacific National Pty Ltd ACN 098 060 550
Pacific National's SOPV Submission	Pacific National's submission to the Council dated 1 February 2019
PAMA Act	*Ports and Maritime Administration Act 1995* (NSW)
PAMA Regulation	*Ports and Maritime Administration Regulation 2012* (NSW)
Part IIIA	Part IIIA of the CCA
Pilbara HCA	*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379; (2012) 290 ALR 750; [2012] HCA 36
PC 2013 Review	The Inquiry Report prepared by the Productivity Commission titled: "National Access Regime – inquiry Report, No. 66, 25 October 2013"
PNO	Port of Newcastle Operations Pty Limited, the operator of the Port of Newcastle
PNO's Arbitration Submission	PNO's submission to the Council dated 29 October 2018
PNO's July 2018 Submission	PNO's submission to the Council dated 2 July 2018
PNO's September 2018 Submission	PNO's submission to the Council dated 17 September 2018
PNO's SOPV Submission	PNO's submission to the Council dated 4 February 2019

PNO v Tribunal	*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115; (2017) 346 ALR 669; [2017] FCAFC 124
Port	The Port of Newcastle
Ports Australia	Ports Australia ABN 44 135 430 705
Ports Australia's August 2018 Submission	Ports Australia's submission to the Council dated 8 August 2018
PWCS	Port Waratah Coal Services
PWCS' August 2018 Submission	PWCS' submission to the Council dated 6 August 2018
PWCS' NERA Submission	PWCS' submission to the Council dated 24 April 2019
PWCS' SOPV Submission	PWCS' submission to the Council dated 4 February 2019
QCA	Queensland Competition Authority
QCA Act	Queensland Competition Authority Act 1997 (Qld)
Re Glencore	*Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6
Relevant Term	The full remaining term of the Declaration, that is, the period up to 7 July 2031
ResourcefulNæss Report	The report prepared by ResourcefulNæss Consulting titled 'Effect of Port Charges on Incentives to Invest in Coal' provided to the Council with PNO's September 2018 Submission
Service	The shipping channel service at the Port of Newcastle, which is the service the subject of the Declaration
Shipping Australia	Shipping Australia Limited
Shipping Australia's August 2018 Submission	Shipping Australia's submission to the Council dated 8 August 2018
SOPV	The NCC's Statement of Preliminary Views dated 19 December 2018
Synergies	Synergies Economic Consulting
Synergies' August 2018 Report	The report prepared by Synergies titled 'Port of Newcastle: Assessment of revocation application by Port of Newcastle Operations' provided to the Council with Glencore's August 2018 Submission
Synergies' February 2019 Report	The report prepared by Synergies titled 'Port of Newcastle: Assessment of revocation application by Port of Newcastle Operations Pty Ltd' provided to the Council with Glencore's SOPV Submission
Synergies' April 2019 Report	The report prepared by Synergies titled 'Revocation of declaration of the shipping channel service at the Port of Newcastle Response to NERA Report' provided to the Council with Glencore's SOPV Submission
Synergies' October 2018 Report	The report prepared by Synergies titled 'Port of Newcastle: Response to submissions and documents provided by Port of Newcastle Operations' provided to the Council with Glencore's October 2018 Submission

t	Tons/Tonnage
TEU	Twenty-foot Equivalence Units
TIF	The Infrastructure Fund
Tribunal	Australian Competition Tribunal
Yancoal	Yancoal Australia Ltd
Yancoal's Arbitration Submission	Yancoal's submission to the Council dated 29 October 2018
Yancoal's August 2018 Submission	Yancoal's submission to the Council dated 8 August 2018
Yancoal's July 2018 Submission	Yancoal's submission to the Council dated 27 July 2018
Yancoal's October 2018 Submission	Yancoal's submission to the Council dated 5 October 2018
Yancoal's SOPV Submission	Yancoal's submission to the Council dated 4 February 2019

1 Executive Summary

1.1 On 16 June 2016, the Australian Competition Tribunal (**Tribunal**) made orders giving effect to its decision to declare the shipping channel service at the Port of Newcastle (**Declaration**).

1.2 On 2 July 2018, Port of Newcastle Operations Pty Ltd (as trustee for the Port of Newcastle Unit Trust) (**PNO**) wrote to the Council requesting that it make a recommendation to the designated Minister to revoke the Declaration.

1.3 Section 44J of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) provides that the Council may recommend to the designated Minister that a declaration be revoked. The Council must have regard to the objects of Part IIIA of the CCA and cannot recommend revocation of a declaration unless it is satisfied that subsection 44F(1) or 44H(4) of the CCA would prevent the declaration of service from being considered, recommended or made (as applicable). Subsection 44H(4) prevents the declaration of a service unless the Minister is satisfied of all of the declaration criteria set out in section 44CA.

1.4 The Council considers some of the declaration criteria set out in section 44CA of the CCA are satisfied. However, it is of the view that the declaration criterion described in subsection 44CA(1)(a) (**criterion (a)**) is not satisfied. The Council considers, therefore, that the Minister could not be satisfied of all the declaration criteria. Having regard to the objects of Part IIIA, it recommends revocation of the Declaration.

Reasons why criterion (a) is not satisfied

1.5 Criterion (a) requires that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in at least one market, other than the market for the service.

1.6 The effect of this criterion is that it is not enough to find that PNO has market power, or operates a "bottleneck" facility, in order to be satisfied that declaration of the Service satisfies the statutory criteria set out in Part IIIA of the CCA. Declaration of the Service needs to promote a material increase in competition in at least one other market. An assessment of whether declaration of a service satisfies criterion (a) therefore requires consideration of the impact declaration would have on competition in so-called "dependent" markets. The Council accepts that when assessing those impacts it is relevant to consider the degree of market power PNO has and the fact that it operates a bottleneck facility. But neither the fact that the service provider has market power nor that it operates a bottleneck facility is in itself sufficient to satisfy criterion (a). It is only where a material increase in competition would be likely to result in another market that the criterion is satisfied.

1.7 In this instance, PNO is not vertically integrated in any meaningful way into any relevant markets related to coal export activity. This means it is unlikely to have an

incentive to deny access to firms operating in related markets (as they are not competitors to PNO); or to provide access on terms and conditions that inhibit the ability of different users of the Service to compete against each other on their merits in these markets. Indeed, PNO is likely to prefer that markets related to the Port are effectively competitive as this is likely to maximise demand (and hence profits) from providing the Service at any given prices it charges.

1.8 The Port is a bottleneck facility and businesses wishing to export coal from the Newcastle catchment must use the Service if they wish to export into overseas coal markets. In that sense, PNO is not constrained by the existence of an alternative port option that its coal customers can use.

1.9 Against this, however, there are important factors that are likely to act as a constraint on PNO in setting the terms and conditions of access PNO will set in a future without declaration of the Service:

- PNO signed a 98 year lease to operate the Port in 2014, and would be likely to act in a way that has regard to its ability to maximise its expected profits over the term of the lease. Revenues from coal mining in the Newcastle catchment will likely remain its most important source of revenue in the near future; and it will be heavily reliant on future investment in coal mining activity in the region. Opportunistic pricing by PNO that "holds-up" existing miners today risks sending a signal to potential miners in the future that PNO will take advantage of them after they make investments, and that they are at risk of not being able to recover sunk costs if they invest in coal mining activities in the Newcastle catchment.

- PNO is, in effect, competing to attract coal mining activity to the Newcastle catchment. Charging excessively high prices for the Service is likely to increase the incentive for some potential future miners to invest in other activities (e.g. investing in coal mining activity in other parts of Australia, or overseas) rather than coal mining in the Newcastle catchment.

- The NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets, or otherwise harm the public interest. Such intervention might be via the terms of PNO's lease; under the terms of the PAMA Act (by referral to IPART); or by introducing new statutory restrictions.

1.10 While none of these factors in isolation is likely to replicate the extent of constraint that would be provided by another port able to provide services to coal exporters in the Newcastle catchment, they should, in combination, act to provide at least some level of constraint on PNO's pricing and output decisions.

1.11 The consequence of the factors set out in paragraphs 1.8 to 1.10 is that it is likely (but not certain) that charges for the Service will be higher in a future without

declaration of the Service, although it is unclear precisely how much higher (if at all). In this respect, the Council notes that:

- Prior to declaration of the Service, PNO set a price of approximately $0.69[1] per gross tonne (GT) for its navigation service, and had a listed price in 2018 of approximately $0.76 per GT.
- With declaration, the ACCC determined a charge of approximately $0.61 per GT (in 2018 dollar terms) for PNO's navigation service in the Glencore-PNO Arbitration, which has been subsequently appealed by both Glencore and PNO to the Tribunal.
- During the Glencore-PNO Arbitration, the parties argued the ACCC's pricing methodology suggested a reasonable price for the navigation charge was approximately $0.41 (Glencore) and $1.36 (PNO) per GT.

1.12 As shown in Figure 1 below, PNO's Navigation Service Charge prior to declaration of the Service was higher than that ultimately determined by the ACCC in the Glencore-PNO Arbitration. However, it was also well within the range of prices argued by the parties to result from the ACCC's chosen pricing methodology for the Service. While past pricing of the Service by PNO is no guarantee of how it will price in a future without declaration of the Service; it is also not certain what price the Tribunal might ultimately consider is reasonable in its review of the ACCC Determination.

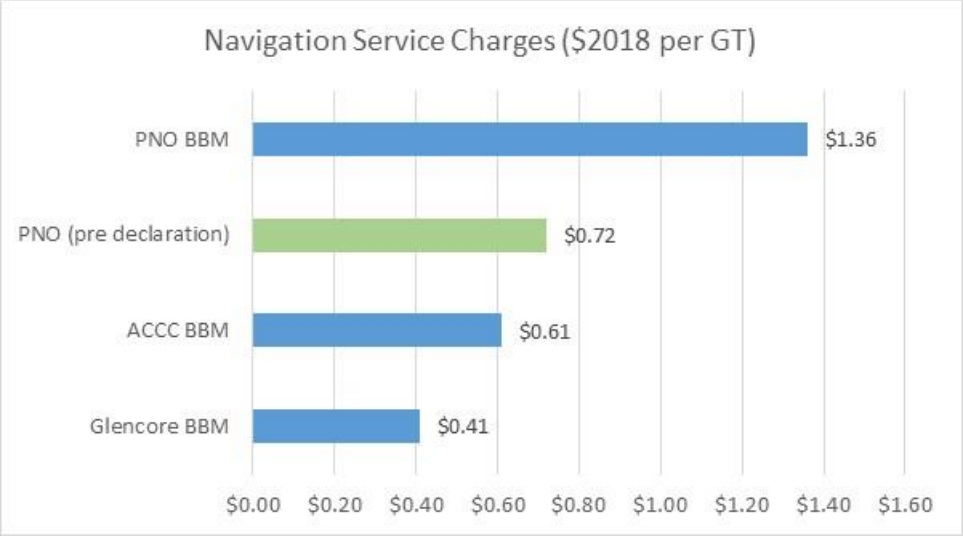

Figure 1 – Navigation Service Charge Reference Points in the Glencore-PNO Arbitration

[1] See ACCC, *Final Determination: Statement of Reasons – Access Dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty* Ltd, 18 September 2018 at p. 7. The ACCC estimates this price in 2015 equates to approximately $0.73 per GT in 2018 dollar terms.

1.13 The Council is not satisfied that the possibility of lower prices in a future with declaration of the Service is likely to promote competition in any related markets. In particular:

- The coal export market is already likely to be effectively competitive such that declaration is unlikely to promote a material increase in competition in this market
- The market(s) for coal tenements is "derivative" of the coal export market, and competition is unlikely to be materially promoted by declaration of the Service. While the possibility of higher prices in a future without declaration of Service may lessen the value to firms contemplating exploring/mining coal in the Newcastle catchment such that they would be prepared to pay less for these tenements, this is not the same as saying competition for tenements between prospective explorers/miners will be greater in a future with declaration of the Service. The Council considers prospective explorers/miners will still be able to compete on their respective merits for tenements in a future without declaration of the Service
- PNO is not vertically integrated into the provision of container shipping services in any meaningful way that would make it likely to discriminate against any rivals in markets for these services.

1.14 Importantly, the Council considers that charges at the Port are likely to remain a small proportion of international spot prices for coal with or without declaration of the Service. In this respect:

- In 2017, PNO estimated the thermal coal spot price was AU$88.42 per tonne
- Synergies (on behalf of Glencore) submitted that research by Wood Mackenzie suggested the thermal coal price could rise to AU$100 per tonne by 2020.

1.15 The difference in navigation service charges between that determined by the ACCC ($0.61 per GT) and that set by PNO ($0.76 per GT) in 2018 (i.e. $0.15 per GT) represents less than 0.2 of 1 per cent of the export price for thermal coal in 2017.

1.16 The Council is satisfied that access to the Service on reasonable terms and conditions as a result of declaration is not likely to promote a material increase in competition in any market other than the market for the Service. Further, the Council is also satisfied that, at the time of this Recommendation, subsection 44H(4) would prevent the Service being declared.[2]

Consistency with the previous Tribunal decision in this matter

1.17 The Council recognises that the Service was declared relatively recently by the Tribunal in June 2016, and that subsequent court appeals of the Tribunal decision[3]

[2] See subsections 44J(2) and 44H(4) of the CCA, discussed in chapter 4.

[3] See paragraphs 3.7 and 3.8.

were dismissed. Importantly, however, the decision of the Tribunal was made prior to legislative changes to criterion (a) in 2017.

1.18 The designated Minister (the then Acting Treasurer, Senator the Hon. Mathias Cormann) previously accepted a recommendation from the Council not to declare the Service in 2016. In making this decision, he adopted the Council's 2015 Final Recommendation that considered that all of the declaration criteria (in their pre-amended form[4]) were satisfied, except for criterion (a) (as it was then worded[5]).

1.19 On an application for review from Glencore (the applicant for Declaration), the Tribunal set aside the Minister's decision and declared the Service. The Tribunal considered that it was bound by the Full Federal Court's decision in *Sydney Airport*[6], which considered the criterion to require a comparison of the future state of competition in the dependent market with and without 'access (or increased access)' as opposed to with and without declaration. Applying this construction of the criterion, the Tribunal precluded consideration of the existing or likely future access or usage of the service. In effect, the Tribunal undertook its consideration of criterion (a) by comparing a future with declaration of the service to a future where no access was provided. This was despite the fact PNO has been providing the Service even without declaration. Under this interpretation, the Tribunal found that criterion (a) was satisfied.

1.20 In its determination, however, the Tribunal stated that:

> If it were wrong about the correct approach to s 44H(4)(a)[7] … it would not be satisfied that increased access would promote a material increase in competition in the coal export market. If that market would not be promoted in that way, it follows that the other four dependent markets would also not be promoted with a material increase in competition in any of them.'[8]

1.21 Following the Tribunal's declaration of the Service, Parliament amended[9] criterion (a) to make clear that the relevant inquiry was into the effects of "access (or increased access) to the service, on reasonable terms and conditions, ***as a result of a declaration*** of the service" [emphasis added].

1.22 The Council considers its views on criterion (a) in this revocation recommendation are, therefore, consistent with the Tribunal's finding in *Re: Glencore* in light of recent legislative amendments to Part IIIA of the CCA.

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4 The pre-amended criteria were set out in subsections 44G(2) and 44H(4) respectively.

5 The previous criterion (a) in subsections 44G(2)(a) and 44H(4)(a) read, "that access (or increased access) to 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".

6 *Sydney Airport Corporation v Australian Competition Tribunal* (2006) 155 FCA 124 (***Sydney Airport***); [2006] FCAFC 146.

7 This subsection set out criterion (a) as it was then worded.

8 *Re Glencore* paragraph 157

9 *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

Other considerations

1.23 The Council has also assessed the other requirements set out in section 44J as follows.

- The Council has had regard to the objects of Part IIIA in making this recommendation.
- None of the circumstances in subsection 44F(1) would prevent the making of an application for declaration.
- Criterion (b) in subsection 44CA(1)(b) is satisfied. The Council considers that the Port could meet the total foreseeable demand in the market in the Relevant Term and at the least cost compared to any two or more facilities.
- Criterion (c) in subsection 44CA(1)(c) is satisfied. The Council considers that the Port is of national significance in terms of its importance to constitutional trade and commerce, and to the national economy.
- The designated Minister could reasonably form the view criterion (d) in subsection 44CA(1)(d) is not satisfied. The Council considers it is possible (but not certain) that declaration will generate some marginal improvement in the efficient use of and investment in relevant infrastructure. However, this benefit must be set against considerable administrative, compliance and legal costs associated with declaration (and any subsequent negotiation and arbitration of terms and conditions of access under the Part IIIA access regime).

1.24 Section 44J does not set out any procedure for the Council's assessment of whether or not it should make a revocation recommendation. The Council conducted public consultation before issuing a Statement of Preliminary Views on 19 December 2018 (**SOPV**) and in response to its SOPV, reflecting the process it would undertake in considering an application for declaration under section 44F. It also undertook additional consultation on an independent economic consultancy report commissioned by the Council from NERA Economic Consulting following release of the SOPV.

1.25 Having engaged in public consultation and considered the material put before it, the Council recommends that the Minister revoke the Declaration.

2 Recommendation

2.1 Section 44J of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) provides that the Council may recommend to the designated Minister that a declaration be revoked. The Council must have regard to the objects of Part IIIA of the CCA and cannot recommend revocation of a declaration unless it is satisfied that subsection 44F(1) or 44H(4) of the CCA would prevent the declaration of service from being considered, recommended or made (as applicable).

2.2 On 16 June 2016, the Australian Competition Tribunal (**Tribunal**) made orders giving effect to its decision to declare the shipping channel service at the Port of Newcastle (**Declaration**). On 28 July 2018, Port of Newcastle Operations Pty Ltd (as trustee for the Port of Newcastle Unit Trust) (**PNO**) wrote to the National Competition Council (the **Council**) requesting that the Council make a recommendation to the designated Minister to revoke the Declaration.

2.3 Section 44J does not set out any procedure for the Council's assessment of whether or not it should make a revocation recommendation. The Council conducted public consultation before issuing a Statement of Preliminary Views on 19 December 2018 (**SOPV**) and in response to its SOPV, reflecting the process it would undertake in considering an application for declaration under section 44F.

2.4 Having engaged in public consultation (described in paragraphs 3.9 to 3.21) and considered the material put before it,[10] the Council has decided to recommend to the designated Minister that the declaration be revoked. The Council's reasons for its position are set out in this Recommendation report.

[10] Some confidential material was put to the Council. The manner in which the Council had regard to this information is discussed at paragraph 3.13.

3 Background

The Service

3.1 In its application to the Council for declaration of the shipping channel service at the Port of Newcastle submitted on 13 May 2015 (**Glencore's 2015 Application**), Glencore Coal Pty Ltd (**Glencore**) defined the service provided at the Port of Newcastle (the **Port**) for which declaration was sought as:

> 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, by virtue of 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[11] (the **Service**).

3.2 This definition has been applied by the Council, the Minister, the Tribunal and the Federal Court of Australia (**Federal Court**) and is not in dispute.

The Declaration

3.3 In May 2015, the Council received an application under Part IIIA of the CCA from Glencore seeking declaration of the Service. The Council conducted a public consultation process and on 10 November 2015 recommended to the designated Minister, the then Federal Treasurer, the Hon. Scott Morrison MP, that the Service not be declared. On 8 January 2016, the then Acting Treasurer, Senator the Hon. Mathias Cormann, decided not to declare the service and the Council published that decision on its website on 11 January 2016. In making this decision, he adopted the Council's 2015 Final Recommendation that considered that all of the declaration criteria (in their pre-amended form[12]) were satisfied, except for criterion (a) (as it was then worded[13]).

3.4 On 29 January 2016, Glencore applied to the Tribunal for review of the Treasurer's decision; and on 31 May 2016 the Tribunal decided the service should be declared with effect from 8 July 2016 to 7 July 2031 (*Re Application by Glencore Coal Pty Ltd* (***Re Glencore***)[14]). On 16 June 2016, the Tribunal made orders setting aside the decision of the Minister, and giving effect to the Declaration.

3.5 The Tribunal considered that it was bound by the Full Federal Court's decision in *Sydney Airport*,[15] which considered the criterion to require a comparison of the

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11 Glencore's 2015 Application, p 15.

12 The pre-amended criteria were set out in subsections 44G(2) and 44H(4) respectively.

13 The previous criterion (a) in subsections 44G(2)(a) and 44H(4)(a) read, "that access (or increased access) to 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".

14 *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6.

15 *Sydney Airport Corporation v Australian Competition Tribunal* (2006) 155 FCA 124 (***Sydney***

future state of competition in the dependent market with and without 'access (or increased access)' as opposed to with and without declaration. Applying this construction of the criterion, the Tribunal precluded consideration of the existing or likely future access or usage of the service. In effect, the Tribunal undertook its consideration of criterion (a) by comparing a future with access to the service to a future where no access was provided. Under this interpretation of "access" in criterion (a), the Tribunal found that the criterion was satisfied.

3.6 On 14 July 2016, PNO applied to the Federal Court for judicial review of the Tribunal's decision. The application was dismissed (*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (***PNO v Tribunal***) [16]).

3.7 On 12 September 2017, Port of Newcastle Operations Pty Ltd applied for special leave to appeal the Full Court's decision to the High Court of Australia. The application was refused by the High Court on 23 March 2018.[17]

3.8 In October 2017, Parliament amended[18] criterion (a) to make clear that the relevant inquiry was into the effects of 'access (or increased access), on reasonable terms and conditions, as a result of a declaration.' The Minister's decision not to declare the Service in 2015 was overturned by the Tribunal on the basis of a construction of criterion (a) that excluded consideration of the effect of declaration. Parliament has since amended criterion (a) to make explicit the focus of the criterion to the effect of declaration.

PNO's request for the Council to consider recommending the Declaration be revoked

3.9 On 2 July 2018, PNO wrote to the Council with a detailed submission requesting that it make a recommendation to the designated Minister that the Declaration be revoked (**PNO's July 2018 Submission**).

3.10 The Council commenced its consideration of whether to make a recommendation to revoke the Declaration in response to PNO's July 2018 Submission.

Consultation process and NERA Report

3.11 On 11 July 2018, the Council published notice of PNO's July 2018 Submission in *The Australian* newspaper. The Council also wrote to interested parties advising of PNO's July 2018 Submission and inviting submissions to be made by 5pm on 8 August 2018.

Airport); [2006] FCAFC 146.

16 (2017) 253 FCR 115; (2017) 346 ALR 669; [2017] FCAFC 124.

17 *Port of Newcastle Operations Pty Ltd v The Australian Competition Tribunal & Ors* [2018] HCATrans 55 (23 March 2018).

18 *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

3.12 The Council received submissions in response to PNO's July 2018 Submission from a further nine interested parties - Anglo American Metallurgical Coal Pty Ltd (**Anglo American**), the Australian Competition and Consumer Commission (**ACCC**), Glencore Coal Pty Ltd (**Glencore**), Newcastle Coal Infrastructure Group (**NCIG**), the NSW Minerals Council (**NSWMC**), Ports Australia, Port Waratah Coal Services Limited (**PWCS**), Shipping Australia Limited (**Shipping Australia**) and Yancoal Australia Ltd (**Yancoal**).

3.13 On 4 September 2018, the Council requested that PNO provide submissions, documents and information on a number of specific matters raised in submissions from other interested parties. PNO provided a public submission in response on 17 September 2018 (**PNO's September 2018 Submission**) accompanied by a confidential submission. The confidential submission related to container terminals. All of the information in the confidential submission that is relevant to the Council's conclusions is available from public sources. The Council considers the confidential information that PNO provided the Council, which was not available publically, does not have any bearing on its conclusions and as such has given those confidential materials no weight.

3.14 On 21 September 2018, the Council invited the other interested parties to make submissions on PNO's September 2018 Submission by 5pm on 5 October 2018. Submissions were received from NCIG, Yancoal and Glencore.

3.15 On 8 October 2018, the ACCC published its final determination (the **ACCC Determination**) of the arbitrated dispute between Glencore Coal Assets Australia and PNO in relation to the terms and conditions for Glencore's access to the declared shipping channel service at the Port of Newcastle (the **Glencore-PNO Arbitration**).

3.16 On 15 October 2018, the Council invited further submissions from interested parties about whether and, if so, how the Council should have regard to the ACCC Determination when considering whether to make a revocation recommendation. Submissions were due by 5.00pm on 29 October 2018. Submissions were received from Glencore, NCIG, NSWMC, PNO, Yancoal and the ACCC.

3.17 On 19 December 2018, the Council published the SOPV which proposed to recommend that the Declaration be revoked. Interested parties were invited to provide submissions to the Council in response to the SOPV by 4 February 2019. Submissions were received from PWCS, Pacific National Pty Ltd (**Pacific National**), The Bloomfield Group (**Bloomfield**), Yancoal, NSWMC, PNO, NCIG and Glencore.

3.18 On 8 April 2019, the Council published on its website a report from NERA Economic Consulting (the **NERA Report**). Interested parties were invited to comment on the report by 28 April 2019. Submissions were received from PWCS, Bloomfield, NSWMC, Glencore and Malabar Coal Limited (**Malabar**)

3.19 All public submissions and relevant correspondence have been published on the Council's website: ncc.gov.au.

3.20 The Council has had regard to all interested party submissions in preparing this Recommendation. In addition, the Council has undertaken its own analysis which has informed its recommendation to the Designated Minister. That analysis is detailed in this Recommendation.

3.21 Summaries of submissions, as set out in this document, are intended to illustrate what the Council considers to be the 'key issues' raised in these submissions. For the avoidance of doubt, the Council has had regard to every submission and document identified in Annexure A.

Designated Minister

3.22 Subsection 44J(1) of the CCA provides that the Council may make a recommendation to the designated Minister that a declaration be revoked.

3.23 The identity of the designated Minister has not been the subject of submissions in relation to a possible revocation recommendation.

3.24 Consistent with its Final Recommendation dated 2 November 2015 regarding Glencore's 2015 Application (**the 2015 Final Recommendation**)[19] and the SOPV,[20] the Council is of the view that the Commonwealth Minister is the designated Minister for the purpose of revocation of the Declaration.

3.25 The Commonwealth Minister in relation to this application is the Federal Treasurer, the Hon Josh Frydenberg MP.

[19] 2015 Final Recommendation at paragraphs 2.30 - 2.38.

[20] SOPV at paragraphs 2.18 – 2.21.

4 The Council's approach to making a recommendation regarding revocation of declaration under section 44J of the CCA

4.1 Section 44J(1) of the CCA provides that the Council may recommend to the designated Minister that declaration of the Service be revoked. The Council received submissions from a number of parties regarding the approach it is required to take in making a decision under section 44J of CCA.

4.2 It is convenient to set out section 44J of the CCA in full. It provides:

> (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.
>
> (3) On receiving a revocation recommendation, the designated Minister must either revoke the declaration or decide not to revoke the declaration.
>
> (3A) The designated Minister must have regard to the objects of this Part in making his or her decision.
>
> (4) The designated Minister must publish the decision to revoke or not to revoke.
>
> (5) If the designated Minister decides not to revoke, the designated Minister must give reasons for the decision to the provider of the declared service when the designated Minister publishes the decision.
>
> (6) The designated Minister cannot revoke a declaration without receiving a revocation recommendation.
>
> (7) If the designated Minister does not publish under subsection (4) his or her decision on the revocation recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day, the designated Minister is taken, immediately after the end of that 60-day period:
>
> > (a) to have made a decision that the declaration be revoked; and
> >
> > (b) to have published that decision in accordance with this section.

4.3 The Council, under section 44J(1), and the Minister, under section 44J(3A), are required to have regard to the objects of Part IIIA when deciding (respectively) whether to recommend revocation or to revoke a declaration. The objects of Part IIIA are set out in section 44AA, and are to:

> (a) 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; and
>
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

4.4 Section 44J requires the Council to have regard to the objects of Part IIIA in determining whether to recommend revocation. The manner in which the Council is to have regard to the objects of Part IIIA has been the subject of several interested party submissions.

4.5 Submissions on the proper application of particular declaration criteria are not discussed in this section. The declaration criteria are discussed in chapters 7 to 10.

Submissions

Before the SOPV

4.6 PNO's July 2018 Submission notes that the Council may recommend to the designated Minister, pursuant to section 44J(1) of the CCA, that the declaration of the Service be revoked. The Council must have regard to the objects in Part IIIA in deciding whether to recommend revocation. The Council cannot recommend revocation unless it is satisfied that at the time of the recommendation, section 44H(4) would prevent the service concerned from being declared; and section 44H(4) provides that the designated Minister cannot declare a service unless she or he is satisfied of *all* of the declaration criteria for the service. On this basis, PNO submits that if the Council considers that one or more of the declaration criteria are not satisfied in respect of the Service, it should recommend revocation.[21]

4.7 Glencore provided a submission to the Council on 8 August 2018 (**Glencore's August 2018 Submission**) which argues that continuing satisfaction or non-satisfaction of criteria (a) to (d) may be relevant to, but is not determinative of, whether to recommend revocation of the Declaration. The Council is afforded discretion in deciding whether to recommend revocation and, in Glencore's view, should have regard to whether there has been a material change in the market conditions or facts since the Declaration (other than those attributable to the Declaration itself). Glencore submits that, in this scenario, there has been no material change of circumstances (other than those attributable to the Declaration itself) since the Full Federal Court in *Port of Newcastle Operations Pty Ltd v*

[21] PNO's July 2018 Submission p 6.

Australian Competition Tribunal[22] (***PNO v Tribunal***) determined that the Declaration was appropriate. As such, Glencore submits it is axiomatic that revocation would be inconsistent with the objects of Part IIIA.[23]

4.8 Glencore also submits that in evaluating whether a recommendation to revoke the Declaration would be consistent with the objects of Part IIIA, the Council must also have regard to:

(a) The impact of revocation in the dependent markets. [24]

(b) The findings in the report prepared by Synergies Economic Consulting (**Synergies)** dated 8 August 2018 (**Synergies' August Report**) that revocation is likely to lead to allocative efficiency losses in the dependent markets. PNO's ability and incentive to charge higher prices to use the Service, absent the Declaration, is likely to distort price signals for investment and dampen incentives for innovation in the dependent markets. [25]

(c) Resultant public detriments, including reduced investment in the Hunter Valley and the transfer of economic rents from miners in the Hunter Valley to PNO, leading to reduced royalties and taxes.[26]

(d) The effect that maintaining the Declaration would have in providing a framework and guiding principles to encourage a consistent approach to access regulation. To revoke the Declaration would represent a failure to users of infrastructure assets and would undermine the operation of the National Access Regime. [27]

4.9 Glencore submits that revocation of the Declaration would not promote the objects of Part IIIA because it would likely lead to: substantially higher prices for the Service; allocative efficiency losses; reduced investor confidence; and increased costs of capital for new coal mining projects in the Newcastle catchment (which in turn will result in lower investment in coal exploration and development of new and expanded coal projects). [28]

4.10 Glencore provided a further submission to the Council on 5 October 2018 (**Glencore's October 2018 Submission**) in which it submits that the Council must not determine the question of whether to recommend revocation of the declaration in the manner suggested by PNO as if there were a current application for declaration of a service. Glencore submits that Parliament intended that in

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22 *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal [2017] FCAFC 124* [95]-[96], [100]

23 Glencore's August 2018 Submission pp 3-5.

24 Ibid pp 5, 26-29.

25 Ibid p 5; Synergies August 2018 Report pp 71-74.

26 Synergies' August 2018 Report pp 75-82.

27 Glencore's August 2018 Submission pp 5, 32.

28 Ibid pp 27-29.

determining whether or not to recommend revocation of a declaration the Council must have regard to whether there has been any materially changed circumstances, and must then compare the position which would be likely to exist in the future were the declaration to continue against the position if the declaration did not. Glencore then restates its view that there has not been a material change in circumstances and submits that the fact of a change in legislation does not qualify as a material change in circumstances for the purpose of revoking the existing declaration.[29]

4.11 Yancoal provided a submission to the Council on 8 August 2018 (**Yancoal's August 2018 Submission**) in which it submits that the structure and wording of section 44J(1)-(2) suggest that section 44J has two key parts:

- a 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 of the CCA; and
- a restriction on that discretion (the Council *cannot* recommend revocation of a declaration unless…) – namely that revocation cannot be recommended unless the Council is satisfied that the preconditions in either section 44J(2)(a) or (b) are met. [30]

4.12 Yancoal contrasts the wording of the declaration provisions (44F and 44H of the CCA) and the revocation provision (44J of the CCA) and suggests that the use of the word 'may' in section 44J(1) imparts a discretion on the Council to decide whether it is appropriate to recommend revocation of a declaration which is not present when the Council makes a recommendation as to whether the Minister should make a declaration.[31]

4.13 Yancoal also contrasts its suggested *discretionary* approach to applying 44J against the revocation framework applied under the National Gas Laws (section 105 of the National Gas Laws[32]). It notes that the wording of the revocation provisions under the National Gas Law clearly imposes a binary decision making framework on the Council which would require it to recommend revocation if it is not satisfied that the pipeline coverage criteria are met. In contrast, the dramatically different wording of 44J implies that the Council would have discretion not to recommend revocation even it was not convinced of the satisfaction of all of the declaration criteria.[33]

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29 Glencore's October 2018 Submission p 3.

30 Yancoal's August 2018 Submission pp 3, 4.

31 Ibid.

32 See *National Gas (South Australia) Act 2008 (SA)* and mirroring legislation implemented by the Commonwealth, New South Wales, Victoria, Queensland, Tasmania, the Australian Capital Territory, Northern Territory and Western Australia on a modified basis.

33 Yancoal's August 2018 Submission pp 4, 5.

4.14 Yancoal goes on to submit that a discretion is appropriate in the context of revocation because the decision in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[34] (**Pilbara HCA**) is not precedent for there being no discretion in the context of a revocation decision due to the differences in wording between 44F and 44H of the CCA. Yancoal submits that the context of declaration and revocation differ and it is reasonable that once a decision has been made on declaration, reversing it should involve a higher hurdle of demonstrating why it is appropriate to do so.[35]

4.15 NCIG and Anglo American's submissions to the Council on 8 August 2018 (**Anglo American's August 2018 Submission**) provide analysis similar to Yancoal (summarised in paragraphs 4.11 to 4.13) and submit that the Council's evaluation of whether to recommend that the declaration of a service be revoked is not to be determined by any alleged non-satisfaction of the 'declaration criteria' at the time of the recommendation. Rather, the power to recommend revocation is a more open discretion, subject to mandatory consideration of the objects of Part IIIA of the CCA.[36] NSWMC's submission to the Council on 8 August 2018 (**NSWMC's August 2018 Submission**) makes arguments similar to those advanced by Glencore and summarised at paragraph 4.7.[37]

4.16 PNO did not make submissions explicitly addressing how the objects of Part IIIA ought to be incorporated into the assessment of whether the Declaration should be revoked.

Responding to the SOPV

4.17 NSWMC's submission of 4 February 2019 (**NSWMC's SOPV Submission**) continues to advance the view that the Part IIIA test should not be applied as if the test needed to be satisfied at this time.[38]

4.18 NCIG submits that the amendments to criterion (a) implemented in 2017 were not designed to prevent the National Access Regime from applying to monopoly pricing by non-vertically integrated infrastructure providers, such as PNO.[39] The Productivity Commission's 2013 report states: 'Access regulation should cover vertically integrated and vertically separated service providers, as both can affect competition in dependent markets where they have the ability and incentive to engage in monopoly pricing of access.'[40]

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34 [2012] HCA 36.

35 Yancoal's August 2018 Submission pp 5-7..

36 Anglo American's August 2018 Submission pp 2, 3.

37 NSWMC's August 2018 Submission p 9; NCIG's August 2018 Submission pp 3-6.

38 NSWMC's SOPV Submission, p 2.

39 Ibid.

40 Productivity Commission 2013, National Access Regime, Inquiry Report no. 66 at page 71.

4.19 Synergies considers that without more detail, the SOPV gave insufficient consideration to the objects of the Act in the Council's decision.[41]

Council's view on the correct application of section 44J

4.20 Unlike sections 44F(1) and 44F(2), no provision is made for the making of an application for a revocation recommendation and no express requirement is imposed on the Council to make a recommendation. Further, unlike sections 44FA, 44GA, 44GB or 44GC, no provision is made for the manner in which the Council is to conduct its consideration of whether to make a recommendation that a declaration be revoked.

4.21 Under section 44J(2), the Council cannot recommend revocation of a declaration unless it is satisfied that, at the time of its recommendation:

(a) Subsection 44F(1) would prevent the making of an application for a recommendation that the service concerned be declared. Subsection 44F(1) provides that a person may apply to the Council to recommend that the service be declared unless one of the circumstances set out in sub-paragraphs (a)—(e) apply. Therefore, the Council cannot recommend revocation of a service unless it is satisfied that none of these circumstances apply. These circumstances are discussed in section 5 below; or

(b) Subsection 44H(4) would prevent the service concerned from being declared. Subsection 44H(4) provides that the designated Minister cannot declare a service unless he or she is satisfied of all of the declaration criteria for the service. The declaration criteria are set out in section 6, and the Council's views on each of criteria (a) to (d) are set out in sections 7 to 10 respectively.

4.22 In Chapter 11 the Council sets out the Recommendation it arrived at in light of its consideration of the declaration criteria set out in the prior chapters.

4.23 In formulating this Recommendation, the Council has had regard to the objects of Part IIIA.

4.24 Some submissions suggest that a declaration should not be revoked unless there has been a material change in circumstances since the Declaration was made (other than those effected by the Declaration itself). The Council notes that Part IIIA does not require that there has been a material change in circumstances in order to make a recommendation for the revocation of a declaration. The Council does not belive it is appropriate to apply such a test where it has not been prescribed in the legislation. While the Council may have regard to whether circumstances have changed since an earlier declaration decision (both in the markets as well as in the law it must apply), that does not alter the nature and scope of its task under section

[41] Synergies February 2019 Report p 47

44J or impose a 'material change in circumstances' test on the exercise of the Council's power to make a recommendation to the Minister.

4.25 Centrally, the analysis under section 44J involves an assessment at the time of the Council's recommendation. In circumstances where there is an existing declaration made at an earlier time on the same declaration criterion, the analysis may involve a consideration of market changes that may have occurred since the earlier determination. It must also have regard to whether the declaration criterion that are to be applied 'at the time of the recommendation' are different to those that applied in the earlier declaration decision.

4.26 While the Council accepts that market conditions may not have changed significantly since 2015, it considers that the amendments to Part IIIA implemented by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (the **Amendment Act**) represent a significant change to the criteria which apply to the question of whether declaration should be revoked.

5 None of the circumstances set out in subsection 44F(1) apply

5.1 The Council may recommend revocation if, at the time of the making of its recommendation, subsection 44F(1) would prevent the making of an application for declaration.

5.2 Section 44F(1) provides that an application to the Council for a declaration recommendation cannot be made in any of the following circumstances.

(a) the service is the subject of a regime for which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(b) the service is the subject of an access undertaking in operation under Division 6; or

(c) if a decision is in force under subsection 44PA(3) approving a tender process, for the construction and operation of a facility, as a competitive tender process--the service was specified, in the application for that decision, as a service proposed to be provided by means of the facility; or

(d) if the service is provided by means of a pipeline (within the meaning of a National Gas Law)--there is:

(i) a 15-year no-coverage determination in force under the National Gas Law in respect of the pipeline; or

(ii) a price regulation exemption in force under the National Gas Law in respect of the pipeline; or

(e) there is a decision of the designated Minister in force under section 44LG that the service is ineligible to be a declared service.

5.3 These circumstances are readily ascertainable as matters of fact, so, unsurprisingly, the Council received no submissions addressing section 44F(1).

5.4 None of the circumstances in subsection 44F(1) apply. That subsection therefore would not prevent the making of an application for declaration of the Service. Thus, this requirement of subsection 44J(2)(a) is not met.

6 The declaration criteria

6.1 The Council may recommend revocation if subsection 44H(4) would prevent the service concerned from being declared at the time of the recommendation.

6.2 Subsection 44H(4) provides that the Minister cannot declare the service unless he or she is satisfied of all of the declaration criteria for the service. The declaration criteria, set out in subsection 44CA(1) of the CCA, are that:

(a) 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 (**criterion (a)**)—see Chapter 7

(b) 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) (**criterion (b)**)—see Chapter 8

(c) the facility is of national significance, having regard to:

(i) the size of the facility, or

(ii) the importance of the facility to constitutional trade or commerce, or

(iii) the importance of the facility to the national economy

(**criterion (c)**)—see Chapter 9

(d) access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest (**criterion (d)**)—see Chapter 10.

Declaration criteria (a) and (d) focus on the effect of declaration on competition and the public interest

6.3 Criteria (a) and (d) require an examination of the effects on competition in dependent markets and the public interest of 'access (or increased access), on reasonable terms and conditions, as a result of a declaration.' The new test in criterion (a) is significantly different to that which applied prior the Amendment Act as interpreted by the Full Federal Court in *Sydney Airport* in 2006 and in the Port of Newcastle matter in 2017. It requires an assessment of whether and the extent to which access on reasonable terms and conditions from declaration is likely to impact on competition in dependent markets and on the public interest, when compared to the terms of access likely without declaration.

6.4 The words 'on reasonable terms and conditions, as a result of a declaration' have been added to criteria (a) and (d)[42] since the Declaration in 2016 and the subsequent appeals by Glencore and PNO heard by the Tribunal[43] and the Federal Court.[44]

6.5 These additional words focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.[45] This requires a comparison of two future scenarios: one in which the Service is declared and access to the Service is through declaration on reasonable terms and conditions, and one in which the Service is not declared and any access to the Service is in the absence of declaration. Through this exercise, the Council examines how the nature and extent of access will change as a result of declaration before considering the possible impact of this change on the state of competition in dependent markets (for criterion (a)) and in promoting the public interest (for criterion (d)).

6.6 Before the Declaration was made, coal exporters and other parties already had access to the Service. PNO states in its July 2018 submission that it currently provides open access to the Service and will continue to do so regardless of whether the Service is declared.[46] The Council considers it likely that access to the Service will be provided with or without declaration.

6.7 The assessment of criteria (a) and (d) therefore involves a comparison of a likely future where the Service is declared and access (or increased access) to the Service is provided on reasonable terms and conditions against a likely future where no declaration is in place.

6.8 The Council considers that when making judgements about likely future conditions and the environment for competition it is necessary to look beyond short-term static effects. In particular, it is appropriate to consider the effects of declaration on investment incentives in dependent markets and for the service provider, and the effects of foreseeable changes in technology and/or market conditions. However, there can be uncertainty about incentives and/or market conditions in the longer term.

6.9 For the purposes of the current consideration, the Council considers it appropriate to have regard to the full remaining term of the Declaration, that is, up to 7 July 2031 (**the Relevant Term**).

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42 Previously subsections 44H(4)(a) and 44H(4)(f) of the CCA, respectively. Amended by the *Amendment Act.*

43 See *Application by Glencore Coal Pty Ltd [2016] ACompT 6* and *Application by Glencore Coal Pty Ltd (No 2) [2016] ACompT 7.*

44 See *PNO v Tribunal.*

45 2017 EM *at paragraph 12.19.*

46 PNO's July 2018 Submission p 16.

Consideration given to the ACCC's arbitration determination on Glencore's terms of access to the Service

6.10 The ACCC's consideration of the Glencore-PNO Arbitration concluded with the issue of a Determination on 18 September 2018. The ACCC's Determination is currently the subject of two applications for review to the Tribunal which have been heard but not decided.[47]

6.11 Interested parties provided submissions to the Council while the Glencore-PNO Arbitration was underway; after the ACCC Determination was released; and after the SOPV was published, as to whether the Council should have regard to the ACCC Determination and, if so, the manner in which it should be treated. Summaries of the submissions received on this issue and a description of the manner in which the Council has had regard to the ACCC Determination are set out below. [48]

Submissions

Before the ACCC arbitration determination was issued (pre 8 October 2018)

6.12 PNO's July 2018 Submission notes that arbitration by the ACCC is a confidential dispute resolution process between named parties and is not a regime whereby the ACCC has general price or terms oversight, or the ability to set general terms of access for all access seekers. PNO also submits that there is no requirement that all access seekers be afforded the same terms of access and notes that price discrimination is expressly permitted where it aids efficiency in accordance with the pricing principles in section 44ZZCA of the CCA.

6.13 Yancoal's submission to the Council on 27 July 2018 (**Yancoal's July 2018 Submission**) states that the capacity for it and other stakeholders to make informed submissions to the Council would be prejudiced by not having transparency regarding the Glencore-PNO Arbitration. Yancoal submits that any draft or final determination issued by the ACCC in that arbitration would be highly relevant to criteria (a) and (d) because such a determination would provide very strong evidence of the 'access on reasonable terms and conditions' that would be delivered if the Declaration continued and would illuminate issues such as the regulatory asset base and rate of return to PNO that the ACCC considers appropriate. Yancoal also submits that the ACCC's Determination would be important for informing the state of dependent markets that would result if Glencore receives access to terms set by the ACCC and the Declaration was

[47] Australian Competition Tribunal File Nos. ACT 2 and ACT 3 of 2018, orders dated 6 December 2018; Australian Competition Tribunal File Nos. ACT 2 and ACT 3 of 2018, orders dated 2 April 2019.

[48] PNO's July 2018 Submission p 14.

subsequently revoked (in which case Glencore would retain access to the terms set by the ACCC). [49]

6.14 PWCS' submission to the Council on 6 August 2018 (**PWCS' August 2018 Submission**) notes that PWCS considers the outcome of the Glencore-PNO Arbitration is extremely important as it will determine a regulated asset base that PWCS anticipates will theoretically apply for all coal industry exporters.[50]

6.15 Yancoal's August 2018 Submission states that, while access terms resulting from the Glencore-PNO Arbitration will not directly apply to other users of the Service, it is very likely that, if declaration of the Service continued, the ACCC would apply the same methodology in determining future access disputes. Accordingly, when considering further access disputes, the methodology for determining 'regulated' access prices would become applicable to other users of the Service as well. Yancoal restated its view that any draft or final determination by the ACCC appears highly relevant to criteria (a) and (d). [51]

6.16 Anglo American's August 2018 Submission states that without access to the material filed in the Glencore-PNO Arbitration, the Council is lacking critical information relevant to its consideration of whether it is appropriate to recommend revocation of the Declaration. Anglo American submits that it is not possible to assess the impact that declaration of the Service has on competition (i.e. criterion (a)) without having regard to the ACCC's Determination of the Glencore-PNO Arbitration, as it is considers regard should be had to a material increase in competition arising from the terms and conditions under the ACCC's Determination.[52]

6.17 NSWMC's August 2018 Submission states that the ACCC's Determination of the Glencore-PNO Arbitration is highly relevant to any recommendation made by the Council in respect of the Service, as the outcome of the arbitration demonstrates the necessity for declaration of the Service. NSWMC further considers a determination was likely to produce a regulated asset base and a price path that would promote certainty for investment in the Hunter Valley coal industry. NSWMC submits that these facts will inform the terms and conditions of access with and without declaration, and an assessment of the promotion of a material increase in competition.[53]

6.18 The ACCC's submission to the Council on 8 August 2018 (**ACCC's August 2018 Submission**) notes that the outcomes of its consideration of the Glencore-PNO

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49 Yancoal's July 2018 Submission pp 1, 2.

50 PWCS August 2018 Submission p2.

51 Yancoal's August 2018 Submission pp 16, 17.

52 Anglo American's August 2018 Submission pp 4, 11.

53 NSWMC's August 2018 Submission p 11.

Arbitration may be relevant to the Council's assessment of the effects of declaration of the Service.[54]

6.19 Glencore's August 2018 Submission notes PNO's submission that reasonable terms and conditions resulting from declaration of the Service would not be more favourable than PNO's current charges because 'port charges are already set, and will continue to be set, so that they take into account the matters that are required to be taken into account in any arbitration relating to access to a declared service, including the mandatory considerations in s. 44X of the CCA'. Glencore submits that the result of the Glencore-PNO Arbitration will reveal whether that claim is false.[55] Synergies' August Report, which accompanied Glencore's August 2018 Submission, submits that the ACCC's Determination of access charges in the Glencore-PNO Arbitration can be expected to constrain PNO's dealings with other users, as PNO will know the likely outcome of any subsequent arbitrations.[56]

6.20 PNO's submission to the Council on 17 September 2018 (**PNO's September 2018 Submission**) states that there is no basis to conclude that PNO can adopt a previous determination in a subsequent dispute with another user of the Service, and restates that Part IIIA is a bilateral dispute resolution mechanism, not a general price setting regime.[57]

6.21 NCIG's submission to the Council on 5 October 2018 (**NCIG's October 2018 Submission**) states that in assessing the impact of declaration on dependent markets, the Council must make an assessment of the likely terms of access with and without declaration. NCIG submits that the Council has insight into the likely port pricing that would occur without declaration of the Service (based on PNO's pricing behaviour before the Declaration was made); but can only speculate as to what terms of access would be with declaration of the Service and following arbitration by the ACCC. NCIG submits that information about the terms of access which the ACCC proposes to set provides critical insight into the likely future with and without declaration and, in turn, would inform the Council's assessment as to whether criterion (a) is satisfied.[58]

6.22 Yancoal's submission to the Council on 5 October 2018 (**Yancoal's October 2018 Submission**) refers to the ACCC's arbitration determination on the Glencore-PNO Arbitration as 'what is currently the best evidence of the impact of declaration'. Yancoal also references Glencore's argument that the result of the Glencore-PNO Arbitration will resolve whether the reasonable terms imposed on PNO as a result of declaration are in fact more favourable and submits that if the terms resulting from the arbitration are materially more favourable it is difficult to see how

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54 ACCC's August 2018 Submission p 1.

55 Glencore's August 2018 Submission pp 3, 4, 21, 22.

56 Glencore's August 2018 Submission p 22, Synergies' August Report pp 13, 14.

57 PNO's September 2018 Submission p 9.

58 NCIG's October 2018 Submission p 9.

criterion (a) could not be found to be satisfied. Yancoal responds to PNO's September 2018 Submission (see paragraph 6.20) that where there is a single access service using identical assets to provide the service to all users, it is difficult to see how the ACCC's Determination in relation to pricing would not provide a set of principles that would not be equally applicable to future access determinations (in which the ACCC is the arbitrator).[59]

6.23 Glencore's October 2018 Submission states that the ACCC's assessment of the public interest under section 44X(1)(b) of the CCA in the context of the Glencore-PNO Arbitration will be highly relevant to the Council. Glencore also responds to PNO's September 2018 Submission (see paragraph 6.20), arguing that the terms and conditions of access that have been set by the ACCC through the arbitration, not just as to price but also access terms (including period of time of access), result from principles that would apply to other access seekers. In turn, this would provide a real constraint on PNO in the future where declaration of the Service continues.[60]

After the ACCC's arbitration determination was issued (between 8 October 2018 and 19 December 2018)

6.24 NSWMC provided a further submission to the Council on 29 October 2018 (**NSWMC's Arbitration Submission**) in which it submits that the ACCC's Determination demonstrates what reasonable terms and conditions of access look like in terms of both price and non-price terms. NSWMC submits that the terms that Glencore receives under the ACCC Determination are materially better than those provided to other users of the Service by PNO, demonstrating that PNO's pricing is currently materially higher than it would be in an efficient (non-monopolist) market. NSWMC submits that that ACCC has noted that the principles set out in the ACCC Determination would apply to others.[61]

6.25 Yancoal provided a further submission to the Council on 29 October 2018 (**Yancoal's Arbitration Submission**) in which it restates the view put in its submission to the Council on 27 July 2018 (see paragraph 6.13). It submits that the ACCC Determination provides Glencore with very significant reductions in the levels of the Navigation Service Charge and certainty as to the methodology to be utilised to calculate the charge up to 7 July 2031. Yancoal submits that the ACCC Determination is highly relevant to the likely state of dependent markets and public interest outcomes considered in criterion (a) and criterion (d) because the ACCC Determination represents the 'access on reasonable terms and conditions as a result of declaration' that both of these criteria refer to. Yancoal notes that it may be typical for the Council to have to apply the future with and without test without knowing the 'reasonable terms and conditions', but in the present circumstances the ACCC Determination provides clear evidence as to what those reasonable terms

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59 Yancoal's October 2018 Submission p 3.

60 Glencore's October 2018 Submission pp 4-7.

61 NSWMC's Arbitration Submission pp 4-6.

and conditions would likely be. Yancoal also submits that the building block methodology **(BBM)** used by the ACCC to determine appropriate access pricing for Glencore would be equally applicable to others users of the Service because the required infrastructure is the same; the operating arrangements are the same; the ACCC would continue to be arbiter for future access disputes; and there is nothing in the ACCC's Statement of Reasons that suggests a different result would apply to other users.[62] Yancoal also notes that the ACCC's Arbitration Report states:

> … while any potential future dispute between an access seeker and PNO in relation to access to the Service would need to be decided on its merits, the ACCC considers that the approach taken in the current dispute provides a useful framework and guiding principles in the parties' negotiations.[63]

6.26 Glencore provided a further submission to the Council on 29 October 2018 (**Glencore's Arbitration Submission**) in which it submits that the ACCC Determination defeats PNO's claim that there would not be a material difference in its pricing in futures with or without declaration as the terms set by the ACCC are approximately 20% lower than the charges imposed by PNO.[64] Glencore also notes that in the Glencore-PNO Arbitration, PNO proposed a Navigation Service Charge of $1.36 per Gross Tonne **(GT)**. Glencore submits PNO is likely to increase its Navigation Service Charge to this price in the absence of declaration.[65] Glencore submits the ACCC Determination regarding reasonable access terms and conditions of access demonstrates that the terms that would otherwise be imposed by PNO absent declaration are likely to be unreasonable.[66] Glencore notes that the ACCC Determination reaches the conclusion that 'the terms of Glencore's access to the Service can promote competition in related markets, including participants in the Hunter Valley Coal chain'[67] and submits that the ACCC, as Australia's competition agency, has a deep knowledge of the coal industry and is well placed to provide an independent regulatory assessment of the promotion of competition which should be respected.[68] Glencore submits that the ACCC is of the view that the terms and conditions set by the ACCC Determination facilitate effective access to the Service and has the potential to increase the efficiency of the Australian-based coal producers, thereby enhancing the welfare of Australians, with no adverse impact on PNO and this view should be respected by the Council in considering criterion (d).[69]

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62 Yancoal's Arbitration Submission pp 2, 3.

63 ACCC, *Arbitration Report – Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, 18 September 2018 at 2.*

64 Glencore's Arbitration Submission p 2.

65 Ibid.

66 Ibid pp 3, 4.

67 ACCC Determination Statement of Reasons p 23.

68 Glencore's Arbitration Submission p 4.

69 Ibid p 5.

6.27 NCIG provided a further submission to the Council on 29 October 2018 (**NCIG's Arbitration Submission**) in which it submits that the ACCC Determination provides an insight into the future state of the world with declaration. NCIG submits that PNO's submission that its charges would not be materially different in futures with or without declaration is debunked by the discount applied in the ACCC Determination, which NCIG submits is evidence that pricing of the Service is likely to be substantially lower with declaration. NCIG also submits that the ACCC Determination clearly outlines the ACCC's views in relation to a large number of issues which are likely to be common issues in any future dispute (e.g. issues relating to asset valuation). In the absence of a material change in circumstances, NCIG submits that the ACCC would adopt substantially the same approach to determining the terms of access in any future dispute. [70]

6.28 PNO provided a further submission to the Council on 29 October 2018 (**PNO's Arbitration Submission**) in which it submits that the ACCC Determination is not relevant to the Council's consideration of whether to recommend revocation, and to the extent that it is relevant, it supports a recommendation that the declaration of the Service be revoked.[71] PNO submits that the only possible relevance of the ACCC Determination is the possibility that it provides insights on what constitutes 'reasonable terms and conditions' for the purpose of criterion (a). PNO submits that:

(a) Neither PNO nor Glencore consider the ACCC Determination provides insight into reasonable terms and conditions as they have both applied for the result of the Glencore-PNO Arbitration to be re-arbitrated before the Tribunal. PNO considers that if the Council undertook its assessment of whether to recommend revocation on the basis that the ACCC Determination represents 'reasonable terms and conditions', it would be pre-empting the outcome of the Tribunal proceedings and constitute a misapplication of the competition test and revocation process.[72]

(b) PNO quotes paragraph 12.21 of the explanatory memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (the **2017 EM,** see paragraph 6.42) and submits that the interpretation of what constitutes 'reasonable terms and conditions' is not intended to be guided by the outcome of arbitrations; it is meant to be made objectively, having regard to the aims of Part IIIA of the Act whereas the Glencore-PNO Arbitration outcome is specific to the parties. PNO submits this reflects the fact that Part IIIA establishes a bilateral dispute resolution mechanism rather than a general price setting regime.[73]

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70 NCIG's Arbitration Submission pp 2, 3.

71 PNO's Arbitration Submission p 2.

72 PNO's Arbitration Submission p 2.

73 Ibid p 3.

(c) The ACCC Determination has a narrow scope in which it is applicable (PNO submits that it is uncertain whether Glencore has used the Service in a manner that would fall within the scope of the ACCC Determination), meaning it is of no practical relevance to the application of the competition test.[74]

6.29 PNO's Arbitration Submission states that even if the ACCC Determination is applied more broadly, it would not affect the state of competition in the relevant dependent markets for the reasons set out by PNO in its discussion of criterion (a) (see Chapter 7, below).[75] The report prepared by HoustonKemp Economists (**HoustonKemp**) titled 'Relevance for revocation application of ACCC's determination' (**HoustonKemp's Arbitration Report**) accompanying PNO's Arbitration Submission states that the ACCC Determination reduces the Navigation Service Charge payable (for eligible ships carrying Glencore coal) by around nine cents per tonne of coal exported, accounting for between 0.1 and 0.2 per cent of the total cost of coal.[76]

6.30 The ACCC provided a further submission to the Council dated 29 October 2018 (**ACCC's Arbitration Submission**) stating that it is appropriate for the Council to have regard to the ACCC Determination in considering whether to recommend revocation of the Declaration. This is because the outcome of the Glencore-PNO Arbitration will inform the Council's interpretation of the 'with and without declaration test' in considering criterion (a). The ACCC submits that its Determination reflects an assessment that PNO's current charging is not appropriate or reasonable, having regard to the criteria in Part IIIA of the Act. The ACCC submits that its Determination provides the best and most recent independent assessment of what constitutes 'reasonable terms and conditions' of access to the Service, as compared to what the service provider considered reasonable.[77] The ACCC notes that its Determination is subject to appeal by both PNO and Glencore, meaning that the terms could change on appeal in favour of either the access seeker or the access provider. However, the ACCC considers that, while the circumstances of a specific access seeker at a point in time are different from those for the broader market in the long run, the Determination as it stands, provides the clearest picture of how the conditions or environment for competition may be promoted by declaration.[78] The ACCC also notes that other access seekers may refer to the ACCC Determination in their own negotiations with PNO and may seek arbitration themselves, or PNO may adopt lower charges or alter terms and conditions for users more generally in reflection of the arbitration determination.[79]

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74 Ibid.

75 Ibid p 4.

76 HoustonKemp's Arbitration Report p 4.

77 ACCC Arbitration Submission p 3.

78 Ibid p 4.

79 Ibid p 4.

Responding to the SOPV

6.31 The ACCC provided a further submission to the Council dated 6 February 2019 (**ACCC's SOPV Submission**) in which the ACCC submits that the 2017 EM would not prevent the Council from considering the result of the Glencore-PNO Arbitration; and that it is appropriate for that outcome to be used to inform the Council's view as to what is likely to occur in the future with declaration in place. The ACCC continues to consider the outcome of the Glencore-PNO Arbitration represents the best and most recent independent assessment of what constitutes reasonable terms and conditions for the Service as a result of declaration. The ACCC submits that not giving sufficient weight to the likely terms and conditions with declaration (as informed by the ACCC Determination) has meant that the Council's analysis of the impact of declaration on dependent markets is incomplete.[80]

6.32 Similarly, Glencore provided a submission responding to the SOPV dated 4 February 2018 in which Glencore submits that the Council's SOPV did not give proper consideration or weight to the ACCC Determination, as that report went to lengths to establish principles that would apply to any other access seeker.[81] NSWMC's SOPV Submission states that NSWMC also considers that the ACCC's views, being those of an independent authority with industry familiarity, should have been given more weight by the Council.[82]

6.33 Synergies' provided a report with Glencore's SOPV Submission titled 'Port of Newcastle: Assessment of revocation application by Port of Newcastle Operations Pty Ltd' (**Synergies' February 2019 Report**). This states that the ACCC's Determination, at the very least, demonstrates that the mere availability of access to arbitration provides the very real prospect of lower, more cost-reflective prices being achieved in a future where the Declaration continues to apply compared to the situation where the Declaration is revoked.[83]

6.34 The ACCC submits that the Council should have used the Navigation Service Charge set by the ACCC Determination, $0.6075 per Gross Tonnage (**GT**)[84], as the cost of accessing the Service that would result in a likely future with declaration.[85]

6.35 Glencore and NSWMC made submissions to the effect that the Council should obtain and have regard to the cost modelling data provided by PNO to the ACCC as part of the Glencore-PNO Arbitration.[86] These parties submit that this cost modelling would better inform the Council as to the level and efficiency of PNO's future pricing.

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80 ACCC's SOPV Submission pp 2-4.

81 Glencore's SOPV Submission pp 4, 6.

82 NSWMC SOPV Submission p 2.

83 Synergies' February 2019 Report pp 2, 3, 14-25.

84 Gross Tonnage is a measure of a ship's internal volume.

85 ACCC's SOPV Submission p 4.

86 Glencore's SOPV Submission pp 1, 2; NSWMC's SOPV Submission p 3.

6.36 PNO's submission dated 4 February 2019 (**PNO' SOPV Submission**) submits that Part IIIA clearly delineates the roles and functions of the NCC and the ACCC, and it is apparent that it was not Parliament's intent for the ACCC to have any role in the declaration and revocation processes. The ACCC's involvement in the revocation process, particularly its submission arguing against revocation, conflicts with its role as the independent arbiter of access disputes arising under Part IIIA.[87]

How the Council has had regard to the ACCC's arbitration

Consideration given to ACCC arbitration determination in relation to criterion (a)

6.37 Criterion (a) requires the Minister to consider whether 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 a dependent market.

6.38 The Council considers it is appropriate to undertake its assessment of criterion (a) without forming a view on the outcomes of any Part IIIA negotiation or arbitration which may be underway or concluded, such as the Glencore-PNO Arbitration. That is not to say that it is irrelevant to the current assessment. However, the Council does not consider it necessary or appropriate to form a concluded view as to whether the terms set in the ACCC Determination are 'reasonable terms and conditions, as a result of a declaration' contemplated in criterion (a).

6.39 Interested parties have suggested that the Council might have regard to the ACCC Determination as a real world example (or the best and most recent assessment) of 'reasonable terms and conditions'. The Council considers that the ACCC Determination reflects the ACCC's appraisal of reasonable terms and conditions for Glencore's access to the declared service provided by PNO at a point in time (rather than a definitive and final assessment of what constitutes 'reasonable terms and conditions'). However, the Council also notes that this determination is the subject of an appeal process, and a concluded view on the merits of this determination has not been made at the time of making this recommendation. The Council has therefore had regard to it only in broad terms as an example of the type of decision that can result from an arbitration under Part IIIA. The Council has also considered the range of disputation between Glencore and PNO with regard to charges for the Service in the arbitration process as indicative of the possible range within which charges for the Service might be set in an arbitration in a future with declaration of the Service. The Council has not needed to rely upon the specific terms of access that the ACCC considered appropriate in order to reach a conclusion on criterion (a).

[87] PNO's SOPV Submission pp 4, 5.

6.40 The Council's approach to the relevance of the arbitration when applying criterion (a) is founded on the following analysis of the legislative framework:

(a) Part IIIA prescribes that the negotiate/arbitrate regulatory regime that results from declaration is imposed following a declaration decision by the Minister that is forward-looking

(b) That declaration decision is: to be made by the Minister on the recommendation of the Council; on consideration of the declaration criteria; and (in the usual course) in the absence of any Part IIIA arbitration decision concerning the service in question

(c) On its face, the with and without test relating to a consideration of access on reasonable terms and conditions as a result of declaration, is an objective test made without regard to specific arbitration outcomes

(d) In this matter we are dealing with revocation, in circumstances where we have a (partially complete) arbitration process based on an earlier declaration decision. Thus, there is an opportunity to have regard to any arbitration outcome in making the necessary forward-looking assessment referred to above

(e) However, that does not change the objective character of the test. Moreover, there are inherent risks in applying too much weight on the arbitration outcome in a specific bilateral dispute, especially when specific issues in other disputes may or may not be equivalent. This risk is further compounded where (as here) the arbitration remains incomplete - in the sense that the matter is on review in the Tribunal.

6.41 This approach is supported by paragraphs 12.20 and 12.21 of the 2017 EM. Paragraph 12.20 of the 2017 EM states that:

> *[Criterion (a)] requires a comparison of two future scenarios: one in which the service is declared and more access is available on reasonable terms and conditions, and one in which no additional access is granted. That is a comparison of either: no access without declaration compared with some access as a result of declaration; or some access without declaration to additional access as a result of declaration. In comparing these two scenarios, it must be the case that it is the declaration resulting in access (or increased access) on reasonable terms and conditions that promotes the material increase in competition.*

6.42 Paragraph 12.21 of the 2017 EM clarifies how 'reasonable terms and conditions' should be considered, stating:

> *What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the*

detriment to competition in dependent markets that may otherwise be caused by the exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility.

6.43 The 2017 EM reinforces the Council's view that it is not Parliament's intent to require the Council or the Minister to form a view on the specific outcomes of a Part IIIA negotiation or arbitration when determining whether declaration of a service is appropriate.

6.44 Interested parties have also submitted that because PNO proposed a Navigation Service Charge of $1.36 per GT in the course of the Glencore-PNO Arbitration, the Council should consider that that price (or a higher price) would apply to the Service in the future without declaration.

6.45 The Council is also conscious that in the Glencore-PNO Arbitration, Glencore's proposed navigation service charge was $0.41 per GT whereas PNO's submitted $1.36 per GT was appropriate.[88] While the Council does not consider that the ACCC's determined price of $0.61 per GT should necessarily be accepted as a definitive and final assessment of what constitutes reasonable terms and conditions of access in a future with declaration of the Service for the reasons set out in paragraph 6.39, the Council is mindful that the BBM methodology applied by the ACCC in the Glencore-PNO Arbitration could be applied in other disputes if the Declaration were to remain in place. On this basis, the Council considers it reasonable to think that the navigation service charge that might be expected to result in a future with declaration of the Service may be close to, if not within, the range of $0.41 – 1.36 per GT.

6.46 The ACCC has expressed a view to the effect that the terms and conditions awarded to Glencore through the ACCC Determination can promote competition in dependent markets. The Council has had regard to the ACCC's views in undertaking its own analysis of the possible effect that terms of access might have on competition in dependent markets. The Council's approach to assessing criterion (a) is set out in Chapter 7, below.

Consideration given to ACCC arbitration determination in relation to criterion (d)

6.47 Criterion (d) requires the Minister to consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the Service would promote the public interest.

6.48 The Council considers that the future with and without declaration concept embodied in criterion (d) is materially similar to that in criterion (a) and, like criterion (a), does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. As such, in its assessment of criterion (d), the Council has noted the ACCC Determination, but has not treated the

[88] ACCC Determination: Statement of Reasons p 7.

outcome of the ACCC Determination as a definitive statement of what reasonable terms and conditions are for the purpose of the Council's task.

6.49 The Council's note at paragraph 6.45 is equally applicable in its consideration of criterion (d).

6.50 The Council's approach to assessing criterion (d) is set out in Chapter 10 below.

Queensland Competition Authority's declaration reviews in relation to Aurizon Network, Queensland Rail and DBCT Management

6.51 On 18 December 2018, the Queensland Competition Authority (QCA) released draft recommendations in its reviews of whether the services provided by Aurizon Network, Queensland Rail and DBCT Management should be declared when the existing declarations of those services expire on 8 September 2020.

6.52 In making these recommendations, the QCA has applied the assessment criteria in section 76 of the *Queensland Competition Authority Act* 1997 (Qld) (QCA Act). These assessment criteria are substantially similar to the declaration criteria applied by the Council under subsection 44CA(1) of the CCA.

6.53 The QCA's draft recommendations are that the coal handling and below-rail service provided by DBCT Management and Aurizon Network respectively be declared, while the below-rail service provided by Queensland Rail be declared in part.

6.54 At the time of the Council making its Recommendation, the QCA had not issued its final recommendations. However, given that both the DBCT service and the shipping channel services provided by PNO relate to the handling of coal at an export terminal, the Council considers it appropriate to note the different positions reached in the QCA's draft recommendation and the Council's final recommendation.

QCA's draft recommendation in relation to the DBCT service

6.55 In its draft recommendation that the DBCT service should be declared, the QCA found that criteria (a) and (d) in section 76 of the QCA Act (which correspond to the criteria applied by the Council in this recommendation) were satisfied.

6.56 In relation to criterion (a), the QCA's draft findings were:

- DBCT Management has an ability and incentive to exercise market power, such that in the absence of declaration, efficient entry to the coal tenements market would be discouraged and there will be a material impact on competition in that market.
- Access (or increased access) to the DBCT service on reasonable terms and conditions as a result of declaration would promote a material increase in competition in the coal tenements market.

6.57 In relation to criterion (d), the QCA's draft findings were:

- Access (or increased access) to the DBCT service on reasonable terms and conditions, as a result of declaration would promote the public interest.
- The QCA has balanced the costs and benefits and considers, among other things, that:
    - Declaration is likely to have a positive effect on investment in other markets, particularly in the coal tenements market.
    - The administrative and compliance costs incurred by DBCT Management under declaration are not excessive, as many of these costs would have to be incurred in the absence of declaration. DBCT Management can manage compliance costs associated with any undertaking at any time by proposing amendments to the QCA.
    - There are efficiency impacts if new (and more efficient) users are crowded out from the upstream tenements market.

6.58 The Council understands the QCA's draft view to be that access to the DBCT service in a future without declaration would likely create a materially uneven playing field between existing users and potential entrants in the market for coal tenements in the Hay Point catchment region, given:

- the existence of evergreen existing user agreements; and
- DBCT Management's discretion in providing access, including its stated intent to provide access to capacity based on users' willingness to pay.

Differences between the Newcastle shipping channel service and the DBCT service

6.59 The Council considers that the different conclusions reached by it and the QCA are likely connected to the differences between the two services. In particular:

- There are no evergreen existing user agreements at the Port of Newcastle.
- Existing capacity at Dalrymple Bay is fully contracted (and is likely to remain so in the future). This means it may have an incentive to deny access to other potential users in the future and, absent any investment in further capacity in the future, has no ability to increase volumes through its port. In contrast, there is substantial surplus capacity at the Port.
- The QCA considers that DBCT Management proposes to treat new and existing mines differently (including future users paying more than existing users) and, therefore, will be favouring some producers over others for reasons other than their efficiency. As noted in paragraph 7.146, PNO has (with the exception of those charges set in the ACCC Determination) not set different charges for exporters of coal in the past;

and there is no evidence before the Council that it intends to do so in the future.

- Terminal charges at Dalrymple Bay are significantly higher than channel charges at the Port; and are likely to represent a significantly greater proportion of the price of coal in the export market(s).

6.60 The Council considers that these differences are sufficiently significant so as to explain a difference in incentives for PNO and DBCT Management; and are important factors in the Council reaching different views with respect to whether declaration of the Service would be likely to meet criteria (a) and (d) in this matter.

7 Material promotion of competition – criterion (a)

7.1 Subsection 44CA(1)(a) of the CCA (**criterion (a)**) requires 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.

7.2 Several interested parties have provided submissions on how the Council should apply criterion (a). A summary of submissions as to the proper approach to applying criterion (a); a description of the approach taken by the Council; and the Council's application of criterion (a) are detailed below.

Submissions on criterion (a)

Before the SOPV was issued

7.3 PNO submits that the current form of criterion (a), as varied by the Amendment Act, puts the focus on the effect of declaration and, quoting Edelman J at the hearing of PNO's High Court special leave application, notes it 'effectively reverses the result of the Full Court in *Sydney Airport'*.[89]

7.4 PNO submits that under the new criterion (a) test, where access to the service is already provided and will continue to be provided without declaration, the question is whether increased access, on reasonable terms and conditions, as a result of 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. This is, in substance, the criterion (a) test (as it then stood) applied by the Council, the Minister and the Tribunal (in its consideration of 'Issue 2', as described at paragraph 35(2) of its judgement)[90] when first considering whether to declare the Service.[91]

7.5 PNO submits that this interpretation of criterion (a) is confirmed by the supplementary materials related to the new criterion (a), including paragraphs 12.18 -12.20 of the 2017 EM.[92]

7.6 PNO also provides submissions on the approach to interpreting 'reasonable terms and conditions' which is referred to in criteria (a) and (d), noting that the 2017 EM explains 'reasonable terms and conditions' as:

> ...an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes

[89] *Port of Newcastle Operations Pty Ltd v The Australian Competition Tribunal & Ors* [2018] HCATrans 55 (23 March 2018).

[90] *Re Glencore,* paragraphs 35(2) and paragraphs 122 to 158.

[91] PNO's July 2018 Submission p 13.

[92] Ibid p 18.

> of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the detriment to competition in dependent markets that may otherwise be caused by the exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility. [93]

7.7 The ACCC submits that the proper construction and application of criterion (a) is of considerable public importance and is particularly important now as this is the first consideration of the amended declaration criteria since the passage of the Amendment Act. [94]

7.8 The ACCC submits that the Amendment Act changes criterion (a)'s emphasis from assessing the effects of access, to assessing the effects of declaration and may mean that declaration is now less likely where a bottleneck facility owner is already providing some level of access without declaration. The ACCC also submits that if the Council does not conduct a proper application of whether criterion (a) is satisfied, it risks raising the declaration threshold and may reduce infrastructure owners' incentives to negotiate in good faith and provide access on reasonable terms and conditions to avoid declaration. [95]

7.9 The ACCC made submissions as to the legal and economic principles that it considers relevant to the proper application of criterion (a). In relation to relevant legal principles, the ACCC submits:

(a) Competition is a process determined by the nature and extent of rivalry in a given market. The extent of competition is the outcome of the process of competition.

(b) 'Promoting competition' does not mean measuring quantifiable increases in competition or the state of competition, but expresses a more flexible idea of creating the conditions or environment for improving competition from what it would otherwise be.

(c) Criterion (a)'s forward looking comparison of the future 'with or without' requires consideration of competition in dependent markets where the service is declared and there is potential recourse to arbitration by the ACCC compared to a situation where there is no potential recourse over the medium-to-long term.

(d) The existing conditions and environment for competition in the dependent markets may be relevant to establishing likely future conditions and the environment for competition, but this is not necessarily always the case. [96]

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93 2017 EM at paragraph 12.21.

94 ACCC's August 2018 Submission pp 1, 3.

95 Ibid p 3.

96 Ibid p 4.

7.10 Yancoal and NCIG acknowledge that the wording of criterion (a) is different from that interpreted by the Tribunal in *Re Glencore*. However, the previous law in relation to the meaning of 'would promote a material increase in competition' remains the same.[97]

7.11 Ports Australia's submission dated 8 August 2018 (**Ports Australia's August 2018 Submission**) states that the legislative amendments brought about by the Amendment Act focus the test on the effect of declaration rather than access. When comparing the 'future with and without declaration' no benefit is gained through declaration as the access is the same under both scenarios. Further, Ports Australia submits that declaration would not necessarily result in improved terms and conditions of access through the arbitration process. [98]

7.12 Shipping Australia's submission dated 8 August 2018 (**Shipping Australia's August 2018 Submission**) states that the new criterion (a) puts the focus on the effect of declaration and regard should be had to existing and likely future usage of the Service without declaration. [99]

7.13 In its October 2018 Submission, Yancoal reiterates its views on the proper interpretation of criterion (a) as set out in its initial submission, and strongly agrees with the ACCC's submissions in relation to the interpretation of criterion (a). In particular, Yancoal submits that consideration needs to be given to the competitive environment over the medium-to-longer term, and how that is impacted by the certainty of reasonable terms created by declaration or the uncertainty and likely investment hold-up which will otherwise apply.[100]

7.14 Anglo American submits that the Declaration has not been in place for long enough to have established a meaningful counterfactual (i.e. the effect of declaring the Service) for the purpose of assessing criterion (a).[101]

7.15 Glencore's October 2018 Submission states that the Council must not determine the question of whether to recommend revocation of the Declaration in the manner suggested by PNO as if a declaration of service was sought now. Glencore submits that the Council must have regard to whether there has been any material change in circumstances and must then compare the position in the future with the Declaration continuing against the future if the Declaration did not. Glencore also submits that a change in legislation does not qualify as a material change in circumstances for the purposes of revoking the existing Declaration.[102]

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97 Yancoal's August 2018 Submission p. 9; NCIG's August 2018 Submission pp 8-9.

98 Port Australia's August 2018 Submission pp 2, 3.

99 Shipping Australia's August 2018 Submission p 6.

100 Yancoal's October 2018 Submission pp 2, 5.

101 Anglo American's August 2018 Submission p 4.

102 Glencore's October 2018 Submission p 3.

Responding to the SOPV

7.16 NSWMC, Pacific National, Synergies and NSWMC note that the SOPV differs from the analytical framework applied by the QCA.[103]

7.17 The ACCC's SOPV Submission notes that the SOPV has regard to the Navigation Service Charge PNO submitted to the ACCC in the Glencore-PNO Arbitration ($1.36 per GT) and Synergies' submission that the Navigation Service Charge could rise as high as $1.64 per GT, and refers to these figures in its counterfactual of a future without declaration. However, the ACCC submits that Council has not adequately compared a future with and without declaration to be able to assess if a lower fee could in fact promote competition, and should compare a price of $1.64 per GT (or higher) in a future without declaration with a price of $0.6075 per GT in the likely future with declaration.[104]

7.18 PNO Submits that it has not sought to increase the Navigation Service Charge to $1.36 per GT, and that the ACCC's Determination and public statements to this effect mischaracterise PNO's submissions on this issue in the Glencore-PNO Arbitration. A price of $1.36 per GT is the maximum Navigation Service Charge that PNO calculated applying the BBM and conventional regulated pricing principles in the context of the Glencore-PNO Arbitration.[105]

7.19 PNO submits that if the ACCC's position on the interpretation of the new declaration criteria was adopted, it would mean all facilities that occupy a natural monopoly position in an infrastructure service market would be subject to access regulation, which conflicts with the intent of the October 2017 amendments to Part IIIA.[106]

7.20 PNO submits that Parliament clearly intended the amendments to apply to services declared under the previous criteria and, therefore, that declaration ought to be revoked where the declaration criteria are no longer satisfied. PNO submits that he NCC's interpretation of the relevant statutory provisions in the SOPV gives effect to, and is consistent with, these amendments and the objects of Part IIIA.[107]

Legislative changes in relation to criterion (a)

7.21 The Council notes that criterion (a) has been amended at various stages since the initial introduction of Part IIIA into the CCA in 1995 – including following decisions of the Tribunal and reviews by the Productivity Commission. Of particular significance, the Council notes that:

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[103] Pacific National's SOPV Submission p 2; Yancoal's SOPV Submission pp 5, 6; Synergies' February 2019 Report pp 8 – 11; NSWMC's SOPV Submission p 3.

[104] ACCC's SOPV Submission p 4.

[105] PNO's SOPV Submission p 11.

[106] PNO's SOPV Submission p 5.

[107] PNO's SOPV Submission p 6.

(a) From the inception of the National Access Regime in 1995, the Council, the Tribunal and the Minister had interpreted criterion (a) – "access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service" – as requiring that *declaration* would promote competition in at least one dependent market.

(b) In its 2001 review, the PC raised concerns that this interpretation had set too low a threshold for declaration, as it meant that the criterion could be satisfied by a marginal or trivial increase in competition.[108] The PC considered that it would be appropriate to consider, at the next review, whether the criterion should be amended to read "access (or increased access) to the service would promote a 'substantial' increase in competition in at least one market (whether or not in Australia), other than the market for the service".

(c) In response to the PC's 2001 review, the Federal Government amended criterion (a) to read "access (or increased access) to 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".[109] The Government used the word "material" to ensure that "access declarations are only sought where the increases in competition are *not trivial* (emphasis added)".[110]

(d) In 2006, the Full Federal Court in *Sydney Airport* held that "access" in criterion (a) does not mean "'declaration". The Court considered that "access" required a comparison of the future state of competition in the dependent market "with a right or ability to use the service and … *without any right or ability*… to use the service".[111] This overturned the previous interpretation of criterion (a) by the Council, the Tribunal and the Minister, and significantly lowered the hurdle to satisfying the criterion.

(e) In its 2013 review, the PC considered that the Full Federal Court decision in *Sydney Airport* had set the threshold for the criterion too low, and recommended restoring the interpretation of the criterion to the position before *Sydney Airport*. That is, it should focus on the *effect of declaration* on reasonable terms and conditions (rather than access per se) in promoting competition in a dependent market.[112]

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[108] Productivity Commission, *National Access Regime*, September 2001, pp. 190-192.

[109] *Trade Practices Amendment (National Access Regime) Act 2006*(Cth).

[110] Government Response to Productivity Commission report on the review of the National Access Regime, 20 February 2004.

[111] *Sydney Airport*, para. 83.

[112] Productivity Commission, The Inquiry Report prepared by the Productivity Commission titled: "National Access Regime – inquiry Report, No. 66, 25 October 2013" (PC 2013 Review), pp.

(f) In 2015, the Harper Review agreed with the PC's recommendation but considered the PC should have gone further and set the threshold for criterion (a) even higher. It considered that the burden of access regulation should not be imposed on the operations of a facility unless access is expected to produce significant efficiency gains from competition.[113]

(g) In October 2017, in response to both reviews, the Federal Government passed legislation to amend the declaration criteria largely in line with the PC's 2013 recommendation. As explained in the extrinsic materials,[114] the amendments to criterion (a) would, in effect, overturn the interpretation adopted by the Full Federal Court in *Sydney Airport* and re-establish the interpretation to that which existed prior to 2006.

7.22 The form of the 2017 amendments to the declaration criteria flow from the deliberate and considered recommendations of the PC in its 2013 review (and to some extent the Harper Review); were subject to consultation with the public and States and Territories; and were subsequently agreed to and implemented by the Federal Government in 2017. The Council considers that the amendments to criterion (a) do not so much 'raise the threshold' to satisfying the criterion; rather, they restore the threshold to where it was prior to the 2006 Full Federal Court's decision in *Sydney Airport*. Restoring the criterion to considering the effect of declaration was clearly what Parliament intended to achieve by enacting the Amendment Act. The Council rejects any suggestion that, to the extent it is giving effect to these amendments, it is 'improperly' raising the threshold to declaration.

Council's approach to criterion (a)

7.23 The Council's approach to assessing criterion (a) is to draw upon the two future scenarios discussed at paragraph 6.5 and asks:

(a) does the Council consider that the provider would have the ability and incentive to deny access to relevant service or restrict output and charge monopoly prices? Where a provider of a relevant service has this ability and incentive, it is more likely that it will be able to set terms and conditions of access that are less favourable than those that would be expected in a competitive market for the service;

172-173.

113 The Harper Review's recommendation builds on the PC's recommendation. That is, in addition to the PC's recommendation to amend criterion (a) to re-focus the test on the specific effect of declaration, criterion (a) should also be amended to require that the dependent market (on which the competition effect is assessed) is nationally significant and that the increase in competition is substantial. See Competition Policy Review, *Final Report*, March 2015, pp. 73-74 and 432-433.

114 Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review)Bill 2017*; and the Australian Government's response on the National Access Regime, 24 November 2015.

(b) if the provider has that ability and incentive, would such conduct materially affect competition in a dependent market?

7.24 Through this analysis, the Council assesses whether access (or increased access), on reasonable terms and conditions, as a result of declaration of the Service, would promote a material increase in competition.

What are reasonable terms and conditions as a result of declaration

7.25 The Council considers that the notion of 'access, on reasonable terms and conditions, as a result of declaration' takes its meaning from the statutory context within Part IIIA. The determination of terms and conditions of access for a declared service is governed by Division 3. If a party is unable to agree with the provider of a service on one or more terms of access to a declared service and notifies the ACCC of the access dispute, the ACCC is required to determine terms and conditions of access. In determining the dispute, the ACCC has regard to a range of factors including the object of the Part, the legitimate business interests of the provider, the direct costs of providing access to the service and the economically efficient operation of the facility.

7.26 The Council therefore considers that the reasonable terms and conditions referred to in criterion (a) can be assumed to be such terms and conditions that would meet or are directed to the mandatory considerations in Division 3.

7.27 The Council considers that in a scenario where a service is declared, the actuality and/or threat of arbitration by the ACCC has the potential to provide an access provider with increased incentives to (and a higher likelihood that it will) provide the service on 'reasonable' (or close to reasonable) terms and conditions'. This may also provide access seekers with greater certainty as to how terms and conditions of access will be set compared to a scenario where the service is not declared.

Would reasonable terms and conditions as a result of declaration promote a material increase in competition in a dependant market

7.28 The Council considers that competition is a dynamic process and the promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

7.29 The focus of the National Access Regime is on the promotion of competition in markets where the lack or restriction of access to infrastructure services that cannot be economically duplicated would otherwise limit competition.

7.30 Consistent with the objects of Part IIIA, the reference to 'competition' in criterion (a) is a reference to workable or "effective competition." This refers to the degree of competition required for prices to be driven towards economic costs. A consequence of this is that, in the long-term, resources are more likely to be allocated efficiently. In a workable or effectively competitive environment, no one seller or group of sellers has significant market power.

7.31 Criterion (a) is not met merely by establishing that a service provider is a bottleneck monopoly or possesses market power. While it is possible that lower prices for access to a service may arise in a future with declaration of a service compared to a future without declaration, this does not necessarily mean that competition will be promoted in a related market. To the extent that a lower price for access would lead to little (if any) change in consumption or production decisions by participants in related markets, the lower price may merely have the effect of redistributing the economic surplus generated within a supply chain. It is also possible that lower prices for access to a service do not materially impact on the ability of market participants in related markets to compete against each other on their merits. This is especially the case if prices were not significantly lower, and were set at broadly equivalent levels for all access seekers.

7.32 Neither is criterion (a) satisfied merely by establishing that regulated access will result in a different share of gains between access seekers and a provider of a service. In a vertical supply chain, parties may disagree about the division of the gains from production and trade. Participants at each stage of the supply chain will want a greater share, necessarily leaving a lesser share for other participants. Actions by one party to secure a greater share of the gains may, but do not necessarily, affect competition in a related market.

7.33 Further, promoting the process of competition is not to be confused with promoting the greatest number of competitors. Competition will lead to the displacement of less efficient rivals by more efficient ones in a market. As noted by the High Court in *Queensland Wire Industries v BHP*[115]:

> Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to "injure" each other in this way. This competition has never been a tort … and these injuries are the inevitable consequence of the competition. (Mason CJ and Wilson J at [22])

7.34 The purpose of access regulation is not, therefore, to promote the greatest number of competitors in a market irrespective of their relative efficiencies. It is instead to promote the process of competition and the consequent improvements in efficient market outcomes that result from it. As noted by the Tribunal in *Re Telstra Corporation Ltd (No. 3)*[116] *:*

> … we believe it is important not to confuse the objective of promoting competition with the outcome of ensuring the greatest number of competitors. That is, the Act aims to promote competition because of the benefits that result from the process of competition, such as lower prices for consumers and the displacement of inefficient suppliers by efficient suppliers of services. (at [99])

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115 (1989) 167 CLR 177.

116 [2007] ACompT 3.

Identifying PNO's ability and incentives to exercise market power

Submissions on PNO's ability and incentives to exercise market power

Before the SOPV was issued

7.35 PNO submits that it provides access to the Service and will continue to do so regardless of whether the Service is declared. The Port says its prices are already set and will continue to be set with consideration given to the matters that would be taken into account from an arbitration resulting from the Declaration.[117] Therefore, even if it is assumed that reasonable terms and conditions resulting from declaration would be more favourable for users than terms and conditions in the future without declaration, PNO submits that criterion (a) would still not promote a material increase in competition in any dependent market. PNO submits that with or without Declaration, it has incentives to maintain volumes, protect competition and not price coal producers out of the market because the Port:

(a) is not vertically integrated (and thus does not have an incentive to price discriminate between shipping lines or coal producers in a way that adversely affects competition)

(b) is heavily reliant on coal export revenues

(c) has excess capacity.[118]

7.36 PNO also submits in its July Submission that:

(a) It is an equally owned joint entity of China Merchants Port Holdings Company Limited (**CM Port**) and The Infrastructure Fund (**TIF**) (no longer managed by Hastings Funds Management)

(b) CM Port and TIF have equal governance rights in relation to PNO. Therefore, CM Port does not control PNO

(c) CM Port is listed on the Hong Kong Stock Exchange. The current shareholders include China Merchants Union (BVI) Limited (**CMU**) (23%), China Merchants Investments Development Company Limited (**CMIDC**) (38.7%) and Orienture Holdings Company Limited (**OHC**) (0.09%) as well as other shareholders

(d) CMU is 50% owned by China Merchants Group Limited (**CMG**) and 50% owned by CNIC Corporation Limited, a Chinese state-owned company. CMIDC is 75.34% owned by CMG and 24.66% owned by CMU. OHC is wholly-owned by China Merchants Shekou Industrial Zone Company Limited (**CMSIZ**), which is a listed company and a non-wholly owned subsidiary of CMG

[117] PNO's July 2018 Submission p. 16, 17.

[118] Ibid pp 34- 37.

(e) Neither CM Port nor CMG have any direct interests in bulk carrier fleets and CMG's only indirect interest is via its ownership stake in China Merchant Energy Shipping Co Ltd (**CM Energy Shipping**), an entity listed on the Shanghai stock exchange

(f) CMG is the largest shareholder of CMES. CMES and its subsidiary Ming Wah Shipping Company control a fleet of LNG carriers, oil tankers and 21 bulk carriers

(g) Since PNO began operating the Port, only two ships owned by CMES or Ming Wah have called at the Port

(h) The only changes to PNO's ownership structure since the declaration process is that PNO is now 50% owned by CM Port rather than CMU, and TIF is no longer managed by Hastings Funds Management.[119]

7.37 Similarly, PNO's September 2018 Submission states that PNO is not relevantly vertically integrated into any container market and does not expect to become relevantly vertically integrated by July 2031. In particular:

(a) PNO is an equally owned joint entity of CM Port and TIF

(b) CM Port and TIF have equal governance rights in relation to PNO. Therefore, CM Port does not control PNO

(c) CM Port is listed on the Hong Kong Stock Exchange with a 62% interest controlled by CMG

(d) CMG is a large consolidated group with a number of discrete business units, one of which, Sinotrans & CSC Holdings Limited, has a controlling interest in Sinotrans Container Lines Co Ltd (**Sinotrans**). Sinotrans operates 56 container vessel routes from China to a number of international destinations predominantly in east and south-east Asia including three weekly routes calling at each of Port Melbourne, Port Botany and Port of Brisbane

(e) this relationship is similar in nature to the relationship between CMG and CMS/Ming Wah Shipping Company (discussed in PNO's submission dated 2 July 2018) and that no vertical integration issues arise for the same reasons as set out in that submission and as accepted by all relevant decision makers during the declaration process

(f) TIF has no related entities involved in the container trade.[120]

7.38 Glencore submits that PNO has clear ability and incentives to maximise its profits through substantially increasing port charges and accepting any consequential impact on port volumes. Glencore disagrees that the Port's prices are set and would continue to be set with regard to the matters which would be considered in an

[119] PNO's July 2018 Submission p 33.

[120] PNO's September 2018 Submission pp 14, 15.

arbitration. Even if PNO uses a BBM to set prices, increases of over 200 per cent, up to $1.64 per GT, could feasibly be implemented in the future. Furthermore, PNO could subsequently change its building block parameter values in order to 'legitimise' additional price increases. Moreover, in the absence of declaration, there is no obligation on PNO to apply a BBM and no constraint on it applying a different methodology in the future.[121]

7.39 Glencore's October 2018 Submission states that the ACCC Determination discounted the price of the Service for Glencore. It further submits this is evidence that access terms with declaration of the Service will indeed be more favourable to access seekers than they would be without declaration. As such, declaration provides a meaningful constraint on PNO.[122] Glencore also cites a statement published on PNO's website that[123]:

> *Newcastle is proud to be the world's largest coal port, but we are also realistic about coal's declining prospects in decades to come, that is why we are committed at the Port of Newcastle to playing a major part in the Hunter region's growth and diversification strategy through the development of a container terminal.*[124]

Glencore submits that even if it was the case that PNO did not have the incentive to price discriminate on any terms of access and was motivated to support increasing coal exports in 2015, it is no longer the case that PNO is commercially motivated or incentivised to expand coal exports. It further submitted that PNO has every incentive and ability to discriminate as to pricing, and to continue to increase channel charges in the absence of declaration.[125]

7.40 Glencore's October 2018 Submission restates that PNO has visibility over the source of coal loaded onto vessels using the Service. In support of this submission, Glencore quotes an affidavit provided by Mr Dowzer of PNO dated 5 October 2017 in which he approximates the number of ships that called in to the Port in 2016 that were carrying coal supplied by Glencore based on information provided by PNO's finance team.[126]

7.41 NCIG's October 2018 Submission supports an argument made by Synergies that PNO, as a natural monopoly, is incentivised to maximise its profit, not its throughput at the Port. NCIG submits that in the absence of declaration, PNO is likely to continue to increase its charges over time up to a level where charges have such a

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121 Glencore's August 2018 Submission pp 22, 23.

122 Glencore's October 2018 Submission p 8.

123 Ibid p 12.

124 PNO, *New CEO commits Port of Newcastle to developing a world-class container terminal. 1 August 2018. https://www.portofnewcastle.com.au/News-and-Media/Items/2018/New-CEO-commits-Port-of-Newcastle-to-developing-world-class-container-terminal.aspx*

125 Glencore's October 2018 Submission p 12.

126 Ibid p 10.

material effect on demand that further reductions in volume outweigh additional revenue from the remaining users. NCIG submits that the Council should not conclude that port charges are likely to remain immaterial over the term of the Declaration.[127]

7.42 NCIG's October 2018 Submission also states that if a container terminal is developed at the Port, PNO will need to compete strongly to attract and keep shippers and shipping lines involved in containerised trade. NCIG submits that where PNO faces competition in the container port market but occupies a monopoly position in the Hunter Valley coal chain, it has a clear incentive and ability to discriminate in favour of containerised services. If the Declaration is removed, NCIG considers the increasing number and diversity of services being supplied through the Port incentivises PNO to shift costs (through discriminatory pricing) and provide preferential access (through beneficial scheduling) in favour of services where the Port faces competition, such as containers and bulk grain.[128]

7.43 Between PNO's July 2018 Submission and PNO's September 2018 Submission, PNO confirmed that it is not relevantly vertically integrated into any of the dependent markets identified in paragraph 7.172 or the 'container port market' discussed below.[129]

7.44 The ACCC submits that a monopolist's incentives to maximise volumes would not constrain it from increasing prices. This is because a monopolist may be able to increase prices in a way that harms the conditions or environment for competition even if volumes do not immediately fall. This may be because the monopolist has the ability to price discriminate in its pricing for the service or because increases in prices in dependent markets allow the monopolist to increase prices without affecting throughput.[130]

Responding to the SOPV

7.45 The ACCC, Glencore/Synergies, Yancoal, NSWMC, Bloomfield, NCIG and PWCS each made submissions to the Council to the effect that standard economic theory suggests that monopolies will seek to maximise their profits, rather than their volumes (throughput); and a monopoly may maximise its profits by increasing its prices to a level that sees a reduction in volumes and/or the number of users utilising their service.[131]

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127 NCIG's October 2018 Submission pp 3, 7-9.

128 Ibid p 9.

129 PNO has disclosed that China Merchant Group holds a controlling interest in Sinotrans Container Lines Co Ltd which operates container vessel routes from china to destinations including Port Melbourne, Port Botany and the Port of Brisbane. China Merchant Groups holds a 62% interest in China Merchant Port Holdings Limited which in turn holds a 50% interest in PNO.

130 ACCC's August 2018 Submission p.6.

131 ACCC's SOPV Submission p 2; Synergies' February 2019 Report pp 8, 17-21; Yancoal's SOPV

7.46 The ACCC questions the assertion that PNO would be unable to obtain sufficient information to price discriminate between mines, either now or in the future, and suggests that some firms may hold long-term contracts. The ACCC submits that PNO could increase the prices faced by some mines to capture additional profit. PNO's ability to do this in the future will reduce the incentive of entities to invest in and expand operations in such mines, given any returns could be appropriated by PNO after they have made any investments. [132]

7.47 NSWMC's SOPV Submission states that the Declaration provides an essential constraint on the terms and conditions of access to the Service by creating the threat of ACCC arbitration, which would act to prevent PNO from increasing service fee charges in a manner that is inconsistent with the ACCC Determination.[133] NSWMC also submits that revoking the Declaration would significantly reduce transparency over PNO's pricing practices and points to PNO's attempt to 'double dip' on channel dredging costs (which came to light in the Glencore-PNO Arbitration) as an example of the type of conduct that is likely to occur in the absence of declaration.[134]

7.48 NCIG submits that the SOPV is internally inconsistent in that the NCC finds that PNO has no material ability to price discriminate among users, but fails to recognise that this means that monopoly pricing will inevitably lead to a reduction in volumes of coal exported through the port over time.[135] The Productivity Commission's 2013 National Access Regime Inquiry Report (the **PC 2013 Review**) noted that pricing by a natural monopoly will inevitably be higher, and that demand for its services will be lower than that which can be expected under an effective access regime. However, the report noted that the impacts of the monopoly on demand might be lower if the infrastructure owner is able to engage in price discrimination.[136]

7.49 NCIG also submits that PNO has an incentive to maximise its profit, not its volume; and would readily accept lower volumes if doing so results in a greater profit from charging a higher price for remaining (lower) throughput volumes. All available evidence suggests that PNO holds market power (as the NCC accepts) and is in a position to impose very substantial increases in the prices of its services. PNO's incentive to maximise profits will inevitably lead it to price at a level which has a disproportionate impact on new entrants as well as small coal miners with a portfolio of more marginal tenements, thereby distorting competition. Reduced production volumes will also result in reduced employment, coal royalties and a

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Submission pp 7-12; NSWMC's SOPV Submission p 2; Bloomfields' SOPV Submission p 3; NCIG's SOPV Submission p 4; PWCS' SOPV Submission p 2.

132 ACCC's SOPV Submission pp 4, 5.

133 NSWMC's SOPV Submission pp 1, 2.

134 Ibid p 3.

135 NCIG's SOPV Submission p 3;

136 Ibid p 7.

reduced contribution to economic activity. NCIG submits that the NCC has underestimated the prices PNO may charge and the impact such prices may have, and this has affected the NCC's preliminary conclusions on criterion (d). [137]

7.50 Pacific National Pty Ltd (**Pacific National**), the largest train operator in the Hunter Valley rail corridor, provided a submission dated 1 February 2019 (**Pacific National's SOPV Submission**) in which it submits that Port users do not have countervailing bargaining power in negotiations with PNO. Mining operators and haulage operators do not have the ability to create a credible threat of bypass in response to unreasonable terms that PNO might impose.[138]

7.51 Pacific National submits that the clear trend without declaration, as evidenced by PNO's previous pricing behaviours, monopoly position and the absence of other regulation, is a propensity to higher and higher prices. It is not simply a point in time consideration as suggested by the NCC. PNO has shown a willingness to increase prices even when it has excess capacity.[139]

7.52 PWCS submits that the NCC should not focus on price increases that were previously imposed, but should instead focus on the price increases that it could profitably impose if it is not subjected to regulation. As an unregulated monopolist, the prices PNO can charge for use of the shipping channel will be constrained only by the ability of users to pay. As a matter of economic principle, a party in a bottleneck monopoly position, such as PNO, could extract from coal miners and other participants in the coal supply chain all (or a substantial proportion) of the profits that those participants could otherwise earn where a regulated or market price was charged.[140]

7.53 Yancoal's SOPV Submission states that the NCC's preliminary view that the likely price rises without declaration are 'unlikely to be a significant cost component or driver of profitability in the coal export market' is based on a view that PNO would maximise its profit by not increasing its prices or only increasing prices to a relatively minimal extent (in dollar terms) so as to instead maximise channel throughput volume. Yancoal does not share this view.[141]

7.54 Yancoal submits:

(a) the test required by criterion (a) is a forward looking with and without test – such that the static price reference points the NCC has available (i.e. prices currently and the pricing that was put forward by PNO in the context of an arbitration or the pricing determined by the ACCC) are not of any real

[137] Ibid pp 3, 4.

[138] Pacific National's SOPV Submission p 1.

[139] Ibid pp 2, 3.

[140] PWCS' SOPV Submission p 2.

[141] Yancoal's SOPV Submission p 8.

evidentiary value in determining the likely magnitude of the future price rises

(b) in addition, those prices are prices which have been put forward by PNO in the context of the constraints imposed by an existing declaration and an ACCC arbitration, such that they are clearly not representative of the terms that are likely to apply in the future in the absence of any such constraint

(c) the NCC has concluded that reasonable terms and conditions as a result of declaration are likely to be more favourable to users than those set by PNO in the absence of declaration[142]

(d) the NCC has concluded that demand is relatively price inelastic[143] – such that the volume of usage of the channel service would be anticipated to change very little in response to material price increases

(e) the NCC (and for that matter PNO) has not provided any economic modelling which substantiates that maximising volume, rather than materially raising prices, would be a profit maximising strategy – which is surely necessary when all evidence suggests the contrary.

Consequently, Yancoal considers the preliminary views the NCC has expressed about PNO's profit maximising conduct in the absence of declaration need to be reconsidered.[144]

7.55 Yancoal submits that PNO's likely profit maximising strategy will be raising prices, not maximising volumes. Users do not have an alternative to use of the channel and, in the absence of declaration, there is nothing which would require PNO to continue to use a BBM for calculating revenue or pricing. Accordingly, the only likely constraint or incentive that exists for PNO in the absence of declaration is that it has an incentive to ensure that demand does not drop below the point that further price increases per tonne are no longer revenue maximising for PNO.[145]

7.56 Yancoal provides examples of how a $10 per tonne price increase and $15 per tonne price increase would be profitable for PNO, noting that at such price increases significant falls in volume simply will not occur as many mines would remain profitable at that higher charging level – even though marginal mines would not.[146] Yancoal submits that once it is properly appreciated that it is profit maximising for PNO to engage in substantial price rises that impact on investment decisions of some users and would make efficient but more marginal mines unviable, it is absolutely clear that criterion (a) would be satisfied.[147]

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142 NCC SOPV at paragraph 6.49.

143 NCC SOPV at paragraph 6.27.

144 Ibid pp 8, 9.

145 Ibid pp 9-11.

146 Yancoal 2019 p 10.

147 Ibid.

7.57 The Bloomfield Group (**Bloomfield**), a relatively small mining operator that has 100% of its company's production contained within the Hunter Valley Coal Chain and has a relatively small production level (less than 2% of the total tonnage exported through the Port of Newcastle)[148] submits that because Bloomfield's business is generally 'Free On Board',[149] PNO's 2015 price increases did not directly impact its cost structure. Instead, the price increase became an additional cost for Bloomfield's Asian customers. However, Bloomfield remains concerned about the potential impact of future price increases on the desirability of Newcastle as a preferred port for its customers.[150]

7.58 Bloomfield submits that, given the significant increase in PNO's charge in 2015, Bloomfield does not share the view of the Council that the possibility of greater increases in port charges that might result in the future without declaration of the Service is unlikely to reach a level where they have a material impact on the expected investment returns in the tenements market.[151]

7.59 Bloomfield's customers operate on a global basis, sourcing coal from many ports and numerous countries to achieve their desired coal blend at the lowest cost. Bloomfield considers that if its customers began to shift tonnage away from the Hunter Valley as a result of increased port charges leading to a higher comparative price of Bloomfield coal, the result would be 'immediate and catastrophic'.[152]

7.60 If Bloomfield or other small mining companies should fail, that would significantly lessen competition by further increasing the market power of mining companies in the Hunter Valley. This result would also negatively impact local supplier and support services as well as the broader seaborne coal market.[153]

7.61 Glencore submits that it cannot see any basis on which the Council could have formed its preliminary view as to PNO's future pricing behaviour being constrained as a commercial matter, noting that the ACCC (which had access to PNO's cost modelling data) formed the contrary view.[154]

7.62 Synergies' February 2019 Report is critical of the Council's use of reference to PNO charging a 'commercially realistic' price (which was defined in the SOPV as charges set at a level that are not above the profit maximising level) without specifying what that charge might be. Synergies was also critical that the Council did not specify why

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148 Bloomfield's SOPV Submission pp 1, 2.

149 'Free On Board' is a term of sale under which the price invoiced or quoted by a seller includes all charges up to placing the goods on board a ship at the port of departure specified by the buyer. Also called collect freight, freight collect, or freight forward. Source: http://www.businessdictionary.com/definition/free-on-board-FOB.html

150 Bloomfield's SOPV Submission pp 2, 3.

151 Ibid.

152 Ibid p 3.

153 Ibid.

154 Glencore's SOPV Submission p 2.

PNO would voluntarily charge a price that is below its profit maximising price; or why substantial price increases would not result in the absence of declaration, leading to access fees becoming a substantial cost.[155] Synergies submits it is inappropriate to rely upon an unspecified 'commercially realistic' prices to underpin analysis of the adverse competition and public interest impacts of revocation of the Declaration.[156] Synergies submits that the Council should, like QCA in the DBCT Decision, make an explicit assessment of the range of prices that could potentially be applied by PNO given its commercial objectives and constraints, and then assess the potential competition impacts having regard to possible application of such prices.[157]

7.63 Synergies disagrees with the view expressed in the SOPV that likely future Port charges in the absence of Declaration are unlikely to be a significant cost component or impediment to profitability in the coal export market. Synergies also disagrees with the Council's view that it is more likely that PNO will be incentivised to set prices at a level that maximises the volume of coal passing through the Port rather than setting prices at a level that reduces coal throughput.[158]

7.64 Synergies' February 2019 Report provides further modelling based on data provided by Wood Mackenzie which suggests that under a low coal price assumption (where coal sells for $75 per t), port charge increases will only cease to be profitable at around a price of $12.50 per t at which point Port charges would comprise 17% of the cost of coal. In models where coal prices are $95 per t or $115 per t, the profit maximising Port charges will be at least $15 per GT.[159] Synergies notes that it is not its intention to suggest that PNO will levy charges at its profit maximising price, but to demonstrate that price increases could be much more significant than the Council appeared to contemplate in the SOPV.[160]

7.65 The ACCC, Synergies, NCIG and PWCS submit that the Council has failed to take account of the impact that Service fee increases can have at the margins and the resulting potential effect on participation levels in dependent markets and on investment. Assumptions made by the Council about the size of the charge have led to an incorrect conclusion that fees for the Service are inconsequential to competition in all circumstances. [161]

7.66 Synergies and NCIG note in their SOPV Submissions that the Council has focused its analysis around the significance of Port Charges as a proportion of costs against cost

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155 Synergies' February 2019 Report pp 11, 14, 17-21.

156 Ibid p 20.

157 Ibid p 22.

158 Ibid p17.

159 Synergies' February 2019 Report pp 19-20.

160 Ibid p 20.

161 ACCC's SOPV Submission p 4; NCIG's SOPV Submission pp 3, 4; Synergies' February Report pp 26-28; PWCS SOPV Submission pp 2, 3.

data provided by PNO for an 'average Hunter Valley Coal Miner'. NCIG and Synergies submit that in examining the significance of Port charges and whether likely increases to those charges would be likely to impact production, the Council has focused on average mines but should have focused its analysis on marginal mines.[162] NCIG Submits that in a commodity market such as coal where there are large number of potential development opportunities and projects with a wide range of costs, the profitability of marginal producers will inevitably be very small or close to zero and these businesses will be materially affected by monopoly pricing of services by owners of bottleneck infrastructure.[163]

7.67 Synergies also observes that the example treated as an 'average' Hunter Valley Coal miner relies on PNO's assessment that an average Hunter Valley coal miner bears cash costs of $43.02 pert, earning a profit margin of $45.39 per t at a coal price of $88.42 per t[164]. In contrast, Synergies provides a Port of Newcastle thermal coal supply curve based on Wood Mackenzie data for existing projects that indicates that there are in fact numerous mines with cash costs above $80 per t. Synergies submits that PNO's profit maximising price is very likely to affect marginal mines (those with the highest operating costs and lowest profit margins); and be even more significant for future coal mines (those that are, in effect, sub-marginal today).[165]

7.68 Synergies submits that the key consideration for demand in the tenements market relates to the expected costs and margins applicable to new and prospective mines, that are, at, present, by definition, sub-marginal. Margins for new coal developments are much thinner than those for operating mines, and the risk of a significant increase in Service charges is likely to be material for such projects. [166] Synergies states:

> Wood Mackenzie also maintains cost curves for known, but yet to be developed, projects. Wood Mackenzie estimates that, in 2025, the cash cost for several of these projects will range from US$70-75/t or AU$95-100/t (2018$s) ... Given a coal price forecast in 2025 of US$75/t (2018$s),[167] these projects would have a cash margin of less than $US5/t to contribute to the capital costs of the projects, which is less than NERA's estimate of capital costs of US$7.2/t. In this context, the perceived risk of a change in input cost of up to $2/t would appear likely to have a material impact on whether or not these projects will be considered viable.[168]

7.69 PNO submits that it is constrained by the threat of regulation and potential action by the NSW Government. PNO expects that the NSW Government would impose

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[162] NCIG's SOPV Submission pp 3, 4; Synergies' February Report pp 26-28.

[163] NCIG's SOPV Submission p 4.

[164] Synergies' February Report p 26.

[165] Ibid p 27.

[166] Ibid p 27.

[167] Wood Mackenzie forecast for 'FOB Newcastle @ 6,000 kcal/kg NAR, market'

[168] Synergies' February 2019 Report p 27; Synergies August Report p 60.

stringent regulatory constraints if it set port charges or other access terms that had the potential to have a material impact on competition in the coal export market or any derivative market.[169]

7.70 PNO submits that increasing service charges to the point where they materially reduce coal exports would reduce PNO's profits.[170]

7.71 PNO agrees with the NCC's view that port charges are, and are likely to remain, an immaterial component of the delivered cost of coal and do not/will not affect coal export volumes and competition in the coal export market. PNO submits that Port charges are too small to create any material uncertainty or impact on competition in dependent markets. In response to Synergies' suggestion that port charges could be increased by up to $3 per tonne without triggering any major reduction in coal export volumes, PNO submits this likely overstates the importance of port charges in coal production and investment decisions and that there is no evidence such increases are likely without declaration.[171]

NERA's Report

7.72 With respect to PNO's incentives, NERA observes that:

a) Given PNO is not vertically integrated into coal mining activities in the Newcastle catchment area, maximising competition in related markets will maximise its own profits

b) PNO will want to encourage coal mining investment in the Newcastle catchment area, and will want the coal tenements market to be competitive

c) PNO's incentive will be to maximise its profits and, depending on whether it is able to price discriminate, this may lead to a reduction in coal levels being exported through the port relative to what might occur if it set a competitive price:

- If PNO can perfectly price discriminate, economic theory suggests PNO will price in a way that ensures volumes across the port were no lower than those expected under a competitive benchmark
- If PNO cannot price discriminate (and instead sets a uniform price for all coal exporters for its service), this would likely involve a price higher than "the competitive level" and lead to some level of volume reduction

d) While PNO may be the monopoly supplier of coal export port services in the Newcastle area, this does not mean it is totally unconstrained when setting prices for services at the Port:

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169 PNO's SOPV Submission p 3,

170 Ibid p 7.

171 Ibid pp 7, 8.

- Given PNO has made a sunk investment in a 98 year lease, it will want to attract future investment in the Newcastle catchment area
- If it prices in a way that "holds-up" existing miners, this will send a signal that discourages future miners contemplating investing in the area – PNO will be wary of chilling investment in future mines
- This is significant as potential coal miners have alternative investment options outside of the Newcastle catchment area. [172]

7.73 As noted before, Synergies' February 2019 Report analyses the level of price increase PNO would find profitable under various levels of coal prices.[173] The Council requested that NERA comment on whether Synergies' analysis in this respect is reasonable.

7.74 NERA accepts that the price PNO might set in the absence of declaration is likely to be higher than that which might be set using a BBM under arbitration of a declared service. [174]

7.75 However, NERA does not agree with the methodology used by Synergies to estimate the price PNO might charge in the absence of declaration. This is because:

a) Synergies assumes PNO would set a price just below the difference between a miner's expected coal price and the "cash costs" faced by Newcastle coal producers – that is, it would set a price just sufficient to incentivise an existing miner to continue its mining activities

b) Such an approach would, however, mean PNO would appropriate revenues the miner would need to cover its sunk costs

c) Doing so would cause a reputation to develop that PNO is likely to do so again in the future, and this would deter future mining investment in the PNO catchment area

d) Such a pricing approach would not be rational behaviour for PNO.[175]

7.76 Further, NERA considers there are reasons to think the price estimate modelled by Synergies is "implausible". This is because its estimated price could be almost 24 times the base price of $0.53 per tonne (and could raise to be even higher), and this:

a) Places no weight on the threat of regulation despite prices having a degree of transparency

[172] NERA's Report pp 2, 3.

[173] See paragraph 7.64, above.

[174] NERA's Report p 6.

[175] Ibid pp 6-8.

b) Implies existing price restraints have been effective at suppressing PNO's profit maximising incentives to date (as prices have not risen to the levels modelled by Synergies)

c) Is doubtful because it implies PNO has left large amounts of money "on the table" for a long period by not raising prices to the level Synergies estimates.[176]

Responding to NERA's Report

7.77 PWCS provided a submission responding to the NERA Report on 24 April 2019 (**PWCS' NERA Submission**) that submits: NERA's theoretical argument that PNO will not want to develop a reputation for hold-up in setting its price for the shipping channel service is commercially unrealistic. A party considering investment in the Hunter Valley coal chain will know that PNO can charge whatever monopoly price it wishes at any point in time and will remain motivated to maximise its profits in the short term. A commercial party is unlikely to make a major investment based solely on the hope that PNO's concerns about its long term reputation will outweigh its desire to maximise immediate profits.[177]

7.78 NSWMC provided a submission responding to the NERA Report on 26 April 2019 (**NSWMC's NERA Submission**) that noted:

a) Some of NERA's factual assertions arise from the Council's SOPV rather than reality. In particular, NSWMC states that it is unclear why NERA accepts that PNO is not vertically integrated.[178] In this respect, NSWMC notes CM Port – which has a 50% shareholding in PNO –has substantial investments in container terminals, container shipping and energy transport (e.g. coal and LNG carriers)[179]

b) PNO's past pricing did not differentiate between existing and future miners and did not reflect that PNO was concerned about 'hold up'. These past observations challenge NERA's hypothetical analysis, which suggests that the Port is only a monopolist in relation to existing mines (not future mines) and would be interested in avoiding 'hold up' [180]

c) PNO's past pricing behaviour suggests that if the declaration is revoked, it is likely to continue to operate as an infrastructure monopolist and will price accordingly for current and future miners, adversely affecting future investment[181]

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176 Ibid p 7.

177 PWCS' NERA Submission at p 1.

178 NSWMC's NERA Submission p 6.

179 Ibid.

180 Ibid p 5.

181 Ibid p 6.

d) Arguments that PNO would avoid the reputational risk that would result from holding up mines overlooks the fact that PNO's commercial relationships with mines have already deteriorated since the imposition of price rises without consultation **in 2015.** NSWMC considers PNO would act similarly in a future without declaration of the Service[182]

e) NERA (and the Council) fail to take into account that the focus of PNO and its shareholders is in developing the container terminal at the Port and diversifying away from coal. In these circumstances, PNO's interest in new coal customers could be significantly reduced and it is more likely to charge as much as it can from its existing and any future mining customers[183]

f) NERA's analysis appears to rely heavily on the PAMA act imparting price transparency on PNO. However, the PAMA act does not provide price transparency to third parties and the ACCC's arbitration was the first mechanism to reveal that PNO had inflated its asset base by including the channel dredging expenditures of the NSW mining industry. Since it is declaration that promotes true transparency in PNO's pricing (through the publication of arbitration reports by the ACCC), the NERA report really supports the continuation of declaration.[184]

7.79 Malabar Coal Limited (**Malabar**), an Australian public company with around 150 shareholders (most of whom reside in NSW) and which only holds assets in the Upper Hunter Valley, provided a submission responding to the NERA Report on 26 April 2019 (**Malabar's NERA Submission**) that submits:

a) NERA's report suggests that PNO's pricing would be constrained by the risk of miners such as Malabar choosing to invest elsewhere around the globe. Malabar's sole investment proposition to NSW investors was to raise sufficient capital to invest solely in Hunter Valley developments. It would be insurmountably difficult for Malabar to invest in other countries. For Australian mining companies of Malabar's size, the options are either operating within Australia or exiting from mining.[185]

b) Malabar is concerned that Hunter Valley coal mining companies will be subsiding PNO's ambition to develop a container terminal and effectively paying the financial penalties of the port commitment deeds imposed by the NSW government.[186]

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182 Ibid p 6.

183 bid p 7.

184 Ibid p 10.

185 Malabar's NERA Submission p 3.

186 Ibid.

7.80 Bloomfield provided a submission responding to the NERA Report on 26 April 2019 (**Bloomfied's NERA Submission**) that submits:

a) PNO's past actions have demonstrated a desire to maximise the returns it appropriates from mining companies in the Hunter Valley. So, in the absence of declaration, there is no reason to think that Hunter Valley miners will not see a recurrence of predatory pricing from PNO.[187]

b) Bloomfield also makes submissions equivalent to those made by Malabar and summarised at paragraph 7.79.[188]

7.81 Glencore provided a submission responding to the NERA Report on 26 April 2019 (**Glencore's NERA Submission**) that submits:

a) NERA's report is critically flawed because it is based on factual misconceptions and assumptions that lack foundation in the NSW and global mining industry

b) PNO is able to exercise price discrimination by entering into commercially negotiated agreements with particular customers in a similar manner to the agreement with Glencore as a result of the ACCC Determination

c) NERA has not conducted any financial analysis of the impact that the threat of losing new mining developments to other areas plays in PNO's commercial decision making. Therefore, the NERA Report cannot provide any reliable assessment of how such a potential pricing constraint would impact PNO's behaviour where the declaration is revoked

d) It may be that the gains from increasing revenue from existing mines (by raising prices for the Service) would massively outweigh any future potential losses from discouraging future investment. It is not the case that pricing would have to rise to a level which prevents future development before having a substantial impact on the tenements market. NERA has not addressed this possibility

e) The constraints contemplated by NERA only exist on the assumption that PNO continues to offer uniform pricing. If this is not the case, then PNO could overcome any such concerns in relation to the developers of new mines by offering differential pricing. Glencore states it knows as a matter of certainty that differential pricing will apply once the pricing arbitration is determined (given its expectation that the arbitrated prices available to it will be different to the stated prices offered by PNO to other users of the Service).[189]

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187 Bloomfield's NERA Submission p 2.

188 Ibid p 2.

189 Glencore's NERA Submission p 2.

7.82 The report prepared by Synergies and dated 26 April 2019 (**Synergies' April 2019 Report**) submits:

a) PNO has previously raised fees by 26-60% (depending on vessel type) - this conduct is inconsistent with the view that PNO is commercially motivated to incentivise coal mine investment[190]

b) There is no credible constraint on the extent to which PNO could increase Port prices provided by the current regulatory regime – or by a future threat of regulation[191]

c) The critical issue that will affect participants in the tenements market is their perception of the risk that PNO will introduce substantially higher prices, as opposed to whether or not PNO actually intends to do so[192]

d) The potential for future significant price increases will create an expectation of higher costs and risks for investors in future coal mines, reducing the economic viability of new and prospective mining developments in the Newcastle catchment area, particularly for smaller companies who are less diversified and have fewer available pathways to finance[193]

e) The higher costs and risks that will result in the absence of declaration would disproportionately impact smaller producers and more marginal tenements, resulting in smaller producers being less likely to acquire tenements[194]

f) Charging high prices is consistent with profit maximisation. Synergies has previously demonstrated that the higher costs and risks would disproportionately impact smaller producers and more marginal tenements, resulting in smaller producers being less likely to acquire tenements

g) It estimates that PNO could potentially earn revenue of about $1,995 million per annum from increasing port charges by $12.50 per tonne. At current prices and maximum foreseeable volumes, PNO will need to earn revenue for approximately 27 more years in order to match the revenue from a $12.50 per tonne price increase applied for a single year[195]

h) If volume impacts resulting from increased prices became significant for PNO, it would be possible for PNO to react by changing its pricing

190 Synergies' April 2019 Report p 9.

191 Synergies April 2019 Report p 22.

192 Ibid p 29.

193 Ibid pp 2, 3

194 Ibid p 4.

195 Ibid pp 10, 11.

arrangements to limit the potential for a reduction in volumes. For example, it could uniformly reduce prices and/or provide long term commitments on price, if it considered that this was likely to promote throughput. Alternately, it could introduce price discrimination in order to encourage new mines, for example by entering into long term agreements with a producer in a similar manner as will occur with Glencore upon finalisation of the current arbitration; or by offering a simple rebate on shipping charges to selected coal mines based on demonstrated throughput[196]

i) PNO may engage in third degree price discrimination and divide the coal market on the basis of signals that are observable and verifiable (such as the age of mines, JORC reserve of a mine or location of a tenement). Although PNO may apply a uniform price to ship owners and agents, it could implement a rebate mechanism associated with the observable and verifiable signals to price discriminate between existing mines and new mines, and between tenements being developed, which may distort competition in the tenements market or even in the coal market.[197]

Council's view on factors impacting PNO's ability and incentive to exercise market power

7.83 As noted in paragraph 7.23, the Council's approach to assessing criterion (a) commences by asking whether the provider of an eligible service has the ability and incentive to deny access to the service; or restrict output and charge monopoly prices. Where a provider of a service does not have the ability and incentive to act in this way, it is unlikely that declaration would be able to materially affect competition in a relevant market.

7.84 A firm that is subject to effective competition is not likely to have the ability and incentive to deny access to a service; or to restrict output and charge monopoly prices. In contrast, a firm with market power is likely to have the ability to deny access; or set terms and conditions for its services free from competitive constraint. As noted by the High Court in *Boral Besser Masonry*[198]:

> The essence of market power is absence of constraint. Market power in a supplier is absence of constraint from the conduct of competitors or customers.
>
> (Gleeson CJ and Callinan J at [121])

7.85 To determine whether PNO is likely to have market power over the provision of the Service, the Council has considered:

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196 Ibid p 13.

197 Ibid pp 13, 14.

198 *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* [2003] HCA 5

a) those factors that suggest PNO is not subject to effective constraints from competitors or customers

b) those factors that suggest PNO is likely to face some level of constraint in its pricing and output decisions

c) the implications for PNO's incentives resulting from it not being vertically integrated in the provision of coal mining or export services

d) whether the Port is likely to be capacity constrained over the term of the existing declaration

e) the significance for PNO's incentives related to whether it has the ability to price discriminate in the terms and conditions of access it sets for various users of the Service

f) how the factors outlined in a) to e) above are likely to effect the terms and conditions of access PNO is likely to set with and without declaration of the Service.

7.86 Each of these considerations is discussed in detail below.

Factors suggesting PNO is not subject to effective constraints

7.87 The Port is the only one coal miners in the Newcastle catchment that can be effectively used to export coal into relevant overseas markets. For users that have already sunk costs in coal exploration/mining in the Newcastle catchment, PNO is not likely to be directly constrained in its pricing by the existence of another nearby port able to export coal for these users. There is also no reasonable prospect of entry by another port operator in the near future that is able to act as an alternative for these miners.

7.88 The Council has also considered if PNO is, or could be, effectively constrained by any countervailing bargaining power of users of the Port. Typically, a user's ability to apply countervailing bargaining power comes from its ability to credibly threaten to use alternative "outside options" if a supplier seeks to set unfavourable terms for it. As indicated above, the Council accepts that users who have already sunk costs into coal exploration/mining are unlikely to have viable outside options they can credibly threaten to turn to if PNO offers them unfavourable terms and conditions of access. As noted in paragraphs 7.97 to 7.101 below, however, users that have not already sunk costs into particular coal exploration/mining activities may have alternative investment options available to them. Further, other users of the Service (such as those seeking to engage in container transportation services) may have alternative ports they can turn to in the event they are dissatisfied with terms and conditions of access for the Service.

7.89 Overall, PNO has control over a natural bottleneck facility in relation to the export of coal from the Newcastle catchment. This gives it a degree of market power over miners seeking to export coal through the Port who have already sunk costs in the provision of coal exploration/mining in the Newcastle catchment. In contrast,

however, some other users of the Port may be able to utilise other port options such that PNO has a lesser degree of market power when seeking to provide services to them.

Factors suggesting PNO is likely to face some level of competitive constraint

7.90 The factors outlined above suggest PNO is likely to have some degree of market power over the provision of the Service to those miners that have already sunk costs to invest in exploring/mining in the Newcastle catchment. This is because these miners are, in a sense, captive to PNO if they wish to export coal into overseas markets. In these circumstances, one might be concerned that a profit-maximising operator of the Port would have the ability and incentive to raise prices and reduce output in a way that enabled it to earn monopoly profits. Further, to the extent existing miners are captive to using the Service to export coal through the Port, one might be concerned that PNO would "hold-up" existing miners. [199]

7.91 Against this, however, the Council considers there are important factors that are likely to apply some level of constraint on the pricing and output decision of the Port with respect to miners of export coal.

PNO signed a 98-year lease and will be wary about developing a reputation for "hold-up"

7.92 PNO signed a 98-year lease for the Port in 2014, and would be likely to price in a way that has regard to its ability to maximise its expected profits over the term of the lease. Where PNO prices in a way that reduces future investment in coal mining activity in the Newcastle catchment, this may reduce future profits it can earn from its operation of the Port. As noted by NERA:

> … PNO will be cognisant that substantial future revenues from the shipping channel service depend largely on continued coal exports. … the continuation of coal exports from the Newcastle catchment represents an important source of future income for PNO, which is a fact it will not ignore in its present decision making. [para 13]

7.93 The consequence of this is that pricing today which might maximise its short-term profits (by, for instance, expropriating or "holding-up" those miners that have already sunk costs in coal exploration/mining) would risk sending a signal to potential investors that it might act in the same way after they make sunk investments in the future. Where investors fear PNO might act in this way in the future, they may be less likely to invest in coal exploration/mining activity in the Newcastle catchment. In turn, this may reduce PNO's profits over the longer term.

7.94 Importantly, it is necessary to distinguish between those miners that have already sunk costs in coal exploration/mining in the Newcastle catchment, and those that

[199] Hold-up involves pricing in a way that provided an existing miner only with sufficient scope to recover future incremental costs (so that they would be incentivised not to shut down); but not provide sufficient scope for them to additionally recover previously incurred sunk costs. In the short-term, incremental costs are likely to be variable costs; in the longer-term, they may involve investments in additional (and potentially sunk) capital costs.

have not yet. While PNO may have the ability to price in a way that "holds-up" those miners that have already sunk costs in coal exploration/mining in the Newcastle catchment, it may not have an incentive to do so due to the signal this would send to those investors that have not yet made any such investments. This distinction is noted by NERA, which states:

> … PNO is the owner of a 98-year lease to (primarily coal) port (sic), which is a sunk investment. In setting its prices for the shipping channel service, it will have an eye on future investment in coal mines in the Newcastle catchment. Although PNO is a monopolist in respect of existing coal mines in the Newcastle catchment, it has quite a different relationship in respect of future investors in coal mines. These investors can develop mines elsewhere, or not invest in mines at all. When considering whether to invest in the Newcastle catchment, they would consider the potential for "hold-up" by PNO once they have sunk their capital. [para 4]
>
> Accordingly, it is important for PNO's future coal-derived profits that it develops a reputation for not holding-up its customers. [para 5]

7.95 The Council considers that the desire not to create a reputation for hold-up in this way is likely to act as some level of constraint on PNO's pricing and output decisions for the Service.

7.96 Importantly, many existing miners today (e.g. Glencore, Yancoal etc.) are also likely to contemplate investing in additional exploration/mining opportunities and/or expanding existing mines in the future. This reinforces the risk that opportunistic pricing of existing miners today would be likely to inhibit additional investment in mining activity in the Newcastle catchment by these miners in the future.

Potential mining investors have options outside of the Newcastle catchment

7.97 Prior to sinking capital costs in coal exploration/mining activities in the Newcastle catchment, investors will likely also consider other investment options available to them. In order not to discourage future mining investment in the Newcastle catchment, PNO will therefore likely need to at least ensure its terms and conditions of access do not lead potential investors to believe their expected rate of return from investing in the Newcastle catchment (including by way of bidding for tenements) will be lower than their opportunity cost of capital. In this respect, NERA notes that:

> PNO will also be cognisant that potential coal mine investors have alternatives to the Newcastle catchment. These alternatives include options for developing coal mines elsewhere, or indeed not investing in coal at all. [para 14].

7.98 It follows, therefore, that PNO faces some level of constraint on its pricing and output decisions at the Port as it is, in effect, competing to attract coal mining activity to the Newcastle catchment region. As noted by NERA:

> Although PNO is a monopolist in respect of existing coal mines in its catchment, it faces competition for future coal mines, and it is not in PNO's interests to undermine development of those mines. [para 27]

7.99 The Council accepts that the extent to which individual miners would be prepared to consider investment opportunities outside of the Newcastle catchment may vary. For instance, as noted in paragraph 7.279 below, Yancoal appears to countenance the possibility that significant increases in charges for the Service at the Port will make tenements in the Newcastle catchment materially less attractive such that investment will instead occur in tenements in other coal regions. As noted in paragraph 7.277 below, however, NCIG suggests that the market for investment in the Newcastle catchment is distinct from investment in coal mines elsewhere in Australia; and that a large number of market participants in the tenements market are based solely in the Newcastle catchment.

7.100 Matters of degree are often involved in assessing competition and market power. The extent to which PNO is constrained by potential miners facing alternative investment opportunities can vary from miner to miner. As noted by NERA:

> There is scope for some potential investors to prefer the Newcastle catchment all else being equal, because of economies of scope and potentially also scale, if those buyers have established operations close to them. However, in general, prior to investing capital into a mine, potential owners of tenements have geographic options. [para 23]

7.101 While the Council does not consider PNO is likely to be constrained in its pricing and output decisions to the same extent that it would be if there were alternative ports offering equivalent service to coal exporters, it does consider there are some constraints on its pricing to existing miners created by the need to attract mining investment for the remaining 93 years of its lease at the Port.

There are likely to be some limited regulatory constraints on PNO in the absence of regulation

7.102 The Council has considered if regulatory constraints other than the actuality or threat of declaration will provide an effective constraint on PNO's market power.

7.103 PNO submits its ability and incentive to price in a way that may impact competition in the relevant dependent markets is constrained by:

a) contractual requirements preventing it from discriminating between port users and imposing stewardship obligations

b) reporting requirements imposed by the *Ports and Maritime Administration Regulation 2012 (NSW)* (**PAMA Act**)

c) the threat of review by NSW's Independent Pricing and Regulatory Tribunal (**IPART**).[200]

7.104 In contrast, Glencore submits that PNO's contractual obligations to the State do not act as a significant constraint on prices. Glencore also submits that the threat of alternative regulatory oversight is also weak as the existing NSW monitoring regime

[200] PNO's July 2018 Submission pp 20-24.

provides no effective constraint on pricing practices and would be unlikely to meet the requirements for certification under the National Access Regime.[201]

7.105 The Council acknowledges that various approaches to the regulation of port services exist in Australia. In some states, a certified effective access regime is established (as in the South Australian Ports and Dalrymple Bay Coal Terminal access regimes). In Victoria, a different approach was adopted with a regulatory regime requiring the port operator to comply with a legislated pricing order that directly regulates the pricing of prescribed port services, with the regulator (the Essential Services Commission) responsible for monitoring compliance. To varying degrees, these regimes provide direct regulatory constraint.

7.106 The PAMA Act and PAMA Regulations do provide a degree of transparency over the charges levied by PNO and a price monitoring framework. This occurs by imposing obligations on PNO to publish its charges, and to notify the Minister and publish notice of any changes to port charges. PNO is also required to annually report certain information to the relevant Minister. These requirements may provide some very limited constraint of PNO's pricing practices by promoting transparency. However, the PAMA Act and PAMA Regulations do not act to directly limit or regulate the level at which prices may be set. Compared to the regulatory approaches set out in paragraph 7.105 above, the PAMA Act and PAMA Regulations establish a very light-handed form of regulation. The resultant regulatory constraint is at the lighter end of the regulatory spectrum.

7.107 Further, the PAMA Act and PAMA Regulations are not certified as effective regimes under Part IIIA and there is no other direct regulatory constraint that acts to set or limit the prices PNO may charge for users to access the Service. Therefore, while the PAMA legislation may provide some very limited constraint on PNO's behaviour, the effect of this constraint falls well short of that which would result from an access regime capable of certification; and it is not a substitute for the type of access regulation contemplated by the National Access Regime.

7.108 The Council acknowledges the submissions from PNO that the lease arrangements between the State of NSW and PNO include provisions designed to 'constrain' the behaviour of PNO. The Council considers that these are effectively private contractual arrangements between the two parties, and that any third party with concerns about PNO's behaviour would have to rely on the State of NSW taking action in order to obtain redress. The Council would expect that taking such steps would entail a significant time and cost commitment by the State. While the Council acknowledges that the lease arrangements may allow for some influence over PNO by the State, they are not a substitute for the access arrangements contemplated by the National Access Regime, and would not limit any effects on competition from PNO's actions.

[201] Glencore's August 2018 Submission pp 22-24.

7.109 The Council is mindful, however, that the NSW Government has a clear interest in the continued development and operation of coal mining in the Newcastle catchment. This is especially the case given the significant value of the coal export industry to the NSW economy; and the value the NSW Government is able to extract from the sale of tenements to potential coal explorers/miners in the Newcastle catchment. Further, and as noted in paragraph 9.4, Yancoal and NCIG submit that coal royalties amounted to $1.776 billion in the 2018 NSW state budget.

7.110 On balance, therefore, the Council expects that the NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets; or otherwise harm the public interest. Such an intervention might be via the terms of PNO's lease, under the terms of the PAMA Act (by referral to IPART); or by introducing new statutory restrictions. As noted by the Council in its 2015 Determination:

> It is … highly unlikely that an attempt by PNO to impose price increases that result in the closure of a non-trivial proportion of the Hunter Valley's coal producers would fail to prompt a response from the relevant government agencies. [202]

PNO's lack of vertical integration has important implications for its incentives

7.111 Where the provider of a natural monopoly bottleneck service is vertically integrated into related markets, it can have an incentive to deny access to competitors in related markets, or to allow access on terms and conditions that inhibit the ability of rivals to compete in these markets. This is noted in the PC 2013 Review:

> … denial of access can be used to protect a monopoly position in an upstream or downstream market, in particular where that allows the service provider to increase total profits across its operations. [p. 84].

7.112 Where such a provider is not vertically integrated, however, it is far less likely to have an incentive to deny access to its services. As noted by the Productivity Commission:

> Where a service provider is not competing in upstream or downstream markets, it will usually have little incentive to deny access. Rather, it will have a commercial incentive to allow competition in dependent markets to maximise its own profits. [p. 84]

[202] 2015 Determination at paragraph 4.101.

7.113 Non-vertically integrated service providers benefit from greater levels of competition in related markets because demand for their services depends on demand in related markets. Where there is less effective competition in related markets, the quantity of the Service demanded at the Port is likely to be lower at any given price PNO charges for its services, and its expected levels of profit will be reduced. This is consistent with the findings of the 1993 Hilmer report that:

> Where the owner of the "essential facility" is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. [pp. 240-241]

PNO is not vertically integrated into coal exploration/mining activities

7.114 It has been suggested that PNO may have a vertical interest in markets relating to the export of coal due to the connection between PNO and CM Energy Shipping, which owns and operates bulk transport vessels. The Council does not consider that this relationship constitutes a vertical interest likely to have any material impact on PNO's operation of the Service due to the actual corporate structure through which the two are (distantly) connected; and the Council's observations of the frequency of CM Energy Shipping bulk vessel visits to the Port.

7.115 As noted in paragraphs 7.35 and 7.43 above, PNO has also confirmed that it is not vertically integrated into the provision of coal exploration and mining activities.

7.116 As set out at paragraphs 7.36 and 7.37, PNO is jointly owned by TIF and CM Port, which hold equal governance rights. CM Port is a publicly listed company in which CMG (through direct and indirect interests) controls a 62% interest. CMG also holds a controlling stake in CM Energy Shipping, which owns bulk carrier vessels. There has not been any suggestion that TIF has any vertical interest in any relevant dependent market. A simplified illustration of the ownership structure is illustrated below:

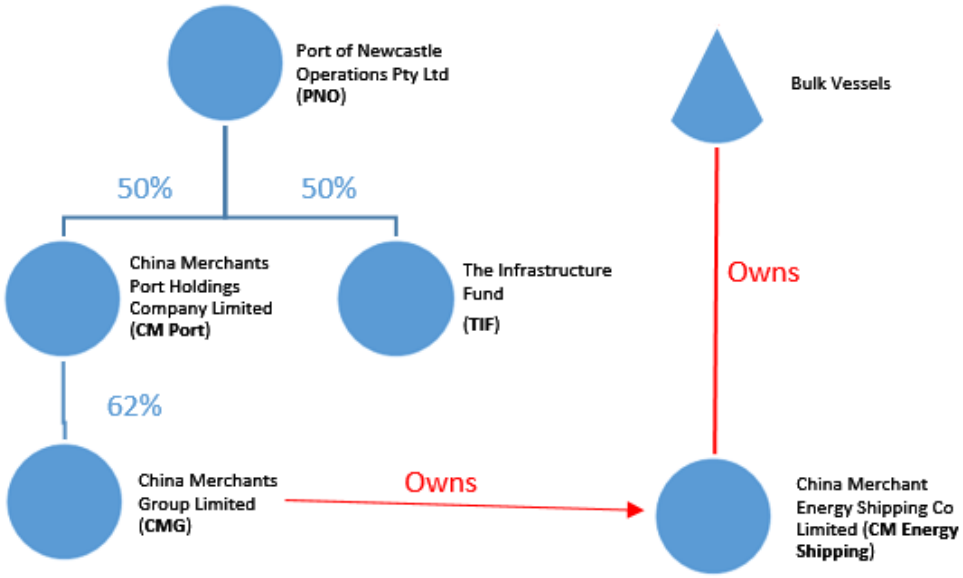

Figure 2 – Simplified ownership structure between PNO and CM Energy Shipping [203]

7.117 The Council considers that the links between PNO and CM Energy Shipping are limited and indirect. The Council considers it highly unlikely that CM Port would seek to impose more favourable terms of access for CM Energy shipping bulk vessels than are offered to other operators. Further, if CM Port did seek to preference CM Energy Shipping vessels, it is unlikely that TIF, which also owns 50% of PNO, would not allow PNO to act in this manner. The Council also notes that this conclusion was accepted by the Tribunal in *re Glencore.*[204]

7.118 The Council has also examined bulk carrier vessel arrival records for the Port over the period 1 January 2014 to 27 May 2019, provided by the NSW Port Authority.[205] These records show the following vessels owned by CM Energy Shipping visited the Port in that period:

a) Pacific Valor on 18/2/2016

b) Pacific Creation on 15/4/2018

c) Pacific Argosy on 11/7/2018

d) Pacific Talisman on 3/1/2019

e) Pacific Spirit on 12/1/2019.

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[203] Prepared by the Council reflecting submissions from PNO, see paragraphs 7.36 and 7.37,

[204] *Re Glencore* at paragraphs 149 to 150.

[205] These records have been published on the Council's website.

7.119 In 2014, 2015 and 2017, no CM Energy vessels visited the Port. In 2016, there was one CM Energy Shipping vessel visit to the Port out of 2,301 total visits in that year. In 2018, were two CM Energy Shipping vessels visited the Port out of 2,337 Port visits in that year. In 2019, there have been two CM Energy Shipping vessel visits to the Port out of the 904 visits recorded from 1 January to 27 May. The Council considers that the presence of CM Energy Vessels, which reached a peak of 0.2% of the bulk vessel visits recorded in the 2019 part year, is insignificant and adds weight to the view that PNO would be unlikely to provide less favourable access terms to non-CM Energy vessels.

7.120 As a consequence of this, the Council considers that PNO has:

a) little incentive to deny access to coal miners seeking to use the Service in order to export coal

b) a commercial incentive for dependent markets to be competitive in order to maximise demand for the Service. This is especially the case given export markets for coal are likely to be effectively competitive (see paragraphs 7.212 to 7.214 below); and the Port is unlikely to face capacity constraints over the term of the existing declaration (see paragraph 7.326 below).

7.121 This view is consistent with the observations of NERA, which states:

> … PNO wants to encourage coal mine investment in the Newcastle catchment area. Because tenements are (critical) inputs into coal mine investments, PNO will therefore want the tenements market to be competitive. If the tenements market was not competitive:
>
> a. Tenements might not be allocated to the most efficient miners. This would reduce coal volumes across the Port, as those miners might not be able to economically produce as much coal as more efficient miners could; and
>
> b. There would be fewer tenements transacted, and so fewer mines developed, reducing coal volumes across the Port. [para 10]

Container markets

7.122 A number of interested parties have also suggested that PNO may be vertically integrated in the Container Port market due to its connection with Sinotrans.

7.123 Sinotrans occupies a similar position to CM Energy Shipping (discussed at 7.116) in the string of entities behind PNO. PNO submits that "CMG is a large consolidated group with a number of discrete business units, one of which, Sinotrans & CSC Holdings Limited, has a controlling interest in Sinotrans Container Lines Co Ltd"[206]. Sinotrans operates container liners on routes between East and South East Asia and Port Melbourne, Port Botany and Port of Brisbane. A simplified illustration of this is provided below:

[206] PNO's September 2018 Submission p 15.

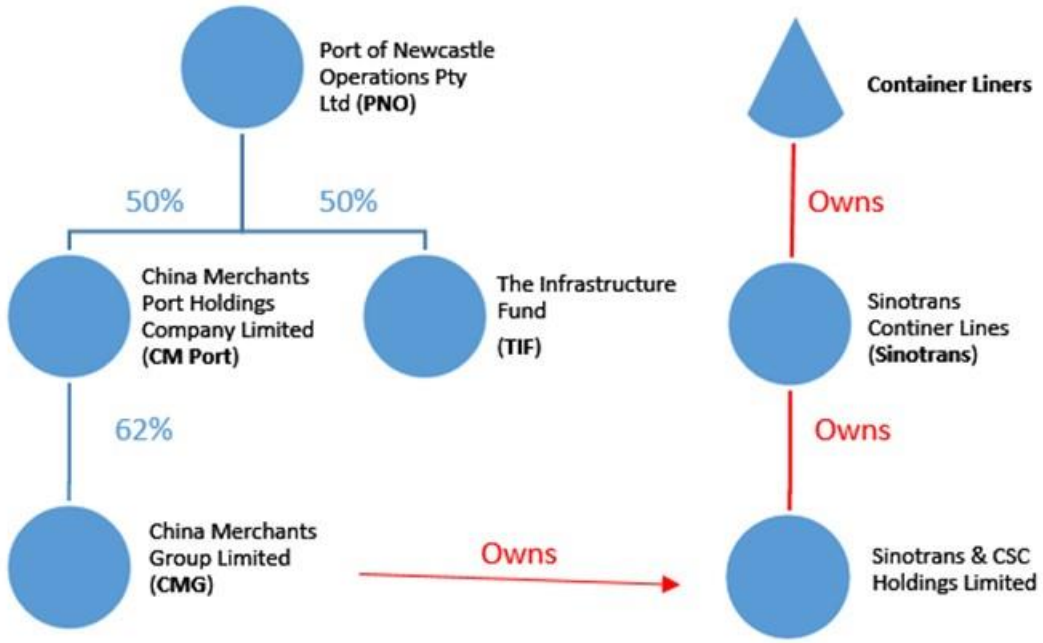

Figure 3 – Simplified ownership structure between PNO and Sinotrans[207]

7.124 The Council considers that the links between PNO and Sinotrans are limited and indirect. As such, the Council does not consider the limited connection between PNO and Sinotrans constitutes a relevant vertical interest.

7.125 The Council also notes that PNO competes with other ports in the container port market which would also constrain its capacity to provide favourable treatment to one liner over another it did in fact have a relevant vertical interest in one or more container liners.

7.126 The Council also notes that some parties have argued that PNO will be incentivised to "cross-subsidise" its operations in container port markets via increased charges for coal exporters seeking to acquire the Service.

7.127 The Council considers that to the extent PNO is able to set different prices for users of the Service operating in container transport markets compared to users competing in coal export markets, it may have an incentive to do so. However, it does not consider that this would rise to the level of "cross-subsidising", where cross-subsidisation would involve setting below-incremental cost pricing for container port services.[208] To the extent the Port is operating significantly below its full capacity (see below), and container and coal export services are not substitutable with each other from a consumer perspective, PNO is likely to

[207] Prepared by the Council reflecting submissions from PNO, see paragraphs 7.36 and 7.37,

[208] See ACCC, *Tests for assessing cross-subsidy*, June 2014, section 1.2.

separately set terms and conditions of access for container and for coal export users that individually maximise its profits for each set of customers. As noted by NERA:

> If containerised demand is more price elastic than coal demand, then PNO could have this incentive [to price discriminate in favour of containerised services]. However, this would not affect PNO's profit maximising price to coal exporters. [para 18]

The Port is unlikely to be capacity constrained over the Relevant Term of the declaration

7.128 Expected changes in the Port's capacity utilisation during the Relevant Term may impact on PNO's incentives to provide access. For instance, if the Port is likely to become capacity constrained over the Relevant Term, it may have altered incentives to provide access to certain types of users (such as those that are likely to generate higher levels of profit for it), or to price discriminate between them. In contrast, where the Port is unlikely to be capacity constrained over the Relevant Term, it is unlikely to have an incentive to deny access, or provide preferential treatment, to particular categories of users.

7.129 The Council has had regard to the likely impact that coal export growth and the possible increase in container liner and cruise ship visit frequency at the Port may have on throughput. As a preliminary point, the Port primarily handles the bulk shipping of coal, measured in million tonnes per annum (**mtpa**), whereas containerised cargo passing through the Port is measured in twenty-foot equivalent units (**TEU**), with the mass of a laden one TEU container varying considerably. To enable aggregation and comparison of throughput against the Port's capacity, the Council has given consideration to 'vessel visits' per annum as a common metric when considering both bulk and other forms of cargo throughput (such as containers).

7.130 PNO submits that Hunter Valley coal export volumes, which account for the significant majority of throughput at the Port, have grown from 67.8 mtpa in 2000 to 159 mtpa in 2017; and are forecast to increase further to 168 mtpa in 2021.[209] Synergies' August Report submits that Wood Mackenzie forecasts suggest that export volumes are expected to increase to approximately 214 mtpa in 2021; and largely stabilise around 210 mtpa until 2030, given current coal prices.[210]

7.131 In terms of total vessel visits, PNO submits that in 2017 it handled 2,326 vessel visits and is forecast to receive 3,228 non-container-ship vessel visits plus 438 container vessel visits in 2031.[211]

7.132 PNO submits that it has modelled its current channel capacity in excess of 328 mtpa or 5,000 vessel visits per annum and, as such, is not currently capacity constrained

[209] PNO's July 2018 Submission pp 22, 23

[210] Synergies' August 2018 Report pp 22, 23.

[211] PNO's September 2018 Submission p 14

or likely to become so by 2031.[212] The extent to which the Port is unlikely to be capacity constrained is illustrated in Figure 4 below.

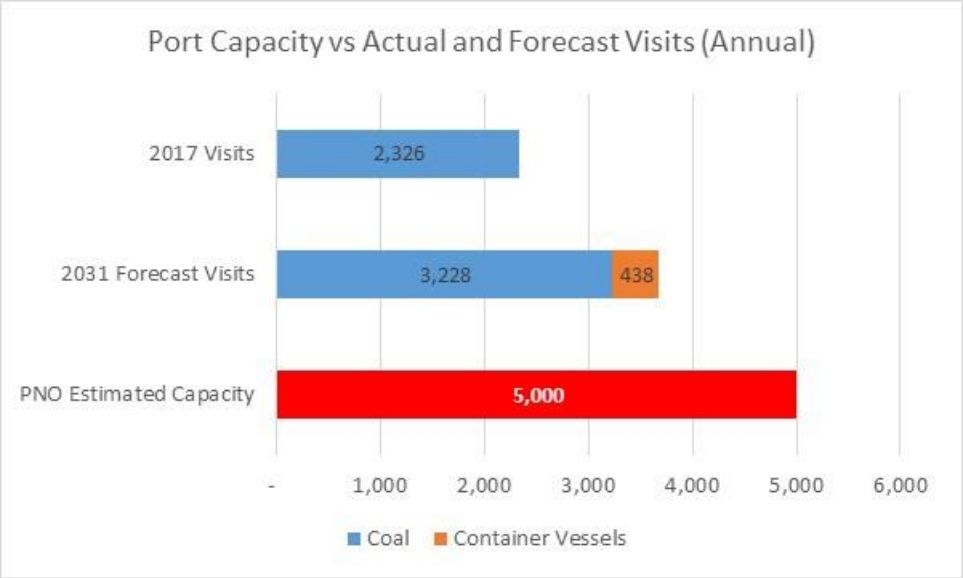

Figure 4 – Comparison of actual and forecast vessel visits at the Port to expected vessel capacity[213]

7.133 In relation to coal exports, PNO further submits that nameplate terminal capacity is currently 211 mtpa and below rail contracted track capacity is currently 192.5 mtpa.

7.134 PNO currently handles a modest level of container trade at the Port and has made public submissions that it is interested in significantly expanding its container capabilities. PNO submits that it has developed a concept proposal for a container terminal development at the Port (**the Container Terminal**) contingent on the removal of a container trade restraint which is currently being investigated by the ACCC. PNO submits that in 2017, its combined container imports and exports totalled only 9,496 TEU across 81 general cargo vessel visits due to the limited types of ships that are able to be served at the Port.[214] In contrast, PNO submits that in year one of Container Terminal operations (i.e. if the Container Terminal investment proceeds), projected container throughput would rise to 76,638 TEU across 77 container vessel visits.[215] If the Container Terminal commences operation on 1 July 2020,[216] projected throughput would rise further to 408,057 TEU across 422 container vessel visits in the year ending 30 June 2031.

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212 PNO's July 2018 Submission p 34 and PNO's September 2018 Submission p 14.

213 Prepared by the Council reflecting submissions from PNO, see paragraphs 7.36 and 7.37,

214 PNO notes that these vessels would have transported containers in addition to other cargoes on their visits.

215 PNO's September 2018 Submission p 11.

216 PNO submits that 1 July 2020 is likely to be the earliest that operations commence if the

7.135 The Council also notes that a cruise ship terminal was being developed at the Port with completion anticipated in 2019 until funding was withdrawn.[217] Between October 2017 and April 2018, 10 cruise ships were scheduled to visit the Port[218], growing to 16 cruise ships scheduled to visit the Port between October 2018 and April 2019.[219] The Council considers that the likely impact of the cruise terminal on cruise vessel visits is unclear, but notes suggestions that the terminal could support a doubling of annual cruise vessel visits.[220] PNO has subsequently stated that the impact of NSW withdrawing funding for the cruise terminal is unlikely to affect cruise ship volumes.[221] The Council has considered the cruise ship projections provided by PNO before NSW withdrew funding for the cruise terminal, since any possible impact of increased cruise ship visits would be more pronounced in that scenario.

7.136 The Council is also mindful of the possible development of a Liquefied Natural Gas (**LNG**) import terminal at the Port.[222] However, ships accessing such a facility are unlikely to require use of the Service and it is unclear whether the terminal will be developed in the Relevant Term. The Council does not, therefore, consider the possibility of such a facility is a relevant factor in its revocation recommendation decision.

7.137 The throughput forecasts and Port capacity estimates put to the Council suggest that the Port's capacity utilisation will increase during the Relevant Term and it may be operating at approximately 75% of its total capacity by 2031 if the Container Terminal is developed. Nevertheless, the capacity of the Port (including potential expansion options) is likely to be sufficient for future growth in throughput during

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container trade restriction were removed). Ibid.

217 PNO. *Newcastle Cruise Terminal*. https://www.portofnewcastle.com.au/Projects-and-Development/Newcastle-Cruise-Terminal.aspx.

ABC. *Crucial funding pulled for Newcastle Cruise terminal.* https://www.abc.net.au/radio/newcastle/programs/drive/crucial-funding-lost-for-newcastle-cruise-terminal/11040112.

218 PNO. *Port of Newcastle launches 2017-18 cruise season. https://www.portofnewcastle.com.au/News-and-Media/Items/2017/Port-of-Newcastle-launches-2017-18-cruise-season.aspx.*

219 PNO. *Cruise Schedule. https://www.portofnewcastle.com.au/CARGOES/Cruise/Cruise-Schedule.aspx.*

220 Newcastle Herald. *Newcastle cruise ship tourism could double after terminal opens.* 28 November 2017. https://www.theherald.com.au/story/5084739/newcastle-aims-for-double-the-cruise-traffic/.

221 ABC. *Crucial funding pulled for Newcastle Cruise terminal.* https://www.abc.net.au/radio/newcastle/programs/drive/crucial-funding-lost-for-newcastle-cruise-terminal/11040112.

222 The Sydney Morning Herald. *Newcastle port could be home to $500 million gas import terminal.* 5 December 2018. https://www.smh.com.au/business/companies/newcastle-port-could-be-home-to-500-million-gas-import-terminal-20181205-p50kc9.html.

the Relevant Term, including where the expansion of cruise ship and container vessel visits are at the upper end of likely levels. As such, the Council does not consider that the Port is likely to be capacity constrained during the Relevant Term and therefore changes in capacity utilisation are unlikely to rise to a level that would influence PNO's incentives to provide access with or without declaration.

7.138 The Council has discussed the impact that growth in vessel visits from container liners and cruise ships would have on pushing the Port towards its throughput capacity because the manner in which a monopolist of a service operating at or approaching full capacity can differ from that of a monopolist with significant excess capacity. In considering the extent of PNO's excess capacity that is likely to exist during the Relevant Term, the use of the Service by any type of vessel (and expended increases in their frequency) is relevant. However, the consideration of certain vessels, such as cruise ships, in this context does not necessarily mean that the markets serviced by those ships warrant consideration by the Council as dependant markets where there is no suggestion that their competitive environment is likely to be impacted by declaration (or its revocation).

7.139 The Council accepts that PNO is seeking to diversify the businesses through which the Port earns its revenues, but does not consider that this diversification provides an incentive for PNO to act in a manner that would lessen competition within any dependant market. Where PNO is unlikely to be capacity constrained in the Relevant Period and has no relevant vertical interests in a market where it does not face competition from another port, the Council considers that PNO will be incentivised to act in a manner which maximises its profits from each of these dependent markets.

7.140 Overall, the Council considers that the possible development of a container and/or cruise terminal is unlikely to increase throughput to a level that fully utilises available capacity and will account for a relatively small proportion of total throughput (and most likely revenue) in the Relevant Term. In these circumstances, the Council does not consider that the possible developments outlined above are likely to incentivise PNO to discriminate in the terms of access offered to different user groups in order to cross-subsidise access for the benefit of more price sensitive users where such discrimination would lead to a reduction in demand in either market.

PNO appears to have engaged in only limited price discrimination to date

7.141 Price discrimination occurs where a firm charges different prices for different units of a good or service, either to the same or different customers, and the difference in charges is not due to differences in the cost of providing these units.[223]

[223] See Tirole, J, *The Theory of Industrial Organisation*, 5th edition, 1992 at pps. 133 – 134.

7.142 To the extent that PNO is able to price discriminate between different users of the Service, this would:

a) Potentially enable it to favour one group of users over another. This might involve it charging, for instance, higher prices for users seeking to export coal through the Port compared to users seeking to import or export containers. Alternatively, it might enable it to charge different miners of coal different prices for the Service (or indeed the same coal miner different prices for different coal it was exporting from different mines). This could be significant as it could, theoretically, enable PNO to hold-up miners that had previously sunk costs in coal exploration and mining; while entering into more favourable terms for those miners seeking to undertake future exploration/mining activities

b) Potentially provide it with an incentive to price in a way that increased usage of the Port relative to what would be expected where it couldn't price discriminate. As noted by NERA:

> If PNO could perfectly price discriminate, then volume would not reduce at all compared to the competitive benchmark. Other forms of price discrimination, if feasible, would result in smaller volume reductions than if there was no ability to price discriminate. [para 12]

The PAMA Act appears to allow PNO to price discriminate

7.143 Section 67 of the PAMA Act provides that PNO may enter into individual negotiated agreements with persons liable to pay any kind of charge under Part 5, which includes the Navigation Service Charge (Part 5, Div 2) and the Wharfage Charge (Part 5, Div 5).

7.144 In its July 2018 Submission, PNO submitted that at that time it had individually negotiated agreements (of the type contemplated by section 67 of the PAMA Act) with visiting cruise ships, but not in respect of other vessels.

7.145 Separately, the Council notes that the Port advertises its fees for accessing the Service in a 'Schedule of Service Charges' which is available on its website.[224] This pricing schedule imposes different charges depending on the cargo being carried, vessel type and berths used.[225] This pricing regime, in effect, allows PNO to price discriminate between markets that rely on access to the Service (intermarket price discrimination).

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[224] PNO 'Schedule of Service Charges Effective from 1 January 2019' https://www.portofnewcastle.com.au/Resources/Documents/Port-of-Newcastle-Schedule-of-Port-Pricing-2019.pdf.

[225] Ibid pp 3, 4.

PNO appears to have engaged in only limited price discrimination between different coal miners

7.146 While PNO appears to charge different amounts for different types of user of the Service, it submitted that (as at July 2018) it did not price discriminate between different coal vessels.[226] Further, its Schedule of Service Charges provides for the same Navigation Service Charge, Wharfage Charge and Port Security Charge rates to be imposed on all coal vessels, regardless of the operator or whose coal is being carried.

7.147 The Council considers that while PNO could enter into individual contracts for different coal miners seeking to use the Service by virtue of section 67 of the PAMA Act, it does not appear to have done so to date. The one exception to this is the charges determined by the ACCC in the Glencore-PNO Arbitration (which were determined after PNO's July 2018 Submission was provided to the Council).

7.148 The Council also notes Yancoal's submission that it has tried to negotiate with PNO unsuccessfully for terms equivalent to those determined in the Glencore-PNO Arbitration. The Council is not aware of Yancoal requesting the ACCC arbitrate an access dispute between it and PNO.

7.149 Depending on the outcome of any appeal processes in relation to the Glencore-PNO Arbitration, it appears possible that some coal miners will be charged different prices for the Service. That said, it is also possible that the Tribunal may determine charges in the appeal of the ACCC Determination that are consistent with those set by PNO for other users of the Service.

7.150 Whether PNO would seek to engage in future price discrimination between different coal miners seeking to acquire the Service is unclear. Importantly, it is unclear how well PNO would be able to separately identify different miners in order to charge different amounts to them. In this respect, a key requirement in order for a firm to be able to successfully price discriminate is that it must be able to identify different customers (or customer groups) in order to set different prices for them.

7.151 In the case of coal, the Council is not satisfied that PNO is able to price discriminate between mines based on its own observations to a significant extent. Once mined, coal from the Newcastle catchment is often stored at a coal loading facility used by several mines.[227] It is then transported to the Port and loaded onto the vessel at one of three coal loading terminals. Each of these coal loading terminals has at least two rail receival facilities.[228] The Council understands that some coal is paid on a delivered basis with coal producers directly chartering the vessel and therefore paying the Navigation Service Charge.[229] However, PNO's customers are usually the

[226] PNO's July 2018 Submission p 7.

[227] Glencore's August 2018 Submission p 7.

[228] Ibid pp 7-14.

[229] Yancoal' August 2018 Submission p. 13.

ship owners and agents, not individual mines. Mr Dowzer's affidavit (see paragraph 7.40) suggests PNO is able to approximate who owns what coal on certain vessels. However, the Council is not satisfied that PNO will have sufficient visibility over the source of coal loaded onto most vessels to be able to set charges so as to expropriate profits from individual coal producers.

7.152 While perfect price discrimination between different coal miners may be practically impossible, Synergies's April 2019 Report submits that even in the absence of transparency around ownership of the coal that is loaded onto vessels using the Service, it would be open to PNO to engage in third degree price discrimination.[230] It claims this could be achieved, for example, by offering differing levels of rebates to different users of the Service.

7.153 Whether or not PNO is able to separately identify which coal belongs to which miner so as to charge different prices for the Service for them when coal is exported through the Port, PNO has not sought to price discriminate in this way to date. Further, the Council has been provided with no evidence that suggests PNO intends to price discriminate in this way in the future.

7.154 Based on the evidence before it at this point in time, the Council is not persuaded that PNO will engage in extensive price discrimination between different coal miners seeking to acquire the Service (except to the extent created by resolution of any appeal in relation to the ACCC Determination). If, however, PNO were to engage in extensive price discrimination in the future, this would be likely to ensure volumes through the Port were more closely aligned with those expected in competitive markets for the Service.

In a future with declaration, negotiations over terms and conditions occur against a backdrop of potential arbitration

7.155 In a future with declaration of the Service, access seekers will be free to negotiate terms and conditions of access to the Service with PNO. If parties are unable to reach commercial agreement, a party will be able to seek arbitration by the ACCC of terms and conditions of access. In this respect, the ability of parties to seek arbitration of a dispute over the terms and conditions of access provides a backdrop that will act to help frame negotiations between PNO and users of the Service.

7.156 At the arbitration stage, the ACCC may, but need not, require the provision of access by the service provider. If it does require the provision of access, the ACCC may set terms and conditions of access, and may deal with any matter relating to access to the service. In making its final determination, the ACCC must take account of the factors set out in section 44X(1) of the CCA and any other matters it considers

[230] Third degree price discrimination refers to a situation where different prices are charged to different *groups* of consumers; whereas perfect price discrimination involves charging each individual user a different price based on their individual willingness to pay for the relevant good or service.

relevant.[231] In the event a party to the ACCC final determination is dissatisfied with the determination, the party is able to seek review of the determination before the Tribunal.[232]

7.157 Under the existing declaration, only Glencore has sought ACCC arbitration of an access dispute with PNO. As noted above, while the ACCC has determined a set of access charges using its arbitration powers under Part IIIA of the CCA, its determination is presently the subject of review before the Tribunal. At this point, it is unclear precisely what terms and conditions of access might result for Glencore to PNO's service at the end of all possible appeal processes.

7.158 Further, access disputes considered by the ACCC are bilateral in nature, and it is open to the ACCC to determine different terms and conditions of access to the Service for different users of the Service. It is also possible under the pricing methodology adopted in the ACCC Determination that different prices could be set for the Service in the future if changes in future events suggest different assumptions may be appropriate to adopt in its pricing approach.

7.159 For all these reasons, it is difficult to predict precisely what terms and conditions of access might be set for the Service in a future with declaration of the Service. While terms and conditions of Glencore's access determined by the ACCC in the Glencore-PNO Arbitration provide an important indication of the methodology the ACCC will likely use if asked to arbitrate a dispute in the future, there is still some uncertainty regarding future arbitrated prices.

7.160 Despite this uncertainty, the Council considers the matters considered by the ACCC in the Glencore-PNO Arbitration provide some indication of the possible charges that might emerge in a future with declaration of the Service. In this respect, the Navigation Service Charge determined by the ACCC for the Service is approximately $0.61 per GT. Separately, as part of the arbitration dispute process the Navigation Service Charge argued by:

a) Glencore to be consistent with the ACCC's approach was approximately $0.41 per GT

b) PNO to be consistent with the ACCC's approach was approximately $1.36 per GT.

7.161 For the purposes of its consideration of whether it should recommend revocation of the Service, the Council considers it is reasonable to use the range of charges over which the parties are in dispute (i.e. approximately $0.41 to $1.36 per GT) as a broad indication of the types of outcome possible under an ACCC arbitrated dispute in a future with declaration of the Service. However, it is possible that fees could be

[231] These include, amongst other things, the objects of Part IIIA, the legitimate business interests of the provider and the provider's investment in the facility, the public interest, the interests of all persons who have rights to use the service, the costs of access, and the economically efficient operation of the facility.

[232] Section 44ZP(1), CCA.

set at any point above, below or within this range. Further, the Council expects that any prices determined via arbitration are likely to frame subsequent negotiations between PNO and users of the Service. In this respect, users of the Service may settle for paying charges that are slightly above those determined via arbitrations in order to avoid the costs of access dispute processes and potential appeals of any arbitral determinations.

7.162 The Council also notes that none of PNO, Glencore or the ACCC proposed to alter the Wharfage Charge from its 2018 pricing schedule level of $0.0746 per revenue tonne.[233]

In a future without declaration, negotiations over terms and conditions will be had without the possibility of arbitration

7.163 In a future without declaration of the service, PNO and users of the Service will continue to negotiate terms and conditions of access to the service. Unlike a future with declaration, however, these negotiations will not occur against the backdrop of parties being able to refer an access dispute to the ACCC for determination (and against any rights of appeal that exist with respect to such arbitral decisions).

7.164 In this instance, PNO will be able to set prices without facing competitive constraint from alternative suppliers able to provide port services to miners in the Newcastle catchment. However, PNO will face some level of constraint in its pricing due to the factors outlined in paragraphs 7.90 to 7.110 above.

7.165 In these circumstances, it is again difficult to precisely determine what prices might result from commercial negotiations in a future without declaration of the Service. That said, the Council notes that following privatisation of the Port in 2014 (but prior to declaration of the service), PNO increased its Navigation Service charge for coal vessels by approximately 40% to $0.69 per GT (which, in 2018 dollar terms, is approximately $0.73 per GT – 19.9% higher than that determined by the ACCC in the Glencore-PNO arbitration). As noted in paragraph 6.21 above, NCIG suggests that past pricing behaviour by PNO prior to declaration of the Service provides some insight into the likely pricing that would occur without declaration of the Service.

[233] ACCC Determination Statement of Reasons p 7.

7.166 The Council has had regard to submissions made by Synergies (on behalf of Clifford Chance for Glencore) that PNO might have an incentive to charge prices up to $12.50 per GT if the export coal price is $75 or above (and even more if export coal prices on world markets rise to higher levels).[234] The Council is not persuaded that prices at this level are likely in a future without declaration of the Service. This is because Synergies' modelling of potential future prices relies on an overly simplistic analysis of PNO's future pricing incentives, as discussed in paragraphs 7.75 to 7.76 above. As noted by NERA:

> … it is important for PNO's future coal-derived profits that it develops a reputation for *not* holding-up its customers. Therefore, PNO wold not price in the way posited by Synergies, because this would easily create a reputation for hold-up, and so would deter future investment in the Newcastle catchment. [para 5].

7.167 Further, the potential price increases modelled by Synergies are over 20 times those previously set by PNO in the absence of declaration of the Service. The Council considers such price increases are implausibly high, and has been provided with no evidence to suggest PNO has any intention to price at these kinds of levels in a future without declaration of the Service. The relative size of the different potential price levels for the Navigation Service charge are depicted in Figure 5 below.

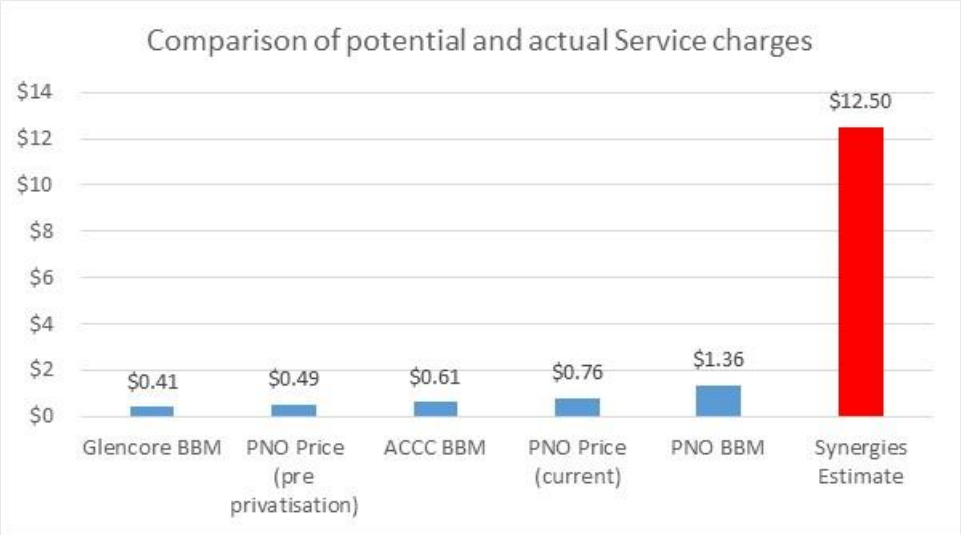

Figure 5 – Range of Navigation Service Charges in dispute versus Synergies' proposed charge

7.168 On balance, the Council considers it is likely (but not certain) that PNO would charge higher prices for the Service in a future without declaration of the Service than those likely to occur in a future with declaration. However, it is unclear precisely how much higher prices might be in a future without declaration of the Service. That said, the prices set by PNO in the absence of declaration of the Service were

[234] Synergies' February 2019 Report pp 19-20.

approximately 19.9 per cent higher than those set by the ACCC in the Glencore-PNO Arbitration. To the extent PNO is unable to price discriminate between different access seekers using the Service to export coal, a price increase in a future without declaration of the Service may lead to small reductions in the volume of coal being exported through the Port. As discussed further in paragraph 7.328 below, it might also mean some marginal mining opportunities that would be profitable in a future with declaration may not be profitable in a future without.

Dependent markets

7.169 The Council must consider whether access (or increased access) to the service, on reasonable terms and conditions, as a result of the declaration would promote a material increase in competition in at least one market other than the market for the service, whether or not that market is in Australia.

7.170 In making this assessment, the Council's focus is on the promotion of competition in other markets. The other markets are commonly referred to as 'dependent markets'. Criterion (a) will be satisfied if access (or increased access), on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in one or more dependent markets.

7.171 This assessment is undertaken by comparing competition in a dependent market in a future scenario in which the service is declared (with access or increased access granted on reasonable terms and conditions) against one in which there is no declaration. If the Council is not satisfied that declaration promotes a material increase in competition in at least one dependent market, the Council will not consider criterion (a) to be satisfied.

Dependent markets previously identified

7.172 The Minister, the Tribunal and the Federal Court have all previously accepted the following dependent markets in their consideration of declaration of the Service:

(a) a coal export market (the **coal export market**)

(b) markets for the acquisition and disposal of exploration and/or mining authorities (the **tenements market**)

(c) markets for the provision of infrastructure connected with mining operations, including rail, road, power and water (the **infrastructure market**)

(d) markets for services such as geological and drilling services, construction, operation and maintenance (the **specialist services market**)

(e) a market for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are a part (the **bulk shipping market**).[235]

[235] Then Acting Treasurer, Senator the Hon. Mathias Cormann, *Decisions and Statement of Reasons Concerning Glencore Coal Pty Ltd's Application for Declaration of the Shipping Channel Service*

7.173 When considering shipping markets such as the bulk shipping market in its 2015 Final Recommendation, the Council noted the limited substitution possible between bulk and containerised shipping.[236] In the context of the 2015 Final Recommendation, the Council considered the relevant product dimension of the bulk shipping market was bulk shipping services (including, but not limited to, coal).

7.174 As it was accepted that the last four dependent markets identified at paragraph 7.172 are effectively derivative markets of the coal export market,[237] it appears to the Council that the bulk shipping market is limited to bulk goods.[238]

Submissions provided to the Council

7.175 PNO's July 2018 Submission states that criterion (a) should be assessed with regard to the same dependent markets considered for the original declaration application (i.e. those listed at paragraph 7.172), although it considers that the last four dependent markets listed are each derivative markets of the coal export market.[239]

7.176 Most of the interested party submissions provided to the Council also accept the dependent markets listed in paragraph 7.172. Glencore refers to these markets in its August 2018 Submission and notes that it considers coal loading terminals, while part of the Port's infrastructure, are likely to be separate markets.[240] Glencore did not provide further information on this point.

7.177 Glencore's August 2018 Submission also states that in the revocation context, criterion (a) cannot be determined by an enquiry into whether dependent markets are (or are likely to be) effectively competitive because the purpose of declaration in the first place is to promote a material increase in competition in the dependent markets and it is to be expected that these markets would become effectively competitive following declaration.[241]

7.178 Shipping Australia's August 2018 Submission suggests that declaration of the Service is likely to have an impact in a 'container port market', noting that PNO conducted a series of public consultations in February 2018 regarding its intention to develop a container terminal.[242]

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at the Port of Newcastle, 8 January 2016, pp 2, 3; *Re Glencore* paragraphs 37, 38; *PNO v Tribunal* paragraphs [20] and [22].

236 2015 Final Recommendation p 31

237 *Re Glencore* paragraphs 126 & 139.

238 Noting that coal is shipped as bulk freight from the Port rather than containerised freight, the Council considers that the Minister and the Tribunal had would not have considered containerised freight to fall within the bulk shipping market when concluding that it is derivative from the coal export market.

239 PNO's July 2018 Submission p 16.

240 Glencore's August 2018 Submission p 19.

241 Ibid p 6

242 Shipping Australia's August Submission pp 5, 6.

7.179 Yancoal[243] and NCIG [244] make similar submissions that the five dependent markets identified at paragraph 7.172 may be appropriate product market definitions, subject to their submissions that there are likely to be separate thermal and metallurgical coal markets, and separate markets for coal authorities as distinct from non-coal authorities.

7.180 PWCS submits that it operates in a market which is dependent on the Service but does not identify the dimensions of this market.[245]

Dependent markets considered by the Council

7.181 The Tribunal and Federal Court have previously accepted that the bulk shipping market, the tenements market, the infrastructure market and the specialist services market are derivative markets of the coal export market. The Council also notes that several interested party submissions state that there has been no material change in market conditions or facts since Declaration.[246] Several interested parties have focused their discussion of criterion (a) on the impact that declaration may have in the tenements market.

7.182 The Tribunal did not consider it necessary to address the impacts suggested in the markets identified as being derivative of the coal export market in *Re Glencore*. The Tribunal noted that the impact of increased access on the coal export market is not such as to satisfy the Tribunal that it would promote a material increase in competition in that market and it is difficult to see how there would be flow-on effects in the derivative markets.[247]

7.183 In its 2015 Final Recommendation, the Council recognised the bulk shipping market as a dependent market noting that there is a distinction between bulk and containerised shipping services.[248] The Council remains of this view in its current consideration of dependent markets.

7.184 Interested parties have commented that the tenements market has not previously been examined in great detail and may be the dependent market most likely to see an increase in competition as a result of declaration. The Council remains of the view that the tenements market is a derivative of the coal export market but considers it appropriate to examine the tenements market in greater detail given the submissions received.

7.185 Noting that PNO has expressed its intention to develop a dedicated container terminal at the Port which could significantly impact east coast containerised freight

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243 Yancoal's August 2018 Submission, pp 10-11.

244 NCIG's August 2018 Submission p.10

245 PWCS' August 2018 Submission p.3.

246 See, for example, Glencore's August 2018 Submission p.5, NSWMC's August 2018 Submission p. 2, Anglo American's August 2018 Submission p. 3. NGIC's August 2018 Submission, p. 3

247 *Re Glencore* paragraph 139

248 2015 Final Recommendation paragraph 4.66.

markets, the Council also considers it appropriate to have regard to a 'container port market' as an additional discrete dependent market.

7.186 The Council considers that the dependent markets relevant to its assessment of criterion (a) are:

(a) the coal export market;

(b) the tenements market; and

(c) the container port market.

The Council is not aware of any other dependent market in which competition might be materially promoted as a result of declaration of the Service without also observing a material increase in competition in one of these three dependent markets.

7.187 The Council accepts that the coal export market, the tenements market and the container port market are each likely to be functionally separate from the market for the Service. While these dependent markets are related to the market for the Service, the shipping channel service is distinct from the exploration, production and sale of coal; and the import and export of shipping containers. The Council has received no evidence to suggest that there is integrated competition across levels of the supply chain that would make distinct functional markets inappropriate.

7.188 As noted at paragraph 7.135, the Council has considered a possible rise in cruise ship visits to inform its view of PNO's incentives, but does not propose to undertake a detailed examination of a possible 'cruise ship market' in circumstances where there has been no suggestion that declaration would increase competition in such a market.

Effect of declaration on competition in the coal export market

Submissions

7.189 PNO submits:

(a) The coal export market is a large, global and highly competitive market which will remain competitive with or without Declaration of the Service. Any dependent markets, similarly, are effectively competitive without declaration

(b) Port charges account for a small percentage of the total cost of coal and would remain so even if port charges were to increase significantly. As such, port charges comprise too small a component of the total delivered cost of coal to create any material uncertainty or impact on competition in relevant dependent markets. PNO estimates port charges to account for less than 1% of the delivered cost of coal exported from the port and 0.43% of the per tonne price paid by a buyer[249]

[249] PNO's August 2018 Submission pp 25-28.

(c) Market participants (namely, coal producers) face much greater uncertainty from other sources than they do in relation to future prices to use the Service. In particular, current port charges and uncertainties around future port charges are dwarfed by volatile global coal export market conditions, landside and sea freight costs and mine operating costs[250]

(d) The 'hold-up' problem identified by the ACCC (see paragraph 7.195) will not arise because the risks to returns from investing in coal mines are subject to greater sources of uncertainty (such as coal prices). There is no basis to assume that access terms will be more favourable for users with declaration than without and PNO is not able to price discriminate between mines[251]

(e) Even if prices to use the Service were set in a manner that may affect the volume of coal exported through the port, this alone is not sufficient to satisfy criterion (a). The promotion of a 'material increase in competition' requires both that the structure of the market or conduct of the market participants is changed in a way that can be expected to materially enhance competition, and that volume and/or quality of output is likely to increase. It is likely that only a significant impact on volumes would have this effect.[252]

7.190 Glencore submits that if declaration is revoked, coal producers will lack certainty regarding prices at the Port and will need to have regard to the risk of significant future price increases. The critical issue is not the relative uncertainty around future port charges (absent declaration) but that in the face of industry wide risks, an additional risk specific to the Newcastle catchment area will detract from the attractiveness of investing in that area.[253] This would reduce investment in new coal mining projects in the Newcastle area which will be of greatest consequence to small coal producers and marginal coal projects. [254] This would limit the scope for effective competition in local, dependent markets.[255]

7.191 Yancoal notes that if the Declaration is revoked there will be a distortion in a number of dependent markets as it is likely that Glencore will have the benefit of ACCC arbitrated terms (which would continue to apply if a final determination is made by the ACCC before the Declaration is revoked)[256].[257]

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[250] Ibid pp 29-32.

[251] PNO's September 2018 Submission p. 2.

[252] PNO's July 2018 Submission, pp 20, 37.

[253] Glencore's August 2018 Submission pp 24, 28.

[254] Ibid pp 26, 27; Synergies' August 2018 Report pp 53-61.

[255] Glencore's August 2018 Submission pp-27-28.

[256] Yancoal's August 2018 Submission pp 15, 16.

[257] It is not necessary for the arbitration to conclude before any revocation. Further, arbitration does not automatically cease if there is a revocation. The arbitration panel must make a decision on the case before them - see s.44V – subject to the exceptions listed in s.44V. Those exceptions would potentially allow the arbitration panel to discontinue the arbitration in the

7.192 Synergies' August Report submits that the coal export market should be divided into separate markets for thermal and metallurgical (coking) coal on the basis that these two grades of coal serve separate purposes (with thermal coal used for energy production and in industrial applications; whereas metallurgical coal is used in steel production) and the markets for each operate largely independently. Synergies submits that the thermal coal market is the most significant for consideration of a coal export market as most of the coal exported from the Port (85-90%) is thermal coal. Synergies also submits that the functional dimension for coal export markets is the sale of coal products for export and the geographic dimension is global in nature.[258]

7.193 As noted at paragraph 7.179, Yancoal and NCIG also submit that there are likely to be separate thermal and metallurgical coal markets.

7.194 Anglo American submits that revocation of the Declaration would lead to reduced investment and economic activity, reduced employment in the Hunter Valley and a reduction in coal exports.[259]

7.195 The ACCC submits that the primary economic concern arises in situations where, absent regulated access, there are few limits on the ability of an owner of monopoly infrastructure to raise the charge for services, or otherwise impose terms and conditions of access that are other than 'reasonable'. This has two main potential effects. First, production in dependent markets may decrease in both the short and long term, with the result that some firms may exit the market. Second, users of the monopoly service are subject to the threat of 'hold-up'; that once an investment is made the monopoly service provider will seek to change the terms and conditions, including price, in its favour. Fearing this, customers will be reluctant to invest, or will make less desirable investments so that there will be potential dampening or chilling of investment incentives by customers who are dependent on the service. Declaration would enhance the conditions or environment for improving competition in dependent markets because commercial negotiations would be conducted with the knowledge that arbitration is available if negotiated agreement cannot be reached. It is more likely that 'reasonable terms and conditions' for using the service would be offered and agreed to in such a scenario.[260]

7.196 PNO's September 2018 submission (accompanied by a report prepared by ResourcefulNæss Consulting titled 'Effect of Port Charges on Incentives to Invest in Coal' [the **ResourcefulNæss Report**] and two reports by HoustonKemp titled 'Effect of Declaration on incentives to invest in coal mines' [**HoustonKemp's Incentives Report**] and 'Effect of declaration on competition for coal authorities' [**HoustonKemp's Tenements Report**]) submits that declaration will not have any

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event of a revocation but it does not require it.

258 Synergies' August Report pp 36-38.

259 Anglo American's August 2018 Submission p 4.

260 ACCC's August 2018 Submission p 5.

material impact on investment incentives in new coal mining projects in the Port's catchment area for the following reasons.

(a) The expected return from mining investments and the risks associated with investing in coal mines will not be discernibly different with or without investment because port charges comprise such a small part of the cost of supplying coal [261]

(b) There are far greater sources of uncertainty (such as coal price and exchange rate fluctuations) impacting the risk around realising returns from coal mining investments which are likely to form the dominate considerations in investment risk appraisals. As such, there is no basis to assume that that access terms will be more favourable for users with declaration of the Service compared to without declaration [262]

(c) PNO is not able to set terms and conditions of access that discriminate between mines, so the 'hold-up problem' described by the ACCC will not arise [263]

(d) Port charges are an immaterial cost of operating or developing a coal mine and are not a determinant of investment decisions to open or expand coal mines.[264]

7.197 NCIG's October 2018 Submission states that:

(a) PNO's analysis ignores the differential effect that port charges will have on different users, noting that new and smaller mining and exploration companies (which are closer to being commercially unviable than larger miners) are more likely to reduce their scale or exit the market in response to the future price increases that are possible if PNO is not constrained by the Declaration. This reduces the effectiveness of these businesses as competitors[265]

(b) If PNO's proposed container terminal is developed, PNO would then hold a monopoly position serving the Hunter Valley coal chain but face competition from other ports in its facilitating containerised trade. This scenario would impose a strong incentive for PNO to apply discriminatory pricing to shift costs towards coal services and provide preferential access to capacity (through preferential scheduling) to those services where the port competes with others (such as containers and bulk grain).[266]

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261 PNO's September 2018 Submission p 2;

262 Ibid

263 Ibid

264 Ibid; ResourcefulNæss Report.

265 NCIG's October 2018 Submission pp 3, 6 and 7.

266 Ibid p 9.

7.198 Yancoal's October 2018 Submission states that PNO's submissions have improperly focused on PNO's current pricing and responds to the reports prepared by ResourcefulNæss Consulting and HoustonKemp Economists as follows.

(a) In response to the ResourcefulNæss Consulting report, Yancoal submits that its own experience is that infrastructure and coal supply chain costs are considered as part of investment decisions. The experience of a single consultant in transactions involving large coal producers during high coal prices is not persuasive of how declaration impacts investment. Much of the consultant's experience relates to Rio Tinto which would see port charges as less material to anticipated project profit margins than would be the case for small producers with smaller scale or lower margin projects[267]

(b) In response to HoustonKemp's Incentives Report, Yancoal submits that the only basis for concluding the hold-up problem will not arise is a comparison of current prices to a spot estimate of average profit margin at a single point in time, which Yancoal says is simplistic. The report ignores the fact that PNO can raise price to all users in a way that causes investment hold-up to at least some users, noting that lower margin producers (which are often newer companies) will be more sensitive to such increases. Coal companies earning/anticipating positive profits may still become concerned about making further investments in the Hunter Valley and instead choose other projects that would not be impacted by PNO future pricing uncertainty. The report ignores the fact that coal prices, freight rates and foreign exchange rates are generally cyclical, predictable and able to be mitigated whereas likely future price increases imposed by PNO without declaration of the Service cannot be estimated or mitigated and are unlikely to be reversed once imposed.[268]

7.199 Glencore's October 2018 Submission responds to PNO's September 2018 Submission and accompanying reports as follows:

(a) Just because coal prices have improved, does not mean that they will remain at current levels[269]

(b) Any mining company in Australia would take prudent steps to prepare for risks in mining and exports in Australia which include all aspects of a company's cost base and there is no basis to claim that rail and port charges are not matters taken into consideration by mining companies when they invest in mining projects. In the view of actual mining companies, these charges are significant[270]

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[267] Yancoal's October 2018 Submission p 5.

[268] Ibid p 6, 7.

[269] Glencore's October 2018 Submission p 7.

[270] Ibid pp 7, 8.

(c) Because demand and supply changes that occur over time are outside of a company's control, companies such as Glencore have to focus on infrastructure costs[271]

(d) Take or pay and rail and port infrastructure charges are important components of new (and additional investment in) mining projects. Smaller miners using the Wiggins Island Coal Terminal faced insolvency due to such commitments[272]

(e) Drawing on its submission that PNO is able to make quite accurate assessments of what coal was in which coal vessels chartered or otherwise shipping Glencore coal (see paragraph 7.40), Glencore submits that the risk of regulatory hold-up that the ACCC noted is real and not hypothetical[273]

(f) As a result of having benefitted from the ACCC's arbitration determination, Glencore will be able to offer its customers a more efficient and competitive offering than its competitors, such as Yancoal.[274]

7.200 If it were accepted that there are no vertical integration issues at this time (which Glencore does not accept), PNO has no control over its shareholders such that there is no certainty that it will not become vertically integrated in a relevant market in the future.[275]

The Council does not consider it likely that declaration would promote a material increase in competition in the coal export market

7.201 In order to export coal mined in the Newcastle catchment into overseas markets, miners need to ensure their coal can be transported from their mine(s) to overseas destinations. A number of key services are needed to achieve this, including acquiring access to rail transport; shipping services; and the Service at the Port. As noted in paragraph 7.87 above, the Council accepts that coal miners operating in the Newcastle catchment face no effective alternative for port services other than those provided by PNO at the Port.

7.202 This means that PNO is unlikely to be constrained by the existence of an alternative port able to provide a substitute for the Service to coal miners that have already sunk costs in coal exploration/mining in the Newcastle catchment. However, as noted in paragraphs 7.87 to 7.110, there are a number of other factors that limit its ability and incentive to take advantage of any market power it might have with respect to the terms and conditions of access for these miners.

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271 Ibid.

272 Ibid and Tim Buckley, Renew Economy, *Stranded assets: Australia's biggest coal project already at risk* 17 April 2014, https://reneweconomy.com.au/stranded-assets-australias-biggest-coal-project-already-at-risk-10350/.

273 Glencore's October 2018 Submission p 10.

274 Ibid p 11.

275 Ibid p 12.

7.203 The Council has considered whether it is likely, in these circumstances, that access (or increased access) to the Service on reasonable terms and conditions, as a result of declaration of the Service, would promote a material increase in competition in a coal export market. It has done this by:

(a) Outlining those findings from the Minister's consideration of whether to declare the Service in 2015 that the Council considers still remain relevant today

(b) Describing key characteristics of the coal export market it has considered

(c) Considering whether PNO is likely to have an incentive to inhibit the ability of coal miners in the Newcastle catchment to compete in this market

(d) Analysing whether declaration of the Service would likely to promote a material increase in competition in the coal export market.

7.204 Consideration of these factors leads the Council to conclude it is unlikely that declaration of the Service is likely to promote a material increase in competition in the coal export market.

Many findings from the Minister's 2015 remain relevant today

7.205 In 2015, the Minister was not satisfied that declaring access to the Service would promote a material increase in competition in any of the five dependent markets identified in paragraph 7.172 because:

(a) there was insufficient evidence that the identified dependent markets are not effectively competitive

(b) the navigation charges represent a small fraction of the overall cost of producing coal, and even if the charges were to increase significantly in the future, they will remain a minor cost element

(c) coal producers manage a range of uncertainties in their businesses, many of which are likely to be far greater than that which exists in relation to navigation charges

(d) PNO was granted a 98-year lease on the Port and is heavily reliant upon coal as the largest share of its throughput

(e) PNO has contractual obligations with the State of NSW to maintain the Port as a major seaborne gateway

(f) PNO is not vertically integrated into any dependent market in a way that affects its business decisions.

7.206 The Minister concluded that the terms of access to the Service provided by PNO were not a material factor in whether dependent markets will remain effectively competitive in the future. The Minister also observed that PNO is heavily reliant on coal exports for its revenue and does not have an incentive to diminish the long-term output of the Hunter Valley coal industry.

7.207 In *Re Glencore*, the Tribunal stated that it had the same view as the Minister on these points. Further, it stated that if it were wrong about the correct approach to section 44H(4)(a) (criterion (a), as it then stood), it would not be satisfied that increased access would promote a material increase in competition in the coal export market.[276]

7.208 In this respect, the Tribunal concluded:

> If it were wrong about the correct approach to s 44H(4)(a) as addressed in Issue 1, it would not be satisfied that increased access would promote a material increase in competition in the coal export market. If that market would not be promoted in that way, it follows that the other four dependent markets would also not be promoted with a material increase in competition in any of them.[277]

7.209 Further, Glencore argued before the Tribunal that the absence of declaration created uncertainty in dependant coal markets arising from PNO's 'unfettered monopoly power to increase prices', and this would have an impact on the state of competition in a way that satisfied criterion (a). It referred to the Hilmer Report (at p 241) in support of this argument. The Tribunal responded:

> … but at that point the Report says that where the essential facility is not vertically integrated, the question of "access pricing" is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process.[278]

Coal export markets are likely to be effectively competitive at present

7.210 In *Fortescue Metals Group Limited*[279], the Tribunal held that access is unlikely to promote competition in a dependant market if it is already effectively competitive (at [1068]). It follows, therefore, that if the coal export markets is likely to be effectively competitive without declaration of the Service, then the inquiry regarding whether declaration would promote a material increase in competition in this market would likely end at this point.

7.211 In 2015, in circumstances without declaration of the Service, the Council concluded that the coal export market was effectively competitive. At the time, it noted that:

(a) Coal from the Hunter Valley is predominantly exported, and Glencore submitted that there was in excess of 35 customers from 16 countries for Hunter Valley coal

(b) Glencore estimated that 70% of exports go to Japan, Korea and Taiwan, with a further 20% exported to China

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276 *Re Glencore* paragraph 157.

277 *Re Glencore* paragraph 157

278 *Re Glencore* paragraph 133

279 [2010] ACompT 2.

(c) Glencore submitted that in the Hunter Valley there are more than 30 operating coal mines, operated by 11 coal producers (as well as other coal projects in various stages of exploration and development)

(d) Glencore estimated that Hunter Valley coal production accounts for around 40% of Australia's black coal production

(e) A number of parties had submitted that coal is an internationally-traded commodity, and prices are set by reference to international spot prices.

7.212 The Council does not consider the features of the coal export market to have changed significantly since it was considered by the Council in 2015. Coal continues to be traded and shipped internationally; and Australian coal exporters participate in this international trade and compete against coal produced and sold through other ports in Australia and overseas. In this respect, there are currently several companies participating in the coal export market which are supplying coal to a wide range of global purchasers; and that the nature of the competitive interactions between participants in the coal export market has not changed significantly despite PNO's acquisition of the Port, and subsequent increases in the price of the Service since 2015.

7.213 The Council has not received any submissions during this consideration that suggest the coal export market is not currently effectively competitive. Instead, a number of interested parties made submissions to the effect that they do not consider there to have been a material change in circumstances since the Declaration was made.[280] The Council takes these submissions to indicate that competitive conditions have not changed significantly in the coal export market since the Declaration was made.

7.214 In this context, export coal miners from the Newcastle catchment are likely to be "price takers" – that is, decisions by individual coal miners regarding how much coal they will export in any given period are unlikely to materially affect prices for coal in overseas export markets. It is also highly unlikely that changes in the price of the Service within the range considered in paragraph 7.160 above in any given period are likely to alter export prices for coal.

7.215 It follows, therefore, that the Council does not consider there is likely to be a difference in the state of competition in the coal export market with or without declaration of the Service in the Relevant Term such that criterion (a) would be met in relation to this dependant market.

7.216 Consistent with its view in 2015, the Council considers the geographic scope of the coal export market for Australian exporters extends beyond Australia and into at least the Asia-Pacific region. However, as the Council's current assessment does not

[280] See, for example, Glencore's August 2018 Submission p.5, NSWMC's August 2018 Submission p. 2, Anglo American's August 2018 Submission p. 3. NGIC's August 2018 Submission, p. 3

turn on the geographic dimension of this market, the Council does not propose to define the geographic boundaries with further precision.[281]

7.217 The Council also acknowledges that coal is not a homogenous commodity and the differences in the grade of coal (i.e. thermal vs metallurgical) may impact its suitability and thus substitutability for particular purposes. In the current matter, the Council has focused its consideration of the coal export market on thermal coal, since this represents the significant majority of coal exported from the Port. However, as the Council's conclusions regarding the coal export market do not turn on the product dimension of this market, the Council does not propose to define the product boundaries with further precision.[282]

PNO is unlikely to have an incentive to diminish competition in coal export markets

7.218 As noted in paragraphs 7.112 to 7.113 above, where a service provider is not vertically integrated into a related market, it will usually have little incentive to deny access to its services; and will instead have a commercial incentive for dependent markets to be effectively competitive. Given PNO is not vertically integrated into the coal export market, the Council considers that PNO:

a) has little incentive to deny access to coal miners seeking to use the Service in order to compete in the coal export market

b) is likely to have a commercial incentive for the coal export market to be effectively competitive in order to maximise demand for the Service. This is especially the case given the Port is unlikely to face capacity constraints over the Relevant Term of the Declaration.

7.219 The Council's views on this apply irrespective of whether PNO is able to price discriminate between miners seeking to export coal through the Port. To the extent PNO is able to price discriminate between different coal miners, the Council considers PNO will not wish to price to individual miners in a way that inhibits their ability to compete in the coal export market. To the extent it did price them out of competing in this market, PNO would effectively be shooting itself in the foot, as it would be unable to earn any revenue or profits from coal being exported by these miners.

7.220 Further, the Council does not consider that price discrimination necessarily harms competition in a dependent market, or that it would reduce volumes served by the Port over time. It can, as noted above, improve efficiency in some circumstances. While such price discrimination may enable the Port to capture more of the gains from trade from individual users, this may be consistent with greater levels of mining investment in the Newcastle catchment.

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281 2015 Final Recommendation p 29.

282 Ibid pp 29, 30.

7.221 In contrast, if PNO was unable to price discriminate between different miners seeking to export coal through the Port in a future without declaration of the Service, the Council considers that PNO would be likely to set a uniform charge across all miners that it believed would maximise its profits over the long-term. The Council also considers that this is likely (but not certain) to involve higher charges for the Service in a future without declaration compared to what might be set in a future with declaration for the reasons set out in paragraphs 7.155 to 7.168 above. In turn, this may have the effect of making some marginal coal exploration/mining activities that would have been profitable in a future with declaration of the Service unprofitable in a future without. However:

a) For the reasons set out in paragraphs 7.222 to 7.227 below, the Council does not consider this effect is likely to be significant

b) For the reasons set out in paragraphs 7.210 to 7.215 above, the Council does not expect declaration would promote a material increase in competition in the coal export market as it considers the market is likely already effectively competitive, and will remain so with or without declaration of the Service.

The relative significance of port charges to prices in coal export markets

7.222 As noted above, the ACCC determined a charge of approximately $0.61 per GT[283] for the Navigation Service in the Glencore-PNO arbitration; and maintained a charge of $0.0746 per revenue tonne (t)[284] for the Wharfage charge[285]. However, the ACCC Determination is the subject of an appeal process before the Tribunal; and during the arbitration process, the ACCC received submissions from the parties that the appropriate Navigation Service Charge using the ACCC's BBM pricing methodology lay in a range between approximately $0.41 per GT and $1.36 per GT. The Council considers this provides a broad indication of the range within which prices may ultimately be determined in a future with declaration of the Service.

7.223 In contrast, in the absence of declaration of the Service, PNO had increased its Navigation Service Charges by 40% to $0.69 per GT (or $0.73 per GT in $2018); and that its current charge has subsequently risen to approximately $0.76 per GT. While Synergies has in submissions following the SOPV argued it would be profitable for PNO to increase this charge to $12.50/GT if coal export prices are $75 in global markets, the Council does not consider this estimate to be plausible for the reasons set out in paragraphs 7.166 to 7.167 above.

7.224 In this context, the Navigation Service Charge at the Port is likely to represent only a small proportion of the price of coal on international spot markets with and without

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283 Gross Tonnage is a measure of a ship's internal volume.

284 Revenue tonnage is a measure of cargo, rated by weight or volume (whichever is larger).

285 PNO, *Port of Newcastle Schedule of Service Charges Effective from 1 January 2018, https://www.portofnewcastle.com.au/Resources/Documents/Port-of-Newcastle-Schedule-of-Port-Pricing-2018.pdf.*

declaration of the Service; and the overall cost of production of coal exported from the Newcastle catchment.

7.225 In this respect, PNO's analysis of the relative impact of its charges notes the spot price of coal in 2017 was AU$88.42 per tonne. Further, it estimates that coal producers' costs are approximately $43.02/t on average; meaning that an average Hunter Valley coal miner earns a margin of $45.39 per tonne.[286] The relative size of the Navigation Service Charge under a range of scenarios to PNO's estimates of global prices; average coal production costs; and margins earned by the average coal miner is depicted in Figure 6 below.

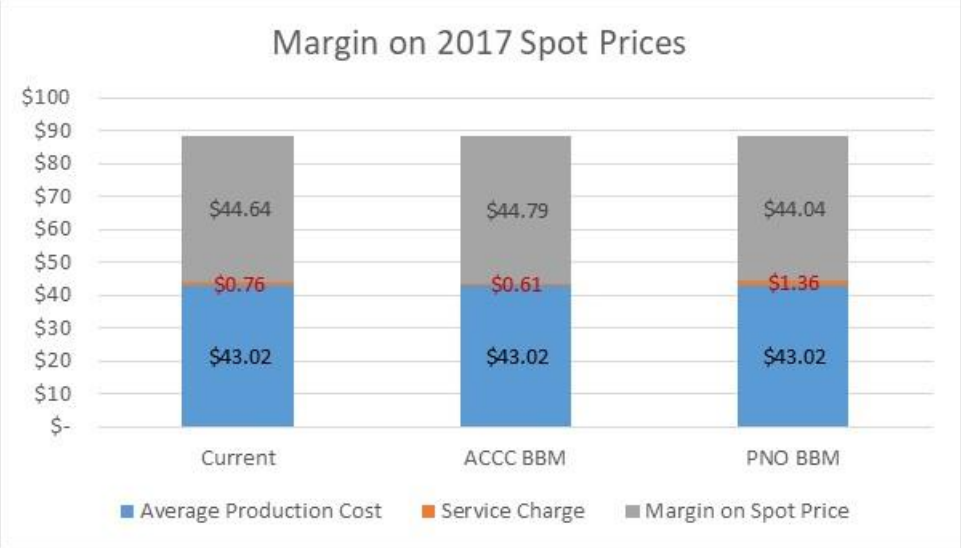

Figure 6 – Comparison of Navigation Service Charge to PNO's estimates of average coal production costs and spot prices in 2017 in the coal export market

7.226 While parties may dispute the exact size of average production costs for miners, the Council considers that the likely range of charges for services at the Port represent only a small proportion of the international spot prices for coal. This would be the case even if prices rose to $1.64 per GT, as Synergies' submitted in August 2018[287] could be argued by PNO to be consistent with the ACCC's BBM pricing methodology[288]. This proportion will be even smaller if the spot price for coal rises from $88/t to expected levels of $100/t by 2020[289]. In this regard, while some submissions argue that the international coal price may fall in the future, Synergies' August Report states that prior analysis prepared by Wood Mackenzie suggests that

[286] PNO's July 2018 Submission pp 25-28.

[287] Synergies' August Report, p 23.

[288] ACCC Final Determination Statement of Reasons – 18 September 2018 (public version) p 7.

[289] Ibid.

coal prices are likely to rise to $100/t in 2020; and increase modestly over the coming decade.[290]

7.227 As indicated in paragraphs 7.155 to 7.168 above, the Council accepts it is likely (but not certain) that charges for the Service will be higher in a future without declaration of the Service, although it is unclear precisely how much higher (if at all). In this respect, the ACCC Determination set prices for the Navigation Service Charge that were approximately 19.9 per cent (in 2018 dollar terms) below those otherwise charged by PNO. While differences in charges for the Service of this order might make a difference at the margin for some miners contemplating investing in exploration/mining of coal in the Newcastle catchment, it is highly unlikely that this would lead to such a material impact on coal mining so as to promote a material increase in competition in coal export markets. This is especially the case given:

a) The coal export market is already effectively competitive; and coal miners in the Newcastle catchment are highly likely to be price takers in this market

b) Charges at the Port are likely to remain a small proportion of international spot prices for coal with and without declaration of the Service.

Uncertainty and investment incentives

7.228 While some interested parties accept existing charges for the Service are a small proportion of coal export prices, a number of interested parties have identified the uncertainty around future price increases for the Service in a future without declaration as a reason why the declaration ought not be revoked. In this context, it is argued that the risk of increases in Port charges adds an extra element of uncertainty for prospective miners in the Newcastle catchment which will likely lead to less investment in the future.

7.229 There is likely to be a certain level of uncertainty with regard to future Port charges in a future without declaration of the Service. While there is still ongoing uncertainty regarding charges likely to be set in a future with declaration due to the ongoing appeal process in relation to the ACCC Determination, the Council also accepts that access prices for users of the Service will, in the long-term, likely be more certain in a future with declaration of the Service. The Council accepts this may have an effect at the margin on some discrete decisions regarding future investment in the Newcastle catchment. However, the Council expects any such impact on future investment will be:

a) Minimal given charges at the Port are likely to remain a small proportion of international spot prices for coal with and without declaration of the Service. Further, charges for the Service are likely to remain a small proportion of the average margins earned by coal miners above their production costs in a future with or without declaration of the Service

[290] Ibid.

b) Tempered by the incentive PNO would have not to materially reduce mining activity in the Newcastle catchment for the reasons expressed in paragraphs 7.218 to 7.219 above

c) Potentially able to be mitigated to some extent by users seeking to enter long-term contracts with PNO regarding the size of future Navigation Service Charges prior to making investments

d) Unlikely in any case to materially affect competition in the otherwise effectively competitive coal export market.

7.230 Coal producers and exporters face significant uncertainty from other factors that are more likely to influence their future coal mining activities in the Newcastle catchment. For instance, they face considerable uncertainty resulting from the magnitude and timing of potential future changes in a number of other factors including coal prices, labour costs and taxes. The Council considers that the risks associated with uncertainty over access charges for the Service are unlikely to contribute significantly to an investor's expected valuation of future mining projects in the Newcastle catchment due to the low relative size of likely charges at the Port compared to likely prices in the coal export market.

Glencore's competitive advantage resulting from the ACCC arbitration

7.231 Arbitration (under Division 3 of Part IIIA of the CCA) is a dispute resolution mechanism between named parties which can be undertaken confidentially or publicly. It is not a regime whereby the ACCC has general price or terms oversight, or the ability to unilaterally set terms of access for all access seekers. There is no requirement that all access seekers be afforded the same terms of access, and price discrimination is expressly permitted where it aids efficiency in accordance with the pricing principles in section 44ZZCA.

7.232 The Council does not consider that PNO has historically price discriminated between different coal producers. However, the Council notes that the ACCC Determination set terms for Glencore's access to the Service, including price, which differ from (and are more favourable than) those available to Glencore's competitors. The Council is mindful that in a future with declaration of the Service, Glencore's competitors will retain the ability to notify the ACCC of any access dispute that might arise and themselves obtain access to terms considered reasonable by the ACCC. This is in contrast to a future without declaration, where the terms granted to Glencore through the ACCC's arbitration would endure (unless revoked or amended through appeal) while its competitors' capacity to obtain equivalent terms through an arbitration process would cease.

7.233 PNO and Glencore have applied to the Tribunal for review of the ACCC's arbitrated terms and as such it remains uncertain whether Glencore will have access to the Service on terms that differ from those available to any other user of the Service. The Tribunal's review of the arbitrated terms provided to Glencore may continue regardless of whether the declaration applies to the Service.

7.234 During the course of this revocation inquiry (and since the Glencore-PNO Arbitration Determination was made by the ACCC in October 2018), any other user of the Service that was unable to negotiate commercial access terms with PNO could have applied to the ACCC for an arbitrated outcome. To date, no other party has lodged an access dispute with the ACCC in relation to the Service. Further, there is no guarantee that the same terms would be granted by the ACCC in any such arbitration dispute, in which case differing terms could apply as between Glencore and any subsequent applicant(s).

7.235 The Council considers that, in both the future with and without declaration of the Service, it is possible that Glencore might have access to the Service on terms that differ from those available to its competitors. However, to the extent that charges similar (or equal) to those in the Glencore-PNO Arbitration are upheld, it is more likely that Glencore will have access to the Service on more favourable terms than those available to its competitors in a future without declaration of the Service.

7.236 However, for the reasons set out in paragraphs 7.222 to 7.227, the Council does not consider that the difference in charges for the Service with and without declaration of the Service is likely to have a material impact on competition in the coal export market. Given the coal export market is likely to be effectively competitive with or without declaration of the Service, it is unlikely that declaration would be likely to materially increase competition in the coal export market due to any advantage conferred on Glencore as a result of it having charges determined via the ACCC Determination. Finally, if the possibility of Glencore retaining such an advantage was a significant concern to market participants, then they could have addressed this by negotiating with PNO to seek terms similar to those available to Glencore; and failing which, they could have notified an access dispute to the ACCC under section 44S of the CCA.

Effect of the proposed container terminal and/or increased cruise ship visits

7.237 The Council has considered whether the proposal to develop a container terminal at the Port, and the possibility of increased cruise ship visits (that may result with or without the proposed cruise terminal), are likely to change PNO's strategy in relation to the coal export market. In particular, the Council has considered whether PNO may offer more favourable pricing or access terms to non-coal users of the Port or seek to subsidise access for such users at the expense of coal export market participants (who are likely to be relatively less responsive to changes in port charges).

7.238 As noted in paragraph 7.127, the Council considers to the extent PNO is able to set different prices for users of the Service operating in container transport markets compared to users competing in coal export markets, it may have an incentive to do so. However, it does not believe that this would rise to the level of "cross-subsidising", where cross-subsidisation would involve setting below-incremental cost pricing for container port services. To the extent the Port is operating significantly below its full capacity, and container and coal export services are not

substitutable with each other from a consumer perspective, PNO is likely to separately set terms and conditions of access for container and coal export users that individually maximise its profits for each set of customers in a future without declaration of the Service. The Council does not expect this would have any effect on competition in coal export markets.

No material increase in competition in the coal export market

7.239 Taking into account the various factors outlined above, the Council is not satisfied that access or increased access to the Service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in the coal export market.

Effect of declaration on competition in the tenements market

7.240 A 'tenement' or 'exploration authority' is the right under licence to carry out prospecting, exploration or mining activity in respect of a specific piece of land. Such licences are required because all mineral resources in Australia are owned by the Crown.

7.241 In NSW, all exploration and mining activity must be conducted in accordance with an authority issued under the *Mining Act 1992 (NSW).*[291]

7.242 Acquiring rights to mineral deposits generally begins with acquiring an 'exploration licence', which grants an exclusive right to search for specific resources in a defined area. An exploration licence enables the licence holder to explore areas where mineral and petroleum resources may be present, to establish the quality and quantity of those resources, and to investigate the viability of extracting the resource). [292] If valuable minerals have been discovered, the owner of the exploration licence may then apply for a production/mining lease.[293] A mining lease permits the business to mine for minerals over a specific area of land.[294] The grant of an exploration licence does not guarantee the grant of a mining lease. As part of the process of applying for a mining lease, the applicant (the exploration licence

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[291] Resources and Geoscience NSW https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/applications-and-approvals/mining-and-exploration-in-nsw/coal-and-mineral-titles

[292] Resources and Geoscience NSW 'Exploration licences and regulation' https://resourcesandgeoscience.nsw.gov.au/landholders-and-community/minerals-and-coal/exploration

[293] NSW Department of Planning and Environment, *Exploration Licences and Regulation,* https://www.resourcesandgeoscience.nsw.gov.au/landholders-and-community/minerals-and-coal/exploration.

[294] Resources and Geoscience NSW 'Mining leases and regulation' https://resourcesandgeoscience.nsw.gov.au/landholders-and-community/minerals-and-coal/mining.

holder) must go through a separate assessment process (including an environmental impact assessment and extensive public consultation).[295]

7.243 Prior to December 2015, all applicants for coal exploration licences in NSW were required to seek the approval of the NSW Minister for Resources before lodging an application. As observed by the NSW Independent Commission Against Corruption (IACA), the processes for allocating exploration licences were opaque and vulnerable to lobbying, with the Minister having a considerably wide discretion to decide whether to allow or refuse the application to be made. An applicant could obtain the licence through a direct allocation from the Minister, or via a competitive process. In response to the IACA Report and on the recommendations of several committees,[296] the NSW Government introduced a new system at the end of 2015 which changed the processes for the allocation, granting and renewal of coal tenements. As a result of the reform, the whole state of NSW is declared a 'controlled release area' for coal,[297] and coal is declared a 'controlled release mineral'. As well as abolishing direct allocation as a way of obtaining a coal exploration licence, the reform introduced two new ways of acquiring exploration licences from the Government. These are described below.

Strategic Release

7.244 The first of these processes is called the 'Strategic Release' framework. The framework seeks to deliver greater transparency and control over the release of exploration areas and the granting of exploration licences, and achieve economic and adequate returns for state owned resources.[298] Unlike previous allocation processes which only required consideration of a much narrower range of issues, this process explicitly considers a broad range of matters upfront (the geological, social, environmental and economic considerations). Under the framework, the process is overseen by an Advisory Body for Strategic Release (an inter-agency group, with an independent Chair). The Advisory Body considers the potential release areas based on an Initial Resource Assessment, and subsequently, a Preliminary Regional Issues Assessment. The last step also includes community consultation – this is a new requirement introduced by the reform, which recognises competing uses of land, and seeks to balance these interests.[299]

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295 Resources and Geoscience NSW https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/programs-and-initiatives/strategic-release-framework-for-coal-and-petroleum-exploration

296 These include the Coal Exploration Steering Group, and NSW Chief Scientist and Engineer on Coal Seam Gas (CSG) activities in NSW.

297 Section 368A(3), *Mining Act 199 (NSW)*.

298 Resources and Geoscience NSW https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/programs-and-initiatives/strategic-release-framework-for-coal-and-petroleum-exploration

299 Ibid.

7.245 Following the above-mentioned processes, the Advisory Body may then make a recommendation to the NSW Minister for Resources for an area to be released for exploration. The recommendations are also considered by the Cabinet. If approved, the Minister will release the area for exploration, and the decision will be published in the Government Gazette and advertised through media channels, and companies will be invited to apply for an exploration licence in that area. [300]

7.246 A single exploration licence may be issued for any given defined area. Which company (if any) receives the exploration licence for an area is decided by a blind auction process, with an undisclosed reserve price set by the Advisory Body. Pre-qualification minimum standards apply to interested businesses and must be met for those businesses to qualify to place a bid.[301]

7.247 If the reserve price is met, then the highest bidder will be recommended by the Advisory Body to the Minister for Resources, who will seek Cabinet's endorsement for that company to be granted an exploration licence.[302]

7.248 If the reserve price is not met, a second auction will take place with the reserve price disclosed to all pre-qualified bidders.[303]

7.249 The Council is not aware of any exploration licences being made available through the Strategic Release Framework since it was introduced in December 2015[304].

Operational Allocation

7.250 The second new method of obtaining an exploration licence from the NSW Government is through an 'Operational Allocation'. The Operational Allocation framework allows existing companies that currently hold an exploration licence or mining lease to apply for an additional exploration title to avoid sterilisation of resources, support better mine design, or expand existing mining operations.[305] This framework recognises the commitment that these miners and explorers have already made in NSW. The maximum land area that can be covered under any operational allocation licence is 33% of the land area of the existing exploration

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300 NSW Government. *Strategic Release Framework for Coal and Petroleum Exploration*. Pp 3 – 5. https://www.resourcesandgeoscience.nsw.gov.au/__data/assets/pdf_file/0004/753160/Strategic-Release-Framework-OVERVIEW_APPROVED.pdf.

301 Ibid p 8.

302 Ibid p 9

303 NSW Government. *Strategic Release Framework for Coal and Petroleum Exploration.* https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/programs-and-initiatives/strategic-release-framework-for-coal-and-petroleum-exploration

304 The Framework was introduced through *Mining and Petroleum Legislation Amendment (Grant of Coal and Petroleum Prospecting Titles) Act 2015 (NSW)*, which amended *Mining Act 1992 (NSW)*.

305 NSW Government. *Guidelines for exploration licence applications for operational allocation purposes*, available at https://www.resourcesandgeoscience.nsw.gov.au/miners-and-explorers/programs-and-initiatives/operational-allocation-guidelines

licence or mining lease to which it relates. This limit ensures that the operational allocation licence mechanism is not a 'land grab', and at the same time, provides a practical way for existing licence holders to gain extra title to support operations.

7.251 Any request for an exploration licence to be issued for an operational allocation purpose will be subject to a market-interest test. This will test for valid interest in the site through an expression of interest process that includes notification in the Gazette, and invites any other interested potential operator to express their interest. Where no market interest is identified (I.e. no other operator expresses interest in the site during the market-interest test period), then the allocation may be awarded to the applicant (subject to the applicant meeting other qualification criteria).[306]

7.252 Where more than one party demonstrates interest in an area where an exploration licence was sought through operational allocation, the details of the application will be referred to the Advisory Body for Strategic Release to consider the most appropriate process.[307] For example, an area adjacent to an existing miner's operations may attract the interest of several miners, in which case that area would be identified to the Advisory Body for Strategic Release. It may then consider if that area should comprise part of a larger area that may be put to market through a strategic release.

7.253 Operational allocations will be subject to financial contributions calculated on the tonnage of saleable coal.[308]

7.254 Aside from acquiring exploration licences from the NSW Government, companies that hold exploration licences and/or mining leases may be acquired by operators with an interest in mining or exploring areas governed by those licences. For example, a company that is interested in further exploring or mining a particular area may seek to acquire another company which holds an exploration licence for that area.

7.255 A market for the acquisition and disposal of exploration and/or mining authorities (i.e. the 'tenements market') was previously accepted as a dependent market of the Service by the Council, the Minister, the Tribunal and the Federal Court in their previous considerations of whether to declare the Service.

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306 NSW Government. *Guidelines for coal exploration licence application for operational allocation purposes*. Pp 1, 2, available at https://www.resourcesandgeoscience.nsw.gov.au/__data/assets/pdf_file/0010/587170/Guidelines-for-coal-exploration-licence-applications-for-operation-allocation-purposes.pdf

307 Any referral to the Advisory Board for Strategic Release does not guarantee that the area will be allocated or released for a competitive process.

308 Ibid p 3.

Submissions

Before the SOPV was issued

7.256 The economic arguments put by the ACCC and summarised at paragraph 7.195 are also relevant to the tenements market.

7.257 Synergies' August 2018 Report submits that the tenements market is best defined as 'the market for prospecting, exploring and developing coal deposits within the Newcastle catchment area (at its broadest level)'.[309] Synergies considers that the product dimension of the tenements market should be described as the rights to explore a specific coal deposit, with different markets existing for predominately thermal and predominately coking coal deposits.[310]

7.258 Yancoal's August 2018 Submission states that separate markets exist for coal and non-coal tenements and the geographic dimension of the exploration and/or mining authorities market is likely to be narrow and confined to the Hunter Valley region. This is because a coal tenement in the Hunter Valley region would not be equivalent to a tenement in other locations due to limits on intra-regional substitutability. Yancoal submits that substitution between regions is limited because of material differences in coal quality between coal basins; significant differences in infrastructure costs; and different regulatory environments for mining developments and approvals. For existing Hunter Valley producers, coal authorities in that region will be far more attractive than coal authorities in other regions because of the producer's ability to use existing contracted capacity (at coal terminals and on the rail network) and to redeploy employees and contractors between mines.[311]

7.259 NCIG's August 2018 Submission similarly submits that the geographic boundary of the tenements market (which it calls the 'Authorities market') is the Hunter Valley region.[312]

7.260 Glencore's August 2018 Submission states that tenements will typically hold less attractive resources than existing coal production areas and have a higher risk and cost profile. These comparatively marginal projects are more likely to be taken on by smaller coal producers which typically face relatively higher marginal costs. As such, participants in the tenements market are likely to be the most affected by the higher costs and risks associated with access through the Port if the Service is not subject to Declaration.[313]

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309 Ibid p 40.

310 Ibid p 42.

311 Yancoal's August 2018 Submission pp 11-12.

312 NCIG's August 2018 Submission p 10.

313 Glencore's August 2018 Submission pp 27, 28.

7.261 Glencore submits that revocation of the declaration will impact on competition in the 'tenements' market. In particular, the higher costs and risks resulting from the unregulated port monopolist will reduce the prospective economic viability of new mines and reduce business' incentives to invest in the exploration and development of coal reserves in the Newcastle Catchment. There will consequently be a reduction in the number of parties willing to bid on tenements and a material risk that sellers of tenements will face less competition among buyers resulting in lower prices and reduced activity in the tenements market. Glencore will have a particular advantage as the only producer with long term certainty of access and price at the Port. Small companies are likely to be less vigorous and effective competitors.[314]

7.262 Synergies' August Report submits that smaller coal producers will be at a comparative disadvantage to the major operators as they are less well placed to withstand the consequences of a lack of investor confidence and a reduction in, or increased cost of, available financing for their projects.[315] Synergies submits that there is already concern about the effectiveness of existing competition in the coal tenements market, with the NSW Government recently reforming its permit allocation process to promote competition for access to coal exploration areas. Synergies submits that this reform has the potential to improve competition in the tenements market, but this potential is unlikely to be realised if higher port charges lead to materially lower interest in exploration and leads to a limited number of bidders that are willing to vigorously compete in the market.[316]

7.263 Glencore submits that the Council cannot be satisfied that criterion (a) is not satisfied in respect of the dependent 'mining tenements market'. In particular, revocation of the declaration will reduce incentives for exploration investments and lead to concentration on the buyer side for mining tenements in the Newcastle catchment area with the effect of materially reducing competition in the coal tenements market.[317]

7.264 Yancoal's August 2018 submission states that if the Declaration is revoked there will be a distortion in a number of dependent markets because Glencore will have the benefit of ACCC arbitrated terms (which would continue to apply if a final determination is made by the ACCC before the Declaration is revoked).[318] This effect would make coal authorities more valuable to Glencore and place Glencore in an

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314 Ibid p 28.

315 Synergies' August Report p 65.

316 Ibid pp 63, 67.

317 Glencore's August 2018 Submission p.3

318 It is not necessary for the arbitration to conclude before any revocation. Further, arbitration does not automatically cease if there is a revocation. The arbitration panel must make a decision on the case before them - see s.44V – subject to the exceptions listed in s.44V of the CCA. Those exceptions would potentially allow the arbitration panel to discontinue the arbitration in the event of a revocation but it does not require it.

advantageous position compared to other potential acquirers in the tenements market.[319]

7.265 PNO submits that the geographic dimension of the tenements market (it refers to this as the 'market for acquisition and disposal of exploration and/or mining authorities') is not limited to the Hunter Valley.[320] HoustonKemp's Tenements Report supports this view, stating that buyers of coal authorities in the Hunter Valley face a vast array of choices about where to acquire rights to potential resources. There are no special circumstances in the Hunter Valley that would mean opportunities in other areas, such as central Queensland or elsewhere, are not close substitutes. Therefore, the actions of PNO are very unlikely to be material to competition in this broader market for coal authorities.[321] PNO submits there would be no material difference in the investment incentives in new coal mining projects (at any stage of their development) with or without declaration of the Service.[322]

7.266 HoustonKemp's Tenements Report also responds to Glencore's (on the basis of Synergies' August Report) and Yancoal's submissions that the geographic dimension of the tenements market is the Hunter Valley at its widest, and potentially narrower.[323]

7.267 In response to Glencore's characterisation of the market, HoustonKemp submits that, based on the Tribunal's finding in *Fortescue Metals*[324], Synergies err in applying a hypothetical monopsonist test in a hypothetical environment in which there are no potential buyers of tenements outside the Hunter Valley competing with its hypothetical Hunter Valley based monopsonist. If a hypothetical monopsonist buying coal authorities in the Hunter Valley were to try to force the price of tenements below their inherent value, it would be outbid by buyers outside the Hunter Valley. HoustonKemp also submits that differences in the availability of infrastructure (e.g. sites with a single infrastructure path vs infrastructure alternatives) may increase the fundamental value of coal authorities (due to potentially lower transportation costs from sites with infrastructure alternatives) when sending resultant coal to market, but does not actually impact on the scope for potential buyers to compete with a hypothetical monopsonist in the Hunter Valley.[325]

7.268 In response to Yancoal's characterisation of the market, HoustonKemp submits that differences in infrastructure costs and regulatory environments between regions

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319 Yancoal's August 2018 Submission p 12.

320 PNO's September 2018 Submission p 3.

321 HoustonKemp's Tenements Report p 5.

322 Ibid p 8

323 Ibid pp 6-8

324 Fortescue Metals Group Limited [2010] ACompT 2, 30 June 2010, p258, paragraphs [1118]-[1119].

325 HoustonKemp's Tenement Report' p 7.

may affect the value of tenements, but have no impact on the substitutability of any particular coal tenement with any other. In response to Yancoal's argument that Hunter Valley coal producers can reallocate rail/terminal capacity and labour resources within the Hunter Valley in a manner that is not possible in other regions, HoustonKemp submits that such a benefit assumes that coal miners have contracted for rail capacity, terminal capacity and/or staffing levels which exceed the requirements of their existing mines (which HoustonKemp submits is unlikely over the medium to long term over which coal authorities are acquired and developed). HoustonKemp submits that this does not actually amount to the synergies submitted by Yancoal and does not constrain substitution of coal authorities between regions to the degree submitted by Yancoal.[326] In relation to the product dimension of the market, HoustonKemp submits that it shares Yancoal's view that a distinction should be drawn between the markets for coal tenements and non-coal tenements, but does not consider that a distinction should be drawn between tenements markets for different grades/types of coal. HoustonKemp observes that, broadly, the same miners operate in the Hunter Valley (primarily thermal and semi-soft coking coal) and in Queensland (which has more of other types of metallurgical coal) and that many mines in both regions produce a mix of thermal and coking coal, suggesting that the expertise and equipment required to extract both types of coal is the same.[327]

7.269 Yancoal's October 2018 Submission notes that the investment hold-up issues (previously considered in the context of the coal export market) are of particular concern for smaller and more marginal producers. Yancoal submits that it is the newer and smaller entrants that are typically active and provide vigorous competition in the tenements market because these smaller companies take on the risk involved in acquiring exploration acreage, and undertaking exploration and appraisal work. As a result, Yancoal submits that the impact on competition in the tenements market of a number of more marginal producers exiting or ceasing to make investments is very significant, even if there is a lesser impact in coal export markets.[328]

7.270 Glencore's October 2018 submission suggests that other stakeholders may not have provided submissions to the Council because they fear retribution from PNO if they publicly oppose it.[329]

7.271 The report prepared by Synergies dated 5 October 2018 (**Synergies' October Report**) submits that HoustonKemp's Tenement Report misapplies the hypothetical monopsony test and the correct application is as applied in Synergies' August report. The fundamental issue in applying the hypothetical monopsonist test in present circumstances is assuming the absence of any other existing or proposed

326 Ibid p 8.

327 Ibid.

328 Yancoal's October 2018 Submission p 7.

329 Glencore October 2018 submission p 11.

facility for the export of coal means that the seller of coal tenements has no other option than to sell to the monopsonist buyer linked to the Port of Newcastle.[330] In relation to the product dimension, Synergies agrees with HoustonKemp's assessment that it is not critical for a product dimension to distinguish between thermal and coking coal, but considers it sensible to restrict the market to resources that the seller of tenements is selling.[331]

Responding to the SOPV

7.272 The ACCC submits that the Council draws upon its pricing analysis to conclude that any uncertainty about PNO's Navigation Service Charge is and will remain unsubstantial, with or without declaration. This argument assumes that the shipping channel costs will remain a relatively small proportion of overall costs. However, this assumption cannot be made in a scenario without declaration, where PNO has unfettered market power.[332]

7.273 The ACCC submits that greater consideration should also be given to the effect of price increases than simply comparing the price of service to the current coal price. The ACCC considers that the threat of the continued future expropriation of miners' profits by PNO is likely to have a dampening or chilling effect on future investment in Hunter Valley coal mines, which in turn will damage the competitive environment of dependant markets.[333]

7.274 In response to the Council's observation that if the ACCC's arbitration had conferred Glencore with a material advantage, then other operators would have undertaken arbitration themselves, the ACCC submits that the Glencore arbitration only finished in late 2018 and firms with existing long term contracts may not be able to seek arbitration until those contracts expire. Over the longer term, most firms would seek to even the playing-field with Glencore. [334]

7.275 The ACCC accepts the Council's view that a mere redistribution of gains does not necessarily satisfy criterion (a). It submits, however, that consideration should also be given to the impact of distribution issues by examining their long term impacts. Repeated loss of gains from users to the monopolist is likely to contribute to the hold-up problem in other markets.[335]

7.276 Bloomfield submits:

a) Because the Bloomfield Group has all of its production in the Hunter Valley Coal Chain, it has no ability to reasonably reduce its exposure to possible Port price

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330 Synergies' October 2018 Report p 3

331 Ibid p 13.

332 ACCC's SOPV Submission p 5.

333 Ibid.

334 Ibid.

335 Ibid.

rises by reallocating its capital and production profile to other states and countries, should PNO port charges increase sufficiently to make the price of its coal globally uncompetitive[336]

b) As a relatively small producer, Bloomfield has previously relied on those more directly impacted by PNO's pricing and with more substantial resources to lead and pursue declaration or arbitration against PNO. As a small mining company, it has been prudent and commercially rational for Bloomfield to await the outcome of the lengthy and costly dispute between Glencore and PNO. Bloomfield recognises that the outcome of the Glencore/PNO arbitration mat have flow-on effects to the broader NSW coal mining industry, in that other parties may in the future be able to rely on the work done and framework established[337]

c) Bloomfield considers that the NCC has not given sufficient weight to the risk of investing and acquiring tenements by businesses, such as Bloomfield, if PNO has the unconstrained ability to increase channel charges[338]

d) PNO's past pricing behaviour indicates that its charges can be significant, unpredictable, and unrelated to coal market forecasts, economic factors or supply chain constraints. The additional risk that would be imparted if declaration is revoked would provide larger mining companies with a relative advantage over smaller operators due to their greater financial capacity that allows big companies to better absorb an unforeseen and immitigable cost increase. For example, small miners which only operate in the Hunter Valley coal chain have fewer risk mitigation options than larger miners which can rebalance their operations in favour of other regions. Small operators and start-ups will be at a comparative disadvantage compared to larger established operators in preparing to absorb an unpredictable out of market cost increase. The additional uncertainty that results from the removal of declaration is material and would result in a significant decrease in competition in the tenements market as Bloomfield, and companies like it, may choose not to risk their capital and/or be able to source project financing from external parties because of increased uncertainty in projected costs.[339]

7.277 NCIG disagrees that the coal tenements market is a derivative market of the broader coal export market, which potentially implies that no effect on competition could be seen to arise if competition in the coal export market was not also affected. Distinct geological, commercial and regulatory conditions mean that the market for investment in tenements in the Newcastle Catchment is distinct from investment in coal mines elsewhere in Australia or globally. Further, a large number

336 Bloomfield's SOPV Submission p 2.

337 Ibid pp 2, 3.

338 Ibid p 3.

339 Ibid pp 3, 4.

of market participants in the tenements market are based solely or principally in the Newcastle Catchment – this is a narrower group than the market participants in coal export markets.[340]

7.278 PWCS submits that in assessing the quantum of Port prices, potential prices should be compared to potential industry profits (and not total costs, as the Council has done) for new and prospective supply chain participants.[341]

7.279 Yancoal submits that the Council's underappraisal of the magnitude of price rises that may eventuate in the absence of declaration has led it to undervalue the role of uncertainty about future price increases in the absence of declaration.[342] At a minimum, when potential buyers undertake a discounted cash flow analysis in seeking to value a tenement, they will need to account for the potential for very significant increases (even the clearly profitable $10-15 price rise modelled by Synergies above accounts for up to a third of PNO's estimate of the average margin of a coal producer, and therefore would be anticipated to make more marginal operators uneconomic. Yancoal submits this will clearly prevent some efficient transactions and investments in the coal tenements market from occurring.[343] Consequently it is not the case that the investment decision for a coal tenement in the Newcastle catchment has to be on the 'knife's edge' relative to an alternative coal tenement in another market. Rather, the magnitude of the likely price rises in the absence of declaration will make tenements in the Newcastle catchment materially less attractive such that investment will instead occur in tenements in other coal regions. [344]

7.280 Yancoal disagrees with the Council's inferences in relation to why Glencore is the only miner that has utilised the ACCC arbitration framework enabled by the declaration. Synergies submits that the NCC fails to appreciate that any attempt by a user to seek arbitration would be met with the same delays and challenges brought against Glencore by PNO, with a view to seeking to prevent there being an arbitrated outcome before a decision is made in relation to revocation. In other words, any attempt to seek an arbitration now would involve substantial expense and would be unlikely to achieve anything if there is a decision to revoke (which the NCC is currently proposing). For that reason, Yancoal, which has already sent a request to negotiate to PNO, has not yet sought arbitration. The possibility of significant price rises is of a significant concern to Yancoal, but given the timelines for an arbitrated outcome (once all legal challenges PNO could bring are taken into account) relative to the timelines for a decision on revocation – Yancoal (and other

340 NCIG's SOPV Submission pp 3, 4.

341 PWCS' SOPV Submission p 2.

342 Yancoal' SOPV Submission pp 7, 8.

343 Ibid p 12.

344 Ibid.

users) have little option but to wait until either the revocation application is rejected or there is greater certainty that that will occur.[345]

7.281 Yancoal submits that it is not necessary for PNO to be able to price discriminate between coal producers in order to impose economic hold-up. Not all coal producers have the same level of profitability – so the hold-up problem is best thought of in these circumstances as being that where PNO has the right to set new prices each year, the profit maximising price in a future year will be a price at or above the point at which a particular producer's mine is no longer profitable (even if numerous other mines remain profitable so that any reduction in PNO's revenue through loss of volume is more than offset by the additional charges based on the remaining throughput, i.e. the rise is profit maximising for PNO). The risk of economic hold-up will have a strong chilling effect in the coal tenements market. Even through demand for the channel service from existing producers is highly price inelastic, for potential tenement purchasers who can simply decide not to invest in a tenement (without the asset stranding or take or pay liability tail an existing producer would experience), it would be anticipated there would be an immediate response and reduction in demand for and competition for tenements.[346]

7.282 Synergies submits that:

a) The NCC assumes that other market participants share its 'benign' view as to the extent to which PNO will increase its prices in the absence of declaration. As demonstrated by the submissions provided, however, such views are not widely held by those who will be affected by such prices. Investors in tenement markets who are more worried about significant cost increases in the absence of declaration are likely to change their investment decisions accordingly. The Council should not consider that all investors share its benign view about the extent to which PNO may increase its prices if it is unconstrained by declaration[347]

b) The matter of risk and its impact in the tenements market is largely a matter of whether or not the costs imposed by that risk can be mitigated and also whether there is any upside potential to offset downside risk.[348]

   Where risks cannot be mitigated or entail no meaningful upside potential and so reduce the expected economic viability of new mining ventures, then this will result in reduced demand for, and competition for, mining tenements.[349]

   It is almost certain that port charges will increase over time (while the quantum of increases is uncertain). The main problem with risk arises where there is no

345 Ibid pp 12, 13.

346 Ibid p 13.

347 Synergies' February 2019 Report p 11.

348 Ibid p 29.

349 Ibid pp 29, 30.

offsetting upside potential. In this case, there is most likely to be a Service charge that does not entail any offsetting benefit to the user. This contrasts to other risks, such as price changes, where there is scope to manage that risk (e.g. through hedging arrangements) and the risk involves both upside and downside changes.[350]

The NCC's view does not adequately distinguish between those risk factors that are able to be mitigated or entail some upside potential and those which cannot be mitigated or have no upside potential for the user.[351]

Synergies notes that QCA considered this to be an important distinction when assessing the impact of risk associated with pricing uncertainty and its impact on competition in the coal tenements market.[352]

c) The SOPV considered the hold-up problem in terms of the potential for PNO to hold up individual mining investments and was dismissed by the NCC on the basis that PNO could not adequately price discriminate between individual mines. The NCC did not consider the hold-up problem in the absence of price discrimination.[353]

   While the ability to price discriminate will assist in allowing a service provider, such as PNO, to increase prices in a targeted way to expropriate a user's profit margin after its investment is sunk, some level of profit expropriation is possible through the application of general price increases. This is particularly relevant for coal mines where, once investment in the mine is sunk, coal volumes (particularly for non-marginal producers) are relatively insensitive to changes in port prices.[354]

   The NCC similarly did not consider the hold-up problem in the absence of declaration, only under the present circumstances.

d) The NCC states that in 2015 it considered the tenements market was and would remain effectively competitive with or without declaration of the Service, but has not undertaken any analysis on the current extent of competition in the tenements market, either in 2015 or 2018.[355]

   Having a large number of companies holding tenement licences the Newcastle catchment is not a robust indication of the state of competition in the market. Factors suggested by Synergies in its 2018 reports suggesting the market is not highly competitive have not been addressed by the NCC.[356]

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350 Ibid p 30

351 Ibid

352 Ibid p 31.

353 Ibid p 35.

354 Ibid.

355 Ibid p 34.

356 Ibid.

Synergies also notes that, with regard to the NSW government reforms to the tenement bidding process, a regulatory change that is expected to reduce expected returns from coal tenements is likely to adversely impact on competition in the tenements market by reducing the incentive for bidders to participate and vigorously compete in the tenements market.[357]

7.283 PNO submits that:

a) Production and investment decisions by coal miners in the Hunter Valley are affected by a number of factors, including export coal prices and foreign exchange rates. The impact of fluctuations in these factors (which will persist with or without declaration) on mining profitability and investment dwarfs PNO's charges and any uncertainty in their magnitude over the term.[358]

   For example, while PNO's aggregate charges have increased by $0.19 per revenue tonne over the past five years, the three-month average thermal coal, high-quality metallurgical coal and standard coal prices have varied by almost AU$50, AU$159 and AU$96 per revenue tonne, respectively.[359]

b) The NCC's analysis of regulatory constraints in the SOPV focusses on existing regulations under the PAMA Act and the contractual arrangements between NSW and PNO, concluding that they do not impose a significant limitation on PNO's behaviour. PNO disagrees with this conclusion.[360]

c) The existing regulatory arrangements, including those imposed under contract, constrain PNO's ability to set the terms of access to the Service. Moreover, these regulatory arrangements are not static. PNO expects and is mindful that, if it imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets or otherwise harm the public interest, the NSW Government would intervene, either via the terms of PNO's lease, under the terms of the PAMA Act (by referral to IPART), or by introducing new statutory restrictions.[361]

d) The State has a clear incentive (and regulatory and legislative power) to protect the public interest and intervene in the event PNO's conduct posed a threat to the competitiveness of relevant markets or the public interest. This background threat of further regulation or intervention acts as a material constraint on PNO's pricing behaviour, and will continue to do so without declaration.[362]

e) Coal producers are aware it is not in PNO's commercial interests to increase prices to the point where it reduces production and investment, leaving PNO

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357 Ibid pp 34, 35.

358 PNO's SOPV Submission p 7.

359 Ibid pp 7, 8.

360 Ibid pp 8, 9.

361 Ibid p 9.

362 Ibid p 9.

with even greater surplus capacity. It is in PNO's commercial interests to encourage increased production and new investment in the Hunter Valley. Coal producers are also aware excessive price increases that had the ability to materially impact on competition in dependent markets would not be countenanced by the NSW Government.[363]

NERA's Report

7.284 In terms of the effect of declaration on competition in the tenements market, NERA observes that:

a) Synergies (and others) view competition in the tenements market through the prism of competition for a single specific tenement in one location (e.g. the Newcastle catchment area)[364]

b) Any such competition would, however, occur within a broader field of rivalry as a potential investor could choose to invest in coal exploration (or indeed other activities) in other geographic regions.[365]

7.285 This leads NERA to state that:

> If an owner of a coal tenement in the Newcastle catchment raised prices above the competitive level …. potential investors could in general look elsewhere … Accordingly we consider the geographic scope of the tenements market to be at least as wide as Australia, and potentially as broad as the Asia Pacific.[366]

7.286 In reaching its conclusions, NERA distinguishes between existing and potential future miners:

> Although PNO is a monopolist in respect of existing coal mines in its catchment, it faces competition for future coal mines, and it is not in PNO's interests to undermine development of those mines.[367]

7.287 Importantly, NERA argues that the desire to attract future investment in the Newcastle catchment area will have some constraining effect on its dealings with existing miners:

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[363] Ibid p 9.

[364] NERA's Report p 4

[365] Ibid

[366] Ibid at [24].

[367] Ibid at [27].

> PNO would not exercise market power in the complementary shipping channel market in a way that would reduce competition in the tenements market … PNO has an incentive to account for the effects that its shipping channel pricing would have on coal mine investors, if that effect would lead to a reduction of future shipping channel revenues. In other words, PNO does not have an incentive to materially reduce the attraction of mining in the Newcastle catchment, and accordingly would not behave in a way that would reduce competition in the tenements market.[368]

7.288 NERA further considers, however, what implications would follow for competition in the tenements market if PNO did instead raise prices in a way that decreased the attractiveness of mining in the Newcastle catchment. In this respect, it observes that:

a) While an increase in PNO's charges may reduce the attractiveness of mining tenements, this would not reflect a reduction in competition *per se*[369]

b) Even if this did remove smaller higher-cost miners from the market (and lead them not to bid for particular tenements in the future), this would not be likely to change who wins any competitive bidding process compared to a situation where PNO's prices were set at a competitive level:

> … a competitive tenements market is one in which the tenements are allocated to the most efficient miners/explorers. Even if the value of tenements was reduced because of PNO's pricing, the tenements are likely to be allocated to the most efficient miners/explorers.[370]

Responding to NERA's Report

7.289 PWCS's NERA Submission states:

a) It is likely to be profit maximising for PNO to set a high (monopoly) price even though that may prevent some new coal mines being developed or existing coal mines being expanded. As such, the presence of an unregulated monopolist at the end of a supply chain will necessarily discourage investment in upstream and downstream markets, including the coal tenements market. In turn, this will reduce dynamic efficiency and competition in those upstream markets and is contrary to the public interest[371]

b) The fact that the thermal coal export market may be global does not mean the tenements market is also global. The Hunter Valley produces a particular type/quality of thermal coal and, to a lesser extent, a very specific type of coking coal (semi-soft). Tenements in other areas have geological differences and are not completely substitutable for Hunter Valley tenements. There are

368 Ibid at [28].

369 Ibid at [30].

370 Ibid at [39].

371 PWCS' NERA Submission pp 1, 2.

also significant differences in the infrastructure and cost of infrastructure services in other coal basins. Buyers and sellers of Hunter Valley coal tenements are not necessarily the same buyers and sellers of tenements in other geographic regions[372]

c) PWCS disagrees with NERA's statement that 'trading in tenements is rare'. In the mining sector tenements are not just traded directly, but (more commonly) through corporate activity such as the acquisition of companies, farm-ins to tenements and other joint venture changes. These transactions must be considered in assessing how the tenements market works. [373]

7.290 NSWMC's NERA Submission states:

a) NERA's analysis does not take into account that the Hunter Valley catchment area has the world's best thermal coal and other investment locations are not directly substitutable for this quality of thermal coal[374]

b) QCA found, in similar circumstances to those being considered by the Council, that the monopoly position of the terminal owner would materially impact investment incentives and that declaration promotes competition in other markets, including the mining tenements market that is in the catchment of the relevant infrastructure

c) NSWMC sees no factual basis to suggest that mining companies located in the Hunter Valley would contemplate there being a broader Asia Pacific market for coal tenements to supply customers in the Asia Pacific. There are considerable and different risks in investing in mining tenements in other countries as compared to the Hunter Valley. NSWMC maintains that the Hunter Valley is the relevant geographic dimension of the tenements market.[375]

7.291 Malabar's NERA Submission states:

a) A key element in making substantial acquisitions and investments in NSW is the confidence that Malabar and its stakeholders have in the regulatory and competitive investment climate in NSW [376]

b) Based on PNO's past actions Malabar expects that, absent declaration, PNO will continually increase charges to the point that coal mines in the Hunter Valley start to fall [377]

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372 Ibid pp 2, 3.

373 Ibid p 3.

374 NSWMC's NERA Submission p 7.

375 Ibid p 8.

376 Malabar's NERA Submission p 2.

377 Ibid.

c) NERA's report does not address the issue that if PNO's prices rise to a level where higher cost miners cease applying for tenements the value is reduced, irrespective of the efficiency of the miner [378]

d) The heightened risk of PNO increasing its fees in the absence of declaration makes it more difficult to raise the funds required to develop new projects[379]

e) The CCA is intended to ensure competitive markets in Australia for the benefit of Australian consumers; this is at odds with NERA's suggestion that the tenement market could be global or at least as wide as the Asia Pacific region. Malabar and companies like it have neither the scale nor desire to operate outside Australia.[380]

7.292 Bloomfield submits that NERA observes that tenements are likely still to be allocated to the most efficient miners/explorers if the value of tenements was reduced as a result of PNO's pricing. This does not address the practical valuation and uncertainty concern that miners would have in the absence of declaration. If PNO is unconstrained, there is no alternative to PNO, no possibility of forecasting their future pricing or tying their pricing to a best estimate of cost plus a reasonable margin, then how could anyone (however efficient) prudently invest in new NSW mining tenements at all? [381]

7.293 Glencore submits that NERA's approach to defining the coal tenement markets is inadequate for a competition assessment. Under NERA's approach, it is hard to see how the tenement market could be limited to any particular commodity or geography globally – such an approach cannot be correct. NERA has also avoided the question of the options available to sellers of tenements and failed to apply a SSNIP test.[382]

7.294 Synergies submits:

a) The Hypothetical monopsonist test is not applied properly by NERA in its discussion of the tenement market[383]

b) Other parts of the Asia Pacific region have very different characteristics to those in the Newcastle catchment. Indonesian tenements, for example, produce low energy coal in a politically unstable, developing nation. Chinese tenements also produce a significantly different coal type, with investment opportunities limited by a restricted foreign investment policy. As a result, the investors in the various different countries are expected to be markedly different, such that it is unlikely to be the case that many potential buyers of tenements in the

[378] Ibid.

[379] Ibid.

[380] Ibid p 3.

[381] Bloomfield's NERA Submission p 2.

[382] Glencore's NERA Submission p 3.

[383] Synergies' April 2019 Report pp 16-19.

Newcastle catchment would also seek to invest in other Asia Pacific countries. In particular, junior Australian miners/explorers may be unlikely to have the resources or mandate to participate in these other markets[384]

c) Synergies does not agree with NERA's suggestion that there is limited potential for competition in the coal tenements market. While the NSW Government is yet to release new exploration permits under the Strategic Release framework, it is anticipated that the market may evolve similarly to that in Queensland, where the Queensland Government periodically releases exploration areas for tender. A competitive process is held for the allocation of those permits, with allocations based on established criteria including the bidder's technical credibility and planned exploration program. Therefore, Synergies considers that there is considerable scope for future improved competition in the coal tenements market as a result of the NSW Government's recent reforms[385]

d) Standard auction theory shows that a reduction in the number of bidders for tenements would lead to lower acquisition prices, and a lessening of competition in the tenements market.[386]

The expectation that PNO has an ability and an incentive to impose significantly higher charges would increase the expected cost and risk of operating coal mines and lower the expected returns of coal mining projects in the Newcastle catchment. An increase in the PNO charge would lower the expected net present value of a mining project to which a tenement relates.[387]

Lower anticipated returns will, in and of themselves, be expected to reduce the value of tenements. However, the higher expected costs and risks of operating coal mines will also be likely to reduce the number of parties willing to bid on tenements, with a particular impact on smaller companies or on companies with a lower risk appetite. An expected reduction in the number of potential buyers of tenements will lessen rivalry for the acquisition of tenements, which Synergies consider will further lower the value of tenements.[388]

The Council does not consider it likely that declaration would promote a material increase in competition in the market(s) for tenements

7.295 In order to supply coal from the Hunter Valley into the coal export market, a prospective miner must first acquire a tenement relevant to the area it wishes to mine. To the extent that tenements are allocated via the NSW Government tender

384 Synergies' April 2019 Report p 17.

385 Synergies' April 2019 Report p 20.

386 Synergies' April 2019 Report p 4.

387 Synergies' April 2019 Report pps 21 – 23.

388 Synergies' April 2019 Report p 21.

processes as described in paragraphs 7.224 to 7.252 above, prospective miners may seek to compete by bidding against each other for such tenements. Prospective miners may also compete against each other to acquire tenements from existing holders in secondary markets, as described in paragraph 7.254 above.

7.296 In the current matter, a number of interested parties have defined the tenements market narrowly, limiting it to the Newcastle catchment (or the Hunter Valley region within the Newcastle catchment). Interested parties have focused their submissions regarding whether criterion (a) is satisfied by declaration of the Service on the impact declaration would have in the market for tenements in the Newcastle catchment. The key contention raised by these parties is that in a future without declaration of the Service, potential acquirers of tenements in the Newcastle catchment face the prospect of both significantly higher charges for the Service at the Port (and significantly greater uncertainty regarding how much higher PNO might raise prices), compared to a future with declaration of the Service. The consequence of this, they argue, is that potential acquirers of tenements will either be prepared to bid less for them or, in the case of some mining opportunities likely to involve higher production costs, not be prepared to bid for them at all. It is argued this will particularly effect smaller miners' ability to compete for particular tenements in an adverse way; and may lead to a reduction in bidders for some tenements available in the future. It is suggested this would amount to a lessening of competition for tenements compared to that which would exist in a future with declaration of the Service.

7.297 In order to assess whether declaration is likely to promote a material increase in competition in the market(s) for tenements, the Council:

a) Characterises the product and geographic dimensions of the market(s) for tenements relating to the Newcastle catchment

b) Considers the effectiveness of competition for tenements in the Newcastle catchment

c) Clarifies the nature of the "competition problem" some interested parties are concerned about in relation to tenements in the Newcastle catchment

d) Considers the incentives PNO has with respect to competition in the market(s) for tenements in the Newcastle catchment

e) Analyses whether the relative level of (and certainty associated with) charges for the Service in a future with declaration of the Service is likely to lead to a material increase in competition in the market(s) for tenements in the Newcastle catchment, compared to a future without declaration of the Service.

7.298 Consideration of these factors leads the Council to conclude it is unlikely that declaration of the Service would promote a material increase in competition in the market(s) for tenements in the Newcastle catchment.

Characterisation of the market(s) for exploration and/or mining tenements

7.299 In order to determine an appropriate characterisation of the market(s) for exploration and/or mining tenements, the Council has sought first to understand the likely source of constraint on sellers of these tenements in the Newcastle catchment.

7.300 In its 2015 Final Recommendation, the Council considered that the geographic scope of the tenements market may extend beyond the Hunter Valley and could be at least national in scope.[389] This conclusion was drawn on the basis that parties seeking coal exploration and/mining authorities may be able to consider alternative investment options in several different regions. However, the Council acknowledged that it did not have the information before it to precisely define the market at that time. It also observed that it did not need to precisely define the tenements market to reach the conclusions it ultimately did in its recommendation to the Minister.

7.301 For the purpose of the SOPV, the Council took a narrow view of the geographic and product dimensions of the tenements market. It did so on the basis that if declaration of the Service would unlikely to promote a material increase in competition in a narrowly defined tenements market, then it would be unlikely to promote a material increase in competition in a more broadly defined market. The Council's SOPV took the geographic dimension of the tenements market to be the Newcastle catchment.

7.302 In contrast, the NERA Report suggests that the geographic dimension of the market would be likely to align with that of the coal export market, which is most likely global and at least as broad as the Asia-Pacific region. As a result, NERA considers the geographic scope of the tenements market is likely to be at least as wide as Australia, and potentially as broad as the Asia Pacific.[390]

7.303 As noted above, several interested parties took issue with the geographic dimension applied by NERA; and the manner in which that approach was arrived at.

7.304 Consistent with its views in 2015, the Council considers it is possible that the tenements market extends beyond the Newcastle catchment. To that end, the Council is aware of numerous companies that hold coal exploration licences and/or mining leases across geographical locations, including the Newcastle catchment, Queensland, New Zealand and elsewhere. However, for the purpose of this Recommendation, it is not necessary to precisely determine the geographic scope of the tenements market in order to assess whether declaration would be likely to promote a material increase in competition in this market. The Council remains of the view that if declaration did not promote a material increase in competition where a narrow geographic view of the market is applied, it is even less likely that declaration would promote a material increase in competition in a more broadly defined geographic market. As such, the Council has continued to analyse whether

[389] 2015 Recommendation at paragraph 4.69.

[390] NERA Report p 4.

declaration would be likely to promote a material increase in competition in a more narrowly defined market for tenements in the Newcastle catchment.

7.305 The Council considers that coal and other minerals are not generally substitutable and may require separate experience and equipment to explore and extract.[391] The Council considers that buyers seeking coal tenements are likely to be distinct from those seeking tenements for other forms of minerals; and as such the market for coal tenements does not include tenements for other forms of minerals.

7.306 Interested party submissions were divided as to whether separate markets exist for thermal and metallurgical coal tenements. Consistent with its approach to the geographic dimension of the market, the Council has taken a narrow view of the relevant product dimension and focused on thermal coal, which is the prevalent type of coal in the Newcastle catchment area.

7.307 For the purpose of this assessment, therefore, the Council has assessed the 'tenements market' as the market for the acquisition and disposal of exploration and/or mining authorities in relation to thermal coal in the Newcastle catchment area.

The tenements markets is a derivative of the coal export market

7.308 In *Re: Glencore*, the Tribunal observed that the market for the acquisition and disposal of exploration and/or mining authorities was a derivative of the coal export market:

> It was accepted that, in a practical sense, the coal export market (using the Service as the gateway means of shipping coal from the Hunter Valley) was an appropriate starting point. The other markets are, in turn, derivative from that market. [para 126]

7.309 The Tribunal also observed that, if it found declaration would be unlikely to promote a material increase in the coal export market, it was difficult to see how declaration would be likely to promote a material increase in competition in the market for the acquisition and disposal of exploration and/or mining authorities:

> … does not consider it necessary to address the impacts asserted in relation to derivative markets. If the impact of increased access on the coal export market is not such as to satisfy the Tribunal that it would promote a material increase in competition in that market, it is difficult to see how there would be the flow-on effects on the derivate markets … [para 139]

7.310 Further, the Tribunal found that if it were wrong about the correct approach to section 44H(4)(a) (criterion (a), as it then stood), which is to say the correct approach was effectively in line with the current criterion (a) test, the Tribunal would not be satisfied that access or increased access would promote a material increase in competition in the coal export market and:

[391] However, there are companies who holdings of exploration tenements are not limited to coal.

> *… If [the coal export market] would not be promoted in that way, it follows that the other four dependent markets would also not be promoted with a material increase in competition in any of them.* [392]

7.311 The Council agrees with this view. Given its findings in relation to the coal export market set out in paragraphs 7.210 to 7.238 above, the Council therefore considers that declaration is unlikely to promote a material increase in competition in the market(s) for thermal coal tenements in the Newcastle catchment. It also follows that submissions summarised in the 'coal export market' section of this report have also been taken into account by the Council in the context of the tenements market.

7.312 Notwithstanding this conclusion, the Council has opted to address below a number of specific issued raised by interested parties specifically in relation to the tenements market(s).

The market(s) for tenements in the Newcastle catchment exhibits signs of being effectively competitive

7.313 In 2015, the Council considered that the tenements market was and would remain effectively competitive with or without declaration of the Service.

7.314 Consistent with the '*List of Coal exploration licences – Newcastle catchment*' provided as Annexure B to Synergies' August 2018 Report, there continue to be a large number of companies holding tenement licences operating in the Gunnedah Basin, Hunter Valley Basin and Western Basin within the Newcastle Catchment. The parent companies of these licence holders include Peabody, Bickham Coal Company, Malabar Coal, Idemitsu, Korea Resources Corporation, BHP, South 32, Yancoal, Glencore and Whitehaven.

7.315 The large number of licence holders suggests that the holding of tenements in the Newcastle catchment is not significantly concentrated in the hands of only one or two market participants. There appear to also be a number of holders of existing licences that have significant market capitalisations, including multi-nationals with diversified operations. In this respect, the Council is conscious of the large number of coal exploration licences held by companies with parent companies that would be regarded as large and well established, such as Yancoal, Centennial Coal, Glencore, South 32, BHP and Whitehaven.[393] These are signs that point to a market that may already be competitive.

7.316 Synergies submitted that there have been concerns about the effectiveness of existing competition in the coal tenements market; and the potential for reforms aimed at improving competition.[394] The Council notes from the link provided in that

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[392] *Re Glencore,* paragraph [157].

[393] Glencore's August 2018 Submission, Annexure B, pp 99, 100.

[394] Synergies' August 2018 Submission pp 65, 67.

submission,[395] and from the information set out in paragraphs 7.243 to 7.253above, that these reforms have changed the process for obtaining tenement rights in NSW.

7.317 At this time, it appears that while the new reforms have addressed the issue of transparency in the market, access to coal exploration licences (and by extension, mining licenses) have become more tightly controlled as coal in NSW becomes a 'controlled release mineral'. Further, any land to be released for coal exploration under the NSW Government's Strategic Release framework must go through a stringent assessment process, taking into account a wide range of competing considerations including community interests which were not previously required to be considered. While applicants could apply for coal exploration licences through operational allocation, that path is generally available only to holder of an existing exploration licence or mining lease (unless there is market interest).[396] To date, no land has been released for coal exploration under Strategic Release.

7.318 Going forward, the Council expects that if more tenements are released for auction under Strategic Release by the NSW Government, this should have the effect of making the allocation of future tenements more transparent, and enable greater competition amongst a large pool of potential investors seeking to acquire tenements in the Newcastle catchment (which will not necessarily be limited to existing investors in the Newcastle catchment). This improvement in the effectiveness of competition for future tenements made available under Strategic Release will exist in a future with or without declaration of the Service, and represents a potential improvement in the environment for competition in the market(s) for tenements in the Newcastle catchment since 2015.

The nature of the competition problem identified by some interested parties

7.319 While some interested parties suggest the geographic dimension of the market(s) for tenements relevant to this matter should be narrowed only to cover those relating to the Newcastle catchment (or even narrower, the Hunter Valley region), the nature of the competition problem they describe appears to be even more narrow in focus. That is, for instance, the concern described in Glencore's August 2018 Submission (summarised in paragraph 7.261 above) relating to the ability of potential miners/investors to compete for future tenements due to the level of (and uncertainty associated with) charges for the Service in a future without declaration of the Service. In this respect, NERA notes that:

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395 NSW Government, 'Strategic Statement on NSW Coal' https://www.resourcesandenergy.nsw.gov.au/__data/assets/pdf_file/0006/521637/Strategic-statement-on-NSW-coal.pdf

396 As discussed in para 7.251 above, an operational allocation is subject to a market-interest test. If any other party (including a non-holder of tenements) expresses interest, the land the subject of the application could be referred for consideration of a possible release under the Strategic Release process.

> From the perspective of any potential tenement investor, each tenement is specific to one location. Therefore it is true that there could be competition for a specific tenement, which Synergies, among others, evaluate in their assessment of competition in the tenements market. [para 21]

7.320 The competition problem they consider likely to be caused in a future without declaration of the Service is that prospective investors in mining tenements will have less confidence regarding charges that might be set by PNO for the Service; and that these charges will be higher in a future without declaration of the Service. They consider this will lead to less prospective investors being prepared to bid for tenements that may become available for acquisition, thereby reducing competition for these tenements.

7.321 The NSW Government is yet to release new exploration permits under the Strategic Release framework (although it may seek to do so in the future). Further, the secondary market(s) for tenements in the Newcastle catchment does not appear to be particularly fluid. While submissions from some interested parties suggest secondary trading in tenements in the Newcastle catchment can occur (including via corporate activity such as the acquisition of companies or buying and selling of shares), the Council is not aware of frequent and regular trading of tenements or of interests in tenements on a day-to-day basis.

7.322 This suggests that, at best, the nature of the competition problem identified by some interested parties is likely to occur only on a periodic basis, and on a tenement-by-tenement basis.

7.323 The Council also considers, consistent with NERA's views, that competition for individual tenements cannot be considered in isolation of competition in a broader tenements market (or indeed competition for the market for export coal more generally):

> … this competition for a specific development tenement is in most cases likely to occur within a broader field of rivalry for coal tenements located across a geography that is wider than the Newcastle catchment. This is because a tenement's ultimate value is derived from its sole use as an input into the production of supply for the coal export market. [para 21]

7.324 While the Council has continued to assess the geographic dimension of the tenements market as covering the Newcastle catchment, it has also focussed its attention on whether declaration would be likely to promote a material increase in competition for individual tenements when they become available for acquisition (either via a NSW Government allocation process; or in secondary markets for trade of tenements).

PNO has no incentive to inhibit competition between bidders for tenements

7.325 As noted in paragraphs 7.112 to 7.113 above, where a service provider is not vertically integrated into a related market, it will usually have little incentive to deny access to its services; and will instead have a commercial incentive for dependent

markets to be effectively competitive. Given PNO is not vertically integrated into the market(s) for tenements in the Newcastle catchment, the Council considers that PNO has:

a) little incentive to deny access to potential investors contemplating bidding for tenements in the Newcastle catchment

b) a commercial incentive for the market(s) for tenements in the Newcastle catchment to be effectively competitive.

7.326 Further, the Council considers that PNO is likely to prefer that the most efficient miners/investors are successful in bidding for tenements. Where more efficient miners of coal are successful in acquiring tenements, it is likely more value will be created by their mining activity in the Newcastle catchment. In turn, this should maximise demand for the Service at any given price set at the Port; and the profits PNO can make from its long-term lease of the Port. This is especially the case given the Port is unlikely to face capacity constraints over the Relevant Term of the declaration.

7.327 The Council's views on this apply irrespective of whether PNO is able to price discriminate between different miners seeking to export coal through the Port. While the Council considers PNO would be unlikely to wish to discriminate between different miners bidding for a particular tenement opportunity for the reasons expressed at paragraph 7.325 above; it may have an incentive to lower prices for all bidders for a marginally-profitable tenement that might only be profitable at lower charges for the Service if it had the capacity to do. In the unlikely event PNO was able to effectively price discriminate in this fashion, the Council does not consider this would harm competition (either for the particular tenement involved; or more broadly in the coal export market). Further, price discrimination can, as noted above, improve efficiency in some circumstances. That said, for the reasons set out in paragraphs 7.150 to 7.154 the Council is not convinced PNO has the ability to price discriminate in this way; and notes it has not in the past sought to discriminate in its charges for individual miners at the Port.

7.328 In contrast, if PNO was unable to price discriminate between different miners seeking to export coal through the Port in a future without declaration of the Service, the Council accepts that PNO would set a uniform charge across all miners at any point in time that it believed would maximise its profits over the long-term. The Council also accepts that this is likely (but not certain) to involve a higher charge for services at the Port in a future without declaration than might exist in a future with declaration for the reasons set out in paragraphs 7.155 to 7.168above. In turn, this may have the effect of making some marginal coal exploration/mining activities that would have been profitable in a future with declaration unprofitable in a future without declaration. It may also mean that some higher cost/less efficient miners consider particular tenement opportunities do not represent profitable opportunities for them, and choose not to participate in bidding for certain individual tenement opportunities. However:

a) For the reasons expressed in paragraphs 7.329 to 7.336 below, the Council does not accept that a higher price for the Service would necessarily result in a lessening of competition in a dependant market *per se.*

b) Further, a reduction in the number of competitors for a tenement is not the same as a decrease in competition for that tenement – this is especially the case if those parties no longer seeking to bid for the tenement are less efficient or higher cost explorers/miners of coal.

c) In any case, for the reasons set out in paragraphs 7.222 to 7.227 above, the Council does not consider this effect is likely to be significant.

d) Further, for the reasons set out in paragraphs 7.308 to 7.312 above, the Council does not expect declaration would promote a material increase in competition in the market(s) for tenements in the Newcastle catchment as it considers the coal export market is likely already effectively competitive and will remain so with or without declaration of the Service.

A higher price for the Service does not equate to a lessening of competition for tenements

7.329 As noted in paragraph 7.168 above, the Council considers it likely (but not certain) that charges for the Service will be higher in a future without declaration of the Service compared to a future with it. However, the Council does not expect PNO would wish to charge different prices to different miners or investors seeking to bid for individual tenements.

7.330 The Council does not believe that setting the same higher charges for all miners or investors for a particular tenement opportunity would necessarily amount to a lessening of competition in the market(s) for tenements in the Newcastle catchment.

7.331 To the extent individual miners or investors face the same higher charge, it is unlikely to influence their ability to compete with each other on their merits for an individual tenement opportunity. That is, while higher charges for the Service in a future without declaration may reduce the expected net present value of a mining project to which a tenement relates, this does not mean it would reduce the ability of individual miners to compete against each other for that tenement on their merits.

7.332 In this respect, the Council notes the observation of the Tribunal in *Re Glencore* that:

> As Hilmer pointed out, unless there is vertical integration the position is that competition in upstream and downstream markets is not necessarily affected. The reason is that the effect of monopoly pricing is simply to raise the price of one of myriad input prices. When one of an industry's costs goes up, there is no presumption of an adverse effect on competition. [para [133]

7.333 In that respect, charges at the Port are akin to any other form of input cost potential miners face when seeking to invest in the Newcastle catchment. Just as the risk of an equal increase in fuel or electricity costs for all miners would not affect their ability to compete on their merits against each other for a particular tenement; neither should the risk of uniformly higher charges for the Service impact on the respective ability of potential miners to compete on their merits for that tenement.

7.334 As noted by the Tribunal in *Re Telstra Corporation Ltd (No. 3) [2007]*:

> Competition is a process rather than a situation … It is the way in which firms interact, and respond to each other, to ensure they best achieve their individual objectives.[397]

7.335 To the extent that all firms competing for an individual tenement faced uniformly higher prices for the Service in a future without declaration of the Service, this should not inhibit the ability of these firms to compete against each other on the merits of their own efficiencies. As noted by NERA:

> … a competitive tenements market is one in which the tenements are allocated to the most efficient miners/explorers. Even if the value of tenements was reduced because of PNO's pricing, the tenements are likely to be allocated to the most efficient miners/explorers. [para 39]

7.336 In this sense, higher charges at the Port would not, of themselves, lead to a lessening of the *process* of potential bidders competing against each other, on the basis of their own individual efficiencies and merits, to acquire tenements. Further, one should expect that the process of bidding for tenements in this context should continue to lead to tenements being acquired by those who are most efficient at (and therefore willing to offer the highest price for) exploring/mining these tenements.

A reduction in the number of bidders for a tenement does not equate to a lessening of competition for tenements

7.337 The Council has also considered submissions that the risk of higher (and more uncertain) charges for the Service might disproportionately effect smaller, higher cost miners from bidding for future tenements. The Council also notes submissions that this may lead to less bidders in markets for future tenements, with a consequent reduction in competitive tension in bidding processes.

7.338 The Council is not persuaded that any such consequence in a future without declaration of the Service would be likely to be material, or amount to a decrease in competition in the market(s) for tenements. This is because if less efficient miners drop out of bidding processes and are unable to acquire particular tenements, this would be consistent with the process of competition in competitive markets for tenements. In this respect, the Council notes the findings of the Tribunal in *Re Telstra Corporation Ltd (No. 3) [2007]*:

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397 *Re Telstra Corporation Ltd (No. 3) [2007]*, ACompT 3, at [97].

> … we believe it is important not to confuse the objective of promoting competition with the outcome of ensuring the greatest number of competitors. That is, the Act aims to promote competition because of the benefits that result from the process of competition, such as lower prices for consumers and the displacement of inefficient suppliers by efficient suppliers of services.[398]

7.339 Synergies submitted that auction theory suggests a reduction in the number of bidders would be expected to reduce the sale price for the auctioned item, with reference to a research paper by staff of the Productivity Commission. The Council accepts that a consequence of possible (but not certain) higher prices for the Service in a future without declaration of the Service is that some potential explorers/miners of coal in the Newcastle catchment may not bid for certain tenements that come up for sale in the future; and/or that the NSW government may receive less in future sales of tenements. However, it does not expect this consequence would be significant, for the reasons set out in paragraphs 7.222 to 7.227. Further, it does not consider a possible (but not certain) higher price for the Service in a future without declaration of the Service would prevent prospective bidders for tenements from competing on their relative merits in bidding processes for these tenements. This point is implicit in the quote from the research paper by staff of the Productivity Commission quoted by Synergies:

> As the number of bidders increases, bidders generally need to bid closer to their own valuations to win an auction. Consider the situation in which a particular bidder has the highest valuation; a new competitor may have a valuation higher than those of the other existing bidders. ***The entry of this new competitor does not affect the outcome that the highest-valuation bidder wins***; however, it may increase the second highest valuation among bidders and therefore the required payment for the winner. Consequently, the price is expected to rise with an increased number of bidders.[399] [emphasis added]

It is unclear whether Glencore will have a competitive advantage in the tenements market as a result of the Glencore arbitration

7.340 As noted in paragraph 7.227 above, the Navigation Service Charge currently set by PNO is approximately 19.9% higher than determined by the ACCC in the Glencore-PNO Arbitration.

7.341 Submissions have suggested that the access terms available to Glencore as a result of the ACCC's arbitration make tenements relatively more valuable to Glencore; and therefore provide it with an advantage over its competitors in the tenements market.

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398 *Re Telstra Corporation Ltd (No. 3) [2007]*, ACompT 3, at [99].

399 Chan, C., Laplagne, P. and Appels, D. (2003). The Role of Auctions in Allocating Public Resources, Productivity Commission Staff Research Paper, Productivity Commission, pp. 18-19.

7.342 In the future with declaration of the Service, Glencore's competitors will retain the ability to notify the ACCC of any access dispute that might arise in their negotiation with PNO and themselves obtain access to terms considered reasonable by the ACCC in the context of those disputes. To the extent the ACCC arbitrated similar terms and conditions of access to any access seeker that notified an access dispute to it, this should ensure any party seeking arbitration by the ACCC should not face a competitive disadvantage relative to Glencore when bidding for future tenements.

7.343 This is in contrast to the future without declaration, where the terms granted to Glencore through the ACCC Determination might endure (unless revoked or amended through ongoing and/or future appeal processes before the Tribunal and the courts), while its competitors' capacity to obtain equivalent terms through an arbitration process would cease.

7.344 PNO and Glencore have applied to the Tribunal for review of the ACCC's arbitrated terms and the Tribunal has heard the matter but not published its decision. As such it remains uncertain whether Glencore will ultimately have access to the Service on terms that differ from those available to any other user of the Service. The Tribunal's review of the ACCC Determination (and the terms provided in that Determination to Glencore) will continue regardless of whether the declaration of the Service is revoked.

7.345 The Council also notes that during the course of this revocation inquiry (and since the ACCC Determination in October 2018), any other user of the Service could have applied to the ACCC for arbitration of the terms and conditions of access to the Service. To date, no other party has notified any access dispute to the ACCC in relation to the Service. Further, there is no guarantee that they would obtain the same terms as granted by the ACCC in the Glencore-PNO access dispute or as ultimately determined by the Tribunal in its current review, in which case differing terms of access to PNO's service could apply as between Glencore and any subsequent arbitration applicant(s).

7.346 The Council is not persuaded that the possibility of different terms being set for Glencore as compared to other users of the Service is likely, in this instance, to materially inhibit competition in the market(s) for tenements in a future without declaration of the Service. As noted in paragraph 3.9 above, PNO requested on 2 July 2018 that the Council make a recommendation to the designated Minister that declaration of the Service be revoked. The Council subsequently published notice of PNO's request and supporting submission in the Australian newspaper on 11 July 2018; and received submissions on this matter from a range of interested parties in early August 2018. The ACCC subsequently made its determination in the Glencore-PNO Arbitration on 18 September 2018, and determined charges that would apply until 7 July 2031.

7.347 As noted elsewhere in this Recommendation, the Council considers it is possible (but not certain) that charges for the Service would be higher in a future without declaration of the Service compared to a future with. To the extent Glencore is

afforded a lower price for the Service in a future without declaration of the Service than its rivals by virtue of whatever price may be determined by the Tribunal at the end of its review of the ACCC Determination, this may mean particular tenements that come up for sale in the future are of more value to Glencore than its rivals. However, it is unclear whether any final charges determined by the Tribunal will be significantly different to those charged by PNO to Glencore's rivals in a future without declaration of the Service; and that charges at the Port remain a small proportion of the price for coal on world markets. Further, Glencore has already incurred significant costs in participating in the arbitration process to this point, and that would offset any benefit it might attain from any future arbitrated terms; and Yancoal has indicated these costs have been a substantial deterrent to it seeking arbitration by the ACCC to date (see paragraph 10.76 below).

7.348 Other users of the Service have had almost 10 months since the ACCC Determination to notify the ACCC of an access dispute in circumstances where they were aware the Council may recommend revocation of the Service declaration. These parties have also known there was a reasonable possibility the Council might make such a recommendation following the release of the SOPV in December of last year. Despite this, other users of the Service have not sought to protect themselves against the risk of any harm to their ability to compete for tenements due to the potential that arbitrated terms and conditions of access might be lower for Glencore than for themselves by notifying the ACCC of an access dispute.

7.349 Some users of the Service have indicated they have not been minded to notify the ACCC of an access dispute at this point due to the significant costs and risk of litigation associated with arbitration procedures (as evidence by the litigious nature of the Glencore-PNO Arbitration).

7.350 The Council considers the factors outlined in paragraphs 7.348 and 7.349 above suggest that users of the Service other than Glencore do not consider that the risk of any disadvantage they may suffer vis-à-vis Glencore's arbitrated terms provided for by the ACCC is sufficiently great so as to outweigh the potential costs of notifying the ACCC of an access dispute and seeking arbitrated terms and conditions of access to the Service. Implicitly, this appears to suggest they may consider any competitive benefit resulting from attaining ACCC arbitrated terms and conditions of access is not likely to warrant the costs involved for them in seeking arbitration by the ACCC of their terms and conditions of access to the Service.

No material increase in competition in the tenements market

7.351 Taking into account the various factors outlined above, the Council is not satisfied that access or increased access to the Service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in the tenements market.

Effect of declaration on competition in container port market

7.352 In its 2015 Final Recommendation, the Council noted the limited substitution possible between bulk and containerised shipping.[400] Beyond this, a market for containerised freight has not previously been considered by the Council, the Tribunal or the Minister in the context of the Service.

7.353 In the current matter, PNO proposes to build a container terminal at the Port, and has considered whether declaration is likely to have any effect on competition in the container port market.

Submissions provided to the Council

Before the SOPV was issued

7.354 PNO submits that, based on information provided by the Port Authority of NSW, in 2017 the Port's combined container imports and exports totalled 9,496 TEU.[401] PNO submits that there are currently no dedicated container vessels calling at the Port. Containers that are currently handled are carried on multi-cargo vessels that often load or discharge containers in addition to others forms of cargo at the Port.[402]

7.355 PNO submits that it currently holds development approval for a 350,000 TEU container terminal at its Mayfield site, but has developed a concept proposal for a container terminal at this site which would have the potential to process 2 million TEU per annum. PNO submits that development of such a container terminal 'is contingent on the removal of the existing restraint on competition for container trade between the ports in NSW (which is currently under investigation by the ACCC) [403] (the **Container Restraint**) and would require further planning and development approvals. PNO submits that it does not currently know if or when the Container Restraint will be removed and, consequently, is not able to estimate if or when a container terminal might commence operation at the Port, except that operations could commence 12-18 months after the removal of the Container

400 2015 Final Recommendation p 31.

401 Ibid p 15.

402 Ibid.

403 The ACCC clarifies that when the NSW Government privatised Port Botany and Port Kembla in May 2013 agreements known as 'Commitment Deed' were entered into, obliging the State of NSW to compensate the operators of Port Botany and Port Kembla if container traffic at the Port of Newcastle is above a minimal specified cap. A further deed was signed when the Port of Newcastle was privatised, requiring PNO to reimburse the State of NSW for any compensation paid under the Commitment Deeds. ACCC Media Release, 10 December 2018, 'ACCC takes action against NSW Ports' https://www.accc.gov.au/media-release/accc-takes-action-against-nsw-ports.

Restraint.[404] In its September 2018 Submission, PNO states that it is unlikely that a container terminal could commence operation before July 2020.[405]

7.356 In the event the Container Terminal were to be built, PNO submits that its current projected throughput in year one of the Container Terminal's operation is 76,638 TEU and 77 container vessel visits. It further projects throughput in year 11 (likely ending 30 June 2031 at the earliest) would be 408,057 TEU and 422 container ship visits.[406]

7.357 PNO submits that charges for the Service (i.e. the Navigation Service Charge levied on the vessel and a component of the Wharfage Charge [relating to the berthing box]) would be $18.16 per TEU, which PNO submits is an insignificant component of the cost of transporting containers.[407] PNO's September 2018 Submission estimates charges for the Service to account for 2.3% of the import and export cost of one TEU through the Port (based on $100 in port charges as a component of $4,350 total import/export costs). On 15 October 2018, PNO provided the Council with an updated estimate based on analysis undertaken by the Freight and Trade Alliance which estimates PNO's component of port charges (i.e. Navigation, Wharfage and Security) to account for 2.8% of the cost of importing one TEU and 3.2% of the cost of exporting one TEU.[408] PNO also notes that the total cost of importing or exporting a one TEU container at the Port is highly variable and will be impacted by a range of factors.[409]

7.358 PNO's submissions regarding vertical integration in dependent markets (see paragraph 7.43) are relevant in the context of the container port market.

7.359 Shipping Australia submits that declaration of the Service would assist PNO in attracting container ships to the Port by providing a measure of price certainty that will assist in developing trade. In turn, this would allow PNO to better compete with the ports of Botany and Brisbane. Shipping Australia submits that revoking the Declaration would have a material negative effect on the competitiveness of the Port in the container shipping market.[410]

7.360 Shipping Australia submits that the prospect of a pricing restructure in which the two-tiered navigation charge is replaced with a flat-rate per GT charge for container ships could see the cost of calling at the Port increase by $100 per unit for the first 100 containers exchanged. Shipping Australia submits that such a cost would prove significant for vessels under 50,000 GT. This uncertainty around pricing could

404 PNO's September 2018 Submission pp 10, 11.

405 PNO's September 2018 Submission p 11.

406 Ibid p 11.

407 Ibid p 12.

408 Ibid p 13 and PNO's letter to the Council dated 15 October 2018. These estimates include a cost element for transporting the container from its origin to the Port

409 PNO's September 2018 Submission p 17.

410 Shipping Australia's August 2018 Submission pp 4, 5.

negatively impact the competitiveness of PNO against Port Botany.[411] Shipping Australia submits that revocation of the Declaration would have a material negative effect on the competitiveness of the Port of Newcastle against the ports of Botany and Brisbane.[412]

7.361 Shipping Australia submits that PNO's plans to develop a container terminal are served by continued declaration of the navigation channel as the price certainty provided will attract vessels and cargo from Port Botany and possibly the Port of Brisbane. It submits that this will promote a material increase in competition in the container port market.[413]

7.362 Synergies' August Report notes that large price increases may have a more significant impact on volumes of products other than coal and that PNO already applies different charges to coal and other products. Synergies submits that as a result of its ability to price discriminate, increasing prices for coal vessels will not affect PNO's ability to remain competitive for other trades, such as in relation to its proposed container terminal.[414]

7.363 Yancoal submits that the same issues identified in relation to the impact of declaration on more marginal coal producers is likely to equally apply to container trade. Yancoal considers it likely that the prospect of future price increases relating to the Service, in the absence of declaration, will adversely impact one or more dependent markets relating to containerised trade.[415]

7.364 In addition to the comments summarised at paragraph 7.42, NCIG's October 2018 Submission states that PNO would primarily compete with Port Botany and Port Kembla in the container port market and, to a lesser extent, with the Port of Melbourne and Port of Brisbane.[416]

Responding to the SOPV

7.365 NSWMC and Synergies have made submissions noting that CMG holds a 50% interest in PNO and also has container shipping operations which could lead to vertical integration issues.[417] Synergies submits that PNO has many opportunities to provide advantages to its shareholder, including through reduced wharfage or reductions in other port related charges.[418]

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411 Ibid.

412 Ibid p 6.

413 Shipping Australia, submission, p 5.

414 Synergies' August Report p 18.

415 Yancoal's October 2018 submission p 11.

416 NCIG October 2018 Submission p 9.

417 NSWMCs SOPV Submission pp 3, 4; Synergies' February 2019 Report p 12.

418 Synergies' February 2019 Report p 19.

7.366 NSWMC's SOPV Submission raises concern over the possibility of PNO being influenced by vertical or other relationships that may see container traffic and Port operations favoured over coal exports. NSWMC submits that the existence of vertical integration alone should be a significant determinant in maintaining the Declaration from a legal and public policy perspective.[419]

Council's view on each relevant factor

Characterisation of the market

7.367 Consistent with its 2015 Final Recommendation, the Council considers that a market for containerised shipping services should be considered separately to the bulk shipping market.

7.368 The Council characterises a container port market as the market in which ports compete to attract container shipping lines that facilitate the movement of containerised trade through the port to various import and export destinations.

7.369 The Council considers that if the Container Terminal begins operation during the Relevant Term, the Port's capacity to accept and handle containerised cargo will improve significantly from its current state. In such a scenario, the Port is likely to be regarded as a viable and attractive alternative for some importers and exporters in the Port's catchment area.

7.370 The Deloitte Report includes the following figure depicting the Port of Newcastle catchment area:

[419] NSWMC's SOPV Submission p 4.

Figure 7 – Comparison of actual and forecast vessel visits at the Port to expected vessel capacity[420]

7.371 The Deloitte Report estimates that:

(a) 87% of the containerised freight imported to NSW initially arrives in Greater Sydney, 4% arrives in the Port's Catchment and 9% arrives in Southern NSW

(b) Of that containerised freight imported to NSW, the unpack location of 61% is Greater Sydney and the unpack location of 27% is the Port's Catchment

(c) Greater Sydney accounts for 43% of NSW's containerised export tonnage whereas the Port's Catchment accounts for 38%.[421]

7.372 While submissions suggest that the Port's competitors on the east coast of Australia could span from the Port of Brisbane in the north to the Port of Melbourne to the south, the Council considers it unlikely that the Port's catchment area would significantly overlap with ports in Brisbane or Melbourne. Therefore, those ports are unlikely to be close substitutes for the majority of container freight originating from or destined for areas in the Port's catchment. The Council therefore considers it appropriate to apply a narrow geographic framework in its consideration of the container port market for the purpose of its assessment. As such, the Council has undertaken its analysis of the container port market in the context of the Port of Newcastle and Port Botany competing to receive vessels carrying containerised

[420] Deloitte Access Economics '*NSW Container and Port Policy – Port of* Newcastle'. March 2018. p X. https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-economics-port-newcastle-nsw%20container-port-policy-010318.pdf

[421] Ibid.

freight originating from, or destined for, areas within their overlapping catchment areas.

7.373 If declaration of the Service is unlikely to improve competition using this narrow geographic dimension for the container port market, then the same result would ensue if a wider geographic dimension were applied (such as including Port Kembla, the Port of Brisbane and the Port of Melbourne as competing for container trade in the Port of Newcastle's catchment area).

7.374 The Council's assessment has been undertaken by considering the market in which the Port of Newcastle and Port Botany compete to attract shipping agents and vessel operators seeking to import/export containerised freight to/from Australia or interstate.

PNO is unlikely to price in a way that decreases competition in the container port market

7.375 Where a provider of a service charges higher prices, this is likely to decrease demand for its services. It may also have the effect of reducing the level of investment in dependent markets.

7.376 At this point in time, however, PNO has not commenced operating the Container Terminal at the Port. If it does, this will enable it to offer a port service to container transport service providers in competition with other ports, such as Port Botany. In this respect, PNO will effectively become a new entrant into the provision of container port services.

7.377 The consequence of this is that if PNO builds the Container Terminal, it will be seeking to attract custom away from alternative container port service providers, such as Port Botany. This is likely to provide a level of constraint on its pricing for container port services at the Port that is different to the type of constraints it faces with respect to the provision of export coal port services. Importantly, container freight is able to travel to and from a wider set of destinations due to the ability to transport containers by road as well as rail. This means that container freight service providers are not "captive" to particular ports to the same extent as export coal service providers (who are largely dependent on the existence of rail networks linking particular coal mines to particular ports). In this respect, the Council considers that a significant proportion of containerised freight originating or destined for the Port's catchment area is currently shipped through Greater Sydney.

7.378 PNO does not appear to be materially vertically-integrated into the provision of container freight transport services. As with the provision of services to coal exporters, this means PNO is unlikely to wish to deny access to different container freight service providers at the Port; or to wish to act in a way that discourages competition in any downstream container freight services.

7.379 PNO has developed its concept proposal for the Container Terminal and called for tenders while the Declaration is in place. Recent media published on the Port's website suggests that a number of container port operators placed bids to develop

and operate a container terminal at the Port.[422] The Council is unaware of any party which has been deterred from bidding to develop a container terminal at the Port as a result of increased uncertainty that might arise if the Service was no longer subject to declaration.

7.380 In submissions made to the Public Works Committee inquiry into the Port of Newcastle, Mr Craig Carmody, Chief Executive Officer of the Port of Newcastle, advised that PNO is able to develop the container terminal using private funds when the Container Restraint is removed.[423] Mr Carmody also submitted in that inquiry that the expanded container operations that the container terminal would enable would not be commercially viable until the Container Restraint is removed.[424]

7.381 PNO has advised that it does not know if or when the Container Restraint will be removed. The Council considers that this is the dominant uncertainty impacting investment supporting the Port's participation in the container port market. The Council does not consider the possible removal of the Container Restraint to be affected by whether or not declaration applies to the Service.

7.382 On 10 December 2018, the ACCC announced that it had instituted proceedings against NSW Ports Operations Hold Co Pty Ltd and its subsidiaries, Port Botany Operations Pty Ltd and Port Kembla Operations Pty Ltd. The ACCC's 10 December 2018 Media Release states:

> *The NSW Government privatised Port Botany and Port Kembla in May 2013 and the agreements, known as Port Commitment Deeds, were entered into as part of the privatisation process, for a term of 50 years.*
>
> *The Botany and Kembla Port Commitment Deeds oblige the State of NSW to compensate the operators of Port Botany and Port Kembla if container traffic at the Port of Newcastle is above a minimal specified cap.*[425]

7.383 The Council considers that to the extent that Service pricing uncertainty differs in the future with the Service declared as compared to the future without declaration, PNO's commercial incentives to price competitively to win market share (discussed below) are likely to make any such difference minimal.

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422 Port of Newcastle. '*Port of Newcastle on track to build container terminal'* 27 August 2018.https://www.portofnewcastle.com.au/News-and-Media/Items/2018/Port-of-Newcastle-on-track-to-build-container-terminal.aspx

423 Public Works Committee. *Inquiry into the impact of port of Newcastle sale arrangements on public works expenditure in New South Wales – Corrected.* 31 January 2019. Page 5. https://www.parliament.nsw.gov.au/lcdocs/transcripts/2166/31%20January%202019%20-%20Corrected%20-%20Port%20of%20Newcastle%20sale%20arrangements.pdf

424 Ibid pp 6, 7,

425 Rod Sims, ACCC. 'ACCC takes action against NSW Ports' 10 December 2018 https://www.accc.gov.au/media-release/accc-takes-action-against-nsw-ports.

The Container Terminal at the Port is unlikely to be capacity constrained

7.384 PNO submits that Container trade at the Port is estimated to result in 438 vessel visits per year (transporting 408,057 TEU in containerised freight) by 2031. These vessel visits would be in addition to the 3,228 non-container vessel visits in that year. PNO also submits that the proposed terminal's capacity is to exceed 2 million TEU per annum,[426] while the Port has capacity to handle 5,000 vessel visits.[427]

7.385 Expected container volumes in 2031 are, therefore, less than 25% of the Container Terminal's proposed capacity. Further, total anticipated vessel visits (including containerised and non-container vessels) to the Port remain considerably below the Port's current capacity. PNO already imposes separate charges for containers and is likely to set fees applicable to containerised freight competitively with or without declaration so as to win market share from with Port Botany in order to support the development of its container trade.

Relative significance of port charges

7.386 The Freight and Trade Alliance estimates PNO's component of port charges (i.e. Navigation, Wharfage and Security) to account for 2.8% of the cost of importing one TEU and 3.2% of the cost of exporting one TEU if PNO sets its fees at $77.22 per TEU and costs are otherwise on par with those applicable at Port Botany.[428] If the port charge estimate from PNO's September 2018 Submission (i.e. $100 per TEU) is used with the Freight and Trade Alliance cost estimates for Port Botany, the Council calculates that port charges would account for 3.6% of the cost of importing one TEU and 4.1% of the cost of exporting a one TEU container. While estimates suggest PNO's component of the cost of importing or exporting a one TEU container (2.8-3.6% and 3.2-4.1%, respectively) is larger than was the case for coal exports (where PNO's fees account for <1%), the Council considers PNO's fees represent a relatively minor cost component and would be constrained by competition from other ports in the market.

Hold-up problem

7.387 No submissions have been provided on the potential impact of the hold-up problem (discussed above) in the container port market.

No material increase in competition in the container port market

7.388 A significant proportion of containerised cargo originating from or destined for the Port's catchment area is currently shipped through Greater Sydney. The Port is not a vigorous competitor to Port Botany in the container port market at present and at

[426] See paragraph 7.373.

[427] See paragraph 7.132, and Port of Newcastle *Port of Newcastle on track to build container terminal* 27 August 2018. https://www.portofnewcastle.com.au/News-and-Media/Items/2018/Port-of-Newcastle-on-track-to-build-container-terminal.aspx

[428] PNO's letter to the Council dated 15 October 2018.

best a weak competitive constraint. Because the limitation to the Port's capacity to compete stems from a lack of container infrastructure rather than prohibitive pricing or terms of access to the Service, the Council considers that the state of competition in the market would not be materially different with or without declaration unless a container terminal at the Port is developed, which (as noted above) is not dependent on whether the Service is declared.

7.389 If the container terminal is developed, PNO will be a new entrant in the market. This event will promote a material increase in competition in the market but is not dependent on declaration of the Service. This is because with or without declaration of the Service, PNO will have incentives in the Relevant Term to set prices for the Service competitively for containerised trade so as to gain market share from other ports.

7.390 The Council is not satisfied that increased access to the Service, on reasonable terms and conditions, as a result of declaration would promote a material increase in competition in the container port market.

Other dependent markets

7.391 The Council considers that the bulk shipping market, the infrastructure market and the specialist services market are closely tied and substantially depend on the coal export market. The Council considers that it is difficult to see how there might be flow-on effects in these markets leading to a material increase in competition in any of these markets where declaration of the Service does not lead to a material increase in competition in the coal export market.

7.392 Having reached the conclusion that declaration of the Service is unlikely to materially increase competition in the coal export market, the Council is not satisfied that increased access to the Service, on reasonable terms and conditions, as a result of the declaration would promote a material increase in competition in the bulk shipping market, the infrastructure market or the specialist services market.

No material increase in competition in any other dependent market

7.393 The Council is not satisfied that access or increased access to the Service, on reasonable terms and conditions, as a result of the declaration would promote a material increase in competition in any other dependent market.

Council's assessment of criterion (a)

7.394 The Council is not satisfied on the material before it that 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 any dependent market.

7.395 Accordingly, the Council considers that criterion (a) is not satisfied. Further, the Council is satisfied that, at the time of this Recommendation, subsection 44H(4) would prevent the Service being declared.

8 Capacity for facility to meet demand – criterion (b)

8.1 Subsection 44CA(1)(b) of the CCA (criterion (b)) stipulates that the facility used to provide the service could meet the total foreseeable demand in the market over the period for which the service would be declared and at the least cost compared to any two or more facilities.

Submissions

8.2 PNO did not make submissions explicitly addressing criterion (b), but submits that it has modelled channel capacity in excess of 328 mtpa (compared to 2017 usage of 167 mtpa) or 5,000 vessel visits (compared to 2,326 vessel visits in 2017), and there is no channel capacity constraint.[429]

8.3 PNO's submissions forecasting coal export growth and vessel visit growth summarised in the discussion on criterion (a) (see paragraphs 7.130 - 7.134) are also relevant to criterion (b).

8.4 The Council also notes PNO's website stated that:

> With capacity to more than double its current trade and ship movements, the Port of Newcastle is well placed to support the predicted doubling of Australian freight over the next 20 years and beyond.[430]

8.5 Yancoal and NCIG submit that:

(a) the Service has natural monopoly characteristics and the capital cost of dredging an alternative channel along with the environmental and regulatory challenges of doing so are very significant,[431] and

(b) Glencore made submissions in its original declaration application that it would be impossible to economically develop another facility to provide the service, noting PNO's valuation of the channel at the time was $2.4 billion, excluding related rail, conveyor and jetty infrastructure.[432]

8.6 Yancoal does not consider a detailed projection of foreseeable demand is necessary to conclude that demand is met at least cost by the Port's channel rather than operating two or more facilities.[433]

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429 PNO's September 2018 Submission p 14.

430 Port of Newcastle, 'Move your Cargo' https://www.portofnewcastle.com.au/CARGOES/Move-your-cargo.aspx.

431 Yancoal's August 2018 Submission p 7; NCIG's August 2018 Submission p 7.

432 Ibid.

433 Yancoal's August 2018 Submission p 8.

Criterion (b) is satisfied

8.7 Based on the information before it, the Council considers that the Port could meet the total foreseeable demand in the market in the Relevant Term and at the least cost compared to any two or more facilities.

8.8 The Council's view is that criterion (b) is satisfied.

9 National significance – criterion (c)

9.1 Section 44CA(1)(c) of the CCA (criterion (c)) stipulates that the facility providing the service is of national significance, having regard to:

(i) the size of the facility, or

(ii) the importance of the facility to constitutional trade or commerce, or

(iii) the importance of the facility to the national economy.

Submissions

9.2 PNO did not make submissions addressing criterion (c).

9.3 Glencore submits that the Port is the world's largest coal export port and the only economically viable means of exporting coal produced in the Hunter Valley. Glencore notes that coal exports make a significant contribution to domestic economic activity and thereby enhances the welfare of Australians.[434]

9.4 Yancoal and NCIG note that, unlike other declaration criteria, criterion (c) was not amended and there is no suggestion that the channel has become less significant in the last two to three years. They submit that the significant volume of coal exports through the Port and the coal royalties that are generated result in significant benefits for both state and federal gross domestic product. They note, as an example, that coal royalties accounted for $1.776 billion in the 2018 New South Wales state budget.[435]

9.5 NCIG further submits that the significance of the channel is likely to increase with the potential for further developments at the Port, such as a major container terminal.[436]

9.6 Pacific National notes that the Port itself is categorised by COAG's Transport Infrastructure Council (**TIC**) as part of the National Key Freight Routes.[437]

Criterion (c) is satisfied

9.7 The Council considers that the facilities are of national significance in terms of their importance to constitutional trade and commerce (specifically, trade or commerce between Australia and places outside Australia) and their importance to the national economy, noting, in particular, the mass and value of trade through the facilities each year, and the economic activity generated by industries that are reliant upon the facilities.

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[434] Glencore' August 2018 Submission p 30.

[435] Yancoal's August 2018 Submission p 8; NCIG's August 2018 Submission p 8.

[436] NCIG's August 2018 Submission p 8

[437] Pacific National's SOPV Submission at p 3.

9.8 No party submitted that the Port is not nationally significant under criterion (c). The Council considers that the conclusion on this matter is free from doubt.

9.9 The Council's view is that criterion (c) is satisfied, and that the Minister would arrive at this conclusion.

10 Material promotion of the public interest – criterion (d)

10.1 Section 44CA(1)(d) of the CCA sets out declaration criterion (d), which is 'that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service, would promote the public interest'.

10.2 The public interest criterion that was in force in 2015 (i.e. 'criterion (f)', which was previously set out at subsections 44G(2)(f) and 44H(4)(f) of the CCA) was formulated as a negative test, i.e. the Council considering a declaration application had to be satisfied that access (or increased access) to the service would not be contrary to the public interest.

Submissions

Before the SOPV was issued

10.3 PNOsubmits that, unlike the previous criterion (f), criterion (d) requires the Minister to be positively satisfied that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of a service would promote the public interest. The matters to which the Minister can have regard are broad, subject to the requirement that those matters must: (i) include the matters identified in section 44CA(3); and (ii) exclude the matters identified in criteria (a) to (c).[438]

10.4 PNO considers that even if the Council were to determine that the other criteria are met in the present case, the declaration of the Service should still be revoked on the basis that criterion (d) is not met. In support of this view, PNO made the following submissions.

(a) Declaration of the Service may have a chilling effect on investment in infrastructure by curbing the returns that would otherwise be realised by investing in infrastructure services

(b) There is no evidence that investment decisions in markets that depend on access to the Service are influenced by port charges. Investment decisions in dependent markets are more likely to be influenced by more significant sources of uncertainty

(c) The Declaration has led PNO to incur significant administrative and compliance costs, including costs from participating in arbitration (both in terms of time and legal costs) and costs from complying with any arbitration determinations. PNO submits that it will continue to be exposed to these administrative and compliance costs as long as the Declaration is in place

[438] PNO's July 2018 Submission pp 39, 40.

(d) PNO is not aware of any other matter that would provide a basis for the Minister to be positively satisfied that maintaining declaration of the Service would promote the public interest.[439]

10.5 Ports Australiasubmits that there is no evidence to indicate that the current declaration has positively impacted related infrastructure services and markets that are dependent on access to the Service, or that the continuation of the Declaration will result in an overall gain to the community. [440]

10.6 On the contrary, Ports Australia submits that the lack of adequate returns from commercial operations due to the declaration decision will result in an inability to manage the long-term viability of the Service. This would jeopardise jobs and businesses in and around the Port that rely on its effective management and, over the long term, may see the State Government take back management of the Port and allocate significant tax-payer monies to revitalise the Service and related infrastructure. Ports Australia submits that neither of these outcomes result in an overall gain to the community and, therefore, criterion (d) is not met.[441]

10.7 Yancoal[442] and NCIG[443] acknowledge that the amendments to criterion (d) require that the Council (and ultimately the Minister) is positively satisfied that declaration of the service promotes the public interest. However, both Yancoal and NCIG consider that this is an assessment of whether declaration would be likely (in the sense of there being a significant finite probability) to generate overall gains to the community (without any materiality requirement being applied to those gains).

10.8 Yancoal[444] and NCIG[445] submit that criterion (d) is met and make the following points in response to PNO's submissions at paragraph 10.4 above.

(a) PNO's submission that declaration of the Service may have a chilling effect on investment in infrastructure services is clearly inconsistent with PNO's own actions and other evidence. Yancoal provides examples of recent and likely investments in the Port and notes that PNO has not provided any examples of investment at the Port which were planned or alleged to have been necessary and have not been carried out because of the existing declaration

(b) The pricing of the Service is not immaterial – particularly for marginal mines and producers. Further, it is not materiality alone, but materiality combined with uncertainty that should be considered. Only declaration

439 Ibid p 41.

440 Ports Australia's August 2018 Submission pp 3, 4.

441 Ibid.

442 Yancoal's August 2018 Submission 18, 19.

443 NCIG's August 2018 Submission pp 14, 15.

444 Yancoal's August 2018 Submission 18, 19.

445 NCIG's August 2018 Submission pp 14, 15.

creates the potential for mitigating the volatility and uncertainty risks which exist in relation to the Service

(c) PNO has failed to substantiate the level of administrative and compliance costs actually incurred. Any costs incurred by PNO as a result of declaration arise because of PNO's own decision to strategically and vigorously oppose declaration. There are a number of factors which indicate the costs of complying with declaration are not as significant as submitted by PNO, including that (a) the nature of the channel service being a single common service for all users results in synergies and simplicity of price regulation which minimises costs incurred; and (b) once pricing structures are set by arbitration, PNO is able to realise efficiency savings in subsequent negotiations and arbitrations by adopting the previous determination and minimising the management time and legal and expert costs incurred

(d) There are a range of wider public benefits that arise from declaration, including:

(i) efficient use of infrastructure;

(ii) ecologically sustainable development;

(iii) promotion of further investment in coal production and exploration in the Hunter Valley region (and related services provision to coal producers) and in a possible future container terminal at the Port;

(iv) higher government royalties.

10.9 Glencoresubmits that ongoing declaration provides an array of public benefits, including facilitating and providing incentives to invest in dependent markets and the Port itself, economic growth, and provision of regulatory certainty. Accordingly, Glencore submits that the Council cannot be satisfied that criterion (d) is not satisfied. [446]

10.10 Synergies states that by providing an effective constraint on PNO increasing its prices to capture monopoly rents, declaration will promote the efficient use of infrastructure and create improved conditions for investment in exploration and development of coal reserves. [447]

10.11 Synergies adds that the additional benefits associated with improved access based on reasonable terms and conditions as a result of declaration (compared to access on PNO's imposed terms) which have not already been identified in criterion (a) fall into the following two broad categories:

(a) the gains arising from increased productive, allocative and dynamic efficiency in markets other than the coal tenements market (which has already been considered in relation to criterion (a)); and

[446] Glencore's August 2018 Submission p 30.

[447] Synergies August Report p 71

(b) the additional economic growth in the NSW and Australian economies associated with increased mining production (i.e. where increased investment attractiveness because of the declaration leads to deposits being proven and ultimately mined).[448]

10.12 Synergies also submits that revoking the declaration will result in public detriments where:

(a) there is no other credible constraint on PNO engaging in monopoly pricing which would mean that the application of the Part IIIIA regulatory framework is redundant

(b) revocation of the declaration will cause a reduction in the value of investments made by coal producers who legitimately expected that PNO's ability to engage in monopoly pricing would be constrained

(c) it establishes a precedent for undeclared ports, across Australia, to raise prices where they perceive the threat of regulation is similarly weak.[449]

10.13 PNO's September 2018 Submission states that the relatively low level of interest from the public to the revocation application supports the view that there is an insufficient basis for the Council (and the Minister) to be satisfied that access (or increased access) on reasonable terms and conditions as a result of the declaration of the Service would promote the public interest.[450]

10.14 In response to the August 2018 submissions by Yancoal and NCIG, PNO submits that it is clear (for example from the Harper Report at p 32) that the onus under the new criterion (d) of demonstrating that access would promote the public interest is on those seeking access, rather than there being an onus on infrastructure owners and operators to demonstrate that access would be contrary to the public interest.[451]

10.15 In relation to the specific points raised by Yancoal and NCIG, PNO submits the following:

(a) A chilling effect on investment does not require an absence of *any* investment, but rather is a reduction in the investment that would otherwise occur. Yancoal and NCIG are not in any position to comment on whether declaration has in fact dampened investment in infrastructure services. Moreover, the chilling effect on investment in infrastructure is broader than specific investments in the Port and relates to investment in infrastructure services generally, which Yancoal and NCIG have not addressed[452]

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448 Ibid.

449 Ibid.

450 PNO's September 2018 Submission p 4.

451 Ibid p 8.

452 PNO's September 2018 Submission p 8.

(b) PNO does not agree with the submissions by Yancoal and NCIG (summarised in point (b) at paragraph 10.8, above) about '*uncertainty*' and; in any case, notes those submissions are relevant only to criterion (a) and not criterion (d)[453]

(c) It is well accepted that regulation necessarily results in increased administrative and compliance costs for the infrastructure operator that would not be incurred absent regulation. PNO disagrees with the submissions by Yancoal and NCIG[454] that there are a number of factors which indicate the costs of complying with declaration are not as significant as submitted by PNO: (a) PNO does not agree that price regulation at the Port is '*simple*' and (b) there is no basis to conclude that PNO can simply '*adopt*' a previous determination in a subsequent dispute with another user, as suggested by NCIG and Yancoal (see summary in point (c) of paragraph 10.8, above)[455]

(d) The claimed ''public benefits'' identified by Yancoal and NCIG[456] do not arise from declaration. In relation to the first two benefits claimed to arise, there is no basis to suggest that it would somehow be necessary to duplicate the channel absent declaration or that declaration is otherwise necessary to ensure efficient use of infrastructure or ecologically sustainable development. The third benefit (promotion of further investment) is properly dealt with under criterion (a), not criterion (d). Finally, any increase in royalties for the State will be dwarfed by the benefits to the State of the declaration being revoked, including investment in infrastructure services not being chilled by the threat (and actuality) of heavy handed regulation and the State's ongoing interest in the value of the assets used to provide the Service and revenue generated through use of the Service.[457]

10.16 PNO notes that Glencore makes a number of submissions to the effect that revocation would be contrary to the public interest and that declaration provides certain public benefits.[458] PNO states that the relevant test is that access (or increased access), on reasonable terms and conditions, as a result of declaration would promote the public interest, not that revocation would be contrary to the public interest. These are not one and the same.[459]

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453 Ibid p 8.

454 Yancoal's August 2018 Submission, p.21 and NCIG's August 2018 Submission, p.17.

455 PNO's September 2018 Submission pp 8, 9.

456 Yancoal's August 2018 Submission, p.22 and NCIG's August 2018 Submission p.18.

457 PNO's September 2018 Submission pp 9, 10.

458 Glencore's August 2018 Submission p.30.

459 PNO's September 2018 Submission p 7.

10.17 PNO submits that the direct benefits Glencore claims would flow from continued declaration of the Service (namely, enhancing the efficiency of Australian-based coal producers and improving competition in dependent markets; and providing incentives and price certainty allowing coal producers to invest in dependent markets) properly fall for consideration in criterion (a), not criterion (d).[460]

10.18 PNO submits that Glencore identifies consequential public benefits (such as increased investment in mining and growth in the economy) but considers that these necessarily rely upon satisfaction of the competition criterion, which is not the case here.[461]

10.19 PNO submits that Synergies has provided no evidence in support of its claim that by providing an effective constraint on PNO increasing its prices to capture monopoly rents, declaration will promote the efficient use of infrastructure and create improved conditions for investment in exploration and development of coal reserves. Furthermore, Synergies has not addressed the fact that port charges represent a *de minimis* cost input for those of the relevant market participants who may possibly bear these costs. Nor has Synergies demonstrated any relationship between coal export volumes and port charges, nor explained why in the absence of declaration PNO would have any incentive to act in a way which would hamper the volume of coal shipments.[462]

10.20 In relation to the public detriments identified by Synergies, PNO submits:

(a) There is no evidence to support the submitted loss of value in investments. PNO notes that export coal prices have experienced very significant growth since June 2016 (when the Service was declared) and it is likely that this and other more relevant factors have influenced investment decisions in the coal sector rather than the Declaration.[463]

(b) Synergies' argument concerning negative precedent implications is premised on the claim that inefficient pricing behaviour will go unaddressed and that the mere act of revoking the Declaration will provide PNO with the incentive and opportunity to set unreasonable terms and conditions. This premise is without foundation for the reasons set out in detail in PNO's revocation application, and as set out in the HoustonKemp Incentives Report.[464]

10.21 Yancoal's October 2018 Submission reiterates that criterion (d) does not have a materiality threshold and states this is important because where the Council must be satisfied that one or more of the declaration criterion are not met before

460 Ibid pp 5, 6.

461 Ibid.

462 Ibid p 6.

463 Ibid p 7.

464 Ibid.

recommending revocation, there would need to be basically no public benefits from declaration in order to come to that conclusion.[465]

10.22 Yancoal also disagrees with PNO's claims around benefits that should be considered under criterion (a) but not criterion (d) (see point (d) at paragraph 10.15) and submits that the effect on competition and investment is clearly relevant to criterion (d).[466]

10.23 Yancoal submits that once it is concluded that declaration promotes investment and revocation will have a chilling effect on investment in the Hunter Valley coal industry, that will be enough (given the minimal, if any, public detriments caused by declaration) for criterion (d) to be satisfied.[467]

10.24 In response to specific points raised in PNO's September 2018 Submission, Yancoal submits:

(a) It is not correct to determine the relevance of the Declaration to the public interest by reference to how many submissions are made in respect of the revocation declaration[468]

(b) The application for revocation of the existing declaration is opposed by both NCIG and PWCS. NCIG shareholders include a range of significant coal producers operating in the Hunter Valley and PWCS shareholders include a mix of Hunter Valley coal producers and Japanese coal customers. The opposition to revocation by these two entities alone demonstrates the deep and broad level of concern across the Hunter Valley coal supply chain about the future state of competition and the health of the Hunter Valley coal market if declaration is removed at Port of Newcastle.[469]

(c) It is misleading to suggest that it can be read into the fact that only Glencore has commenced an access dispute that declaration does not promote the public interest[470]

(d) The effect of declaration should be assessed by the Council with the benefit of the determination that is ultimately made by the ACCC in respect of the Glencore - PNO Arbitration[471]

(e) Yancoal considers that the typical regulatory approach for an infrastructure service of this type where the same capital is employed for all users, to provide materially the same service, and where the statutory regime provides for the same price to be charged to all users, makes it

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465 Yancoal's October 2018 Submission p 8.

466 Ibid pp 8, 9.

467 Ibid.

468 Ibid pp 9, 10.

469 Yancoal's October Submission pp 9, 10.

470 Ibid

471 Ibid pp 10, 11.

extremely likely that the ACCC's ultimate determination in respect of the Glencore - PNO Arbitration will have more general application[472]

(f) Yancoal continues to consider that any ongoing administrative or compliance costs for PNO would be expected to be relatively minor, particularly given that the ACCC is highly likely to resolve the principles which will apply in such disputes in its determination of the Glencore - PNO Arbitration. Yancoal agrees with the conclusion drawn in the Synergies Report that there is a high likelihood that PNO would be able to avoid future arbitrations by offering terms of access determined in that initial arbitration to other users.[473]

10.25 NCIG's October 2018 Submission disputes PNO's submission that it would be inappropriate for the Council to take into account benefits that flow from increased competition in dependent markets in their assessment of whether or not criterion (d) is satisfied.[474]

10.26 NCIG refers to the 2017 EM and states that the Minister is required to weigh up the benefits that are identified from an assessment of criteria (a) – (c) (but not to question or re-assess the outcomes of the prior assessment of those criteria), along with any other matter that is relevant to the public interest (including the matters specified in section 44CA(3)) and judge whether, on balance, declaration would promote the public interest. To suggest that in doing this exercise, the Minister should instead ignore benefits to competition in dependent markets that were identified in assessing criterion (a), but instead only identify and be satisfied of other benefits unrelated to competition, would be to divorce criterion (d) from the objective and structure of Part IIIA in a way that has no support in the legislation or supporting materials.[475]

10.27 NCIG remains of the view that criterion (d) is clearly satisfied. It submits that declaration will promote a material increase in competition in a range of dependent markets and help to support investment certainty and the long term future of the Hunter Valley coal industry.[476]

10.28 Synergies' October 2018 Report disputes PNO's claim that it has mis-stated the public interest criterion test and applied it as a negative assessment rather than through the application of the positive test in which the designated Minister must now be positively satisfied that access (or increased access) to the Service would promote competition.[477]

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[472] Ibid p 10.

[473] Ibid p 10.

[474] NCIG's October Submission pp 3.

[475] Ibid pp 5-7.

[476] NCIG's October 2018 Submission p 10.

[477] Synergies October 2018 Report p 4.

10.29 Synergies states its assessment that revocation would not promote the public interest is based on the application of the public interest to a future *with continued declaration* and a future *without declaration*. Under this scenario, the starting point is not the absence of declaration. More appropriately, where the starting point is a circumstance of declaration existing, then the test of 'disbenefit' or the detriment that is likely to arise in the event that the declaration is removed, is the only practical application of the with and without test.[478]

Responding to the SOPV

10.30 The ACCC does not agree that criterion (d) allows the Minister to consider the "likely flow on effects that follow from its conclusions on criterion (a) – (c))". This risks the result that criterion (d) will not be met wherever criterion (a) is not met. Instead, an assessment of criterion (d) should look at whether there is any matter other than those addressed in criterion (a) – (c) relevant to whether access on reasonable terms as a result of declaration would promote the public interest. An appropriate approach would be to assess criterion (d) under the assumption that criteria (a) – (d) are met.[479]

10.31 The ACCC also submits that the Council's finding that a future with declaration may result in charges that lead to underinvestment does not acknowledge that arbitrated outcomes take into account investment incentives and the impact on future investments. The Council simply assumes that the risk of regulatory error in setting access terms and conditions will outweigh the benefits of more efficient pricing. A regulator-determined rate of return is more likely to lead to efficient investment outcomes than the return embedded in unconstrained monopoly prices. The ACCC questions what evidence underpins the Council's assumption that regulatory risk distorts investment outcomes in a negotiate-arbitrate regime.[480]

10.32 The ACCC submits that the assumption that PNO will be incentivised to charge at a level that facilitates efficient investment and does not consider dependent markets have led to the incorrect conclusion that declaration will not promote the public interest.[481]

10.33 Yancoal submits that the Council's analysis of criterion (d) was conducted in the context of the Council's preliminary findings in respect of criterion (a), that the likely changes in charges without declaration would not be of sufficient magnitude to impact investment decisions. Given criterion (d) should be assessed based on the outcome in respect of criterion (a), and criterion (a) should actually be satisfied for the reasons set out in Yancoal's submission, Yancoal considers that it is clear on further analysis that, absent declaration, PNO has the ability and incentive to

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478 Ibid pp 4, 23, 24.

479 ACCC's SOPV Submission pp 6.

480 ACCC's SOPV Submission pp 6, 7.

481 Ibid.

increase prices to (and past) the point that will materially impact investment decisions in the tenements markets. It would be expected that once it is concluded that there are material impacts on investment in the coal tenements market, taking into account the economic growth and activity that drives, criterion (d) will clearly be satisfied.[482]

10.34 Pacific National submits that:

a) The SOPV raises issues about the legitimacy of the Part IIIA monopoly regulation regime and could leave open the possibility of the NCC overturning any Part IIIA declaration process, including the Part IIIA regime covering the regulation of monopoly airports[483]

b) Declaration has been critical to promoting effective competition and investment across key freight and transport supply chains (dependent markets) over the past twenty years.

   In support of this view, Pacific National points to its experience in Queensland where regulated access to infrastructure proved effective in creating an environment in which rail freight competition can materially develop and grow. Pacific National considers its ability to grow its business in Queensland has been critically dependent on having certainty with respect to terms of access to key infrastructure. Pacific National also provides its submission to QCA's Staff Issues Paper regarding DBCT and CQCN in which it lists a number of investments it has undertaken in Queensland before stating "[Pacific National's] investment would not have been justified, absent a stable regulatory environment".[484] Pacific National's submission also details how it considers regulated access to have supported its investments and ability to compete in Queensland[485]

c) The NCC's examination of the negative effects of Declaration is weak. For example, the claimed cost of regulatory error is theoretical at best and issues attached to the cost of regulatory error have been addressed through information gathering and better resourcing of regulators. The risk of regulatory error is not a reason to remove regulation itself.[486]

10.35 PWCS submits:

a) PNO charging a price that extracts profits from other industry participants involves more than just an allocation of profits between stages in the supply chain (as suggested by the NCC). The presence of an unregulated monopolist in the supply chain will dampen the incentive for investment in each market that is

[482] Yancoal's SOPV Submission pp 14, 15.

[483] Pacific National's SOPV Submission p 1.

[484] Pacific National submission to QCA Issues Paper 30 May 2018, p 6.

[485] Pacific National's SOPV Submission pp 1, 2.

[486] Ibid p 2.

ultimately dependent on the channel service due to the fear of profits that might result from a given investment being siphoned off by PNO in the future[487]

b) Experience in other regulated industries, such as electricity, illustrates that regulation does not itself remove the incentive to invest[488]

c) Port Waratah is concerned that revoking declaration would have serious negative effects on the coal supply chain and, consequently, on Port Waratah's business (which depends on coal export volumes being maintained or increasing in order to underwrite infrastructure investments)[489]

d) Port Waratah is also concerned that it will need to negotiate with PNO in relation to its upcoming lease renewal and by the effects that revoking declaration and allowing PNO unconstrained ability to increase prices may have.[490]

10.36 PNO submits that regulatory error disproportionately impacts PNO compared to users given PNO relies on port charges for the significant majority of its revenue, compared to users where port charges are a *de minimis* cost and not a significant source of uncertainty or risk compared to other uncertainties and risks.[491]

10.37 Synergies submits that irrespective of competition impacts in dependent markets, continued declaration will facilitate increased investment and output from the Hunter Valley and this outcome advances the public interest in the context of the CCA's objectives.[492]

10.38 Synergies submits that:

a) the consequence of higher port charges for the coal industry means that prospective bidders for coal tenements are less likely to purchase tenement rights, or if they do, will pay lower prices because they assess that their expected returns will be materially lower in the face of rising costs (port charges) which cannot be mitigated. Increased port charges effectively transfer the wealth that would have been realised from investments from port users to PNO, reducing coal resource values in the area and impacting market incentives.[493] There is also likely to be a reduced volume of coal output from the Hunter Valley relative to what would occur in the absence of the revocation over the longer term.

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487 PWCS' SOPV Submission pp 2, 3.

488 Ibid p 3.

489 Ibid p 4.

490 Ibid

491 PNO's SOPV Submission p 14.

492 Synergies' February Report p 3

493 Synergies' February 2019 Report pp 3, 8, 9 and 25.

b) continued declaration will promote the public interest by creating incentives for increased efficiency in supply chain infrastructure and enhancing growth in the NSW and Australian economies. The NCC's position is contrasted with that taken by the QCA, which found that access as a result of declaration would create an environment for efficient investment in coal tenements markets which would result in higher coal export revenues and would generate wider economic benefits. Synergies references QCA's position on criterion (d) as 'regulatory precedent'.[494]

   Synergies argues that there is significant channel capacity such that no significant investment in channel capacity is required over the medium term and future investments will most likely be funded by users. There is no expectation that PNO will commit its own funds to channel development for the foreseeable future. In contrast, the absence of declaration may have a chilling effect on investment that other parties are willing to make, both in relation to the declared service (e.g. dredging) and complementary infrastructure where businesses consider that PNO may subsequently increase port charges to expropriate profit margins.[495]

c) the Council's criterion (d) analysis did not consider efficiency losses that can arise without competition being impacted, such as allocative efficiency. Synergies notes that allocative efficiency effects arise wherever the pattern and associated value of economic activity differs between a status quo factual position and a counterfactual position following a policy or parameter change, such as a materially higher port charge where declaration is revoked. These outcomes are not necessarily dependent on there being a material reduction in workable competition in any market.[496]

d) The Council did not respond to Synergies previous submission as to the benefits that would arise from wealth being transferred from PNO to miners and on to the Australian and NSW economies as a result of more profit accruing to miners (rather than PNO) if declaration remains in place.[497]

Responding to NERA's Report

10.39 Bloomfield submits that the negative economic impacts of oligopolistic behaviour of electricity generators is only recently becoming apparent following their privatisation. Bloomfield considers that the Port will be even more problematic than these electricity generators since it occupies a monopoly over the distribution of Hunter Valley export coal. There seems to be very little downside to recommending that declaration be maintained, whereas revocation delivers risk to pricing,

494 Synergies' February 2019 Report p 36.

495 Synergies' February 2019 Report p 41.

496 Ibid pp 38, 39.

497 Ibid p 43.

investment and growth as well as the potential for unforeseen or mis-modelled outcomes that have resulted in other recent unconstrained privatisations.[498]

Council's approach to criterion (d)

10.40 Criterion (d) requires that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration of a service, would promote the public interest.

10.41 In considering criterion (d), regard must be had to the matters identified in subsection 44CA(3)(a) and (b). Subsection 44CA(3) provides that "…in considering whether [criterion (d)] applies the Council or the designated Minister must have regard to:

(a) the effect that declaring the service would have on investment in:

(i) infrastructure services; and

(ii) markets that depend on access to the service; and

(b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared."

10.42 Paragraph 12.40 of the 2017 EM provides that:

> criterion (d) does not call into question the results of subsections 44CA(1)(a), (b) and (c). It accepts the results derived from the application of those subsections, but it enquires whether, on balance, declaration of the service would promote the public interest. It provides for the Minister to consider any other matters that are relevant to the public interest.

10.43 In *Pilbara HCA* the High Court considered the previous public interest criterion. It found (at paragraph [42]) that:

> It is well established[499] that, when used in a statute, the expression 'public interest' imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*[500], when a discretionary power of this kind is given, the power is 'neither arbitrary nor completely unlimited' but is 'unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view'. It follows that the range of matters to which the NCC and,

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498 Bloomfield's NERA Submission p 3.

499 See, for example, *O'Sullivan v Farrer* (1989) 168 CLR 210 at 216; [1989] HCA 61; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at 443-444 [55]; [2006] HCA 45; *Osland v Secretary to Department of Justice* (2008) 234 CLR 275 at 300 [57], 323 [137]; [2008] HCA 37; *Osland v Secretary to Department of Justice [No 2]* (2010) 241 CLR 320 at 329 [13]; [2010] HCA 24. See also *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505; [1947] HCA 21.

500 (1947) 74 CLR 492 at 505.

> more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would *not* be contrary to the public interest is very wide indeed. And conferring the power to *decide* on the Minister (as distinct from giving to the NCC a power to *recommend*) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.

10.44 The Council considers that the relevance and import of the High Court's comments regarding the content of public interest inquiries, and the political nature of such inquiries, is unaffected by the amendments made to the public interest criterion in 2017.

10.45 The Council notes the ACCC's suggestion that criterion (d) should be assessed under the assumption that criteria (a) – (c) are met, but does not consider that this is the correct approach. The approach proposed by the ACCC is not supported by the legislative text of criterion (d), nor elsewhere in the legislation. The ACCC cites paragraph 12.39 of the 2017 EM as being consistent with its proposed approach, noting it provides that "[criterion (d)] now constitutes an additional positive requirement which must be met…However, it is only to be considered when [criteria] (a), (b) and (c) have been met."[501] .

10.46 The statement that criterion (d) is only considered *when* criteria (a), (b) and (c) have been met does not imply that criterion (d) should be assessed under the assumption that the other criteria are met. It suggests, rather, that where, as here, criterion (a) is not met, it is not necessary to consider criterion (d). Further, the subsequent paragraph of the 2017 EM provides "Criterion (d) does not call into question the results of [criteria (a) – (c)]. It accepts the results derived from the application of those subsections, but it enquires whether, on balance, declaration of the service would promote the public interest." [502]

10.47 Explanatory Memoranda are not conclusive as to the construction of legislation. The Council considers the appropriate approach to criterion (d) is to consider all matters relevant to the public interest applicable in the circumstances. This includes the matters considered under criteria (a) to (c), and the conclusions drawn under them. Moreover, it is consistent with the Part IIIA objective of promoting "the economically efficient operation or, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets".[503] The promotion of competition in upstream and downstream markets is the subject matter of criterion (a). The Council considers that taking into account the results of the other criteria in assessing criterion (d), particularly criterion (a), promotes the objects of Part IIIA. To do otherwise would

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501 ACCC, Submission on SOPV, 6 February 2019, page 6

502 2017 EM at [12.40].

503 Section 44AA(a) of the CCA; the objects of Part IIIA relevant to declaration of services.

be inconsistent with the legislative scheme. This approach allows the Minister to consider all other matters affecting the public interest and allows him or her to refuse or revoke declaration where the other criteria are satisfied.

10.48 Contrary to the ACCC's submission, the Minister may prevent declaration where there is an important public interest consideration not addressed by the other criteria, notwithstanding that criterion (a) may be satisfied.

10.49 The Council has assessed criterion (d) in light of its task under subsection 44J(2)(b), elucidated by the High Court's discussion of the public interest, and the key role of the Minister in assessing that criterion. As the public interest is a matter better weighed by the holder of political office rather than being a technical matter for expert advice, there would need to be matters that clearly and strongly weigh against the public interest before the Council could arrive at the conclusion that the Minister could not be satisfied that criterion (d) is met.

Council's view on each relevant factor

10.50 The Council's view on each of the mandatory factors in subsection 44CA(3), and other matters relevant to criterion (d), is set out below.

Effect of declaration on investment in infrastructure services

10.51 In considering section 44CA(3)(a)(i), and consistent with the Hilmer report[504], the Council is primarily concerned with whether declaration would undermine the viability of efficient investment decisions; and hence risk deterring future investment in important infrastructure projects.

10.52 As a preliminary note, the Council has not limited its consideration of relevant infrastructure investments solely to investments that improve the Service or access to it. Further, paragraphs 10.62 to 10.72 below specifically address the effect of declaration on investment in dependent markets.

10.53 The Council considers that declaration of any service (and any consequent access regulation achieved via a negotiate-arbitrate regulatory model under Part IIIA) has the potential to alter a service provider's incentive to efficiently invest in maintaining or improving infrastructure necessary to provide the service; and/or inefficiently distort the timing of those investments. This might occur, for instance, if regulated terms and conditions of access set via an arbitration determination unintentionally prevent a service provider from recovering the efficient costs of its past and future investments in the infrastructure necessary to provide a declared service. As noted in the PC 2013 Review:

> Prices that are set too low can lead to delayed investment, or the non-provision of some infrastructure services [page 104]

[504] National Competition Policy Review ('Hilmer Report') 25 August 1993 p 251.

10.54 The ACCC submits that arbitrated outcomes take into account investment incentives; and the likely impact that the arbitrated access terms would have on future investment.[505] The Council does not wish to suggest the ACCC would consciously intend to regulate in a way that under- or over-compensates an access provider for its efficiently incurred costs. However, the determination of access prices via arbitration regularly involves the ACCC (and, potentially on review, the Tribunal)developing a sophisticated BBM of the type used in the Glencore-PNO Arbitration; and making judgements on a series of particular input parameter assumptions for these models. These judgements often extend to forming views on uncertain future events, such as demand forecasts and capacity utilisation of a service. While access regulation under Part IIIA via arbitration can allow for a risk-adjusted commercial return on investment, it is impossible to completely remove all risks of unintentional regulatory error when setting reasonable terms and conditions of access to a service. As noted in the PC 2013 Review:

> Given that regulators are unable to set optimal access prices (prices that would maximise overall economic efficiency) with precision, there is scope for regulatory error in the setting of access terms and conditions. As Allan Fels acknowledged, 'setting the appropriate price requires much detailed, difficult to obtain information about industry cost and demand conditions, making some degree of regulatory error inevitable' [p. 103]

10.55 Similarly, and as noted by the ACCC during the PC 2013 Review:

> Due to information constraints and limitations on the regulator's ability to foresee all potential consequences of regulatory decisions, it is not possible to design access regulation that avoids creating any distortions to infrastructure investment incentives. [p. 100]

10.56 The fact that the ACCC is obliged to consider the impact of its arbitral decisions on investment incentives does not remove the risk that its decisions may adversely affect those incentives. No regulator can remove the risk of regulatory error merely by taking into account that it may occur.

10.57 Notwithstanding the inevitable risks associated with regulatory error, the Council considers it is unclear whether declaration of the Service will have a materially negative effect on PNO's incentive to efficiently invest in the infrastructure necessary to provide the Service. In the first instance, where the majority of costs necessary for investment in a particular access service have already been "sunk" (i.e. incurred, and can no longer be avoided by the service provider), any distortion to investment decisions associated with declaration of a particular service are likely to be muted. In this respect, Synergies' submission is that there is significant existing channel capacity at the Port such that no additional significant investment in channel capacity is required over the medium term. The Council also notes Synergies' submission that any necessary future investments in channel capacity may be funded by users who require it.

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[505] ACCC's SOPV Submission p 6.

10.58 Against this, however, there is still the possibility that PNO will need to make future investments to upgrade and/or maintain the infrastructure necessary to provide the Service; and that independently determined terms and conditions of access for the Service via arbitral determination may unintentionally involve regulatory error that distorts these future investment decisions.

10.59 Second, and as noted in paragraph 7.168 above, the Council considers it is likely (but not certain) that PNO would charge higher prices for the Service in a future without declaration of the Service than those likely to occur in a future with declaration. However, it is unclear precisely how much higher prices might be in a future without declaration of the Service. For instance, charges set by the Port in the absence of declaration of the Service sit within the range of charges argued by Glencore and PNO to result from application of the ACCC's BBM in the Glencore-PNO Arbitration Determination (which is presently subject to review by the Tribunal).

10.60 PNO's submitted that regulatory error is likely to disproportionately impact it (as compared to users of the declared Service) since charges at the Port represent the significant majority of its revenue (whilst representing a minor proportion of the costs faced by miners). The Council considers that regulatory error can take the form of over-estimation or under-estimation of charges for access to the Service; and as such represents a risk to both PNO and users of the Service. The Council makes no finding regarding for whom the risk of regulatory error is more significant. The Council notes, however, the finding in the PC 2013 Review that

> … the consequences for efficiency from setting access prices too low are, all else equal, likely to be worse than setting access prices too high. This is because deterring infrastructure investment (from setting access prices too low) is likely to be more costly than allowing service providers to retain some monopoly rent (from setting access prices too high) [PC page 104]

10.61 On balance, the Council believes it is possible that declaration of the Service could have an adverse effect on efficient investment in the infrastructure necessary to provide the Service. However, it is not clear in this instance that this effect would be substantial due to the fact that significant investments necessary to provide the Service have already occurred; the Port is unlikely to be capacity constrained over the relevant period of the declaration; and it is unclear how different (if at all) prices for the Service would be in a future with and without declaration of the Service.

Effect of declaration on investment in dependent markets

10.62 While it is possible that declaration of a service can have a negative effect on incentives for efficient investment in the infrastructure necessary to provide the service, access regulation may conversely lead to more efficient investment in dependent markets. For instance, if declaration can prevent an access provider from setting charges for a service at inefficiently high levels, it can encourage other entities to efficiently invest in infrastructure which complements (or is reliant on access to) the service. As noted in the PC 2013 Review:

> Investment in markets that rely on access to an infrastructure facility could be lower due to any enduring market power held by the incumbent service provider. For instance, if an incumbent infrastructure service provider does not allow third party access, the amount of innovation and the range of services available to end users could be lower than otherwise. Moreover, even if a service provider does provide access to third parties, efficiency enhancing investments in dependent markets could still be delayed, or not made at all. [p. 82]

10.63 The Council believes its observations on the incentives of PNO in the context of criterion (a) are relevant to the arguments put by interested parties about the effect that declaration (or revocation of the Declaration) would have in dependent markets. In particular, PNO is not materially vertically integrated into the provision of services in dependent markets. This means PNO:

a) has no incentive to deny access to users seeking to compete in related markets, for the reasons set out in paragraphs 7.112 to 7.113 above

b) is likely to prefer that the most efficient miners/investors are successful in bidding for tenements, as this means it is likely more value will be created by their mining activity in the Newcastle catchment. As described in paragraph 7.326 above, more efficient mining activity in the Newcastle catchment would be likely to maximise demand for the Service at any given price set at the Port; and the consequent profits PNO can make from its long-term lease of the Port.

10.64 These factors suggest PNO is unlikely to have an incentive to deliberately act to reduce efficient investment in dependent markets.

10.65 Further, and as noted in paragraph 7.328 above, if PNO was unable to price discriminate between different miners seeking to export coal through the Port in a future without declaration of the Service, it would likely seek to set a uniform charge that it believed would maximise its long-term profits. This is likely (but not certain) to involve a higher charge for services at the Port in a future without declaration than might exist in a future with declaration, for the reasons set out in paragraphs 7.222 to 7.227 above.

10.66 To the extent prices for the Service are higher in a future without declaration of the Service, the Council does not expect this would have a material impact on efficient investment in the coal export market. This is because this market is already likely to be effectively competitive, for the reasons set out in paragraphs 7.210 to 7.215 above.

10.67 As noted in paragraph 7.221, however, the Council accepts that a higher uniform price (or uncertainty about the level of price) for the Service in a future without declaration may, conceptually, have the effect of making some marginal coal exploration/mining activities that would have been profitable in a future with declaration unprofitable in a future without. This suggests that declaration has the potential to improve efficient levels of investment in the market(s) for coal tenements. However, for the reasons discussed in paragraphs 7.221 and 7.328, it is

unlikely that any such consequence of declaration would be material in this instance.

10.68 Further, investors or potential investors of coal tenements in the Newcastle catchment will likely face a range of significant uncertainties which will bear upon their investment decisions. Besides regulatory change, there are other uncertainties of considerable magnitude unrelated to 'pricing uncertainty' that will impact on commercial decisions of investors or potential investors, such as the coal price (from which the ultimate value of a coal tenement is derived), the risk profile of a particular site (a greenfield site will have reserves of lesser known quality/quantity compared to more mature sites, which tend to attract more market interests), and ongoing costs (such as labour costs). The Council considers it is likely that uncertainty with respect to these factors would weigh far more heavily on investment decisions in coal exploration/mining than uncertainty in relation to charges at the Port in a future without declaration of the Service.

10.69 The Council notes it has not been provided with any factual evidence demonstrating which particular efficient investments in mining tenements would not occur in a future without declaration of the Service.

10.70 The Council accepts that a number of users of the Service may hold fears that PNO might seek to engage in "hold-up" of their sunk investments in a future without declaration of the Service. However, as noted in paragraphs 7.92 to 7.96 above, the Council considers that the desire not to create a reputation for hold-up is important in order for PNO to maximise the long-term return on its 98-year lease at the Port. In turn, this is likely to act as some level of constraint on the PNO's pricing and output decisions for the Service; and the extent to which it is likely to engage in hold-up of users if they make sunk investments in coal exploration/mining activities. Further, it is open to users contemplating investment in future coal exploration/mining activities to seek to enter long-term contracts with PNO *prio*r to making sunk investments in order to remove uncertainty about the extent to which PNO might nonetheless seek to hold-up their investments once they are made.

10.71 Service charges comprise a larger cost component of containerised freight than export coal, though they are still a minor cost component. As noted in paragraph 7.377 above, however, the Council considers PNO faces significantly greater competitive constraints with respect to the provision of container port services due to the existence of other alternative ports able to provide these services to its potential customers. Further, and as noted in paragraph 7.229 above, potential investors in the container port market could seek to secure long-term contracts with PNO prior to making sunk investments if they fear PNO would seek to engage in hold-up.

10.72 The Council notes Pacific National's submissions as to its view of the importance of declaration to promoting effective investment across key freight and transport supply chains in Queensland (see paragraph 10.34 b)). As noted in paragraph 10.63 above, however, the Council does not consider there is any likelihood of access to

the Service being unreasonably denied to any access seeker; and PNO will not wish to reduce efficient investment in dependant markets. Further, while it is possible (but not certain) that prices for the Service may be higher in a future without declaration of the Service, the Council is not convinced that the difference in prices would have a material effect on efficient levels of investment in the dependent markets identified by Pacific National.

Administrative and compliance costs of declaration

10.73 The Council considers that the administrative and compliance costs of declaration include the costs of negotiating and arbitrating access disputes. The level of such costs may differ depending on factors such as the likely number of access disputes that may arise in relation to the declared service; the number of parties to these disputes; and the complexity of the issues likely to arise.[506]

10.74 To date, Glencore is the only user of the Service that has notified the ACCC of an access dispute. Other users (including Yancoal[507]) have had the opportunity to notify the ACCC of access disputes following publication of the Glencore-PNO Arbitration Determination, or at any other time while the Service has been declared. The Council is not aware of any other or currently notified access disputes regarding the Service.

10.75 In a future with declaration of the Service, additional parties may seek arbitration of terms and conditions of access to the Service by the ACCC if PNO were to seek to raise Service charges over the Relevant Term. The number of access disputes that would be referred to the ACCC in these circumstances, and the complexity of issues over which dispute may arise, is, however, uncertain.

10.76 Yancoal's October 2018 and April 2019 Submissions both refer to costly legal challenges instigated in connection with Glencore's access dispute as a reason why other Service users have refrained from notifying the ACCC of access disputes with PNO. The Council recognises that the Glencore-PNO Arbitration is likely to have come at a substantial cost to both parties (and that these costs will continue to grow while the Tribunal reviews the ACCC Determination and if there are any further court appeals in relation to this matter). Further, the ACCC Determination contains clauses enabling the possibility of future reviews of the charges set out in the Determination at periodic intervals.[508] These factors attest to the non-trivial extent of administrative and compliance costs associated with declaration of the Service.

10.77 That said, the Council believes it is unclear whether subsequent access disputes involving the Service will require the same amount of time or cost as that involved

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[506] NCC, 'A Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth), Version 6, April 2018, p 44.

[507] Yancoal's October 2018 submission p 10.

[508] See Section 7.6 of the ACCC Determination.

in the Glencore-PNO Arbitration in a future with declaration of the Service. In this respect, the ACCC's Determination Report states:

> … while any potential future dispute between an access seeker and PNO in relation to access to the Service would need to be decided on merits, the ACCC considers that the approach taken in the current dispute provides a useful framework and guiding principles in the parties' negotiations.[509]

10.78 While future additional access disputes arbitrated by the ACCC are likely to be relatively less costly than the Glencore-PNO Arbitration, a series of bilateral access disputes involving PNO and a series of access seekers may add to a significant additional administrative and compliance cost associated with declaration of the Service. This is especially the case if individual parties seek review of any future access determinations made by the ACCC in relation to the Service.

10.79 Overall, the Council considers that the Glencore-PNO Arbitration (and subsequent appeal to the Tribunal) has demonstrated the willingness of parties to defend their positions vigorously in access disputes concerning the Service. While the cost of any future negotiations and arbitration (or subsequent reviews of arbitration determinations) may be relatively low given any precedent established in the ongoing reviews of the Glencore-PNO Arbitration, there is still a reasonable likelihood of significant future administrative and compliance costs associated with declaration of the Service. Further, and as noted in paragraph 7.350, Council considers that users of the Service other than Glencore do not appear to consider that the risk of any disadvantage they may suffer vis-à-vis Glencore's arbitrated terms provided for by the ACCC is sufficiently great so as to outweigh the potential costs of notifying the ACCC of an access dispute and seeking arbitrated terms and conditions of access to the Service. Implicitly, this appears to suggest they may consider any competitive benefit resulting from attaining ACCC arbitrated terms and conditions of access is not likely to warrant the costs involved for them in seeking arbitration by the ACCC of their terms and conditions of access to the Service.

Other matters

Economic efficiency

10.80 As noted in the Council's Declaration Guide, issues of economic efficiency and competition are important in the context of criterion (d) as they form the twin elements of the first of the overall objects of Part IIIA of the CCA.[510]

10.81 Importantly, and as noted by the Tribunal in *Re: Telstra*, there is an important causal link between increased competition and improved economic efficiency:

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[509] ACCC, *Arbitration Report – Access Dispute between Glencore Coal Assets Australia PTY Ltd and Port of Newcastle Operations Pty Ltd*, 18 September 2018, at p. 2.

[510] NCC, 'A Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth), Version 6, April 2018, p45.

> … competition between firms … is desirable from a consumer perspective because it creates incentives for firms:
>
> - To lower their prices towards their costs of production in order to attract more consumers to their businesses so that they can expand their market share; and
> - To seek greater productive efficiencies (now and over time) so that they may lower their costs of production. In turn, this enables them profitably to lower prices for consumers in ways that will attract more consumers to their business in order to increase their share of the market.[511]

10.82 As noted in its consideration of criterion (a), the Council is not convinced that declaration of the Service would promote a material increase in competition in any related market. In that sense, therefore, it is unlikely that declaration would materially promote efficiency in any of these markets in this way.

10.83 As noted in the PC 2013 Review, however, higher prices for access to a service can still involve a loss of allocative efficiency[512] relating to the use of the service, even where it is not associated with a reduction in competition in a dependant market:

> By reducing output, monopoly pricing of access has the potential to affect competition in downstream markets. However, there can still be allocative efficiency costs from monopoly pricing even where this has no effect on competition in a downstream market, because less of the infrastructure service is produced. [p. 79]

10.84 In its August 2018 and February 2019 submissions, Synergies notes that allocative efficiency losses can occur in dependent markets without there being a material adverse impact on competition in those markets.

10.85 As noted paragraphs 7.222 to 7.227 above, the Council believes it is likely (but not certain) that charges for the Service will be higher in a future without declaration compared to those that might be set in a future with declaration. In these circumstances, it is possible that usage of the Port in a future without declaration of the Service might be less than that which would exist in a future with declaration. This would also be the case if higher prices for the Service meant some marginal coal exploration/mining activities that would have been considered profitable in a future with declaration of the Service were not considered to be in a future without. The Council accepts that, in circumstances where the Port is not capacity constrained, this could, conceptually, lead to a lesser utilisation of the Port, and a subsequent reduction in allocative efficiency. However, for the reasons set out in paragraph 7.227, the Council is not convinced that this consequence is certain, or likely to be significant.

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511 [2007] ACompT 3 at [97].

512 Allocative efficiency is achieved where resources used to produce a set of goods or services are allocated to their highest valued uses. Hilmer, p.4.

Transfer of surplus

10.86 For those transactions that continue to occur following an increase in the price of a service, the price rise will have the effect of transferring economic surplus from the buyer to the seller. To the extent that a dollar in the hands of a buyer is of equal value to a dollar in the hands of a seller, such a transfer of surplus is not normally considered to have any consequence for economic efficiency. As noted in the PC 2013 Review:

> In some circumstances the exercise of market power may simply lead to a transfer of economic rents between parties in the supply chain. (Economic rents are payments in excess of normal profits and hence do not affect the willingness of existing producers to supply.) The exercise of market power might have no effect on output or efficiency outcomes in dependent markets and hence not warrant government intervention. [p. 8]

10.87 As noted in paragraphs 7.222 to 7.227, the Council considers it is possible (but not certain) that prices for the Service will be higher in a future without declaration compared to a future with declaration of the Service. Where any such increase in prices in a future without declaration of the Service has no consequential effect on usage of the Port, or output in related markets, this would not typically be considered to generate a loss in economic efficiency – instead, it would simply represent a transfer of surplus between PNO and users of the Port. This is to be distinguished from the efficiency consequences of possible reductions in mining activity discussed in paragraph 10.83 above.

10.88 Synergies and a number of interested parties submit that it is preferable for revenues to accrue to miners rather than PNO due to the royalties that they pay. The Council considers that a transfer of surplus from entities operating under one taxation regime to those operating under a different taxation regime does not, of itself, promote the public interest.

10.89 Synergies also submits that higher port prices reduce the value of mining opportunities for operators and tenement holders which reduces coal resource values, and therefore the amounts the NSW government may receive from the allocation of tenements in the Newcastle catchment. The Council accepts that if declaration does lead to a lower price for the Service, users of the Service may be prepared to bid more for tenements that might become available in the Newcastle catchment in the future. In turn, it is possible that declaration of the Service could have the effect of transferring some level of surplus from PNO to the New South Wales government via prices bid for tenements released in the future, even though such a transfer might not typically be considered to have any consequence for economic efficiency.

10.90 The Council acknowledges interested party submissions that revoking the Declaration may lessen the value of investments in infrastructure services which were made while the Declaration has been in place. However, the Council considers that given the Declaration had been the subject of numerous judicial review

challenges brought by PNO (from July 2016, when it applied to the Federal Court for a review of the Tribunal's decision to declare the service, to March 2018, when its special leave application to the High Court to review the Full Federal Court's decision was dismissed),[513] sophisticated investors would be likely to have taken the risk of the Declaration being overturned into consideration. Further, while any such reduction in value would be adverse to the interests of the investor concerned, it would not necessarily lead to a reduction in economic efficiency; and would have no effect on the efficiency of previously sunk investments.

Economic growth

10.91 Some interested parties suggest that declaration of the Service will promote economic growth in NSW and Australia, including as a result of increased efficiency in supply chain infrastructure (as Synergies suggests[514]).

10.92 The Council accepts that if declaration promotes economic efficiency and, in particular, improves incentives for efficient investments in coal mining, it may also have wider flow-on effects in terms of economic growth at a regional, state, and, potentially, national level. However, for the reasons set out in paragraphs 10.80 to 10.85, the Council is not convinced that declaration is certain to materially promote economic efficiency; or that any such improvement that might occur would be material.

May prompt other ports to raise their prices

10.93 The circumstances applicable to the provision of services at other ports in Australia vary significantly, often with different regulatory environments, user mixes and competitive dynamics.

10.94 In these circumstances, the Council considers that its view on declaration of the Service does not necessarily provide a relevant precedent for other ports.

Number of submissions on criterion (d)

10.95 The Council does not accept PNO's argument that there have been insufficient interested party submissions for it to conclude that criterion (d) is satisfied. The Council considers that it is the substance, rather than the number, of submissions which is relevant to its assessment of criterion (d).

Viability of the Service

10.96 The Council does not consider on the material currently before it that any reduction in revenue to PNO that would result from declaration of the Service is likely to be of such a magnitude that it threatens the viability of the Port. As such, the concerns

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513 *Port of Newcastle Operations Pty Ltd v The Australian Competition Tribunal & Ors [2018] HCA Trans 55 (23 March 2018)*.

514 Synergies SOPV Submission p 36.

raised by Ports Australia as to resultant loss of employment and reduced revenue for related businesses is unlikely to arise.

Council's proposed approach may lead to revocation of other Part IIIA declared services

10.97 Pacific National submits that the SOPV raises issues about the legitimacy of Part III monopoly regulation and leaves open the possibility of the Council overturning any other declaration, including the Part IIIA regime covering the regulation of monopoly airports.

10.98 The Council considers that questions as to whether Part III and Part IIIA are working as intended is a question for parliament. The Council considers that its role is to make recommendations to the Minister based on its best interpretation of the CCA.

Negative outcomes have resulted in unregulated oligopolistic markets

10.99 Bloomfield examines negative economic impacts that have resulted in electricity generation markets and submits that whereas energy generation was an unregulated oligopoly, the Port is a monopoly where more severe adverse effects could result if declaration is revoked. Bloomfield also submits that there seems to be very little downside to allowing declaration to remain in place, whereas revocation creates risks to pricing, investment and economic growth as well as the potential for unforeseen or mis-modelled outcomes.

10.100 The Council considers that each market should be examined based on its own characteristics, as it has done in this Recommendation considering the Service. To the extent that unforeseen outcomes may occur, the Council considers that decisions should be based on the information available, rather than speculation and the Council's consideration of each issue has been approached on that basis. The risk factors suggested by Bloomfield, being impacts on price, investment and economic growth, have already been considered in this Recommendation.

Stevedore lease renewals

10.101 PWCS has raised concerns that if declaration is revoked it may be adversely affected in its upcoming lease renewal for its Carrington terminal (see paragraph 10.35(d)).

10.102 The Council understands that PWCS is concerned by the lease terms that PNO may seek from it in its upcoming lease renewal, but does not consider this issue is relevant to the matter the Council must address in this Recommendation. The Service is defined as "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, by virtue of 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". The Council does not consider that the Service, as declared, is defined in a manner that captures the negotiation of PWCS' lease renewal as a matter that would be covered by the Declaration and referrable to the ACCC as an access dispute under

Part IIIA. As such, the Council does not consider that declaration would have any impact on the negotiation of a future lease and does not raise any issues relevant to criterion (d). Further, the issue raised is not relevant to the consideration of criterion (a). The Council also notes that it has no basis upon which to consider it likely PNO would seek to raise prices in the fashion that has concerned PWCS.

Council's view on criterion (d)

10.103 In respect of the mandatory considerations in subsection 44CA(3), the Council considers that access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration:

- Is unlikely to significantly effect investment in the infrastructure necessary to provide the Service
- Has the potential to improve efficient levels of investment in dependent markets; however, it is unlikely that any such consequence of declaration would be material
- is likely to result in material administrative and compliance costs.

10.104 The Council considers it is not possible to accurately determine the likelihood of these considerations occurring, nor measure or quantify their impact if they do occur, with a reliable degree of certainty.

10.105 The Council considers it is possible (but not certain) that charges for the Service will be higher in a future without declaration of the Service compared to a future with declaration. If the removal of declaration did lead to higher prices, and these price increases reduced use of the Port and/or investment, this could constitute a reduction in allocative efficiency with respect to use of the Port. However, the Council is not convinced that this consequence is certain, or likely to be significant. If removal of declaration was considered likely to adversely impact allocative efficiency, this is a factor that weighs in favour of the public interest in assessing criterion (d).

10.106 The Council has also had regard to the effect of declaration on a range of other matters that interested parties submitted are relevant, including: the desirability of surplus accruing to PNO or to Service users; the possibility of enhanced economic growth in NSW and Australia; the viability of the Port and the message that revoking the Declaration may be perceived to send. The Council cannot be satisfied that any of these matters establishes a public interest benefit or decrement that it can establish or measure in terms of considering whether declaration would promote the public interest.

10.107 In summary, the Council considers that the cost of regulation and the possibility of regulatory error are impacts of declaration that will occur and which weigh against the public interest. Declaration may create detrimental impacts on investment incentives which would be against the public interest, but the Council cannot predict the likelihood of these outcomes. It is possible (but not certain) that

revocation will cause a comparative increase in prices for the Service. This could result in a loss in allocative efficiency. If so, it establishes a factor in the public interest that weighs in favour of declaration. The Council is unconvinced that a loss in allocative efficiency is certain, or likely to be significant. The Council is unable to measure or quantify these potential costs and benefits so as to determine whether or not they establish that declaration promotes the public interest. This discussion of the matters relevant to criterion (d) is not exhaustive; it is open to the Minister to consider other matters bearing on the public interest.

10.108 In these circumstances, the Council considers the designated Minister could reasonably conclude that criterion (d) is not satisfied.

11 Conclusion and recommendation

11.1 The Council's task, which is addressed by this Recommendation, is discussed in detail in paragraphs 4.3 and 4.4, and the approach that the Council has adopted in fulfilling that task is set out above.

11.2 The Council's view is that criterion (a) is not satisfied. Further, the Council is satisfied that, at the time of this Recommendation, subsection 44H(4) would prevent the Service being declared. Therefore, section 44J(2) does not prevent the Council from recommending revocation of the Declaration. The Council considers it is appropriate that the Declaration be revoked, having regard to the objects of Part IIIA, as discussed below. The Council therefore recommends that the Minister revoke the Declaration of the Service.

11.3 The Council has had regard to the objects of Part IIIA in making this recommendation. Based on the material before it, the Council considers that the magnitude of Service charges which are likely to be imposed in the Relevant Term, with or without declaration of the Service, is very small compared to the total delivered costs of major products that rely on the Service (being coal and containerised freight). Accordingly, the Council considers that these charges are insufficient to materially impact investment incentives in relation to (and efficient use of) the infrastructure by which the Service is provided; or otherwise promote competition in any upstream or downstream market directly.

11.4 The Council also considers that amendments made to Part IIIA by the Amending Act (which came into effect after the Declaration was made) require the Council to evaluate whether the current circumstances and likely developments over the Relevant Term meet the legal tests specified in 44J of the Act, including the Declaration Criteria, as they now stand. The Council is conscious that revocation of the Declaration would mean that the Service would have, at various times, been subject to declaration and not subject to declaration over the Relevant Term. However, the Council considers that it is important that only services which meet the current criteria in section 44CA are subject to declaration. As such, the Council considers that revocation of the Declaration supports a consistent approach to access regulation in the industry.

11.5 The Council considers that recommending that the Declaration be revoked is consistent with the will of the Legislature, as expressed in the Amending Act, as to how Part IIIA is to work. The 2015 decision of the designated Minister not to declare the Service was overturned by the Tribunal primarily on the basis that criterion (a) ought to be assessed by comparing the likely future with and without access, and not declaration. The Amending Act has restored the focus of criterion (a) to considering the effect of declaration, reversed that position, such that criterion (a) requires an assessment of the future with and without access on reasonable terms as a result of declaration.

11.6 The Council has also assessed the other requirements set out in section 44J as follows.

- None of the circumstances in subsection 44F(1) would prevent the making of an application for declaration.
- Criterion (b) in subsection 44CA(1)(b) is satisfied. The Council considers that the Port could meet the total foreseeable demand in the market in the Relevant Term and at the least cost compared to any two or more facilities.
- Criterion (c) in subsection 44CA(1)(c) is satisfied. The Council considers that the Port is of national significance in terms of its importance to constitutional trade and commerce, and to the national economy.
- The designated Minister could reasonably form the view criterion (d) in subsection 44CA(1)(d) is not satisfied. The Council considers it is possible (but not certain) that declaration will generate some marginal improvement in the efficient use of and investment in relevant infrastructure. However, this benefit must be set against considerable administrative, compliance and legal costs associated with declaration (and any subsequent negotiation and arbitration of terms and conditions of access under the Part IIIA access regime).

11.7 Having regard to the objects of Part IIIA of the Act, the Council recommends to the designated Minister that the Declaration be revoked.

Appendix A: List of Submissions and materials considered

A.1 Submissions

ACCC's submission to the Council dated 8 August 2018.

ACCC's submission to the Council dated 29 October 2018 (provided to the Council on 30 October 2018).

ACCC's submission to the Council dated 6 February 2019.

Anglo American's submission to the Council dated 8 August 2018.

Bloomfield's submission to the Council dated 4 February 2019.

Bloomfield's submission to the Council dated 26 April 2019

Glencore's submission to the Council dated 8 August 2018.

Glencore's submission to the Council dated 5 October 2018.

Glencore's submission to the Council dated 29 October 2018.

Glencore's submission to the Council dated 4 February 2019.

Glencore's submission to the Council dated 26 April 2019.

Malabar's Submission to the Council dated 26 April 2019.

NCIG's submission to the Council dated 8 August 2018.

NCIG's submission to the Council dated 5 October 2018.

NCIG's submission to the Council dated 29 October 2018.

NCIG's submission to the Council dated 4 February 2019.

NSWMC's submission to the Council dated 8 August 2018.

NSWMC's submission to the Council dated 29 October 2018.

NSWMC's submission to the Council dated 4 February 2019.

NSWMC's submission to the Council dated 26 April 2019.

Pacific National's submission to the Council dated 1 February 2019 (and its annexures).

PNO's submission to the Council dated 2 July 2018.

PNO's submission to the Council dated 17 September 2018 (and its annexures), noting the revision set out in PNO's letter to the council dated 15 October 2018.

PNO's submission to the Council dated 29 October 2018.

PNO's submission to the Council dated 4 February 2019.

Ports Australia's submission to the Council dated 8 August 2018.

PWCS' submission to the Council dated 6 August 2018.

PWCS' submission to the Council dated 4 February 2019.

PWCS' submission to the Council dated 24 April 2019.

Shipping Australia's submission to the Council dated 8 August 2018.

Yancoal's submission to the Council dated 27 July 2018.

Yancoal's submission to the Council dated 8 August 2018.

Yancoal's submission to the Council dated 5 October 2018.

Yancoal's submission to the Council dated 29 October 2018.

Yancoal's submission to the Council dated 4 February 2019.

A.2 Reports

HoustonKemp 'Effect of declaration on incentives to invest in coal mines' dated 14 September 2018 - Provided to the Council with PNO's 17 September 2018 submission.

HoustonKemp 'Effect of declaration on competition for coal authorities' dated 14 September 2018 - Provided to the Council with PNO's 17 September 2018 submission.

HoustonKemp 'Relevance for revocation application of ACCC's determination' dated 29 October 2018 - Provided to the Council with PNO's 29 October 2019 submission.

NERA Economic Consulting 'Declaration of the shipping channel service at the Port of Newcastle' dated 8 April 2019 – Prepared at the request of the Council.

ResourcefulNæss Consulting 'Effect of Port Charges on Incentives to Invest in Coal' dated September 2018 - Provided to the Council with PNO's 17 September 2018 submission.

Synergies 'Port of Newcastle: Assessment of revocation application by Port of Newcastle Operations' dated 8 August 2018 - Provided to the Council with Glencore's 8 August 2018 submission.

Synergies 'Port of Newcastle: Response to submissions and documents provided by Port of Newcastle Operations' dated 5 October 2018 - Provided to the Council with Glencore's 5 October 2018 submission.

Synergies 'Port of Newcastle: Assessment of revocation application by Port of Newcastle Operations Pty Ltd' dated 4 February 2019 - Provided to the Council with Glencore's 4 February 2019 submission.

Synergies 'Revocation of declaration of the shipping channel service at the Port of Newcastle Response to NERA Report' dated April 2019 - Provided to the Council with Glencore's 26 April 2019 submission.