

Port of Newcastle Operations Pty Ltd

Application for revocation of declaration

**Submissions in response to invitation for further submissions dated
15 October 2018**

29 October 2018

On 15 October 2018, the NCC invited submissions from interested parties about whether, and if so, how the NCC should have regard to the ACCC's final determination in the arbitration between Glencore and PNO on the terms and conditions for Glencore's access to the Service (**Determination**) when considering whether to make a revocation recommendation.

PNO sets out below its submissions on this issue. Capitalised terms in this submission have the same meaning as in PNO's previous submissions to the NCC, unless otherwise indicated.

A report from Houston Kemp dated 29 October 2018 addressing the economic aspects of this issue is attached.

PNO considers the Determination is not relevant to the NCC's consideration of whether to recommend revocation, and to the extent the NCC considers the Determination is relevant, PNO says it supports a recommendation that the declaration of the Service be revoked.

As outlined in PNO's application for revocation, under the new declaration criterion (a) (the **competition test**), the designated Minister cannot recommend declaration of a service unless he or she is satisfied "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". PNO has previously made detailed submissions in support of its contention that criterion (a) is not satisfied in the case of the Service. The Determination does not alter the correctness of this contention.

1. The Determination is not relevant to the NCC's consideration of whether to recommend revocation

PNO submits that the only potential relevance of the Determination is that it might be considered to provide insights on what constitutes 'reasonable terms and conditions' for the purposes of the competition test. PNO rejects this for the following reasons.

1.1 The access dispute is being re-arbitrated before the Australian Competition Tribunal (Tribunal)

Both PNO and Glencore have applied to the Australian Competition Tribunal (**Tribunal**) for review of the Determination. The applications of the parties challenge fundamental aspects of the Determination, including the determined Navigation Service Charge. It is evident from these applications that neither party considers the ACCC's Determination provides for 'reasonable terms and conditions'.

The review by the Tribunal is a re-arbitration of the dispute (s 44ZP(3)) that stays the operation of the Determination (s 44ZO(2)). The Tribunal can vary or affirm the Determination (s 44ZP(6)). The Tribunal's decision is taken to be the ACCC's determination for the purposes of the Act and it takes effect when it is made (s 44ZP(7) and (8)).

Given the Tribunal review involves a re-arbitration of the dispute and operates to stay the Determination, and that both PNO and Glencore have challenged fundamental aspects of the Determination, PNO does not believe the Determination can be seen as providing any relevant insights into what constitutes 'reasonable terms and conditions' for the purposes of the competition test.

If the NCC undertook its assessment of the revocation application on the basis that the Determination represents 'reasonable terms and conditions', it would be pre-empting the outcome of the Tribunal process and constitute a misapplication of the competition test and the revocation process.

1.2 The interpretation of what constitutes ‘reasonable terms and conditions’ is not intended to be guided by the outcome of arbitrations

The Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* states (at 12.21):

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.

This extract from the Explanatory Memorandum makes it clear the assessment of what constitutes ‘reasonable terms and conditions’ for the purpose of the competition test is meant to be made objectively, having regard to the aims of Part IIIA to promote efficient investment in infrastructure and avoid monopoly pricing that adversely affects competition in dependent markets. Consistent with this, the Explanatory Memorandum explicitly states that the NCC is not required to come to a view on the outcomes of a Part IIIA arbitration or negotiation. The reason for this is that arbitration and negotiation outcomes are specific to the parties, reflecting the fact that Part IIIA establishes a bilateral dispute resolution mechanism rather than a general price setting regime.

In this instance, if the NCC held the Determination was relevant to the application of the competition test, it would constitute a misapplication of the objective test required in assessing what constitutes ‘reasonable terms and conditions. The Determination reflects the peculiarities of the dispute between PNO and Glencore and takes into account a range of matters agreed between the parties. Using the Determination as a marker of what constitutes reasonable terms and conditions would be contrary to, and inconsistent with, the legislative intent behind the competition test.

1.3 The scope of the Determination is narrow, meaning it is of no practical relevance to the application of the competition test

The Determination has a narrow scope, being confined to circumstances where Glencore either:

- charters a vessel to enter the Port precinct and load Glencore coal; or
- makes a representation to PNO of the kind referred to in section 48(4)(b) of the Ports and Maritime Administration Act 1995 that it has the functions of the owner of a vessel, or accepts the obligation to exercise those functions, in order to enter the Port precinct and load Glencore Coal.

The restrictions on scope mean the determined charges and other terms of access apply in a very confined set of circumstances. At present, it is even uncertain as to whether, and if so how frequently, Glencore has used the Service in a manner that falls within the scope of the Determination.

Given these constraints on the scope of the Determination, and disregarding the matters raised in sections 1.1 and 1.2 above, at a practical level, the determined charges and other terms of access are of no relevance to the NCC’s application of the objective test regarding what constitutes ‘reasonable terms and conditions’.

2. To the extent the Determination is relevant, it supports revocation

If the NCC considers that the Determination is relevant, PNO considers it supports PNO's earlier submissions that the NCC should recommend that the declaration of the Service be revoked.

The Determination does not affect PNO's previous submission that increased access, on reasonable terms and conditions, as a result of the declaration of the Service would not promote a material increase in competition in any dependent market. In 6.4 of PNO's application for revocation PNO submitted that, even if declaration was to result in more favourable terms and conditions (including by creating a pricing constraint or promoting greater pricing certainty), criterion (a) would still not be satisfied because:

1. the relevant dependent markets are already workably or effectively competitive without declaration;
2. Port charges are a minor cost element and are not material to competition in the dependent markets;
3. market participants face much greater uncertainty from other sources than they do from any uncertainty about future Port prices;
4. without declaration, the Port has the incentive to maintain volumes, protect competition and not price coal producers out of the market; further, its ability and incentive to price in a way that may impact on competition in the relevant dependent markets is constrained by the threat of regulation;
5. PNO does not have the ability or incentive to adversely affect competition by discriminating between shipping lines or coal producers when setting Port charges; and
6. even if future Port prices 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 Determination does not affect the correctness of any of the above matters or change the way in which these matters should be considered. This is so for the following reasons.

- As set out above, the Determination is confined in its scope and operation, and in any case is subject to review.
- The Determination does not and cannot affect the state of competition in the relevant dependent markets. This would be the case even if the terms of access in the Determination applied more broadly than the confined scope and operation of the Determination.
- Port charges (including as determined or any reasonably foreseeable increase in current Port charges, following the Tribunal review, or otherwise as a result of declaration) represent a minor cost element and are not material to competition in dependent markets. In this regard, it should be borne in mind that there is no evidence upon which to conclude that coal producers pay Port charges, or even bear the economic cost of such charges. In the absence of such evidence it should not be inferred that they do, and the economically prudent assumption is that such costs are shared throughout the supply chain.

- PNO's incentive to maximise throughput have not changed by reason of the Determination nor does the Determination affect the other forms of regulatory constraints imposed on PNO.

Put another way, if the NCC considers that the Determination represents a proxy for "reasonable terms and conditions as a result of the declaration" and compares the state of competition in dependent markets without the Determination (the current factual) versus the state of competition in dependent markets with the Determination (including if the determined terms of access were to apply more broadly) (the hypothetical counterfactual) it would properly conclude that there is no discernible or material difference in terms of competition between the two states of affair. Furthermore, under the required counterfactual analysis it is not sufficient for the Determination to result in some different, or even superior, state of competition in dependent markets, the effect of the Determination (if used as a proxy for "reasonable terms and conditions as a result of the declaration") must be to "materially promote competition" in order to satisfy criterion (a).

PNO refers to and relies on the Houston Kemp report dated 29 October 2018 in further support of these submissions.