

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

**Submissions in response to NCC's Statement of Preliminary
Views**

4 February 2019

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1 Introduction and overview

The Port of Newcastle Operations Pty Ltd (**PNO**) agrees with the conclusions reached by the National Competition Council (**NCC**) on the key issues concerning its application for revocation and the proposed recommendation that the Declaration of the Port's channel service (**Service**) be revoked, as set out in the NCC's Statement of Preliminary Views dated 19 December 2018.

PNO's submissions in relation to matters arising from the NCC's Statement of Preliminary Views are set out below. PNO also continues to rely upon its submissions and evidence previously provided to the NCC.

In summary, PNO submits the following.

- The NCC has undertaken a comprehensive and appropriate process for considering whether to recommend revocation of the Declaration.
- Where the declaration criteria are no longer satisfied, as is the case here, the Declaration should be revoked. Revocation in these circumstances is consistent with the objects of Part IIIA. Revocation is also consistent with the intention of the October 2017 amendments to Part IIIA, which re-focus the competition and public interest declaration criteria to the effect of declaration. The amendments explicitly apply to services declared under the old declaration criteria.
- There is no proper basis to conclude that access (or increased access) to the Service on reasonable terms and conditions as a result of declaration will promote a material increase in competition in any relevant dependent market. Due to this, criterion (a) is not satisfied. The key issues in relation to this conclusion are as follows.
 - The relevant dependent markets are those identified by the NCC, and the NCC has appropriately focussed on the coal export market.
 - The Port is not, and will not be during the Relevant Term, capacity constrained. Therefore, PNO has a strong incentive to maximise coal exports and Port throughput. PNO does not have any incentive to set Port charges in a way that would impact on competition in the coal export market and any derivative market.
 - Port charges are an immaterial cost component and will not have any measurable impact on investment decisions or competition in the coal export market and any derivative market in the Relevant Term.
 - PNO is constrained by the threat of regulation and potential action by the NSW Government. PNO expects, and is mindful, that the NSW Government would impose more 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.
 - The "hold-up" problem identified by the ACCC (and properly rejected by the NCC) will not arise because of PNO's incentives to maximise coal throughput at the Port, the immateriality of its charges and the background threat of additional regulation by the NSW Government.
 - The ACCC Determination relating to Glencore's terms of access is not a proxy for reasonable terms and conditions as a result of declaration.

- There is no basis to conclude Glencore will enjoy any competitive advantage in the event of revocation, including any advantage that is likely to impact on competition in any dependent market.
- Terms of access to the Service will not necessarily be more favourable with declaration.
- In light of the above, the NCC cannot be satisfied that continued declaration of the Service will promote a material increase in competition in the coal export market or any derivative market, including the tenements market. Further, the NCC cannot be satisfied that continued declaration will promote a material increase in competition in any other dependent market, including the container terminal market (where PNO will be constrained by competition from other ports).
- There is no proper basis to conclude that access (or increased access to the Service) on reasonable terms and conditions as a result of declaration of the Service will promote the public interest, and therefore criterion (d) is not satisfied. In summary:
 - declaration will not affect investment in dependent markets; and
 - declaration is likely to decrease PNO's incentives to invest in infrastructure services, and result in significant compliance costs.
- Accordingly, the declaration criteria are not satisfied, and the Declaration should be revoked.

PNO notes the NCC's analysis and conclusions are consistent with its findings in 2015 concerning the original application for the Declaration of the Service. The NCC's 2015 recommendation that the Service not be declared because declaration was not likely to result in a material increase in competition in dependent markets was supported by the Treasury and Acting Treasurer. The Australian Competition Tribunal and the Full Federal Court also agreed that declaration was not likely to result in a material increase in competition in dependent markets but decided to declare the Service on the basis that declaration criteria (a) (the so-called 'economic test') involved a 'with and without access' test (where current and likely future usage was not taken into account) rather than the current 'with and without declaration' test.

Capitalised terms in this submission have the same meaning as in the Statement of Preliminary Views unless otherwise indicated.

2 NCC's process and submissions received

PNO has no issues with the process the NCC has followed in relation to its application for revocation. The approach adopted by the NCC—to adopt a mirror process to that proscribed for declaration applications—is appropriate, providing all affected parties with an adequate opportunity to be heard and to exchange views and information with the Council.

PNO notes that many of the submissions from interested parties opposing revocation comprised unsubstantiated assertions and speculation in relation to factual matters, and a number were substantively repetitive of other submissions. PNO considers the evidence supports the NCC's proposed recommendation to revoke the declaration.

In relation to the ACCC's submissions, PNO notes Part IIIA clearly and expressly delineates the roles and functions of the NCC and ACCC, and it is readily apparent that Parliament did not intend for the ACCC to have any role in the declaration and revocation processes. The ACCC's involvement in the revocation process, particularly its submissions arguing against

revocation, conflict with its role as the independent arbiter of access disputes arising under Part IIIA. Further, as is explained below, if the ACCC's substantive 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. This conflicts with the intention of the October 2017 amendments to Part IIIA.

PNO considers that the NCC has acted independently and reached its own conclusions on the key legal and economic matters, consistent with its role under Part IIIA.

3 Revocation and the objects of Part IIIA

3.1 The NCC's task

PNO agrees with the NCC's analytical approach to considering whether it should recommend the Declaration be revoked and with its interpretation of the declaration criteria.

Contrary to the submission of some interested parties, there is no "residual discretion" not to recommend revocation (in the case of the NCC) or not to revoke (in the case of the designated Minister) where the NCC or the designated Minister respectively considers the declaration criteria are not satisfied.

The NCC has properly rejected the submissions of some interested parties that revocation is subject to a "material change in circumstances" test (which has no basis in the statute) and recognised that the October 2017 amendments to Part IIIA are significant in considering whether the declaration should be revoked. The October 2017 amendments restored the declaration criteria to their original policy intent and, in doing so, raised the threshold for declaration.¹ That particular interested parties may be unhappy that the threshold has been raised does not provide a basis to construe the new declaration criteria in a manner that seeks to curtail the effect of the amendments. To do so would be contrary to Parliament's clear intention in enacting the amendments, and would be contrary to the objects of Part IIIA.

3.2 The objects of Part IIIA

The purpose of Part IIIA is to prevent the use of monopoly power in infrastructure service markets in a way that adversely affects competition in dependent markets and thereby reduces welfare (community wellbeing). This is reflected in the objects of Part IIIA, which are to:

- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

As the NCC has recognised at [6.54]-[6.55], Part IIIA is not intended to address concerns related solely to how economic rent is distributed amongst participants in supply chains with monopoly service providers. This issue is beyond the scope of Part IIIA, principally because it does not affect welfare, only the relative profitability of the affected participants. As the NCC stated in its submission to the Productivity Commission's ongoing inquiry into Economic Regulation of Airports [3.31]:

¹ See e.g. ACCC submission to the Productivity Commission Inquiry into Economic Regulation of Airports (28 November 2018) including fn 64 at p 33

In line with its objectives to pursue economic efficiency however, if there is no demonstrable improvement to competition or efficiency in any dependent markets, Part IIIA offers no remedy for any distributional concerns; indeed, it does not, and is not intended to operate as a mechanism to redistribute economic rents between airports and airlines (or any other third parties).

Access regulation is burdensome and intrusive, interfering with the free operation of markets and the freedoms and rights associated with private property. Due to this, it has long been accepted that the burden of access regulation should not be imposed lightly and only where it 'is expected to produce significant efficiency gains from competition'.² This underlying principle is embodied in Part IIIA, with the objects and declaration criteria manifesting a clear intention that a service should not be subject to access regulation under Part IIIA unless it will promote competition and economic efficiency. In particular, a service should not be declared, or remain declared, absent clear evidence it will promote a material increase in competition in dependent markets and the public interest, relative to the situation without declaration.

The continued application of Part IIIA to a service that does not satisfy criteria (a) is inconsistent with the object of the regime to promote economic efficiency (s 44AA(a)). Similarly, where criterion (d) is not satisfied because the NCC is not satisfied that the declaration of the Service promotes the public interest, including having regard to the effect on investment in the relevant infrastructure services, continued application of Part IIIA to the Service would also be inconsistent with the object articulated in s 44AA(a). Further, as recognised by the NCC, where criteria (a) and/or (d) are not satisfied, continued application of Part IIIA to the Service would be inconsistent with the object of the regime to 'encourage a consistent approach to access regulation' (s 44AA(b)). Continued declaration would mean the Service is subject to access regulation under Part IIIA in circumstances where it would not be if the application for declaration was made now, and others in a similar position are not and will not be subject to Part IIIA. This would be unfair, arbitrary and inconsistent, and instil a lack of public confidence in the regime.

The recent amendments to Part IIIA, including to the declaration criteria, were designed to ensure Part IIIA operates as originally intended, and as previously interpreted by the NCC (including when it recommended that the Service not be declared in 2015). Parliament clearly intended the amendments to the declaration criteria would apply to services declared under the previous criteria and, therefore, that declaration ought to be revoked where the declaration criteria are no longer satisfied.³ The NCC's interpretation of the relevant statutory provisions in the Statement of Preliminary Views gives effect to, and is consistent with, these amendments and the objects of Part IIIA.

4 Criterion (a)

PNO agrees with the NCC's conclusion set out in the Statement of Preliminary Views that criterion (a) is not satisfied in respect of the Service.

² NCC, *Economic Regulation of Airports: Submission to Productivity Commission Inquiry*, 28 November 2018, at p 9. See also F Hilmer et al., *National Competition Policy Report by the Independent Committee of Inquiry* (Commonwealth of Australia, 1993) (**Hilmer Report**); Productivity Commission, *National Access Regime* (Commonwealth of Australia, 2013); and I Harper et al., *Competition Policy Review: Final Report*, Commonwealth of Australia, March 2015 (**Harper Review**).

³ See s 44J(2) of Part IIIA, and s 19(3) of the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)

PNO makes the following remarks about the NCC's analysis and conclusions, including some additional matters to those accepted by the NCC in the Statement of Preliminary Views that PNO considers further supports the proposed revocation recommendation.

- **The relevant dependent markets are those identified by the NCC and the NCC has properly focused on the coal export market.**

The other relevant coal-related markets identified are themselves derivative of the coal export market and accordingly, if reasonable terms and conditions as a result of declaration are unlikely to promote a material increase in competition in the coal export market, it is unlikely there would be flow-on effects in markets derivative of the coal export market.

- **The Port is not (and will not be) capacity constrained and has a strong incentive to maximise throughput. Therefore, it does not have an incentive to set charges in a way that may impact competition.**

As set out in PNO's previous submissions, and accepted by the NCC, the Port is not and will not be capacity constrained during the Relevant Term, even if the proposed container terminal development proceeds (which is subject to significant uncertainty). Given the excess capacity at the Port, and the importance of coal-related revenues to its business, PNO has a strong incentive and commercial motivation to maximise coal exports through the Port. This is consistent with economic theory and is also a commercial reality. PNO has no incentive or intention to impose charges that could have a material adverse impact on coal production in, and coal exports from, the Hunter Valley. Increasing service charges to the point where they materially reduce coal exports would reduce PNO's profits.

- **Port charges are, and are likely to remain, an immaterial component of the delivered cost of coal and do not and will not affect coal export volumes, and therefore do not impact on competition in the coal export market. Investment decisions in the relevant coal-related dependent markets are impacted by a range of factors and uncertainty far more significant than Port charges.**

As set out in PNO's previous submissions, and accepted by the NCC, Port charges are a very small and immaterial component of the delivered cost of coal.

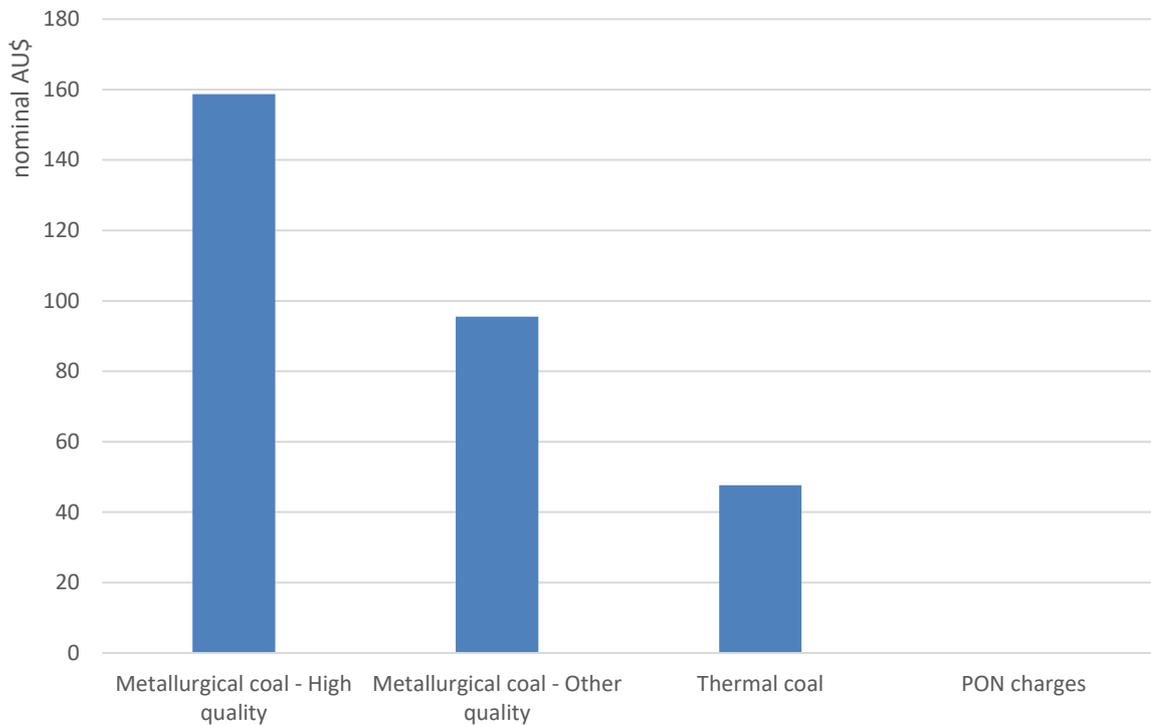
Port charges are too small to create any material uncertainty or impact on competition in dependent markets. Glencore's economic advisers, Synergies, suggest Port charges could be increased by up to \$3 per tonne without triggering any major reduction in coal export volumes.⁴ While this likely overstates the significance of Port charges in coal production and investment decisions, there is no evidence such increases are likely without declaration, particularly given PNO's incentives to maximise coal exports.

Production and investment decisions by coal miners in the Hunter Valley are affected by a number of factors, two of the most important of which are 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. 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

⁴ See Synergies' August Report at p 24

metallurgical coal and standard quality metallurgical coal prices have varied by almost AU\$50, AU\$159 and AU\$96 per revenue tonne respectively (Figure 1).

Figure 1. Difference in maximum and minimum three-month average high quality metallurgical, standard quality metallurgical and thermal coal prices relative to five-year increase in aggregate Port of Newcastle charges, per revenue tonne of coal, 2014-2018



Coal production and investment in coal-related dependent markets, and therefore competition in these markets, is not impacted by fluctuations in the cost of items like port services that constitute only a very small fraction of total production and export costs. As the NCC concluded in its 2015 recommendation not to declare the Service:

*...charges for the service represent only a very small component of the overall cost of the production and sale of coal for export from the Hunter Valley. The price increases imposed by PNO necessarily represent a still smaller proportion of this cost. While producers are undoubtedly sensitive to the charges, it is difficult to conclude that changes to those charges (even changes materially above those that have been imposed to date) would have a material impact on decisions that would affect competition in any relevant market ...*⁵

- **PNO is constrained by the threat of regulation and potential action by the NSW Government.**

The NCC's analysis of regulatory constraints in the Statement of Preliminary Views focusses on existing regulations under the *Ports and Maritime Administration Act 1995 (NSW) (PAMA Act)* and the contractual arrangements between the State and

⁵ NCC, *Declaration of the shipping channel service at the Port of Newcastle: Final recommendation* (Commonwealth of Australia, 2015) para 4.96.

PNO, concluding that they do not impose a significant limitation on PNO's behaviour. PNO disagrees with this conclusion. 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. 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. As the NCC concluded in 2015:

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.⁶

- **The “hold-up” problem identified by the ACCC will not arise.**

There is no merit to the ACCC's submission that the mere threat of price increases by an unregulated monopoly infrastructure service provider like PNO can deter investment and impact on competition, and therefore provide a basis for criterion (a) to be satisfied. The NCC has correctly concluded that the “hold-up” problem will not arise, which is also consistent with the Full Federal Court's treatment of similar submissions made by the ACCC during the review of the Declaration.⁷

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 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.

The NSW Government earns more than AU\$1 billion a year from coal royalties. The coal industry is also a significant driver of economic activity in NSW, contributing around \$15 billion to gross state product and directly employing around 30,000 people.⁸ These factors provide the NSW Government with strong financial, economic and political incentives to act to prevent PNO from imposing price increases that materially harm coal production and investment, and competition in coal-related dependent markets. Hence, well before PNO was able to impose the charges envisaged by the ACCC's hold-up argument (even if it had an incentive to do so), the NSW Government would intervene and impose price constraints.

⁶ NCC, above n 6, para 4.101.

⁷ *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124 at [187]

⁸ Australian Bureau of Statistics (ABS), *Australian National Accounts: State Accounts, 2017-18* (Commonwealth of Australia, 2018); ABS, *Labour Force, Australia, Detailed, Quarterly, Aug 2018* (Commonwealth of Australia, 2018); Centre for International Economics, *The Contribution of Mining to the New South Wales Economy*, Report for the NSW Minerals Taskforce (CIE, 2014).

PNO is acutely aware of this reality, as is the coal industry. Consequently, there is no hold-up threat.

- **The ACCC Determination relating to Glencore’s terms of access is not a proxy for reasonable terms and conditions as a result of declaration.**

The ACCC Determination relates to a private dispute between PNO and Glencore, has a very limited scope of application, and does not represent general price setting or regulation. Any other arbitration would need to be conducted on its merits and deal with the particular dispute at hand, and therefore it cannot be assumed that terms determined for Glencore will be the same as terms negotiated by or determined for other parties. Further, the ACCC is not the final decision maker. Both PNO and Glencore consider the ACCC Determination is incorrect, and the Tribunal is currently engaged in a broad “re-arbitration” which may result in more or less favourable terms.

- **There is no basis to conclude that Glencore will enjoy any competitive advantage in the event of revocation, including any advantage that is likely to impact on competition in any dependent market.**

As discussed above and in PNO’s previous submissions, Port charges are an immaterial cost and cannot and will not impact on competition in the coal export market (and derivative markets). Any potential “competitive advantage” to Glencore in relation to Port charges will be similarly immaterial in terms of competition in the relevant dependent markets. As the NCC has recognised, any competitive advantage to Glencore is likely to be minimal. In any case, identical pricing is not necessary for effective competition in a market.

Other points of note on this issue include the following.

- There is significant uncertainty about what Glencore’s terms of access may be in the future and no basis to conclude that Glencore’s terms of access will be as set out in the ACCC Determination (which is of no effect pending Tribunal review).
- The “negotiate-arbitrate” framework that flows from declaration is a private dispute resolution mechanism and it cannot be assumed that other parties would access the Service on the same terms as Glencore if the Service remains declared.
- The current scope of application of the ACCC Determination is very narrow (and PNO considers that, as a matter of law, must be even narrower) and the volumes affected are likely to be small. PNO is only aware of a handful of occasions on which Glencore has used the Service since Declaration.
- The Service has been declared since 2016 and other parties have had ample opportunity to seek to take advantage of the Declaration. The revocation process has been on foot for more than seven months (and is not yet concluded) and has been well publicised.
- As the NCC has found, whether Glencore may have access to the Service on more favourable terms than its competitors in the future is not dependent on whether the Service is declared, and the possibility of Glencore having a competitive advantage in respect of Port charges would remain regardless of whether the Service is declared.

In the circumstances, any potential competitive advantage to Glencore (which is speculative, likely to be minimal, and is not dependent on ongoing declaration)

cannot provide a basis for the Service to remain declared. This would be a perverse outcome that would undermine the objects and intent of Part IIIA.

- **Terms of access to the Service will not necessarily be more favourable without declaration.**

PNO does not consider that terms of access to the Service will necessarily be more favourable to users with declaration compared to without declaration.

PNO notes that the NCC considers that reasonable terms and conditions as a result of declaration are likely to be more favourable for users than those that would be set by PNO without declaration, and that the NCC has relied on the outcome of the ACCC Determination in reaching this conclusion.

PNO does not consider that the ACCC Determination is a proxy for, or a reliable indicator of, reasonable terms and conditions as a result of declaration for the reasons set out above. While PNO agrees with Synergies that increases in Port charges will not impact on coal export volumes, PNO does not consider there is any evidence PNO is likely to increase Port charges (without declaration) to a level higher than would be permitted in an arbitration, properly applying conventional regulatory principles. As set out in PNO's previous submissions, PNO intends to continue to set Port charges having regard to the factors required to be taken into consideration in arbitration. PNO considers the ACCC Determination contains errors and has not properly applied the matters that are required to be taken into account in arbitration. This issue is currently before the Tribunal and has not yet been resolved.

PNO also wishes to clarify that it has not sought to increase the Navigation Service Charge to \$1.36/GT, and that the ACCC's Determination and public statements to this effect mischaracterise PNO's submissions on this issue in the Glencore arbitration. A price of \$1.36/GT is the maximum Navigation Service Charge that PNO calculated applying the building block model and conventional regulated pricing principles in the context of the Glencore arbitration. PNO notes that PNO, Glencore and the ACCC each have different views about the proper application of the building block model and conventional regulated pricing principles (and therefore the maximum regulated charge for Glencore's use of the Service) which is yet to be resolved by the Tribunal (and any appeal courts).

PNO notes the comment at [6.95] of the Statement of Preliminary Views that the maximum price derived through a building block model (including the \$1.36/GT maximum price) "provide an indication of the prices that might be commercially feasible in the future without declaration". PNO submits this is in fact the current (regulated) charge that could potentially apply to Glencore's use of the Service *with* declaration, properly applying a building block model and conventional regulated pricing principles. PNO notes that the ACCC Determination, however, allows Glencore to continue to use PNO's standard terms. PNO considers that its current standard terms (which are not the result of declaration) are more favourable than the maximum charges that may properly be determined with declaration.

This supports PNO's submission that:

- terms of access are not likely to be more favourable without declaration;
- regulated maximum prices may be higher than unregulated prices; and
- PNO is subject to other constraints on its pricing, particularly:

- the commercial incentive to maximise coal exports through the Port so as to increase utilisation of the Service and increase profitability;
- the threat of regulation or other similar response from the State of NSW; and
- competition from other ports in respect of non-coal vessels.

Therefore, PNO does not consider that its charges without declaration are likely to be unreasonable, or that reasonable terms and conditions as a result of declaration are likely to be more “reasonable” or favourable to users than the likely terms that will apply without declaration.

- **In light of the above, the NCC cannot be satisfied that reasonable terms of access as a result of declaration will promote a material increase in competition in the coal export market.**
- **Reasonable terms of access as a result of declaration will also not promote a material increase in competition in the tenements market.**

PNO agrees with the NCC that the tenements market is derivative of the coal export market.

PNO maintains its view that the geographic dimension of this market is broader than the Newcastle catchment area, and therefore reasonable terms and conditions as a result of declaration are even less likely to promote a material increase in competition in this market. PNO notes that the miners who conduct mining operations in the Newcastle catchment area, including Glencore, also conduct extensive operations outside of this area. However, PNO agrees with the NCC that, if it is assumed against PNO that the tenements market is confined to the Newcastle catchment, then reasonable terms and conditions as a result of declaration are unlikely to promote a material increase in competition in the tenements market.

It is notable that, as the NCC has recognised, no market participants have claimed that their investment decisions in the tenements market are or will be affected by Port charges. Further, while some submissions from interested parties contend that smaller coal producers will be particularly disadvantaged without declaration, no such coal producers have made submissions to the NCC. There is no foundation for Glencore’s suggestion that other stakeholders may not have provided submissions to the Council because they fear “retribution” from PNO. For the avoidance of any doubt, PNO welcomes the broad consultation undertaken by the NCC and confirms that it has not and will not seek “retribution” against any party who wishes to make submissions or provide information to the NCC. It is not, in any case, in PNO’s interests to seek any form of retribution against participants in the Hunter Valley coal industry given PNO’s incentives to maintain and support the competitiveness of the Hunter Valley coal industry.

- **Reasonable terms of access as a result of declaration will also not promote a material increase in competition in the container port market.**

PNO reiterates that the possible development of a container terminal at the Port remains highly uncertain.

While noting that, PNO considers the geographic dimension of the container port market is broader than considered by the NCC, and that the market includes Port Kembla, the Port of Brisbane and the Port of Melbourne. However, PNO agrees with the NCC that, even if a narrower geographic dimension is adopted, with or without

declaration PNO will face significant competition and will have an incentive to set its charges so as to maximise throughput. Accordingly, there is no basis to conclude that declaration is likely to result in more favourable terms for container vessels or, in any case, promote a material increase in competition in the container port market.

4.1 Conclusion in respect of criterion (a)

In light of the matters recognised by the NCC, the NCC has properly concluded that it is not satisfied 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 at least one dependent market, and therefore criterion (a) is not satisfied.

The additional matters identified by PNO above further support this conclusion, although it is not necessary for the NCC to agree with PNO on these matters in order to reach its conclusion in respect of criterion (a).

5 Criterion (d)

PNO agrees with the NCC that access (or increased access) to the Service, on reasonable terms and conditions as a result of a declaration of the Service is not likely to promote the public interest, and therefore criterion (d) is not satisfied.

In order to be satisfied of criterion (d), the NCC must be positively satisfied that the public interest would be promoted. This is a significantly higher threshold compared to the previous public interest test, and the NCC has properly concluded it is not satisfied of the criterion as amended.

In considering criterion (d), the NCC must have regard to the effect that declaration would have on investment in infrastructure services and in markets that depend on access to the service (s 44CA(3)(a)). This is a balancing exercise that requires the NCC to closely examine likely investment incentives with and without declaration in infrastructure services and in dependent markets. This recognises the potential for declaration to undermine incentives to invest in infrastructure services. The importance of investment in infrastructure services is also recognised in the object in s 44AA(a). Section 44CA(3)(b) also requires the NCC to have regard to the administrative and compliance costs associated with declaration.

As set out in PNO's previous submissions, criterion (d) is not satisfied here because there is no evidence that declaration will promote or affect (or at least not materially affect) investment in dependent markets, ongoing declaration is likely to have a chilling effect on investment in infrastructure services, and PNO will incur significant administrative and compliance costs if the Service remains declared.

5.1 Declaration will not affect investment in dependent markets

As discussed above in respect of criterion (a), PNO does not consider that terms of access are likely to be more favourable to users if the Service remains declared.

However, even if declaration was to result in more favourable terms for users, the lack of materiality of Port charges (discussed above) means that such terms will not impact on investment in dependent markets. Further, as discussed above, Port charges are not a significant source of uncertainty, particularly compared to other sources of uncertainty faced by participants in the relevant dependent markets, and therefore any increase in "certainty" associated with declaration will also not impact on investment in dependent markets. Accordingly, as the NCC has concluded, investment incentives will be similar with or without declaration.

Tellingly, as the NCC has noted, there is no evidence that material differences in investment in dependent markets might result with or without declaration.

PNO also agrees with the NCC that any investments made while the Declaration has been in place (although PNO is not aware of any evidence of such investments being made in reliance on the Declaration) would have been made in the full knowledge that the declaration was first under review and appeal by PNO, that the declaration criteria were amended (which led to the risk of revocation) prior to the Declaration appeal process being completed, and that revocation was sought by PNO shortly after the conclusion of the Declaration appeal process.

PNO notes the NCC's view that declaration of the Service may have a marginally greater impact on investment in the container port market (or derivative markets) compared to the coal market. PNO submits that, to the extent PNO's container terminal proposal proceeds (noting the uncertainties discussed above), PNO will face competition from other container ports that will constrain PNO (as discussed above) and does not consider that declaration is likely to materially affect Port charges in respect of containers or to affect investment in the container port market (or derivative markets).

5.2 Declaration is likely to chill investment in infrastructure services, and result in significant compliance costs for PNO

Ongoing declaration is likely to decrease the incentives to invest in infrastructure services (s 44CA(3)(a)). It will also impose significant administrative and compliance costs on PNO and other parties without generating any public benefits (s 44CA(3)(b)).

PNO agrees with the NCC that declaration of the Service, with the resultant access regulation through the negotiate-arbitrate model under Part IIIA, is likely to:

- lessen PNO's incentives to invest in the Port because it may limit the returns from such investment; and
- distort investment incentives due to the risk of regulatory error.

The risk of regulatory error is significant in respect of the Service, as evidenced by the many grounds of review currently before the Tribunal in respect of the ACCC Determination. Regulatory error in the context of the Service has the potential to significantly impact on PNO and its shareholders. For example, the ACCC's approach to claimed "user contributions" has the potential to materially impact on PNO's revenue, profit and the ongoing investment of its shareholders in the Port. The full impact on PNO and potential investment in the Port will not be known until after the review (and any appeals therefrom) in respect of the ACCC Determination are completed. Glencore has also sought review of many aspects of the ACCC Determination that it considers contains regulatory error. Regulatory error also disproportionately impacts on 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 (as set out above).

In addition to regulatory error, the time, costs and resource burden of ongoing declaration is significant for PNO and other parties. In particular, arbitration (and subsequent review and any appeals) are expensive, resource intensive and protracted, involving significant legal and expert costs as well as management time, and complex legal, economic and factual issues. PNO expects this will likely continue to be the case in the future, even once Glencore's terms of access are finally determined, given arbitration is a bilateral dispute resolution process and each dispute must be considered and determined on its own facts and merits. PNO (nor the ACCC) cannot simply "adopt" the terms of access determined for Glencore for other

users, nor is it possible at this stage to pre-empt the terms that may be sought by other users.

PNO is significantly smaller in terms of revenue, headcount and resources compared to most of its users and other interested parties, including Glencore. Therefore, the time, costs and resources required for arbitration and subsequent reviews (and any appeals) have a disproportionately significant impact on PNO and gives large users and interested parties significant countervailing power against PNO.

These issues are likely to affect investment decisions, both in respect of the Port and other facilities, and therefore declaration has a significant potential to harm the public interest by chilling investment in respect of both the Port and other infrastructure services in Australia.

6 Conclusion in respect of criterion (d)

PNO agrees with the NCC's conclusion that it is not positively satisfied that declaration of the Service would promote the public interest, as required by criterion (d).

The public interest assessment required by criterion (d) is a balancing exercise. To the extent any public benefits may arise from access (or increased access) to the Service on reasonable terms and conditions, as a result of declaration of the Service (which PNO does accept), these are significantly outweighed by the public detriments identified by the NCC and discussed above such that declaration (and any resultant reasonable terms of access) would not promote the public interest.

7 Conclusion

Declaration under Part IIIA is burdensome and intrusive, and distorts investment incentives, and accordingly is only called for where there is a clear economic and legal case for regulation.

The recent amendments to the declaration criteria make clear that the threshold to declaration is high, and returns the test in respect of criterion (a) to that originally intended and previously applied by the NCC. The amendments ensure that declaration is not inappropriately applied to services such as the Service at the Port, where there is no evidence that more favourable terms of access as a result of declaration would promote a material increase in competition in any dependent market, and therefore there is no proper economic or competition case for regulation. Declaration in these circumstances would operate to distort investment incentives in respect of, and chill investment in, infrastructure services, and unduly interfere with the rights of the service provider.

Further, the amended declaration criteria make clear that a service should only be declared where the NCC and the designated Minister are positively satisfied that declaration would promote the public interest. In this case, declaration would chill investment in the Port and other infrastructure services and impose a significant compliance burden on PNO, while having no (or at least no material) impact on investment in dependent markets, and therefore will not promote the public interest.

Revocation of the Declaration is consistent with the new declaration criteria, the objects of Part IIIA, and parliament's clear intention in respect of the application of the declaration and revocation provisions of Part IIIA (including its intention that the amended declaration criteria apply to revocation of existing declarations), as well as economic and regulatory principles.