NATIONAL
COMPETITION
COUNCIL

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

Statement of Preliminary Views

19 December 2018

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 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)
Amendment Act	*Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)
Anglo American	Anglo American Metallurgical Coal Pty Ltd
Anglo American's August Submission	Anglo American's submission to the Council dated 8 August 2018
CCA	*Competition and Consumer Act 2010* (Cth)
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 6.177, 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 October Submission	Glencore's submission to the Council dated 5 October 2018
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 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 Submission
IPART	Independent Pricing and Regulatory Tribunal of NSW
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
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 Submission	NCIG's submission to the Council dated 8 August 2018
NCIG's October Submission	NCIG's submission to the Council dated 5 October 2018
NSWMC	New South Wales Minerals Council
NSWMC's Arbitration Submission	NSWMC's submission to the Council dated 29 October 2018
NSWMC's August Submission	NSWMC's submission to the Council dated 8 August 2018
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
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 Submission	PNO's submission to the Council dated 2 July 2018
PNO's September Submission	PNO's submission to the Council dated 17 September 2018
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
PWCS	Port Waratah Coal Services
PWCS' August Submission	PWCS' submission to the Council dated 6 August 2018
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 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 Submission	Shipping Australia's submission to the Council dated 8 August 2018
Synergies	Synergies Economic Consulting
Synergies' August 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 Submission
Synergies October 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 Submission
t	Tons/Tonnage
TEU	Twenty-foot Equivalence Units
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 Submission	Yancoal's submission to the Council dated 8 August 2018
Yancoal's October Submission	Yancoal's submission to the Council dated 5 October 2018

1 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**). 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.

1.2 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).

1.3 Section 44J does not set out any procedure for the Council's assessment of whether or not it should make a revocation recommendation. However, the Council considers that it is appropriate to conduct a public consultation mirroring as much as is practicable the process it would undertake in considering an application for declaration under section 44F. Having engaged in public consultation (described in paragraphs 2.7 to 2.15) and considered the material put before it,[1] the Council proposes to recommend to the designated Minister that the declaration be revoked. The Council's reasons for its preliminary position are set out in this Statement of Preliminary Views.

1.4 The Council invites interested parties to make submissions in response to this Statement of Preliminary Views. **The deadline for submissions is 5pm on Monday 4 February 2019**.

2 Background

The Service

2.1 In Glencore's application for declaration of shipping channel services at the Port of Newcastle submitted to the Council on 13 May 2015 (**Glencore's 2015 Application**), 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

[1] Some confidential material was put to the Council. The manner in which the Council had regard to this information is discussed at paragraph 2.10.

relevant terminals located within the Port precinct and then depart the Port precinct[2] (the **Service**).

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

The Declaration

2.3 In May 2015, the Council received an application under Part IIIA of the CCA from Glencore Coal Pty Ltd (**Glencore**) seeking declaration of the Service. The Council conducted a public consultation process and on 10 November 2015 recommended to the designated Minister, the Federal Treasurer, the Hon. Scott Morrison MP, that the Service not be declared. On 8 January 2016, the 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.

2.4 On 29 January 2016 Glencore applied to the Tribunal for review of the Acting 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***)[3]). On 16 June 2016 the Tribunal made orders giving effect to the Declaration.

2.5 On 14 July 2016, PNO applied to the Federal Court for judicial review of the Tribunal's decision. The Court heard PNO's application on 28 and 29 November 2016 and on 16 August 2017 handed down its judgment, dismissing the application (*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (***PNO v Tribunal***)[4]).

2.6 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 dismissed by the High Court on 23 March 2018.[5]

Revocation consultation process

2.7 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 Submission**). The Council commenced its consideration of whether to revoke the Declaration in response to PNO's July Submission.

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

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[2] Glencore's 2015 Application, p 15.

[3] [2016] ACompT 6.

[4] (2017) 253 FCR 115; (2017) 346 ALR 669; [2017] FCAFC 124.

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

2.9 The Council received submissions in response to PNO's July 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**).

2.10 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 Submission**) accompanied by a confidential submission. The Council considers the confidential information that PNO provided the Council does not have any bearing on its conclusions and as such has given those confidential materials no weight.

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

2.12 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 accessing the declared shipping channel service at the Port of Newcastle (the **Glencore-PNO Arbitration**).

2.13 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.

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

2.15 The Council has had regard to all interested party submissions in preparing this Statement of Preliminary Views. In addition, the Council has undertaken its own analysis which has informed its proposed recommendation to the Designated Minister. That analysis is detailed in this Statement of Preliminary Views.

2.16 This Statement of Preliminary Views reflects the information available to the Council as at the date of its issue and the Council's preliminary views in relation to the declaration criteria and other relevant issues.

2.17 The Council invites submissions in response to this Statement of Preliminary Views by **5pm on Monday 4 February 2019.**

Designated Minister

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

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

2.20 Consistent with its Final Recommendation dated 2 November 2015 re Glencore's 2015 Application (**the 2015 Final Recommendation**)[6] the Council is of the view that the Commonwealth Minister is the designated Minister for the purpose of revocation of the Declaration.

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

3 Revocation of declaration: section 44J of the CCA

3.1 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.

3.2 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

[6] 2015 Final Recommendation at paragraphs 2.30 - 2.38.

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.

3.3 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.

3.4 The substantive approach that section 44J requires the Council to take in determining whether to recommend revocation of a declaration and 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.

3.5 Note that submissions on the proper application of particular declaration criteria are not discussed in this section. The declaration criteria are discussed in chapters 6 to 9.

Submissions

3.6 PNO's July 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 they are 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.[7]

3.7 Glencore provided a submission to the Council on 8 August 2018 (**Glencore's August 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

[7] PNO's July Submission p 6.

those attributable to the Declaration itself) since the Full Federal Court in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal*[8] (**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.[9]

3.8 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.

(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.

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

(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.

3.9 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.

3.10 Glencore provided a further submission to the Council on 5 October 2018 (**Glencore's October 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 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

[8] *[2017] FCAFC 124* [95]-[96], [100]

[9] Glencore's August Submission pp 3, 5,

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.[10]

3.11 Yancoal provided a submission to the Council on 8 August 2018 (**Yancoal's August 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 wide 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.

3.12 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.[11]

3.13 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[12]). 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 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 satisfied of the satisfaction of all of the declaration criteria.[13]

3.14 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*[14] (**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

[10] Glencore's October Submission p 3.

[11] Yancoal's August Submission pp 3, 4.

[12] 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.

[13] Yancoal's August Submission pp 4, 5.

[14] [2012] HCA 36.

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.[15]

3.15 NCIG and Anglo American's submissions to the Council on 8 August 2018 (**Anglo American's August Submission**) provide analysis similar to Yancoal (summarised in paragraphs 3.11 to 3.13) 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.[16] NSWMC's submission to the Council on 8 August 2018 (**NSWMC's August Submission**) makes arguments similar to those advanced by Glencore and summarised at paragraph 3.7.[17]

3.16 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.

Council's preliminary view

3.17 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.

3.18 Section 44J(1) empowers the Council to make one decision – that is, whether to recommend to the designated Minister that declaration of the Service be revoked. Describing that task as a two-step process, as some parties have done in their submissions, is inapt and has the potential to lead to confusion as to the nature of the power the Council has to make a decision under section 44J.

3.19 The Council can only recommend revocation of a declaration to the designated Minister where it considers that declaration of that service would be prevented by section 44F or section 44H.

3.20 In formulating this Statement of Preliminary Views, the Council has had regard to the objects of Part IIIA.

3.21 In response to interested party submissions that there has been no 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 the Council to find that there has been a material change in circumstances in order to make a recommendation for the revocation of a declaration. While the Council accepts that

[15] Yancoal's August Submission pp 5, 6.

[16] Anglo American's August Submission pp 2, 3.

[17] NSWMC's August Submission p 9; NCIG's August Submission pp 3-6.

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.

4 Would subsection 44F(1) prevent the making of an application for declaration?

4.1 The Council can only recommend revocation if subsection 44F(1) would prevent the making of an application for declaration.

4.2 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.

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

4.4 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) is not met, and the Council may only recommend revocation if it considers that one or more of the declaration criteria are not satisfied.

5 Would subsection 44H(4) prevent the Service being declared?

5.1 The Council can only recommend revocation if the declaration criteria in subsection 44H(4) would prevent the service concerned from being declared.

5.2 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 6

(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 7

(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 8

(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 9.

Focus on effect of declaration on competition and public interest

5.3 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.'

5.4 The words 'on reasonable terms and conditions, as a result of a declaration' have been added to criteria (a) and (d)[18] since the Declaration in 2016 and the subsequent appeals by Glencore and PNO heard by the Tribunal[19] and Federal Court.[20] The Council considers that these additional words focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would

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

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

[20] See *PNO v Tribunal.*

promote competition.[21] 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)).

5.5 The Council notes that before the Declaration was made, coal exporters and other parties already had access to the Service. PNO states in its July submission that it currently provides open access to the Service and will continue to do so regardless of whether the Service is declared.[22] The Council considers it likely that access to the Service will be provided with or without declaration.

5.6 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.

5.7 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, the Council considers that there is considerable uncertainty about incentives and/or market conditions in the longer term.

5.8 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**).

Consideration given to ACCC arbitration determination

5.9 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 are listed for hearing in May 2019.

5.10 Interested parties provided submissions to the Council while the Glencore-PNO Arbitration was underway and after the ACCC Determination was released, 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.

[21] 2017 EM *at paragraph 12.19.*

[22] PNO's July Submission p 16.

Submissions

Before ACCC arbitration determination published (pre 8 October 2018)

5.11 PNO's July 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.

5.12 Yancoal's submission to the Council on 27 July 2018 (**Yancoal's July 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 subsequently revoked (in which case Glencore would retain access to the terms set by the ACCC).

5.13 PWCS' submission to the Council on 6 August 2018 (**PWCS' August 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.[23]

5.14 Yancoal's August 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, such that over the course of considering further access disputes the methodology for determining the 'regulated' access pricing would become applicable to other users of the Service as well. Yancoal also restates its view that any draft or final determination by the ACCC appears highly relevant to criteria (a) and (d). [24]

5.15 Anglo American's August 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

[23] PWCS August Submission p2.

[24] Yancoal's August Submission pp 16, 17.

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 that regard should be had to a material increase in competition arising from the terms and conditions under the ACCC's Determination.[25]

5.16 NSWMC's August 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 and NSWMC considered such a determination 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 the promotion of a material increase in competition.[26]

5.17 The ACCC's submission to the Council on 8 August 2018 (**ACCC's August Submission**) notes that the outcomes of its consideration of the Glencore-PNO Arbitration may be relevant to the Council's assessment of the effects of declaration of the Service.[27]

5.18 Glencore's August 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.[28] Synergies' August Report, which accompanied Glencore's August 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.[29]

5.19 PNO's submission to the Council on 17 September 2018 (**PNO's September 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.[30]

5.20 NCIG's submission to the Council on 5 October 2018 (**NCIG's October 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

[25] Anglo American's August Submission p 4.

[26] NSWMC's August Submission p 11.

[27] ACCC's August Submission p 1.

[28] Glencore's August Submission pp 3, 4, 21, 22.

[29] Glencore's August Submission p 22, Synergies' August Report pp 13, 14.

[30] PNO's September Submission p 9.

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.[31]

5.21 Yancoal's submission to the Council on 5 October 2018 (**Yancoal's October 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 criterion (a) could not be found to be satisfied. Yancoal responds to PNO's September Submission (see paragraph 5.19) 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).[32]

5.22 Glencore's October 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 Submission (see paragraph 5.19), submitting 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 and would therefore provide a real constraint on PNO in the future where declaration of the Service continues.[33]

After ACCC arbitration determination published (post 8 October 2018)

5.23 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 Final 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.[34]

[31] NCIG's August Submission p 9.

[32] Yancoal's October Submission p 3.

[33] Glencore's October Submission pp 4-7.

[34] NSWMC's Arbitration Submission pp 4-6.

5.24 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 5.12) and 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 and conditions would likely be. Yancoal also submits that the building block methodology from which the ACCC determined 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.[35] 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.'[36]

5.25 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.[37] Glencore also notes that in the Glencore-PNO Arbitration PNO proposed a Navigation Service Charge of $1.36 per Gross Tonne. Glencore submits PNO is likely to increase its Navigation Service Charge to this price in the absence of declaration.[38] Glencore submits the ACCC Determination of what are 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.[39] Glencore notes that the ACCC Determination reaches the conclusion that 'the terms of Glencore's access to the

[35] Yancoal's Arbitration Submission pp 2, 3.

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

[37] Glencore's Arbitration Submission p 2.

[38] Ibid.

[39] Ibid pp 3, 4.

Service can promote competition in related markets, including participants in the Hunter Valley Coal chain'[40] 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.[41] 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).[42]

5.26 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) and in the absence of a material change in circumstances the ACCC would adopt substantially the same approach to determining the terms of access in any future dispute. [43]

5.27 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.[44] 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

[40] ACCC Determination p 23.

[41] Ibid p 4.

[42] Ibid p 5.

[43] NCIG's Arbitration Submission pp 2, 3.

[44] PNO's Arbitration Submission p 2.

pre-empting the outcome of the Tribunal proceedings and constitute a misapplication of the competition test and revocation process.[45]

(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 5.35) 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, reflecting the fact that Part IIIA establishes a bilateral dispute resolution mechanism rather than a general price setting regime.[46]

(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.[47]

5.28 PNO's Arbitration Submission states that even if the ACCC Determination 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 6, below).[48] 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.[49]

5.29 The ACCC provided a further submission to the Council on 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 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

[45] PNO's Arbitration Submission p 2.

[46] Ibid p 3.

[47] Ibid.

[48] Ibid p 4.

[49] HoustonKemp's Arbitration Report p 4.

considered reasonable.[50] 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. 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.[51]

Council's approach

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

5.30 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.

5.31 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. 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).

5.32 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 and PNO at a point in time and therefore has had regard to it as an example of the type of decision that can result from an arbitration under Part IIIA. However, the Council has not needed to rely upon the specific terms of access that the ACCC considered appropriate in order to reach a preliminary conclusion on criterion (a). The Council has not treated the ACCC Determination as a definitive statement of what reasonable terms and conditions would be.

5.33 The Council's approach to applying criterion (a) is supported by paragraphs 12.20 and 12.21 of the 2017 EM.

5.34 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*

[50] ACCC Arbitration Submission p 3.

[51] Ibid p 4.

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.

5.35 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.*

5.36 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 outcomes of a Part IIIA negotiation or arbitration.

5.37 Interested parties have also submitted that because PNO proposed a Navigation Service Charge of $1.36 per Gross Tonne 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. The Council has had regard to this piece of information in its consideration of criterion (a) but, as detailed below, has also considered the possibility of higher access prices being imposed.

5.38 The Council notes that 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 6, below.

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

5.39 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.

5.40 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 outcome of the

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

5.41 The Council's approach to assessing criterion (d) is set out in Chapter 9 below.

6 Material promotion of competition – criterion (a)

6.1 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.

6.2 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 application of criterion (a)

6.3 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*'.[52]

6.4 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 when first considering whether to declare the Service.

6.5 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.

6.6 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 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

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

conditions include those necessary to protect the legitimate interests of the owner of the facility.

6.7 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.

6.8 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.

6.9 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.

6.10 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.[53]

6.11 Ports Australia's submission dated 8 August 2018 (**Ports Australia's August Submission**) states that the legislative amendments brought about by the Amendment Act focus the test on the effect of declaration rather than access. When

[53] Yancoal's August Submission p. 9; NCIG's August Submission pp 8-9.

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. [54]

6.12 Shipping Australia's submission dated 8 August 2018 (**Shipping Australia's August 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. [55]

6.13 In its October 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.[56]

6.14 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).[57]

6.15 Glencore's October 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.[58]

Council's approach

6.16 The Council's approach to assessing criterion (a) is to draw upon the two future scenarios discussed at paragraph 5.4 and ask, firstly, does the Council consider that the provider would have the ability and incentive to deny access to a relevant service or restrict output and charge monopoly prices? And secondly, if the provider has that ability and incentive, would such conduct materially affect competition in a dependent market?

[54] Port Australia's August Submission pp 2, 3.

[55] Shipping Australia's August Submission p 6.

[56] Yancoal's October Submission pp 2, 5.

[57] Anglo American's August Submission p 4.

[58] Glencore's October Submission p 3.

6.17 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.

PNO's ability and incentives to exercise market power

Submissions

6.18 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.[59] 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, and

(c) has excess capacity.[60]

6.19 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 arbitration. Even if PNO uses a building block methodology to set prices, increases of over 200 per cent, up to $1.64/t, 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 building block methodology and no constraint on it applying a different methodology in the future.[61]

6.20 Glencore's October Submission states that the ACCC's arbitration determination discounting the price of the Service for Glencore is evidence that access terms with declaration of the Service will indeed be more favourable to access seekers than they

[59] PNO's July Submission p. 16

[60] Ibid pp 36, 37.

[61] Glencore's August Submission pp 22, 23.

would be without declaration. As such, declaration provides a meaningful constraint on PNO.[62] Glencore also cites a statement published on PNO's website that:

> *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.*[63]

Glencore submits that even if it was the case that PNO did not have the incentive to price discriminate on the terms or 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 now and PNO has every incentive and ability to discriminate as to pricing and to continue to increase channel charges in the absence of declaration.[64]

6.21 Glencore's October 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.[65]

6.22 NCIG's October Submission supports Synergies' argument 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 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.[66]

6.23 NCIG's October 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

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[62] Glencore's October Submission p 8.

[63] 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*

[64] Glencore's October Submission p 12.

[65] Ibid p 10.

[66] NCIG's October Submission pp 3, 7-9.

beneficial scheduling) in favour of services where the Port faces competition, such as containers and bulk grain.[67]

6.24 Between PNO's July Submission and PNO's September Submission, PNO confirmed that it is not relevantly vertically integrated into any of the dependent markets identified in paragraph 6.60 or the 'container port market' discussed below.[68]

6.25 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.[69]

Council's preliminary view

6.26 As a commercial entity, PNO has an incentive to maximise profits. The Council accepts that the Port occupies a bottleneck position in the Hunter Valley export coal supply chain (see Chapter 7 for the Council's preliminary views on Criterion (b)) and may therefore have both the ability and incentive to earn monopoly profits by denying access to the service, significantly increasing charges for the service or cross-subsidising in a way that materially affects competition in a dependent market.

6.27 The Council has considered if PNO's market power is or could be effectively constrained by users of the Port or other ports. The Council considers that current users of the Port are not an effective constraint. This is because they have no effective alternative to using the Service, limited ability to pass on increases in Service access charges, and the demand for the shipping channel service is relatively price inelastic. The Council considers that future users of the cruise terminal and proposed container terminal are likely to have alternatives to using the Service. In particular, Port Botany may already be an alternative for some users located in the Port's catchment area who wish to import or export containerised freight. The presence of Port Botany places some constraint on PNO's market power in relation to those users for which it may be commercially viable to use either port for their needs, but does not provide an overall constraint for other users who have no commercially viable choice but to use the Port (and consequently, the Service).

[67] Ibid p 9.

[68] The Council notes that 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.

[69] ACCC's August Submission p.6.

6.28 The Council has also considered whether PNO will have incentives to use its market power to deny access to the service or cross-subsidise between dependent markets, with or without declaration. No material has been put to the Council to indicate that PNO is relevantly vertically integrated into any dependent market or is likely to become so during the Relevant Term. The Council therefore accepts that PNO is unlikely to have an incentive to use its position as a provider of shipping channel services to set terms and conditions that discriminate in favour of any related operation(s) in a dependent market in a way that may lead to reduced volumes, with or without declaration, as may be the case in access matters involving vertically integrated service providers.

Port capacity

6.29 Expected changes in the Port's capacity utilisation during the Relevant Term may impact on PNO's incentives to provide access. If the port is likely to become capacity constrained, for example, it may have altered incentives to provide access to certain users, or to price discriminate between users.

6.30 The Council has had regard to the likely impact that coal export growth and the possible development of container and cruise terminals at the Port may have on throughput. As a preliminary point, the Council notes that 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).

6.31 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 to 168 mtpa in 2021.[70] 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.[71]

6.32 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.[72]

6.33 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 or

[70] PNO's July Submission pp 22, 23

[71] Synergies' August Report pp 22, 23.

[72] PNO's September Submission p 14

likely to become so constrained by 2031.[73] In relation to coal exports, PNO submits that nameplate terminal capacity is currently 211 mtpa and below rail contracted track capacity is currently 192.5 mtpa.

6.34 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 9,496 TEU which were transported across 81 general cargo vessel visits.[74] PNO submits that in year one of Container Terminal operations projected container throughput is 76,638 TEU and 77 container vessel visits.[75] If the Container Terminal commences operation on 1 July 2020[76] then in the year ending 30 June 2031 projected throughput would be 408,057 TEU and 422 container vessel visits.

6.35 The Council also notes that a cruise ship terminal is being developed at the Port and is due for completion in 2019.[77] Between October 2017 and April 2018 10 cruise ships were scheduled to visit the Port[78], growing to 16 cruise ships scheduled to visit the Port between October 2018 and April 2019.[79] 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.[80] 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 the Relevant Term, including where the Container Terminal and cruise terminal become

[73] PNO's July Submission p 34 and PNO's September Submission p 14.

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

[75] PNO's September Submission p 11.

[76] PNO submits that 1 July 2020 is likely to be the earliest that operations commence if the container trade restriction were removed). Ibid.

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

[78] 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.*

[79] PNO. *Cruise Schedule. https://www.portofnewcastle.com.au/CARGOES/Cruise/Cruise-Schedule.aspx.*

[80] 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/.

operational. 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.

6.36 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:

- set service charges at a level that would lead to a reduction in volumes in any market including the coal export market, or
- 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 volumes in either market.

Regulatory constraints

6.37 As discussed above, the Council considers that PNO's market power will not be effectively constrained by port users or other ports (where other ports operate in the relevant market). It has therefore considered if regulatory constraints other than the actuality or threat of declaration will provide an effective constraint on PNO's market power.

6.38 PNO submits that its ability and incentive to price in a way that may impact competition in the relevant dependent markets is constrained by contractual requirements preventing it from discriminating between port users and imposing stewardship obligations, reporting requirements imposed by the *Ports and Maritime Administration Regulation 2012 (NSW)* (**PAMA Act**) and threat of review by NSW's Independent Pricing and Regulatory Tribunal (**IPART**).[81]

6.39 Glencore submits that PNO's contractual obligations to the State do not act as a significant constraint on prices and the threat of alternative regulatory oversight is also weak as the existing NSW monitoring regime provides effectively no constraint on pricing practices and would be unlikely to meet the requirements for certification under the National Access Regime.[82]

6.40 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

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

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

pricing of prescribed port services and with the regulator (the Essential Services Commission) responsible for monitoring compliance. To varying degrees these regimes provide direct regulatory constraint. Amongst these regulatory approaches, the PAMA Act and PAMA Regulations establish a very light-handed form of regulation with regulatory oversight but without price regulation of port services. The resultant regulatory constraint is at the lighter end of the regulatory spectrum.

6.41 The PAMA Act and PAMA Regulations 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 Minister. The PAMA Act and PAMA Regulations do not act to limit or regulate the level at which prices may be set. These requirements may provide some very limited constraint of PNO's pricing practices by promoting transparency.

6.42 The PAMA Act and PAMA Regulations are not certified as an effective regime under Part IIIA and there is no other direct regulatory constraint that acts to set or limit the prices that 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. The Council recognises that the impact of regulation on monopoly service providers varies between states in Australia and that New South Wales is at the lighter end of this regulatory spectrum.

6.43 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.

Reasonable terms and conditions as a result of declaration

6.44 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 access provider 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. 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.

6.45 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.

6.46 The Council considers that in the scenario with the Service declared, the actuality and/or threat of arbitration by the ACCC has, and will continue to result in increased incentives and likelihood for PNO to provide 'reasonable terms and conditions' (or close to reasonable) and greater certainty as to how terms and conditions are determined than in a scenario with no declaration in place.

6.47 Such an approach is consistent with the view of the Full Court of the Federal Court of Australia in *Pilbara Infrastructure Pty Limited v Australian Competition Tribunal (2011)*[83], where the Full Court held that 'access':

> *is access on such reasonable terms and conditions as may be determined in the second stage of the Pt IIIA process (at [112]).*[84]

6.48 The approach is also consistent with the outcome of the ACCC Determination and Synergies' August Report which suggests that price adjustments of up to $3/t are possible absent declaration without triggering any major reduction in coal export volumes at current and forecast prices.

6.49 Accordingly, the Council's preliminary view is that 'reasonable terms and conditions as a result of a declaration' are likely to be more favourable for users of the Service than those which would be set by PNO in the absence of Declaration.

Promote a material increase in competition

6.50 Having formed the view that the terms and conditions of access to the Service are likely to be more favourable to users in the future with declaration, the Council has also considered whether these more favourable terms and conditions are likely to promote a material increase in competition in relevant dependent markets compared with a situation in which there is no declaration.

6.51 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.

6.52 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.

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[83] 193 FCR 57.

[84] The High Court in *Pilbara HCA* did not consider this aspect of the Full Court's decision.

6.53 As provided in 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 and for resources to be allocated efficiently, at least in the long term. In a workable or effective competitive environment no one seller or group of sellers has significant market power.

6.54 A promotion of competition is different from the distribution of gains from specific transactions. 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.

6.55 Criterion (a) is not met merely by establishing that a service provider is a bottleneck monopoly or possesses market power. Neither is it satisfied merely by establishing that regulated access will result in a different share of gains between access seeker and provider. Rather, criterion (a) focuses and limits the ambit of the regime by requiring that access (or increased access), on reasonable terms and conditions, as a result of declaration promotes a material increase in competition in a dependent market. While access (or increased access), on reasonable terms and conditions, as a result of declaration may change the distribution of gains as between the port and its users, this is not in itself sufficient to satisfy criterion (a).

6.56 The market power of the service provider is relevant to the assessment of criterion (a) insofar as it is part of the Council's assessment of the ability and incentive of the service provider to adversely affect competition in a dependent market.

Dependent markets

6.57 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.

6.58 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 will materially promote competition in one or more dependent markets.

6.59 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.

Identifying dependent markets

Markets previously identified

6.60 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**); and

(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**).[85]

6.61 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.[86] 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).

6.62 As it was accepted that the last four dependent markets identified at paragraph 6.60 are effectively derivative markets of the coal export market,[87] it appears to the Council that the bulk shipping market is limited to bulk goods.[88]

Submissions

6.63 PNO's July 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 6.60), although it considers that the last four dependent markets listed are each derivative markets of the export coal market.[89]

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[85] Mathias Cormann, Acting Treasurer, *Decisions and Statement of Reasons Concerning Glencore Coal Pty Ltd's Application for Declaration of the Shipping Channel Service at the Port of Newcastle, 8 January 2016*, pp2, 3; Re Glencore paragraphs 37, 38; PNO v Tribunal paragraphs 20, 22.

[86] 2015 Final Recommendation p 31

[87] Re Glencore paragraphs 126 & 139.

[88] 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.

[89] PNO's July Submission p16.

6.64 Most of the interested party submissions provided to the Council also accept the dependent markets listed in paragraph 6.60. Glencore refers to these markets in its August Submission and notes that it considers coal loading terminals, while part of the Port's infrastructure, are likely to be separate markets.[90] Glencore did not provide further information on this point.

6.65 Glencore's August 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.[91]

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

6.67 Yancoal[92] and NCIG[93] make similar submissions that the five dependent markets identified at paragraph 6.60 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.

6.68 PWCS submits that it operates in a market which is dependent on the Service but does not identify the dimensions of this market.[94]

Council's preliminary view

6.69 The Council notes that 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.[95] Several interested parties have focused their discussion of criterion (a) on the impact that declaration may have in the tenements market.

6.70 The Council also notes that 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 *PNO v Tribunal*. The Tribunal noted that the impact of increased access on

[90] Glencore's August Submission p 19.

[91] Ibid p 6

[92] Yancoal's August Submission, pp 10-11.

[93] NCIG's August Submission p.10

[94] PWCS' August Submission p.3.

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

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.[96]

6.71 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.[97] The Council remains of this view in its current consideration of dependent markets.

6.72 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.

6.73 Noting that PNO has expressed its intention to develop a dedicated container terminal at the Port which could significantly impact east coast containerised freight markets, the Council also considers it appropriate to have regard to a 'container port market' as an additional discrete dependent market.

6.74 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.

6.75 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 vertically related to the market for the Service, the shipping channel service is distinct from the exploration, production and sale of coal and 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.

[96] Re Glencore paragraph 139

[97] 2015 Final Recommendation paragraph 4.66.

Effect of declaration on competition in the coal export market

Submissions

6.76 PNO submits the following.

(a) The coal export market is a large, global and highly competitive market which will remain competitive with or without the Declaration. 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. [98]

(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.[99]

(d) The 'hold-up' problem identified by the ACCC (see paragraph 6.82) 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.[100]

(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.[101]

6.77 Glencore submits that if declaration is revoked, coal producers will lack certainty of price increases 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

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

[99] Ibid pp 29-32.

[100] PNO's September Submission p. 2.

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

risk specific to the Newcastle catchment area will detract from the attractiveness of investing in that area.[102] 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. [103] This would limit the scope for effective competition in local, dependent markets.[104]

6.78 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)[105].[106]

6.79 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.[107]

6.80 As noted at paragraph 6.67, Yancoal and NCIG also submit that there are likely to be separate thermal and metallurgical coal markets.

6.81 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.[108]

6.82 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

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

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

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

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

[106] The Council notes 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 event of a revocation but it does not require it.

[107] Synergies' August Report pp 36-38.

[108] Anglo American's August Submission p 4.

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.[109]

6.83 PNO's September 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 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 and without investment because port charges comprise such a small part of the cost of supplying coal.

(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 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.

(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. [110]

(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.

6.84 NCIG's October 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

[109] ACCC's August Submission p 5.

[110] PNO's September Submission p 2.

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.[111]

(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).[112]

6.85 Yancoal's October 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.[113]

(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.[114]

[111] NCIG's October Submission pp 3, 6 and 7.

[112] NCIG's October submission p 9.

[113] Yancoal's October Submission p 5.

[114] Ibid p 6, 7.

6.86 Glencore's October Submission responds to PNO's September Submission and accompanying reports as follows.

(a) Just because coal prices have improved, does not mean that they will remain at current levels.[115]

(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.[116]

(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.[117]

(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.[118]

(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 6.21) Glencore submits that the risk of regulatory hold-up that the ACCC noted is real and not hypothetical.[119]

(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.[120]

(g) 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.[121]

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[115] Glencore's October Submission p 7.

[116] Ibid pp 7, 8.

[117] Ibid.

[118] 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/.

[119] Glencore's October Submission p 10.

[120] Ibid p 11.

[121] Ibid p 12.

Council's preliminary view

2015 findings

6.87 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 6.60 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 and even if the charges were to increase significantly in 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; and

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

6.88 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.

6.89 In *Re Glencore*, the Tribunal stated that it had the same view as the Minister on these points and 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.[122]

Characterisation of the market

6.90 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 internationally.

[122] *Re Glencore* paragraph 157.

6.91 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 turn on the geographic dimension of this market, the Council does not propose to define the geographic boundaries with further precision.[123]

6.92 The Council 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.[124]

Relative significance of port charges

6.93 The Council notes that relevant charges for the Service (currently $0.7553 per Gross Tonnage (**GT**)[125] for the Navigation Service and $0.746 per revenue tonne (**t**)[126] for the Wharfage charge)[127] represent only a very small component of the overall cost of the production and sale of coal for export from the Hunter Valley.

6.94 PNO's analysis of the relative impact of its charges notes the spot price of coal in 2017 was $88.42/t and estimates that the coal producers costs are approximately $43.02/t such that an average Hunter Valley coal miner earns a margin of $45.39/t.[128] On this basis PNO submits that port charges are a small component of the total delivered cost of coal, accounting for less than 1%.

6.95 The Council considers that the magnitude of possible future price rises and their impact on costs and profitability is more relevant than current charges for considering the future with and without declaration. The Council notes in submissions made to the ACCC in the Glencore-PNO Arbitration, PNO suggested that the Navigation Service Charge should be increased to $1.36/GT (under a building block model).[129] The Council also notes Synergies' submission that under a building block model the navigation fee could rise to $1.64/GT.[130] The Council considers these figures provide

[123] 2015 Final Recommendation p 29.

[124] Ibid pp 29, 30.

[125] Gross Tonnage is a measure of a ship's internal volume.

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

[127] 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.*

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

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

[130] Synergies' August Report, p 23.

an indication of the prices that might be commercially feasible in the future without declaration.

6.96 However, with a current coal price of $88/t, expected to increase to $100/t by 2020[131], the Council considers that even if Service charges increase to the level predicted by Synergies, those charges would continue to be a very small cost component and have a minimal impact on profitability given forecast coal prices. In this regard, the Council notes some submissions that the coal price may fall in the future. In contrast, the Council notes that Synergies' August Report states that prior analysis prepared by Wood Mackenzie suggests that coal prices are likely to rise to $100/t in 2020 and increase modestly over the coming decade.[132] On the basis of the information before it, the Council considers that the commercially rational price increases which may be imposed by PNO in the future without declaration of the Service remain unlikely to be a significant cost component or driver of profitability in the coal export market in the Relevant Term.

6.97 Furthermore, in the future without declaration, commercial constraints would still operate on PNO and influence its decisions about future pricing levels and structures in order to maximise the revenue generated from the Service. Synergies' August Report suggests a commercial motivation for PNO to charge as much for the provision of the Service as possible consistent with ensuring the maximum economic usage of the Service.

6.98 If price rises imposed by PNO materially impaired the global competitiveness of coal leaving the Port or led to coal operations in the Hunter Valley ceasing to operate, it is likely that the flow on effect would be a reduction in volumes shipped through the Port and less revenue realised by PNO. The Council notes that it is possible that reducing coal volumes through the Port may not diminish PNO's profitability if other users of the Service increase their volumes sufficiently to compensate for lost coal volumes. However, considering PNO's ongoing reliance on coal export revenues, the Council does not consider this likely. The Council considers it more likely that PNO will have the incentive to maximise the volume of coal passing through the Port rather than set prices at a level that materially reduces coal throughput. The Council considers that, with or without declaration of the Service, PNO's commercial motivation is to ensure that the Service supports the ongoing coal export market operation and its expansion, rather than setting prices at a level that leads to a reduction of coal production (and would impact competition in the coal export market).

6.99 The Council considers that commercially realistic changes to Service charges (that is, charges set at a level that are not above the profit maximising level) which might arise in the future without declaration (even changes materially above those that

[131] Ibid.

[132] Ibid.

have been imposed to date) would not have a material impact competition in the coal export market compared to the future with declaration.

Uncertainty and investment incentives

6.100 A number of interested parties have identified the uncertainty around future price increases for the Service in the future without declaration compared to the future with declaration as a reason why the declaration ought not be revoked.

6.101 The Council accepts that PNO is likely to seek to increase its charges during (and after) the Relevant Term with or without declaration and this is likely to create some uncertainty for coal producers about the nature and extent of any future price rises.

6.102 The Council also accepts that the level of uncertainty around future increases in prices of the Service in a future with the Declaration is likely to be lower than it would be in a future where the Service is not declared.

6.103 However, the Council considers that coal producers and exporters face significant uncertainty resulting from the magnitude and timing of potential future changes in a number of other factors including coal prices, labour costs and taxes. Compared to these other factors, any uncertainty about charges at the Port of Newcastle is likely to be relatively small (because the cost of access to the Service is itself a small cost component and the extent to which it might increase in the future is limited). The Council considers that the reduction in uncertainty associated with port charges in a future with the Service declared, as compared to a future where there is no declaration of the Service, is so small that it is not likely to promote a material increase in competition in the coal export market.

6.104 Some interested parties consider that future increases in port charges represent an additional risk which only applies in to the Newcastle catchment that will detract from the attractiveness of investing in that area.

6.105 The Council considers that the difference between the level of uncertainty relating to prices of the Service with or without declaration of the Service is too small to play a determinative role in a decision whether or not to invest in the Newcastle Catchment. Further, the Council notes that in the context of the coal export market, a decision to invest or not invest in the Newcastle catchment rather than another Australian coal mine is unlikely to have a material impact on competition given the likely wide geographic scope of the market.

Competition in coal export market

6.106 In 2015 the Council concluded that the coal export market was effectively competitive. It has not received any submissions that 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.[133] The Council takes these

[133] See, for example, Glencore's August Submission p.5, NSWMC's August Submission p. 2, Anglo

submissions to indicate that competitive conditions have not changed significantly in the coal export market since the Declaration was made.

6.107 The Council observes that there are currently several companies participating in the coal export market which are supplying coal to a wide range of global purchasers. The Council considers 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 the Service price increases implemented since 2015.

6.108 The Council does not consider that 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.

Competitive advantage from ACCC arbitration

6.109 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 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.

6.110 The Council does not consider that price discrimination necessarily harms competition in a dependent market and thus reduce volumes over time. It can, as noted above, improve efficiency in some circumstances. Price discrimination could, however, enable the Port to capture more of the gains from trade from individual users which could enable the Port to maximise profits while maintaining throughput volumes. The Council considers that the Port would be subject to some constraint in setting prices, however, if users supply into competitive markets and are not able to pass higher costs through to those markets.

6.111 The Council does not consider that PNO has historically price discriminated between various coal producers. However, the Council notes that the ACCC Determination sets the terms for Glencore's access to the Service, including price, which differ from those available to Glencore's competitors and are more favourable to Glencore than its previous terms. The Council is mindful that in the future with declaration, 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 contrast to the 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.

6.112 The Council notes that 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

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American's August Submission p. 3. NGIC's August Submission, p. 3

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 will continue regardless of whether the declaration applies to the Service.

6.113 The Council also notes that at present the Declaration remains effective and any user of the Service which is unable to negotiate commercial access terms with PNO could apply to the ACCC for an arbitrated outcome, as Glencore has done. However, there is no guarantee that the same terms would be granted by the ACCC, in which case differing terms would apply as between Glencore and any subsequent applicant(s).

6.114 The Council considers that, in both the future with and without declaration of the Service, it is possible that Glencore may or may not have access to the service on terms that differ from those available to its competitors. Whether Glencore has access to the Service on more favourable terms than those available to its competitors is not dependent on whether the Service is declared or not.

6.115 The Council is uncertain whether Glencore will gain a competitive advantage in the coal export market as a result of the ACCC's arbitrated terms, but notes that the possibility of Glencore retaining such an advantage would remain in the future with and without declaration of the Service. The Council also considers that given the significance of charges for the Service to users' costs and profitability any such competitive advantage is likely to be minimal. If the possibility of Glencore retaining such an advantage was a significant concern to market participants then they could have addressed this by seeking arbitration under section 44ZZCA of the Act.

Hold-up problem

6.116 The Council accepts that the threat of hold-up can deter efficient investments in some circumstances. However, the Council considers that these circumstances seem unlikely to arise in relation to coal mines.

6.117 In particular, the Council considers that in order for PNO to hold-up individual mining investments it must be able to price discriminate between mines. The Council is not satisfied that PNO is able to do so to a significant extent. Once mined, coal from the Hunter Valley is often stored at a coal loading facility used by several mines.[134] It is then transported to the Port and loaded into the vessel at one of three coal loading terminals. Each of these coal loading terminals has at least two rail receival facilities.[135] 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.[136] However, PNO's customers are usually the ship owners and agents, not individual mines. The Council notes that Mr Dowzer's affidavit (see paragraph 6.21) 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

[134] Glencore's August Submission p 7.

[135] Ibid pp 7-14.

[136] Yancoal' August Submission p. 13.

source of coal loaded onto most vessels to be able to set charges so as to expropriate profits from individual mine investments. Finally, the Council does not consider PNO's current charges structure facilitates price discrimination between mines.

6.118 The Council also notes that even if PNO has the ability to hold-up mines' investments, it may not be in PNO's interests over the longer term to seek to hold-up its individual customers' coal mining investments as it has long term relationships with those customers. Any chilling effect on investment as a result of hold-up would risk those relationships over the longer term and reduce the volume of coal exported through the Port over time. This could impact on PNO's revenues and profitability. The Council considers it unlikely that PNO could replace lost volumes by increasing production from coal producers who were not subject to hold-up. This is because PNO would likely develop a reputation for holding-up coal producers' investments which have the same chilling effect on investments as if hold-up actually occurred. Furthermore, as coal exports are, and are forecast to remain, the main product exported from the port, the Council considers it unlikely that PNO could replace revenues lost from coal producers by increasing throughput of non-coal trade.

Effect of proposed container terminal and/or cruise terminal

6.119 The Council has considered whether the proposal to develop a container terminal and a cruise terminal at the Port is 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).

6.120 As discussed at paragraph 6.35, 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:

- set service charges at a level that would lead to a reduction in volumes in the coal export market, or
- engage in any discriminatory behaviour that would diminish coal export volumes or otherwise impair the competitive operation of the coal export market.

Conclusion

6.121 The Council's preliminary view is that it 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 tenements market

6.122 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.

6.123 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. If valuable minerals have been discovered, the owner of the exploration licence can then apply for a production/mining lease.[137]

6.124 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 consideration of whether to declare the Service and resultant litigation.

6.125 As noted at paragraphs 6.70 and 6.89, the Tribunal considered the tenements market to be a derivative of the coal export market. It stated 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 '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'. [138]

6.126 In the current matter, a number of interested parties have focused their discussion of whether criterion (a) is satisfied around the impact that declaration of the Service might have in the tenements market. For example, Synergies' August Report states 'Synergies considers that the most significant loss of competition that would result from revocation of the declaration will result in the coal tenements market'.[139] Several interested parties raise concerns that smaller coal producers will be adversely affected in the absence of declaration and note that smaller businesses are more common in the tenements market where projects are often more marginal.

6.127 Accordingly, the Council has given more detailed consideration to the tenements market in this Statement of Preliminary Views.

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

[138] Re Glencore paragraph [157].

[139] Synergies' August Report p 34.

Submissions

6.128 The economic arguments put by the ACCC and summarised at paragraph 6.82 are also relevant to the tenements market.

6.129 Synergies' August 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)'.[140] 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.[141]

6.130 Yancoal's August 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 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.[142]

6.131 NCIG's August Submission similarly submits that the geographic boundary of the tenements market (which it calls the 'Authorities market') is the Hunter Valley region.

6.132 Glencore's August 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.[143]

6.133 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

[140] Ibid p 40.

[141] Ibid p 42.

[142] Yancoal's August Submission pp.11-12.

[143] Glencore's August Submission pp 27, 28.

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.[144]

6.134 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.[145] 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 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.[146]

6.135 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.[147]

6.136 Yancoal's August 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).[148] This effect would make coal authorities more valuable to Glencore and place Glencore in an advantageous position compared to other potential acquirers in the tenements market.

6.137 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.[149] HoustonKemp's Tenements Report supports this view, stating that buyers of coal authorities in the Hunter Valley face a vast array of

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[144] Ibid p 28.

[145] Synergies' August Report p 65.

[146] Ibid pp 63, 67.

[147] Glencore's August Submission p.3

[148] The Council notes that 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.

[149] PNO's September Submission p 3.

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.[150] 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.[151]

6.138 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.[152]

6.139 In response to Glencore's characterisation of the market, HoustonKemp submits that, based on the Tribunal's finding in *Fortescue Metals*[153]*,* 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.[154]

6.140 In response to Yancoal's characterisation of the market, HoustonKemp submits that differences in infrastructure costs and regulatory environments between regions 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

[150] HoustonKemp's Tenements Report p 5.

[151] Ibid p 8

[152] Ibid pp 6-8

[153] Fortescue Metals Group Limited [2010] ACompT 2, 30 June 2010, p258, paras 1118-1119.

[154] HoustonKemp's Tenement Report' p 7.

the degree submitted by Yancoal.[155] 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.[156]

6.141 Yancoal's October 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.[157]

6.142 Glencore's October submission suggests that other stakeholders may not have provided submissions to the Council because they fear retribution from PNO if they publicly oppose it.[158]

6.143 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 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.[159] 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.[160]

[155] Ibid p8.

[156] Ibid.

[157] Yancoal's October Submission p 7.

[158] Glencore October submission p 11.

[159] Synergies' October Report p 3

[160] Ibid p 13.

Council's preliminary view

Characterisation of the market

6.144 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.[161] This conclusion was drawn on the basis that parties seeking coal mining authorities may be able to consider several different regions. However, the Council acknowledged that it did not have the information before it to define the market with great precision at that time, but also noted that it did not need to precisely define the tenements market.

6.145 For the purpose of this preliminary assessment, the Council has taken a narrow view of the geographic and product dimensions of the tenements market on the basis that if declaration of the Service is unlikely to materially promote competition in a narrowly defined tenements market then it would be unlikely to materially promote competition in a more broadly defined market.

6.146 On this approach, the Council has taken the geographic dimension of the tenements market to be the Newcastle catchment area.

6.147 The Council considers that coal and other minerals are not generally substitutable and may require separate experience and equipment to explore and extract. 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 considers that the market for coal tenements does not include tenements for other forms of minerals.

6.148 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.

6.149 For the purpose of this preliminary assessment, 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.

Uncertainty and investment incentives

6.150 The Council considers that the tenements market is a derivative market of the coal export market and is similarly exposed to many of the risks and incentives which operate in the coal export market in addition to those inherent in speculation.

6.151 Submissions summarised in the 'coal export market' section of this Statement of Preliminary Views have been taken into account by the Council in the context of the

[161] 2015 Recommendation at paragraph [4.69]

tenements market to the extent that they raise arguments that are relevant to this market.

6.152 The Council considers that a number of participants in the tenements market may be smaller, less substantial companies than typical participants in the coal export market. However, 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 Whitehaven, Yancoal, Centennial Coal, Glencore and BHP Billiton.[162] The Council accepts that the investment profile of participants in the tenements market is likely to be characterised by higher costs and risks than may be present for investment in existing mines.

6.153 However, consistent with its view of the coal export market, the Council considers that any uncertainty about port charges is likely to be relatively small compared to uncertainty about other factors such as coal prices, labour costs and taxes. Accordingly, the Council considers that the reduction in uncertainty associated with port charges in a future with the Service declared, as compared to a future where there is no declaration of the Service, is so small that it is not likely to promote a material increase in competition in the tenements market.

6.154 Similarly, the Council does not consider that the presence of uncertainty that may result if the Service is not declared (at the level that could reasonably be expected to result in connection with realistic future Port pricing) is sufficient to result in a rational decision on the part of tenements market participants to redirect their investment/participation from the Newcastle catchment area to alternative areas or to otherwise abandon tenement trade. As noted in submissions, a decision to invest in the Newcastle Catchment may be motivated by the possibility of drawing on factors of production and contracts for other mines in that area (where present) or may be made with regard given to pre-existing infrastructure in the area. The Council considers that in order for uncertainty linked to the absence of declaration of the Service to have a material impact on participation in Newcastle catchment tenements, the investment decision between participating in the Newcastle catchment versus other areas would have to be a 'knife's edge' decision. The Council does not have any evidence that this is currently the case.

6.155 The Council notes that submissions have been received from large mining companies advising of the vulnerability of small mining participants in the tenements market but it has not received any submissions from the small mining companies which are likely to be most affected. Glencore suggests this could be because small companies fear retribution from PNO from taking a public stand. The Council notes that such issues could be alleviated by providing the Council with a submission that could be published anonymously or providing comments to the Council confidentially (noting that it may be appropriate for such comments to be given limited weight).

[162] Glencore's August Submission, Annexure B, pp 99, 100.

6.156 The Council does not consider the difference in uncertainty resulting from whether the Service is declared to have a material effect on the decision whether to invest or participate in the tenements market.

Relative significance of port charges

6.157 The Council notes that its discussion of the relative significance of Service charges in the context of the coal export market is relevant to its consideration of these charges in the tenements market. In particular, the Council considers that the desirability of participating in the coal export market will reflect the desirability of participating in the tenements market.

6.158 The Council considers that port charges could affect demand for tenements to the extent they influence costs and profitability of exporting coal.

6.159 The Council notes PNO's estimate of Port costs as a proportion of the export price of coal indicates that Service fees account for a very small component of the cost of coal. Therefore those fees would have a small impact on the profitability of exporting coal. As discussed previously, the Council considers that Service charge increases (to commercially realistic levels) would remain a small component of coal costs and have a minimal impact on the profitability of coal exports with or without declaration. As such, the Council considers such increases would have a minimal effect on expected returns from participating in coal trade and the consequent demand for tenements in the Newcastle catchment.

6.160 The Council notes that higher prices to use the Service in the future without declaration, as compared to the future with declaration, may factor in to the cost and availability of finance and investor confidence more generally. However, the Council considers that the proportional cost of port charges as compared to estimated margins on coal sales and other costs that apply in the market is too small to have a material impact on decisions that would result in a reduction of competition in the tenements market. The Council considers the possibility of greater increases in port charges that might result in the future without declaration of the Service (as compared to the future with the Service declared) is unlikely to reach a level where they have a material impact on the expected investment returns in the tenements market.

6.161 The Council notes that no submissions have been provided by current or prospective tenement market participants demonstrating that their decision to participate in the tenements market was so finely balanced that (commercially realistic) increased Service charges that could be imposed by PNO with or without declaration have or would lead to a decision to exit or not enter the tenements market.

Competition in tenements market

6.162 In 2015 the Council considered that the tenements market was and would remain effectively competitive with or without declaration of the Service.

6.163 As set out in the '*List of Coal exploration licenses – Newcastle catchment'* provided as annexure B to Synergies' August Report, the Council notes that there are a large number of companies holding tenement licences operating in the Gunnedah Basin, Hunter Valley Basin and Western Basin within the Newcastle Catchment. This supports the Council's previous views.

6.164 However, the Council notes Synergies submission that there are concerns about the effectiveness of existing competition in the coal tenements market and potential reforms aimed at improving competition.[163] The Council notes from the link provided in that submission[164] and from information on the NSW Department of Planning and Environment's website that these reforms will, among other things, change the process for bidding for tenement rights and are not related to declaration of the Service. The Council also notes recent enforcement action by the ACCC in relation to bid ridding for certain NSW coal tenements.[165] The Council does not consider that these market conditions would be impacted by declaration of the Service.

Competitive advantage from ACCC arbitration

6.165 Submissions have suggested that the access terms available to Glencore as a result of the ACCC's arbitration make tenements more valuable to Glencore and provide it with an advantage over its competitors in the tenements market.

6.166 The Council's earlier discussion of Glencore's arbitrated terms in the context of the coal export market (see paragraphs 6.109 - 6.115) is relevant to the consideration of the effect of declaration of the Service in the tenements market.

6.167 The Council considers that in circumstances where Glencore's ACCC arbitrated terms are under challenge and Declaration is in place (allowing Glencore's competitors to apply to the ACCC for arbitration under section 44ZZCA of the Act) it is not certain that Glencore will enjoy a competitive advantage over the Relevant Term.

6.168 If, as a result of the ACCC arbitration, Glencore enjoys more favourable terms than its competitors during the Relevant Term, the Council considers that any advantage conferred on Glencore is too small (accounting for a fraction of a percent of the delivered cost of coal) to make a material difference to the state of competition in the tenements market.

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[163] Synergies' August Submission pp 65, 67.

[164] 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

[165] ACCC Media release: 'Loyal Coal Pty Ltd admits breaching competition law in relation to Mount Penny coal exploration license tender process', 5 April 2016, https://www.accc.gov.au/media-release/loyal-coal-pty-ltd-admits-breaching-competition-law-in-relation-to-mount-penny-coal-exploration-licence-tender-process

6.169 The Council is not satisfied that Glencore will gain a competitive advantage in the tenement market as a result of the ACCC's arbitrated terms and notes that the possibility of Glencore retaining such an advantage would remain in the future with and without declaration of the Service. The Council also considers that if the possibility of Glencore retaining such an advantage was a material concern which market participants considered could be rectified by seeking arbitration under section 44ZZCA of the Act, then more businesses would have done so.

Hold-up problem

6.170 The Council notes submissions to the effect that companies with thinner profit margins will be more sensitive to the hold-up problem and that participants in the tenements markets are generally smaller, less profitable companies.

6.171 While the Council accepts that less profitable companies would be more significantly impacted by the threat of hold-up, it remains of the view that in order for PNO to hold-up individual mining investments it must be able to price discriminate between mines, which the Council is not satisfied PNO is able to do, particularly in relation to small companies (see paragraphs 6.116 - 6.118).

6.172 As discussed at paragraph 6.118, the Council is not satisfied that PNO would be incentivised to hold-up mining investments over the Relevant Term, if it were able to do so.

6.173 The Council does not consider that hold-up issues are likely to arise in the tenements market over the Relevant Term in the future with or without declaration of the Service

Conclusion

6.174 The Council's preliminary view is that it 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

6.175 In its 2015 Final Recommendation the Council noted the limited substitution possible between bulk and containerised shipping.[166] 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.

6.176 In the current matter, the Council notes 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.

[166] 2015 Final Recommendation p 31.

Submissions

6.177 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)[167] (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 Restraint.[168] In its September Submission, PNO states that it is unlikely that a container terminal could commence operation before July 2020.[169]

6.178 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.[170] PNO submits that there are currently no 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 in the Port.[171]

6.179 PNO submits that its current projected throughput in year one of the Container Terminal's operation (which is unlikely to be earlier than July 2020) is 76,638 TEU and 77 container vessel visits, and projected throughput in year 11 (likely ending 30 June 2031 at the earliest) would be 408,057 TEU and 422 container ship visits.[172]

6.180 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.[173] PNO's September Submission estimates charges for the Service to account for 2.3% of the import and export cost of one TEU through the

[167] 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.

[168] PNO's September Submission pp 10, 11.

[169] PNO's September Submission p 11.

[170] PNO's September Submission p 15.

[171] Ibid.

[172] Ibid p 11.

[173] Ibid p 12.

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 (these estimates include a cost element for transporting the container from its origin to the Port).[174] PNO 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.[175]

6.181 PNO estimates the Port's current capacity at 5,000 vessel visits per annum. Based on forecast growth of existing trade PNO estimates that in 2031 it will handle 3,228 vessel visit (excluding container ships) and if the Container Terminal commences operations on 1 July 2020 then the Port would also handle 438 container vessel visits in 2031.[176]

6.182 PNO's submissions regarding vertical integration in dependent markets (see paragraph 6.24) are relevant in the context of the container port market.

6.183 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.[177]

6.184 Shipping Australia submits that the prospect of a pricing restructure in which the two-tiered navigation charge is replaced with a flat-rate /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 negatively impact the competitiveness of PNO against Port Botany.[178] 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.

6.185 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

[174] Ibid p 13 and PNO's letter to the Council dated 15 October 2018.

[175] PNO's September Submission p 17.

[176] Ibid p 14

[177] Shipping Australia's August Submission pp 4, 5.

[178] Ibid.

Brisbane. This will promote a material increase in competition in the container port market.[179]

6.186 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.[180]

6.187 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.[181]

6.188 In addition to the comments summarised at paragraph 6.23, NCIG's October 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.[182]

Council's preliminary view

Characterisation of the market

6.189 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.

6.190 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.

6.191 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.

6.192 The Deloitte Report includes the following figure depicting the Port of Newcastle catchment area:

[179] Shipping Australia, submission, p 5.

[180] Synergies' August Report p 18.

[181] Yancoal's October submission p 11.

[182] NCIG October Submission p 9.

Figure i: Catchment area of Port of Newcastle

Source: Port of Newcastle, Deloitte Access Economics[183]

6.193 The Council notes that 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%.[184]

6.194 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 substitutes for container freight originating from or destined for areas in the Port of Newcastle'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 preliminary 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

[183] 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

[184] Ibid.

freight originating from, or destined for areas within their overlapping catchment areas.

6.195 The Council notes that 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)

6.196 The Council's preliminary 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.

Uncertainty and investment incentives

6.197 The Council considers that heightened uncertainty around the extent of increased costs relating to the Service has the potential to chill investment incentives in the same manner discussed earlier in the context of the coal export market and the tenements market). The Council notes that shippers in the container port market may be more sensitive to the competitiveness of Service charges than shippers in the coal export markets due to the availability of a competing port.

6.198 The Council notes that 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 have placed bids to develop and operate a container terminal at the Port.[185] 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.

6.199 The Council also notes that PNO has advised that the development of the Container Terminal is contingent on the removal of the Container Restraint and that it does not know if or when this 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.

6.200 The Council notes that on 10 December 2018 the ACCC announced that it has 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:

[185] 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

> *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.*[186]

6.201 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.

Relative significance of port charges

6.202 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 submits that the proposed terminal's capacity is to exceed 2m TEU per annum while the Port has capacity to handle 5,000 vessel visits.[187] The Council considers that in circumstances where the expected container volumes in 2031 are less than 25% of the Container Terminal's proposed capacity and total anticipated vessel visits (including containerised and non-container vessels) to the Port remain approximately 25% below the Port's current capacity, PNO will be incentivised to set its charges at a level that will not impact its competitiveness as such pricing may, in turn, adversely affect throughput and negatively impact profits. The Council notes that 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.

6.203 The Council notes that 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.[188] If the port charge estimate from PNO's September 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

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[186] 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.

[187] See paragraphs 6.31 to 6.35, above, 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

[188] PNO's letter to the Council dated 15 October 2018.

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.

6.204 The Council notes that PNO is not relevantly vertically integrated into any relevant container market. If price rises imposed by PNO materially impaired its competitiveness in attracting container shipments destined for the east coast of Australia, it is likely that the flow on effect would be a reduction in volumes shipped through the Port and less revenue realised by PNO. As previously noted, expected coal export growth is unlikely to reach a level that fully utilises the Port's capacity and as such, the Council considers that PNO will be commercially motivated to maximise container volumes passing through the Port and resulting revenue. As such, the Council considers that with or without declaration of the Service, PNO is likely to have incentives to set its charges so as to maximise the volume of containers imported and exported at the Port and gain market share.

Hold-up problem

6.205 The Council notes that no submissions have been provided on the potential impact of the hold-up problem (discussed above) in the container port market.

6.206 The Council considers that in circumstances where PNO currently discriminates in the prices it applies to containerised and bulk freight, there would be greater scope for the hold-up problem to arise in the container port market than was the case in the coal export market or the tenements market.

6.207 However, the Council also considers that the economic and commercial disincentives discussed in the context of coal at paragraph 6.118 would operate to restrain PNO from engaging in pricing behaviours that would lead to the hold-up problem.

6.208 The Council is not satisfied that the hold-up problem is likely to arise in the container port market on the material presently before it.

Conclusion

6.209 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 and at 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.

6.210 As discussed above, the Council considers that if the container terminal is developed the Port of Newcastle will be a new entrant in the market. This event will materially promote 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

6.211 The Council's preliminary view is that it 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

6.212 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.

6.213 Having reached the preliminary conclusion that declaration of the Service is unlikely to materially increase competition in the coal export market, the Council's preliminary view is that it 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.

Conclusion

6.214 The Council's preliminary view is that it 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 dependent market.

Council's preliminary view on criterion (a)

6.215 On the material presently before it, the Council considers that the magnitude of Service charges that 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). As such, the Council considers that these charges are insufficient to materially impact the volume of goods traded through the Port, investment incentives or otherwise promote competition in any upstream or downstream market directly.

6.216 The Council is not satisfied on the material presently 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.

6.217 Accordingly, the Council's preliminary view is that criterion (a) is not satisfied.

7 Capacity for facility to meet demand – criterion (b)

7.1 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

7.2 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.

7.3 PNO's submissions forecasting coal export growth and vessel visit growth summarised in discussion on criterion (a) (see paragraphs 6.31 - 6.35) are also relevant to criterion (d).

7.4 At the date of this Statement of Preliminary Views, PNO's website states 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'.[189]

7.5 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, 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.

7.6 Yancoal does not consider a detailed projection of foreseeable demand necessary to conclude that demand is met at least cost by the Port's channel rather than operating two or more facilities.

Council's preliminary view on criterion (b)

7.7 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.

7.8 The Council's preliminary view is that criterion (b) is satisfied.

8 National significance – criterion (c)

8.1 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

[189] Port of Newcastle, 'Move your Cargo' https://www.portofnewcastle.com.au/CARGOES/Move-your-cargo.aspx.

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

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

Submissions

8.2 PNO did not make submissions addressing criterion (c).

8.3 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.[190]

8.4 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 coal exports through the Port of Newcastle and the coal royalties that are generated result in significant benefits for both state and federal gross domestic product. They note as an example that coal royalties accounted for $1.776 billion in the 2018 New South Wales state budget.[191]

8.5 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.[192]

Council's preliminary view on criterion (c)

8.6 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.

8.7 The Council's preliminary view is that criterion (c) is satisfied.

9 Declaration would promote the public interest – criterion (d)

9.1 Section 44CA(1)(d) of the CCA (criterion (d)) requires that the Council be satisfied 'that access (or increased access) to the service, on reasonable conditions, as a result of a declaration of the service, would promote the public interest'.

9.2 The public interest criterion that was in force in 2015 (i.e. 'criterion (f)', which was previously set out at section 44G(2)(f) of the CCA) was formulated as a negative

[190] Glencore' August Submission p 30.

[191] Yancoal's August Submission p 8; NCIG's August Submission p 8.

[192] NCIG's August Submission p 8

obligation, i.e. the Council had to be satisfied that access (or increased access) to the service would not be contrary to the public interest.

9.3 Interested parties have provided submissions on how the Council should apply declaration criterion (d).

Submissions

9.4 PNO[193] submits 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 limitation that those matters must: (i) include the matters identified in section 44CA(3); and (ii) exclude the matters identified in criteria (a) to (c).

9.5 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 submits the following.

(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.

(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.

9.6 Ports Australia[194] submits 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.

9.7 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

[193] PNO's July Submission pp 39, 40.

[194] Ports Australia's August Submission.

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.

9.8 Yancoal[195] and NCIG[196] acknowledge that the new construction of criterion (d) requires 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).

9.9 Yancoal and NCIG submit that criterion (d) is met and make the following points in response to PNO's submissions at paragraph 9.5 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, and considers that it is not materiality alone, but materiality combined with uncertainty that should be considered. Only declaration 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;

[195] Yancoal's August Submission 18, 19.

[196] NCIG's August Submission pp 14, 15.

(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 of Newcastle;

(iv) higher government royalties.

9.10 Glencore[197] submits 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.

9.11 Synergies[198] 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.

9.12 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) and which have not already been identified in criterion (a) fall into two broad categories as follows:

(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

(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).[199]

9.13 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; and

[197] Glencore's August Submission.

[198] Synergies August Report

[199] Ibid p 71.

(c) it establishes a precedent for undeclared ports, across Australia, to raise prices where they perceive the threat of regulation is similarly weak.[200]

9.14 PNO's September 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.

9.15 In response to the August 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.

9.16 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.[201]

(b) PNO does not agree with the submissions by Yancoal and NCIG (summarised in point (b) at paragraph 9.9, above) about '*uncertainty*' and in any case, notes those submissions are relevant only to criterion (a) and not criterion (d).[202]

(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[203] 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 9.9, above.

[200] Ibid.

[201] PNO's September Submission p 8.

[202] Ibid p 8.

[203] Yancoal's August Submission, p.21 and NCIG's August Submission, p.17.

(d) The claimed ''public benefits'' identified by Yancoal[204] and NCIG 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.

9.17 PNO notes that Glencore makes a number of submission to the effect that revocation would be contrary to the public interest and that declaration provides certain public benefits.[205] 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.

9.18 PNO submits that the direct benefits Glencore claims would flow from continued declaration of the Service (namely, enhancing 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).

9.19 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.

9.20 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.

9.21 In relation to the public detriments identified by Synergies, PNO submits the following.

[204] Yancoal's August Submission, p.22 and NCIG's August Submission p.18.

[205] Glencore's August Submission p.30.

(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.

(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.

9.22 Yancoal's October 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 recommending revocation, there would need to be basically no public benefits from declaration in order to come to that conclusion.

9.23 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 9.16) and submits that the effect on competition and investment is clearly relevant to criterion (d).

9.24 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.

9.25 In relation to specific points raised in PNO's September Submission, Yancoal submits the following.

(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.

(b) 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.

(c) 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 access dispute.

(d) 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 extremely likely that the ACCC's ultimate determination in respect of the Glencore/PNO access dispute will have more general application.

(e) 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 access dispute. Yancoal agrees with the conclusion draw 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.

9.26 NCIG's October 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.

9.27 NCIG refers to the Amendment Act Explanatory Memorandum 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.

9.28 In relation to specific points raised by PNO's September Submission, Yancoal submits the following.

(a) It has long been the case that what is 'of interest to the public' should not be confused with the legal test of what is in the public interest.

(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.

9.29 NCIG remains of the view that criterion (d) is clearly satisfied. 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.

9.30 Synergies' October 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.

9.31 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.

Council's approach

9.32 Criterion (d) requires the Council to be positively satisfied 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.

9.33 The Council must have regard to the matters identified in subsection 44CA(3) in considering criterion (d). These mandatory considerations are:

(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.

9.34 Paragraph 12.40 of the 2017 EM clarifies 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.

9.35 In *Pilbara HCA* the High Court considered the previous public interest criterion. It found (at [42], footnotes in original) that:

> It is well established[206] 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*[207], when a discretionary power of this

[206] 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.

[207] (1947) 74 CLR 492 at 505.

> 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, 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.

9.36 Although criterion (d) requires the Council to be satisfied that access or increased access through declaration would *promote* the public interest (as compared to the previous criterion (f) test that required the council to consider if increased access would *not* be in the public interest) the Council considers that the High Court's observations remain relevant.

9.37 In undertaking this assessment the Council does not call into question its conclusions on criteria (a) – (c). It accepts those results and enquires whether, on balance, declaration of the service would promote the public interest giving consideration to likely flow on effects that follow its conclusions on criteria (a) – (c) as well as any other matters that are relevant to the public interest.[208]

Council's preliminary view

9.38 The Council's preliminary view 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

9.39 In considering section 44CA(3)(a)(i), and consistent with the Hilmer report[209], 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.

9.40 The Council considers that declaration of the Service (with the resultant access regulation through a negotiate-arbitrate regulatory model under Part IIIA) may lessen PNO's incentive to invest in maintaining or improving the Port or the Service due to limiting the returns which might otherwise have been accrued to PNO from such investment. While access regulation under Part IIIA (arbitration) allows for a risk-adjusted commercial return on investment, it may be difficult to completely avoid

[208] 2017 EM at [12.40].

[209] National Competition Policy Review ('Hilmer Report') 25 August 1993 p 251.

distortion of investment incentives and the risk of regulatory error in setting the appropriate access terms and conditions (that maximise overall economic efficiency).

9.41 On the other hand, declaration of the Service and the access regulation that follow may increase the incentives for other efficient investment to be made. By limiting the potential for PNO to set Service charges at an inefficiently high level, other entities may have a greater opportunity to invest in infrastructure which complements or is reliant on the Service. However, the Council considers that this effect is likely to be limited in this case given the magnitude of the Service charge, with or without declaration, is unlikely to impact volumes in dependent markets.

9.42 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 in circumstances where the Declaration has been challenged by PNO from the time that it was made by the Tribunal until the High Court disallowed PNO's appeal in March 2018,[210] sophisticated investors would have taken the risk of the Declaration being overturned into consideration. As such, if any infrastructure would drop in value compared to that which a sophisticated investor reasonably expected, the drop in value attributable to the removal of the Declaration is likely to be minimal.

Effect of declaration on investment in dependent markets

9.43 The Council considers that its observations on investment incentives 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.

9.44 The Council notes that submissions made about the impact of declaration on investments in dependent markets have primarily focused on coal markets and have not been supported by evidence that material differences in investments might result with or without declaration of the Service. As noted in the Council's consideration of the coal export market and the tenements market, the Council does not consider Service charges or uncertainty around how they might change in the Relevant Term are sufficient to materially impact investment decisions.

9.45 The Council considers that investment incentives in dependent markets will be similar with or without declaration of the Service.

9.46 The Council notes that Service charges comprise a larger cost component of containerised freight than export coal, though still a minor cost component. As such, the Council considers that declaration of the Service may have a marginally greater impact on investment in the container port market, or derivative markets thereof, than is the case for coal market. However, the Council has not received detailed submissions on this point for it to form a view as to whether declaration of the

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

Service would be likely to have any material effect on efficient investment in the Container Port market or any derivative market thereof.

Administrative and compliance costs of declaration

9.47 The Council considers that the administrative and compliance costs of access includes the cost 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.[211]

9.48 The Council notes that, to date, Glencore is the only user of the Service that has notified the ACCC of an access dispute. Other users (including Yancoal[212]) may choose to notify the ACCC of access disputes following publication of the access terms determined by the ACCC in the Glencore-PNO Arbitration, or at any other time while the Service is declared. The Council is not aware of any currently notified access disputes regarding the Service. The Council considers that if PNO were to seek to raise Service charges over the Relevant Term in a way that attempts to extract monopoly rents or otherwise impose unreasonable terms of access, additional parties may seek arbitration by the ACCC if the Service is subject to declaration. The Council considers that the number of access disputes referred to the ACCC is uncertain.

9.49 Yancoal's October Submission notes costly legal challenges instigated in connection with Glencore's access dispute as reason for other Service users to refrain from notifying the ACCC of access disputes before the ACCC issued its determination on the Glencore-PNO Arbitration. The Council recognises that the Glencore-PNO Arbitration is likely to have come at a substantial cost to both parties; however, the Council considers that subsequent access dispute arbitrations may not require the same amount of time or cost as was required in the Glencore-PNO Arbitration. In particular, the Council notes that 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". The Council considers that any future Service access disputes arbitrated by the ACCC are likely to be relatively less complex due to the issues already considered by the ACCC in the Glencore-PNO Arbitration where substantively similar issues are considered.

9.50 The Council considers that PNO and Glencore have demonstrated their willingness to vigorously defend their positions in access disputes concerning the Service, such that the cost of each negotiation and arbitration (or subsequent reviews of arbitration determinations) may be relatively high. However, it appears to the Council that a

[211] NCC, 'A Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth), Version 6, April 2018, p 44.

[212] Yancoal's October submission p 10.

relatively small number of access disputes are likely to arise or result in arbitration because uncertainty around the particulars of arbitrated access terms will continue to narrow as disputes are arbitrated (where determinations are published) and PNO is likely to be incentivised to have regard to these terms in future negotiations with access seekers to avoid arbitration. Where such disputes result in arbitration, they are likely to be less costly than the Glencore-PNO Arbitration.

Other matters

Improved efficiency

9.51 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.[213]

9.52 As set out in its preliminary view on criterion (a), the Council is not satisfied that declaration of the Service will promote a material increase in competition in any dependent market and thus improve efficiency and welfare.

Transfer of surplus

9.53 The Council considers that declaration of the Service is likely to result in terms and conditions of access (including price) that are more favourable to access seekers and, thus, would redistribute surplus from PNO to users of the Service.

9.54 A number of interested parties submit that it is preferable for revenues to accrue to miners due to the royalties that they pay. The Council considers that a transfer of surplus from entities operating under one taxation regimes to those operating under a different taxation regime does not, of itself, promote the public interest.

Economic growth

9.55 In response to submissions suggesting that declaration of the Service will promote economic growth in NSW and Australia, the Council first notes that it is not satisfied that declaration of the Service will promote a material increase in competition in any dependent market and thus improve efficiency and welfare.

9.56 The Council has also considered whether the transfer of rents from PNO to users of the service is likely to lead these parties to realise efficient returns on and in turn support the incentive to undertake efficient investments or improved innovation. However, the Council does not consider that the wealth transfer effected by declaration of the Service will be sufficient to have any material effect in these circumstances.

9.57 Overall, the Council does not consider that declaration of the Service will appreciably impact economic growth.

[213] NCC, 'A Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth), Version 6, April 2018, p45.

May prompt other ports to raise their prices

9.58 The Council notes that 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.

9.59 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)

9.60 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

9.61 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 raised by Ports Australia as to resultant loss of employment and reduced revenue for related businesses is unlikely to arise.

Council's preliminary view on criterion (d)

9.62 The Council has had regard to the effect of declaration on investment in infrastructure, investment in dependent markets, the administrative and compliance costs of declaration of the Service, and a range of other matters submitted by interested parties.

9.63 The Council considers that there are some benefits and some detriments that are likely to be realised from access or increased access, on reasonable terms and conditions, as a result of declaration of the Service.

9.64 Overall, however, the Council is not positively satisfied that declaration of the Service would promote the public interest.

9.65 The Council's preliminary view is that criterion (d) is not satisfied.

10 Preliminary conclusion and proposed recommendation

10.1 The Council's task, which is addressed by this Statement of Preliminary Views, is discussed in detail in paragraphs 3.2 and 3.3, and the approach that the Council has adopted in fulfilling that task is set out above. As noted in paragraph 3.20, the Council has had regard to the objects of Part IIIA.

10.2 The Council's preliminary view is that criterion (a) and criterion (d) are not satisfied, and it is thereby empowered under section 44J(1) to recommend revocation of the Declaration if it considers it appropriate to do so, having regard to the objects of Part IIIA.

10.3 On balance, the Council's preliminary view is that declaration of the Service would not have any appreciable effect in promoting the economically efficient operation of, use of or investment in the infrastructure by which the Service is provided.

10.4 The Council accepts that the Service is a bottleneck monopoly in the coal export market, impacts derivative markets of the coal export market and could play a role in the future state of competition in the container port market (if the Container Terminal is developed). However, having considered PNO's ability and incentives to increase Service charges or impose restrictive access terms in the Relevant Term, the Council does not consider that PNO is likely to increase charges to a level or set access terms in a way that would result in inefficient operation of the Service if the Declaration is revoked.

10.5 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 or otherwise promote competition in any upstream or downstream market directly.

10.6 The Council 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 section 44H(4) criteria are subject to declaration. As such, the Council considers that revocation of the Declaration supports a consistent approach to access regulation in the industry.

10.7 Having regard to the objects of Part IIIA of the Act, the Council proposes to recommend to the designated Minister that the Declaration be revoked.