

27 July 2018

PON Revocation
National Competition Council
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BY EMAIL

Consideration of application to revoke declaration of service at the Port of Newcastle

Yancoal Australia Limited (**Yancoal**) understands that the National Competition Council (**NCC**) has received an application from Port of Newcastle Operations Pty Ltd (**PNO**) seeking revocation of the shipping channel service declared by the Australian Competition Tribunal on 16 June 2016 (the **Declared Service**).

Yancoal is an existing user of the Declared Service, which is considering making submissions to the NCC in respect of the NCC's consideration of PNO's revocation application.

However, Yancoal's (and for that matter nearly all other stakeholders') ability to make informed submissions to the NCC is currently severely prejudiced due to not having transparency regarding the arbitration proceedings before the Australian Competition and Consumer Commission (**ACCC**) in relation to the access dispute between Glencore Coal Assets Australia Pty Ltd (**Glencore**) and PNO.

While that arbitration is currently private, it is a matter of public record (including through the Federal Court's decision in *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* [2017] FCA 1330) that Glencore notified the ACCC of an access dispute on 4 November 2016 and requested the ACCC arbitrate, and the ACCC has subsequently continued that arbitration.

Given the statutory time frames for delivering a decision in an arbitration, Yancoal's understanding is that a determination by the ACCC in those arbitration proceedings must be close to being delivered.

Any draft or final determination by the ACCC in that arbitration appears highly relevant to the consideration of criterion (a) and (d) in respect of the Declared Service. In particular, the application of the with and without test that is inherent in those criteria, practically requires consideration of such a determination.

That is the case because:

- such a determination provides very strong evidence of the 'access on reasonable terms and conditions' that would be delivered (to a broader range of customers than just Glencore) if the declaration continued – in particular because it would be anticipated to go to issues which would also be relevant to other users, like the regulatory asset base and rate of return that the ACCC considers is appropriate; and

- if such a determination was granted in respect of access by Glencore on terms which would continue to apply where the declaration was subsequently revoked, it also becomes relevant to the state of dependent markets without declaration.

Yancoal therefore finds it highly surprising that PNO's revocation application does not even refer to the ongoing arbitration process with Glencore, or that the NCC process might occur without that outcome being known.

Consequently, Yancoal suggests that:

- the NCC should require PNO to publish any draft or final determination received in the arbitration with Glencore, or at a minimum the proposed terms and conditions on which access to the Declared Service is to be provided (in respect of pricing and non-pricing matters) and the methodology by which pricing terms were derived; or
- if PNO is unwilling or unable to do so, postpone the timing for consideration of the declaration application until after the ACCC publishes its final determination as required under section 44ZNB *Competition and Consumer Act 2010* (Cth).

Yours sincerely

Mike Dodd
General Manager, Infrastructure
Yancoal Australia Limited

cc: Matthew Schroder, Australian Competition and Consumer Commission