

**Third submission on revocation
application for the Port of Newcastle
Shipping Channel Service**

29 October 2018



1 Background and context

On 8 October 2018, the Australian Competition and Consumer Commission (**ACCC**) published its final determination of the arbitrated dispute between Glencore Coal Assets Australia (**Glencore**) and Port of Newcastle Operations Pt Ltd (**PNO**) in relation to the terms and conditions for Glencore accessing the declared shipping channel service at the Port of Newcastle (the **ACCC Determination**).

The ACCC Determination provided charges and other terms for Glencore's use of the declared service including, most relevantly, both very significant reductions in the levels of the navigation service charge, and certainty as to the methodology to be utilised to calculate the charge for the nearly 13 years remaining in the period of declaration (i.e. until 7 July 2031).

This submission responds to the National Competition Council's (the **NCC**) invitation to make submissions in relation to '*whether, and if so, how the Council should have regard to the ACCC's final determination when considering whether to make a revocation recommendation*'.¹

Yancoal's view on that matter has been made clear as early as its first correspondence to the NCC on 27 July 2018 which stated:¹

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 continue – 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.*

Those comments have now been proven correct with the publication of the ACCC Determination.

Consistent with that letter, and the submissions Yancoal has subsequently made to the NCC in respect of PNO's revocation application, Yancoal continues to consider the ACCC Determination is highly relevant to whether the declaration criteria are satisfied.

Given the outcomes in the ACCC Determination, both in terms of providing substantially lower prices and providing a certain methodology for how pricing will be determined across the period of declaration, which the ACCC expressly envisages will have relevance to other users, Yancoal considers it is now clear that criterion (a) and (d) will both be satisfied.

Accordingly, for the reasons set out below and in Yancoal's previous submissions, Yancoal remains strongly of the view that the NCC should recommend against revocation, such that the declaration of the Port of Newcastle shipping channel service is continued.

¹ Yancoal, *Letter to National Competition Council*, 27 July 2018.

2 Relevance to criterion (a) and (d)

2.1 Relevance to the likely future outcomes *with* declaration

Criterion (a) requires consideration of the likely state of the environment for and opportunities for competition in dependent markets with and without declaration.

Criterion (d) requires an assessment of the public interest outcomes with and without declaration.

The ACCC Determination is highly relevant to the likely state of dependent markets and public interest outcomes in both scenarios.

By its very nature, the ACCC Determination represents the '*access on reasonable terms and conditions as a result of declaration*' that criterion (a) (and criterion (d)) refers to. In many declaration proceedings it may be typical for the NCC to have to determine this without knowing the 'reasonable terms and conditions'. However, in this case the ACCC Determination provides clear evidence of what those reasonable terms and conditions would be likely to be.

PNO has sought to obfuscate on this point in its previous submissions by claiming that it is not clear that the terms applicable to Glencore would be applied to other users in subsequent ACCC determinations of access disputes regarding the channel service.²

However, that assertion is no longer credible in light of the ACCC Determination. The fact is that the building blocks methodology from which the ACCC determined the appropriate pricing would be equally applicable to other users of the service. The required infrastructure is the same, the operating arrangements are the same, the ACCC would continue to be the arbitrator for future access disputes and there is nothing in the statement of reasons to the ACCC Determination that suggests a different result would apply to other users.

In fact, the ACCC's Arbitration Report specifically noted:³

*Further, 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.***

That is not just a theoretical position. Since the publication of the ACCC Determination, Yancoal has written to PNO seeking to negotiate access to the channel services on the same terms obtained by Glencore.

Consequently, Yancoal considers it is clear that in assessing criterion (a) and (d), the NCC should assume that, whether through commercial negotiations or further arbitrations, the likely state of the dependent markets will reflect the terms obtained by Glencore being extended to other users.

2.2 Relevance to the likely future outcomes *without* declaration

On Yancoal's review of the ACCC Determination, there is nothing which would result in the terms determined in favour of Glencore ceasing to be applicable if the declaration was ultimately revoked.

Rather the ACCC Determination sets the terms available to Glencore for the entirety of the declaration period, and prescribes termination rights which do not provide PNO with a right to cease those terms in the event of revocation.

² PNO, *Further submission in response to letter from the NCC dated 4 September 2018*, 17 September 2018 at 9.

³ ACCC, *Arbitration Report – Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd*, 18 September 2018 at 2.

Yet, in the event of a revocation, the timelines for an access dispute being resolved by arbitration will be such that it is highly unlikely that any other party will be able to obtain similar arbitrated reasonable terms and conditions prior to the revocation taking place.

As a result, as discussed at length in Yancoal's initial submission,⁴ the likely future outcomes without declaration should be assessed on the basis that revocation will bring about differential pricing (for reasons that have nothing to do with efficiency) with:

- (a) Glencore *alone* having the benefit of the reasonable terms and conditions set out in the ACCC Determination; but
- (b) All other users of the service having the less favourable terms offered by PNO (which cannot credibly be argued to be likely to be better than what PNO proposed as 'reasonable' in the context of the arbitration where it knew regulatory scrutiny would be applied to its claims).

2.3 Application of criterion (a)

Once the relevance of the ACCC's Determination is properly understood (as set out above) it becomes clear that criterion (a) is satisfied because:

- (a) with the substantially lower costs and long term certainty provided by the certain price review methodology provided for (nearly 13 years) provided by the ACCC Determination terms it is clear that coal producers will have far greater incentives to make long term investments than they would when faced with the uncertain future pricing and likely price rises that would apply in the absence of declaration; and
- (b) the incentives to invest, and therefore ability to compete in the coal authorities and other markets, will be the same for all users with declaration, but the environment for competition will be distorted and adversely impacted when without declaration only one user has long term certainty and favourable pricing.

Yancoal anticipates that PNO will seek to assert that the differences between the PNO proposed charges and the charges from the ACCC Determination are not sufficient to impact on coal producers incentives. However, as discussed in Yancoal's previous submissions, the issue is not just the magnitude of the current difference, but the magnitude of the current difference coupled with:

- (a) the investment hold-up created by PNO being effectively unconstrained in the absence of declaration from increasing prices further each year to extract as much as possible of the margin which would otherwise be available to the coal producer (i.e. the both the magnitude of the future difference and the uncertainty of that magnitude); and
- (b) the inability of coal producers to manage or even mitigate that uncertainty (where hedging and other strategies exist to mitigate other sources of uncertainty).

2.4 Application to criterion (d)

Once the relevance of the ACCC's Determination is properly understood (as set out above) it becomes clear that criterion (d) is satisfied because:

- (a) there is a public interest in achieving efficiency, which the extent of the price decrease provided for in the ACCC Determination conclusively demonstrates will not occur if PNO is allowed to set prices without the potential for ACCC determination of access disputes;

⁴ Yancoal, *Submission on revocation application for the Port of Newcastle Shipping Channel Service*, 8 August 2018, at 15.

- (b) there is a public interest in incentivising further investment, which the analysis above in respect of criterion (a) demonstrates will not occur in the absence of declaration; and
- (c) the ACCC Arbitration Report makes clear that the terms set out in the ACCC Determination are a 'guiding principle' and the building blocks methodology through which the pricing was determined in the ACCC arbitration should be equally applicable given the same service is provided to all users utilising the same infrastructure – such that regulatory, administrative and compliance costs of declaration should be far more minimal than PNO has sought to suggest in its previous submissions given the greater certainty which now exists as to the terms the ACCC would be likely to determine in a future dispute (which in turn is more likely to lead to commercially negotiated outcomes).

3 Conclusion

It follows from the analysis above (and that in Yancoal's previous submissions), that the ACCC Determination provides strong evidence of:

- (a) the likely reasonable terms and conditions that would apply to all users of the service as a result of declaration; and
- (b) the likely terms and conditions that would apply to Glencore alone without declaration, and consequently is highly relevant to the with and without declaration analysis required by criterion (a) and (d).

Once the ACCC Determination is properly taken into account it is clear that both criterion (a) and (d) are satisfied.

Accordingly, Yancoal considers that following the publication of the ACCC Determination it is now clear that the NCC cannot recommend revocation, as the precondition for recommendation revocation in section 44J(2) *Competition and Consumer Act 2010* (Cth) is not met.