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

5 October 2018

Yancoal thanks the National Competition Council (the ***NCC***) for the opportunity to make further submissions regarding the NCC's consideration of whether to recommend revoking the declaration of the shipping channel service at the Port of Newcastle, as requested by Port of Newcastle Operations Pty Ltd's (***PNO***) on 2 July 2018.

This submission addresses the responses provided by PNO of 17 September 2018 (the ***2nd PNO Submission***) to the NCC's requests of 4 September 2018, while also having regard to relevant submissions made by other stakeholders.

For the reasons set out below and in Yancoal's initial submission, 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

Yancoal Australia Limited (***Yancoal***) is a significant coal producer with interests in a portfolio of coal mines in the Hunter Valley, including Hunter Valley Operations, Mount-Thorley Warkworth, Moolarben, Ashton, Austar, Donaldson; and Stratford-Duralie.

All export production from those mines is exported through the Port of Newcastle, requiring access to the Port of Newcastle shipping channel services to which the revocation application relates.

Yancoal is therefore critically concerned with ensuring that the Port of Newcastle channel services remain available to coal producers and their customers on the reasonable terms and conditions that can only be produced through declaration.

2 Executive Summary

Yancoal continues to consider that, on the evidence before it, the NCC cannot, and should not, recommend revocation of the declaration of the Port of Newcastle shipping channel service.

As set out in Yancoal's initial submission, Yancoal considers it is clear from section 44J *Competition and Consumer Act 2010* (Cth) (***CCA***) that:

(a) the NCC cannot recommend revocation unless the NCC is positively satisfied that one or more of the declaration criteria is not satisfied; and

(b) even if the NCC is so satisfied, the NCC has a discretion as to whether revocation should be rejected.

PNO has not made any submissions that address either of those points (so Yancoal can only assume those points are not in contention).

PNO has also made no submissions in relation to criterion (b) and (c) not being satisfied and for the reasons set out in Yancoal's initial submissions, it is clear that they are satisfied. Accordingly, only criterion (a) and (d) appear to be in contention.

Yancoal considers the NCC cannot be positively satisfied that criterion (a) is not satisfied as:

(a) the outcome of the Glencore / PNO access dispute may well be determinative of whether criterion (a) is satisfied, and the NCC does not have the ACCC's determination before it currently;

(b) when criterion (a) is interpreted properly (i.e. involving a forward-looking analysis as to how the competitive environment would be impacted by declaration over the medium-longer term), it is clear, given the lack of any material restraints on PNO's future pricing and the investment hold-up that will surely create, that the NCC cannot be satisfied that

declaration would not promote a material increase in competition in at least the coal authorities market;

(c) the point about investment hold-up becomes particularly clear once the effect on smaller or more marginal coal producer's investment decisions are properly considered (whereas PNO focuses its attacks on the companies like Yancoal while overlooking the fact that it does not require differential or discriminatory pricing to have a differential effect on the investment choices of different producers).

Yancoal considers that the NCC cannot be positively satisfied that criterion (d) is not satisfied as, when criterion (d) is interpreted properly such that the findings in relation to criterion (a) regarding efficiency and adverse impacts on investment are relevant, it is clear that the chilling effect on investment in coal exploration and production that will arise in the absence of declaration far outweigh the minimal costs that might arise from declaration.

3 Relevance of the Glencore arbitration determination

Yancoal once again expresses its concern that stakeholders are having to make submissions without the benefit of what is currently the best evidence of the impact of declaration – namely the arbitration determination that has presumably been made, or is now imminent, in relation to the access dispute between PNO and Glencore.

Based on the submissions, other stakeholders (Glencore, NCIG and the ACCC) share this concern.

As Glencore's submission puts it:

> *The determination of the ACCC in the arbitration between PNO and Glencore will resolve whether the reasonable terms imposed on PNO as a result of declaration are in fact more favourable*

If the arbitrated determination provides materially more favourable terms of access and/or more long term certainty regarding pricing of access, it is difficult to see how criterion (a) could not be found to be satisfied.

PNO asserts that it cannot be assumed that such an arbitration determination will be relevant to other users of the declared service. However, where there is a single access service using identical assets to provide the service to all users, it is difficult to see how the 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 would continue to be the arbitrator).

While Yancoal of course has no knowledge of how the ACCC has or will determine the Glencore / PNO access dispute, Yancoal particularly notes the ACCC's comments in its previous submission[1] that the consideration of the access dispute is well-advanced and that:

> *The outcomes of that consideration may be relevant to the NCC's assessment of the effects of declaration of the shipping channel service. The ACCC may well need to put in further submissions to the NCC on the Revocation Recommendation at the conclusion of the arbitration process.*

4 Criterion (a)

4.1 Further submissions on the legal interpretation of criterion (a)

Having considered all the submissions made by other stakeholders, Yancoal continues to hold the views expressed in its initial submission regarding the interpretation of criterion (a).

[1] ACCC Submission, 8 August 2018 at 1

Yancoal notes its strong agreement with the submissions of the ACCC in relation to the interpretation of criterion (a), as succinctly summarised in the ACCC's submission as follows:[2]

> *a proper consideration of whether declaration would promote competition in a dependent market requires:*
>
> - *a forward-looking analysis;*
> - *assessment over the medium to long term;*
> - *consideration and comparison of the competitive conditions and environment likely to arise in the future with and without declaration, including considering the likely incentives of a monopoly service provider.*
>
> *A proper assessment also requires more than just considering the level of production likely to arise in the dependent market in the future with and without declaration. Narrowly focussing on the level of services offered (rather than the prices and terms, and whether they could be considered 'reasonable') does not give appropriate consideration to the possible economic and competitive outcomes.*

As noted in Yancoal's initial submissions, the NCC's own Guide to Declaration,[3] previous case law such as the Tribunal and Federal Court decisions in the Sydney Airport proceedings,[4] and the recent Full Federal Court decision in respect of the shipping channel service,[5] the 'promotion of competition' required for the purposes of criterion (a) is an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

The changes to the wording of criterion (a) in the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) did not relate to the 'promote competition' wording, and there was no suggestion in the related explanatory memorandum or government responses to the Harper Review and Productivity Commission review of the National Access Regime that suggested there was any intent to change the meaning of that phrase.

It follows that there is stark contrast between the promotion of competition required for criterion (a) to be satisfied and an immediate quantifiable increase in competition – with PNO's submissions seemingly fixated on the latter without addressing the impact on the competitive environment which criterion (a) is actually concerned about.

The ACCC submission is helpful in succinctly describing the two main potential effects that can arise where, absent regulated access, there appear to be few limits on the ability of a monopoly infrastructure provide to raise charges for services or impose term that are other than reasonable, namely:

(a) an increase in prices, on unreasonable terms, may mean that production in dependent markets decreases as firms are unable to absorb increases in costs (with the harm to competition resulting from firm's exiting the market); and

(b) without any pricing restraint, users of the monopoly service face an investment hold-up threat – the threat that once an investment is made, the monopoly service provider will seek to change the terms and conditions, including price, in its favour (with the harm to

[2] ACCC Submission, 8 August 2018 at 3.

[3] National Competition Council, *Declaration of Services – A Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)* at [3.23].

[4] *Re Virgin Blue Airlines Pty Ltd* [2005] ACompT 5 at [162] and *Re Sydney International Airport* (2000) 156 FLR 10.

[5] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124 at [34] and [182].

competition arising from the chilling effect on future investment by customers who are dependent upon such a service provided by a firm with market power).

PNO's submissions have been very focused on the first of those – by focussing too narrowly on an immediately short term quantifiable impact on the number of competitors or volume.

Yet, as the ACCC correctly points out:[6]

> *even if a charge for a monopoly service is currently small as a proportion of the total supply chain costs, there is no guarantee that it will remain small in the future*

It follows very clearly 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 apply otherwise.

4.2 Impact on incentives to invest

PNO's submissions in respect of criterion (a) are heavily reliant on its supporting expert reports.

Both reports, like PNO's submissions, are myopically focused on the current channel charges being a small proportion of current total supply chain costs or profits.

Issues regarding the ResourcefulNaess Consulting Report

In respect of the report from ResourcefulNaess Consulting, Yancoal is sceptical of the evidentiary value of the conclusions drawn by that report. In particular:

(a) Yancoal's own experience is that infrastructure and coal supply chain costs are considered as part of investment decisions and that is the case for Yancoal's own investment decisions;

(b) the test is forward looking as discussed earlier in this submission, such that the past experience of a single consultant over a small selection of transactions involving major producers largely at times of high coal prices, is not particularly persuasive evidence of how declaration impacts on investment; and

(c) much of the Principal Consultant's career and experience relates to a very large scale 'tier 1' miner in Rio Tinto (with a significant amount of that experience also in roles relating to engineering or coal seam gas and not directly related to investment in coal projects), for who port charges may have been far less material to anticipated project profit margin, whereas by contrast for small producers with smaller scale or lower margin projects, the channel service charges will be far more significant.

Issues regarding the HoustonKemp Report

In respect of the report from HoustonKemp Report, Yancoal considers its reasoning and conclusions deeply flawed as:

(a) there does not seem to be any basis for the conclusion that there is no possibility for investment 'hold up' of the type Yancoal's initial submission (and the ACCC and Glencore submissions) anticipated other than a simplistic comparison at a fixed point in time of current channel service charges to a spot estimate of average profit margin;

(b) the assertion that PNO cannot cause investment hold-up because they cannot price services to each customer individually, seems to ignore the fact that PNO can raise price to all users in a way which causes investment hold-up to at least some users. Lower margin producers, which are often junior or newer companies, will be more sensitive to

[6] ACCC Submission, 8 August 2018 at 6.

channel service increases as their profit margin will be significantly less than the average PNO/HoustonKemp rely so heavily on;

(c) as a monopolist, in the absence of declaration PNO will be incentivised to maximise profits, not volumes – which is likely to result in profits being maximised through higher margins even if that causes some reduction in volume from lower profit margin producers. In that regard, it is worth remembering the applicable pricing regime provides PNO with the ability to reset the price every year to effectively reset the price at a profit maximising level (whereas coal producers face high sunk costs and cannot simply exit an investment after it has been made without material destruction in value);

(d) it is not necessary that a coal company would make zero profit for them to be concerned about making further investments – particularly when many miners will have internal competition for capital – i.e. other projects outside of the Hunter Valley region that would not be affected by the uncertainty as to PNO's future pricing; and

(e) it simply ignores that volatility in coal prices, freight rates or foreign exchange rates are completely different to the uncertainty of future channel charges in terms of their impact on investment decisions, as:

(i) volatility of coal prices, freight rates and foreign exchange rates are things that coal producers can predict and have the potential to mitigate (whether through hedging or fixed price contracting);

(ii) coal prices, freight rates and foreign exchange rates are generally cyclical such that they will 'turn' over the life of the project if they are initially adverse;

whereas the likely increases in pricing by PNO are something that (in the absence of declaration) cannot be estimated or mitigated and are highly unlikely to ever be reversed.

Consequently, Yancoal does not consider either of the third-party reports provided by PNO to be compelling in relation to this likely impact of declaration (or revocation) on investment.

Misleading submissions by PNO in respect of Yancoal CEO's statement

The PNO submission goes on to quote a comment from Yancoal's CEO in support of their arguments. However, their reliance on that quote is again misguided for a number of reasons:

(a) firstly, it is unsurprising that the effect on investment of declaration is not felt by a major coal miner with significant tier 1 coal projects – the effect on investment will always be felt first by more marginal producers;

(b) secondly, it is noticeable that the quote specifically references three large open cut mines (Moolarben, Hunter Valley Operations and Mount Thorley Warkworth) the statement did not state, and cannot sensibly be read to state, that all other coal mines are bullet proof against all changes in conditions;

(c) thirdly, it is clearly about coal prices – an issue that while not within the control of coal companies, coal companies can at least predict and mitigate as discussed above.

As discussed in the Yancoal's initial submission, the chilling effect on investment is caused by the uncertainty of future price rises, which blunt the incentives to make investments in long life, high sunk cost, mines – which can effectively be held hostage to PNO's annual pricing decisions.

4.3 Application of criterion (a) in coal authorities markets

As discussed in more detail in its initial submission, Yancoal considers that declaration promotes a material increase in competition in at least the markets for coal authorities in the Hunter Valley.

Yancoal considers that promotion can be found to exist by virtue of either of:

(a) the investment hold-up issues created by the uncertainty of future pricing and unrestrained pricing powers held by PNO (as discussed in Yancoal's initial submission and in more detail above); and

(b) the differential pricing that will face potential investors in that market if the ACCC's determination in the Glencore/PNO access dispute is made and survives any revocation, but all other users of the services are exposed to PNO's unrestrained future prices (discussed in detail in Yancoal's initial submission).

The impact on competition in the authorities market arising from investment hold-up

As discussed in section 4.2 of these submissions above, the investment hold-up will be a particular issue for smaller / more marginal producers.

The PNO submissions and HoustonKemp report overlook the impact on these marginal producers by principally relying on a percentage of profit margin which is calculated by reference to:

(a) a single point in time – whereas the investment hold-up is principally caused by concerns about:

  (i) future increased pricing levels of the channel service charges and the uncertainty regarding the extent of those increases; and

  (ii) profitability at anticipated long-term coal prices (i.e. which industry anticipates to be lower than the 2017 pricing utilised by PNO/Houston Kemp) not profitability at a spot price,

  as coal mines are by their nature, long term investments with significant up-front capital costs, such that investment decisions are not made on the basis of a static point in time profitability analysis;

(b) an 'average' profit margin – when numerous producers will have lower profit margins than that average because they are:

  (i) higher on the cost curve (e.g. through underground mining, having higher coal supply chain costs through being more distant from the port or mining method or operating methodology); or

  (ii) selling a lower quality coal (e.g. through having a higher ash content),

  such that they will make investment decisions based on the profitability of their own projects and will therefore be more sensitive to channel service charges, future increases in those charges and uncertainty about the extent of those increases relative to producers with above average profitability.

It is these newer and smaller entrants that are typically active and provide the vigorous competition in the market for coal exploration authorities – both in terms of acquisitions of interests in authorities (or the companies that own authorities) by private merger and acquisitions activity as well as through participating in the New South Wales' governments competition tender process for new coal exploration acreage. It is more typically these smaller companies that take on the risk involved in acquiring exploration acreage, initial exploration and appraisal work.

Consequently, the impact on competition in the coal authorities market of a number of more marginal producers exiting or ceasing making investments is very significant, even if there is a lesser impact in thermal or metallurgical coal markets.

Geographic dimension of the market

The PNO submissions and HoustonKemp Report assert that the geographic dimension of the authorities market is not limited to the Hunter Valley. They do not provide any real basis for this assertion – simply asserting that buyers of coal tenements will regard coal authorities in the Hunter Valley as substitutable for coal authorities elsewhere, and simply discounting issues like the synergies produced by acquiring multiple mining projects in a similar region. However, given that tenements would typically be valued on a discounted cash flow basis, and that there will be material differences in coal quality, infrastructure costs and compliance costs (due to different regulatory environments) and very significant economies of scale from having large mining operations co-located in one region, it seems highly unlikely to Yancoal that there is a wider geographic authorities market.

Accordingly, Yancoal considers that it is clear that criterion (a) is satisfied on the basis of a promotion of competition in the coal authorities market.

Yancoal notes for completeness that the quote on page 5 of the HoustonKemp Report is not entirely from the Australian Competition Tribunal decision as HoustonKemp have misleadingly asserted. As is evident from the statement about the 'Hay Point catchment' part of that quote is taken from Houston Kemp's own work in relation to the review of the declaration of coal handling services at Dalrymple Bay Coal Terminal.

5 Criterion (d) – Promotion of the public interest

5.1 Criterion (d) does not contain a materiality threshold

PNO seeks to reject Yancoal's submission that criterion (d) does not have a materiality threshold seemingly on the basis that 'promotion' necessarily implies a level of improvement or enhancement.[7]

Yet, that misses the point that Yancoal actually raises – namely that it is acknowledged that some improvement or public benefit as a result of declaration is necessary, but the drafting of criterion (d) clearly does not impose any materiality threshold which that improvement or public benefit needs to surpass.

While PNO asserts 'there is no basis for this submission', the basis is plainly evident in the wording of the declaration criteria – which evidences a clear decision when the new criterion (d) was enacted by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) to not replicate the materiality threshold from criterion (a).

This is important because, particularly in the context of this review, where the NCC must be satisfied that one or more of the declaration criterion are not met, there would need to be basically no public benefits from declaration in order to come to that conclusion.

5.2 The effect on competition and investment is clearly relevant to criterion (d)

PNO asserts that the chilling effect on investment Yancoal considers is likely to eventuate in the absence of declaration is 'relevant only to criterion (a) and not criterion (d)' and that improved competition in dependent markets 'cannot satisfy criterion (d)'.

With respect, that is simply a clear and blatant misstatement of the law, and results in all of PNO's submissions in respect of criterion (d) being flawed by excluding clear public benefits.

[7] PNO 2nd Submission, 8.

Section 44CA(3) CCA makes it expressly clear that the NCC or Minister is intended to have regard to the effect that declaring the service would have on investment in infrastructure services and markets that depend on access to the service.

Consistent with that clear statutory wording is the explanatory memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (the ***EM***), which notes:[8]

> *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.*

That is, it takes the finding about the likely impact on investment that will have occurred in connection with criterion (a) and then takes that into account in assessing criterion (d).

Similarly, the examples given in the EM refer to incentives to make investments as issues would be relevant to criterion (d) in the hypothetical circumstances described.

The interpretation, PNO contends for is also inconsistent with judicial and regulatory consideration of the factors that are relevant to the public interest. In particular:

(a) the factors which are relevant to the public interest are interpreted extremely broadly – for example the High Court's decision in the Pilbara proceedings described the range of matters to which the NCC is to have regard to as 'very wide indeed' and involving a 'great breadth of matters';[9] and

(b) the NCC's Guide to Declaration both confirms the mandatory need to have regard to the effect of declaration on investment and indicates that the list in the Competition Principles Agreement provides some guidance as to factors relevant to the public interest– which relevantly includes reference to '(d) economic and regional development, including employment and investment growth, (f) the competitiveness of Australian businesses and (g) the efficient allocation of resources'.[10]

Whereas, PNO submissions would effectively completely exclude clear public benefits from consideration.

It would therefore be an error of law, and a failure to take account of a relevant consideration, for the NCC not to take the effect of declaration on investment into account.

Consequently, once there is a finding that the absence of declaration would have a chilling effect on investment, that would typically satisfy criterion (d), unless there were extremely significant public detriments (none of which exist here).

5.3 Responses to other PNO submissions on application of criterion (d)

PNO's submission also goes on to make some highly misleading assertions about the application of criterion (d) to the service.

Number of submissions

First, it is highly misleading to suggest (as PNO does) that the NCC can somehow determine the relevance of the declaration to the public interest by reference to how many submissions are made in respect of the revocation declaration. Where the public interest encompasses issues like

[8] Explanatory Memorandum to *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* (Cth) at [12.40]

[9] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [42].

[10] National Competition Council, *Declaration of Services – A Guide to Declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)* at [6.7] – [6.10].

efficiency and investment in relevant markets (which coal companies are best placed to provide evidence of) it is not particularly surprising that coal companies are the main respondents.

It is notable that a number of respondents are industry owned bodies – such as NCIG and PWCS, such that the concerns expressed in those submissions are in fact held by a large range of coal producers and customers, with their shareholders being:

(a) NCIG: BHP Billiton, Centennial Coal, Peabody, Yancoal and Whitehaven (all New South Wales coal producers); and

(b) PWCS: New South Wales coal producers including BHP Billiton, Bloomfield Collieries, Centennial Coal, Glencore, Idemitsu, Peabody, Yancoal and numerous Japanese coal customers.

The fact that the government did not make submissions is also not particularly surprising given the context of the New South Wales government having been the vendor of the channel infrastructure. Clearly criterion (d) needs to be assessed on its merits, not based on a shallow assessment of how many individual submissions were received.

Number of access disputes commenced

Second, it is also highly 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.

As would be expected, other users:

(c) are conscious of the way PNO has responded to that access dispute (in terms of extremely expensive legal challenges); and

(d) appreciate that, given the nature of the service provided to all users is materially the same, that the outcome in respect of the Glencore access dispute is highly likely to provide principles which are generally applicable to other users,

such that, but for the current revocation application it was prudent for other users to simply wait for the outcome Glencore achieved.

Once the current revocation application was made by PNO, the timeframe to achieve an arbitrated determination is such that it seems highly likely a decision would be made on the application prior to it being possible for any other access seeker to obtain a determination, such that there was little point in submitting another access dispute.

Assuming the resulting terms arising from the Glencore / PNO access dispute are published, Yancoal will review the terms and, if commercial negotiations with PNO cannot achieve the same result, Yancoal is likely to commence its own access dispute.

Position of stakeholders to comment on effect on investment

Third, PNO asserts that Yancoal and others are not in a position to comment on whether declaration has dampened investment (whereas, PNO apparently feels extremely well qualified to comment on whether declaration has dampened investment in the coal authorities market).

As discussed previously in this submission – the effect of declaration should be assessed by the NCC with the benefit of the determination that is ultimately made by the ACCC in respect of the Glencore/PNO access dispute.

Relevance of the ACCC's arbitration in respect of the Glencore/PNO access dispute

Fourth, PNO overreaches in relation to its assertions about the likely implications for other users of an arbitration determination on the pricing which will apply to other users.

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 (as PNO's submissions note multiple times) 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. As a practical matter, it would be anticipated to guide PNO's price setting from that point onwards, as another ACCC determination applying similar principles would be the next best alternative.

PNO asserts there is no reason to think that any two users are likely to have the same dispute with PNO – when it is well known across the Hunter Valley coal industry that all users are aggrieved by PNO's price increases, and the high potential for further substantial price increases.

Administrative and compliance costs

Yancoal continues to consider that PNO is over-exaggerating the likely administrative and compliance costs that would arise from declaration.

There is no suggestion that PNO will be required to provide an access undertaking, such that the likely outcome of declaration will be to provide an opportunity to regulate price.

That will not be a complicated compliance matter, such that any ongoing administrative or compliance costs would be expected to be relatively minor, particularly given that the ACCC is highly like 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.

Public benefits

It is clear to Yancoal 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. In particularly, more investment will generate greater employment, economic activity, coal royalties and income taxes.

5.4 Conclusions on criterion (d)

Yancoal considers that it is very clear that access (or increased access) on reasonable terms and conditions as a result of declaration will promote the public interest, such that criterion (d) will be satisfied.

6 Newcastle Container Terminal

Yancoal considers it is clear from PNO's further submissions in respect of the proposed Newcastle Container Terminal that the current declaration of the shipping channel service has not had any chilling impact on PNO's incentives to invest in the terminal.

In addition, the same issues identified above in relation to the impact on investment of more marginal coal producers, is likely to equally apply to container trade (as recognised by PNO's responses identifying that 'the total cost of importing or exporting one TEU container at the Port is highly variable and will be impacted by a range of factors'[11]).

Accordingly, it appears to Yancoal there is a material likelihood that the prospect of a future material increase in shipping channel service charges (in the absence of declaration) will adversely impact on one or more dependent markets related to containerised trade.

[11] PNO 2nd Submission, 17

7 Conclusion

It follows from the analysis above and in Yancoal's initial submission, that:

(a) the NCC cannot recommend revocation as each of the declaration criterion are satisfied in respect of the service such that the precondition for recommending revocation in section 44J(2) CCA is not met;

(b) that conclusion follows because:

  (i) the NCC has not (to Yancoal's knowledge) has access to the ACCC's existing or pending determination in the Glencore/PNO access dispute, without which it should not be possible for the NCC to be positive satisfied that declaration does not promote a material increase in competition;

  (ii) when criterion (a) is interpreted properly (i.e. involving a forward looking analysis as to how the competitive environment would be impacted by declaration over the medium-longer term), it is clear, given the lack of any material restraints on PNO's future pricing and the investment hold-up that will surely create for more marginal coal producers, that the NCC cannot be satisfied that declaration would not promote a material increase in competition in at least the coal authorities market (where those more marginal producers are the most active participants);

  (iii) when criterion (d) is interpreted properly such that the findings in relation to criterion (a) regarding efficiency and adverse impacts on investment are relevant, it is clear that the chilling effect on investment in coal exploration and production that will arise in the absence of declaration far outweigh the minimal costs that might arise from declaration; and

(c) even if that was not the case, the NCC should exercise its discretion to not recommend revocation under section 44J(1) CCA given the damage to investment and other public benefits that would be taken away by revocation, public detriments which would be caused by revocation and the lack of any change in the circumstances or markets in which the service is provided which would justify a change in approach.