New South Wales Minerals Council

Application for a declaration recommendation in relation to the Port of Newcastle

July 2020

Contents

1. Details of Applicant

1.1 Name

New South Wales Minerals Council ("**NSWMC**")

1.2 Contact person

Mr Andrew Abbey
Policy Director
NSWMC
Level 3
12 O'Connell Street
Sydney NSW 2000
Email: aabbey@nswmining.com.au

Copy to:

Dave Poddar
Partner
Clifford Chance
Level 16, No 1 O'Connell St
Sydney NSW 2000
Email: dave.poddar@cliffordchance.com

1.3 Address for delivery of documents

NSW Minerals Council
Level 3
12 O'Connell Street
Sydney NSW 2000

2. Executive Summary

2.1 Introduction and reason for application

Application for declaration of the Port of Newcastle by NSWMC

NSWMC (**Applicant**) is the peak industry association representing the NSW mining industry, including explorers, miners and associated service providers. A list of current members can be found at https://www.nswmining.com.au/our-members.

This application is made to the National Competition Council ("**Council**") in accordance with the provisions of Part IIIA of the *Competition and Consumer Act 2010* (Cth) ("**Act**"). The Applicant seeks a recommendation by the Council that access to certain services as further detailed in this application relating to the Port of Newcastle ("**Port**"), should be declared for the purposes of Part IIIA of the Act.

PNO has an infrastructure monopoly at the Port

This application arises in the context of a series of access issues arising between Port of Newcastle Operations Pty Ltd (**PNO**) and users of the Port, as outlined later in this application. Many of NSWMC's members are exporters of coal (and other commodities) from the Hunter Valley region through the Port. The Port is located at the end of a multi-user export supply chain that involves an extensive rail network from multiple mine sites that culminates at coal loading terminals located at the Port.

As a practical matter the Port is the only economically efficient means for mining companies to export bulk commodities such as coal from the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield (i.e. the broader Hunter Valley region).

PNO has market power, as PNO is a "bottleneck" or essential service for mines in the Hunter Valley system and there are no reasonably substitutable services available for exporters from the Hunter Valley. PNO therefore has a commercial incentive to maximize profits by seeking to achieve as high access charges as possible. Accordingly, PNO has the ability and incentive to exert market power in the absence of declaration (and recent events described in this application confirm to NSWMC that PNO has no commercial or regulatory constraints which impact its ability to seek to maximise its profits).

The Council's previous recommendation to revoke declaration at the Port presupposed that PNO would have commercial incentives not to exercise its market power

NSWMC is aware of the application by Glencore Coal Assets Australia Pty Ltd (**Glencore**) for declaration of the Port and the deemed revocation of that declaration that occurred in late 2019 when the Commonwealth Treasurer did not make a decision within the statutory timeframe in the face of the Council's recommendation to revoke the declaration. As the Council will be aware, NSWMC opposed PNO's revocation application before the Council as we believed that if the declaration was revoked, PNO would have an unfettered ability to increase prices for access to the Port, as well as impose commercially unreasonable terms and conditions of access. Our view was that such a situation would lead to coal producers who have already invested substantial amounts in coal mining in the Hunter Valley, as well as miners proposing to develop new mining tenements, being subject to unconstrained price increases as PNO would be aware that they have considerable sunk investments in the Hunter Valley. This would deter investment in the Hunter Valley mining industry that would materially decrease competition in relevant dependent markets.

Indeed, almost immediately after the declaration was revoked, PNO did increase the charges for accessing the Port from 1 January 2020 and alter the terms on which access would be provided. PNO did this using the rationale that it was entitled to recover, through its pricing, approximately $912 million of user funded investments, primarily involving channel dredging by users of the Port. The users view PNO's approach of including this expenditure in an asset base used for the purpose of calculating prices as double charging the users, and an imposition of unreasonable terms and conditions of access to the Port. The industry is also concerned about the potential for PNO to further increase its charges, as there is no requirement for PNO to continue to apply this price calculation methodology in the future. As discussed later in this application, NSWMC believes that the terms and conditions of access PNO is imposing on users would be materially different and much more reasonable for users if the relevant services at the Port were declared.

While we have noted the Council's reasoning in its recommendation to revoke the declaration, being that PNO would not have the commercial incentives to adversely affect competition in certain markets, we believe the Council did not focus on the relevant issue. Namely, that regardless of whether PNO had an incentive to adversely affect competition in certain markets, PNO did and does have market power to increase its profitability, and the incentive to use it, and the use of that market power would materially impact competition in dependent markets.

Impact on competition in dependent markets

Each of the following markets is relevant for the assessment of the impact on competition in dependent markets: (a) the coal export market; (b) the infrastructure market; (c) the specialist services markets (such as geological and drilling services, construction services, mining safety services, and mining technology services); (d) the bulk shipping market; and (e) the coal tenements market(s) (encompassing the tenement acquisition market as well as tenement development market) as set out in section 9.7.

In addition, in further elaboration of previous submissions on the impact on competition in the coal tenements market, NSWMC submits that there are three separate and functionally distinct markets for coal tenements that are relevant for consideration in this matter: (a) early stage Exploration Licences (**EL**s)—the market for trading ELs for coal in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield; (b) advance stage ELs that are likely to be developed into operating coal mines—the market for the supply and acquisition of late stage ELs in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield, and parts of the Western Coalfield catchment (essentially types of tenement developments); and (c) operating coal mines, typically Mining Licences (**ML**s)—the market for the supply and acquisition of operating mines in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield.

The Council's view of the commercial incentives of PNO was misplaced

Ultimately, NSWMC is bringing this application because the Council's faith expressed in its recommendation to the Treasurer that PNO would not exercise its market power has unfortunately been misplaced. PNO again did not consult with industry and included user-funding in the Port asset base in the face of opposition by the users, and included unreasonable access terms in contracts offered to users. Relevantly, the application of the approximately $912 million in user-funded expenditure demonstrates that PNO as the operator of monopoly infrastructure will not put the interests of the users before its own interests. Equally, clauses that hold PNO and its shareholders harmless from changes in taxation or decreased returns arising from adverse commercial circumstances affecting the Port (e.g. a downturn in the coal industry) are commercially unreasonable and would not arise if PNO did not have monopoly power and was subject to declaration. These matters demonstrate that PNO has the incentive to use its market power to maximise its own profits, and will in the future, to the detriment of the competitiveness of the users and relevant dependent markets noted above. Accordingly, while PNO may not have an intention to adversely affect competition in a dependent market, that is simply the effect of PNO's commercial strategy and pricing practices.

PNO is not subject to regulatory constraints from the NSW Government or otherwise

As the Council may be aware, earlier this year NSWMC lodged an authorisation application with the Australian Competition and Consumer Commission (**ACCC)** seeking to provide the users with an opportunity to reasonably discuss their issues and negotiate with PNO as industry organisations generally do with infrastructure providers. The ACCC issued an interim authorisation to allow this to occur and a draft determination noting the public benefits associated with that proposed negotiation.

PNO however declined outright to negotiate with the users.[1] NSWMC is disappointed with PNO's decision to decline to even attempt to negotiate, but this is further evidence of PNO's unfettered market power.

In the circumstances where the Treasurer's deemed revocation did not allow parties to appeal the Council's recommendation, the users through NSWMC wish to re-commence the declaration process for the Port. Declaration will constrain PNO's monopoly infrastructure power as it will give the ACCC the ability to arbitrate access disputes, and as such will provide a long-term certainty for the users in relation to affected markets. This will also be in the public interest as such certainty will support increased employment, investment and regional growth in NSW, and increased competitiveness of Australian exports through the Port to the benefit of the Australian economy in general.

NSWMC notes that while it believes these objectives are consistent with the NSW Government's desire for increased investment in the coal mining industry in the Hunter Valley pursuant to its Strategic Statement on Coal,[2] NSWMC does not see the NSW Independent Pricing and Regulatory Pricing Tribunal (**IPART**) having any statutory ability to intervene, because while IPART may review PNO's pricing including at the direction of the relevant NSW Minister, IPART has no ability to impose price caps or otherwise regulate PNO. This is considered further in section 4.4 of this application.

2.2 Structure of application

Against the above background, NSWMC will not revisit all the material that has previously been placed before the Council and will incorporate that material by reference to Glencore's declaration application and PNO's revocation application.[3]

This application begins with an overview of the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield coal industry and the coal supply chain/system from coal production through to shipping for export. This sets the context for the focus of this application; the shipping channels and berthing facilities required for the export of coal from the Port (i.e. the relevant service) and the terms on which the infrastructure of one of the world's largest coal export ports should be accessed, to promote and ensure workably competitive markets. The task of exporting coal from the Port involves vessels entering the Port, transiting the channels in the Port, tying up at the berths to load coal at the coal terminals and then once again transiting the channels before exiting the Port for delivery of the coal to its ultimate destination.

The Council previously considered that criterion (b) in subsection 44CA(1)(b) of the Act was satisfied, and similarly criterion (c) in subsection 44CA(1)(c) of the Act was satisfied.[4] Given this, the focus of this application will be only on criterion (a) and (d), which the Council previously considered were not satisfied.

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1 See https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/new-south-wales-minerals-council-nswmc .

2 See: https://www.resourcesandgeoscience.nsw.gov.au/__data/assets/pdf_file/0004/1236973/Strategic-Statement-on-Coal-Exploration-and-Mining-in-NSW.pdf .

3 See: http://ncc.gov.au/application/consideration-of-possible-recommendation-to-revoke-declaration-of-service-a/1 .

4 NCC, Revocation of the declaration of the shipping channel service at the Port of Newcastle, 22 July 2018 (**Revocation Recommendation**), [11.6].

2.3 Previous declaration and access disputes

As is known publicly, in 2015 Glencore sought a declaration of the shipping channel at the Port from the Council. While the Council did not recommend declaration of the channel services and the relevant Minister did not decide to declare the services, Glencore was successful in the Australian Competition Tribunal (**Tribunal**) in 2016 (**Tribunal Determination No. 1**).[5] Tribunal Determination No. 1 was upheld on appeal to the Full Federal Court and the High Court did not grant special leave on application by PNO and the Council.

Glencore brought an access dispute to the ACCC which issued an access determination in 2018 for access charges of $0.6075 per gross tonne (**ACCC Determination**).[6] PNO appealed that ACCC arbitration determination to the Tribunal on 8 October 2018 and the Tribunal in 2019 issued a determination increasing access prices to $1.0058 per gross tonne (**Tribunal Determination No. 2**).[7] The most significant reason for the differential in charges from the ACCC Determination and the Tribunal Determination No. 2 was the inclusion in the regulated asset base of user expenditure of $912 million that mostly related to dredging of the channels at the Port, a decision which did not necessarily reflect the previously well accepted precedent on the treatment of contributed assets.

It is noted that Glencore and the ACCC have challenged Tribunal Determination No. 2.[8] However, even if the ACCC and Glencore are successful, while such a decision will have precedent value as to whether user-funding can be included in the regulated asset base, it will as a practical matter have no impact on other access seekers to the Port because the access arbitration determination by the ACCC is specific to Glencore. Further, even though the ACCC access determination principles as to the regulated asset base for PNO was proposed to apply to any other access seeker, this is no longer possible given the revocation of the declaration of the Port in late 2019.[9]

Following the revocation of the declaration of the Port, in November/December 2019 PNO sought to increase channel and berthing charges at the Port. Having regard to Tribunal Determination No. 2, PNO increased its published charges effective 1 January 2020, rationalised on the basis of including the user-funded expenditures of $912 million in its asset base used for the purpose of calculating prices.

At the same time, PNO has offered mining companies an alternative 10 year pricing deal if they agree to terms of a deed (a copy of the pro forma deed from the PNO website (**Deed**) is annexed to this application as **Annexure A**).[10] This reflects a significant departure by PNO from its historic approach to setting the terms and conditions of access to the port. Whereas in the past PNO has applied a transparent and consistent charge to all port users, the Deed provides for terms and conditions of access, including charges, to be individually negotiated with mining companies, creating an opportunity for PNO to apply price discrimination.

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5 Application by Glencore Coal Pty Ltd [2016] ACompT 6.

6 Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, Final Determination: Statement of Reasons, 18 September 2018.

7 Application by Port of Newcastle Operations Pty Ltd [2019] ACompT1.

8 See PNO Media Release dated 28 November 2019: https://www.portofnewcastle.com.au/news/further-investment-uncertainty-for-hunter-coal-industry/ .

9 See http://ncc.gov.au/images/uploads/Port_of_Newcastle_-_Recommendation_22.7.2019.pdf for the Council's recommendation to revoke the declaration of the relevant service.

10 See: https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/PORT-USER-PRO-FORMA-LONG-TERM-PRICING-DEED.pdf .

The Applicant has concerns with the Deed as it requires users to accept an initial capital base that includes industry expenditure. Further, it requires users to accept the principle that this initial capital base should be returned to PNO over the leasehold period – something specifically prohibited by Tribunal Determination No.2 (which required these assets to be treated as perpetual, thereby permitting PNO to earn a return on, but not a return of, this asset value). Specifically, users do not consider it reasonable having to double pay for past user funded channel dredging.

Moreover, PNO's 10-year pricing deal is subject to significant pricing re-openers which, while making the initial pricing superficially more attractive than the terms otherwise applying from 1 January 2020,[11] make this lower price likely to be illusory in reality for the reasons explained in this application. NSWMC notes that on 13 March 2020, PNO replaced the Deed with a "Producer Deed"[12] and a "Vessel Agent Deed"[13] (a copy of which is annexed to this application as **Annexures B** and **C** respectively) which look to re-word some of the clauses effecting the pricing re-openers. However, such changes to the Deed as contained in the Producer Deed and the Vessel Agent Deed have no substantive change in effect, and continue to give PNO the ability to vary pricing terms to protect and maximise its commercial interests, as outlined later in this application. These documents also have very onerous requirements as to the information that is required to be provided to PNO, in relation to the cargo that the vessels contain as well as matters such as demurrage costs. It is unclear on what basis PNO should be reasonably entitled to request that coal exporters provide this information, given PNO's role is limited to Port operator.

Pricing risks to coal exporters increase even further, upon the expiry of the 10-year Deed, with the Deed providing no certainty for users around future prices. Users will have no option but to continue to use the Port, creating a strong bargaining position for PNO that will enable it to further appropriate the value of sunk investments made by users.

Individual negotiations between members of NSWMC and PNO in relation to PNO's proposed deeds have not culminated in a successful resolution of users' issues. Given this, on 5 March 2020, NSWMC and ten mining company members (together, the **Collective Bargaining Applicants**) applied to the ACCC for authorisation of collective bargaining conduct, to provide collective discussions amongst themselves and with PNO in relation to the terms and conditions of access to the Port. On 2 April 2020, the ACCC granted interim authorisation for such proposed collective bargaining conduct (**Interim Authorisation**),[14] and the Collective Bargaining Applicants formed a collective bargaining negotiating committee to discuss key the terms and conditions of access to the Port in accordance with the terms of the Interim Authorisation.

On 29 April 2020, NSWMC wrote to PNO requesting an initial meeting with PNO to commence negotiations. However, PNO has declined the request for an initial meeting and indicated that it does not support collective bargaining.

Accordingly, in NSWMC's view, having regard to the new terms and conditions of access imposed by PNO, access seekers currently do not have access to the Port on

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11 See: https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/Schedule-of-Service-Charges-2020.pdf .

12 See: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf .

13 See: https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020_.pdf .

14 See: https://www.accc.gov.au/system/files/public-registers/documents/Interim%20Authorisation%20Decision%20-%2002.04.20%20-%20PR%20-%20AA1000473%20-%20NSWMC.pdf .

reasonable terms and conditions. Having regard to this, NSWMC is seeking that the Council recommend the Port (and the relevant service as further described below) be declared, to provide users with confidence that the value of their investment will not be subject to expropriation by PNO, by PNO unilaterally changing terms and conditions of access, potentially on a discriminatory basis. NSWMC believes that declaration would promote a material increase in competition as a result of declaration.

2.4 **Description of Service**

The service comprises the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct (**Service**). The Service is currently provided by PNO.

The shipping channel and relevant facilities have previously been declared in Tribunal Determination No. 1. However, in the consequent myriad of access disputes between Glencore and PNO, even the original application to the Council was the subject of legal argument as to the breadth of the "service" therein described. As such, NSWMC notes that the description of the "service" could potentially lead to disputes over the scope of the "service" and ultimately the assets that could be included in the regulated asset base. With this in mind, and the range of disputes and contentions that can occur between an access seeker and access provider, NSWMC is seeking in this application to provide additional context from a practical perspective such that these types of issues hopefully do not subsequently arise in this matter.

2.5 **Assets, services and facilities that the Service is comprised of**

There have been disputes between Glencore and PNO regarding what the Service comprises in terms of whether it is merely accessing the channels or is also accessing berth facilities at the Port. For the avoidance of any doubt, access to the Service requested by this application includes all of the services and facilities provided by PNO necessary for a vessel to enter a Port precinct and load and unload coal at relevant terminals located within the Port precinct, and then depart the Port precinct.

2.6 **Scope of the Service**

For the avoidance of any doubt and having regard to the various disputes that have occurred with PNO in the past, the Applicant wishes to make clear that the Service relates to all coal being exported from the Port either on a Free on Board (**FOB**) or Cost including Freight (**CIF**) basis. Coal producers sell such coal from mines that they own themselves or they operate in different forms (depending on joint venture arrangements). Coal producers may then export the coal themselves by loading the coal onto chartered vessels where title transfers to the customer at the destination port (i.e. CIF), or in the more usual situation, where the coal is simply loaded onto vessels at loading berths and title passes to their customers at the vessel rail (i.e. FOB). As such, NSWMC submits that the consideration of this application and the scope of any recommendation by the Council to the Minister should encompass the terms and conditions of access to the Service in relation to all such coal, whether exported on a FOB or CIF basis.

It is noted that in the litigation with Glencore, various arguments appear to have been raised by PNO as to whether Glencore was a third-party access seeker other than in its capacity as a vessel charterer exporting coal. While NSWMC believes that a

narrow application to chartering in this situation is not consistent with industry practice as to how coal is exported, pursuant to various types of contractual arrangements (that do not affect the underlying commercial arrangement to export coal), the issue is moot now that PNO in the latest proposed Producer Deed appears to accept that vessels may be "covered" by pricing negotiated with coal producers, irrespective of the precise contractual arrangement.

2.7 Challenges for the Hunter Valley region Coal Industry

There are significant on-going cost pressures on the coal industry to be efficient in all aspects of constructing and operating mines. Australian coal miners compete with miners from many other countries including; Indonesia, Columbia, Canada, Russia, the USA, South Africa, Mozambique, and, China. It is critical that infrastructure charges including at the Port are efficient and facilitate the competitiveness of Australia's coal exports and in particular, exports through the Port.

NSWMC believes the encouragement of long-term investment solutions underpinned by certainty of access to infrastructure on reasonable terms arising from declaration is crucial for efficient future coal exports in the greater Hunter Valley region as set out in section three of this application.

3. Background to the Hunter Valley Coal Industry

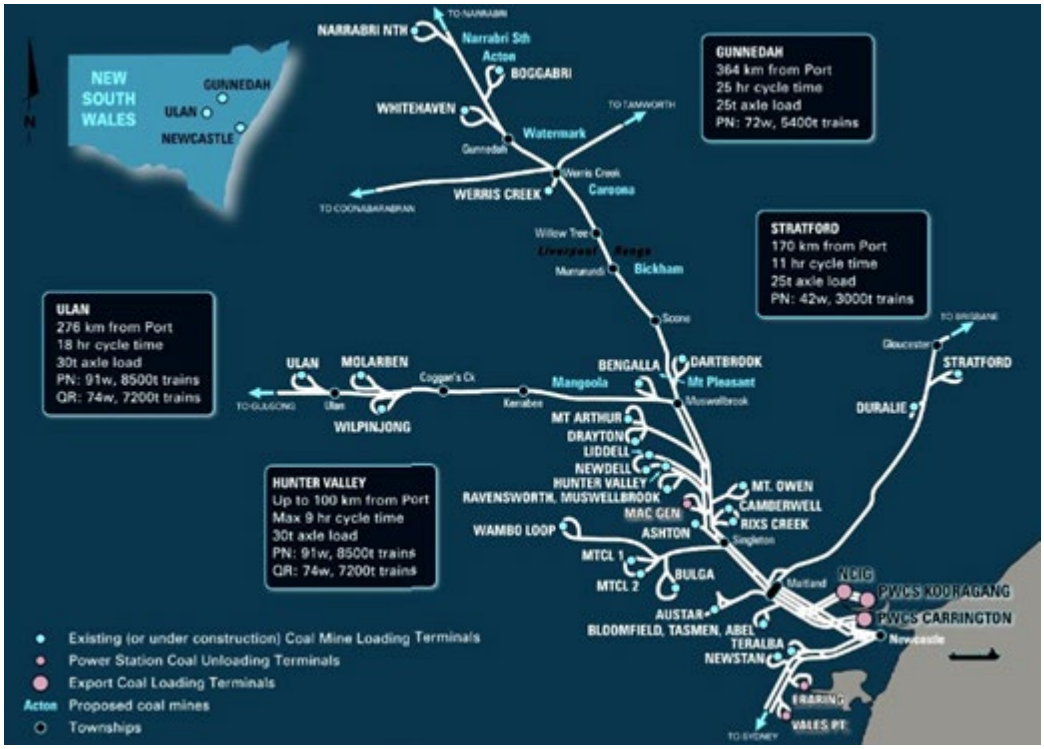
3.1 Overview

The Hunter Valley export supply chain/system is the largest coal export operation in the world. In 2018-19 NSW exported 168 million tonnes of coal. 161 million tonnes of this, or 96%, was exported through Newcastle, with the remainder exported through Port Kembla. The Port is the only practical way through which coal can be exported from the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield.

The coal mines exporting through the Hunter Valley employ the vast majority of the 22,000 people directly employed by the NSW coal mining industry.[15] Data collected by NSWMC indicates the NSW mining industry directly spent $13.7 billion in the NSW economy in 2018-2019, which included $2.5 billion in wages and salaries; $8.9 billion in goods, services and community contributions; and $2.3 billion in state government payments, such as royalties and taxes. The majority of this expenditure came from coal mining, with the Hunter region accounting for 39.5% of the total direct spend for NSW.

[15] See: https://www.coalservices.com.au/mining/statistics-2/ .

Figure 1: Map of Hunter Valley Coal Chain network



Source: Hunter Valley Coal Chain Coordinator

Coal from Newcastle is exported to around 20 countries primarily in the Asian region. Japan is the largest customer base, receiving 44% of exports from Newcastle during 2018-19. China, South Korea, and Taiwan accounted for a further 44%. Metallurgical and thermal coal products are produced in the region.

The Hunter Valley Coal Chain is made up of coal producers (or mines), rail haulage providers, the Australian Rail Track Corporation ("**ARTC**"), three export terminals, port managers and the Hunter Valley Coal Chain Coordinator ("**HVCCC**"). These are described below.

3.2 Coal producers exporting through the Hunter Valley Coal Chain

There are more than 35 operating coal mines operated by 11 coal producers that export through Newcastle. There are also a number of coal projects in various stages of exploration, approval, and development.

Coal producers exporting through the port include:

- Glencore, which is New South Wales' largest coal producer and operates several mines and mining complexes across the Newcastle, Hunter Valley and Western Coalfields;
- BHP, which operates the Mount Arthur Mine, the largest mine in NSW located near Muswellbrook in the Upper Hunter Valley;
- Peabody Energy Australia, which operates the Wambo mine in the Hunter Valley and the Wilpinjong mine in the Western Coalfield;
- Yancoal Australia Limited, which operates several mines in the Hunter Valley, Newcastle and Western Coalfields;

- Whitehaven Coal, which operates several mines in the Gunnedah Basin;
- MACH Energy, which operates the Mt Pleasant mine in the Upper Hunter Valley;
- New Hope Group, which operates the Bengalla Mine in the Upper Hunter Valley;
- The Bloomfield Group, which is an Australian owned group of private companies which operates two open cut coal mines - Bloomfield at East Maitland and Rix's Creek at Singleton in the Hunter Valley;
- Centennial, which operates the Mandalong, Myuna and Newstan mines in the Newcastle coalfield;
- Idemitsu, which owns the Boggabri mine in the Gunnedah Basin and the Muswellbrook mine in the Upper Hunter Valley;
- Delta Coal, which owns the Chain Valley mine approximately 60km south of Newcastle and adjacent to the Vales Point Power Station.

Other mines at various stages of planning may export through the Port in the future, including Malabar Coal's Spur Hill and Maxwell proposals.

3.3 Rail infrastructure

Rail infrastructure in the Hunter Valley is extensive. Access to the rail infrastructure requires in general terms:

- coal producers entering into access agreements with ARTC which provide a contractual commitment for "below-rail" path availability and use of ARTC's rail track network;
- operator agreements entered into between ARTC and accredited "above-rail" operators to operate on the ARTC rail track, and;
- rail haulage agreements between coal producers and above rail operators for the haulage of coal from mine to Port.

The railway corridor used is part of the Main North railway line. The Hunter Valley rail infrastructure is owned by the State Government-owned RailCorp and managed by the Federal Government-owned ARTC under a 60 year lease until 2064. The other infrastructure associated with coal transport, such as load points, is privately owned, usually by a mine or a coal loader.

The Hunter Valley coal network consists of a dedicated double track 'coal line' between Port Waratah and Maitland, a shared double track line (with increasingly significant stretches of third track) from Maitland to Muswellbrook, and a shared single track with passing loops from that point north and west.

ARTC is vertically separated, providing 'below-rail' services (such as the rail track infrastructure) but not 'above-rail' services (such as haulage). ARTC provides a single point of contact for parties seeking to run trains on the Hunter Valley Rail Network.

ARTC is responsible for managing the network and granting access to the network.

Figure 2: Rail infrastructure in Hunter Valley Corridor

Source: Aurizon

All but a very small proportion of the export coal shipped through the Port is transported via rail. Most of this coal comes from a series of mines and coal loaders throughout the Hunter Valley, Gunnedah, Western, Gloucester and Newcastle coal basins. Domestic coal is also transported over the same network.

Export coal also arrives at the terminal from a small number of mines to the south of Newcastle. This traffic operates on the RailCorp network as far as Broadmeadow.

3.4 Above-rail operators

There are four operators currently providing rail haulage services to coal producers in the Hunter Valley Coal Chain:

- Pacific National which is the largest coal hauler in NSW.
- Aurizon, which commenced operations in the Hunter Valley in 2005.
- One Rail Australia (previously Genesee & Wyoming Australia), which acquired Glencore Rail in December 2016.
- Southern Shorthaul Railroad (SSR), which entered the coal haulage market in 2010.

The above and below rail operators participate in the Hunter Valley Coal Chain transporting coal from the mines to the three coal export terminals, located at Kooragang Island and Carrington.

3.5 Loading and unloading of coal at the coal loading terminals

There are three coal terminals at the Port, which receive coal from the mines, stockpile it and load it to vessels for export. The terminals are owned by coal

producers, coal traders, and coal customers. Two of these terminals are located on Kooragang Island, with a third at Carrington. The significant operations of these coal terminals are dependent on coal vessels accessing the shipping channels and utilising the Port. The terminals are:

- Newcastle Coal Infrastructure Group (**NCIG**) – NCIG is located on Kooragang Island and is the newest of the three terminals, beginning operations in 2010. NCIG has a total handling capacity of 66 million tonnes per annum.

- Port Waratah Coal Services (**PWCS**) Carrington Coal Terminal – PWCS began operating the Carrington Coal Terminal in 1976. It has a total handling capacity of 25 million tonnes per annum.

- PWCS Kooragang Island Coal Terminal – Kooragang Island began operating in 1984 and has expanded to a total handling capacity of 120 million tonnes per annum.

Figure 3: Aerial map of NCIG operations

Source: NCIG

Figure 4: Shiploaders and berths at NCIG Terminal

Source: NCIG

Figure 5: Aerial map of PWCS Operations

Source: PWCS

3.6 Specialist services providers

Coal mining in the Hunter Valley region is supported by a significant array of mining services and contractors including:

- exploration services in the nature of geological and drilling services;

- seismic, electromagnetic, and other specialist geological services;
- geotechnical specialists;
- equipment provision services;
- mining safety services;
- mining technology providers;
- construction contractors;
- surveyors (ground and aerial);
- mining contractors;
- drill and blast contractors;
- explosive manufacturing and supply;
- specialist HR and mine health service providers;
- project management services;
- machinery manufacturing and repair and maintenance;
- specialist professional services (legal, financial, environmental, logistics, tax etc).

Given that these specialist services are intrinsically linked to coal mining / exploration activities, the demand for such services and the competition within the relevant market(s) related to such services is similarly linked to the competitiveness and efficiency of the market(s) related to coal mining and exploration.

Service providers to the infrastructure (rail track, port terminals, berths) and co-ordination of the supply chain also make up a considerable portion of the wider specialist services industry.

4. Background to Port of Newcastle and privatisation

4.1 Port of Newcastle

The Port has been used for commercial shipping for over 220 years. It handles more than 25 different cargoes and approximately 2,300 ship movements per annum.[16] There are 200 hectares of vacant land available for development at the Port, and the total land holdings of the Port are 792 hectares.

Coal is the primary commodity exported through the Port. Other commodities which pass through the Port include:

- **imports** of; alumina, cement, fertiliser, fuels, machinery, project cargo and vehicles, grains, petroleum coke, pitch and tar products and steel;

[16] See: https://www.portofnewcastle.com.au/wp-content/uploads/2019/09/Trade-Report-2018.pdf .

- **exports** of; aluminium, metal concentrates, machinery, project cargo and vehicles, pitch, and tar products, steel, and grains.

Until 2014 the Port Authority of NSW, a government-owned corporation of the State of New South Wales, was responsible for the overall development and operation of the Port. The construction of the terminals within the Port precinct has been undertaken by private companies / users of the Port. These arrangements reflected the fact that the development of the Port had historically been a function of the State.

4.2 Privatisation process

As from 30 May 2014, certain functions which had previously been carried out by the Port Authority NSW were transferred to the new Port operator, PNO as trustee for the Port of Newcastle Unit Trust through a long-term lease arrangement.

PNO is jointly owned by investors The Infrastructure Fund (**TIF**) and China Merchants Port Holdings Company (**CMPort**). TIF is an Australian infrastructure fund with a portfolio of Australian and overseas assets worth more than A$2.4 billion. TIF's portfolio is managed by Macquarie Infrastructure and Real Assets. CMPort is part of the China Merchants Group Ltd (**China Merchants**), and is a global port developer, investor, and operator, with a ports network portfolio spanning across 18 countries and regions. China Merchants is headquartered in Hong Kong with business sectors which extend beyond infrastructure to property development and financial investment. China Merchants is a state-owned corporation of People's Republic of China. In 2018, China Merchants had total assets in the value of 8 trillion RMB (c. A$1.6 trillion), with 649 billion RMB (c. A$130 billion) in revenue. Currently, China Merchants operates 53 ports in 18 countries and districts, and in 2017, its container throughput exceeded over 100 million TEU[17] for the first time.

The privatisation transaction of the Port was completed in May 2014 and generated gross proceeds of approximately A$1.75 billion for the State of New South Wales.

4.3 Price rises

NSW port operators have statutory power to fix charges for certain port services (this is discussed in greater detail in section [8]). Shortly after assuming its role as Port operator, PNO published price increases and changes to the charging regime which came into effect on 1 January 2015 and re-valued the Port assets from $1.75 billion to $2.4 billion.

As noted in Tribunal Determination No. 1:

"After PNO assumed the role of Port operator, the price for coal ships using the channels to enter and exit the Port was increased by between approximately 40% and 60% for some vessel types – particularly the larger more efficient vessels. Price increases also occurred for non-coal vessels. It is said, without demur, that those price increases were not accompanied by any change in the nature or quality of the Service. It is also said, again without demur, that the price increases were imposed by PNO without significant consultation with users of the Service."[18]

The following table sets out the percentage price increases in relation to the navigation service charge (**NSC**) and the wharfage charge (**WC**), from 2014-2020,

[17] Twenty-foot Equivalent Unit.

[18] Tribunal Determination No. 1, [16].

and from 2019-2020 respectively. The pricing schedules for 2019 and 2020 have been annexed to this submission as **Annexures D** and **E** respectively.

	2014 – 2020 (% price increase)	2019 – 2020 (% price increase)
NSC[19]	142.9[20]	33.5
WC[21]	21.6	3.95

As noted earlier in this Application, NSWMC understands that the price increases are not associated with or offset by any increase in productivity, efficiency or service to be provided by PNO, nor are they required for the purpose of funding any further investment in Services provided to the mining industry as far as the Applicant is aware.

4.4 Lack of regulatory constraint on PNO in relation to price increases

The Applicant understands that there is no intention of the New South Wales Government to put in place any form of regulatory oversight for cost increases or importantly for any future fixing of price increases for the channels or any associated infrastructure. This creates considerable uncertainty for the operation and commercial viability of existing and future coal mines in the greater Hunter Valley region as noted in section 3.

As noted in Tribunal Determination No. 1, in some cases of bottleneck infrastructure, there is a certified access regime or other effective regulatory framework to 'manage' the prices set by the monopoly owner or operator of that infrastructure for the use of the particular infrastructure. There is no such regime in place in relation to the Port and given that it is no longer declared under Part IIIA of the Act, there is now no longer any constraint on PNO's pricing that arises from ACCC oversight.

The underpinnings of the Council's recommendation in 2019 for revocation of the declaration, being that PNO would be constrained commercially by its relationships with its customers do not seem to have eventuated, given PNO's clear approach of unilaterally implementing significant further price increases for 2020, requiring unreasonable price re-openers in its proposed Deed (and Producer / Vessel Agent Deeds) and refusing to negotiate collectively with customers. The ACCC's assessment that PNO as a monopoly infrastructure provider would seek to maximize returns have in fact transpired.

As the Port operator from May 2014 onwards, PNO has controlled the terms and conditions of access to the Port. PNO has and may exercise the statutory powers conferred under Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (**PMAA**) in order to levy charges on the vessels which use the Port. On each occasion a vessel enters the shipping channels, it incurs liability to pay usage charges for the use of the Port at rates determined by PNO, which has the express entitlement under the lease of the Port from the State of NSW, to exclude access to the channels if the shipping charges are not paid.

While the prices levied by PNO are subject to price reporting to the relevant Minister of the State of NSW under Part 6 of the PMAA, and the Minister may refer the pricing

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19 NSC applicable for coal vessel over 600GT.

20 This figure reflects the percentage increase from the 2014 price of $0.4292 for the first 50,000 gross tonnes. The 2014 price for every tonne after the first 50,000GT was $0.9656, and was capped at a maximum charge of $45,633.68.

21 WCs vary across different dykes at the Port. Percentages set out in this table reflect an average of the percentage price increases.

for investigation to IPART, this does not allow IPART to set maximum prices or determine prices relevant to the Services and it is "*common ground that the IPART regime is not a certified or effective access regime: if it were, s 44G(2)(e)(ii) of the Act would mean that the NCC could not recommend the Service.*"[22]

PNO has in the past claimed that there are some existing constraints on PNO in relation to its pricing structures (e.g. the price reporting mechanism under the PMAA). However, the fact is that at present, there are no direct regulatory constraints or oversight on its pricing structures, and in any event, the constraints claimed by PNO have proven to be ineffective in constraining PNO from imposing unreasonable terms and conditions of access.

Moreover, the existing practical price constraints on PNO under legislation and under the contractual leasing arrangement between PNO and the State of NSW do not provide an effective substitute for access regulation. As noted by the Tribunal:

"the understandable commercial incentive to maximise its profitability, and its revenue, may be served in different ways at different times, depending upon the strength of the coal export market. The fact remains (as noted above) that coal miners supplying coal into that market from mines in the Hunter Valley have no real practical alternative to using the Service, and in more profitable times (accepting what has been said about the present state of that industry) be vulnerable to charging changes imposed by PNO for access to the Service to absorb to a significant degree the profitability of exporting coal produced from the Hunter Valley."[23]

5. Description of Service and facility

5.1 Service

The Service comprises the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct. The Service is currently provided by PNO and was previously the subject of declaration by the Tribunal in Tribunal Determination No 1.

The facilities used to provide the Service are the shipping channels ***and*** vessel berth areas (as described above) identified in the plan attached as **Annexure F** to this application, (the "**Facilities**"). The Applicant submits that the Facilities are relevantly considered as the physical assets essential for the provision of the Service. These are referred to in PNO's pricing schedules attached as Annexures D and E.

NSWMC wishes to ensure for the sake of simplicity and consistency that the description of the Service does not diverge from the regulated asset base used by the ACCC in the ACCC Determination, so that if there is a subsequent access dispute, any access seeker could use that regulated asset base as an initial starting position. As such, the description of the Service is intended to be sufficiently encompassing to ensure that the relevant cost base (and the assets therein) is

[22] Tribunal Determination No. 1, paragraph 14.

[23] Tribunal Determination No. 1, paragraph 166.

consistent with that found by the ACCC in its access arbitration with Glencore and PNO.[24]

For the avoidance of any doubt and having regard to the various disputes between PNO and Glencore in relation to access arrangements at the Port, the Applicant wishes to make clear that the scope of the Service relates to all coal being exported from the Port either on a FOB or CIF basis. Coal producers sell such coal from mines that they own themselves or they operate in different forms (depending on joint venture arrangements). Coal producers may then export the coal themselves by loading the coal onto chartered vessels where title transfers to the customer at the destination port (i.e. CIF), or in the more usual situation, where the coal is simply loaded onto vessels at loading berths and title passes to their customers at the vessel rail (i.e. FOB).

In the Producer Deed it appears PNO accepts that the proposed access charges should apply to all such types of contractual arrangements, given that the proposed pricing applies to all "Covered Vessels".[25] It is therefore hoped that this issue of scope will not be contentious in relation to this application.

As such, NSWMC submits that consideration of this Application and the scope of any recommendation by the Council to the Minister should encompass the terms and conditions of access to the Service in relation to all such coal, whether exported on a FOB or CIF basis.

5.2 Provision of Service

There is a division of responsibilities between PNO and the Port Authority of NSW (which remains under the ownership of the State of NSW). PNO is responsible for the provision of the Facilities, the scheduling of vessels using the Facilities and is also responsible for carrying out the activities necessary for the provision of the Service, such as the dredging and surveying of the channel and the provision of aids to navigation.

Port Authority of NSW remains responsible for communicating with vessels as they approach anchorage outside of the Port (and outside of the area of the Facilities), arranging pilotage for vessels using the Facilities and for communicating with vessels to instruct them to sail in accordance with the schedule provided by PNO. Port Authority NSW also retains the harbour master function, which is the responsibility for giving vessels (including those using the Facilities) such instructions as may be necessary from time to time for the safe operation of the Port. The scope of this application is limited to the Service, which is provided wholly by PNO rather than Port Authority NSW.

5.3 Services not included in this application

(a) The Applicant is not currently seeking any recommendation in respect of other services provided by PNO such as property management and port development services, although those services might also present a good case for declaration under Part IIIA of the Act.

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[24] ACCC Determination.

[25] See the definition of "Covered Vessel" in Schedule 4 of the Producer Deed.

(b) The Applicant is not seeking any recommendation in respect of the services provided by Port Authority NSW, such as pilotage services or Harbour Master services at the Port.

6. Provider of the Service and the owner of the Port

6.1 Provider of the Service

PNO as trustee for the Port of Newcastle Unit Trust trading as "Port of Newcastle" is the provider of the Service. The Council has previously found that PNO is the owner of the Service for the purposes of Part IIIA of the Act and while there were some disputes as to this in the litigation with Glencore, this was ultimately accepted by PNO in the ACCC Determination, Tribunal Determination No. 1 and Tribunal Determination No. 2.

6.2 Owner of Facilities

The Crown in right of New South Wales is the owner of the tidal areas of the Port including the channels and the berths. It is also the ultimate owner of other areas of land which are leased to the Port and may be used or occupied by the Facilities or in relation to the provision of the Service.

The Facilities are made available to PNO by the State of New South Wales by way of a long-term lease and PNO is for all intents and purposes of the Act the owner of the Facilities (under the Act) and therefore the relevant responsible Minister is the Federal Treasurer.

7. Background to declaration of the Service at the Port

Some elements of the access disputes between PNO and Glencore have been covered in section 2.3, but this section is intended to provide a chronological history of that dispute.

On 13 May 2015, Glencore applied to the Council for a recommendation pursuant to section 44G of the CCA in respect of the following service at the Port:

"*…the provision of the right to access and use the shipping channels (including berths next to the wharves as part of the channels) at the Port, by virtue of which vessels may enter the Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.*"[26]

The timeline set out below details the key events that followed Glencore's application for a recommendation that the relevant service be declared, which is relevant for contextual background as to the lengthy and complex access disputes that the Service and Port have been the subject of.

Date	Event
10 November 2015	The Council recommended to the Minister that the relevant service not be declared under section 44F of the Act.[27]

[26] See: http://ncc.gov.au/application/application-for-declaration-of-shipping-channel-services-at-the-port-of-new/1 .

[27] NCC, Declaration of the shipping channel service at the Port of Newcastle – Final Recommendation, 2 November 2015.

Date	Event
8 January 2016	The Minister decided not to declare the relevant service as recommended by the Council, and publishes his decision under section 44H(1) of the Act.[28]
29 January 2016	Glencore applied to the Tribunal under section 44K(2) of the Act for review of the Minister's decision.
31 May 2016	The Tribunal gave its reasons for setting aside the decision of the Minister that was made under section 44H(1) of the Act.[29]
16 June 2016	The Tribunal made orders setting aside the decision of the Minister and declaring the relevant service pursuant to section 44K(8) of the Act for the period commencing on 8 July 2016 and expiring on 7 July 2031.[30]
14 July 2016	PNO applied for judicial review of the Tribunal's decision to the Full Court of the Federal Court.
4 November 2016	Glencore notified the ACCC of an access dispute under section 44S of the Act and the arbitration process commenced. The parties agreed to stay the arbitration pending the Full Federal Court appeal.[31]
16 August 2017	The Full Federal Court dismissed PNO's application for judicial review of the Tribunal's decision. The arbitration recommenced.[32]
12 September 2017	PNO filed an application for special leave to appeal the Full Federal Court's decision before the High Court.[33]
9 October 2017	PNO filed an application for judicial review of the validity of the ACCC's decision that an access dispute existed under section 44S of the Act.
9 November 2017	The Federal Court dismissed PNO's application for judicial review of the ACCC's decision.[34]
23 March 2018	PNO's special leave application is dismissed by the High Court.
2 July 2018	PNO applied to the Council to recommend that the Minister revoke the declaration.
18 September 2018	The ACCC released the ACCC Determination, noting inter alia that user funded contributions should not be included in the calculation of PNO's initial regulated asset base, as this will ensure that users do not pay for the same assets twice – once through their initial investment and again through PNO's charges.
26 July 2019	The Council recommended to the Minister under section 44J(1) of the Act that the declaration of the relevant service be revoked. Following the expiration of the 60-day statutorily prescribed period during which the Minister may make its decision as to whether or not to revoke the declaration of the relevant service and the Minister not doing so, it was taken that a decision to

28 Mathias Cormann, Acting Treasurer, Decision 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.

29 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6.

30 *Application by Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7.

31 ACCC, *ACCC notified of an access dispute over charges at the Port of Newcastle,* 16 November 2016.

32 *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124.

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

34 *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* [2017] FCA 1330.

Date	Event
	revoke the declaration was made by the Minister on 24 September 2019.
30 October 2019	Following PNO's appeal of the ACCC's findings to the Tribunal, the Tribunal concluded that user funding cannot be deducted from calculations of the regulated asset base, which has effectively resulted in a material price increase of 33.5%[35] and the perverse situation of users having to pay twice for the use of the Service.

8. Reason for NSWMC seeking declaration

8.1 Current arrangements for provision of the Service

The Port is one of the largest coal export ports in the world. It is essential to the Hunter Valley supply chain because it is the only commercially viable option for the export of seaborne coal from the broader Hunter Valley region.

PNO generally does not enter into agreements for the provision of access but instead relies on the statutory powers conferred on it under the PMAA in order to levy charges on the vessels which use the Service. We say "generally" as PNO has recently proposed the Producer Deed (and Vessel Agent Deed) for a 10-year access period, but that Producer Deed only appears intended to be available for a short period of time.

Therefore, generally, on each occasion that a vessel enters the Port either the ship's master acting on behalf of the owner or charterer (which may be the coal producer or one of the coal producer's export customers) must effectively request access to the Service. The Service is provided by PNO including the vessel within the schedule that it provides to the Vessel Traffic Information Centre of vessels which are permitted to use the Facilities.

An NSC is payable by the owner of a vessel or cargo in respect of the Service (section 50 of the PMAA). The charge is generally payable on each entry by the vessel into the Port and is calculated by reference to the gross tonnage of the vessel. It is a usage-based charge.

Under section 51 of the PMAA the relevant Port Authority may fix the NSC. The Port Authority has been declared to be the Port operator. PNO is therefore entitled to fix the NSC under statute, and has done so by publishing its Schedule of Pricing which sets the NSC (amongst other access charges).[36] Whilst the Minister may issue directions to the Port Authority from time to time requesting information about the navigation service charges,[37] there is no statutory oversight of these charges or the manner in which they are varied by the Port Authority.

As the Council would be aware, declaration of the Port and the relevant service was deemed to be revoked in September 2019. Given this, access to the Service and the Port is on terms and conditions as set by PNO, with in the NSWMC's view, no effective regulatory oversight.

[35] Increase in the NSC imposed by PNO from 2019 to 2020.

[36] See https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/Schedule-of-Service-Charges-2020.pdf.

[37] See section 82 of the PMAA.

8.2 Detrimental effect on competition in relevant markets

As described in section 3, a number of the Applicant's members own and operate coal mines which export coal through the coal export terminals located at the Port. It is not possible for vessels of the nature described in Schedule 4 of the Producer Deed (who are subject to the price increases) to use the coal export terminals at the Port without using the Service and paying the NSC (and other access charges such as the WC) to PNO.

Coal is generally either sold on a “spot” basis, where the price is determined for each cargo when it is sold, or on a long-term basis, where the price is fixed for a period of time but subject to periodic price resets. In both cases, the market fluctuations for the price of coal will impact the revenue that coal producers generate from the sale of their coal. A clear example of such market fluctuations having a negative impact upon coal producers' revenue is the recent price falls for NSW thermal coal since the coronavirus started affecting demand in February 2020, with media reports suggesting that more than 30 percent of Australian thermal coal exports being unprofitable at current prices.[38] Moreover, at current prices, it has been suggested that 46 percent of global seaborne thermal coal supply would be operating at cash loss on a spot price basis.[39] These recent falls in coal prices, when combined with increases and uncertainty in relation to future port access and prices, can put significant pressure on coal producers and mines in the Hunter Valley region.

Coal exported through the Port competes in the same market for seaborne coal with coal produced and sold through other ports throughout the Pacific. The thermal coal produced in the Hunter Valley region and exported through the Port is of a comparatively higher quality coal, which may be produced and exported through ports in other regions. Despite the higher quality of Hunter Valley coal, producers remain price takers, and in purchasing coal, buyers will take account of the difference in grades of coal, and importantly, also the cost of transporting coal from the point of sale to the point of its ultimate consumption. Those costs would include the charges imposed by PNO.

Any increase in the charges imposed by PNO will therefore impact upon the prices which coal producers receive for coal and have a detrimental effect on the coal producers in the Hunter Valley region (including the Applicant's members) because:

(a) it will result in an immediate increase in transportation costs which cannot be reasonably passed to coal customers, which means that these costs will need to be absorbed by the coal mines in an already high cost environment where there is a negative outlook on commodity prices; and

(b) it will negatively impact investment in coal projects in the Hunter Valley region because of the uncertainties associated with forecasting the Service cost component for these projects. This uncertainty differs from the ‘business as usual’ risks associated with operating a coal mine, which do not arise from an individual supply chain participant’s unilateral decision-making and control. PNO is unique in being able to appropriate the surplus created by other parties.

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38 See: https://www.afr.com/companies/mining/coal-s-price-collapse-threatens-australian-mines-20200507-p54qyv#:~:text=Prices%20for%20top%20quality%20NSW,cent%20over%20the%20past%20year.
Price falls have also affected other 'intermediate' coal products, with most coal types facing the lowest prices since 2015, raising concerns of mine closures if prices remain weak.

39 Wood Mackenzie, Commodity Market Report, "*Global thermal coal short-term outlook April 2020: supply cuts are inevitable*", April 2020, p.2.

As coal production operates within the inter-connected Hunter Valley Coal Supply Chain, the uncertainty for coal projects will have flow on effects for the following relevant upstream and downstream markets:

(a) the market for mining services as set out in section 3.6 of this application, above and below rail providers, as well as their employees who depend on the ongoing viability of coal development projects to themselves remain commercially and financially viable;

(b) the market for the provision of shipping and cargo services, predominantly the shipping agents and companies that make up the c.2,300 ship movements per annum;[40]

(c) the export of coal and other commodities from the Hunter Valley mining operations; and

(d) the market for coal tenements, including those in the initial exploration phase, the development phase and the operating phase.

At a broader level, the decline in activity and investment in the greater Hunter Valley region will have a detrimental effect on the Australian economy, given the importance of the coal mining industry to other sectors through its royalties and tax contributions, which in turn drives the generation of jobs and investment in other sectors.

8.3 Implications of pricing uncertainty

The Applicant appreciates that the recent increase in the NSC may initially appear relatively minor in percentage terms given the significant costs involved in large scale coal exports (although the amounts per vessel are significant). However, these amounts can have a material effect on new bulk commodity mining projects like coal, which are to a large extent based on delivering high volumes at smaller margins and over longer terms of operation than many other commodities. This means that any significant ongoing uncertainty relating to future unavoidable costs can impact the viability of further coal mine development in the greater Hunter Valley region.

PNO has market power, as the Port is a 'bottleneck' or essential service for mines in the greater Hunter Valley region, and it is not constrained by any close substitutes. As noted above, as a business PNO has an incentive to maximise profits by seeking to achieve as high an access charge as possible. Given this, and without regard to other potential constraints, PNO will have the ability and incentive to exercise market power in the absence of declaration. Against this background, prospective mine investors make long term investment decisions (over the length of a mine life which is typically 30 years), requiring the commitment of permanent ("sunk") investment and long term take or pay contracts for supply chain capacity, and mine owners seeking to invest over such periods would need to consider PNO's conduct over the economic life of their mines.

The requirement for substantial sunk investments and long term contracts, given the length of a mine's life and the uncertainty about the pricing regime that PNO will apply, create the potential for hold-up of new investments.

The Queensland Competition Authority (**QCA**) described the "hold-up problem" in detail in the recent Queensland Rail Service Final Recommendation:

[40] See PNO 2018 Trade Report: https://www.portofnewcastle.com.au/wp-content/uploads/2019/09/Trade-Report-2018.pdf .

"*Hold-up' is an economic problem that occurs where the value of an economic agent's relationship-specific investment is potentially appropriable by that agent's trading partner(s). Relationship specific investments are, by definition, particular to a given business relationship. For example, a supplier's purchase of specialised equipment or machinery to produce inputs specific to a buyer represents a relationship-specific investment.*

A relevant feature of this type of investment is that, once made (sunk), its value in alternative uses is lower than its value in the current trading relationship. Further, the more specific the assets are to the current relationship, the more difficult it becomes for the investor to redeploy them to other uses. As a result, exit from the relationship is costly.

Accordingly, at the time of the initial investment decision, both parties have an incentive to make the relationship 'work'. However, once the investment is made (i.e. costs are sunk), the incentives of the parties change. This is because the gains from trade are only realised after the initial investment occurs. As such, the parties have an incentive post-investment to behave strategically — should an opportunity arise — in order to appropriate a greater share of the gains from trade. The risk of this type of opportunistic behaviour is known as the hold-up problem."[41]

The most efficient and effective way to provide commercial certainty for coal producers (both new and existing) investing in mines in the Hunter Valley region and facilitate investment in their coal mining projects is to ensure a process is available for achieving certainty with respect to the price and/or the method for ascertaining the price for the Service at the Port through the declaration of the Service. It is for this reason that the uncertainty created by a lack of regulatory oversight and the NSW Government's unwillingness for the Port lessee to be subjected to any pricing oversight or regulation in relation to channel access charges is likely to adversely affect competition in relevant upstream and downstream markets. It is important to consider the attached Synergies Report (**Annexure G**) having regard to this discussion.

8.4 The future with declaration

With declaration of the Service, users and market participants will be assured that access to the Port will be made available on reasonable terms and conditions for the term of the declaration. This would be supported by a legal right of access and statutory opportunity to seek arbitration before the ACCC in the event of a dispute that is not able to be resolved by negotiation.

The recourse to arbitration would be available in relation to PNO's terms and conditions of access, including price. This will ensure that the resulting terms and conditions, including price, are reasonable, which was reflected in the significantly lower access charges imposed by PNO when the Port and relevant service was declared following Tribunal Determination No.1.

Reasonable terms and conditions for access to the Service should include prices that are aligned with the efficient cost of providing the Service. In a future with declaration, PNO would be subject to regulatory and statutory constraints where it would need to ensure that its terms and conditions are in line with the objectives and pricing principles of Part IIIA of the Act. This is particularly critical in circumstances

[41] See QCA Final Recommendation, Part B – Queensland Rail declaration review, March 2020 at Appendix A, page 214. See: https://www.qca.org.au/wp-content/uploads/2019/05/declaration-reviews-final-recommendations-part-b_-queensland-rail-service.pdf .

where in the absence of declaration, PNO has demonstrated that it can and will impose significant increases in its pricing despite there being no changes to the nature or quality of services provided.[42]

Accordingly, in the view of NSWMC, given the significant sunk costs involved in acquiring and developing a mine, the uncertainty as to the pricing that will apply going forward is likely to give rise to the risk of hold-up. In particular, the risk of hold-up is likely to be sufficient to discourage users from entering the development stage tenements market.

The funding of a new mine or an extension of an existing mine typically includes a significant proportion of debt. The debt is typically provided by a syndicate of domestic and international banks. Without declaration, the uncertainty and risk arising from PNO's unfettered ability to increase Port charges will negatively impact the ability of mine owners to raise capital and/or increase the cost of capital.

Declaration would thereby largely reduce the risk of hold-up and reduce impediments/risks to funding, and as such, access (or increased access) as a result of declaration of the Service at the Port would promote a material increase in competition in the development stage tenements market (and specialist services market).

In particular, declaration would ensure that users have a right to access the Service on reasonable terms and conditions, which not only should involve charges that are substantially lower than PNO's current tariffs, but which will also provide confidence that future increases in charges will be constrained. Such reasonable terms and conditions would not pass on all risks to Port users as the following sections now discuss.

Annexure G is an economic report from economics consultancy firm Synergies, which sets out their economic analysis supporting this application.

9. Promotion of material increase in competition

9.1 The statutory test

The statutory test under section 44CA(1)(a) of the Act is 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 at least one market (whether or not in Australia), other than the market for the service*".

The Applicants note that the wording of this statutory test in its current form has not been judicially considered to date. Nevertheless, the statutory test involves a consideration of the counterfactual, taking into account whether there is an existing entitlement or legal right to access.

Presently, there is no entitlement or legal right to access the Service,[43] and it is only through declaration that users of the Port would have such a legal right or entitlement to use the Service on reasonable terms and conditions. Given this, access to the Service, on reasonable terms and conditions, as a result of declaration would surely promote a material increase in competition in a dependent market.

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42 For example, it increased the NSC by 33.5% from 2019 to 2020.

43 *Port of Newcastle Operations Pty Ltd v The Australian Competition Tribunal* [2017] FCAFC 124, [88].

The statutory test for criterion (a) focuses upon the competitive impact of access (or increased access), on reasonable terms and conditions, with declaration, in dependent markets. Relevantly, this is not just a focus on price, but on overall terms and conditions of access.

Moreover, unlike the position with Glencore's application to the Council in 2015, this application is being made in circumstances where following the Council recommendation, the declaration has been revoked and PNO has implemented new terms and conditions from 1 January 2020. PNO's new terms and conditions, particularly when contrasted with Glencore's terms and conditions of access obtained under the declaration from the ACCC Determination, provide a unique ability to contrast PNO's terms and conditions of access with and without the declaration for the purposes of assessing against criterion (a).

NSWMC also believes that in the situation of declaration, the ACCC would approach any access dispute in a manner that would be very conscious of the issues associated with user funding. Noting that Tribunal Determination No. 2 did not necessarily reflect the previously well accepted precedent on the treatment of contributed assets and that this decision is currently subject to appeal, NSWMC believes that PNO would not be able to include user funded expenditure in the regulated asset base as it is now seeking to do.

9.2 **The Council's approach to section 44CA(1)(a)**

As noted above, the Applicant submits that there has been no substantive change to the statutory test for criterion (a). However, even if the Council were to adopt a narrower approach as to the right of access users currently have and the analysis of the counterfactual, declaration will still promote a material increase in competition in dependent markets.

As explained in further detail below, following revocation of declaration, users of the Service no longer have a right of access to the Service on reasonable terms and conditions, which was a concern expressed by Port users to the Council, in relation to its consideration of whether to revoke declaration of the relevant Service. The reality that has transpired following revocation of declaration is that PNO has leveraged its market power to maximise and protect its own commercial interests, in particular, its interest in increasing its profitability. While it may not have the direct incentive to adversely affect competition, the terms and conditions that it has unilaterally imposed on users are not reasonable and have real world detrimental impacts on competition in dependent markets as explained above.

The Council acknowledged in its Revocation Recommendation that access prices for users of the Service would, in the long-term likely be more certain in a future with declaration of the Service, but that in the Council's view this may only have an effect at the "margin" on some decisions regarding future investment in the Newcastle catchment.

A key part of the basis for the Council's view of the impact on competition being at the "margin" however would appear to be that PNO did not have an incentive to adversely affect competition. Further, the Council's analysis was naturally prior to PNO's changes to its access terms and conditions that were effective from 1 January 2020, such that the Council did not have the benefit of assessing the impact on future investment that may arise based on actual changed terms and conditions. In particular, it did not have the benefit of observing PNO imposing these changed conditions without consulting substantively with industry or being willing to do so under a collective bargaining arrangement authorised by the ACCC. Nonetheless,

looking backwards, the Council's analysis suggested that the impact of the revocation would be:

"(*a) Minimal given charges at the Port are likely to remain a small proportion of international spot prices for coal with and without declaration of the Service. Further, charges for the Service are likely to remain a small proportion of the average margins earned by coal miners above their production costs in a future with or without declaration of the Service*

(b) Tempered by the incentive PNO would have not to materially reduce mining activity in the Newcastle catchment for the reasons expressed … above

(c) Potentially able to be mitigated to some extent by users seeking to enter long-term contracts with PNO regarding the size of future Navigation Service Charges prior to making investments

(d) Unlikely in any case to materially affect competition in the otherwise effectively competitive coal export market"[44]

We now address the Council's previous analysis.

The Council's Revocation Recommendation appears to have largely proceeded on the reasoning that PNO would have commercial incentives not to increase prices at the Port in such a manner that would dissuade investment in mine development and competition in the coal tenements market. On that basis the Council was not persuaded that the continuation of the declaration would promote a material increase in competition in at least one dependent market.

NSWMC is unclear how the Council formed a view that PNO would have any focus on competition in the manner the Council predicated because as a monopoly infrastructure operator, PNO would have been expected to simply seek to maximise its returns. Further, what we have seen since revocation of the declaration of the Port is PNO taking advantage of its monopoly position by increasing its charges, in this instance rationalising this by incorporating user funded expenditures in its asset base for pricing purposes, even though it would appear to accept that it did not in fact pay for those expenditures itself. That is, in the absence of any constraint imposed by declaration, PNO has simply "appropriated" the industry's expenditure *because it can do so*. While in this instance, PNO has appropriated user funded expenditure within an otherwise conventional building block calculation of total revenue, it is important to recognise that there is no obligation on PNO to maintain this methodology, and it will continue to have the ability to appropriate a greater share of the gains from trade between the parties, simply because it can do so.

With this in mind in relation to criterion (a), NSWMC will now turn to focus on what we believe would be the alternative terms and conditions of access if declaration was imposed, and then the nature of the impact of those terms.

We believe that the counterfactual with declaration would see different terms and conditions to those now offered by PNO, with the terms offered under a declaration being far more reasonable. For example:

a. we believe the pricing to access the Service would be more consistent with that found in the ACCC Determination. In particular, PNO would not have

[44] Revocation Recommendation, [7.229].

sought to effectively double charge the mining industry by including both return on and return of the mining industry's expenditure on channel dredging;

b. we believe that the terms and conditions of access would be different to those proposed by PNO in the Deed, Producer Deed, and Vessel Agent Deed, namely:

    i. that PNO would be subject to the same situation as any other company in Australia if tax or any other laws changed, rather than seeking to pass on any and all negative impacts those changes to the users of the Port because they have no alternative to the Port;

    ii. that PNO would not seek to impose a provision that kept the shareholders in PNO harmless from any "material" changes in the operating environment at the Port to the detriment of the mining industry users of the Port. The provision seeks to allow PNO to increase charges to maintain the rate of equity return for those shareholders regardless of external events (such as a downturn in the demand for coal) and possibly even internal (to PNO) events;

    iii. there would be transparency in how PNO made further investments in the Port to ensure that the Port users are not being overcharged for costs that were inefficient, unjustified or not related to coal export;

    iv. there would not be an over-reach by PNO as to the data it required exporters to provide on the nature of their cargoes or destinations, as that information is strategic, sensitive and not necessary for PNO to charge fees based on tonnages.

NSWMC notes that the above terms and conditions proposed by PNO for the 10 year pricing arrangement were only imposed on users by PNO post-revocation of the declaration of the Port, and do not appear to be provisions that PNO sought in the terms and conditions of access before the ACCC in the Glencore / PNO arbitration. As noted by the Queensland Treasurer in relation to the QCA declaration review of the Dalrymple Bay Coal Terminal (**DBCT**) service, the Deed Poll and Access Framework proposed by the monopoly infrastructure operator (i.e. DBCTM) in relation to the DBCT service, either alone or in combination with the threat of declaration, were not sufficient to constrain DBCTM's ability and incentive to exercise market power. This is primarily for the following reasons:[45]

a. the access environment under the DBCT Deed Poll would be less favourable for users compared to access under declaration given the uncertainty about potential amendments to the DBCT Access Framework, and about aspects of enforcement of the Deed Poll, because there would be no independent regulator to monitor access arrangements and enforce compliance;

b. as to uncertainty arising from the ability to amend the DBCT Access Framework:

    i. the restrictions on DBCTM's ability to amend the Deed Poll and Access Framework are relatively weak, given the wide discretion it has to make amendments on the non-pricing terms which may have a

[45] Extraordinary Queensland Government Gazette No. 31, 1 June 2020, p279-280. See: https://www.publications.qld.gov.au/dataset/extraordinary-gazettes-june-2020/resource/9c57ea19-3f3f-4650-8836-6ff45f1a9439 .

cumulative impact, and the lack of remedies (other than litigation) available to affected individual stakeholders. As a result, the Deed Poll and Access Framework provide little certainty as to the future terms of access;

ii. while the amendment provisions adopt similar language to the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**), in a future with declaration an independent regulator weighs the various considerations and determines whether amendments to access arrangements are appropriate, whereas under the Deed Poll, DBCTM determines what amendments are appropriate and this decision is then subject to court proceedings;

iii. given the scope of the mandatory considerations in the amendment provisions in the Deed Poll, it may be difficult for a court to determine that a challenged amendment by DBCTM to the Access Framework is contrary to those provisions;

c. as to the limitations of the negotiation and arbitration procedures:

i. from the perspective of users of DBCT, referring a dispute to an arbitrator is inferior and materially different to the dispute resolution mechanisms under the QCA Act. The QCA as a 'known entity' can be relied on to be consistent and rigorous in its approach to determining access matters;

ii. uncertainty is likely to attend DBCTM's compliance with its obligations under the negotiation and arbitration provisions in the Deed Poll and Access Framework as they are highly reliant on potentially protracted and costly (bilateral) litigation and arbitration;

iii. there may be reluctance on the part of access seekers to commence arbitration due to information asymmetry, which prevents an access seeker from making an assessment of probable arbitration outcomes;

d. in a future without declaration, the QCA would no longer have the powers to monitor and enforce compliance with the Access Framework and would not be able to oversee amendments to the framework, determine the terms of access for users or resolve disputes, to the effect that the risk profile of users could increase in the absence of such oversight. Further, the ability of users to challenge DBCTM amendments to the Deed Poll and Access Framework or other compliance and enforcement issues under such a framework is not a credible threat to DBCTM.

In the following sections, we consider similar key provisions in the deeds proposed by PNO to demonstrate how they are unreasonable, would not have been imposed in an environment "with" the declaration, and are not sufficient to constrain PNO's ability and incentive to exercise market power for the duration of the proposed deed(s) and beyond. While we note that the Deed has been superseded by the Producer Deed (and the Vessel Agent Deed), the drafting of the Deed is illustrative of PNO's commercial intentions behind its proposed pricing arrangement.

9.3 Inclusion of user funded expenditure in Initial Capital Base of the Port

NSWMC sees no justification for the Port being able to include the $912 million user funded expenditure in the "Initial Capital Base" that is defined in the Deed. It appears

to have been included simply on the basis that it has been used as part of the DORC methodology used by PNO in calculating its asset base rather than on any basis that the amount was actually expended by PNO. This is artificial to say the least.

Irrespective of the outcome of the appeals by Glencore and the ACCC of Tribunal Determination No. 2, there is no factual dispute that PNO did not make that expenditure and therefore PNO should not be allowed to charge for it through the inclusion of such capital expenditure in its Initial Capital Base.

Whilst the actual DORC methodology that was used in the ACCC arbitration and Tribunal No. 2 Determination is the subject of some dispute, NSWMC submits that if the Port was declared once again, an alternative valuation model is likely to not include what has been acknowledged by PNO as expenditure they have not undertaken. Given the magnitude of the difference (i.e. 43c per tonne) we believe that this pricing would materially incentivise and increase investment in the Hunter Valley region in the relevant markets identified in the sections below.

9.4 Material adverse change clause in Deed

The Deed includes very vague and general provisions dealing with material adverse change events for PNO's shareholders. It is unclear what these changes could encompass but again in an environment of an access arbitration administered by the ACCC, it is unlikely that the ACCC would permit all material adverse risks to be passed on to users, to hold PNO's shareholders harmless from any commercial risks. For example, if there is a global economic downturn and associated reduction in coal demand, the Deed seeks to allow PNO to increases charges to hold itself harmless from any of the external events on a global basis.

While the wording in the Producer Deed "waters down" the express reference to material adverse changes and changes to taxes and laws, it nevertheless gives PNO the ability to increase the charges where the proposed increase is more than 5% and the increased charges are consistent with the "Pricing Principles", which are skewed in PNO's favour.[46] In effect, PNO still has the ability pass on the adverse effects of certain commercial events or shifts in the regulatory landscape to users of the Port, such that it is still able to leverage its position as the infrastructure monopolist to shield its shareholders from these material adverse changes.

<u>With declaration an independent arbitration by the ACCC would not allow PNO to pass on the full impact of any changes in tax or other laws by imposing unreasonable terms and conditions on users</u>

In an ordinary commercial situation, there would not be an ability for an infrastructure monopolist to transfer all the tax risk ordinarily faced by a company to the users of its facilities. This creates an unknown and significant risk to users of unquantifiable future charges that could arise. For example, if the Government clarified tax laws which had different tax consequences for PNO's shareholders, it is inappropriate that they are passed on to the mining industry. Such transfer of risk to users is possible on the basis of PNO's ability and incentive to exercise market power, in the absence of declaration.

With declaration, arbitration of access dispute would be conducted by the ACCC rigorously and with a consistent approach to applying the statutory pricing principles, as opposed to the approach contemplated by PNO under the contractual framework

[46] See Annexure to the Producer Deed, clause 7(b).

whereby a set of pricing principles are to be applied by mediator(s),[47] who may not have the same ability to compel the production of information to address the information asymmetry faced by users of the Port.

9.5 Promotion of material increase in competition through declaration

NSWMC believes that in the counterfactual situation of the Port operating subject to declaration, there would be constraints placed on PNO to act reasonably in relation to the terms and conditions it imposes and / or because of the access terms and conditions that would be imposed by the ACCC under an independent arbitration determination (for example as obtained by Glencore). In particular, in a scenario of PNO operating under a declaration, NSWMC believes that PNO would not enjoy the ability to act in an unconstrained manner and force users of the Port to take on all of the commercial risks that arise in the mining industry, as well as risks that arise for all companies such as changes in tax or other laws.

The new terms and conditions imposed by PNO highlight the inability of the mining industry to be able to balance or address the risks in dealing with PNO in any reasonable manner. These terms and conditions imposed by PNO create long term uncertainty as to the pricing and other terms and conditions of access at the Port, which mean that any user would rationally be hesitant in investing in the greater Hunter Valley region when there can be no meaningful ability to manage the costs imposed on them by PNO.

The Treasurer has recently indicated in a speech to the Business Council of Australia that businesses should be willing to accept lower rates of return in their investments and expansions, and has encouraged businesses to invest.[48] Mining investments require significant initial expenditure which is then typically the subject of returns over a 30 year period. In these circumstances, the terms and conditions which PNO is imposing make it clear that there can be no certainty on what impact these terms and conditions will have upon returns for any mining company that invests in the greater Hunter Valley region.

Accordingly, while PNO has sought to put in place a ten year pricing offer (i.e. the Deed / Producer Deed / Vessel Agent Deed), in reality, those new terms and conditions provide no certainty for future investment and pose no meaningful long term constraint on PNO. In the absence of this certainty, there is likely to be less investment in the Hunter Valley which will detrimentally affect markets in Australia as well as our export of thermal coal through the Port.

Given this, declaration (and the constraints that flow from declaration) would promote a material increase in competition compared to the present situation where users have no access to the Service on reasonable terms and conditions and investment is being impacted in the Hunter Valley region, as discussed further in the next section.

9.6 The revocation of the declaration and ensuing price increases (again with no meaningful consultation) on the basis of user funded expenditure highlight

[47] See for example, Schedule 3, [4.2] of the Producer Deed.

[48] See: https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/speeches/address-business-council-australia .

that PNO has an unfettered ability to increase prices and chill investment in the Hunter Valley

PNO's actions post-revocation provide an instructive counterfactual

As rightly predicted by Synergies in its report which was submitted to the Council in August 2018 together with Glencore's submission,[49] following revocation of the declaration of the Port in 2019:

- PNO has materially increased access prices at the Port, once again demonstrating its propensity to unilaterally materially increase prices without regard for industry circumstances;
- this will lead to reduced investor confidence and higher cost of capital for new coal mining projects in the Newcastle catchment area; and
- smaller coal producers or producers with relatively high marginal costs in the Newcastle catchment areas have been most affected.

In considering whether to recommend revocation to the Minister of the relevant service in July 2019, the Council noted the following as reasons as to why section 44CA(1)(a) of the Act was not satisfied:

- it is not enough to find that PNO has market power or operates a "bottleneck" facility in order to be satisfied that declaration of the Service satisfies the statutory criteria set out in Part IIIA of the Act;
- PNO is not vertically integrated in any meaningful way into any relevant markets related to coal export activity, and as such is unlikely to have an incentive to deny access to firms operating in related markets or to provide access on terms and conditions that inhibit the ability of different users of the Service to compete against each other on their merits in these markets.[50]

The Council therefore acknowledged that the Port is a bottleneck facility and businesses wishing to export coal from the Newcastle catchment must use the Service if they wish to export into overseas coal markets – i.e. PNO is not constrained by the existence of an alternative port option that its coal customers can use.

However, there were other factors that the Council previously considered would likely act as a constraint on PNO in setting the terms and conditions of access in a future without declaration of the Service, being that:

- the 98-year lease PNO signed as part of the privatization in 2014 incentivizes PNO to act in a way that has regard to its ability to maximise its expected profits over the term of the lease;
- PNO is competing to attract mining activity to the Newcastle catchment and that charging excessively high prices for the Service is likely to increase the incentive for some potential future miners to invest in other activities in other parts of Australia or overseas, rather than in the Newcastle catchment;

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[49] Synergies Economic Consulting, Port of Newcastle – Assessment of revocation application by Port of Newcastle Operations, 8 August 2018, see: http://ncc.gov.au/images/uploads/Glencore_Coal_Pty_Ltd_-_Synergies_Report_-_8_August_2018.pdf .

[50] Revocation Recommendation, [1.6]-[1.7].

- the NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets or otherwise harm the public interest (whether such intervention be via the terms of PNO's lease, under the terms of the *PAMA Act* or by introducing new statutory restrictions).[51]

The reality that has transpired since revocation of declaration of the relevant service in September 2019 is that the factors the Council had expected to constrain PNO in its pricing and offering reasonable terms and conditions of access to the Port, have not been effective. The Council had predicted that the consequence of these constraining factors was that it was "*likely (but not certain) that charges for the Service will be higher in a future without declaration of the Service, although it is unclear precisely how much higher (if at all).*"[52]

Since that time, PNO has released its Schedule of Charges for 2020 and the Deed / Producer Deed / Vessel Agent Deed, which all reflect material increases in access prices.

Moreover, the Applicant notes that the NSW Government has made no intervention in relation to PNO's setting of new terms and conditions in relation to the Service and as noted earlier in this application, IPART has no power to set prices for PNO. It is also not clear what was meant by the Council's comment that PNO is incentivized to recover over the term of the 98-year lease. It would seem while that is true, PNO is equally (if not more) incentivised to recover as much as possible during that period. That could also mean being incentivized to charge the coal industry as much as possible at this time while there is a high confidence in the volume of coal exports.

Further, as to the Council's views that PNO would not charge excessively so as to discourage investment by mining companies, it would appear that PNO has no such concerns as to mining companies who are already within the Hunter Valley region (and have no alternative means to export their coal) or those who may consider investing in the Hunter Valley. Appropriating the mining companies' past expenditure into PNO's asset base without any qualms would surely be viewed by any investor in the Hunter Valley region as a disincentive to invest, because it demonstrates unfettered infrastructure power. We now consider this in more detail.

<u>Port users are paying twice for same assets under PNO's terms of access</u>

At the time of the Council making its recommendation to the Minister to revoke the declaration in July 2019, the Tribunal had not yet issued its determination in relation to whether or not user-funded assets ought to be included in the calculation of PNO's initial regulated asset base (i.e. Tribunal Determination No. 2).

In the decades prior to the privatisation of the Port in May 2014, the users contributed very significant sums to the State of NSW to develop the port assets and infrastructure. Such user funded contributions were accepted by the ACCC to amount to $912 million.[53]

As noted in the ACCC Determination, there were two major tranches of user funded works, being the Harbour Deepening Project (1977-83) and the South Arm channel and berth pocket dredging (primarily 1989-2010) that included development works of

51 Revocation Recommendation, [1.9]

52 Revocation Recommendation, [1.11].

53 ACCC Determination, p. 136.

channel dredging, land reclamation, wharf construction and terminal development, as well as a number of comparatively smaller user funded works.

User funded contributions to assets have increased the Port's capacity significantly. Notably, the Port assets that were developed through user funded contributions are perpetual assets (i.e. channel and berth boxes, riverwalls and revetments), and so continue to provide value to users in perpetuity.

The increase in the channel and berthing charges at the Port in November / December 2019 reflects the inclusion of the $912million user funded assets to PNO's asset base. Moreover, such price increases are not mitigated by the alternative 10-year pricing deal set out in the Deed, as considered in more detail below. The Deed not only requires that users explicitly agree that PNO has an entitlement to earn a return on these user funded assets in its prices, but further that PNO has an entitlement to recover the capital value of these perpetual assets in its prices, contrary to the requirements of Tribunal Determination No.2.

It is noted that Glencore and the ACCC have challenged Tribunal Determination No. 2 as to *inter alia* whether user funding can be included in the asset base. However, as a practical matter, any price adjustments / impact would be confined to Glencore, and not to other users of the Port who face the same issues in relation to material increases in PNO's pricing, given that declaration of the relevant service was revoked in September 2019.

Long term contracts are not practically viable

As noted above, PNO has materially increased prices since taking over as the Port operator in 2014. By way of example, the price increase over the short period from 2019 to 2020 in relation to the NSC was 33.5%. In December 2019, PNO released its price schedule for 2020 which purported to offer users with a "long term" pricing offer under the Deed. The Deed offered "discounted" rates of $0.8121 per gross tonne in relation to the NSC, and $0.0802 per gross tonne in relation to the WC, for an initial term of 10 years.[54]

However, the pricing mechanism set out under the Deed does not actually provide users with pricing certainty. As noted above, the Producer Deed and Vessel Agent Deed similarly empower PNO to unilaterally vary the access charges. While the Deed has been superseded by the Producer Deed and Vessel Agent Deed, this section nevertheless sets out the relevant parts of the Deed, as the drafting reveals PNO's commercial intentions behind this 10-year pricing arrangement.

These deeds provide PNO with a number of "re-openers" and mechanisms by which it may adjust the price for use of the Port based on factors that are not detailed and based on capital expenditure that is solely within the determination of PNO. NSWMC also believes that the Deed (and similarly the Producer Deed / Vessel Agent Deed) provides very unclear mechanisms for users to ascertain the data needed to understand such changes or to dispute those charges.

[54] The Producer Deed and Vessel Agent Deed similarly impose this charge.

Item 6 of the annexure to the Deed relevantly provides that the "*Covered Vessel Specific Charges will not be varied by PON during the Initial Term, except for the following variations:*

(a) *Annual Adjustment*

At the beginning of each Contract Year (other than the beginning of the first Contract Year) (each an Adjustment Date) each Covered Vessel Specific Charge will be adjusted to the amount which is the greater of Amount A and Amount B, where

$$\textbf{Amount A} = C_1 + (C_1 \times 4\%)$$

$$\textbf{Amount B} = \left\{C_1 \times \frac{\textbf{Current CPI}}{\textbf{Previous CPI}}\right\}$$

Where:

C_1 is the amount of the relevant Covered Vessel Specific Charge (excluding GST) immediately before the Adjustment Date

CPI means the consumer price index number published by the Australian Statistician for Australia-All Groups

Current CPI means the CPI for the quarter ending 30 September in the calendar year immediately preceding the Adjustment Date (**Current Contract Year**)

Previous CPI means the CPI for the quarter ending 30 September in the calendar year immediately before the Current Contract Year

(b) *Change in Tax or law*

If during the Initial Term there is a change in any Tax (including any new Tax) or a change in any law (including any new law) which:

(i) *PON pays or bears, or is required to pay or bear; or*

(ii) *will result in PON bearing increased costs or being able to recover less revenue, PON may vary the Covered Vessel Specific Charges to pass through the net effect of such changes on PON's costs or revenue in accordance with the Pricing Principles*

(c) *Material change event*

On the occurrence of any material change during the Initial Term which will:

(i) *increase the costs (including operating and capital expenditure costs) to PON of providing the Vessel Services; or*

(ii) *reduce the equity rate of return (ERR) for the equity investors in PON, PON may increase the Covered Vessel Specific Charges to recover*

the additional costs or to sustain the ERR in accordance with the Pricing Principles

(d) *Capex investment*

PON may increase the Covered Vessel Specific Charges at the end of each of each Contract Year to provide for a reasonable rate of return on any capital expenditure incurred by PON during the applicable Contract Year in accordance with the Pricing Principles." (emphasis added).

Similarly, item 7 of the Producer Deed provides that:

"(b) Other variations

PON may increase the Producer Specific Charges in addition to the basis set out in Item 7(a) where each of the following requirements is met:

(i) *where any such increase is Material; and*

(ii) *the increased Producer Specific Charges are consistent with the Pricing Principles.*

(c) Capex transparency

(i) *Without affecting PON's rights under paragraph 7(b), in order to provide the Producer with visibility of and the opportunity to comment on any prospective increases in the Producer Specific Charges on account of capital expenditure proposed to be incurred by PON, not later than 31 March 2020 PON will prepare and provide to the Producer a forward looking 5 year forecast (covering the period 1 January 2020 to 31 December 2024) of its projected capital expenditure that may impact the Producer Specific Charges and meet with the Producer to discuss those forecasts and any potential associated variations to the Producer Specific Charges. PON will update this 5 Year CAPEX Forecast annually on a rolling 5 year basis by no later than 31 March each following Contract Year and will meet with the Producer to discuss each such updated 5 Year CAPEX Forecast. For the avoidance of doubt, PON may, but is not obliged to, implement any comments made by the Producer on its 5 Year CAPEX Forecasts or any proposed increase to the Producer Specific Charges.*

(ii) *The operation of Item 8 and Item 9 of this Deed with respect to resolving a Dispute following a Price Variation Objection Notice concerning a Notified Price Change are unaffected by the terms of, and any communications which may occur between the parties pursuant to, this Item 7(c)."*[55]

NSWMC is concerned that not only does the Deed / Producer Deed include user-funded contributions, it is subject to the re-openers as set out above which, while making the initial pricing superficially more attractive compared to the terms otherwise being offered in its 2020 Schedule of Pricing (Annexure E), make it more

[55] Item 7, Annexure to Producer Deed. These provisions are mirrored in Item 7 of the Annexure to the Vessel Agent Deed.

likely to be illusory in reality and a dampener on investment and competition in the relevant markets.

9.7 **Declaration would promote material increase in competition in a number of dependent markets**

As noted above, with declaration, market participants may be assured that access to the Port will be made available on reasonable terms and conditions for the term of the declaration. Not only has this not been made available by PNO to users under the current terms of access, given PNO's incentive to maximise profits and the lack of any pricing constraint in the absence of declaration, this is unlikely to occur in future.

The Council previously considered that declaration would not promote a material increase in competition in dependent markets for the following reasons:

- the coal export market is already likely to be effectively competitive such that declaration is unlikely to promote a material increase in competition in this market;

- the market(s) for coal tenements is "derivative" of the coal export market, and competition is unlikely to be materially promoted by declaration of the Service. The Council drew a distinction between the possibility of higher prices in a future without declaration of the Service lessening the value to firms contemplating exploring / mining coal in the Newcastle catchment, and competition for tenements between prospective explorers / miners being greater in a future with declaration of the Service. Given PNO's practice in transparently applying uniform prices through its pricing schedule, the Council considered that prospective explorers / miners would still be able to compete on their respective merits for tenements in a future without declaration of the Service;

- PNO is not vertically integrated into the provision of container shipping services in any meaningful way that would make it likely to discriminate against any rivals in markets for these services.[56]

<u>The relevant dependent markets</u>

NSWMC submits that declaration of the Service would promote a material increase in competition in a number of dependent markets. 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 (**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**);

[56] Revocation Recommendation, [1.13].

(e) market for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port are a part (the **Bulk Shipping Market**).[57]

Section 44G of the Act provides that the Council cannot recommend that a service be declared unless it is satisfied of all of the declaration criteria for the service. The Council accepted in the Revocation Recommendation that some of the declaration criteria set out in section 44CA of the Act are satisfied (being section 44CA(1)(b) and (c)), but was of the view that the declaration criterion described in subsection 44CA(1)(a) was not satisfied. The Council considered that the Minister could reasonably conclude that section 44CA(1)(d) was not satisfied.

Relevantly, section 44CA(1) provides that the declaration criteria for a service includes:

"(a) 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…" (i.e. criterion (a)).

In the Revocation Recommendation, the Council considered that the dependent markets relevant to its assessment of criterion (a) were the Coal Export Market, the Tenements Market, and the Container Port Market.[58]

The Council noted that given criterion (a) could not be satisfied, the Council therefore considered that the Minister could not be satisfied of all the declaration criteria and having regard to the objects of Part IIIA, it recommended revocation of the declaration. The NSWMC is unclear as to why the Council only focused on the Tenements Market and the Container Port Market, with no real (substantive) re-examination of the Specialist Services Market. This is because if there was a substantive increase in competition in the Tenements Market, then it is likely that there would have been a similarly positive increase in competition in the Specialist Services Market.

As such, the following section considers whether access (or increased access) on reasonable terms and conditions as a result of declaration would promote competition by improving the opportunities and environment for competition in a dependent market so as to promote materially more competitive outcomes. In this matter we look at the relevant dependent upstream and downstream markets in the coal supply chain, focusing in particular on the Tenements Market.[59]

9.8 Background on the Tenements Market

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.[60] In

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57 Revocation Recommendation, [7.172].

58 The Council noted that PNO had expressed its intention to develop a dedicated container terminal at the Port which the Council considered could significantly impact east coast containerised freight markets and as such, considered it appropriate to have regard to a "container port market" as an additional discrete dependent market.

59 As noted at [11.6] of Revocation Recommendation, the Council was satisfied that criterion (b) in subsection 44CA(1)(b) was satisfied, and similarly criterion (c) in subsection 44CA(1)(c) was satisfied. In relation to criterion (d), the Council considered it possible that declaration would generate some marginal improvement in the efficient use of and investment in relevant infrastructure. Consideration of criterion (d) is set out later in this application.

60 Revocation Recommendation, [7.240].

NSW, all exploration and mining activity must be conducted in accordance with an authority issued under the *Mining Act 1992 (NSW).*

Following reforms to the processes for allocating exploration licences, the whole state of NSW was declared a "controlled release area" for coal, and coal has been declared a "controlled release mineral". As well as abolishing direct allocation as a way of obtaining a coal exploration licence, the reform introduced two new ways of acquiring exploration licences from the Government:[61]

- 'Strategic Release' framework – this is overseen by an Advisory Body for Strategic Release which considers the potential release areas based on an Initial Resource Assessment, then a Preliminary Regional Issues Assessment, followed lastly by community consultation. The Advisory Body then makes a recommendation to the NSW Minister for Resources for an area to be released for exploration, who then decides whether to release the area for exploration. A single exploration licence may be issued for any given defined area. The company (if any) that receives the exploration licence for an area is decided by a blind auction process, with an undisclosed reserve price set by the Advisory Body. If the reserve price is met, then the highest bidder is recommended by the Advisory Body to the Minister for Resources, who will seek Cabinet endorsement for that company to be granted an exploration licence. As noted by the Council, no exploration licences have been made available through this framework since it was introduced in December 2015;[62]

- Operational Allocation – this framework allows existing companies that currently hold an exploration licence or mining lease to apply for an additional exploration title to avoid sterilization of resources, support better mine design or expand existing mining operations.[63]

Aside from acquiring exploration licences from the NSW Government, companies that hold exploration licences and / or mining leases may be acquired by operators with an interest in mining or exploring areas governed by those licences. 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 considerations of whether to declare the Service.[64]

Presently, potential acquirers of tenements in the Newcastle catchment face both significantly higher charges for the Service at the Port (e.g. the 33.5% increase in NSC from 2019 to 2020) and significant uncertainty in relation to future price increases that PNO may impose, whether it be on a yearly basis through its schedule of charges or via the pricing re-openers contained in the Producer Deed / Vessel Agent Deed, together with uncertainty over pricing terms after ten years.

Consequently, potential acquirers of tenements are either prepared to bid less for them or in the case of certain mining opportunities that are likely to involve higher costs, not be prepared to bid for them at all. This is particularly the case for the acquisition of development stage tenements, where users face greater uncertainty, asymmetry and higher access prices for the export of coal, compared to buyers of coal tenements in circumstances where the Port is declared.

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61 Revocation Recommendation, [7.243].

62 Revocation Recommendation, [7.244]-[7.246].

63 Revocation Recommendation, [7.250].

64 Revocation Recommendation, [7.254]-[7.255].

9.9 **Declaration will materially improve conditions for competition in the Tenements Market**

In its Revocation Recommendation, the Council considered the following when assessing whether declaration was likely to promote a material increase in the market(s) for tenements:

- characterization of the product and geographic dimensions of the market(s) for tenements relating to the Newcastle catchment;
- effectiveness of competition for tenements in the Newcastle catchment;
- nature of the "competition problem" and concerns as expressed by interested parties in relation to tenements in the Newcastle catchment;
- incentives PNO has with respect to competition in the market(s) for tenements in the Newcastle catchment;
- whether the relative level of (and certainty associated with) charges for the Service in a future with declaration of the Service was likely to lead to a material increase in competition in the market(s) for tenements in the Newcastle catchment, compared to a future without declaration of the Service.[65]

The Council concluded that it was unlikely that declaration of the Service would promote a material increase in competition in the market(s) for the tenements in the Newcastle catchment. In particular, it noted that:

- the secondary market(s) for tenements in the Newcastle catchment does not appear to be particularly fluid (i.e. the Council was not aware of frequent and regular trading of tenements or of interests in tenements on a day-to-day basis);[66]
- competition for individual tenements cannot be considered in isolation of competition in a broader tenements market;[67]
- PNO is not vertically integrated into the market(s) for tenements in the Newcastle catchment and has little incentive to deny access to potential investors contemplating bidding for tenements in the Newcastle catchment, but rather PNO has a commercial incentive for the market(s) for tenements in the Newcastle catchment to be effectively competitive as this is likely to maximise demand (and hence profits) from providing the Service at any given price it charges;[68]
- a higher price for the Service does not equate to a lessening of competition for tenements – that is, while higher charges for the Service in a future without declaration may reduce the expected net present value of a mining project to which a tenement relates, provided that they are applied transparently and uniformly, this does not mean it would reduce the ability of individual miners to compete against each other for that tenement on their merits;[69]

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65 Revocation Recommendation, [7.297].
66 Revocation Recommendation, [7.321].
67 Revocation Recommendation, [7.323].
68 Revocation Recommendation, [7.325].
69 Revocation Recommendation, [7.331].

- a reduction in the number of bidders for a tenement does not equate to a lessening of competition for tenements.[70]

Relevantly, the Queensland Treasurer noted the QCA's views in relation to the DBCT service that:

- it is possible that the prospect of paying a higher charge may lessen the value of a tenement to a potential DBCT User. The QCA however considered that this does not necessarily mean that the absence of declaration would materially impact on the ability of new entrants to develop tenements into mining operations;

- as long as mining projects are expected to remain profitable, it is not evident that there would be a material difference in the investment decisions of potential DBCT users with or without declaration;

- the higher charge may merely have the effect of redistributing the economic surplus generated within a supply chain.

However, the Treasurer was not convinced by the focus of the QCA's analysis on profit margins, noting that:

- "*given the significant sunk costs involved in acquiring and developing a mine, the uncertainty for New Users as to the pricing that will apply after 2030 is likely to give rise to concerns on the part of those New Users about the risk of hold-up*";

- the risk of hold-up for "*New Users is sufficient to discourage New Users from entering the development stage tenements market*";

- the presence of hold-up risk for "*New Users is likely to create a further asymmetry in the market. This is because for Existing Users, the evergreen nature of their existing user agreements (including the pricing provisions) mean that they do not face the risk of hold-up in respect of capacity governed by those existing user agreements. To the extent that Existing Users have spare capacity under their user agreements which they can apply to a new tenement, this will provide those Existing Users with a risk (and hence cost) advantage over New Users when competing for the acquisition of tenements*".[71]

The Treasurer then rightly determined that declaration would remove this risk of hold-up for new users, or at least do so to an extent such that it would lead to access or increased access that would promote a material increase in competition.

Similarly, NSWMC considers that the pertinent question ought to be whether the pricing differential (i.e. the access price determined by the ACCC compared to the access price currently offered by PNO under the proposed deeds) is likely to cause buyers to assess a tenement as having a value materially below that assessed by existing holders of tenements / users of the Port.

Further, the Revocation Recommendation, in the face of smaller mining companies such as Malabar and Bloomfield raising concerns with the negative impact of revocation on their willingness to participate in auctions for tenements, and its

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70 Revocation Recommendation, [7.338].

71 Extraordinary Queensland Government Gazette No. 31, 1 June 2020, p. 296.

reference to the Tribunal's decision *in Re Telstra Corporation Ltd (No. 3)*[72] that the number of bidders does not necessarily equate to the impact on the level of competition, is trite competition analysis. Generally, the greater number of people willing to bid for something means that the level of competition will be higher. The Council has undertaken no analysis from a qualitative perspective of the likely impact in the face of actual hard evidence and submissions from the mining industry that an unconstrained PNO will be problematic for competition in the Tenements Market. In NSWMC's view, the Council's recommendation was based on a complete lack of evidence that justified its analysis in the face of hard evidence to the contrary.

Moreover, an analysis of the materiality of the NSC and the WC based on a percentage of the total sale price for the exported coal is not a determinative comparison given that the sale price of coal includes many different costs that are imposed on the coal producer that in aggregate affect the profit margin on the sale of a tonne of coal. Whilst the NSC component is a comparatively smaller proportion, the relevant issue is that it is a cost that is not avoidable and is a cost that is not able to be determined into the future with any certainty. In those circumstances, the ability for PNO to extract on an unfettered basis, materially increasing charges from users creates substantial uncertainty as to future returns for any investment. In particular, as Malabar indicates,[73] that uncertainty may affect the willingness to pay for future mining tenements and therefore competition in the Tenements Market is materially decreased in the absence of declaration.

The Council in the Revocation Recommendation also dismissed concerns as to the impact on competition by a revocation of the declaration, by considering that PNO had no incentive to decrease competition. However, NSWMC believes this view is misconceived as to its focus on PNO not being incentivised to reduce competition as opposed to being incentivised to maximise profits. That this focus was misconceived is supported by the commercial reality that has transpired following revocation of the declaration. This is because whilst PNO may have no incentive to decrease competition, it has every incentive to maximise profits and returns for its shareholders, the effect of which is to materially lessen competition in dependent markets and in particular, in the development stage tenements market.

In this matter, PNO's conduct post-revocation highlights that the Council's focus was misdirected because PNO did seek to increase returns for its shareholders post-revocation of the declaration of the Port in terms of:

(a) significantly increasing access charges; and

(b) imposing terms and conditions for long term access that held its shareholders harmless from all changes in the legal (tax and law changes) and business (material adverse change clauses) environment,

which is consistent with an infrastructure monopolist who has an incentive to maximise its returns without regard to the impact on competition this may cause.

NSWMC does not believe that Part IIIA of the Act requires applicants for declaration to prove that an infrastructure monopolist has a desire (or incentive) to adversely affect competition; the relevant question is whether its terms and conditions of access (including as to price) have such a material impact on competition in dependent markets. Just as many of the provisions of Part IV of the Act focus on an alternative of whether agreements or conduct have the "purpose" or "effect" of

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72 *Re Telstra Corporation Ltd (No. 3) [2007]* ACompT3 (***Re Telstra***), referred to in Revocation Recommendation, [7.338].

73 As noted at Revocation Recommendation, [7.291].

substantially lessening competition, NSWMC does not need to prove both. In this matter, the material impact on competition arises from the "effect" of PNO's conduct and that derives from PNO having unquestioned market power and the ability and incentive to use it, which it has shown by the inclusion of user funded expenditure in its asset base as well as the outright refusal to engage in any form of negotiation with NSWMC and its mining company members in the collective bargaining authorisation before the ACCC, particularly when the ACCC have found clear public benefits in doing so.

The reasons outlined for Council's views in Revocation Recommendation do not stand having regard to PNO's actions post-revocation

Turning to each of the Council's arguments in its Revocation Recommendation, NSWMC now briefly addresses why they are either not the case or even if they were what the Council stated, on closer examination and having particular regard to what has unfolded post revocation, they should not provide a basis as to why the Service should not be declared.

First, PNO has now clearly demonstrated that it has a commercial incentive and strategy to maximise its profits. For example, the material increases in price it has imposed subsequent to revocation from 2019 and 2020 (and indeed from 2014 when the Port was privatised) has shown that it has a clear commercial incentive and strategy in relation to the maximization of profits. The most effective way for it to maximise profits is by way of charging higher access prices, even if that were to occur at the expense of throughput volume (which is unlikely given the existence of take or pay agreements at the coal terminals at the Port). This is a completely rational strategy for an infrastructure monopolist and has nothing to do with their incentives or views on competition. Hence NSWMC believes that the Council's perspectives on the PNO's incentives in relation to competition are beside the point. The impact on competition derives from PNO's incentives as an infrastructure monopolist to increase prices in order to maximise profits.

Similarly, while PNO is not vertically integrated into the Tenements Market(s) and may have no direct incentive to deny access to potential investors contemplating bidding for tenements in the Newcastle catchment, its pricing practices have the direct flow on effect in the Tenements Market(s), particularly the market for development stage tenements, of reducing the number of investors who could viably compete for tenements, and also the level of commercial interest in developing projects in that catchment area. Again, the commercial incentives for PNO to maximise profits has the effect of foreclosing entry to the Tenements Market(s), rather than an intention to do so.

The Council also suggested that the impact on the Tenements Market may be limited because of the illiquid nature of the secondary market. This Council view appears to be based on the number of possible participants in the market having regard to the Council's reliance on *Re Telstra*. However, NSWMC notes that the relevant question is as to the impact on the conditions of competition, rather than the number of participants, or individual or incremental sales of tenements (because each tenement involves very substantial development activity and investment stemming from the purchase, which would materially increase competition).

By analogy, the ACCC conducts very limited numbers of spectrum auctions for telephony services but each auction is subject to intense scrutiny by the ACCC as to the number of bidders and the outcome of those auctions. Similarly, the Council's focus on the number of auctions or subsequent secondary trades is not determinative

of the impact on competition. Instead, the conditions of competition should be determinative and NSWMC believes that in the absence of declaration, PNO's unfettered powers harm the conditions of competition which leads to a material decrease in competition in dependent markets.

The Council also countered the industry's submissions on the Tenements Market by indicating that individual tenements could not be considered in isolation from the broader tenements market or the coal export market, citing the NERA report for that proposition.[74] However, NSWMC questions that analysis for the following reasons:

(a) **it has been accepted that the relevant catchment area for the Port is the broader Hunter Valley region and therefore it is irrelevant to hypothesise that users could invest in other regions of Australia and that they therefore wouldn't be subject to the monopoly infrastructure power of PNO.** The Council has accepted that PNO enjoys an export monopoly in the Hunter Valley region for coal mined in the greater Hunter Valley region / Newcastle catchment. This application for declaration is in relation to the Port and in circumstances where the Council has acknowledged that the Port enjoys a monopoly position. NSWMC submits that it is not relevant in respect of the monopoly the Port has, as to whether there could be other mining tenements in other regions or States that have coal that could theoretically compete with coal from the Hunter Valley region. Coal from other mining tenements in other States or territories of Australia would not be exporting through the rail and coal terminal infrastructure that connect into the Port, and so are therefore irrelevant for consideration of whether the Port should be declared;

(b) **the Council's analysis ignores that there are existing coal miners who have expertise in the Hunter Valley region and have existing operations**. Their existing operations in the Hunter Valley region mean that they will have substantial sunk investments which as a practical matter mean that their operations are confined to the Hunter Valley region and can only viably export coal through the Port. NSWMC notes that the Council did not address the factual evidence from Bloomfield, Whitehaven and Malabar to that effect;

(c) **Thermal coal produced in the Hunter Valley region is not necessarily substitutable with coal from other regions of Australia.** There was no factual evidence before the Council that the coal exported from the Hunter Valley / Newcastle catchment is substitutable with coal exported from other regions of Australia. It is therefore not tenable for the Council to argue that a mining tenement in the Hunter Valley region is substitutable with a mining tenement located in say Queensland, as the nature of the coal and its characteristics is likely to be different.

Accordingly, NSWMC does not believe that the Council's views on the substitutability of coal tenements are correct and certainly do not ameliorate the impact of PNO's monopoly position on the Tenements Market(s) in the Hunter Valley region. In relation to the Council's views as to the market for the acquisition and disposal of exploration and/or mining authorities in relation to thermal coal in the Newcastle catchment area, in this application we have spent considerable time focusing on the development stage tenements market (i.e. a market where access terms are directly relevant to making long term investment decisions).

[74] Revocation Recommendation, [7.323].

Further, in relation to the Council's views on the geographic dimension of the market, it is difficult to reconcile the Council's view with its view in the Pilbara matter where the Council stated that '*Given that most iron ore tenements in the Pilbara are attractive only to parties with access to rail infrastructure in the Pilbara or parties that have reasonable prospects of being able to negotiate access to rail and port infrastructure in the Pilbara, they are substitutable only for other iron ore tenements in the Pilbara. Accordingly, the market for iron ore tenements is Pilbara-wide*'.[75] By the same logic, the geographic dimension of the tenement(s) market would be the Hunter Valley region.

Finally, the Council explicitly recognises that in the absence of declaration, it is most likely that prices for access to the Service will increase. The Council then seeks to justify that position on the basis that all bidders for the tenements will face the uniformly higher prices, and that this should not inhibit their ability to compete against each other on the merits of their own efficiencies.

Although a higher price may not always equate to a lessening of competition, it impacts materially on the attractiveness of mining / exploration projects (which as the Council rightly notes, may be reflected in a lower expected net present value of a mining project), which in turn drives competition down in the dependent Tenement Market. In other words, the incentives to invest are materially diminished in the face of prospective buyers having any future returns / profits eroded by PNO's increased prices for exporting coal through the Port. In any event, it is noted in addition to PNO having increased pricing for access to the Services, PNO has also engaged in price discrimination (something that the Council did not consider possible), and changed the nature of its contractual terms, resulting in a situation where users can no longer be confident of access prices being on uniform terms.

NSWMC submits that declaration will boost incentives for investments in exploration projects and materially increase competition in the Tenements Market(s) and in particular the tenements development market in several ways:

- owners of tenements will have increased incentive to invest in the exploration of their tenement, either for the purpose of developing the tenement itself or obtaining more information about the tenement to improve its prospective value;

- sellers will enjoy greater competition amongst buyers when selling their tenements, both due to the greater information available about tenements, as well as to the removal of a key area of uncertainty in relation to Port access prices, thereby driving price and activity in the Tenements Market;

- the NSW Government, as the originating seller of tenements, will benefit from increased competition in the bidding for licences, underpinned by pricing certainty in relation to Port access prices.

These matters are also canvassed in the Synergies Report.

9.10 **Declaration will also materially improve conditions for competition in the Specialist Services Market**

The Council did not previously examine this market, on the basis that it was a derivative market dependent on the impact on competition in the coal export market.

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[75] NCC, *Fortescue Metals Group Ltd – Application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the Trade Practices Act 1974,* Final Recommendation, March 2006, [7.81].

However, while NSWMC believes that the more relevant market is the Tenements Market(s), if competition is materially increased in the Tenements Market(s), this will have a positive flow-on market to the Specialist Services Market. This is because if there is increased demand for coal tenements as a result of lower access prices or more certain terms of access following declaration of the Service, then it is most likely that there will be increased demand for the specialist services involved in developing those mining tenements.

9.11 **Competition in the Coal Export Market**

The local impact of global coal market dynamics

The global market for seaborne coal is competitive with prices determined by international customers, producers, and traders. However, as price takers, local producers must absorb the costs associated with access to export infrastructure and transportation. As the coal price is derived from the interaction of supply and demand curves for the commodity, the current economic climate is significantly affected by the significantly decreased demand for coal and other minerals.

Australia's economy is heavily dependent on a competitive resources sector. The competitiveness of the Australian resources sector, and in particular the coal export market, is in turn heavily dependent on an efficient and cost competitive export supply chain and delivery of timely and coordinated (across the chain) export infrastructure. Ensuring efficient and effective regulation of export infrastructure is essential for reducing supply side impediments to exporting.

Recent Australian experience

Efficiency and commercial certainty in exporting has never been more important given the ongoing challenges to Australia's resource industries' international competitiveness, including in relation to significant supply side cost increases arising from labour, energy and transportation costs, taxation levels and royalty imposts.

Following the previous cyclical global coal price downturn there are currently fewer operating mines in the Hunter region than a decade ago. In relation of coal producers operating in the Hunter Valley region, the overriding consideration should be that in circumstances where there is practically only one supplier (of channel infrastructure) to multiple users, market forces cannot be relied upon to ensure that competition in mineral export markets is facilitated.

Importance of regulating export infrastructure to support export markets

Export infrastructure occupies a very strategic position in the mineral export industry by providing the essential services required to compete in the dependent seaborne markets.

NSWMC notes that the increase in the NSC was initially justified by PNO on the basis of robust predictions of increasing coal exports and a more profitable Hunter Valley coal industry as the Australian dollar fell. Considering the current economic climate and experience of Australian coal producers, such an optimistic basis for imposing additional costs was questionable at the time and no longer tenable.

In such market conditions, ongoing incremental cost increases at the margin may drive coal producers to exit the market. This has inevitable repercussions for related markets that support the coal export market. The uncertainty associated with the unfettered ability of PNO to set and increase prices compounds broader global

pressures, threatening the ability of Hunter Valley coal producers to compete within this market.

The Council's focus on the percentage of the export infrastructure costs compared to the export price for coal ignores both the total amount of infrastructure charges and PNO's unfettered ability to continue increasing access prices

PNO's pricing and proposed long term pricing offer (i.e. Producer / Vessel Agent Deed) post-revocation highlight PNO's incentive to improve its returns to shareholders, regardless of broader conditions in the industry. If volumes of coal exports were to decrease through the Port, then PNO is very likely going to increase the amount of access prices to hold their equity returns steady by treating this as a material change event under the proposed deeds. This means that the current pricing provides very little comfort for coal miners that the current proportion of access charges per tonne will stay the same.

For example, during the 2008 downturn, it was widely recognised that with coal prices of approximately USD $35-40 per tonne, some coal miners were not covering operating costs, so the relevant consideration is the proportion of that infrastructure charge on a particular coal miner and the financial implications for particular coal mining operations. Similarly, as outlined above, the recent falls prices for NSW thermal coal is exacerbated by the uncertainty created by the terms and conditions of access imposed by PNO, to such a degree that it may have a significant impact on the viability of mining operations and continued investment in the broader Hunter Valley region that export through the Port, as noted earlier in this application.

PNO has also indicated a desire to build a container terminal[76] but there is no certainty as to the expenditure that would be involved. It is very likely that the coal exporters may be forced to contribute to this terminal and associated dredging through increased access charges. The proposed deeds provide no certainty as to how this additional capital expenditure would be allocated, nor any ability for users / mining companies to obtain the construction cost information. While the Producer Deed / Vessel Agent Deed superficially look to address this information asymmetry by representing that PNO will prepare and provide a 5-year forecast of its projected capital expenditure that may impact the access charges and meet with the producer / vessel agent to discuss those variations, the deeds make clear that "*PON may, but is not obliged to, implement any comments made by the Producer on its 5 Year CAPEX Forecasts or any proposed increase to the Producer Specific Charges*". Also, the proposed deeds do not impose the obligation on PNO to respond to producers' information requests.

Moreover, in the absence of any declaration, users have no ability to seek to raise an access dispute to ascertain the breakup of those expenditures, and whether they were part of reasonable terms and conditions of access. For example, the user funded expenditure of approximately $912 million comprised substantially of channel dredging of the south arm. If the proposed container terminal required a similar dredging campaign then the expenditure would likely be similar to that of the coal terminal dredging. Hence, there is the high likelihood that this expenditure would be appropriated into PNO's Initial Capital Base just as the PWCS and NCIG coal terminal dredging campaigns have been, and imposed across all users of the Port, of whom are predominantly coal vessels.

[76] https://www.portofnewcastle.com.au/news/future-proof-port-of-newcastle-container-terminal/ .

9.12 **Declaration will materially improve conditions for competition in the Coal Export Market**

The various tiers and participants that make up the Hunter Valley Coal Chain (as outlined in section 3) demonstrates the complexity and inter-dependence of the industry that supports the coal export through the Port.

Declaring access to the port channel will address uncertainty and create conditions for improved competition from what they otherwise are should the status quo prevail. The right to negotiate will ensure that more reasonable and certain pricing is achieved as occurred under the ACCC Determination. Such reasonable costs or an ability to have reasonable costs determined may then be anticipated by producers and be projected into ongoing operation costs.

This will ensure the related markets to continue to remain competitive in supporting the coal export chain as well as ensuring their own viability (this is discussed in further detail in the foregoing).

9.13 **Declaration will materially improve conditions for competition in the Port Container Market**

NSWMC notes the Council considered the Port Container Market to be a relevant dependent market. The mining industry did not seek to raise significant competition concerns with the development of a new container terminal. However, NSWMC notes at [7.378] of the Revocation Recommendation that the Council considered PNO did not appear to be vertically integrated. NSWMC notes that CMPort is part of the China Merchants Group, and is a global port developer, investor and operator, with a ports network portfolio spanning across 18 countries and regions. China Merchants Group is one of the eight Level-A SOEs and as such, has indirect linkages with other Chinese shipping lines.[77] In those circumstances given that there is a degree of indirect vertical integration, declaration would assist in providing additional safeguards.

10. Development of another facility to provide the Service

10.1 Alternative channel facility at Newcastle

It has been recognised that it is practically impossible to develop another facility that would allow vessels to use the existing Port terminals at Newcastle without using the Facilities. As the Council would be aware, the existing coal terminals at the Port have been designed and constructed so as to be capable of loading vessels which approach using the channel – which we understand has been leased to PNO by the State of New South Wales. There is no route through any existing waterway which could be used to approach the existing coal terminals even with dredging activities.

As this issue does not appear to be in contention, we do not propose to deal with it in detail in this application.

[77] http://www.cmhk.com/main/a/2016/a26/a30448_30530.shtml .

11. National significance

11.1 Port of Newcastle

The Applicant believes that coal exports from the Port via the shipping channels are of national significance.

This is evidenced by the Port of Newcastle 2018 Trade Report, in that year, the Port handled 158.6 million tonnes of coal with a value of approximately $23.6 billion.[78]

11.2 NSW mining sector's economic contribution

The following information is taken from the NSW Minerals Council's Economic Impacts study and the recent NSW Government data.[79]The New South Wales mining industry employs more than 22,000 people in direct jobs and 89,000 people in indirect jobs and supports around 7,000 NSW businesses in the mining supply chain. Royalties from coal brought in approximately $2 billion in 2018-2019 to the State Government, which is used to fund public services and infrastructure that will deliver benefits for the people of NSW and other industries for many years to come. 85% of the coal mined in the State is exported, making it the State's most valuable commodity export.[80] The mining industry contributed $13.7 billion to the State last year.

In 2018/19, the Hunter mining sector directly supported 3,282 businesses; directly employed 13,347 people; paid $1.4 billion in wages and salaries; directly spent $4.0 billion on goods and services; paid $55.0 million to local government; and provided $4.0 million to 397 community groups. In total, about 19.1% of the Hunter Region's workforce was supported by mining. Mining made up 22.8% of Gross Regional Product, a total of $11.5 billion.

In light of the rising unemployment rate and increasing cost pressures on coal production, maintaining the mining industry's employment contribution in the broader Hunter Valley region is important to many local communities.

11.3 Coal export industry

The coal export industry is an important source of foreign earnings for Australia and a substantial contributor to the Australian economy. In 2019, coal accounted for $18 billion (77%) of NSW's merchandise export earnings.[81]

In 2018-19, coal was Australia's second most valuable export after iron ore and accounted for approximately 15% of Australian exports by value.[82]

Hence, the Applicant submits that the Facilities are of national significance.

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78 https://www.portofnewcastle.com.au/wp-content/uploads/2019/09/Trade-Report-2018.pdf .

79 https://www.resourcesandgeoscience.nsw.gov.au/__data/assets/pdf_file/0004/1236973/Strategic-Statement-on-Coal-Exploration-and-Mining-in-NSW.pdf .

80 https://www.business.nsw.gov.au/industry-sectors/industry-opportunities/mining-and-resources/coal/coal-in-nsw#:~:text=This%20was%20easily%20the%20State's,95%25%20of%20NSW%20coal%20exports.

81 https://www.dfat.gov.au/sites/default/files/state_by_country_and_sitc_pivot_table_2009_to_2019.xlsx .

82 https://www.dfat.gov.au/sites/default/files/trade-investment-glance-2020.pdf .

12. Method of access to the Service

12.1 Method of access

The Service is currently provided by PNO. The Applicant does not propose any changes to the current method of access to the Service.

12.2 Risks to human health and safety

Given that the Service is currently being provided in the manner in which the Applicant would propose it continue to be provided, it is not considered that any additional risk to human health or safety would arise through the declaration of the Service.

13. Existing regime in relation to access

13.1 Price monitoring scheme

Under Part 6 of the PMAA, a price monitoring scheme applies in respect of charges levied by PNO. Section 79 of the PMAA requires PNO as Port operator to publish a list of charges which includes the charges for the Service. Section 80 of the PMAA requires notification of price increases to the Minister and publication of those charges; the notice of the increase in the charge must include the basis of the charge's calculation and the reason for any change. Under section 82 of the PMAA the Minister may require the provision of information by the port operator. The Minister may publish reports and statements about the service charges based on the information that is provided by the port operator. The PMAA does not limit the charges that may be levied by PNO for the purpose of setting navigation service charges as defined in accordance with section 47 of the PMAA.

13.2 Not an effective access regime

The Applicant notes that the price monitoring scheme described above has not been certified as effective, and no application for certification has been proposed by the New South Wales Government to make it effective.

In particular, so far as the Applicant is aware:

(a) no provision has been made for an independent body to determine access disputes. Although the Minister might choose to refer matters to IPART to consider (but IPART has no power to enforce an outcome), an access seeker cannot do so;

(b) there is no provision for the negotiation of access agreements;

(c) no provision is made for any negotiation or arbitration process;

(d) no provision is made for separate accounting arrangements for the elements of the business which are covered by the access regime; and

(e) there is no provision restraining either the owner or user of the Facilities engaging in conduct for the purpose of hindering access by others.

NSWMC notes that PNO has recently put forward a long-term pricing offer (i.e. the Deed / Producer Deed / Vessel Agent Deed) which makes reference to certain pricing principles as well as terms and conditions of access.

NSWMC does not see those proposed contractual arrangements as providing any form of effective access regime, and certainly not the oversight that NSWMC's members seek and consider is necessary through declaration.

14. Access to the Service would promote the public interest

14.1 Introduction

Section 44CA(1)(d) provides that in considering whether or not to declare a service, one of the criteria is "*that 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)**).

PNO's conduct following the revocation of the declaration in 2019, and in particular, the terms and conditions imposed by PNO effective from 1 January 2020 demonstrate that in the absence of declaration, PNO enjoys unfettered monopoly power in relation to Port users.

The new terms and conditions imposed by PNO also create considerable uncertainty for Port users for future investment.

If, through declaration, there was an ability to obtain more reasonable terms and conditions, then NSWMC and its members are of the view that there would be more appetite for investment in the broader Hunter Valley region which would be in the public interest.

We believe that “public interest” can be reasonably equated to the concept of "public benefits". Public benefits would accrue through increased employment in the mining industry which would have flow on effects to the regions in terms of mining support services, associated investment in public sector infrastructure, and health and education services. In the absence of this, there would be an effect on this investment resulting in a likely decline in the regions.

In relation to this matter, further significant public benefits would accrue through declaration in terms of imposing a constraint on PNO as to the terms and conditions upon which access is granted. As set out in section 9 above dealing with criterion (a), the terms and conditions that PNO is seeking to impose would not be likely to be imposed if it was subject to the constraints imposed by declaration. For example, it is unlikely that PNO would be permitted by the ACCC to have clauses in relation to material adverse change, or price adjustments resulting from a change in laws such as tax.

14.2 Benefits to the Hunter Valley and broader coal regions

In 2018/19, the Hunter mining sector directly supported 3,282 businesses; directly employed 13,347 people; paid $1.4 billion in wages and salaries; directly spent $4.0 billion on goods and services; paid $55.0 million to local government; and provided $4.0 million to 397 community groups. In total, about 19.1% of the Hunter Region’s workforce was supported by mining. Mining made up 22.8% of Gross Regional Product, a total of $11.5 billion. In light of the rising unemployment rate identified previously maintaining the mining industry’s employment contribution in the Hunter Valley region is important to the local communities.

The Applicant further submits that 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. In view of the improvements to competition in the

dependent markets identified above, and the resulting economic growth and efficiencies that are anticipated, increased access to the Service will bring about public benefits.

Provision of the Service on improved and reasonable terms and conditions will create greater cost certainty and associated flow on benefits that Port users and parties in the export supply chain may benefit from. Since the revocation, PNO has increased prices but as we have explained in relation to criterion (a), PNO has imposed new terms and conditions which create significant uncertainty for users of the Port in relation to long term access and the rates of return users would achieve over the lengthy periods they need to recoup their investments in the Hunter Valley region.

14.3 The Revocation Recommendation provides a counterfactual to compare the terms and conditions imposed by PNO with and without the declaration

Criterion (d) requires an assessment of whether the terms and conditions imposed as a result of declaration would promote the public interest.

NSWMC believes that such terms and conditions would be in the public interest, because it is clear that in the absence of declaration, PNO has imposed wholly one-sided terms and conditions which shift all material commercial and legal risks onto Port users, and grant PNO an unfettered ability to increase access prices through various re-openers. For example, the shifting of commercial risk involves the users being charged more if coal demand reduces or there were other reasons for a decrease in vessel traffic which decreased the return for PNO's shareholders. Similarly, the proposed deeds shift risk for any change in taxation treatment or the law which adversely affect PNO's profitability onto the users.[83]

NSWMC notes that the above terms and conditions were only imposed on users by PNO post-revocation of the declaration of the Port and were not provisions that PNO sought for terms and conditions of access before the ACCC in the Glencore / PNO arbitration.[84]

As a final matter, NSWMC notes that the proposed terms and conditions of access that PNO has provided suffer from significant information asymmetry issues in that there is no provision made for access seekers to be able to obtain relevant data to assess PNO's expenditure and operations in accordance with the "pricing principles" set out in the Producer Deed / Vessel Agent Deed. This information asymmetry makes virtually impossible for an access seeker to challenge PNO's actions purportedly taken in accordance with the terms and conditions of access.

14.4 The Council's previous views on the public interest criterion

In the Revocation Recommendation, the Council considered that access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration:

- "*is unlikely to significantly effect investment in the infrastructure necessary to provide the Service;*

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83 See Item 6 of Annexure to the Deed, Item 7 of the Producer Deed / Vessel Agent Deed.

84 https://www.accc.gov.au/system/files/public-registers/other/Glencore%20PNO%20access%20dispute%20-%20Final%20Determination%20-%2018%20September%202018%20%28Public%20version%29.pdf .

- *has the potential to improve efficient levels of investment in dependent markets; however, it is unlikely that any such consequence of declaration would be material;*

- *is likely to result in material administrative and compliance costs.*"[85]

The Council also "*considers it possible (but not certain) that charges for the Service will be higher in a future without declaration of the Service compared to a future with declaration. If the removal of declaration did lead to higher prices, and these price increases reduced use of the Port and / or investment, this could constitute a reduction in allocative efficiency with respect to use of the Port. However, the Council is not convinced that this consequence is certain, or likely to be significant. If removal of declaration was considered likely to adversely impact allocative efficiency, this is a factor that weighs in favour of the public interest in assessing criterion (d)*."[86]

NSWMC has noted the Council's arguments in relation to criterion (d) but those considerations did not address the real world evidence put forward from coal miners whether large or comparatively small such as Whitehaven and Malabar which was to the effect that an unfettered ability for PNO to increase prices in the absence of the declaration would in particular influence them as small mining companies in choosing whether to develop further mines in the Hunter Valley and compete in the Tenements Market.

NSWMC has also noted that almost immediately after the revocation, PNO did increase its prices from 1 January 2020. This was as anticipated by NSWMC and other mining companies as well as the ACCC, given the clear incentive for PNO to maximise its profits in a deregulated environment ripe for such self-interested action.

By PNO seeking to appropriate costs incurred by third parties / Port users and charging the mining industry for those expenditures (that it did not make) through the substantially increased access charges, there was indeed a decrease in allocative efficiency. NSWMC submits that this is both inappropriate and highly inefficient, and is, as the Council noted in the Revocation Recommendation, a factor that should weigh in favour of the public interest in assessing Criterion (d).

In relation to the Council's reference to the declaration would see a material increase in compliance and administrative costs for PNO, it is unclear on what basis this finding was made. In any event, NSWMC believes that the administration and costs incurred by the industry as a whole in seeking to obtain reasonable terms and conditions of access in the absence of a declaration, far outweigh any compliance and administrative costs PNO may incur.

Finally, NSWMC notes that the Queensland Treasurer in the recent assessment of the continued declaration of DBCT also found it would be in the public interest to continue the declaration. In the current situation with no declaration and the recent decision of PNO to refuse to negotiate with NSWMC and 10 of its members as well as the finding by the ACCC in its draft determination of the public benefits in such industry attempts to resolve issues with PNO,[87] NSWMC submits there are clear public benefits in terms of criterion (d).

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85 Revocation Recommendation, [10.103].

86 Revocation Recommendation, [10.105].

87 See: https://www.accc.gov.au/system/files/public-registers/documents/Draft%20Determination%20-%2019.06.20%20-%20PR%20-%20AA1000473%20NSWMC.pdf .

15. **Duration of declaration**

The Tribunal previously declared the Service for a period of 15 years. We would normally consider that to be appropriate. NSWMC would note however that since declaration from 8 July 2016, the actual declaration was challenged on multiple occasions by PNO on both administrative and other legal grounds, and that the access determination itself was also challenged. Accordingly, the utility of the 15 year declaration period has been eroded by litigation which has stopped the access terms coming into place even now, as the ACCC Determination is also subject to appeal.

The Applicant submits that certainty for coal producers in the Hunter Valley region and those seeking access to the Service should be an important consideration in determining the duration of the declaration sought.

It is requested that the Council recommend to the designated Minister that access to the Service be declared for a period that is at least twenty years given the long term nature of coal mines, and the significant investment involved.

Annexures

A PNO Deed

B PNO Producer Deed

C PNO Vessel Agent Deed

D PNO 2019 Schedule of Charges

E PNO 2020 Schedule of Charges

F Plan of channel

G Synergies Report