

# GLENCORE COAL PTY LTD

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

May 2015

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## 1 Details of Applicant

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## 2 Executive Summary

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, should be declared for the purposes of Part IIIA of the Act.

The application begins with a detailed overview of the Hunter Valley coal industry and the coal supply chain from coal production through to shipping for export. This sets the context for the focus of this application; the shipping channels in the Port of Newcastle 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 service relates to the use of the shipping channels at the Port of Newcastle by vessels calling at the terminals located within the Port precinct.

The Council has previously found that Australian shipping channels are natural monopolies in the certification of the Victorian Access Regime for Commercial Shipping Channels ("**Commercial Shipping Channels Certification**").<sup>1</sup> As the shipping channels leading to the Port are the only means by which coal ships can gain entry to (and in turn exit) Australia's largest coal export port,<sup>2</sup> the channels are clearly of national significance.

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<sup>1</sup> See Application for Certification of the Victorian Access Regime for Commercial Shipping Channels; Reasons for Decision", 12 May 1997, p 8.

<sup>2</sup> Coal exports from the Hunter Valley in the 2013 to 2014 period were approximately \$13.6 billion.

Access to the shipping channels at the Port of Newcastle is a natural "bottleneck" monopoly that it is submitted should be subject to Part IIIA. As the Council has previously found in relation to the Commercial Shipping Channels Certification:

*"The Council takes the view that duplication of shipping channels is not commercially viable given the nature of those facilities. Shipping channels are characterized by features which economists associate with natural monopolies. They require large up front investments however their variable operating costs are relatively small, which acts as a barrier to investment in competing facilities."*<sup>3</sup>

The Council also considered the question of whether access to the service provided by shipping channels is necessary to permit downstream or upstream competition in a market, and has found that such access promotes competition in a variety of markets. In its Commercial Shipping Channels Certification decision, the Council stated as follows:

*"Is access to the service necessary to permit competition in a downstream or upstream market?"*

*The Victorian Regime provides a means by which access seekers (i.e. shipping companies or their agents) can negotiate lower charges. Victoria's shipping channels constitute an integral link in the transport of goods to and from Victoria. Accordingly, the Council considers that the freedom to negotiate lower charges for access has a potential to assist the competitive position of manufacturing, importing and exporting activities located in Victoria. The Regime's negotiation provisions also have a capacity to stimulate competition in the provision of shipping services. In addition, the arrangements provide for further opportunities for competition between some Victorian ports.*

*The Council has also considered this question in light of Victoria's longstanding channel access arrangements under its Harbour Master rules and obligations to international sea Conventions. These arrangements acknowledge the necessity of freedom of access to ports to facilitate competition between producers and suppliers of goods through international and interstate trade. The arrangements also acknowledge the degree of 'bottleneck' power inherent in shipping channels and the need to circumvent this power. Consequently, the Council believes that it is generally accepted that access to ports, and consequently shipping channels, is necessary to permit competition between producers and suppliers of goods. The Council notes that Victorian Regime provides a clear mechanism to facilitate and enforce fair and reasonable access to shipping channels."*<sup>4</sup>

This application arises in the context of the New South Wales Government's recent privatisation of the Port of Newcastle for a price of approximately \$1.75 billion. The new operator of the Port has increased prices for coal ships using the shipping channels to enter the Port by approximately 60% for some vessel types, with no change in the nature of services provided to coal exporters. The New South Wales Government has advised the Applicant that there is no form of control over such increases at the Port of Newcastle and it would appear that none is planned. Apart from the cost increases themselves, this provides no certainty in relation to the scale or nature of future cost increases and therefore creates commercial risks for current and future coal projects in the Hunter Valley and dependent operations in relevant associated upstream and downstream export and mining services. The uncertainty associated with the lack of regulatory oversight over future port pricing at the Port of Newcastle is likely to have a particularly profound impact on marginal mining operations given the resources downturn and increased uncertainty surrounding the global price of coal.

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<sup>3</sup> "Application for Certification of the Victorian Access Regime for Commercial Shipping Channels; Reasons for Decision", 12 May 1997, p 8.

<sup>4</sup> "Application for Certification of the Victorian Access Regime for Commercial Shipping Channels; Reasons for Decision", 12 May 1997, p 8.

It is therefore important that this price increase and associated uncertainty surrounding the potential for future price increases is considered in the context of the broader circumstances facing the industry, particularly in relation to the global downturn in coal prices.

The application highlights the interconnection between the process for pricing coal and the costs associated with accessing infrastructure as a key component of the coal export supply chain. Where costs associated with accessing port infrastructure are subject to unregulated price increases, investors in existing and future mining developments are detrimentally affected by a lack of commercial certainty which creates disincentives for long term investment. In addition to a variety of markets associated with coal production, the market for financing mining developments is, like any market for investment, highly dependent on the ability to project and have some degree of certainty of the expected costs and returns. In the absence of this, the market for financing mining projects is not workably competitive.

The uncertainty of future pricing for accessing the shipping channels also affects the competitive dynamics in operations in shipping and cargo. In circumstances where the access charges for Port of Newcastle negate the economic viability of transporting coal from the Port of Newcastle, parties may look to establishing operations elsewhere where there is likely to be greater certainty around issues regarding the ongoing economic viability of the respective operations.

Therefore, because the shipping channels are the gateway for the export of coal out of Newcastle, particularly given the national economic importance of coal exports, effective regulation over the pricing and access to those shipping channels is vital to permit competition in upstream as well as other downstream markets.

Declaration of the service will allow for price transparency and regulation and promote a material increase in competition in the relevant above mentioned market for financing mining developments as well as other relevant upstream and downstream markets.

There are no public safety issues involved in this application as has been shown with access regimes applying to other shipping channels previously certified by the Council.

Finally, the recommendation for declaration is important for the industry and those employed in the Hunter Valley region as it will allow for reasonable regulatory oversight of access to Port infrastructure. Declaration will restore the certainty for investments and encourage the economically efficient use of the facilities which in turn will promote price transparency and cost recoverability for coal producers and associated industry participants.

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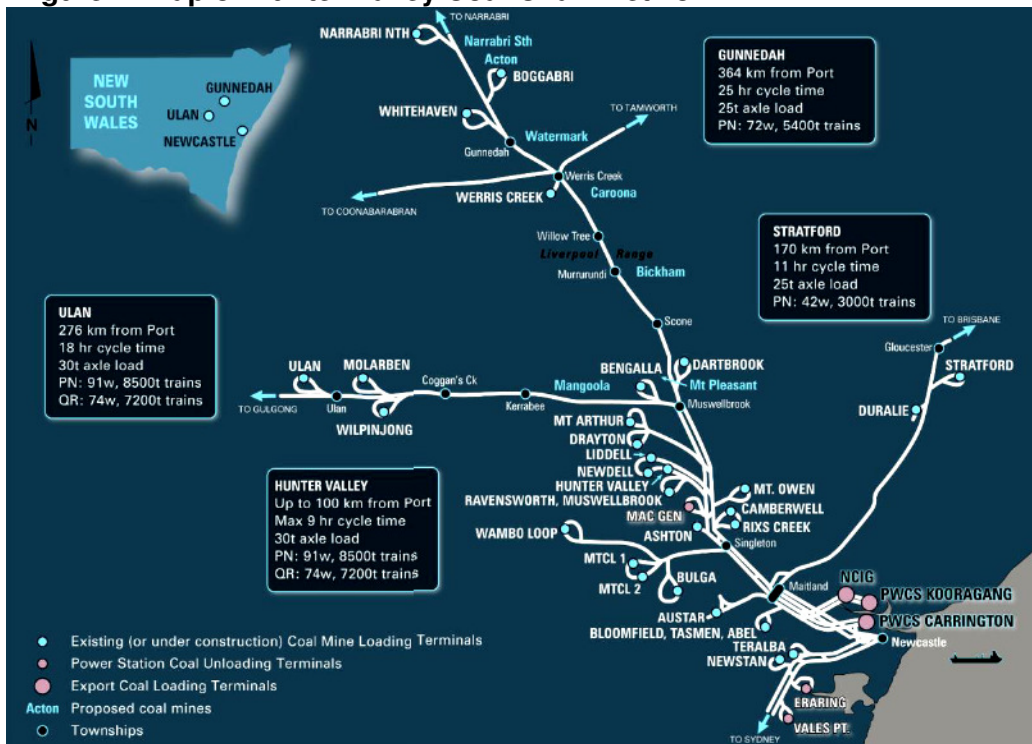
### **3 Background to the Hunter Valley Coal Industry**

#### **3.1 Overview**

The Hunter Valley Coal Industry and associated export supply chain is the largest coal export operation in the world. Spread over 250km, the Hunter and Newcastle coalfields produce over 170 million tonnes of saleable coal per year. This is around 90% of New South Wales production and 40 per cent of Australia's black coal production. The following material in this section is from publicly available sources.

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**").

**Figure 1: Map of Hunter Valley Coal Chain network**



*Source: Hunter Valley Coal Chain Coordinator*

The Hunter Valley Coal Chain is made up of the following operations and service providers:

- more than 30 operating coal mines operated by 11 coal producers, as well as other coal projects in various stages of exploration and development.
- 31 points at various mines for loading coal onto trains.
- Four main rail haulage providers (Pacific National, Aurizon, Glencore and Southern Shorthaul Railroad). Collectively they transport coal from the 31 different load points to the three terminals at the Port of Newcastle. The track is owned and maintained by ARTC and train movements scheduled by HVCCC so that rail arrivals are aligned with stockyard capacity at the Port as well as vessel arrivals.
- Three coal loading terminals: Kooragang Coal Terminal ("**KCT**"), Carrington Coal Terminal ("**CCT**") (both managed by Port Waratah Coal Services ("**PWCS**") and Newcastle Coal Infrastructure Group ("**NCIG**") Terminal (managed by the NCIG).

These coal mines in the Hunter Valley employ approximately 11,078 people directly (and 58,904 indirectly) and contribute almost \$5.9 billion to the New South Wales economy.

There are in excess of 35 customers from 16 countries of coal mined from the Hunter Valley. Approximately 70% of exports go to Japan, Korean and Taiwan with a further 20% going to China. Most of the coal mines in the Hunter Valley are open cut mines and both soft coking and thermal coal products are produced in the region.

The coal, once mined, is stored either at a railway siding located at the mine or at a coal loading facility (used by several mines). The coal is then transported to the Port of Newcastle, almost exclusively by rail. The coal is then loaded onto the vessels at one of three coal loading terminals. Overall, 16 independent organisations are required to move each tonne of coal from mine to vessel.

### 3.2 Large coal producers in the Hunter Valley

#### *Glencore Coal (the Applicant)*

The Applicant is New South Wales' largest coal producer and the Applicant's group operates the following mines in the Hunter Valley:

- (a) West Wallsend Colliery: an underground coal mining operation located in the Newcastle Coalfields near Lake Macquarie.
- (b) Bulga: Bulga Coal includes Bulga Open Cut, Bulga Underground Operations and the Coal Handling and Preparation Plant. The Bulga Complex produces approximately 16 million tonnes of semi soft coking coal and thermal coal a year.
- (c) Mangoola: an open cut coal operation in the Wybong area. Mangoola Coal is based on a large, undeveloped coal reserve of approximately 150 million tonnes.
- (d) Mt Owen: the Mt Owen Complex consists of the Mt Owen, Ravensworth East and Glendell open cut coal mines.
- (e) Liddell: an open-cut mine located at Ravensworth, approximately 25 kms north west of Singleton.
- (f) Ravensworth Surface Operations: consists of two open cut mines: Narama and Ravensworth North mines.
- (g) Ravensworth Underground Mine: this underground mine has been developed for longwall extraction to extract a large semi soft coking coal reserve.
- (h) Ulan: consists of two approved underground mining operations (Ulan No.3 which is existing, and Ulan West which has just commenced construction) and an Open Cut coal reserve.

The Applicant's coal is exported through the Port Waratah Coal Terminal. The Applicant has also invested in the Hunter Valley coal supply chain to ensure security of supply by establishing Glencore Rail (discussed in 3.5 below, a fleet of trains that complement existing services from Pacific National in New South Wales).

#### *BHP Billiton*

BHP Billiton operates the Mount Arthur complex, the largest mine in the Hunter Valley. Mount Arthur is an open-cut coal mine located near Muswellbrook.

#### *Coal & Allied Industries Limited*

Coal & Allied Industries Limited has three operations in the Hunter Valley: Bengalla, the Hunter Valley Operations ("**HVO**") and Mount Thorley Warkworth ("**MTW**").

Bengalla, an open cut mine, supplies international markets with approximately seven million tonnes of thermal coal per annum. In 2010 Coal & Allied and Bengalla's joint venture partners reached agreement on a \$141 million expansion of Bengalla. The expansion increased Bengalla's capacity from 7.8 to 9.3 million tonnes per year of run-of-mine coal and included upgrades to the site.

HVO is a multi-pit open cut mine. In 2013 HVO produced more than 11 million tonnes of thermal coal and 2.6 million tonnes of semi-soft coking coal. HVO had marketable reserves of 277 million tonnes as at 31 December 2013.

MTW is an integrated operation of two open cut mines located adjacent to each other, 15km south west of Singleton. In 2013 MTW produced more than 2.3 million tonnes of thermal coal and 1.8 million tonnes of semi-soft coking coal.

#### *Peabody Energy Australia*

Peabody Energy Australia operates the Wambo and Wilpinjong coal mines in the Hunter Valley. Wambo is a combined open-cut and underground mine, operating in the upper Hunter Valley since 1969. It produces metallurgical and thermal coal, which is railed to Newcastle Port and domestic customers. In 2013, Wambo Open-Cut produced 2.6 million tons of saleable coal and North Wambo Underground produced 3.5 million tonnes of saleable coal. The main export markets for Wambo coal are Japan, Korea and China. Coal from Wambo is shipped through both PWCS and NCIG facilities.

The Wilpinjong mine is an open-cut mine that produces thermal coal for export and domestic markets. Wilpinjong produced 12.7 million tons of saleable coal in 2013.

#### *Yancoal Australia Limited*

Yancoal Australia Limited operates several mines in the Hunter Valley.

Moolarben coal mine comprises an existing open cut mine producing thermal coal and an underground thermal coal development project. Moolarben has an established rail loop and loading facilities capable of loading trains within the required time cycle. The mine has existing port capacity through NCIG.

Ashton underground mine has a current capacity of over 1.5 million tonnes per annum of semi-soft coking coal. Product coal is sold to a number of Asian based steel mills. The mine is located next to the main northern railway. The coal is railed to Newcastle (94kms) where the mine has an allocation of 3 million tonnes per annum through PWCS.

Austar Coal Mine is a deep underground longwall coal mine located in the lower Hunter Valley, producing coking coal for overseas customers. The coal is shipped through the Port of Newcastle, where Yancoal has port capacity allocation through PWCS.

The Abel Underground Mine uses existing surface infrastructure and the Bloomfield Coal Handling and Preparation Plant, rail loader and rail loop for coal processing and loading.

The Tasman underground mine covers 952 hectares and is located south of Maitland. Following extraction, the raw coal is brought to the surface where it is transported by truck to the established coal washing and loading facilities at Bloomfield Colliery (16 km). There it is washed under contract to export steam coal specification.

The Donaldson open cut mine is located 25km from the Port of Newcastle. Raw coal is transported by truck on internal roadways to the established coal washing and loading facilities at Bloomfield Colliery (1.5km away) where it is washed under contract to export specification.

### **3.3 Smaller coal producers in the Hunter Valley**

#### *Anglo Coal Australia Ltd*

Anglo Coal Australia Ltd operates the Drayton mine in the Hunter Valley. Drayton is an open-cut thermal coal mine, which began operating in 1983 and currently produces around 5 million tonnes of thermal coal each year for export and domestic markets. Anglo Coal sold its Dartbrook mine near Aberdeen in 2014.

### *The Bloomfield Group*

The Bloomfield Group is an Australian owned group of private companies which operates in the Hunter Valley. It operates two open cut coal mines: Bloomfield at East Maitland and Rix's Creek at Singleton.

The Bloomfield open cut mine uses a multi seam, multi bench system, mining up to 13 seams or splits, utilising a range of heavy earthmoving equipment to deliver the run-of-mine coal to the onsite washery. Coal is railed to PWCS.

Rix's Creek produces both thermal and semi-soft coking coal for overseas and domestic customers. Run-of-mine coal is processed by the onsite Coal Handling and Processing Plant. Product coal from Rix's Creek is transported across the mine site by trucks to the rail loader. Coal is then railed to PWCS.

### *Centennial*

Centennial operates the Mandalong mine near Morriset, which produces thermal coal for domestic and export markets.

### *Idemitsu Australia Resources Pty Ltd*

Idemitsu Australia Resources owns the Boggabri and Muswellbrook coal mines in the Hunter Valley.

The Muswellbrook coal mine procures thermal coal. The coal is washed on site and product coal is hauled by highway trucks to the Ravensworth Coal Terminal. It is then transported by rail to Newcastle.

The Boggabri mine produces thermal and semi-soft coking coal. Open cut coal mining is currently conducted via hydraulic excavators in a strip mining configuration. Coal from the pit is loaded into rear dump trucks and transported to the run-of-mine crusher pad. Coal is then crushed and loaded into B-double trucks for transport to the rail load-out facility via a private 17km haul road. The coal is then railed to the Port of Newcastle for export.

### *Lake Macquarie Coal*

Lake Macquarie Coal owns the Chain Valley mine approximately 60km south of Newcastle and directly adjacent to the Vales Point Power Station.

### *Whitehaven*

Whitehaven operates several mines including its Narrabri underground operation which commenced longwall production in October 2012, and three open cut mines - all situated in NSW's Gunnedah Basin and the Maules Creek mine.

## **3.4 Railway infrastructure**

Rail infrastructure in the Hunter Valley is extensive. It involves in general terms:

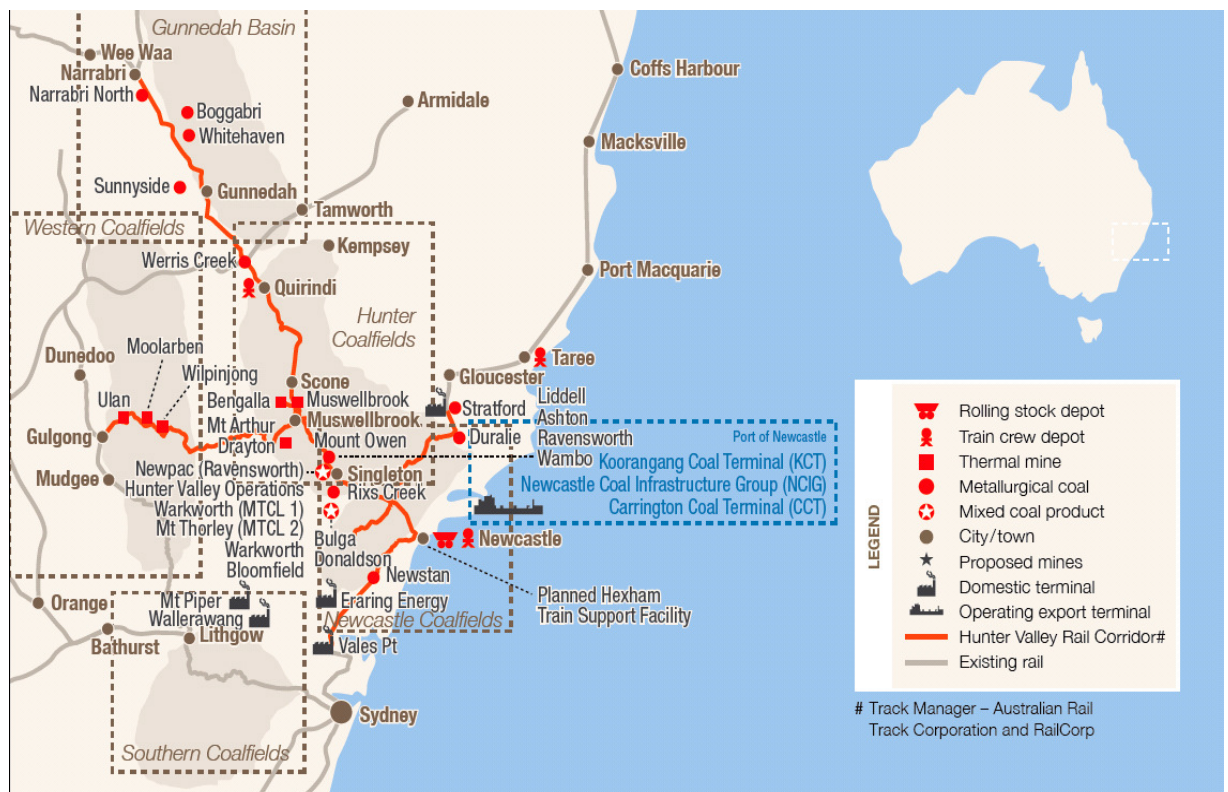
- (a) coal producers entering into access agreements with ARTC which provide a contractual commitment for below rail path availability and use of ARTC's rail track network;
- (b) operator agreements entered into between ARTC and accredited above rail operators to operate on the ARTC rail track; and

- (c) 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.

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 of Newcastle is transported via rail. Most of this coal comes from a series of mines and coal loaders strung out along the Hunter Valley, conveyed to the terminals on the railway that runs between Muswellbrook and Newcastle. Coal also feeds onto this line from Ulan and the Gunnedah basin, west and northwest of Muswellbrook respectively, and, much closer to the terminal, from Stratford, Pelton and the southern suburbs of Newcastle. Domestic coal is also transported over the same network.

Export coal also arrives at the terminal from the Newstan and Teralba mines to the south of Newcastle. This traffic operates on the RailCorp network as far as Broadmeadow. 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.

### 3.5 Rail operators

As mentioned above, there are four operators currently providing rail haulage services to Hunter Valley coal producers – Pacific National, Aurizon (formerly QR National), Glencore Rail and Southern Shorthaul Railroad ("**SSR**").

#### *Pacific National*

Pacific National is fully owned by the Asciano Group. In NSW, Pacific National Coal is the largest coal hauler with an estimated 72% market share.

In 2012, Pacific National Coal opened its \$110 million Greta Train Support Facility in the Hunter Valley. The facility includes five new tracks, wagon maintenance facilities, a provisioning shed providing facilities for crew change and refuelling, and other ancillary facilities.

#### *Aurizon*

Aurizon commenced operations in the Hunter Valley in 2005 and provides rail haulage for almost 30% of the coal market. It delivered 39 million tonnes of coal in 2012-2013. Aurizon is currently investing around \$150 million on the Hexham Train Support Facility.

Aurizon currently has rail haulage contracts with 9 coal producers (covering 16 mines) for coal exports from the Hunter Valley. Table 1 lists Aurizon's contracts and the rail haulage distances for each mine.

**Table 1: Aurizon's contracted mines in the Hunter Valley coal chain**

Customer	Mine	Haul mine to terminal (km)
BHP Billiton (HVEC)	Mt Arthur	120
Bloomfield Group	Rix's Creek	88
	Bloomfield	25
Rio Tinto Coal Australia (Coal & Allied)	Hunter Valley Operations	108
	Mt Thorley	83
	Warkworth	83
	Bengalla	134
Yancoal Australia	Ashton	114
	Moolarben	272
	Donaldson	24
	Duralie	21
Peabody Energy Australia	Wilpinjong	262
	Wambo	94
Vale Australia	Integra	88
Whitehaven Coal	Narrabri	410
Anglo American Metallurgical Coal	Drayton	120

**Source: Aurizon**

#### *Glencore Rail*

Glencore Rail's nine trains have the capacity to haul approximately 70% of the Applicant's NSW coal production and can service all of Glencore's Hunter Valley operations. Glencore Coal relies on the other haulage companies to transport the rest of their production.

#### *Southern Shorthaul Railroad*

SSR entered the coal haulage market in 2010. Current operations centre on rail freight services from four mines located within a 250 km radius of Sydney, and transporting this

resource to the four primary export terminals in NSW (NCIG Terminal, KCT, CCT (together comprising PWCS) and the Port Kembla Coal Terminal). In addition SSR also supplies coal to Eraring power station through the station's state of the art quick drop wagon discharge system.

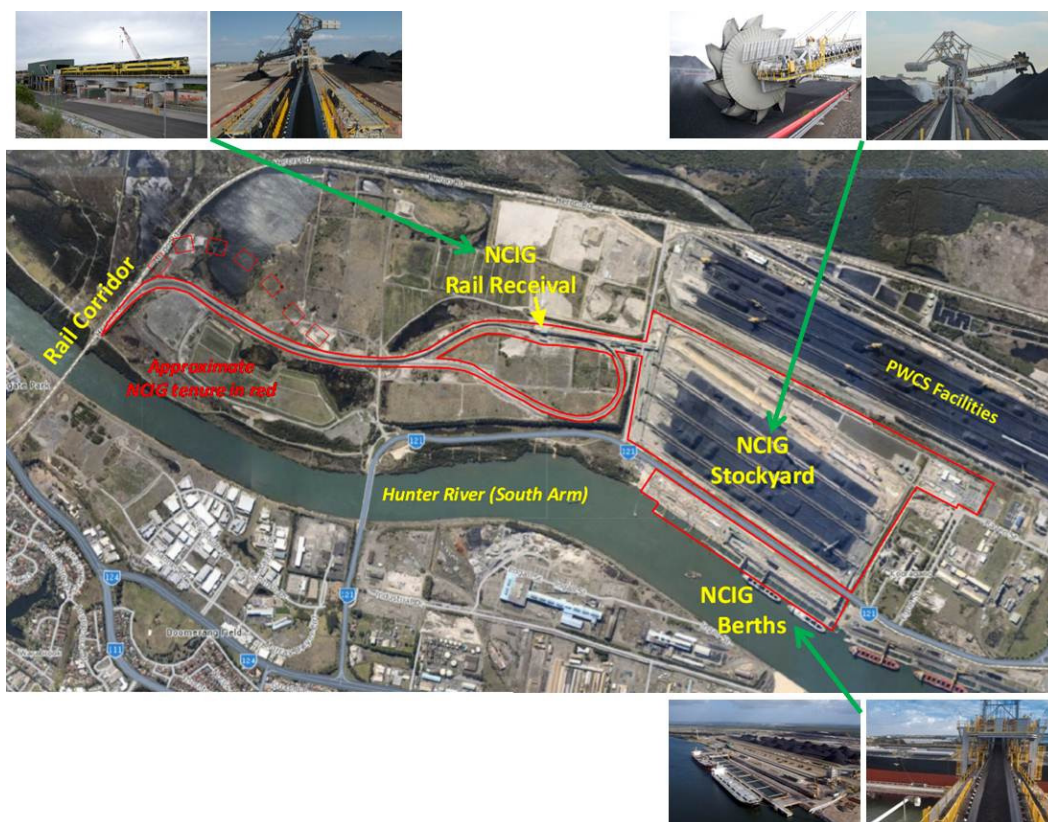
All of these above and below rail operators participate in the Hunter Valley Coal Supply Chain exporting coal to the two main coal export terminals, NCIG and PWCS.

### 3.6 Loading and unloading of coal at the coal loading terminals

#### *Newcastle Coal Infrastructure Group Terminal*

Coal trains enter the NCIG site from the Kooragang Island main rail line. The trains travel along the NCIG rail arrival sidings and empty their coal wagons into one of the two train unloading stations. Empty trains continue around the NCIG rail loops in a clockwise direction and then rejoin the Kooragang Island main rail line.

**Figure 3: Aerial map of NCIG operations**



**Source: NCIG**

**Figure 4: Shiploaders and berths at NCIG Terminal**



**Source: NCIG**

*Port Waratah Coal Services:*

*(a) Carrington Coal Terminal*

Coal can be received by rail and road although the majority of coal is delivered by rail through two rail receipt facilities. Vessels arriving at CCT are loaded utilising two shiploaders. Depending on the coal and vessel requirements, either single head or dual head shiploading may be used (single head being one ship loader loading one vessel, dual head being two shiploaders loading one vessel). All shiploaders and reclaimers have a capacity of 2,500 tonnes per hour. Both the receipt and the shiploading systems utilise surge bins as part of the process to maintain consistent throughput rates.

*(b) Kooragang Coal Terminal*

All of the coal received at KCT is delivered by rail into four rail receipt facilities located on the northern edge of the terminal. A feature of the Kooragang shiploading system is the use of buffer bins, into which coal is diverted during hatch changes and other short term interruptions during loading. This permits operation of the rail mounted shiploaders at a peak rate of up to 10,500 tonnes per hour for each shiploader.

**Figure 5: Carrington and Kooragang Terminals**



*Source: NCIS*

The PWCS and NCIG Terminals commenced operations in 1976 and 2010 respectively. The construction and expansion of these coal loading terminals required billions of dollars of capital investment. PWCS is worth over \$1.8 billion<sup>5</sup> and shiploaded approximately 10 million tonnes of coal in the month of January 2015 alone<sup>6</sup>. The significant operations of these coal terminals are dependent on coal vessels accessing the shipping channels and utilising the Service.

### **3.7 Specialist services providers**

Coal mining in the Hunter Valley region is supported by a significant array of related mining services from exploration services in the nature of geological and drilling services, to equipment provision services, mining safety services and mining technology services. Construction, project management and machinery manufacturing represent further industries in this area.

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.

### **3.8 Challenges for the Hunter Valley Coal Industry**

In May 2014, two major coal mines in the Hunter Valley were placed into care and maintenance, with a negative impact on 500 jobs. This reflects a general trend in the rising unemployment rate in the Hunter Valley region. There were 10,800 coal jobs in the Hunter Valley in December 2014, compared to a peak of 24,400 in April 2012. The more than 30% drop in coal prices over the past two years has caused many coal companies to re-evaluate their operations. The Applicant shut down its mines for a three week period over the course of December 2014/January 2015. As the mining investment boom comes to an end, both large and small producers are focusing on the economic viability

<sup>5</sup>Port Waratah Coal Services Limited Annual Report 2013.

<sup>6</sup> See monthly statistics on NCIG website [www.pwcs.com.au](http://www.pwcs.com.au).

of their productions. The slowdown in production has also had a considerable impact on the workforce, local businesses and community who depend on the support of continued investment in mining projects.

The NSW Minerals Council and analysts note that despite the downturn, the drop in the value of the Australian dollar, falling oil prices and cost cutting will help the Australian coal export industry. This is however, a short-term solution to a long term problem. The competitiveness of the Australian dollar may help maintain momentum however the encouragement of long term financing and investment solutions underpinned by regulatory certainty for infrastructure is crucial to securing a future for coal production and export in the Hunter Valley region.

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## **4 Background to Port of Newcastle and recent privatisation**

### **4.1 Port of Newcastle**

The Port of Newcastle has been used for commercial shipping for 215 years. It handles more than 25 different cargoes and 4,600 ship movements per annum. There are 200 hectares of vacant port land available for development at the port, and the total land holdings of the port are 792 hectares.

PWCS operates the Kooragang and Carrington terminals with a total nameplate capacity of 145 mtpa of coal export capacity. Newcastle Coal Infrastructure Group Pty Ltd operates the NCIG terminal with a total nameplate capacity of 66 mtpa of coal export capacity.

Other commodities which pass through the port include: imports of alumina, cement, fertiliser, fuels, machinery, project cargo and vehicles, meals and grains, petroleum coke, pitch and tar products and steel; exports of aluminium, concentrates, machinery, project cargo and vehicles, pitch and tar products, steel and grains.

Although the development of terminals within the Port precinct has been undertaken by private companies, until recently the Port Authority NSW, a government owned corporation of the State of New South Wales, was responsible for the overall development and operation of the Port. This position reflected the fact that the development of the Port had historically been a function of the State.

### **4.2 Privatisation process and background of Port lessee**

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, Port of Newcastle Operations Pty Ltd as trustee for the Port of Newcastle Unit Trust ("**Port of Newcastle Ops**") through a long term lease arrangement.

Port of Newcastle Ops is jointly owned by investors Hastings Funds Management and China Merchants Group. Hastings, a global fund manager, specialises in infrastructure equity and debt. Its portfolio includes major infrastructure assets across Australia such as the M5 Southwest Motorway, Perth Airport, Melbourne Airport, Gold Coast Airport and Port of Portland. China Merchants is headquartered in Hong Kong with business sectors which extend beyond infrastructure to property development and financial investment. As at June 2014 China Merchants managed global assets in the value of approximately \$820 billion across 13 countries, including 24 seaport and seaport-related investments.

The transaction was completed in May 2014 and generated gross proceeds of approximately \$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 7). Shortly after assuming its role as port operator, Port of Newcastle Ops published price increases and changes to the charging regime which came into effect on 1 January 2015 (a copy of the notification of the price revisions is annexed to this application). The price rises and associated uncertainty in relation to future pricing are the primary catalyst for this application. The Applicant draws particular attention to the significant price increase for navigation service charges levied on vessels at the time of port entry for the general use of the Port and its infrastructure.

The Applicant has calculated that the aggregate impact of these amendments is an increase in prices for coal vessels of approximately 60% for Handymax, Panamax and Post Panamax vessels and 26% for Capesize vessels. The Applicant further notes that shipping agents and the industry body, Shipping Australia, have expressed similar concerns in respect of the price rise. As the increase is calculated by gross tonnage, many coal ships that typically carry large loads up to 110,000 tonnes would incur a charge of up to \$75,000 per vessel.

As a direct result of this increase alone, the Applicant estimates that the Port of Newcastle Op's revenue from navigation charges will increase by approximately 40%, or at least \$20m per year compared to the 2012/13 Annual Report for the Port of Newcastle (excluding any volume effect). From discussions that the Applicant has had with Port of Newcastle Ops, it understands that the price increases are not associated with or offset by any increase in productivity, efficiency or service to be provided by Port of Newcastle Ops, and nor are they required for the purpose of funding any further investment.

Annexure B sets out the basis on which the Applicant has calculated the impact of the price increases on coal vessel types and the coal traffic moving through the Port.

The Applicant has discussed these price increases with Port of Newcastle Ops and the New South Wales Government. It is understood that there is no intention of the Government to put in place any form of regulatory oversight for these current 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 Hunter Valley region.

### 4.4 Application of the National Access Regime to Government Privatisations

The Applicant is conscious that the application for declaration of the Service arises in a time where state government asset privatisations have attracted a considerable degree of concerns from regulators and stakeholders. The concerns reflect on the repercussions of asset sales in the absence of appropriate market structures or regulatory arrangements being put in place prior to privatisation, the fear being that privatisation detracts from economic efficiency rather than boosting it.<sup>7</sup>

The concern has further been expressed by the Australian Competition and Consumer Commission ("**ACCC**") as being a danger of governments privatising assets with a view to maximising proceeds of sale at the expense of competition.<sup>8</sup> In addressing this concern the National Competition Policy Review Panel recommended that Governments should ensure that monopoly infrastructure is privatised in a way that promotes competition by adopting certain best practice guidelines and processes.

<sup>7</sup> Rod Sims, Chairman of ACCC, Address to the Committee for Economic Development of Australia (CEDA) at the Brisbane Convention and Exhibition Centre on 23 April 2015.

<sup>8</sup> Competition Policy Review Final Report, March 2015.

The Applicant submits that such concerns and the recent recommendation provide a strong foundation for the merits of declaring the Service to provide sufficient safeguards to promote competition. The shipping channels of the Port of Newcastle are the precise nature of monopoly infrastructure to which the National Access Regime was intended to apply.

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## **5 Description of service and facility**

### **5.1 Service**

The service comprises 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 a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct (the "**Service**"). The Service is currently provided by Port of Newcastle Ops.

The Applicant submits that the Service is a "service" capable of declaration within the meaning of section 44B of the Act and is consistent with various previous decisions of the Council and certifications of Commonwealth Ministers. What is being sought for access is consistent with other channel access regimes used in other states and previously recommended for certification by the Council. The Service includes the use of a relevant facility (being the shipping channels) and does not entail the supply of goods, the use of intellectual property or the use of a production process.

### **5.2 Provision of Services**

There is a division of responsibilities between Port of Newcastle Ops and Port Authority NSW (which remains under the ownership of the State of NSW). Port of Newcastle Ops 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 Services such as the dredging and surveying of the channel and the provision of aids to navigation. Port Authority 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 Port of Newcastle Ops. 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 Port of Newcastle Ops 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 Port of Newcastle Ops 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.
- (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.

### **5.4 Facility**

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 C 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. The Council

has previously accepted that port infrastructure is likely to exhibit natural monopoly characteristics, for example in its consideration of the South Australian Ports Access Regime.<sup>9</sup> In this matter, the Facilities are integral to the infrastructure of the Port of Newcastle and accord with this conceptualisation.

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## **6 Provider and owner**

### **6.1 Provider of Service**

The Applicant believes that the Port of Newcastle Operations Pty Ltd as trustee for the Port of Newcastle Unit Trust trading as “Port of Newcastle” is the provider of the Service.

### **6.2 Owner of Facilities**

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

The Applicant understands that the Facilities are made available to Port of Newcastle Ops by the State of New South Wales by way of a long term lease and that Port of Newcastle Ops is for all intents and purposes of the Act the owner of the facilities (particularly given the Services are not provided by a government business enterprise any longer pursuant to the privatisation “transaction”) under the Act and therefore the relevant responsible Minister should be the Federal Treasurer.

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## **7 Reason for seeking access**

### **7.1 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 Hunter Valley region.

Port of Newcastle Ops does not enter into agreements for the provision of access but instead relies on the statutory powers conferred on it under the Ports and Maritime Administration Act 1995 (NSW) (“**PMAA**”) in order to levy charges on the vessels which use the Service.

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

A navigation service charge is payable by the owner of a vessel or cargo in respect of the Service (s50 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 as opposed to a take or pay based charge.

Under section 51 of the PMAA the relevant port authority may fix the navigation service charges. The port authority has been declared to be the port operator. Port of Newcastle Ops is therefore entitled to fix the navigation service charge under statute,

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<sup>9</sup> Statement of reasons: Decision of the effectiveness of the South Australian Ports Access Regime, the Hon David Bradbury MP, 9 May 2011.

and has done so by publishing a Schedule of Port Pricing which sets the navigation service charge.<sup>10</sup>

Whilst the Minister may issue directions to the Port Authority from time to time requesting information about the navigation service charges (s82 of the PMAA), there is no statutory oversight of these charges or the manner in which they are varied by the Port Authority.

## **7.2 Detrimental effect**

As described in section 3.2, the Applicant and its subsidiaries own and operate coal mines which export coal on an FOB basis through the coal export terminals located at the Port of Newcastle. It is not possible for vessels of the nature described in section 4.3 (who are subject to the price increases) to use the coal export terminals at the Port without using the Service and paying the navigation service charges to Port of Newcastle Ops.

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 upon the revenue that coal producers generate from the sale of their coal.

Coal produced at Newcastle competes in the same market for seaborne coal with coal produced and sold through other ports throughout the Pacific. In purchasing coal, buyers will take account of the cost of transporting the coal from the point of sale to the point of its ultimate consumption. Those costs would include the charges imposed by Port of Newcastle Ops.

Any increase in the charges imposed by Port of Newcastle Ops 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) because:

- (a) it will result in a significant and immediate increase in transportation costs which cannot be reasonably passed to end user customers, which means that these costs will need to be absorbed by the coal mining projects in an already high cost environment where there is a negative outlook on commodity prices; and
- (b) it will negatively impact investment in coal mining projects in the Hunter Valley region because of the uncertainties associated with forecasting the Service cost component for these projects.

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 providers such as drilling, construction, 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 4,600 ship movements per annum; and

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<sup>10</sup> <http://www.portofnewcastle.com.au/Resources/Documents/PON-Port-Pricing-Schedule---Effective-1-January-2015.pdf>

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

### 7.3 Implications of pricing uncertainty

The Applicant appreciates that the current increase in navigation service charges may appear marginal in terms of initial percentages given the significant costs involved in large scale coal exports (although the amounts per vessel are significant). However these amounts may still affect projects which are already marginal and create significant ongoing uncertainty as to future costs that will have a significant impact on the viability of coal production in the Hunter Valley region. Dr Yeates' report annexed to this application observes the impact of the current increase on coal producers operating in the current constrained market environment. The foregoing section considers the market environment in which firms participating in the Hunter Valley Coal Chain are operating in greater detail. It is from this standpoint that the Applicant submits that the issue of a lack of certainty and lack of transparency for port infrastructure charges must be considered.

The most efficient and effective way to provide commercial certainty for coal producers (both new and existing) in the Hunter Valley region and facilitate investment in their coal mining projects is to ensure 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 deliberate lack of regulation 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 result in preventing and hindering effective competition in relevant upstream and downstream markets.

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## 8 Promotion of material increase in competition

### 8.1 Bottleneck characteristics of channel access

As noted earlier in this application, the Council has previously recognised that shipping channels are indeed natural monopolies and that the service provided by such channels cannot be duplicated. As the classic "bottleneck", access to shipping channels can, as the Council has previously rightly noted, facilitate an improvement in competition in a variety of affected upstream and downstream markets. Access can also materially promote competition in some affected markets. This is now considered.

Section 44G(2)(a) of the Act, provides that the Council cannot recommend that a service be declared unless it is satisfied that access (or increased access) to the service would promote a material increase in competition in at least one other market other than the market for the service (whether or not that market is in Australia).

The following section considers whether access (or increased access) would promote competition by improving the opportunities and environment for competition in a dependent market such as to promote materially more competitive outcomes. In this matter we look at both upstream and downstream markets in the coal supply chain.

First, it is noted that the Australian Competition Tribunal ("**Tribunal**") stated in the Sydney Airport decision<sup>11</sup> that:

*"The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the*

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<sup>11</sup> *Re Sydney International Airport* (2000) 156 FLR 10 at [107].

*removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market."*

In the current circumstances, it is submitted that the operator of the channel service as a bottleneck facility has clear market power and in the Applicant's submission this is consistent with the Tribunal's comments in the Duke EGP decision<sup>12</sup>:

*"The object of the Code, and its structure, make it clear that criterion (a) does not have as its focus a factual question as to whether access to the pipeline services is available or restricted. Put in that way, the question would not take sufficient account of the terms on which access is offered. Rather, the question posed by criterion (a) is whether the creation of the right of access for which the Code provides would promote competition in another market."*

In terms of a non trivial or material increase in competition, in the Sydney Airport decision, the Tribunal stated as follows.<sup>13</sup>

*"We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial."*

Promotion of competition has been accepted by the Tribunal to mean a mere 'unlocking the door' to the competitive process.<sup>14</sup> In the Tribunal's Sydney Airport Decision it was further found that:

*"The notion of 'promoting' competition involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration will be better than they would be without declaration."<sup>15</sup>*

In the Tribunal's 2010 Fortescue Metals decision appeared initially to endorse a similar approach in defining the promotion of competition:

*"A particular act will have the tendency to promote a material increase in competition in a socially useful way if sellers are given greater freedom to engage in rivalrous behaviour, or if the act will cause an increase in the number of rivals coupled with a move to more independent behaviour. Often the inquiry will come down to this: Will the act (eg an alteration to an aspect of market structure or a change in a firm's conduct) increase the constraints on the market power of sellers or, more directly, will it increase their rivalry in a way that will produce greater efficiency? If the answer is in the affirmative, the act will promote an increase in competition."<sup>16</sup>*

The Applicant submits that the granting of access to the shipping channel in the Port of Newcastle will unblock a bottleneck to monopoly infrastructure and remove an inhibition on competition in several dependent markets and therefore the conditions or environment of competition will be improved and/or enhanced so that there is a real

<sup>12</sup> *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at [74].

<sup>13</sup> *Re Sydney International Airport* (2000) 156 FLR 10, at [107].

<sup>14</sup> *Re Sydney International Airport* [2000] ACompT 1 (1 March 2000) [20].

<sup>15</sup> *Re Sydney International Airport* [2000] ACompT 1 (1 March 2000) [106].

<sup>16</sup> *Fortescue Metals Group Limited* [2010] ACompT 2, [1061].

likelihood of increased competition which is "not trivial" and "material". Declaration will indeed "unlock the door" to improve the opportunities and environment for competition in the dependent markets outlined in the foregoing section of this application.

## **8.2 Impact of navigation charges on coal production in the Hunter Valley region**

The Glencore group (to which the Applicant belongs) is a significant exporter of seaborne thermal coal and one of the largest producers of metallurgical coal. Approximately 85% of the coal mined by Glencore's mines is exported to global markets including Japan, South Korea, Taiwan, China and Europe. Glencore has interests in over 30 open cut and underground coal mines in Australia, South Africa, Columbia and exploration projects in Canada. Investments have been made in coal mines on the basis that it is expected already regulated facilities will continue to be regulated or at least have the opportunity to be regulated.

Coal exports represent more than 90% of total throughput tonnage at the Port of Newcastle. Coal is a globally traded commodity with prices determined by international markets. The global market for seaborne coal is highly competitive and coal producers can be regarded as "price takers" because the coal price is derived from the interaction of supply and demand curves for the commodity.

Coal is widely distributed throughout the world and new producers are generally able to enter the market without significant barriers to entry that are present in other markets. Entry is of course dependent on producers having sufficient capital (whether independently or, as is more often the case, with project financing arrangements) to embark on developments.

When negotiating the price for export coal from the Hunter Valley region, end user customers will take into account various costs including transportation costs. The navigation service charges at the Port of Newcastle will be analysed as part of this process.

As transportation costs associated with exporting coal from the Port of Newcastle are already high because of the greater distance between the Port and major export markets when compared to other coal producers in the Asia Pacific region, there is limited (if any) scope for coal producers to recover the navigation service charges from end user customers because of the highly competitive nature of the market. As such, coal producers will ultimately absorb the full amount of any increases in these charges through a corresponding reduction in the price they receive from end user customers for their coal.

This will result in a decrease in the returns available to coal miners in the Hunter Valley region and the current or future operation of mines in the region.

## **8.3 Markets in the coal industry in the Hunter Valley region**

There are various upstream and downstream markets in the Hunter Valley region which are dependent on the Service for the export of their coal. A number of such dependent markets include:

- (a) Coal export market: As mentioned above in section 3, the Hunter Valley coal supply chain is the world's largest coal export operation and is economically important to Australia's participation in the global market for the export of seaborne coal.
- (b) Financing market: The market for the financing of coal mining projects (including the expansion of existing projects) which will utilise the Service.

- (c) Authority market: Exploration and mining activity in New South Wales must be conducted in accordance with an authority issued under the Mining Act 1992 (NSW). The authority gives the holder exclusive rights to explore or mine for coal. There are markets for the acquisition and disposal of exploration and/or mining authorities.
- (d) Infrastructure market: Coal producers often compete for access to the same infrastructure (particularly in the resource rich Hunter Valley region) including rail, roads, power and water. There are markets for the provision of this infrastructure.
- (e) Specialist services market: Coal mining exploration and mining requires specialist services including geological and drilling services, construction services and operation and maintenance services. There are markets for the provision of these services.
- (f) Commercial shipping market: Shipping agents and vessel operators calling at the terminals within the Port of Newcastle precinct. There are markets for the provision of commercial shipping services.

These markets are the “**Dependent Markets**”.

## 8.4 Competition in the Coal Export Market

### *The local impact of global coal market dynamics*

As set out above in section 8.3, the global market for seaborne coal is workably competitive with prices determined by international markets. 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 relative decline of Australia’s resource industries international competitiveness having regard to a number of factors including: significant supply side cost increases arising from labour, energy and transportation costs and taxation imposts. Australia is no longer cost competitive as more than half of Australia’s mines operate at costs above the global averages.

The Hunter Valley has already seen its first wave of mine closures and stagnant operations.<sup>17</sup> In respect 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 competition in mineral export markets is facilitated.

<sup>17</sup> Experiences such as the recent West Walls and mine closure, the Applicant’s temporary coal mine closures over the 2014/2015 Christmas period and earlier care and maintenance arrangements for mines such as the Vale Integra mine complex, Airlay Mountain, Invincible Colliery and Cullen Valley Mine and the Mannering coal mine.

### *Importance of regulating export infrastructure to support export markets*

Mining export infrastructure occupies a strategic position in the mineral export industry and provides services required to compete in the dependent seaborne coal and other mineral markets.

The Applicant notes that the navigation charge increase was initially justified by Port of Newcastle Ops on the basis of robust predictions of growing 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 is certainly no longer tenable.

In such fragile market conditions, even incremental cost increases at the margin may have the degree of impact to drive coal producers to exit the market, this having inevitable repercussions for the related markets that support the coal export market. The uncertainty associated with the unfettered ability of the Port of Newcastle Ops to set and increase prices compounds the broader global pressures, threatening the workable competitiveness of this market.

#### **8.5 Access 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 3.1) demonstrates the complexity and inter-dependence of the industry that supports the coal export supply out of the Port of Newcastle.

Declaring access to the port channel will address the uncertainty and create conditions for improving competition from what they will otherwise be should the status quo prevail. The right to negotiate will ensure that more reasonable and certain pricing is maintained. 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 commercial viability for 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).

#### **8.6 Competition in the Financing Market**

Although it is submitted that declaration of the Service will materially increase competition in each of the Dependent Markets, it is likely to be most relevant in the market for financing of coal mining projects.

The source and nature of the financing arrangements for a coal mining project will depend upon (among other things) the size and location of the mine, the commodity being mined and the appetite of investors to fund ongoing capital and operating expenditure during the life of the mine. Large coal mining projects in Australia tend to be financed on a limited or non-recourse basis using debt capital markets. Smaller coal mining projects in Australia are often financed using shareholder loans, capital raisings (if the entity is listed) and/or debt capital markets.

The financing of a coal mining project brings with it certain key challenges for investors:

- (a) the bespoke nature of the ore body means that each mine is different, both in terms of its development and production profile;

- (b) mines are often physically dislocated from the export port which creates a level of contractual uncertainty and complexity with respect to access to existing third party infrastructure and/or the development of new infrastructure;
- (c) the development of a mine is capital intensive;
- (d) a continuous injection of capital is necessary to maintain production levels over the term of the mine life;
- (e) mines are long life assets so the return on capital investment is typically recovered over a long period of time (e.g. 10 – 20 years);
- (f) revenue derived from end user customer arrangements is highly sensitive to commodity booms and busts; and
- (g) if the price of coal is not denominated in the same currency as the development and operating costs, investors are subject to a significant foreign exchange risk that needs to be mitigated through (often expensive) hedging arrangements.

Financiers will look at the projected cash flows generated from the sale of coal to end user customers rather than the balance sheet of the coal producers as the source of repayment of the debt. This is commonly referred to non-recourse financing because the debt is secured by the project and repaid from project cash flows rather than from the non-project assets of the borrower. In order to obtain comfort that cash flows will be available to repay them, financiers will carry out a bankability review of the project. Risks that are retained at the project level and not passed down to third party suppliers or customers will often be perceived by financiers to reduce the amount of money available to repay financiers. This impacts upon their assessment of the bankability of the project and may mean that there is less money available to lend to the project; the cost of funds is higher; the tenure of the debt is shorter; and/or sponsor support is required from shareholders (i.e. limited recourse financing) to give comfort that cash flows will be available to repay financiers at the time they expect to be repaid in the financial model. This method of financing has recently been used by Glencore in its recent acquisition of a 50.1% share in the Clermont coal mine from Rio Tinto.

Given the physical dislocation between the mine and the export port, financiers will also require comfort that long term arrangements are in place for the transportation of the coal from the mine to the port. The price for those transportation services will be factored into the financial model.

Financiers will therefore need to be satisfied that, during the period over which the bank debt is expected to be amortised, the coal project will continue to be able to access the export infrastructure which is required for the export of the coal at prices which are reasonably predictable. Where there is no certainty with respect to the price and/or method for ascertaining the price, financiers will build certain conservative assumptions into the financial model, which in turn will impact the bankability of the project (as mentioned above).

Port of Newcastle Ops does not offer long term contracts for the Service, as such, in the absence of a declaration of the Service there is no certainty with respect to the navigation service charge and it is impossible to be sure that the Service will be available for the life of a coal mining project at a predictable price. The recently announced price increases at the Port (effective 1 January 2015) demonstrate that significant increases for these charges can and do occur.

Whilst some larger coal producers in the Hunter Valley region may be able to take a view on the timing and quantum of future prices for which the Service will be available this pricing uncertainty is likely to lead to:

- (a) a lack of investor confidence and commitment to support new coal mining projects in the Hunter Valley (particularly given the current economic climate and negative outlook on commodity prices); and
- (b) financing for new and existing coal mines being unavailable or available but at a higher cost and on terms more favorable to the financier.

The lack of certainty regarding the navigation service charges payable at the Port of Newcastle, together with the arbitrary manner in which price increases may occur means that the financing market in particular is not workably competitive. This is likely to particularly impact smaller coal producers and result in their exclusion from the Dependent Markets because they are not as well placed as the majors to withstand the consequences of a lack of investor confidence and a reduction in, or increased cost of, available financing for their projects. Raising the barrier to entry for these smaller producers in Dependent Markets would be likely to substantially affect competition within those markets.

The presence or absence of smaller coal producers in the Dependent Markets is particularly significant because it tends to be those smaller producers who carry out the more marginal coal projects which do not attract the attention of the majors, because, by way of example, they are smaller in scale and do not provide sufficient scale for majors to generate an acceptable return on capital. In the absence of smaller coal producers who develop these marginal projects, competition will be diminished.

## **8.7 Access will materially improve conditions for competition in the Financing Market**

In view of the foreseeable impact of the access arrangements under the status quo outlined above, it is submitted that the competitive environment and conditions of competition will materially improve as the cost of projects and level of cost recoverability under the current regime has become uncertain and detrimentally impacts the project viability for major coal producers and in particular for smaller producers. Smaller coal producers are already facing the challenges of low prices following a rise in exports from rival producers such as those located in Indonesia, and the uncertainty of pricing of the Service will further impact the ability to obtain appropriate financing.

The declaration of the Service on reasonable terms will result in a material improvement of the conditions for competition in the various Dependent Markets. This is because export costs will include more reasonable pricing for the Service cost component that is able to be predicted for the long periods during which the financing of coal projects will be amortised.

The declaration of the Service will materially promote competition and will also improve the conditions of competition in the Dependent Markets as:

- (a) the continued or increased participation of smaller coal producers will result in an increased demand for mining authorities and result in a material increase in competition in the bidding for the award of mining authorities;
- (b) the continued or increased participation of major and smaller coal producers will result in an improvement in the opportunities and environment for competition in the provision of the infrastructure required for the development of coal projects, including in particular in relation to the development and output from smaller more marginal projects; and
- (c) the continued or increased participation of major and smaller coal producers will also result in further demand in the markets for specialist services in the Hunter Valley region.

In the current matter, the shipping channel is a bottleneck infrastructure facility/service which is essential for access to the Port of Newcastle. The lack of any access regime and the uncertainty created by the unlimited power to increase prices for vessels entering the Port of Newcastle by the shipping channels is a clear situation of actual monopoly power if there ever was one consistent with the Hilmer Recommendations for an access regime under Part IIIA.

Declaration of the Service would materially promote competition in a variety of downstream and upstream markets as it creates increased certainty for access pursuant to an access regime. If an access regime for access to monopoly infrastructure such as port channel services does not materially increase competition in affected markets using those services for exports, then it is difficult to see that an access regime for any infrastructure would ever "materially" or "non trivially" increase competition under Part IIIA.

## **8.8 Impact on other Dependent Markets**

### *Degree of impact in the face of uncertainty*

The Dependent Markets which are outlined above all relate in one way or another to the coal export market. The coal export market is a workably efficient market in which producers can be regarded as "price takers", subject to the pressures produced by changes in supply and demand. The operation, development and financing of coal projects is directly correlated to the coal price prevailing at the time. The development of infrastructure and the provision of services which are related to coal projects is also cyclical, tending to decline and rise in tandem with the development of coal projects. Therefore, the likely degree of impact that the regulation of the Services would have at any particular time is likely to depend very significantly on the point that the commodity cycle has reached in its demand cycle at any particular time.

For a prolonged period the coal price was high by historical levels, though over the past few years the price has declined very significantly and is forecast to remain low for some time to come. In times of a commodity boom market, whether or not the Service is regulated may be less significant to competition in the Dependent Markets we have identified in this section of the application. As Dr Yeates points out in his supporting letter, the FOB cost of the current shipping access charge is just less than 1% of the FOB costs of export coal although for coal vessels of 110,000 tonnes or more this will still incur a charge of up to \$75,000 per vessel. For commodities facing high demand, a charge of this nature might not diminish competition (although the risk of non-provision of the Service might still be significant). However, in more constrained market circumstances such as those which prevail at present, we consider that uncertainty as to future charge increases and access to the Service would have a material impact on the Dependent Markets which have been identified.

Importantly, Dr Yeates has identified that the charge might represent between 10% and 100% of sales margin in current market circumstances.

Currently in the Hunter Valley region the Applicant believes that many of the operating coal mines are operating on marginal if any profitability and that many are operating so as to pay for long term take or pay contractual commitments for rail or port infrastructure. In this marginal operating environment, the revised cost increases amounting to 10% or more of the current sales margin at such mines, together with the ability for those costs to be increased, may see the operators of those mines considering their closure or that they be put into care and maintenance.

Such charges, while conducive to the port operator's commercial need to generate maximum returns from its asset purchase, effectively act as an additional tax on the

exporters and the participants of the Dependent Markets and affect the ability of these participants to compete efficiently.

#### *Impact on commercial shipping market*

The navigation charges have a direct impact on shipping agents and vessel operators calling at the terminals within the Port of Newcastle precinct. The potential impact of the higher navigation charges on commercial shipping in the Port of Newcastle has an impact on vessels calling at the port precinct. The Vessels must be able to gain access on reasonable terms in order to effectively compete in the market for commercial shipping services. Declaration of the Service will provide the regulatory oversight to achieve this.

In particular, we note that the increased charges for the Services do not apply evenly to all vessels. While such discrimination may be justified on the grounds of efficiency, it will produce an impact on competition between vessel owners. We would also note that discrimination between different sized vessels produces an impact on competition between different producers – since smaller sized vessels are necessary due to constraints in the destination port of the vessel, and that producers will have different proportions of customers demanding differently sized vessels.

In any event, it may well be the case that the vessel sizes which are preferred under the pricing structure adopted by Port of Newcastle Ops are not those which would be preferred under a regulated price structure. This may produce impacts not only in relation to the market for vessels but also on the relative economic position different coal producers and on associated Dependent Markets.

#### *Impact on infrastructure market*

As outlined above, the Hunter Valley Coal Chain relies upon a significant amount of investment into the infrastructure that supports coal development and export from the Port of Newcastle. The coal terminals (PWCS and NCIG), ARTC rail track and related maritime, bulk handling and storage facilities are reliant upon commercially viable coal development projects and export operations. The uncertainty of port pricing will have flow on effects for the utilisation of this infrastructure and negatively impact the competitive dynamics in this market. This impact must be considered in context of the already declining demand for coal.

The NCIG terminal was constructed by a consortium of shippers on the basis of a project financed structure. The commercial uncertainty produced by the pricing and availability of the Services being dictated by an unregulated private sector monopolist would impact the feasibility of financing any similar port terminal development in the future.

#### *Impact on specialist services market*

The mining specialist services industry provides construction, drilling, geological and technology services that help downstream mining companies to build infrastructure and engage in exploration and production at mining sites. The market is labour intensive and fragmented with many small operators concentrating their activities within a certain geographic location or product segment.<sup>18</sup> The decrease in demand has seen larger companies reduce prices charged to mining companies to ensure optimal use of equipment and to attempt to maintain revenue levels and profit margins. The additional pressure on mining companies in the face of uncertain port pricing will be passed on to mining specialists with smaller providers being particularly affected.

#### *Declaration to promote increase in competition in other Dependent Markets*

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<sup>18</sup> IbisWorld: Mining Support Services Market Research Report, December 2014.

The Applicant submits that declaration of the Service will provide certainty and regulatory oversight of port pricing that will encourage non trivial and meaningful promotion of competition in the other Dependent Markets outlined above. Given the inter-connectedness of industries that make up the Hunter Valley Coal Supply Chain, the flow on effects of declaration to these other Dependent Markets is important, particularly in the current economic climate of closing or reducing coal mining activities.

The impact of the declaration of the Service will be felt particularly in relation to any project which requires the investment of new capital. Coal production which utilises capital investment which has already been sunk is relatively unresponsive to pricing pressures, since so long as positive operating cash flow can be generated then the economically rational decision is to continue to operate that infrastructure (even if the pricing pressures may have reduced or eliminated any return on the relevant capital investment). However, pricing pressure and particularly uncertainty of the terms of access to essential monopoly export infrastructure, will have adverse consequences on any new capital investment.

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## **9 Development of another facility to provide the Service**

### **9.1 Alternative channel facility at Newcastle**

It is virtually impossible that any facility would be built which would allow vessels to use the existing Port terminals at Newcastle without using the Facilities. As can be seen from the Plan of the Channel which is attached as Annexure B, the existing coal terminals at the Port of Newcastle 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 Port of Newcastle Ops 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.

Even if such a facility could be constructed, Port of Newcastle Ops is entitled by statute to impose a navigation service charge as follows in accordance with section 50 of the PMAA:

*“(1) A navigation service charge is payable in respect of the general use by a vessel of a designated port and its infrastructure, apart from:*

*(a) the use of a pilot, or*

*(b) the use of land-based port facilities and staff directly involved in providing services at those facilities, or*

*(c) port access for cargo at the interface between the vessel and land-based facilities for the purpose of stevedoring operations.*

*“(2) Unless the regulations otherwise provide, the charge:*

*(a) is payable on each entry by the vessel into any designated port, and*

*(b) is to be calculated by reference to the gross tonnage of the vessel.*

*“(3) The charge is payable whether entry to the waters of a port is by sea or from the land (or, in the case of a seaplane, from the air).”*

Therefore, even if (for example) a new artificial waterway were constructed instead of the present shipping channel, Port of Newcastle Ops would appear to be entitled to levy navigation services charges on vessels which utilised that new infrastructure. In any event, this would be essentially impossible to do, given that it would require the

construction of an artificial canal through the city of Newcastle and the reconstruction of the existing export terminals to service vessels which approached through this canal. Furthermore, the reconstruction of the existing coal export terminals in this fashion (even if economically feasible, which it is not) would be unlikely to be approved by their landlord –Port of Newcastle Ops.

The boundaries of Newcastle Harbour are set by statutory instrument as follows:

*“Newcastle Harbour*

*The waters of Newcastle Harbour and of all bays, rivers and their tributaries connected or leading to Newcastle Harbour (but excluding Fullerton Cove) bounded by mean high water mark and by, as upstream boundary, the eastern side of the Hexham Bridge together with that part of the Tasman Sea below mean high water mark enclosed by the arc of a circle of radius 3 nautical miles having as its centre the navigation light at Nobbys Head.”<sup>19</sup>*

The Applicant does not see it as being feasible to avoid the payment of the navigation services charges by constructing a jetty and coal conveyors to a point outside the boundaries of Newcastle Harbour established by statutory instrument and to construct an offshore wharf and shiploading facilities. However, as well as costing several billions of dollars such a construction would be likely to require approvals from Port of Newcastle Ops – for example, as the lessee of the Port land or the existing channel area.

The Council has repeatedly acknowledged that shipping channels constitute natural monopolies and the Applicant relies on and accepts the reasoning by the various State Government applicants and the Council in that respect.

## **9.2 Feasibility of constructing a new port precinct**

A theoretical alternative might be argued to be to construct an alternate port precinct and associated channel. However, a port would need to be identified which was sufficiently proximate to the Hunter Valley coal region in order to transport coal to the new port precinct. The requirements for an appropriate site for the development of a new port precinct restrict the potential sites at which an alternative facility could be developed. If an appropriate alternative site cannot be identified then it will be impossible to economically develop another facility to provide the Service. The Applicant submits that there is not any alternative site which would be viable.

The development of a new port precinct would be a highly significant exercise having a material impact on the site of the development and its surrounding areas. By its nature, the new facility must be located on the coast, and the coastal areas which are in proximity to the Hunter Valley coal basin contain many areas of high amenity which are either populated or are the subject of specific restrictions on their development, such as National Parks and State Forests. Even in areas which are not subject to restrictions such as this, the development of a new port precinct which could provide the services is unlikely to be permitted in accordance with the State’s development laws. If appropriate consents are not able to be obtained then it will be impossible to economically develop another facility to provide the Service. The Applicant submits that it would be highly unlikely that the appropriate consents would be able to be obtained.

The costs of developing a new port will depend in large part in the dredging required to create a viable shipping channel. Generally, dredging costs are reasonably predictable based on the volume of material to be removed and the density of that material. The valuation which Port of Newcastle Ops places on the channel is approximately \$2.4

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<sup>19</sup> Ports and Maritime Administration Regulations 2012 (NSW), Schedule 1.

billion.<sup>20</sup> This gives some indication of the costliness of dredging activities given that virtually all of the cost of the channel would relate to the costs of dredging. In fact, given that the Port of Newcastle has been located in its current site due to the suitability of that site for its use as a port, we would expect that alternative sites might require much more dredging than was required to create the Facilities.

However, the Applicant would not accept that this figure should be used as the basis for the regulation of the Facilities as for example it does not take into account the significant capital contributions that have been made by the coal industry over many years in order to develop the Facilities as they exist today. That figure is based on the cost of dredging the Hunter estuary, the natural features of which were already suited to the development of a port, hence the reason for the historical development of the port precinct in its current location. That figure also does not include costs which might be required in order to reclaim the land in an alternate port location in order to render it suitable for the construction of port terminals, the cost of which would might well be measured in hundreds of millions of dollars as can be readily established through the costs of port developments such as the recently constructed Wiggins Island Coal Terminal.

### **9.3 State support**

In order to develop an alternative facility, it is likely that an exercise of the powers of the New South Wales Government under the PMAA and other legislation would be required. For example, ports currently operating in New South Wales rely on their statutory powers to levy charges under the PMAA in order to levy charges on users. These powers would not be available to the developer of a new shipping channel or new port without the support of the State.

Furthermore, since the tidal waterways of New South Wales are the property of the Crown, permission from the Crown may also be required to carry out dredging and other activity in order to create shipping channels and other parts of a new facility.

It appears unlikely that the State would give any such co-operation in order to develop a new shipping channel or port precinct to provide the Service instead of Port of Newcastle Ops, and that being the case it will be impossible to economically develop another facility to provide the Service.

Given the magnitude of development required, both State and Federal environmental approvals processes are also likely to be required for the development of a new port precinct and associated infrastructure. The conduct of the required environmental impact studies and the obtaining of such approvals would be likely to take several years.

### **9.4 Other infrastructure**

As discussed in section 3, coal is transported to the existing coal export terminals by rail haulage. In order for coal exports to utilise any alternative facility developed to provide the Service it would be necessary to construct new railway lines to the new port precinct. The construction of new railway lines requires very significant amounts of capital investment, as well as the support of the State in acquiring the land required to construct such new railways. Further, the use of an alternative facility in order to provide the Service would also require the construction of new coal export terminals located within the new port precinct developed.

The costs of building new rail infrastructure from the existing Hunter Valley and other coal mines which utilise the Facilities to an alternate facility will depend upon the cost of acquiring the land over which it passes, the length of railway required, the topography of the land over which it passes and the throughput capacity of which the rail infrastructure must be capable. It is therefore impossible to say with any accuracy what the costs of

<sup>20</sup> See <http://www.portofnewcastle.com.au/Resources/Documents/2014-11-24-Trade-Asset-Financial-Performance-Table.pdf>

constructing such infrastructure would be, but based on recent experience the cost for the construction of rail infrastructure can be upwards of \$5m per kilometer.

Depending on the location of the new port, operating costs to transit the further distances to the new port precinct would add to the operating costs to produce and export coal, and would also render any possible new port development less economic.

Coal producers typically contract for their infrastructure requirements under long term contracts on a “take or pay” basis. That is, even if the services under those contracts are not used, the producer must pay charges to the infrastructure provider. This ensures that the infrastructure provider is able to recover the investment that it has made in the relevant infrastructure. Take or pay contracts will exist in relation to the existing port terminal, rail track and rail haulage services which enable coal to be exported through the Port of Newcastle, and hence use the Service. In order to justify the construction of alternative facilities it would be commercially necessary to enter into new take or pay contracts in relation to the replacement infrastructure. This would essentially require the coal producers to pay these infrastructure costs twice over – once for the infrastructure which is actually used and once for the infrastructure which is not used. This means that it is economically impossible to develop this competing infrastructure and hence that it is impossible to economically develop another facility to provide the Service.

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## **10 National significance**

### **10.1 Port of Newcastle**

According to the Port of Newcastle website:

*“In the financial year 2013-14, the port handled 159.6 million tonnes in trade throughput, with a value of approximately \$15.5 billion. Of this, coal comprised 154.4 million tonnes (value: \$13.6 billion).”*

The value of coal exports to the national economy from coal exported from the Port of Newcastle is highlighted by these figures. The Applicant believes that coal exports from the Port of Newcastle being exported via the shipping channels are of national significance.

### **10.2 NSW mining sector’s economic contribution**

The following information is taken from the NSW Minerals Council’s Economic Impacts study.<sup>21</sup> The New South Wales mining industry employs more than 40,000 people and supports a large range of local businesses including grocers, cafes, schools, electricians and service industries. The industry pays \$1.3 billion in royalties to the State Government. The industry also invests in major state-building infrastructure such as ports and railways that will deliver benefits for the people of NSW and other industries for many years to come. The mining industry contributed \$12.8 billion to the state last year. Coal accounted for 31% of all NSW exports in 2012-13, making it the state’s most valuable commodity export. More than 136 million tonnes of coal – worth an estimated \$15.2 billion – were exported from NSW last year.

In 2013/14, the Hunter mining sector directly supported 4,238 businesses; directly employed 11,078 people residing in the area; indirectly employed 58,904 more; paid \$1.5 billion in wages and salaries; and spent \$4.4 billion on goods and services, local councils and community groups. In total, about 21% of the Hunter Region’s workforce was supported by mining. Mining made up 28% of Gross Regional Product, a total of \$12.2 billion. In light of the rising unemployment rate identified in above section 3.7,

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<sup>21</sup> <http://www.nswmining.com.au/industry/economic-impact-2013-14>

maintaining the mining industry's employment contribution in the Hunter Valley region is important to the communities who have been impacted by the decline in coal production.

### **10.3 Coal export industry**

In 2013, coal was Australia's second most valuable export after iron ore, and accounted for 28.4% of Australian exports by value.<sup>22</sup> The coal export industry is an important source of foreign earnings for Australia and is a substantial contributor to the Australian economy.

The Facilities are essential to the access and utilisation of the Port, the Applicant submits that the Facilities are of national significance in light of the Port's aforementioned economic contributions to overseas trade and the national economy.

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## **11 Method of access to the Service**

### **11.1 Method of access**

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

### **11.2 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.

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## **12 Existing regime in relation to access**

### **12.1 Price monitoring scheme**

Under Part 6 of the PMAA, a price monitoring scheme applies in respect of charges levied by Port of Newcastle Ops. Section 79 of the PMAA requires Port of Newcastle Ops 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 Port of Newcastle Ops, which as the port operator appointed by the Minister (along with the Port Authority NSW) is the relevant port authority in respect of the Port of Newcastle for the purpose of setting navigation services charges as defined in accordance with section 47 of the PMAA.

### **12.2 Not an effective access regime**

The Applicant understands that a state or government developed industry specific access regime that has been certified as effective, may apply to the exclusion of declaration under Part IIIA of the Act. The Applicant notes that the price monitoring scheme described above has not been certified as effective, and the Applicant understands that no regulation is proposed by the New South Wales Government.

Notwithstanding this the Applicant notes that an uncertified access regime may have implications for the Council's assessment of declaration criteria by way of being a regime which may have already facilitated a competitive environment in a relevant

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<sup>22</sup> Trade at a Glance 2013, <https://www.dfat.gov.au/publications/trade/trade-at-a-glance-2013/>

market or for the reason that declaration sought may not be in the public interest if it is to create both a state and national access regime for the service. The Applicant does not consider that these arrangements would justify the application of either of the aforementioned factors. 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, 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 on the owner or user of the facility engaging in conduct for the purpose of hindering access by others.

For the reasons outlined above, the Applicant submits that criterion 44G (2)(e) is satisfied.

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### **13 Access to the Service will not be contrary to public interest**

The Applicant further submits that access or increased access to the Service will not be contrary to 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.

We note that improved access will not require any physical re-construction of the Facilities providing the Service so as to cause any undue delay or disruption to port operations and usage. Further, the use of the Service at present has not been contrary to public interest (other than in respect of the increase in navigation charges discussed herein) and provision of the Service on improved and reasonable terms will only serve to generate public benefits in the form of the greater cost certainty of port infrastructure charges which port users and parties in the relevant export supply chain may benefit from.

It is also important to note that in relation to the Council recommended certification of the access to commercial shipping channels leading into Melbourne Port (which was subsequently certified by the former federal treasurer Peter Costello AC), access was considered not to raise public safety issues and was not contrary to the public interest. It is submitted that the access to the Service sought under this application covers a considerably narrower scope of port infrastructure and will not be contrary to the public interest.

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### **14 Negotiation of access**

Access to the Service is currently made available by Port of Newcastle Ops, and hence it has not been necessary for the Applicant to negotiate access to the Service. However, the Applicant is concerned that the terms on which the Service is provided have been unreasonably amended through the published changes to the charges for the Service. The Applicant has written to Port of Newcastle Ops to express its concern at the price increases that have occurred. However, Port of Newcastle Ops has indicated that there will be no reconsideration of these charges.

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## **15 Duration of declaration**

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 fifteen years or for a longer period deemed appropriate by the Council given the long term notice of projects in the coal industry in the Hunter Valley. We note that in the authorisation decision for the Capacity Framework Arrangements by the ACCC in 2009, the ACCC granted authorisation for a 15 year period. The ACCC considered this to be an appropriate timeframe in view of the long term contract periods of coal projects and commercial contracts in this industry.<sup>23</sup>

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<sup>23</sup> Port Waratah Coal Services Limited & Ors - Authorisations - A91147 - A91149 & A91168 & A91169.

## **Annexures**

- A      Schedule of Port Pricing Effective from 1 January 2015**
- B      Price increase – calculation of impact**
- C      Plan of channel**
- D      Letter from Dr Rob Yeates dated 6 May 2015**