

3 June 2015

Mr David Crawford
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National Competition Council
Level 35
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Dear Mr Crawford

Application for declaration of shipping channel services at the Port of Newcastle – Submission on Designated Minister

Thank you for your letter of 13 May 2015 attaching a copy of Glencore Coal Pty Ltd's ("**Glencore**") application for a recommendation for declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth) of a service provided at the Port of Newcastle.

This submission sets out the Port of Newcastle Operations Pty Limited's (as trustee of the Port of Newcastle Unit Trust) ("**Port of Newcastle Operations**") view on the identity of the "designated Minister" for the purposes of section 44D of the *Competition and Consumer Act*.

1 Executive summary - identity of designated Minister

1.1 The Port of Newcastle Operations submits that the designated Minister is the "responsible Minister" of New South Wales because:

- (a) a body of the State of New South Wales is the owner of the facility that is used to provide the service the subject of Glencore's application to the Council; and
- (b) the State of New South Wales is a party to the Competition Principles Agreement as agreed on 25 February 1994.

1.2 The "responsible Minister" of New South Wales is the Premier of New South Wales.

- 1.3 The following sections of this submission set out the reasons for our view, based on each of the elements of the statutory term “designated Minister” in section 44D of the *Competition and Consumer Act*.

2 Definition of designated Minister

- 2.1 Section 44D of the *Competition and Consumer Act* provides that:

- “(1) *The Commonwealth Minister is the designated Minister unless subsection (2), (3), (4) or (5) applies.*
- (2) *In relation to declaring a service in a case where:*
- (a) *the provider is a State or Territory body; and*
 - (b) *the State or Territory concerned is a party to the Competition Principles Agreement;*
- the responsible Minister of the State or Territory is the designated Minister.”*

- 2.2 The test in section 44D for determining the identity of the designated Minister is neither ambiguous nor discretionary in nature. The effect of section 44D is that where:

- (a) a State body is a provider; and
- (b) the State is a party to the Competition Principles Agreement,

the designated Minister is the responsible Minister of the State and it is not relevant that others may also be a provider.

3 Definition of responsible Minister

- 3.1 Section 44B of the *Competition and Consumer Act* provides:

“**responsible Minister** means ... the Premier, in the case of a State ...”

4 Competition Principles Agreement

- 4.1 The State of New South Wales is a party to the Competition Principles Agreement, as agreed on 25 February 1994.

- 4.2 Accordingly, the second element of subsection 44D(2) of the *Competition and Consumer Act* is satisfied.

- 4.3 To ascertain whether the first element of subsection 44D(2) of the Act is satisfied, it is necessary to ask whether “the provider is a State ... body”.

5 Definition of a State body

- 5.1 Section 4 of the *Competition and Consumer Act* provides:

“**State or Territory body** means:

- (a) a State or Territory;
- (b) an authority of a State or Territory.

- 5.2 Roads and Maritime Services is an agency of the State of New South Wales established under section 46 of the *Transport Administration Act 1988* (NSW).

5.3 Further, Roads and Maritime Services constitutes “the Crown” for the purposes of the *Crown Proceedings Act 1988* (NSW).¹

5.4 Roads and Maritime Services is, therefore, a State body for the purposes of section 44D of the *Competition and Consumer Act*.

5.5 The remaining question, therefore, is whether Roads and Maritime Services is a “provider”.

6 Definition of provider

6.1 Section 44B of the *Competition and Consumer Act* states:

“provider, in relation to a service, means the entity that is the owner or operator of the facility that is used (or to be used) to provide the service.”

6.2 The definition of “provider” is determined by reference to the owner or operator of the facility used to provide the service, rather than who provides the service the subject of the application to the Council.

7 Case law on the definition of provider

7.1 The meaning of “provider” in section 44B and section 44D of the *Competition and Consumer Act* was judicially considered by Black CJ and Wilcox and Goldberg JJ in *Rail Access Corporation v New South Wales Mineral Council Ltd* (1998) 87 FCR 517.

7.2 In that case, their Honours said:

*“there may be a difficulty in Pt IIIA of the Act as a result of the terms of the definition of “provider” in s 44B. Although the definition of “service” makes clear that the service may be provided by a means other than the mere use of an infrastructure facility, the definition of “provider” draws in the owner or operator of the facility that is used to provide the service. Thus, when the National Competition Council receives an application under s 44F(1) of the Act to recommend under s 44G that a particular service be declared, it is required by s 44F(2) to tell the provider of the service, that is to say the owner or operator of the facility that is used to provide the service, that it has received the application. However, that owner or operator may not necessarily be the person who in fact provides the relevant service... If this difficulty exists, it need not be resolved in this proceeding ...”*²

8 More than one entity may be a provider

8.1 Section 23 of the *Acts Interpretation Act 1901* (Cth) provides that words said in the singular include the plural and vice versa.

8.2 The effect of section 23 of the *Acts Interpretation Act* is that the definition of “provider” in section 44B of the *Competition and Consumer Act* allows for the possibility of more than one “entity being the owner or the operator of the facility that is used (or to be used) to provide the service.”

8.3 Consistent with section 23 of the *Acts Interpretation Act*, on page 25 of the Council’s Guidelines entitled “*Declaration of Services: A guide to declaration under Part IIIA of the Competition and Consumer Act 2010* (Cth)”, the Council states:

*“the word ‘provider’ can extend to more than one party including, the owner, the operator and any person with control over the provision of the service or the use of the facility. Where the owner and the operator of the facility are not the same entity, the identification of the provider depends on an assessment of the entity that controls the use of a facility. **The***

¹ Section 3 of the *Crown Proceedings Act 1988* (NSW) defines the Crown in the right of New South Wales as including the Government of New South Wales and a Minister of the Crown in the right of New South Wales and a statutory corporation, or other body, representing the Crown in right of New South Wales.

² *Rail Access Corporation v New South Wales Mineral Council Ltd* (1998) 87 FCR 517, 525.

Council's practice is to include as the provider of a service the owner, operator and any other party with control over the use of the facility by which is service is provided" (emphasis added).

- 8.4 The Council's practice to "include as the provider of a service the owner, operator and any other party with control over the use of the facility by which is service is provided" overcomes any potential difficulty, should any difficulty actually exist, arising from the existence of more than one "provider".
- 8.5 Further, having more than one "provider" does not pose any challenges to the operation of Part IIIA of the *Competition and Consumer Act*, as a whole, because the question, for the purposes of section 44B, is not whether there are multiple providers as defined and is limited to whether any of them are a State body.

9 The facility defined by Glencore

- 9.1 In its application to the Council, Glencore states:

*"The facilities used to provide the Service are the shipping channels and vessel berth areas ... identified in the plan attached to Annexure C ..."*³

- 9.2 In its application to the Council, Glencore also states:

*"The Crown in the right of New South Wales is the owner of the tidal areas of the Port of Newcastle including the channels and berths. It is also the ultimate owner of other areas of land which ... may be used or occupied by the Facilities or in relation to the provision of the Service."*⁴

10 The service defined by Glencore

- 10.1 Glencore defines the service which it is applying to have declared as follows:

*"The service comprises the provision of the right to access and use the shipping channels (including the 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 with the Port precinct, and then depart the Port precinct (the "Service")."*⁵

...

*"[The service does not include] other services ... such as property management and port development services ... [or] services provided by Port Authority NSW, such as pilotage services or Harbour Master services ..."*⁶

11 Definition of entity

- 11.1 Section 44B of the *Competition and Consumer Act* states:

"entity means a person, partnership or joint venture."

- 11.2 Section 2C of the *Acts Interpretation Act 1901* (Cth) states:

"(1) In any Act, expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic

³ Section 5.4, page 15 of Glencore's application to the National Competition Council, May 2015.

⁴ Section 6.2, page 16 of Glencore's application to the National Competition Council, May 2015.

⁵ Section 5.1, page 15 of Glencore's application to the National Competition Council, May 2015.

⁶ Section 5.3, page 15 of Glencore's application to the National Competition Council, May 2015.

or corporate as well as an individual.

(2) *Express references in an Act to companies, corporations or bodies corporate do not imply that expressions in that Act, of the kind mentioned in subsection (1), do not include companies, corporations or bodies corporate.*"

11.3 Roads and Maritime Services is a 'body politic'⁷ established under the *Transport Administration Act*.

11.4 Consequently, Roads and Maritime Services is a "body politic" and a "person." It is, therefore, an "entity" for the purposes of section 44B of the *Competition and Consumer Act*.

11.5 The next question is whether Roads and Maritime Services is an owner or an operator of the facility defined by Glencore used to provide the service defined by Glencore.

12 Owner of the facility used to provide the service

12.1 The shipping channels and berthing boxes identified by Glencore as the facilities used to provide the service are owned by Roads and Maritime Services. This is evidenced by Attachment 1, comprising results of title searches and a map of the channel and berthing boxes.

12.2 It follows that, for the purposes of sections 44B of the *Competition and Consumer Act*, "the provider is a State body."

13 Conclusion

13.1 In conclusion, the State of New South Wales is a party to the Competition Principles Agreement and a body of the State of New South Wales is a provider of the service the subject of Glencore's application to the Council and Roads and Maritime Services is the owner of the channel and berthing boxes.

13.2 Determining who may or may not be the operator of the facility, in terms of operational control or otherwise is not relevant to the conclusions once it is clearly established that the State is party to the Competition Principles Agreement and a State body is a provider.

13.3 The designated Minister for the purposes of section 44D of the *Competition and Consumer Act* is, therefore, the Premier of New South Wales.

Please contact me if you have any questions about the content of this submission.

Yours sincerely



Simon Gelder
Acting Chief Executive Officer
Port of Newcastle Operations Pty Ltd

⁷ The State of South Australia was described as a 'body politic' in *Lipohar v The Queen* (1994) 200 CLR 485. In *McGraw-Hinds (Aust) Pty Ltd v Smith* (1978) 144 CLR 633, the High Court held that the ordinary meaning of a "person" includes the Crown.

Attachment 1: Owner of the facility



Port of Newcastle



Ownership Plan

1 of 1

SEPP 14 BOUNDARY

ROADS AND MARITIME SERVICES

PROPERTY DESCRIPTION:

Newcastle Harbour

PURPOSE:	Ownership Plan
COUNCIL:	Newcastle
DWG REF:	239034-RMS-OWN-001-A
CLIENT:	



Central coast office ph: (02) 4305 4300
Hunter office ph: (02) 4978 5100
www.qcwjohnson.com.au

VER.	DATE	COMMENT	DRAFTER	CO-ORDINATE INFORMATION
A	03/06/2015	PRELIMINARY LAYERED RMS OWNERSHIP PLAN	RC	CO-ORDINATE SYSTEM: MGA 56
-	-	-	-	ORIGIN OF CO-ORDINATES: n/a

SURVEY



LOT	DP	REGISTERED PROPRIETOR
4	1184514	Roads and Maritime Services
3	1184514	Roads and Maritime Services
5	1104199	Roads and Maritime Services
101	1190502	Roads and Maritime Services
4	1195231	Roads and Maritime Services

L.J. Kane & Co.

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LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 4/1184514

SEARCH DATE	TIME	EDITION NO	DATE
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3/6/2015	1:09 PM	-	-

CERTIFICATE OF TITLE HAS NOT ISSUED

LAND

LOT 4 IN DEPOSITED PLAN 1184514
AT KOORAGANG
LOCAL GOVERNMENT AREA NEWCASTLE
PARISH OF NEWCASTLE COUNTY OF NORTHUMBERLAND
TITLE DIAGRAM DP1184514

FIRST SCHEDULE

ROADS AND MARITIME SERVICES

SECOND SCHEDULE (1 NOTIFICATION)

1 RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S)

NOTATIONS

UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

AMANDA

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LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 3/1184514

SEARCH DATE	TIME	EDITION NO	DATE
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3/6/2015	1:12 PM	-	-

CERTIFICATE OF TITLE HAS NOT ISSUED

LAND

LOT 3 IN DEPOSITED PLAN 1184514
AT KOORAGANG
LOCAL GOVERNMENT AREA NEWCASTLE
PARISH OF NEWCASTLE COUNTY OF NORTHUMBERLAND
TITLE DIAGRAM DP1184514

FIRST SCHEDULE

ROADS AND MARITIME SERVICES (TZ AI191530)

SECOND SCHEDULE (1 NOTIFICATION)

* 1 T447400 LAND EXCLUDES MINERALS WITHIN THE PART(S) SHOWN SO
INDICATED IN THE TITLE DIAGRAM

NOTATIONS

DP1093768 NOTE: PLAN FOR EASEMENT PURPOSES - SEE PIPELINES ACT 1997
DP1102600 NOTE: PLAN IS FOR PIPELINE EASEMENT PURPOSES - SEE
PIPELINES ACT 1967
UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

Amanda

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LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 5/1104199

SEARCH DATE	TIME	EDITION NO	DATE
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3/6/2015	1:12 PM	2	7/8/2009

LAND

LOT 5 IN DEPOSITED PLAN 1104199
AT CARRINGTON
LOCAL GOVERNMENT AREA NEWCASTLE
PARISH OF NEWCASTLE COUNTY OF NORTHUMBERLAND
TITLE DIAGRAM DP1104199

FIRST SCHEDULE

ROADS AND MARITIME SERVICES (R AI55485)

- SECOND SCHEDULE (6 NOTIFICATIONS)

- 1 3849415 LAND EXCLUDES MINERALS (S.171 CROWN LANDS ACT 1989)
 - * 2 RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S) AND LAND EXCLUDES MINERALS VIDE B361219
 - 3 AE817833 EASEMENT FOR INFRASTRUCTURE AFFECTING THE PART SHOWN DESIGNATED (H) & (J) IN DP1129968
 - * 4 AF186898 EASEMENT FOR PIPELINE 5 WIDE AFFECTING THE SITE DESIGNATED (C) IN DP1129968
 - * 5 AF186898 EASEMENT FOR PIPELINE VARIABLE WIDTH AFFECTING THE SITE DESIGNATED (G) IN DP1129968
 - * 6 DP1193181 EASEMENT FOR SUPPORT 10, 13 METRE(S) WIDE AND VARIABLE AFFECTING THE PART(S) SHOWN SO BURDENED IN DP1193181

NOTATIONS

AI55485 NOTE: CT PRODUCED & DESTROYED
UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

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LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 101/1190502

SEARCH DATE	TIME	EDITION NO	DATE
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3/6/2015	1:12 PM	-	-

CERTIFICATE OF TITLE HAS NOT ISSUED

LAND

LOT 101 IN DEPOSITED PLAN 1190502
AT NEWCASTLE, STOCKTON
LOCAL GOVERNMENT AREA NEWCASTLE
PARISH OF STOCKTON COUNTY OF GLOUCESTER
PARISH OF NEWCASTLE COUNTY OF NORTHUMBERLAND
TITLE DIAGRAM DP1190502

FIRST SCHEDULE

ROADS AND MARITIME SERVICES

SECOND SCHEDULE (5 NOTIFICATIONS)

- 1 RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S)
- * 2 DP1189091 RIGHT OF CARRIAGEWAY 3.5 METRE(S) WIDE APPURTENANT TO
THE LAND ABOVE DESCRIBED
- * 3 DP1189091 RIGHT OF CARRIAGEWAY AND EASEMENT FOR SERVICES 3.5
METRE(S) WIDE AND VARIABLE APPURTENANT TO THE LAND
ABOVE DESCRIBED
- * 4 DP1190502 EASEMENT FOR SUPPORT 0.5 WIDE, 2 WIDE AND 4 METRE(S)
WIDE AFFECTING THE PART(S) SHOWN SO BURDENED IN THE
TITLE DIAGRAM
- * 5 DP1193181 EASEMENT FOR SUPPORT 10, 13 METRE(S) WIDE AND
VARIABLE AFFECTING THE PART(S) SHOWN SO BURDENED IN
DP1193181

NOTATIONS

DP1010897 NOTE: PLAN FOR LEASE PURPOSES
UNREGISTERED DEALINGS: NIL

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LAND AND PROPERTY INFORMATION NEW SOUTH WALES - TITLE SEARCH

FOLIO: 4/1195231

SEARCH DATE	TIME	EDITION NO	DATE
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3/6/2015	1:12 PM	-	-

CERTIFICATE OF TITLE HAS NOT ISSUED

LAND

LOT 4 IN DEPOSITED PLAN 1195231
AT CARRINGTON
LOCAL GOVERNMENT AREA NEWCASTLE
PARISH OF NEWCASTLE COUNTY OF NORTHUMBERLAND
TITLE DIAGRAM DP1195231

FIRST SCHEDULE

ROADS AND MARITIME SERVICES

SECOND SCHEDULE (3 NOTIFICATIONS)

- * 1 LAND EXCLUDES MINERALS , WHARVES, STRUCTURES, CRANES & FIXED APPARATUS REFERRED TO IN SEC. 13A MARITIME SERVICES ACT, 1935 WITHIN THE PART SHOWN SO INDICATED IN THE TITLE DIAGRAM
- * 2 RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S) AND LAND EXCLUDES MINERALS VIDE B361219 WITHIN THE PART SHOWN SO INDICATED IN THE TITLE DIAGRAM
- * 3 DP1193181 EASEMENT FOR SUPPORT 10, 13 METRE(S) WIDE AND VARIABLE AFFECTING THE PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM

NOTATIONS

UNREGISTERED DEALINGS: NIL

*** END OF SEARCH ***

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