

DECISION AND STATEMENT OF REASONS CONCERNING NEW SOUTH WALES MINERALS COUNCIL'S APPLICATION FOR DECLARATION OF CERTAIN SERVICES AT THE PORT OF NEWCASTLE

Competition and Consumer Act 2010, section 44H

BACKGROUND

Statutory provisions

Section 44F of the *Competition and Consumer Act 2010* (CCA) provides that the designated Minister, or any another person, may apply to the National Competition Council (NCC), asking the NCC to recommend that a particular service be declared.

After receiving the application, the NCC must, after having regard to the objects of the Part IIIA of the CCA, recommend to the designated Minister that the service be declared or not be declared (s 44F(2)(b)). The objects of Part IIIA are set out in section 44AA, and are as follows:

- (a) to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The NCC cannot recommend that a service be declared unless it is satisfied of all the declaration criteria for the service (s 44G). The declaration criteria in s 44CA(1) are:

- (a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; and
- (b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:
 - (i) over the period for which the service would be declared; and
 - (ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility); and
- (c) that the facility is of national significance, having regard to:
 - (i) the size of the facility; or
 - (ii) the importance of the facility to constitutional trade or commerce; or
 - (iii) the importance of the facility to the national economy; and

- (d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

Section 44CA(3) requires the Minister, when considering paragraph 44CA(1)(d), to have regard to:

- (a) the effect that declaring the service would have on investment in:
 - (i) infrastructure services; and
 - (ii) markets that depend on access to the service; and
- (b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it (s 44H(1)). The designated Minister must have regard to the objects of Part IIIA in making their decision (s 44H(1A)). The designated Minister cannot declare a service unless they are satisfied of all of the declaration criteria (s 44H(4)).

In the present circumstances, the designated Minister is the Commonwealth Treasurer.

Application by New South Wales Minerals Council

On 23 July 2020, the NCC received an application from the New South Wales Minerals Council (NSWMC) under section 44F(1) of the CCA (the Application) requesting that the NCC make a recommendation to declare certain services at the Port of Newcastle (the Service).

The NSWMC defined the Service provided at the Port of Newcastle as:

the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct.¹

The provider of the Service at the Port of Newcastle is Port of Newcastle Operations Pty Ltd (PNO).

The NCC undertook public consultation in respect of the Application. On 30 October 2020 the NCC released its Draft Recommendation, which proposed to recommend that the Services not be declared.

¹ NSWMC Application, p 17.

On 18 December 2020, following further public consultation, I received the NCC's final recommendation (the Recommendation). The NCC recommended that the Service not be declared on the basis that the criteria in paragraphs 44CA(1)(a) and (d) had not been satisfied.

DECISION

I have decided not to declare the Service.

FINDINGS AND REASONS

In making this decision, I have had regard to:

- the objects of Part IIIA;
- the declaration criteria in section 44CA of the CCA; and
- the NCC's Recommendation provided to me on 18 December 2020.

I have considered the findings and reasoning in the NCC's Recommendation, including the NCC's consideration of the submissions it received, and I accept the conclusions reached by the NCC in the Recommendation. Having considered those conclusions, I have independently decided that I am not satisfied that either paragraph 44CA(1)(a) or (d) are met.

Declaration criteria in section 44CA

Paragraph 44CA(1)(a)

Criterion (a) requires that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.

I have considered the NCC's approach to the criterion in paragraph 44CA(1)(a) set out in paragraphs 7.2 to 7.15 of the Recommendation, and I have adopted that approach in making my decision.

I accept that there are likely to be five, functionally distinct dependent markets relevant to access to the Services. These markets are:

- a coal export market (the coal export market)
- markets for the acquisition and disposal of exploration and/or mining authorities (the tenements market)
- markets for the provision of infrastructure connected with mining operations, including rail, road, power and water (the infrastructure market)

- markets for services such as geological and drilling services, construction, operation and maintenance (the specialist services market)
- a market for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are a party (the bulk shipping market).²

The NCC also analysed the impact in the container port market.

I consider that the tenements market, the infrastructure market, the specialist services market and the bulk shipping market are derivative markets of the coal export market, taking into account the analysis contained in the NCC's Recommendation. It follows that if declaration is unlikely to promote a material increase in competition in the coal exports market, there would be unlikely to be a material increase in competition in any derivative market.³

The Port's ability and incentive to exercise market power

In determining whether criterion (a) is satisfied, I accept the following matters identified by the NCC in its Recommendation:

- The Port is a bottleneck, with Hunter Valley coal producers having no practical alternative to the Port for the export of their coal. This gives PNO considerable bargaining power over coal producers who have sunk costs in the Newcastle catchment (paragraphs 7.33-7.34 of the NCC's Recommendation)
- PNO's incentive to deny access to the Service or otherwise exercise market power is limited:
 - PNO is not vertically integrated into dependent markets in any meaningful way, and has no incentive to deny access to firms operating in dependent markets (paragraphs 7.53 and 7.72)
 - PNO is not capacity constrained at the Port, nor is it likely to become so over the foreseeable future (paragraphs 7.55 and 7.59)
 - PNO has provided an open access arrangement and offered a ten-year Deed to coal exporters wishing to use the Port (paragraph 7.72)

² These markets were outlined in NSWMC's Application. The NCC states at paragraph 7.98 that these are the same markets as those previously identified by the NCC, the Minister, the Tribunal and the Full Court of the Federal Court of Australia in relation to Glencore's 2015 Application for Declaration.

³ The NCC in its Recommendation notes the Tribunal's decision in *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6, at [139] and [157].

- The potential for regulatory intervention by the NSW Government is likely to provide a low level of constraint on PNO’s pricing absent declaration (paragraph 7.73)
- Given the importance to PNO of coal mining revenue, and its long lease, where there is the prospect of further investment and continued demand for coal export services, PNO is likely to be mindful of reputational effects caused by its pricing (paragraphs 1.24, 7.49 and 7.73)

Competition in the coal export market

In considering whether declaration would promote a material increase in competition in the coal export market, and having considered the NCC’s Recommendation, I accept the following matters:

- the NCC found that the market is likely to be effectively competitive (paragraph 7.125)
- PNO is unlikely to have an incentive to diminish competition in coal export markets or to price discriminate in a way that will inhibit coal exporters’ ability to compete (paragraphs 7.116-7.117)
- Port charges are likely to remain a comparatively small component of the cost of production and export of coal, with or without declaration (paragraphs 7.118 – 7.123)
- While there is uncertainty around the price the Tribunal will re-determine for the Navigation Service Charge (NSC) in its re-determination of the Glencore-PNO access dispute, the NCC considered that it is not clear that an NSC set with declaration will be materially different to that offered by PNO absent declaration (paragraph 7.122). In a future without declaration, users are expected to have the option of entering a long-term deed and PNO has also published open access arrangements (paragraph 7.125)
- Coal producers face uncertainty from factors other than port charges that are more likely to influence their ability to compete in export coal markets (paragraph 7.126).

The Tribunal has found that access is unlikely to promote competition in a dependent market if that market is already effectively competitive.⁴ Based on findings set out in the NCC’s Recommendation, I consider that the coal export market is already likely to be effectively competitive such that access, or increased access, to the Service, on reasonable terms and conditions, as a result of declaration would not promote a material increase in competition in that market (paragraph 7.129).

Competition in other markets

Having found above that the tenements, infrastructure, bulk shipping, and the specialist services markets are derivative of the coal export market, it follows consistent with the

⁴ *Fortescue Metals Group Limited* [2010] ACompT 2, at [1068].

NCC's findings at paragraphs 7.151 and 7.164 to 7.167 that declaration would not be likely to promote competition in those markets. I also note the NCC's finding at paragraph 7.147 that the broader coal tenements market is and is likely to remain effectively competitive with or without declaration. Further, for the reasons identified by the NCC at paragraph 7.162 and 7.163 of its Recommendation, I am not satisfied that declaration would promote a material increase in competition in the container port market.

I am not satisfied that access or increased access to the service, on reasonable terms and conditions, as a result of declaration of the Service would promote a material increase in competition in at least one market, other than the market for the Service.

Accordingly, I am not satisfied that the criterion in paragraph 44CA(1)(a) is met.

Paragraph 44CA(1)(b)

Criterion (b) requires that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market over the period for which the service would be declared, and at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility).

I adopt the NCC's findings that this criterion is satisfied, as set out in Chapter 8 of its reasons.

Paragraph 44CA(1)(c)

Criterion (c) requires that the facility is of national significance, having regard to the size of the facility, the importance of the facility to constitutional trade or commerce, or the importance of the facility to the national economy.

I adopt the NCC's findings that this criterion is satisfied, as set out in Chapter 9 of its reasons.

Paragraph 44CA(1)(d)

Criterion (d) requires that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest. Sub-section 44CA(3) states that, in considering whether paragraph 44CA(1)(d) applies, the designated Minister must have regard to:

- (a) the effect that declaring the service would have on investment in:
 - (i) infrastructure services; and
 - (ii) markets that depend on access to the service; and
- (b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

I have considered the NCC's approach to the criterion in paragraph 44CA(1)(d) set out in Chapter 10 of the Recommendation, and I have adopted that approach in making my decision.

With respect to the effect of declaration under Part IIIA on investment in infrastructure services, I adopt the NCC's findings and reasoning at paragraphs 10.22-10.30. I also adopt its relevant reasoning and conclusion at paragraph 10.63 that declaration:

is unlikely to significantly affect investment in the infrastructure necessary to provide the Service as it is unclear how different (if at all) prices for the Service would be in a future with and without declaration of the Service.

With respect to the effect of declaration on investment, I adopt the NCC's findings and reasoning in paragraphs 10.31 to 10.38 and its conclusion at paragraph 10.63 that declaration is unlikely to significantly affect investment in dependent markets.

With respect to the administrative and compliance costs that would be incurred by the provider of the service if the Service were declared, I adopt the NCC's findings and reasoning in paragraphs 10.39-10.44. I also adopt its finding at paragraph 10.63 that administrative and compliance costs are likely to arise both in the future with, and without, declaration and that, on balance, those costs are unlikely to be materially different.

I adopt the NCC's analysis at paragraphs 10.47 to 10.62 of the impact of declaration on economic efficiency, including on the efficient use of and operation of the infrastructure by which the Service is provided, and on efficiency in dependent markets. In respect of the infrastructure by which the Service is provided, the NCC did not find that declaration was likely to lead to material improvements in productive, allocative or dynamic efficiency relative to the future absent declaration. The NCC also did not find that declaration was likely to materially promote efficiency in dependent markets.

In light of the above analysis and conclusions, I am not satisfied that access, or increased access, to the service on reasonable terms and conditions, as a result of declaration of the service would promote the public interest.

Accordingly, I am not satisfied that the criterion in paragraph 44CA(1)(d) is met.

Objects of Part IIIA of the CCA

In making my decision, I have had regard to the objects of Part IIIA, and in particular the object set out in paragraph 44AA(a). As I have referred to above, the NCC did not find that declaration was likely either to (i) materially improve productive, allocative or dynamic efficiency relative to the future absent declaration or (ii) materially promote efficiency in dependent markets. I have adopted the NCC's analysis in this regard and I am therefore satisfied that my decision is consistent with the objects of Part IIIA which are outlined above.

Conclusion

While I am satisfied that the Port facility meets the declaration criteria set out in paragraphs 44CA(1)(b) and (c), I am not satisfied that access (or increased access) to the Service, on reasonable terms and conditions, as a result of declaration of the Service would promote:

- a material increase in competition in at least one market (whether or not in Australia), other than the market for the Service, as required by paragraph 44CA(1)(a); or
- the public interest, as required by paragraph 44CA(1)(d).

Accordingly, I have decided not to declare the Service.



JOSH FRYDENBERG

Treasurer

Dated 16 February 2021