



25 November 2020

For Public Register

Mr Richard York
Executive Director, National Competition Council
Melbourne VIC 3000
By email

Dear Mr York

Application for declaration of certain services at the Port of Newcastle – submission on NCC Draft Recommendation

1. Introduction

This submission by New South Wales Minerals Council (**NSWMC**), is in relation to our application for declaration of certain channel services (**Services**) at the Port of Newcastle (**Port**) under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) pursuant to our application dated 23 July 2020 (**Application**).

This submission responds to the draft recommendation to the Federal Treasurer (**Treasurer**) by the National Competition Council (**NCC**) dated 30 October 2020 (**Draft Recommendation**) and in particular addresses whether declaration criteria (a) and (d) of section 44CA of the CCA are satisfied.

We will approach this submission by:

- (a) first noting the different practical perspective that NSWMC has regarding the situation at the Port and the timeline why declaration is needed at this time;
- (b) outlining where we believe the NCC has taken positions not supported by the underlying facts that the industry currently faces; and
- (c) addressing criteria (a) and (b) considerations based on key factual propositions we have put forward.

We note that this submission should be read in conjunction with our previous submissions on this matter and that we will not seek to address every matter in this submission where we disagree with the Draft Recommendation.



We also note that NSWMC has maintained an ongoing interest in Port of Newcastle Operations (PNO) proposal for a container terminal. Concerns around the proposal have increased significantly given the increased public references by PNO, our attempts to seek further information as outlined in our Collective Bargaining Authorisation (CBA) application, PNO's refusal to meet, and the subsequent appeal of the CBA to the Australian Competition Tribunal (Tribunal).

2. NSWMC has a different practical perspective and timeline regarding why declaration is needed at this time

Contrary to the view of the NCC, PNO is operating on a 15 year timeframe to largely replace coal exports with container operations at the Port. NSWMC therefore believes that the NCC should address infrastructure issues in the Hunter Valley at this time by declaring the Services at the Port to provide the coal industry with a fair and equitable access safeguard through declaration, as PNO seeks to develop its container operations and associated \$2 billion expenditure at the Port.

NSWMC notes that the NCC appears to have largely accepted the submissions of PNO, in preference to the submissions from NSWMC and the submissions of mining companies regarding the practical impact on individual mines and the Hunter Valley coal industry generally of the lack of constraints on PNO.

We find it difficult to understand how the NCC has given such little weight to the views of major mining companies and how the NCC has made determinations to follow its own views in the absence of supporting evidence. The Draft Recommendation provides very limited explanations in this regard.

A possible reason for the limited explanation of the NCC's dismissal of the mining companies' arguments is that the Draft Recommendation largely mirrors the NCC's recommendation dated 22 July 2019 that the designated Minister revoke the 2016 declaration of the channel services at the Port (**Revocation Recommendation**). This is extremely disappointing given significant developments have occurred since the 2016 Revocation Recommendation. This includes PNO's efforts to significantly increase port user charges following the 2016 revocation, unreasonable one-sided terms and conditions included by PNO in Deeds of Agreement offered to coal companies, PNO's refusal to negotiate with NSWMC and the coal industry as part of collective bargaining negotiations for access to the Services, as well as significant changes in the export price of coal from the Hunter Valley.



NSWMC is also disappointed that it was not given the opportunity to comment on PNO's confidential submission to the NCC referred to at [6.22] of the Draft Recommendation regarding PNO's producer and shipping agent deeds. It appears that PNO has put forward views on the operation of coal export contracts which the NCC seems to have accepted without question. We believe the NCC's views are therefore fundamentally flawed because it is, as a practical matter, ultimately the coal producer and coal customer who make those arrangements, not the vessel owner as PNO appears to have argued and the users of the Port have little choice but to accept PNO's terms. If the coal producers had the opportunity to negotiate better terms than the producer and shipping agent deeds that PNO has required, they would have done so. Further if the 2016 declaration was still in place, PNO's refusal to negotiate as part of the collective bargaining arrangement could have led to an access dispute and arbitration by the Australian Competition and Consumer Commission (ACCC) that is likely to have led to better terms. Therefore the NCC should not be taking a position it has adopted in the Draft Recommendation that those terms and conditions of access under the producer deeds would still be in place if a declaration remained on foot. They clearly would not be as materially better terms and conditions would be in place with a declaration of the Service.

We also note that as well as not accepting the views of the mining industry, the NCC has also not accepted the ACCC's submissions regarding the power or incentives of PNO, including the risk of economic hold of investment up by PNO. In addition, we note that the NCC believes the position adopted by the Queensland Treasurer in relation to the declaration at Dalrymple Bay in Queensland under similar competition provisions in the *Queensland Competition Authority Act 1997 (QCAA)*, was not a similar situation. We do not accept the NCC's preliminary view. The Dalrymple Bay matter involved a monopoly infrastructure provider in relation to coal exports where the Queensland Treasurer agreed with the ACCC that the infrastructure provider had the ability and the incentive to extract monopoly rents and engage in an economic hold up of investment in the absence of declaration because coal exporters had no alternatives. It is clear that the PNO situation is extremely similar.

We also request that the NCC consider our submission in light of the broader trading issues facing the Hunter Valley coal industry exporting from the Port. These issues need to be addressed now to ensure a commercial environment for the Hunter Valley coal industry that is conducive to efficient investments and future exports which will support and facilitate employment. Issues in relation to PNO's market power should be addressed now rather than several years in the future when PNO is seeking to undertake a container terminal expansion. By not facing into these issues now, the NCC is effectively seeking to defer these fundamental



access issues ‘down the road’ when it will be too late to ensure that expenditures by PNO at the Port are fair efficient rather than ‘gold plating’ or attempts by PNO to transfer costs related to the container terminal expansion to the Hunter Valley coal industry Port users.

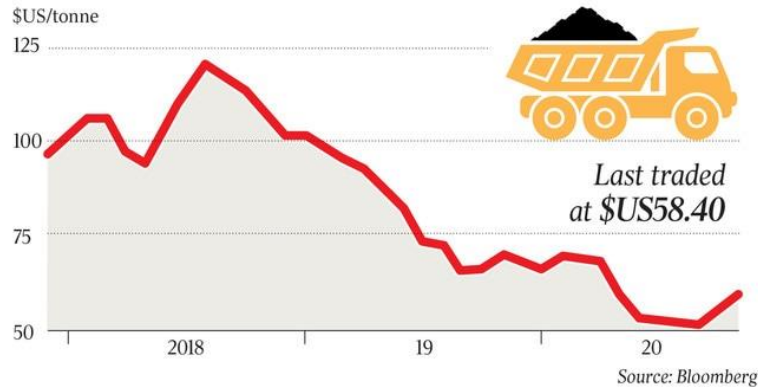
The NCC should consider the issues that NSWMC and the Hunter Valley mining companies have raised which are important to the international competitiveness of our export industries in a commercial and practical manner, particularly given around 13,500 thousand Australians are directly employed in the Hunter Valley coal industry. We ask that the NCC consider the matter based on the current factual situation at the Port, including PNO’s ambitions on their proposed container terminal development.

As the article from The Australian of 16 November 2020¹ and the image below demonstrates, thermal coal prices from Newcastle are currently at the bottom of the price cycle near multi-year lows. It is therefore even more important to ensure that coal is exported from Australia as efficiently as possible, particular in relation to export infrastructure costs such as those imposed by PNO. We did not previously accept PNO's arguments on the impact on investment of PNO's charges, and our arguments are now even stronger given the recent decline in thermal coal prices. Accordingly we continue to not accept PNO's arguments that the infrastructure costs are so small as not to make a difference. Our industry is sensitive to any additional costs imposed, and even more so when those costs can be potentially increased by further amounts in the future. Such impacts put our export competitiveness at risk, and even increases that seem small to those outside our sector can become material when accumulated over time.

¹ <https://www.theaustralian.com.au/business/mining-energy/trade-pacts-will-allow-coal-miners-to-bypass-china-keith-pitt/news-story/7f71c8706b2ad46995c2dc7a09e725>



Australian thermal coal



3. PNO's public statements do not accord with the NCC's views

NSWMC and the Hunter Valley coal industry do not share the NCC's views on how the Hunter Valley coal industry operates, or how PNO manages or will manage the Port. PNO's CEO has publicly indicated on repeated occasions that PNO's desired intention is to transition from coal operations to container operations over the next 15 years, or if it is unable to do so, to "sweat the coal terminals." This publicly stated approach is very different to that currently accepted by the NCC.

The NCC has relied heavily on the assumption that PNO will be focused on supporting the coal industry over the 98 year term of the lease of the Port granted by the State of NSW in 2014 and will therefore have a commercial incentive to protect the interests of the Hunter Valley coal sector, including not seeking to maximize charges imposed on the coal industry. The NCC Preliminary Recommendation heavily relies on this assumption to take the position that PNO will not seek to deter future coal industry investment as PNO will be focused on facilitating access to its Services by the coal industry.

As NSWMC set out at paragraph 4.2 of our July 2020 submission to the NCC, PNO is jointly owned by the Infrastructure Fund (**TIF**) and China Merchants Group Ltd (**China Merchants**) which is a global port developer, investor and operator, with a global ports network portfolio. We note China Merchant's portfolio includes container terminal operations² which are part of the Chinese Government Belt and Road Initiative.

² <https://www.newcastleherald.com.au/story/6900489/proposed-foreign-relations-bill-and-chinese-belt-and-road-projects-including-the-port-of-newcastle/>



As is publicly known and is set out in detail on PNO's website³ PNO is seeking to develop a container terminal at the Port in the near term. PNO has taken the view that the Port's long term future is in relation to container terminals and not coal exports. It is therefore seeking to expand its allowable container terminal operations, and to fund the move to container terminal operations from parties which we anticipate may involve China Merchants.⁴ Please see Annexure Two to this submission for an AFR article on this issue.

This approach has been reflected in multiple public statements by PNO over several years.

For example, the CEO of PNO told business website Hunter Headline on 6 August 2018,

"Newcastle is proud to be the world's largest coal export port, but we are also realistic about coal's declining prospects in decades to come. That is why we are committed at the Port of Newcastle to playing a major part in the Hunter region's growth and diversification strategy through the development of a container terminal."

On 21 January the CEO of PNO outlined his role specifically involved changing the Port's customer base, telling industry newsletter Daily Cargo News,

"The Port of Newcastle needs to diversify, that's what the board, the owners, want, and that's why I've been brought in."

On 23 February 2020 the PNO CEO was reporting in the Sydney Morning Herald as saying:

"Port of Newcastle chief executive Craig Carmody said \$2 billion of private investment was waiting for the green light to develop a container terminal and move the Hunter away from coal."

On 25 February 2020 further similar comments from the PNO CEO were reported in the Newcastle Herald:

"Mr Carmody says the outlook for thermal coal (used to heat water in power station boilers) appears stable enough for the next 15 years. After that, demand is expected to drop off substantially. He says now is the time to get a Newcastle terminal up and running so that the port – and by implication the wider Hunter economy – has

³ <https://www.portofnewcastle.com.au>

⁴ <https://thefutureuncontained.com.au/project/>



diversified by the time that income from coal comes to an inevitable end."

For the purpose of clarity, NSWMC does not currently oppose the development of a container terminal at the Port. However we do have serious concerns, based on the past behaviour and approach of PNO towards our industry, and these and other public statements from PNO regarding its views on the future of the coal sector and its stated aspirations and intentions for the long term future of the Port, and how our industry may suffer as a result. NSWMC's recent attempt to seek a meeting with PNO through the authorised collective bargaining arrangements would have provided an opportunity to reasonably ask for details on PNO's intentions regarding its proposed container development. This would help our industry understand whether the proposed development of the container terminal and associated infrastructure may adversely affect existing operations or investments of the NSW coal industry by imposing restrictions on access to the Port, or the risk we that as a result of any additional costs incurred by PNO in relation to its container terminal plans, the Port may seek to increase our infrastructure costs and therefore negatively affect the Hunter Valley coal industry's competitiveness. Given PNO is seeking deeds of agreement with individual companies, with parties prevented from discussing or seeking to dispute user-funded expenditure in those deeds, it is extremely relevant and appropriate for NSWMC to seek to engage with PNO on such matters that impact the industry more broadly. Indeed, under these circumstances it is arguably the only forum for doing so. However PNO declined the meeting, as set out in our material before the ACCC in the collective bargaining authorisation matter.

PNO's own website outlines proposed expenditure on the container terminal at the Port of around \$2 billion. We note that this would almost double PNO's existing claimed asset base of \$2.4 billion. We also note from PNO's website that these costs involve further expenditures on Port infrastructure and channel deepening.

In these circumstances, NSWMC is understandably concerned about possible future issues that may arise regarding user-funded expenditure and how that will be treated by PNO. For example, there is a reasonable and legitimate concern that PNO will claim that expenditure by the container terminal developer on channel dredging for the container terminal should be charged to the coal exporters as part of PNO's asset base. This is a legitimate concern as the PNO/Glencore Tribunal litigation involves issues on user funding and how PNO has incorporated into its asset base and charged for user-funded industry expenditure incurred by the coal terminals on channel dredging.

These concerns are extremely valid, particularly given that PNO has declined to even discuss the future expenditure plans at the Port with NSWMC and the coal industry, even in



circumstances where the ACCC had granted an authorization under the CCA to engage in discussions with PNO. We will further discuss this later in our submission.

In any event, it is clear that even if the NCC had some basis for previously believing that PNO had a commercial focus on facilitating access by the coal industry over the term of the 98 year lease, PNO is now focusing its long term future on container operations. Accordingly, we submit that the fundamental premise of the NCC's assessment is incorrect.

We also note that while there is in fact no prohibition on PNO operating container terminals at the Port, there are certain limitations imposed by the NSW Government through a Port Commitment Deed (**PCD**) on PNO (a matter PNO was aware of in entering into the 98 year lease as part of the Port privatisation).⁵

While PNO is clearly seeking to transition and expand into container terminals, we also remain of the view that PNO will be, as the ACCC anticipates, continuing to extract as much as commercially possible from the Hunter Valley coal industry. Again, this has been public stated by the PNO CEO who told the Sydney Morning Herald on 24 February 2020 that:

"We are the world's largest coal port... if the [PCD] remains in place for the period its meant to, the Port of Newcastle's best option is to just sweat the coal terminals until 2064, he said."

We now address some of the matters from the NCC's Draft Recommendation that we again wish to highlight, and we request that the NCC takes these matters into consideration in its assessment whether to recommend declaration of the Services. We emphasize that we are seeking light handed regulation of the Services through such a declaration. However, a light handed regulatory approach is only effective if it includes an effective threat of further regulation if required. In this matter, it is only the threat of compulsory arbitration by the ACCC when the Services are declared (if PNO does not seek to reasonably negotiate), that will allow PNO to seek to develop its container terminal while also imposing safeguards for the coal industry.

⁵ See in particular paragraphs 1.27 and 1.28
<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2516/Final%20version%20of%20report%20-%2025%20February%202019.pdf>



NSWMC believes that a declaration of the Services will still allow PNO to obtain a reasonable rate of return while providing the coal industry clarity on a price path that will provide certainty for continued investment and employment in the Hunter Valley coal industry. The recent listing of the Dalrymple Bay coal terminal by Brookfield demonstrates that such a declaration does not inhibit the infrastructure owner realizing both a good price for the asset and also a commercial rate of return⁶

4. PNO's vertical integration

In the Draft Recommendation the NCC states that PNO is not vertically integrated in any meaningful way into any markets dependent on the market for the Service.⁷ The NCC then puts the proposition (in general terms), that PNO therefore has no incentive to engage in a manner that charges the coal industry in a way that would deter investment in dependent markets or adversely affects competition in such markets.

NSWMC does not accept that PNO does not have actual or potential vertical integration issues. It is clear that if PNO operates a container terminal, issues arise regarding whether its shareholding, and its 50% shareholder's interest in container terminals globally, could see the coal industry comparatively disadvantaged. There is also no statutory requirement in the CCA that vertical integration has to be into dependent markets, but rather the focus should be on the impact of such vertical integration on those dependent markets.

5. PNO's refusal to negotiate in relation to collective bargaining

As the peak NSW mining industry association NSWMC has sought to reasonably engage with PNO in relation our collective bargaining matter authorized by the ACCC (see the ACCC website linked below and the submissions and material on that website are included by reference in this submission).⁸ In particular as set out in the NSWMC collective bargaining application to the ACCC, we hoped to engage on legitimate industry-wide coal issues,

⁶ <https://www.afr.com/street-talk/dalrymple-bay-ipo-launches-at-2-57-a-security-7pc-yield-20201112-p56dwr>

⁷ Draft Recommendation, [1.19].

⁸ <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/new-south-wales-minerals-council-nswmc>



including PNO's proposed expenditure for the container terminal, resulting future pricing paths and the treatment of user funding (a matter expressly excluded from the producer deeds).

There should be little doubt that such matters, including PNO's plans for development of a container port, are legitimate industry issues for discussion on an industry basis. PNO's argument that such discussions must instead be undertaken one by one by PNO and with individual producers or shipping agents pursuant to individual deeds (where the other party is prevented from discussing or seeking to dispute user-funded expenditure in those deeds), are flawed, and highlights PNO's attempt to gain unfair commercial advantage. If PNO was actually seeking to act in the interests of the Hunter coal industry it would have no hesitation in discussing such industry issues and negotiating with the industry, rather than simply declining to meet.

For the avoidance of doubt, given PNO has refused to negotiate those deeds and they are simply standard form agreements imposed by an infrastructure monopolist, any suggestion they are reasonable terms and conditions of access should also be rejected.

NSWMC notes that the NCC chose not to address in the Draft Recommendation the NSWMC's submission of 5 September 2020 that PNO declined to engage with the NSWMC in relation to collective bargaining, as evidence that PNO does not consider it is subject to any form of commercial constraint from the coal industry, or any form of regulatory constraint from the ACCC or government body. Since then, PNO has gone even further than declining to meet with the industry, seeking to appeal the ACCC decision to authorize the conduct with the Tribunal⁹.

Given PNO cannot be compelled to negotiate with NSWMC under the ACCC authorization, PNO's appeal to the Tribunal and refusal to negotiate is indicative of PNO's lack of concern regarding how it is perceived by the NSW coal industry. Such an approach by PNO to dealings with its customers demonstrates absolute confidence in its own market power, because there is arguably limited utility in any appeal by PNO to the Tribunal as PNO has within its own power whether or not it negotiates (because the ACCC authorisation does not compel PNO to negotiate). It is entirely a matter for PNO in the absence of the ACCC being able to compulsorily arbitrate under a declaration. This is clearly a different position with or without declaration and we do not believe that the NCC can deny that proposition that with a declaration PNO would have been subject to an ACCC access arbitration.

⁹ <https://www.competitiontribunal.gov.au/current-matters/act-2-of-2020>



6. The Port being a bottleneck facility gives PNO monopoly negotiating power

NSWMC raised the fact that the Port is a natural monopoly and bottleneck facility,¹⁰ to highlight PNO's monopoly bargaining position. The Hunter Valley (and surrounding regions) coal industry has no other practical options to export coal, other than through the Port and the shipping channels at the Port that NSWMC is seeking to have declared.

What we have sought to highlight from the Port being a bottleneck facility is that PNO has monopoly negotiating power derived from this position. This argument is obvious and should not be controversial. In any event PNO's approach to the collective bargaining authorisation highlights its belief in its absolute market power. We now address the NCC's preliminary reasoning why it believes that power is constrained and why we do not believe the NCC's preliminary views on the constraints on PNO are correct.

Given its position as a monopoly infrastructure provider and given it is seeking to pivot from coal mining to container terminal operations within the next 15 years, and having regard to PNO's vertical integration, PNO will have commercial incentives to maximize returns from the NSW coal industry contrary to the NCC's propositions

Contrary to the NCC's preliminary view set out in the Draft Recommendation, PNO will have both the ability and incentive to seek to maximize its commercial returns from the coal industry, not only because of its bottleneck position, but also because PNO is pivoting away from the coal industry to the container industry within the short to medium term.

We anticipate issues between PNO and the coal industry as PNO seeks to replace the coal export industry with a major container terminal operation over the term of its lease. Therefore the NCC has not addressed our concerns that PNO will act detrimentally to the coal industry because the NCC has largely made this assessment on the basis that PNO has no direct coal interests. To the contrary, the NSWMC point is slightly different. Given PNO's stated ambition, there is a real likelihood that PNO will operate a container terminal at the Port, and given PNO's shareholding, there should be safeguards for the coal industry that PNO will not favor the container industry over the coal industry. Given the nature and character of PNO's shareholding structure, there would not seem to be any means to safeguard against this issue

¹⁰ This would appear to be unchallenged from the Tribunal's 2016 determination at [14].



without declaration.

PNO will also have a commercial incentive to maximize returns from the coal industry within the short to medium term and does not have the commercial imperative that the NCC appears to believe it has, to support the long term interests of the coal industry. Instead we anticipate that PNO will be motivated to extract as much as it can in a short period from the coal industry. This is because PNO's time horizon is not the 98 year lease that the NCC has anticipated, but a much shorter time period based on the public statements from PNO's CEO that the coal operations will be of a limited time span of some 15 years. Given these statements from PNO's CEO they must be taken as having been intended and therefore must be given considerable weight.

As described earlier in this submission, the NCC will be aware of the issues facing the Hunter Valley coal industry as part of global trade issues which have resulted in the decrease in export prices for coal which affect the profitability and viability of the Hunter Valley coal industry. This makes it even more important that infrastructure costs imposed on the Hunter Valley coal industry are efficient. NSWMC has noted at [1.24] of the NCC's Draft Recommendation (taken from PNO's submissions) that there are said to be bigger issues facing the coal industry than the infrastructure charges imposed by PNO.

PNO's charges are significant and have the potential to become even more significant with the development of a container terminal given the cost of the terminal is approximate to the existing asset base of PNO. Accordingly, with coal prices at current levels as noted earlier in this submission, costs that are within a coal producers control in how it invests are matters that coal companies consider closely in making investments and they do affect mining company decisions as they are within a producer's control.

The NCC at [5.26] to [5.31] of the Draft Recommendation gave some consideration to the NSWMC submission that the Queensland Treasurer's decision to continue the declaration at Dalrymple Bay was relevant because it related to a similar set of competition provisions in the QCAA. Unfortunately, the NCC has taken the view that the Dalrymple Bay matter is not relevant. The NSWMC considered it was relevant as the Queensland Treasurer decided that it was important to continue to have the services declared because doing so would lead to a material increase in competition in relevant markets, including in relation to a market for



mining tenements.

In terms of the NCC's analysis, we believe that the NCC's assessment at [5.30] of the Draft Recommendation in particular is questionable. The NCC focuses on theoretical channel capacity, not coal vessel capacity that is limited by loading capacity at the coal terminals (at which capacity is constrained). The NCC also glosses over the fact that the highly questionable producer deeds create the very differential in user charging that the NCC states does not exist at the Port. That is, if you acquiesce to those terms and conditions you theoretically receive a lower price. As we have mentioned in our earlier submissions, we believe that the rights and benefits to users in the deeds are illusory.

In these circumstances NSWMC's submission is that the Queensland Treasurer correctly accepted the service provider at Dalrymple Bay had both the ability and incentive to increase charges in a manner that meant that a continued declaration would see a material increase in competition in relevant markets – importantly including coal mining tenements – a relevant market that NSWMC has submitted in relation to a declaration of the Services in this matter.

7. Glencore/PNO Arbitration Litigation

NSWMC notes the NCC's review of the Glencore and PNO arbitration litigation in Chapter 6 of the NCC Draft Recommendation. The NCC correctly notes that the matter has been referred back by the Full Federal Court to the Tribunal to make an assessment of the extent of user funding to be taken into consideration in establishing the navigation service charge that is to apply as between Glencore and PNO under the arbitration determination by the ACCC. However, NSWMC respectfully believes that the NCC's analysis in the Draft Recommendation misses the relevance of the Full Federal Court judgment. The decision by the Full Federal Court means that under Part IIIA of the CCA, the Tribunal must take user funded expenditure into account in determining efficient pricing under Part IIIA. Therefore, if the Services were again declared, NSWMC submits that any access dispute arbitrated by the ACCC would see the user funded expenditure being a live issue and taken into account in establishing efficient pricing. This is relevant because PNO is continuing to maintain that it is not possible to question user funding in the producer deeds unless PNO agrees and in any event, that past user funding in PNO's capital base cannot be questioned.



Accordingly, NSWMC has referred to the Glencore/PNO Full Federal Court decision not in relation to the pricing outcome necessarily, but rather to the economic principles that arise from that decision which mean that the current position as to user funding taken by PNO is inappropriate and inefficient. We note we expect that PNO will raise that it has sought special leave to appeal the Full Federal Court decision to the High Court. However, it is clear as a matter of law, that unless the High Court sets it aside, the position in the Full Federal Court prevails as the current law.

8. NCC's assessment of PNO Producer Deeds

NSWMC has noted that the NCC has relied upon a confidential submission to the NCC in its preliminary finding that PNO's terms and conditions are reasonable and would not be materially different in the situation of a declaration. NSWMC is concerned that in a public process such as this matter, and in relation to terms and conditions of documents that PNO has made public on its website, that submissions in relation to the operation of those deeds could be confidential. Further, the basis or expertise of a Federal Government agency such as the NCC to say that terms are commercially reasonable, particularly without industry consultation, is open to criticism. We submit this is not normally a process regulatory agencies would adopt as they are not best placed to make such assessments as to what is "commercially" reasonable, as opposed to what may be their view of the law (which in any event is still subject to judicial review).

Given that NSWMC has not seen PNO's confidential submissions on the producer deeds, we only wish to again highlight the problematic and one sided nature of those deeds rather than addressing the deeds in detail. For example, variations to Producer Specific Charges look limited until closer examination, with PNO being able to increase prices beyond annual adjustments having regard to any price increase of more than 5% (which appears to apply in addition to Item 7 increases) and is subject only to the very vague "Pricing Principles". Further examples include in relation to "capex transparency" where PNO will consult but is under no obligation to implement any comments by a producer in relation to CAPEX forecasts or any proposed increase to the Producer Specific Charges. Hence we say much of the rights of producers under the deeds are in fact, illusory.



Nonetheless, while we have made submissions on PNO's producer deeds and its dispute resolution provisions before, we have highlighted the problematic nature of certain provisions of the deeds and the dispute resolution provisions in Annexure 3 to this submission.

9. Constraints imposed on PNO not to hold up capital investment by coal companies as that would affect PNO's reputation

NSWMC notes the NCC's analysis that PNO would be concerned about the impact on PNO if its conduct led to hold ups in investment by coal miners. NSWMC submits that PNO operates a bottleneck monopoly and it has previously been prepared to adopt positions with the coal industry that may negatively impact its reputation. This includes public statements regarding the long term future of the coal sector, as previously outlined. It also includes, as explained in the material lodged with the ACCC, PNO declining to even meet with NSWMC and industry representatives in relation to the ACCC collective bargaining authorisation and then appealing the authorisation to the Tribunal even though unless Services are declared again, there is no compulsion on PNO to negotiate. If the Services were declared, PNO would be subject to access dispute provisions in the CCA and mandatory negotiations arbitrated by the ACCC.

In these circumstances we do not believe that PNO has any concerns about the impact on its reputation if it is viewed as holding up investment in the Hunter Valley by coal mining companies. PNO has clearly moved on from seeking to facilitate exports by the coal industry and is now focused on expanding container operations.

10. Constraints imposed by threat of NSW Government Intervention

NSWMC does not see any basis as a matter of law or otherwise where the NSW Government has the ability to intervene in pricing at the Port – contrary to the assertion by the NCC that the Port's pricing is constrained by the NSW Government summarised at [1.20] of the Draft Recommendation. PNO has not put forward any provisions of its lease to suggest that the State has any ability to terminate or alter the lease if PNO were to charge excessive prices. PNO must "consult" with the State, but the State has no price controls over PNO.

We have not seen a situation previously where a Government agency would assert a position of a Government to potentially intervene where there is actually no law in existence giving



rise to such a power to intervene. It would be necessary to pass such a law to allow IPART to intervene and set prices for the Services. The normal course for agencies such as the ACCC is not to take into account such speculative situations. NSWMC again notes that PNO's arguments regarding constraints from the NSW Government therefore lack substance.

We note the following from the NSW Treasury Submission to the NCC in 2015 opposing declaration. <https://ncc.gov.au/images/uploads/DEPONSu-012.pdf>

"The State decided to implement the following competition and regulatory framework:

- *bidders for the ports would have to obtain Australian Competition and Consumer Commission (ACCC) merger clearance or be able to state that there was no risk of ACCC intervention in their ownership of the port in order to lodge a final bid for a port*
- *the transaction documentation imposed an ongoing obligation on the Port Lessee to notify the State of any material changes in ownership or control contractual obligations were imposed on the Port lessee to operate the port in a manner which promotes the efficient operation of the port and associated facilities and a light-handed price monitoring regime was implemented to oversee pricing practices at the port in private operation.*

These measures were in addition to the constraints placed on the Port Operator provided by the: price monitoring regime in Part 6 of the PAMA

- *significant countervailing power of the shipping lines which use the relevant ports*
- *threat of State Government intervention by way of more intrusive economic regulation*
- *anti-competitive conduct provisions in Part IV of the CCA and*
- *threat that a third party may initiate declaration of relevant port services under Part IIIA of the CCA."*

This makes it very clear that the NSW Government was imposing a light handed price monitoring regime – not a price capping or setting regime. It also makes it clear that one of the constraints was the threat of declaration. It is therefore circuitous for the NCC to argue



that the threat of the NSW Government's IPART setting a price is a constraint, when the NSW Government itself has indicated that IPART is a light handed price monitoring regime not a constraint, and that the constraint on PNO arose through the threat of declaration.

As we set out in Annexure One to this submission, contrary to PNO's assertions, there is in fact no mechanism to allow the NSW Government to have IPART undertake a price setting role at the Port. Indeed as per the Port Authority of NSW's letter to the ACCC in the ACCC collective bargaining matter, the converse appears to apply namely; that the State of NSW actually earns more money through PNO increasing the navigation service charge as it appears to obtain a proportion of that charge and therefore has an incentive not to intervene. Accordingly, NSWMC believes that in fact there is no mechanism for the NSW Government to intervene without new legislation and that is very unlikely.

11. Response in relation to the NCC's assessment of criterion (a) and why criterion (a) is satisfied

The NCC Draft Recommendation largely bases its view that criterion (a) is not satisfied on a belief that PNO is not vertically integrated in any meaningful way (Draft Recommendation [1.19]). The NCC then proceeds on the basis that PNO does not have the incentives to extract monopoly rents or engage in conduct that would hold up investments by coal mining companies. On this basis the NCC's preliminary view is that access (or increased access) to the Services, on reasonable terms and conditions as a result of declaration, would not promote a material increase in competition in at least one dependent market and therefore criteria (a) is not satisfied.

In effect the NCC concedes that while PNO has the ability to extract monopoly rents from users of the Services, PNO does not have an incentive to do so. NSWMC strongly disagrees.

(PNO's potential vertical integration into container terminal operations (beyond the interests of its shareholder China Merchants), would see it likely discriminate against the coal mining industry (or at the very least favour the container industry), as it seeks to pivot to container terminal operations; and

Further, as noted in Section 3 of this submission, PNO has signalled through its public statements that it is working to a timeframe of around 15 years for the Hunter Valley coal



industry before it declines, clearly demonstrating that PNO is incentivised to extract the greatest return possible from the coal industry over the next 15 or so years, rather than seek to protect the long term interests of the coal sector for the term of its 98 year lease as contended by the NCC.

Accordingly, NSWMC disagrees with the NCC's assessment of PNO not being vertically integrated and not having any incentive to extract as much as it possibly can from the coal industry as quickly as it can.

However, NSWMC's views are not dependent on the vertical integration argument given PNO's public statements that they will focus on extracting as much as possible from the coal industry within the short to medium term.

We now turn in more detail to the NCC reasoning on why the NCC argues that criteria (a) is not satisfied. As we have noted above, NSWMC's analysis on why criteria (a) is satisfied begins with a different but clearly valid premise in relation to vertical integration. PNO's major shareholder is vertically integrated in container terminals and as a result it is likely that PNO will have an incentive to favor that business, particularly given the statements from PNO's CEO on the intention to pivot to a significant container terminal operation, irrespective of the likely timing of any imminent move into container operations. In any event, the statements from PNO highlight a much shorter timeframe than the term of its lease during which PNO can seek to extract as much economic rent from the coal industry.

We now turn to the bullet points argued by the NCC in [1.20].

- **First bullet point – The 98 year lease.** As we have explained in this submission, PNO's focus as repeatedly stated publicly by their CEO is to replace coal revenues over the next 15 years with revenues from a significant expansion in container operations. As such, PNO is seeking to replace revenues from its coal industry customers, and will therefore have no concerns about any "hold up" of future investments in the Hunter Valley coal sector. Indeed it appears that PNO is actually intending to extract as much income as possible from coal miners over the next 15 years before it believes the sector will decline, and that contrary to the NCC's preliminary assessment, it is more likely the coal industry will be exploited during this period by PNO seeking to maximise profits from the sector while it believes it can.
- **Second bullet point – Competition to attract mining investment.** As explained in the response to bullet point one, PNO is not focused on competing to attract global



coal mining investments to the Hunter as the NCC suggests given its publicly stated views that the Hunter coal industry (currently its largest customer) does not have a long term future. As seen from the public statements from the PNO CEO in Section 3 of this submission, PNO is clearly seeking to pivot away from the mining industry. Further, should PNO fail in its efforts to establish significant container terminal operations, PNO has also been equally clear that it will "sweat" the mining industry in the short to medium term. This very public approach by PNO is unlikely to act as a global beacon to attract further long term mining investment, and is inconsistent with the NCC's belief that PNO will actively "compete" for such investments. Such conduct reinforces why the Services should be declared in order to put in place reasonable constraints on PNO.

- **Third bullet point – NSW Government will be likely to intervene.** The NCC states that:

"...such intervention might be via the terms of PNO's lease; under the terms of the Ports and Maritime Administration Act 1995 (NSW) (by referral to IPART); or by introducing new statutory restrictions."

NSWMC notes the inconsistency in the NCC's arguments as set out in the Draft Recommendation. At [7.35] of the Draft Recommendation, the NCC notes the Ports and Maritime Administration Act 1995 (NSW) (**PAMA**), does not "currently act to directly limit or regulate the level at which prices may be set by PNO". Indeed in the view of NSWMC, it is clear that IPART only has a monitoring role and there is no actual constraint. We also refer the NCC to Annexure One to this submission.

In relation to the lease itself, at [7.36] of the Draft Recommendation, the NCC appears to dismiss any effective constraints imposed by the NSW Government under the lease. The NCC also notes there are no private rights to enforce the lease, and further notes it would be very costly and time consuming for the NSW Government to seek to do so.

As noted earlier in this submission, the NCC suggestion that the NSW State Government would amend legislation to impose additional regulatory burden on a comparatively recently privatised asset is surprising given the potential legal and political implications. NSWMC considers regulatory intervention by the NSW Government unlikely given the nature of the privatisation and the potential threat of litigation by PNO as a result of any regulation change by the State of NSW.



In relation to [1.23] of the Draft Recommendation, the NSWMC responds as follows:

- As noted above, PNO is pivoting to develop a container terminal and PNO's commercial incentives are changing to extract as much as possible from the coal industry over the next 15 years. We believe this could have a significant effect on coal exports if costs continue to increase (particularly to achieve returns over a 15 year period instead of the 98 year term of the lease), and also having regard to the volatile nature of coal prices and the high volume, low margin long term business model that underpins much of the Hunter Valley coal industry's operations. NSWMC notes the importance of efficiency of infrastructure costs imposed on Australian coal exports in order to seek and maintain the international competitiveness of Australia's coal exports. PNO's current and potential future infrastructure charges are not efficient if, as the Full Federal Court has noted, PNO seeks to pass on to the coal industry expenditures that PNO did not actually spend, or any future container terminal infrastructure costs;
- We do not believe that the coal tenement market is derivative of the coal export market in the manner suggested by the NCC. Such a market involves considerable investments and the consideration of likely future costs and returns before making an investment decision, which is different to situations where investments have already been made. The coal tenement market in the Hunter Valley catchment area is sensitive to risks of unconstrained cost increases, including those imposed by service providers such as PNO. As noted, coal producers are very concerned about the risk of economic hold up by PNO. Declaration and the availability of ACCC arbitration that would force PNO to negotiate would result in more reasonable behaviour when negotiating future expenditures and pricing paths for the Port.

In relation to [1.24] of the Draft Recommendation, NSWMC notes that coal producers focus on matters within their control in making decisions to invest, and that the potential container terminal development by PNO significantly increases risks about how PNO may charge the coal industry in the short to medium term.

We note the assertion by PNO in its submission that coal producers face significantly greater uncertainty from other factors that are likely to affect their future mining activities, and therefore cost increases by PNO are not significant. While that argument was adopted by the NCC in the Draft Recommendation, the argument fails



to give appropriate consideration to how mining companies operate in practice. For example, while some factors may change, miners can adopt strategies to deal with them in response, including diversifying customers and suppliers. These options are clearly not available to mining companies beholden to PNO as a bottleneck monopoly service provider.

Having regard to the above matters, we do not accept the reasoning set out by the NCC that PNO's market power is ameliorated by any existing constraints. As such, NSWMC believes that declaration would impose reasonable constraints on PNO that do not currently exist and therefore, competition in relevant markets and in particular the tenements market, would be materially increased.

Why criterion (a) is satisfied

Light handed regulation through declaration would create constraints on PNO that do not currently exist through the threat of arbitration by the ACCC - which would see materially improved terms and conditions, including safeguards as to user funding.

These safeguards are a very significant matter given the substantial likely expenditures involved in the container terminal operations and likely impact that would have on the navigation services charge. Moreover, if the Services were subject to declaration, PNO would be compelled to negotiate and explain to the industry future expenditures at the Port, rather than the current situation exemplified by PNO's refusal to engage in any manner under the ACCC authorised collective bargaining authorisation and provisions in the producer deed where PNO can simply ignore a producer's objections to future expenditure. Declaration will promote a material increase in competition through the imposition of such a constraint on PNO and the likely resulting increased willingness by PNO to negotiate on future expenditure and pricing paths would in turn give the coal mining industry increased confidence in investing in the Hunter Valley.

NSWMC notes that even leaving aside our submissions on PNO's vertical integration issues concerning container terminals, NSWMC has sufficiently established through the examples relating to PNO's refusal to meet to collectively bargain, as well as the significant downturn in coal prices, that the NCC's views on PNO's commercial incentives and the factual premises of the NCC's Draft Recommendation should be revised.

NSWMC believes that if revised by the NCC in accordance with our submission, this should logically lead to a finding that criteria (a) is satisfied.



12. Response in relation to NCC's assessment of criterion (d) and why criterion (d) is satisfied

NSWMC notes that the NCC analysis of criterion (d) in the Draft Recommendation appears to be largely based on the NCC's preliminary assessment that criterion (a) is not satisfied. In addition to the matters canvassed in this submission on why NSWMC believes that criterion (a) is satisfied, NSWMC believes that given the Port was privatised with no effective access regime, and that PNO is seeking to develop a container terminal operation involving extensive expenditure (noting PNO has declined to meet with representatives of the Hunter Valley coal industry to discuss legitimate coal industry concerns associated with the development), it would manifestly be in the public interest to have the Services declared.

Such a declaration would provide safeguards for the Hunter Valley coal industry in dealing with PNO, as it would be possible to seek to have an access dispute arbitrated by the ACCC.

Further, Hunter Valley coal industry is of significant economic importance to the Hunter region and the NSW and national economies. The sector directly employs over 12,000 people in the region, contributes around 20 per cent of the region's Gross Regional Product, is NSW's most valuable export commodity, contributes over a billion dollars each year in mining royalties, and is a key component of the national resources export effort underpinning the strength of the Australian economy through national coal export volumes. There is clearly a strong public interest in any measure that contributes to the ongoing viability of the Hunter Valley coal industry. This includes declaration of the Services to deliver effective regulatory constraint on PNO as a monopoly service provider to this economically vital industry.

NSWMC submits that it would therefore be in the public interest for a declaration of the Services in these circumstances.

Turning to the aspects of the Draft Recommendation dealing with criterion (d) in the executive summary of the Draft Recommendation, we now address the NCC's analysis.

First, NSWMC believes that the NCC has not given appropriate consideration to the Glencore/PNO Full Federal Court judgment and its ramifications, which undermines elements of the NCC's analysis.

The Full Federal Court in the Glencore matter gave clear direction to the Tribunal that it must take into account user funding as an important element of the pricing principles in Part IIIA. It indicated it would not be consistent with efficient pricing for PNO to be able to charge for expenditure it did not make. If the Services were again declared, the NSW Coal Industry



would seek to ensure, that contrary to the 'take it or leave it' producer deeds put forward by PNO, an ACCC compulsory arbitration would examine what PNO actually expended at the Port, and seek to limit PNO's ability to incorporate user funded expenditure in its asset base. The Full Federal Court judgment effectively states that PNO cannot charge for what it did not expend.

Further, the NCC analysis at [7.62] of the Draft Recommendation is considered incorrect. If the issues are largely the same (which they are in this matter) the ACCC will allow arbitration involving multiple parties – the arbitration is not therefore "bilateral" in nature. Accordingly, the coal industry would have the opportunity to have industry issues with PNO arbitrated by the ACCC.

Dealing with the five bullet points from [1.26] of the NCC's Draft Recommendation in turn, we respond as follows:

- **Bullet point one - Regulatory risk on investment through arbitration.** NSWMC notes that PNO proposes to expend some \$2 billion on a container terminal. In this regard it is not correct to say that significant expenditure has already occurred as this remains a significant and unresolved issue for the coal industry. Potential future expenditure by PNO presents a significant risk for the Hunter Valley coal industry. Given PNO has declined to meet with the industry to provide a forum to collectively discuss what this expenditure may involve, it is in the public interest that the Services be declared to provide the industry with improved certainty on any future cost increases and access issues arising from such investment and expenditure. Obtaining greater certainty on such investment associated with a future container terminal and associated infrastructure will have a positive impact on industry investment in the Hunter Valley coal industry;
- **Bullet point two – Other factors are said by the NCC to overshadow PNOs charges.** The NCC has not engaged with the Hunter Valley coal industry in relation to what other factors may affect coal producer exports. As the NSWMC has noted in relation to criteria (a), the coal industry's position in relation to PNO is different as PNO is operating an infrastructure monopoly and the industry cannot seek to ameliorate its risks in dealing with PNO as it can with other suppliers or customers. Accordingly, the coal industry does not agree with the NCC commentary that PNO's infrastructure charges are not material, nor are they overshadowed by other factors as we have explained in detail in this submission;



- **Bullet point three – Evidence as to efficient investments hindered by PNO.** The NCC claims there is no factual evidence before the NCC to demonstrate which efficient investments by industry participants will not occur in the absence of declaration. As noted previously, the industry has significant confidentiality concerns with disclosure to PNO of future plans and investment. There is a risk that highly confidential investment decisions and analysis provided to the NCC will become available to PNO. In addition, NSWMC notes that to the contrary, the factual evidence before the NCC is that coal producers have directly outlined in their submissions the potential risk that exists in relation to investing in the Hunter Valley when there's no certainty or constraints on the potential future extraction of profits from coal miners by PNO, as well as the significant "hold up risk". It is not necessary to show actual investments that have been stymied as a result of PNO's behavior. Equally there is no evidence that there has been investment as a result of the alleged 'certainty' that arises from the producer deeds. Further, the NCC analysis fails to appreciate the industry reluctance to enter into the deeds as they restrict producers from arbitrating legitimate issues such as user funding, and contain illusory protections that the NCC appears to have accepted as real. For example, PNO can simply ignore any comments on future expenditure that a producer may have and proceed irrespective of a producer's concerns.
- **Bullet point four – "Potential hold up risk".** NSWMC does not agree with the NCC analysis that the holdup risk in relation to investing in mining activities is constrained by PNO's incentive to not develop a reputation for 'holding up investments', or that the risk is mitigated by the Deed offered by PNO. First, it is clear to the mining industry that in practice, PNO has significant market power (as found by the NCC in the Draft Recommendation at [7.67]). It's also clear from PNO's litigation against NSWMC in the collective bargaining matter, which is a voluntary process which PNO can refuse to enter, that PNO has no concerns about its reputation with the mining industry economically or otherwise. Further, the submission explains why the producer deed is neither effective nor reasonable in limiting or mitigating PNO's market power. Being presented with the deed on a 'take it or leave it basis' without the ability to engage with PNO on industry related issues highlights PNO's significant market power, and why it is in the public interest that power be constrained by declaration.
- **Bullet point five – Administrative and compliance costs.** PNO's litigation against NSWMC on the collective bargaining matter by appealing the ACCC authorisation to



the Tribunal when negotiations are entirely in PNO's hands, highlights that such administrative and compliance costs are not a concern to PNO. Again, the litigious nature of PNO highlights why it is in the public interest that the Services be declared and why there should be an independent regulator like the ACCC to assist in an arbitration under a declaration and to allow the industry to cost effectively collectively bargain.

Why criterion (d) is satisfied

NSWMC believes that because of the unfettered market power of PNO it is in the public interest under criterion (d) that PNO should be subject to constraint by declaration.

While NSWMC agrees with the NCC finding that PNO has market power, we do not believe that the constraining factors that the NCC points to in fact exist. Indeed, the evidence is to the contrary, including as PNO's refusal to meet as part of the collective bargaining authorisation-particularly where the ACCC found that such bargaining was in the public interest.

Given that PNO has the ability to refuse to meet industry representatives in relation to a matter found to be in the public interest by the ACCC, we seek a more formal ability through declaration, to compel PNO to negotiate or face compulsory arbitration by the ACCC.

Importantly, from a public policy perspective, as PNO pivots to favor container terminal operations over the coal industry, and recognising PNO has unfettered market power, as well as the significant economic importance of the coal industry, it is in the public interest that declaration occur to safeguard the coal industry from being exploited by PNO.

NSWMC considers it is in the public interest that PNO, having been found by the NCC to have market power, faces a light handed form of regulatory constraint through declaration.

11. Conclusion



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NSWMC has sought to address the main issues raised by the NCC in its Draft Recommendation and to point to material that NSWMC believes the NCC should have taken into account in relation to PNO's existing incentives and bargaining power (irrespective of whether or not PNO develops a container terminal).

In addition, PNO's publicly stated aspirations and plans for significant future container terminal operations make it even more imperative that the Services be declared, and support NSWMC's arguments in relation to criteria (a) and (d).

Declaration will clearly provide a safeguard to the Hunter Valley coal industry that gives rise to the likelihood of a material increase in competition in dependent markets.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Stephen Galilee", with a large, sweeping flourish at the end.

Stephen Galilee
CHIEF EXECUTIVE OFFICER



ANNEXURE 1

OVERVIEW – PORT OF NEWCASTLE STATUTORY CHARGES AND IPART PRICE MONITORING SCHEME

1. INTRODUCTION AND EXECUTIVE SUMMARY

1.1. In summary:

- 1.1.1. PNO has the power and authority to, amongst other things, fix and collect port charges pursuant to Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (the **PMAA**);
- 1.1.2. there is currently no regulatory oversight over PNO's pricing. While PNO is required under statute to provide information to the NSW Government in relation to its charges, there is no independent regulatory body that reviews its pricing;
- 1.1.3. only the Minister (i.e. the NSW Government) has the statutory ability to refer the pricing for investigation to the New South Wales Independent Pricing and Regulatory Tribunal (**IPART**) and there is no ability for a user of the Port to have pricing concerns referred to IPART.

2. FACTUAL BACKGROUND AND PNO'S STATUTORY ABILITY TO LEVY CHARGES

- 2.1. PNO has operated the Port since May 2014. Prior to this, the Port was operated by the State of NSW. In May 2014, the joint venture parents of PNO acquired a 98-year lease from the NSW Government effectively privatising the Port's assets. Under the terms of the lease, PNO has the power and authority to, amongst other things, fix and collect port charges pursuant to Part 5 of the *PMAA*.

Key statutory provisions of the PMAA that enable PNO to levy access charges

- 2.2. Part 5 of the *PMAA* governs the imposition of various port charges on either the owner of the vessel in which cargo is loaded or the owner of the cargo being loaded. Ordinarily, such charges are payable to the relevant port authority pursuant to section 68 of the *PMAA*, but by virtue of the 98-year lease arrangement, these charges are payable to PNO.



2.3. The two charges that have been the primary subject of dispute between Port and users are the "navigation service charge" (NSC) and the "wharfage charge" (WC) under the *PMAA*.

2.3.1. Section 50 of the *PMAA* provides for the imposition of the NSC as follows:

- "(1) A navigation service charge is payable in respect of the general use by a vessel of a designated port and its infrastructure...*
- (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*
- ...
- (4) A navigation service charge is payable by the owner of the vessel concerned."*

2.3.2. Section 61 of the *PMAA* provides for the imposition of the WC in relation to the loading and unloading of cargo at the Port:

- "(1) A wharfage charge is payable in respect of the availability of a site at which stevedoring operations may be carried out.*
- ...
- (3) The charge is payable:*
- (a) in the case of cargo that is unloaded at the site – by the person who, immediately after it is unloaded, is the owner of the cargo, and*
 - (b) in the case of cargo that is loaded at the site – by the person who, immediately before it is loaded, is the owner of the cargo."*

2.4. In addition, there are three statutory charges that might potentially be levied in respect of the berthing and loading process that users of the Port undertake:

2.4.1. the port access charge (section 55 *PMAA*);

2.4.2. the site accommodation charge (section 60 *PMAA*);

2.4.3. berthing charge (section 65 *PMAA*).



- 2.5. Notably, the PMAA does not provide any access seeker of the Port with any right to negotiate the terms and conditions of access or to provide for any enforcement process if agreement as to the terms of access cannot be reached.¹¹

Price monitoring scheme under PMAA and referral to IPART

- 2.6. Part 6 of the *PMAA* contains a price monitoring scheme which imposes certain obligations on the port operator of a port (i.e. PNO in relation to the Port) including the following:

- 2.6.1. publishing port charges on its website (section 79);
- 2.6.2. giving notice of any proposed change in the port operator's service charges to the relevant Minister in writing at least 20 business days before the change is proposed to be made, and publishing that notice on the port operator's website at least 10 business days before the change is proposed to be made (section 80);
- 2.6.3. undertake annual reporting of charges to the Minister, including the revenue received by the operator during the financial year from service charges (section 81);
- 2.6.4. providing information to the Minister as directed (section 82).

Accordingly, this is essentially a consultation obligation.

- 2.7. The Minister may refer the pricing for investigation to IPART pursuant to Part 3, Division 1, section 11 of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) (**IPART Act**), which provides:

"(1) The Tribunal is to conduct investigations and make reports to the Minister on the following matters –

(a) the determination of the pricing for a government monopoly service supplied by a government agency specified in Schedule 1,

(b) a periodic review of pricing policies in respect of government monopoly services supplied by such an agency."

- 2.8. Schedule 1 of the IPART Act sets out government agencies for which the Tribunal has standing reference and includes "*Port Corporations or other relevant port*

¹¹ *Application by Glencore Coal Pty Ltd [2016] ACompT 6, [15].*



authorities within the meaning of Part 5 of the Ports and Maritime Administration Act 1995." Relevantly, section 4(5) of the IPART Act provides that "to avoid doubt the service for which a navigation service charge under Part 5 of the Ports and Maritime Administration Act 1995 is payable is capable of being declared to be a government monopoly service. The relevant port authority (within the meaning of that Part) is taken to be the supplier of that service."

- 2.9. On the basis of the statutory provisions of the IPART Act set out above, the Minister (i.e. the NSW Government) has the ability to refer PNO's pricing for investigation by IPART. There is however no ability for IPART to actually set prices.
- 2.10. Additionally, as the Tribunal noted in its 2016 decision in relation to whether the Port should be subject to declaration under Part IIIA of the *Competition and Consumer Act 2010* (Cth), the IPART regime is not a certified or effective access regime:

*"In some cases of bottleneck infrastructure, there is a certified access regime or other effective regulatory framework for "managing" the prices set by the monopoly owner or operator of that infrastructure for the use of the particular infrastructure. There is no such structure in place in relation to PNO. The prices levied by PNO are subject to price-reporting to the relevant Minister of the State of NSW under Pt 6 of the PMAA, and the Minister may refer the pricing for investigation to the New South Wales Independent Pricing and Regulatory Tribunal (IPART). It is common ground that the IPART regime is not a certified or effective access regime: if it were, s 44G(2)(e)(ii) of the Act would mean that the NCC could not recommend the Service, because it would not be satisfied that there was no other appropriate access regime. That question did not arise in the NCC consideration or its recommendation."*¹²

¹² *Application by Glencore Coal Pty Ltd [2016] ACompT 6, [14].*

ANNEXURE 2

Chinese ships will come to Newcastle, not Botany, if \$100 fee dumped: Craig Carmody *AFR Dec 11, 2018 – Jenny Wiggins, Infrastructure Reporter*



Port of Newcastle CEO Craig Carmody says Chinese shippers are willing to call at Newcastle if it builds a container port. **Ian Kirkwood**

Chinese ships are willing to bypass Sydney and call at Newcastle instead if Port of Newcastle can strike a deal with the NSW government to dump a \$100 handling fee and build its own container terminal, chief executive Craig Carmody says.

Mr Carmody, a former political adviser who became Port of Newcastle CEO in August, said he was already in talks with the NSW government over removing a so-called "port commitment deed" before the competition watchdog launched legal action against Port Botany's private owners on Tuesday.

"What I'm trying to do is get a deal with the NSW government that says this is how we're going to move forward and once that's done, the investors will give me the money," Mr Carmody said.

...

"The investors will not give me the money while the port commitment deed exists," he said. "It's really just black and white.

...

"And I don't need to wait for a court case to have that conversation with the NSW government."

Mr Carmody says the 2013 deed, which requires the Newcastle port to reimburse the NSW government for a fee of \$100 per container once it moves more than 30,000 containers annually as part of the \$5.1 billion sale of Port Botany, is stopping investors giving Newcastle money to develop a container port.



The \$100 container fee would be passed on to Port Botany's owner, NSW Ports, which includes AustralianSuper, IFM and Tawreed Investments.

Shipping Australia chief executive Rod Nairn said the organisation was "very disappointed" when both Port Botany and Port Kembla were sold to the same group but was worried about how Newcastle was going to attract shippers that wanted to call at only one east coast port, and how it would make its forecast numbers "stack up."

Newcastle handles just 10,000 containers annually compared with the 2.6 million containers that pass through Port Botany, but wants to develop a port that can handle big ships and move up to 2 million containers a year.

Mr Carmody, who was in China and Hong Kong last week, said he had met with Chinese shipping lines who had told him they were prepared to call at Port of Newcastle instead of Port Botany under certain conditions.

"They told me what they want to see in Australia, if I can do it, obviously I will."

Mr Carmody declined to specify the conditions but said China Merchants Port Holdings' 50 per cent ownership of Port of Newcastle was helping the port develop relationships with Chinese shippers.

"The way the Asian market works, somebody's got to introduce you in the first place – otherwise you're just this brash Australian who's turned up."

China Merchants operates in about 38 ports globally and handles about 100 million containers annually.

The Port of Newcastle on Tuesday released a report it had commissioned from consultants AlphaBeta Advisors that forecast a container port at Newcastle could add \$6 billion to NSW's gross state product by 2050, by lowering land freight costs, creating more competition and reducing traffic congestion.

Port of Newcastle expects that most of the containers it handles will eventually use the inland rail route, once it is complete.

NSW Ports declined to comment on whether the 2013 Port Botany sale agreement included provisions for compensation if the \$100-a-container fee is changed or removed.

NSW Ports has said it will vigorously defend the ACCC court proceedings and that the success of Port Botany and Port Kembla is in "the national interest" because it is majority owned by superannuation funds investing on behalf of more than 6 million Australians.



ANNEXURE 3

NSWMC comments on Port of Newcastle Producer Deed and Dispute Resolution Terms¹³

Port of Newcastle's template Producer Deed is available [here](#)

PORT OF NEWCASTLE DISPUTE RESOLUTION PROCESS

This Dispute Resolution Process forms part of and binds the parties to the Contract.

1. OBJECTIVE

- 1.1 PON is committed to the fair and final resolution of commercial disputes proactively and constructively without unnecessary delay or expense and, where possible, informally and quickly in a cost effective manner.

2. RAISING A DISPUTE

2.1 Where:

- (a) a User wishes to raise a Dispute with PON; or
- (b) PON wishes to raise a Dispute with a User,

that party must do so within 3 months after the circumstance giving rise to that Dispute by providing a Dispute Notice to the other party for the purpose of endeavoring to resolve the Dispute.

2.2 The Dispute Notice must be in writing and include details of:

- (a) the nature of the Dispute, including, where the Dispute relates to a service provided by PON to the User, the precise details of the service in question;
- (b) the outcome sought by the party in relation to the Dispute; and
- (c) the action on the part of the other party which the party believes will resolve the Dispute.

¹³ <https://www.portofnewcastle.com.au/wp-content/uploads/2019/12/Dispute-Resolution-Terms.pdf>



[The dispute resolution process suffers from information asymmetries – NSWMC notes that there is no mechanism for the users to seek information from PNO as to matters such as costs or other factual underpinnings of PNO's conduct in order to challenge PNO's costings and price increases]

- 2.3 The parties agree and the User accepts that no Dispute may be raised by a User that is an Excluded Dispute.

[NSWMC notes the dispute resolution process is limited in breadth – NSWMC notes that this significantly limits access seekers dispute rights]

3. RESOLVING THE DISPUTE

- 3.1 Within 7 days of a party providing the other party with a Dispute Notice, senior representatives of each party must meet and undertake genuine and good faith negotiations with a view to resolving the Dispute expeditiously by joint discussion.
- 3.2 If the Dispute is not resolved in accordance with clause 3.1 within 14 days of a party providing the Dispute Notice to the other, then the Dispute shall be mediated in accordance with the ACICA Mediation Rules. The mediation shall take place in Sydney, Australia and be administered by ACICA.
- 3.3 If the Dispute has not been settled pursuant to the ACICA Mediation Rules within 28 days of a party providing the Dispute Notice to the other or within such other period as the parties may agree in writing, the Dispute shall be resolved by arbitration in accordance with the ACICA Arbitration Rules, and:
- (a) the seat of arbitration shall be Sydney, Australia;
 - (b) the language of the arbitration shall be English;
 - (c) the number of arbitrators shall be one;
 - (d) the parties designate the laws applicable in the State of New South Wales as applicable to the substance of the Dispute.

4. MATTERS TO BE TAKEN INTO ACCOUNT IN PERMITTED PRICE DISPUTES

- 4.1 To the extent the Dispute to be resolved is a Permitted Price Dispute:
- (a) a mediator in conducting a mediation must take into account; and
 - (b) an arbitrator in making any award must apply, the Pricing Principles set out in clause 4.2.



Pricing Principles

[NSWMC notes these pricing principles are very vague and open to interpretation as the Glencore/PNO dispute highlights. In particular they require extensive facts from PNO]

- 4.2 The matters that must be taken into account by a mediator and applied by the arbitrator in resolving a Permitted Price Dispute are:
- (a) PON's legitimate business interests and investment in the port or port facilities, including a reasonable opportunity to recover over the Leasehold Period the efficient cost of the service provided at the Port of Newcastle, which recovery shall include:
 - (i) the value of its Initial Capital Base and any updates thereof;
 - (ii) a reasonable rate of return on the value of all assets comprising its Initial Capital Base and any updates thereof; and
 - (iii) the return over the Leasehold Period of the total value of the assets comprising its Initial Capital Base and any updates thereof;
 - (b) the costs to PON of providing the service (including the costs of any necessary modification to, or extension of, a port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets;
 - (c) the economic value to PON of any additional investment that the User or PON has agreed to undertake;
 - (d) the interests of all persons holding contracts for use of any relevant port facility;
 - (e) firm and binding contractual obligations of PON or other persons (or both) already using any relevant port facility;
 - (f) the operational and technical requirements necessary for the safe and reliable provision of the service;
 - (g) the economically efficient operation of any relevant port facility;
 - (h) the benefit to the public from having competitive markets;
 - (i) that prices should allow multi-part pricing and price discrimination when it aids efficiency;



- (j) that prices should not allow a vertically integrated service provider to set terms and conditions that would discriminate in favour of either its upstream or downstream operations, except to the extent that the cost of providing services to others would be higher; and
- (k) that prices should provide incentives to reduce costs or otherwise improve productivity.

[NSWMC notes that these issues are very general and require extensive information to be provided by PNO in order to dispute PNO's assertions – It should also be noted that as part of the definitions, crucial matters in issue have been excluded]

5. GENERAL

5.1 The terms of this Dispute Resolution Process govern the resolution of all Disputes to the exclusion of other forms of dispute resolution unless agreed to by the parties. Neither a User, PON, nor any person acting on their behalf, may commence any court proceedings in relation to a Dispute, except where:

- (a) an Insolvency Event affects, or is reasonably likely to affect imminently, either PON or any entity comprising the User, and the other party reasonably considers it necessary to commence court proceedings in relation to a Dispute to preserve its position with respect to creditors of the other party;
- (b) PON or the User is seeking to enforce unpaid debts;
- (c) PON or the User is seeking urgent interlocutory relief; or
- (d) the relevant Dispute relates to a material failure by PON or the User to comply with this Dispute Resolution Process.

5.2 The parties agree that no appeal may be made to the Court on a question of law arising out of an award of the arbitrator appointed under this Dispute Resolution Process.

5.3 The particulars of the Dispute, any negotiation, mediation or arbitration and any terms of resolution including any Award must be kept strictly confidential by PON and the User.

[NSWMC notes that PNO not only holds all cards as to information but has excluded any appeal rights]

6. DEFINITIONS



In this Dispute Resolution Process, capitalised terms have the meaning given in the Contract and the following meanings will apply (unless the context otherwise indicates):

ACICA means the Australian Centre for International Commercial Arbitration.

Coal vessel has the meaning given in the Schedule of Service Charges.

Contract means the agreement defined at the webpage entitled "Vessel Open Access Terms" which binds the User and PON with respect to the relevant Vessel's entry to and use of the Port.

Corporations Act means the Corporations Act 2001 (Cth).

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

Dispute means any dispute, controversy or claim arising out of, relating to or in connection with the Contract, including any question regarding its existence, validity or termination.

Dispute Notice means a notice given by a party of a Dispute under clause 2.1 in a form which complies with clause 2.2.

Excluded Dispute means a Dispute relating to:

- (a) the amount of the Navigation Service Charge for Coal vessels, where the amount of the Navigation Service Charge per gross tonne published in the Schedule of Service Charges for Coal vessels does not exceed \$1.04 (exclusive of GST) per vessel gross tonne in 2020, and each subsequent annual CPI increase in the amount of the Navigation Service Charge for Coal vessels each calendar year for a 10 year period from 1 January 2020; and
- (b) the amount of the Wharfage Charge, where the amount of the Wharfage Charge for each of East Basin 1 and 2, Dyke 4 and 5, Kooragang 4-10, BHP 6 and Mayfield 7 published in the Schedule of Service Charges does not exceed \$0.0802 (exclusive of GST) per revenue tonne in 2020, and each subsequent annual CPI increase in the amount of that Wharfage Charge each calendar year for a 10 year period from 1 January 2020.

[NSWMC notes that PNO has excluded any dispute over current prices or CPI increases]

Initial Capital Base means the value established by reference to the depreciated optimised replacement cost as at 31 December 2014 of the assets used in the



provision of all of the services at the Port of Newcastle and, unless otherwise agreed by PON, without deduction for user contributions.

[NSWMC notes that PNO has excluded any challenge to its initial capital base that includes user funded expenditure]

Insolvency Event means, in respect of a person:

- (a) the person states that it is unable to pay its debts or becomes insolvent within the meaning of section 95A of the Corporations Act or insolvent under administration within the meaning of section 9 of the Corporations Act, or circumstances exist such that the court must presume insolvency under section 459C of the Corporations Act (regardless of whether or not an application has been made as referred to in that section);
- (b) an application being made to a court for an order to appoint, or a step is taken to appoint, a controller, administrator, receiver, provisional liquidator, trustee for creditors in bankruptcy or analogous person to the person or any of the person's property or such an appointment being made;
- (c) the person suspends payment of its debts or enters, or takes any step towards entering, a compromise or arrangement with, or assignment for the benefit of, any of its members or creditors;
- (d) any event under any law which is analogous to, or which has a substantially similar effect to, any of the events referred to in paragraphs (a) to (c),

unless this takes place as part of a solvent reconstruction, amalgamation, merger or consolidation.

Leasehold Period means the term of the Port Lease which expires on 30 May 2112, at which time the land and improvements to the land on which the Port is situated will revert to the lessor for nil consideration.

Navigation Service Charge has the meaning given in the Schedule of Service Charges.

PAMA means the Ports and Maritime Administration Act 1995 (NSW).

Permitted Price Dispute means a Dispute which is not an Excluded Dispute and relates to:

- (a) the amount of the Navigation Service Charge published in the Schedule of Service Charges; and



- (b) the amount of the Wharfage Charge published in the Schedule of Service Charges.

PON means the Port of Newcastle Operations Pty Limited (ACN 165 332 990) as trustee for the Port of Newcastle Unit Trust, being the operator of the Port of Newcastle.

Port has the meaning given to the term "Port of Newcastle" under the PAMA.

Port Lease means the 98-year leasehold interest dated 30 May 2014 granted by Port of Newcastle Lessor Pty Limited to Port of Newcastle Investments (Property) Pty Limited in the land on which the Port is situate.

Schedule of Service Charges means the schedule of charges published by PON on its website for services supplied at the Port to Users from time to time.

User means a Vessel Operator. Where a person asserts that they act on behalf of the Vessel Operator for the purposes of the DR Process, such person must furnish to PON written authority from the Vessel Operator to do so in a form satisfactory to PON in its absolute discretion.

Wharfage Charge has the meaning given in the Schedule of Service Charges.