



Application by the Port of Newcastle Pty Ltd for the Revocation of the Declaration of the Shipping Channel Service at the Port of Newcastle

NSW Minerals Council Submission – October 2018

1 Introduction and Executive Summary

1.1 Introduction

The NSW Minerals Council (**NSWMC**) is the peak industry association representing the NSW mining industry, including explorers, miners and associated service providers. A list of our members is set out in Annexure A.

NSWMC makes this further submission to the National Competition Council (**NCC**) in light of the publication of the arbitration determination of the Australian Competition and Consumer Commission (**ACCC**) dated 18 September 2018 (**ACCC Final Determination**) and the NCC's request for further submissions regarding the revocation application by Port of Newcastle Operations (**PNO**).

The ACCC Final Determination comprises the ACCC Arbitration Report, ACCC Determination and ACCC Statement of Reasons.¹ This submission is supplementary to the submission provided by NSWMC dated 8 August 2018.

It is part of NSWMC's role, as the representative of its members, to make submissions to Government and statutory bodies, such as the NCC. Our submissions reflect the views of our members. PNO's submission to the NCC dated 17 September 2018 suggested that there was limited stakeholder feedback, or feedback by the public generally, to PNO's revocation application. NSWMC, on behalf of its members, takes PNO's revocation application extremely seriously and strongly opposes the revocation application.

We ask the NCC, on behalf of our members, as well as their employees and their families and the people indirectly employed through their mining operations in the Hunter Valley, to carefully consider NSWMC's submissions.

1.2 Executive Summary

NSWMC is extremely concerned about the economic power of PNO, which is an infrastructure monopolist in relation to the multi-user Port of Newcastle (**Port**). In the absence of the declaration, PNO will have the ability to exercise that monopoly power in an unconstrained manner in relation to the provision of access to the Port given that there is no other meaningful regulatory oversight of this

¹ <https://www.accc.gov.au/public-registers/access-to-services-registers/determination-of-the-access-dispute-between-port-of-newcastle-operations-and-glencore-coal-assets-australia>

monopolist. The exercise by PNO of its monopoly power has had, and in the absence of the declaration will continue to have, a negative impact on our members' export operations.

NSWMC submits that the NCC should not recommend revocation of the declaration, as the declaration and the consequential opportunity to have terms and conditions of access to the shipping channel service (**Service**) arbitrated by the ACCC, imposes an essential constraint on PNO and provides an environment in which competition is promoted and materially increased.

The declaration of the Service imposes a constraint on PNO as the declaration provides a "backstop" for Port users to obtain reasonable terms and conditions for access through arbitration if these cannot be negotiated directly with PNO. Absent the declaration, there is simply no incentive for PNO to negotiate reasonable terms and conditions as our members have no choice but to use the Service. The fact that the declaration would be in place for a fixed period of time also provides our members with certainty, which in turn provides them with the ability to invest in their mining operations in the Hunter Valley. NSWMC believes this is a meaningful procompetitive result that will not be achieved in the absence of the declaration.

Mining companies are familiar with the usual supply and demand fluctuations that arise in relation to commodities and can manage their own operations having regard to these external factors. However, mining companies in the Hunter Valley have no ability to control or manage their infrastructure cost risks in dealing with the monopolist PNO in the absence of the declaration (and specifically the ability to have terms and conditions of access arbitrated by the ACCC).

2 Declaration provides an important constraint on PNO

2.1 Introduction

The declaration of the Service is significant to all Port users as the declaration acts as a constraint on PNO. The Australian Competition Tribunal has found that the shipping channels at the Port are a "natural 'bottleneck' monopoly"². The ACCC has also found that, without regulation, owners of shipping channels can arbitrarily set terms and conditions of access that limit competition within relevant markets.³ The declaration, and consequential ability to utilise the ACCC's arbitration process, provides all Port users with the ability to seek fair and reasonable terms of access to the Service.

The declaration provides a critical constraint on PNO's exercise of its monopoly power in two important ways:

1. The declaration operates for a fixed period; and
2. The declaration enables all Port users to seek arbitration (if the requirements for arbitration are met) for reasonable terms and conditions of access that appropriately address the negotiating imbalance that otherwise exists because of PNO's monopoly position.

2.2 Declaration applies to all users for a fixed period

The declaration was made on 16 June 2016 and applies for the period 8 July 2016 to 7 July 2031 (Term of Declaration).

The declaration applying for a fixed period provides Port users with certainty over the period in which they will have this important protection in negotiating the terms and conditions for access to the Service with PNO. This certainty enables Port users to plan investments in their own infrastructure

² *Re Application of Glencore Coal Pty Ltd* ACT 1 of 2016, [7].

³ Final Determination: Statement of Reasons, page 23.

and in their mining operations in the Hunter Valley. Certainty in investment planning in turn enable Port users to develop their competitive long term business strategies.

Importantly, under the declaration, any Port user can seek an arbitration of a dispute if they are unable to agree terms of access with PNO. This means that both large and small coal exporters will have this regulatory protection in their negotiations with PNO.

2.3 Negotiation of reasonable terms of access with PNO

PNO provides an essential monopoly service that is required by exporting coal producers in the Hunter Valley. In the ACCC Final Determination, the ACCC acknowledged the significance of the Port:

"The Port is the world's largest coal export port, and the only economically viable means of exporting coal produced in the Hunter Valley. The Commission considers any access dispute determination to facilitate effective access to the Service at the Port has the potential to enhance the efficiency of Australian-based coal producers, such as Glencore, competing with rivals for the sale of coal to overseas customers. Coal exports make a significant contribution to domestic economic activity and therefore enhances the welfare of Australians."⁴

Given the significance of the Port to the export of Australian coal, and the importance of coal exports to Australia's economy, it is very important that an opportunity is provided to coal exporters to negotiate terms and conditions of access to the Service. There is a significant power imbalance between PNO and the users of the Service. This is demonstrated by the fact that Glencore, one of the largest coal exporters in the Hunter Valley and a significant global company, was unable to negotiate reasonable terms and conditions of access to the Service. If a large coal exporter such as Glencore is unable to negotiate reasonable terms and conditions without arbitration, there would appear to be very limited ability for other miners to achieve a different outcome.

In summary, the declaration and resulting ability to arbitrate provides Port users with the ability to obtain reasonable terms and conditions of access – for a known period – that would not otherwise exist given that PNO is a monopoly service provider. This is a procompetitive outcome which has significant positive effects on the Australian economy, including the Hunter Valley region.

3 A framework for reasonable terms and conditions of access

3.1 Certainty of application

The Term of Declaration is fixed and therefore all Port users know that the arbitration “backstop” will be available for the Term of the Declaration. This certainty is important from a business planning perspective.

The uncertainty that would exist absent the declaration is indicated by the way in which PNO exercised its monopoly power in 2014/15. In that period, when the coal mining industry was experiencing a significant downturn and fragile market conditions, other infrastructure service providers in the Hunter Valley, such as PWCS, took steps to reduce charges to assist in ensuring the ongoing viability of their customers. PNO, on the other hand, significantly increased its charges for the Service. Contrary to PNO's submissions, these infrastructure charges are not insignificant. As mentioned previously, the Service must be used by Hunter Valley coal exporters and the charges have a material impact on the international competitiveness of those exporters.

⁴ Final Determination: Statement of Reasons, page 15.

At the time PNO increased its charges in 2014/15, several Hunter Valley mines were forced to close permanently or suspend operations. If the Service had been declared at this time, it is unlikely that PNO would have been able to increase the charges for the Service to the same extent, which may have resulted in a more limited impact of the coal sector downturn on the Hunter Valley region. This clearly demonstrates the public interest in the Service being declared.

3.2 Reasonable terms and conditions of access materially promotes competition

An arbitration determination may deal with any matter relating to access by the third party to the Service, including matters that were not the basis for notification of the dispute.⁵ The arbitration process provides Port users with an avenue to negotiate terms and conditions of access with PNO on a level playing field should they otherwise be unable to negotiate such access terms. In other words, the arbitration will remove the negotiation advantage that PNO enjoys because it is a monopolist. An arbitration, or the prospect of an arbitration, will not mean that PNO is disadvantaged, as it will still be entitled to recover its costs and appropriate profit from the provision of the Service, however, it will not be entitled to recover monopoly rents.

The Final ACCC Determination is a comprehensive document that provides Glencore with reasonable terms and conditions for access for the Term of Declaration. Therefore, Glencore has certainty about the terms on which it will be able to access the Port for approximately the next two decades.

In PNO's submission dated 17 September 2018, PNO submitted that there was *"no basis to assume that access terms and conditions will be more favorable for users with declaration compared to without declaration ..."*. The ACCC Final Determination in relation to the terms and conditions of access that apply to Glencore clearly demonstrates that is not the case. First, the ACCC Final Determination provides Glencore with certainty of access for some two decades. No other coal exporter has that level of certainty. This certainty will enable Glencore to develop its business plans for its investment decisions and therefore operate its business at an optimal level.

Secondly, it is likely that the terms of access which were secured would not have been achieved without the Service being declared. The price that Glencore will pay for the Service is 20% less than that paid by all other Port users. This is a significant differential and represents the removal of a monopoly rent which unfortunately all other Port users remain burdened with.

If the declaration remains in place, these more favorable terms would also be potentially available to other users who sought an ACCC access arbitration. The ACCC has noted the principles set out in the ACCC Final Determination would apply to others. Revoking the declaration would prevent other coal users from being able to access these more favorable terms as to price for the Services.

Revoking the declaration would, as well as providing PNO the ability to continue to extract monopoly rents from coal exporters generally, give Glencore an unintended competitive advantage in the coal export market. The access terms and prices that Glencore has obtained will assist Glencore in operating efficiently and competing with other coal miners. While Glencore has borne the costly and time consuming exercise of seeking an access declaration and the associated litigation, NSWMC is of the view that it is important that the declaration continues to allow other exporters the ability to negotiate similar terms and conditions.

3.3 The importance of transparency

The ACCC arbitration between Glencore and PNO has established a Regulatory Asset Base for pricing purposes. This provides important transparency for all Port users as to PNO's cost base and as to how it calculates its charges that has not been available to date. For example, in 2015, PNO restructured its port charges and introduced substantial price increases for use of the Service and the

⁵ Final Determination: Statement of Reasons, page 14.

Port. This was of concern to industry. What is now apparent is that PNO, in determining the price increases at that time, in fact included in its own cost base user funded expenditure. In other words, PNO recovered not only its own costs but also costs previously paid by the users for dredging of the Port shipping channel. Had users of the Service been aware of this in 2015, they may have been able to negotiate with PNO so that they were not put in the position of paying twice for the dredging of the shipping channel at the Port.

Of course, not only is the availability of the arbitration process important for transparency purposes but is also important as, armed with the relevant information, the ACCC is able to determine the appropriate asset base to calculate the prices that should be paid for the Service. Relevantly, the ACCC Final Arbitration determination has meant that the access terms for Glencore are more reasonable as the user funded expenditures referred to in the previous paragraph were excluded by the ACCC from the regulated asset base. PNO will receive an appropriate return but will not be able to extract monopoly rents from Glencore by requiring Glencore to effectively contribute twice to the costs of dredging the shipping channel.

3.4 Public interest considerations

NSWMC believes that it is in the public interest that the declaration continues, not only because of the lack of any other regulatory oversight of PNO, but also because the ACCC arbitration process has permitted transparency as to the efficient regulated asset base of the Port and has shone a light on PNO's expropriation of user funding and double counting.

In addition, NSWMC does not accept PNO's submissions that the declaration has chilled or will chill PNO's investment in and operation of the declared services. PNO remains entitled to receive an appropriate return on its investment in the Port. All that the declaration has done and will continue to do if it remains in place, is ensure that PNO cannot extract an inflated return from its investment by requiring the users of the Service to pay monopoly rents.

3.5 Competition in dependent markets

NSWMC remains unconvinced as to PNO's claims that it has an aligned commercial interest with Port users in maximising Australia's coal exports. Consistent with Glencore's most recent submission to the NCC of 5 October 2018, NSWMC believes that PNO clearly has (based on its past and current conduct), a commercial incentive to maximise profits irrespective of the level of Australia's coal exports. Our belief is supported by the fact that the ACCC Final Determination makes it clear that PNO's pricing is currently materially higher than it would be in an efficient (non-monopolist) market. NSWMC believes that PNO's pricing and approach to access terms has, during its period of ownership of the Port, suppressed and inhibited investment and has accordingly chilled competition in dependent markets.

The chilling impact on competition is apparent in the market for new coal mining tenements. New mining companies in the Hunter Valley would wish to be able to obtain the terms and conditions of access that Glencore has now achieved as that would alleviate their disadvantage of scale that other incumbent coal miners in the Hunter Valley have. We believe that these terms and conditions would be available to be negotiated or otherwise obtained by arbitration. As the ACCC stated at page 2 of the Arbitration Report.⁶

"Further, while any potential future dispute between an access seeker and PNO in relation to access to the Service would need to be decided on its merits, the ACCC considers that the approach taken in the current dispute provides a useful framework and guiding principles in the parties' negotiations."

⁶ <https://www.accc.gov.au/system/files/public-registers/other/Glencore%20PNO%20access%20dispute%20-%20Arbitration%20Report%20-%202018%20September%202018%20%28Published%20version%29.pdf>

Having regard to the monopoly infrastructure characteristics of the Service, NSWMC believes that it is important that the declaration remain in place. Further, and specifically in response to the NCC's request for submissions on this issue, NSWMC believes that the ACCC Final Determination demonstrates what reasonable terms and conditions of access look like in terms of both price and non price terms, compared to the inability to negotiate any terms with PNO that previously existed and would exist in the absence of the declaration. The ACCC Final Determination highlights that the declaration promotes a material increase in competition in dependent markets by putting in place constraints on PNO by means of the terms that would arise by virtue of the arbitration, or threat of arbitration, which would not otherwise arise. As we have noted, the terms that Glencore has achieved through the ACCC arbitration are materially better than those obtained by other users of the Service provided by PNO.

NSWMC appreciates the opportunity to make this submission.

Full Members

Alkane Resources Ltd
Anchor Resources Limited
Australian Pacific Coal Limited
BHP Billiton
Bengalla Mining Company Pty Ltd
The Bloomfield Group
Centennial Coal Company Ltd
China Molybdenum Co
Clean Teq
Evolution Mining
Fortescue Metals Group Ltd
Glencore Coal (NSW) Pty Limited
Gloucester Resources Ltd
Heron Resources Limited
Hillgrove Mines Pty Ltd
Idemitsu Australia Resources Pty Ltd
Iluka Resources Pty Ltd
Kepco Bylong Australia Pty Ltd
Mach Energy Australia Pty Ltd
Newcrest Mining - Cadia Valley Operations
New South Resources Pty Ltd
Peabody Energy Australia
Regis Resources Limited
South 32 Illawarra Coal Holdings
Shenhua Watermark Coal Pty Limited
Shoalhaven Coal Pty Ltd
Silver Mines Ltd
Spur Hill Management Pty Ltd
Thiess Pty Ltd
Whitehaven Coal Limited
Wollongong Coal Limited
Wyong Areas Coal Joint Venture
Yancoal Australia Limited

Associate Members

Aecom Australia Pty Ltd
Ampcontrol Pty Ltd
ARTC - Australian Rail Track Corporation
Ashurst
Aurizon Holdings LTD
Baccus Resources Pty Ltd
B Marheine Holdings Ltd
Cancer Council NSW
Centre for Mined Land Rehabilitation
Civeo Pty Ltd
Coal Services Pty Ltd
ElectraNet
Emeco International Pty Ltd
Emmerson Resources
EMM Consulting
EMS Group Pty Ltd

Genesee & Wyoming Australia Pty Ltd
Gold and Copper Resources Pty Limited
Golden Cross Resources Ltd
Helix Resources Ltd
Herbert Smith Freehills
Hunter Business Chamber
Hughes Mining Services
Hansen Bailey Pty Ltd
Jodama Pty Ltd
Jervois Mining Limited
Sydney Mining Club
Jennmar Australia
Johnson Winter Slattery
L McClatchie Pty Ltd
McCullough Robertson
Mitsubishi Development Pty Ltd
MRS Services Group Pty Ltd
NuCoal Resources Ltd
NSW Aboriginal Land Council
Niche Environment & Heritage
Newcastle Coal Infrastructure Group
Orica Australia Pty Ltd
Pacific National Pty Ltd
Paradigm Resources Pty Ltd
Peel Mining Ltd
PricewaterhouseCoopers
Port Waratah Coal Services Limited
Hetherington Exploration and Mining Title Services Pty Ltd
Hughes Mining Services
Rangott Mineral Exploration Pty Ltd
Quarry Mining & Construction Equipment P/L
Rimfire Pacific Mining NL
Resource Strategies Pty Ltd
RW Corkery and Company
Seyfarth Shaw Australia
Silver City Minerals Limited
Sparke Helmore Lawyers
Sada Pty Limited
UNSW Mining Engineering
TAFE NSW – Illawarra Institute
TEC-C Investments Pty Ltd
Thomson Resources Ltd
Toptung Limited
Umwelt (Australia) Pty Limited
University of Wollongong
XCoal Energy and Resources