

PUBLIC VERSION

By email

25 November 2020

Mr Richard York
Executive Director
National Competition Council
Level 17, Casselden
2 Lonsdale Street
MELBOURNE VIC 3000

info@ncc.gov.au

Dear Mr York

Application for declaration of certain services at the Port of Newcastle - Submission by Port of Newcastle Operations Pty Limited (PNO) in response to Draft Recommendation

1. PNO appreciates your invitation to provide its views on the draft recommendation (**Draft Recommendation**) of the National Competition Council (**NCC**), in relation to the application for declaration of certain services (**Services**) at the Port of Newcastle (**Port**) lodged by the NSW Minerals Council on behalf of it and its members (**Applicants**) on 23 July 2020 (**Application**).
2. PNO welcomes the NCC's Draft Recommendation that the designated Minister not declare the Service. For the reasons set out in this submission and PNO's Previous Submissions¹, PNO agrees with the key conclusions reached in the Draft Recommendation - namely, that neither statutory criteria (a) nor (d) in s 44CA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) are satisfied in respect of the Services and that therefore the NCC should not recommend that the designated Minister declare the Service.
3. This submission is divided into two sections.
 - (a) In Part A, PNO explains why it agrees with the NCC's analysis and conclusions, and provides additional information that PNO considers further supports the Draft Recommendation not to declare the Service.
 - (b) In Part B, consistent with its September Submission, PNO updates the NCC on its application for special leave to appeal the decision of the Full Court of the Federal Court² to the High Court of Australia as a further relevant matter in support of the NCC's conclusion that "*it is appropriate to undertake [the] assessment of criterion (a) without forming a view on...the ongoing access dispute between Glencore and PNO*".³

¹ PNO submissions of 26 August 2020 (**August Submission**) and 7 September 2020 (**September Submission**) (together, **Previous Submissions**).

² *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (**FCAFC Decision**).

³ Draft Recommendation at [6.24].

PART A. Access or increased access to the Service, as a result of declaration, would not promote a material increase in competition in any dependent market (criterion (a)), or the public interest (criterion (d))

The NCC's approach to criteria (a) and (d) is consistent with s 44CA and the NCC's previous reasoning

4. PNO agrees with the NCC's approach to considering whether it should recommend declaration of the Service. PNO submits, consistent with its August Submission and the NCC's Revocation Recommendation, that the NCC's approach to assessing criterion (a) in the Draft Recommendation is consistent with s 44CA(1)(a).
5. In the Draft Recommendation, the NCC asks, in relation to criterion (a):
 - (a) would the provider have the ability and incentive to deny access to the relevant service or restrict output and charge monopoly prices? Where a provider of a relevant service has this ability and incentive, it is more likely that it will be able to set terms and conditions of access that are less favourable than those that would be expected in a competitive market for the service; and
 - (b) if the provider has that ability and incentive, would any resulting conduct be likely to materially affect competition in a dependent market?
6. PNO considers that the NCC has properly concluded that PNO has neither the ability nor the incentive to deny access to the Service, or to restrict output and charge monopoly prices.
7. It is well-established that the assessment under criterion (a) requires a counterfactual analysis "with/without" declaration,⁴ and that criterion (a) requires that the NCC compare the degree of competition in dependant markets where access is declared on reasonable terms and conditions to the terms of access likely without declaration - which include any existing or likely contractual access arrangements - such as, in the present case, the open access arrangements and long-term vessel agent deeds (**Deeds**) that PNO has entered into under s 67 of the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**). **[Redacted]**
8. As the Port operator, PNO is naturally incentivised to contract with Port users in a way that has regard to its ability to maximise its expected profits over the term of its 98-year lease. However, as the NCC has accepted:⁵
 - (a) PNO is not meaningfully vertically integrated and, consequently, has little incentive to deny access to coal miners seeking to use the Service. PNO has a commercial incentive for dependent markets to be competitive in order to maximise demand for the Service.
 - (b) The Port is not currently capacity constrained, nor is it likely to become capacity constrained in the foreseeable future, such that PNO may be incentivised to provide access to certain types of users or to price discriminate between them. Price discrimination in this context means charging different prices to different customers where the difference is not due to the different costs involved in providing the Service.
 - (c) It is the case that PNO's offerings presently set different charges for different types of user of the Service. The open access arrangements set different prices for different groups of Port users (e.g. coal vessels, non-coal vessels). However, this kind of price discrimination is not that described above, and is unlikely to inhibit the

⁴ See *Sydney Airport Corporation Ltd v Australian Competition Tribunal* [2006] FCAFC 146 at [81]; *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124 at [88]-[89]; *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

⁵ Draft Recommendation at [7.43], [7.45], [7.49].

ability of different coal miners to compete on their merits against each other in dependent markets.

9. Should PNO price in a way that reduces future investment in coal mining activity in the Newcastle catchment, such conduct it is unlikely to be profit maximising as it may reduce future profits it can earn from its operation of the Port. PNO is also constrained by the risk of reputational damage if its actions result in hold-up of miners' investments.
10. Further, as the NCC has previously observed,⁶ the NSW Government has a clear interest in the continued development and operation of coal mining in the Hunter Valley, given its significant economic contribution to the State. The NSW Government could be expected to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets, or otherwise harm the public interest. As the Draft Recommendation concludes: "[s]uch an intervention might be via the terms of PNO's lease, under the terms of PAMA Act by referral to IPART; or by introducing new statutory restrictions".⁷ Further, the PAMA Act and associated regulations⁸ provide transparency over the charges levied by PNO and a price monitoring framework.

Access is already being provided on reasonable terms and conditions

11. The NCC has properly rejected the Applicants' submission that "*it is only through declaration that users of the Port would have...a legal right or entitlement to use the Service on reasonable terms and conditions*".⁹
12. As explained in PNO's August Submission,¹⁰ PNO has, since December 2019, provided access to the Service pursuant to open access arrangements for users published on its website - and will continue to do so regardless of whether the Service is declared.
13. **[Redacted]**
14. The charge presently offered by PNO for the navigation service in 2020 under the Deed is within the range of prices previously determined by the ACCC and the Tribunal in their respective arbitration determinations (adjusted for inflation). As the NCC has concluded:

*Further, for coal vessels, the NSC under the Deed is less than that provided for under the open access arrangement. This can mean that some coal producers will pay more for the Service than others. However, the choice to acquire access under either the Deed or the open access arrangement is available to all users at the Port. Users at the Port are, therefore, all able to choose which option best suits their individual circumstances. In that sense, the Council does not consider the availability of these different options for all users at the Port is likely to inhibit the ability of individual miners to compete on their merits in dependent markets.*¹¹

15. The Applicants' assertion that, "*following revocation of declaration, users of the Service no longer have a right of access to the Service on reasonable terms and conditions*"¹² is unfounded and should not be accepted.

No increased certainty

16. In addition to PNO's non-discriminatory, open access arrangement, which of itself demonstrates that criterion (a) is not satisfied, the NCC has properly concluded that the long-

⁶ See eg Revocation Recommendation at [7.109].

⁷ Draft Recommendation at [1.20].

⁸ See *Ports and Maritime Administration Regulation 2012* (NSW).

⁹ Draft Recommendation at [7.16].

¹⁰ See August Submission at [26]-[36].

¹¹ Draft Recommendation at [7.50].

¹² Application at [9.2].

term pricing Deeds that PNO has offered, [Redacted], all access seekers calling at the Port, "provide a significant degree of certainty, at least for the (ten year) duration of the deed" and "provide a constraint on PNO's behaviour" absent declaration.¹³ As the NCC has found,¹⁴ under the terms of the Deeds, PNO is contractually precluded from unilaterally withdrawing or varying the Deed (outside of an event of default allowing termination). Similarly, PNO could not withdraw its open access arrangements and offer materially poorer terms without suffering significant reputational harm.

17. Importantly, as the NCC has accepted, given that the pricing principles which apply to price disputes under the Deed are substantially the same at those set out in the Competition Principles Agreement, the arrangements under the Deed cannot be said to give rise to a degree of uncertainty that is materially different from that applying to services provided by any significant infrastructure asset anywhere in Australia.
18. As the NCC has recognised, coal producers and exporters face significantly greater uncertainty from other factors that are more likely to influence their future coal mining activities in the Newcastle catchment than the impact of declaration of the services provided at the Port.¹⁵ The open access arrangements and long-term Deeds provide more long term certainty for investment decisions in the coal chain than during the period of declaration.
19. In fact, as the NCC has correctly observed,¹⁶ the counterfactual involves a certain degree of uncertainty regarding precisely what terms and conditions, including price, of access might be set for the Service in a future with declaration of the Service. For example, the Tribunal and ACCC may reach different views of what are reasonable terms and conditions within the meaning of the CCA - as evidenced by the procedural history of the ongoing access dispute between PNO and Glencore. This is discussed further in Part B below. In a future with declaration of the Service, there is no guarantee of certainty over access charges in the short-to-medium term.

No material increase in competition in dependent markets

20. PNO agrees with the NCC's conclusion that declaration will not promote a material increase in competition in any of the dependent markets identified by the Applicants:
 - (a) **Coal export market:** As the NCC has concluded, the coal export market is effectively competitive at present, and PNO does not have any incentive to diminish competition in coal export markets because, inter alia, PNO is not meaningfully vertically integrated, and due to the absence of capacity constraints at the Port.¹⁷ The NCC has previously noted,¹⁸ including in the Draft Recommendation, that the navigation service charge (**NSC**) at the Port represents "*only a very small component of the overall cost of the production and sale of coal for export from the Hunter Valley*".¹⁹

It cannot be said that the NSC with declaration would be materially different to that currently offered by PNO absent declaration. In this regard, PNO notes that, while the Draft Recommendation suggests that "*it is likely (but not certain) that the Tribunal will re-determine an NSC somewhere between \$0.63 and \$1.04 per GT*",²⁰ the re-arbitration of the bilateral access dispute between PNO and Glencore is yet to commence before the Tribunal. Following the FCAFC Decision, that re-arbitration will involve the examination of evidence and issues that were not previously the subject of the ACCC's or the Tribunal's arbitrations in the matter

¹³ Draft Recommendation at [7.56].

¹⁴ Ibid.

¹⁵ Draft Recommendation at [7.103].

¹⁶ Draft Recommendation at [7.63].

¹⁷ Draft Recommendation at [7.41]-[7.46], [7.95].

¹⁸ Revocation Recommendation at pp 94-96.

¹⁹ Draft Recommendation at [7.96].

²⁰ Draft Recommendation at [7.100].

(namely, the value to the provider of so-called user contributions to be taken into account in setting the maximum allowable revenue for the Service).

As explained in PNO's September Submission, this bilateral dispute relates to the terms and conditions of access to the Service for the applicant in that matter, Glencore, only. The arbitration of that dispute, including any determination made in the arbitration of that dispute, does not extend to, or affect in any way, the terms of access to the Service by any other party - including all Applicants other than Glencore. As the NCC has recognised in the Draft Recommendation, "[i]n a future with declaration of the Service, there is no guarantee of certainty over access charges in the short-to-medium term". As noted above, coal producers and exporters face significant uncertainty from other factors that are more likely to influence their ability to compete in coal export markets.

- (b) **Tenements market:** As explained in PNO's August Submission, none of the Applicants, or any other owner or proposed owner of development stage tenements, has provided any evidence that PNO's terms and conditions of access is actually having an impact on their investment decisions nor articulated any such concerns by reference to the pricing principles adopted by PNO.

PNO agrees with the NCC's conclusion in the Draft Recommendation (consistent with its Revocation Recommendation and the reasoning of the Tribunal²¹) that it is unlikely that declaration of the Service would promote a material increase in competition in the market(s) for tenements in the Newcastle catchment. Relevantly:

- (i) the tenements markets is a derivative of the coal export market, and is already effectively competitive without declaration;²²
- (ii) PNO has no incentive to provide uncertainty around access charges for users at the Port in circumstances where these lead to significantly less investment in mining activity in the Newcastle catchment;²³ and
- (iii) to the extent that the NSC in a future with declaration is lower than that currently levied by PNO under the Deeds and open access arrangements (which cannot be said with any certainty), a higher price for the Service would not necessarily result in a lessening of competition in a dependant market. In this respect, the NCC has correctly determined that PNO setting the same higher input prices (ie, NSC) for all miners or investors competing to acquire a particular tenement opportunity would not necessarily amount to a lessening of competition in the market for tenements in the Newcastle catchment. That is, while higher charges for the Service in a future without declaration may reduce the expected net present value of a mining project to which a tenement relates, this does not mean it would reduce the ability of individual miners to compete against each other for that tenement on their merits.²⁴

- (c) **Other markets (bulk shipping, infrastructure, specialist services):** The NCC has assessed the bulk shipping market, the infrastructure market and the specialist services markets identified by the Applicants together as closely tied and substantially dependant on the coal export market.²⁵

Having reached the conclusion that declaration will not materially increase competition in the coal export market, it follows that increased access to the

²¹ See *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [126], [139].

²² Draft Recommendation at [7.121]-[7.126].

²³ Draft Recommendation at [7.128].

²⁴ Draft Recommendation at [7.130].

²⁵ Draft Recommendation at [7.135].

Service, on reasonable terms and conditions, as a result of declaration would not promote a material increase in competition in these other related markets either.

In relation to the Applicants' submission that "*it is unclear why the Council did not re-examine the specialist services market in greater detail*",²⁶ PNO considers that it is clear from the Revocation Recommendation and the Draft Recommendation that the NCC did not focus on the specialist services market because of the tie to coal export market. The NCC correctly considered that it was difficult to see how there might be flow-on effects in this market leading to a material increase in competition where declaration of the Service does not lead to a material increase in competition in the coal export market.

No public interest supporting declaration

21. As set out in PNO's Previous Submissions, criterion (d) is not satisfied in relation to the Service as there is no evidence that declaration will promote or affect (or at least not materially affect) investment in dependent markets; ongoing declaration is likely to have a chilling effect on investment in infrastructure services; and PNO will incur significant administrative and compliance costs if the Service remains declared. Addressing each of these in turn:

(a) **Effect of declaration on investment in infrastructure services:** As noted in PNO's August Submission, PNO has currently planned future investments which are relevant to the Service. These include a project to widen the channel the subject of the Service.

Although the NCC has made no finding as to whether the risk of regulatory error is more significant for PNO or users of the Service, PNO notes the findings of the Productivity Commission (cited in the Revocation Recommendation) that "*...detering infrastructure investment (from setting prices too low) is likely to be more costly than allowing service providers to retain some monopoly rent (from setting access prices too high)*".²⁷

PNO disagrees with the NCC's assessment that the risk of regulatory error to PNO "*is [not] substantial, due to the fact that significant investments necessary to provide the Service have already occurred*".²⁸ As explained in PNO's August Submission, in PNO's experience, investors are reluctant to fund future projects in circumstances where future revenues and returns could be affected by a potential error following declaration. PNO's ability to raise debt to fund future investments could be significantly impacted in circumstances where declaration results in regulatory error which lead to a decline in PNO's revenue base and inability to recover reasonable returns on its investments.

(b) **Effect of declaration on investment in dependent markets:** For the reasons set out in paragraphs 8-10 above, PNO clearly has no incentive to deliberately act to reduce efficient investment in dependent markets. In the absence of declaration, decisions regarding what prices will be most likely to maximise profits over the long term at the Port will be influenced by a range of factors, including:

- (i) the potential for regulatory intervention by the State of NSW;
- (ii) the risk of reputational harm if it seeks to "hold-up" access seekers following their decisions to make sunk investments;
- (iii) PNO's lack of meaningful vertical integration; and

²⁶ Draft Recommendation at [7.137].

²⁷ Revocation Recommendation at p 104.

²⁸ Draft Recommendation at [10.29].

- (iv) the current underutilisation of capacity at the Port.

As the NCC has accepted, all of these factors are likely to act as a constraint on PNO's incentive to raise prices or to act in a manner that may reduce efficient investment in dependent markets. In addition, investors will face a range of significant uncertainties which will bear upon their investment decisions. Besides regulatory change, there are other uncertainties of considerable magnitude unrelated to NSC so-called "pricing uncertainty" that will impact on commercial decisions of investors or potential investors, such as the coal price, the risk profile of a particular site, and ongoing costs. Uncertainty with respect to these factors would weigh far more heavily on investment decisions in coal exploration/mining than uncertainty in relation to charges at the Port in a future without declaration of the Service.²⁹

- (c) **Administrative and compliance costs of declaration:** As the NCC correctly considered at [10.39] of the Draft Recommendation, the administrative and compliance costs of declaration include the costs of negotiating and arbitrating access disputes (and, where sought, review of arbitral decisions), which costs "*have the potential to be significant*".³⁰

While the open access arrangements and Deeds give rise to administrative and compliance costs for PNO and industry participants, the NCC is correct to conclude that these costs will be comparatively lower than those that may arise with declaration. A series of bilateral access disputes involving PNO and a series of access seekers is likely to add to a significant additional administrative and compliance cost associated with declaration of the Service, particularly if further review of the ACCC determinations (or Tribunal re-arbitrations) is sought.

- (d) **Efficient use of and operation of the infrastructure by which the Service is provided:** In order to be satisfied that declaration would be likely to promote allocative efficiency, the NCC would need to be satisfied that declaration would lead to a decrease in the price of the Service closer to its marginal cost of production; and that such a decrease in price would lead to a material increase in use of the Service.³¹

It cannot be said that prices for the NSC with declaration will be materially (if at all) lower than currently without declaration - either under PNO's open access terms or the Deeds. Even if declaration were to result in a lower price for the Service (which PNO does not necessarily accept), it is unclear whether this would lead to a material increase in consumption of the Service. This is because, as the NCC has concluded, demand for the Service at the Port is derived from demand in the world market for coal exported from the Hunter Valley region and the willingness of miners to supply into this market. Further, the NSC represents a small proportion of the costs of supplying Hunter Valley coal into export markets.³²

While differences in the price of the NSC with and without declaration of the Service may impact on the profitability of some marginal coal exploration/mining activities, there is no basis for the NCC to conclude this would be likely to materially affect overall demand for (and hence usage of) the Service at the Port.

In relation to the ACCC's submission that productive efficiency gains could be made by declaration of the Service,³³ PNO agrees with the NCC's observation that the Service is not provided in a contestable market. The situation at the Port is therefore distinguishable from contestable markets where pricing in excess of the

²⁹ Draft Recommendation at [10.36].

³⁰ Draft Recommendation at [10.42].

³¹ Draft Recommendation at [10.48].

³² Draft Recommendation at [10.51].

³³ See ACCC, *NSW Minerals Council application for declaration at the Port of Newcastle* (26 August 2020) at pp 7-8.

standalone cost of providing a service may motivate entry by a rival producer and can lead to inefficient duplication of services and productive inefficiency.³⁴ Nor is there any evidence that any difference in the NSC in a future with and without declaration of the Service is likely to generate inefficient duplication of the Services provided by PNO at the Port. Even if the price for the NSC was higher in a future without declaration of the Service, it is highly unlikely to elicit entry by a rival producer of services at the Port. This is because new entry would involve largely (or substantially) sunk investment in circumstances where PNO has already made such investment.

22. In relation to the ACCC's submissions to the NCC, PNO notes that Part IIIA clearly and expressly delineates the roles and functions of the NCC and ACCC. Under s 44F of the CCA, it is the NCC who is charged with recommending that a particular service should or should not be declared. It is only once a service is declared that the role of the ACCC is enlivened as the independent arbiter of access disputes: s 44S. There is no provision for the ACCC to be involved in, or to review, decisions of the NCC recommending or not recommending declaration of a service. It is readily apparent that Parliament did not intend for the ACCC to have any role in the declaration process.

³⁴ See Draft Recommendation at [10.53].

PART B. Application for special leave to appeal to the High Court further reduces the relevance of the FCAFC Decision to the task currently before the NCC

23. In its September Submission, PNO outlined its views as to why the FCAFC Decision is of no relevance to the statutory task currently before the NCC, including because:
- (a) the decision is an irrelevant consideration under the statutory declaration criteria in s 44CA, which are exhaustive and make no reference to matters relating to the arbitration of access disputes in respect of a service that was previously declared. It would be an improper exercise of the NCC's powers under s 44F to take into account irrelevant considerations outside the enumerated statutory criteria in s 44CA;
 - (b) the PNO/Glencore arbitration is specific to the parties and relates to the terms and conditions of access to the Service for the applicant in that matter only (being Glencore). The arbitration of that dispute, including any determination made in the arbitration of that dispute, does not extend to, or affect in any way, the terms of access to the Service by any other party - including all Applicants other than Glencore;
 - (c) there is no arbitral decision currently in force. The FCAFC Decision has not resolved the substantive dispute between PNO and Glencore. Rather, the Full Court has remitted the matter for re-determination by the Tribunal under s 44ZP. In doing so, the FCAFC Decision set aside the previous determination of the Tribunal in the matter (that is, it is nullified as if never made) - and the Full Court has placed the parties in the same position as when the parties' applications to the Tribunal for review of the ACCC's determination were made in October 2018;
 - (d) the NCC has previously accepted that the bilateral access dispute is not relevant to its assessment of the declaration criteria in both its Revocation Recommendation and this Draft Recommendation; and
 - (e) arbitration of the terms and conditions of access by miners will not have any effect on actual access seekers, **[Redacted]**.
24. PNO supports the NCC's Draft Recommendation that:
- (a) Part IIIA prescribes that the negotiate/arbitrate regulatory regime that results from declaration is imposed following a declaration decision by the designated Minister that is forward-looking;
 - (b) that declaration decision is to be made by the designated Minister on the recommendation of the NCC; on consideration of the declaration criteria; and (in the usual course) in the absence of any Part IIIA arbitration decision concerning the service in question; and
 - (c) the 2017 EM reinforces that it is not Parliament's intent to require the NCC or the designated Minister to form a view on the specific outcomes of a Part IIIA negotiation or arbitration when determining whether declaration of a service is appropriate.
25. Accordingly, PNO agrees with the NCC's determination that it is appropriate for the NCC to undertake its assessment of criterion (a) without forming a view on the outcomes of any Part IIIA negotiation or arbitration which may be underway or concluded - including the ongoing access dispute between PNO and Glencore.
26. PNO observes that some interested parties have submitted that FCAFC Decision means that the asset base used to determine terms and conditions of access at the Port will be reduced to take into account user funded contributions.

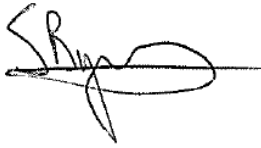
27. The FCAFC Decision has not mandated how the Tribunal must take account of user funded contributions when determining an appropriate asset base and calculating a reasonable set of terms and conditions of access for the Service. The Tribunal has never considered the factual basis for the user funded contributions or made findings in this respect. As a result of the FCAFC Decision, it will be required to do so for the first time in taking into account the value to the provider of extensions whose cost is borne by someone else under s 44X(1)(e) of the CCA.
28. To the extent that the NCC considers that the ongoing access dispute between PNO and Glencore forms "*part of the context of its assessment of the Application*",³⁵ PNO notes that it has filed an application for special leave to appeal the FCAFC Decision before the High Court of Australia, insofar as it relates to Glencore's appeal to the Full Federal Court from the Australian Competition Tribunal's determination of 30 October 2019 (**High Court Application**).
29. PNO's grounds of appeal in the High Court Application relate to both substantive issues the subject of the pending re-arbitration of the access dispute by the Tribunal, being:
- (a) the scope of the arbitral determination; and
 - (b) the extent to which regard should be had to the value of past contributions by users of the Port when determining the regulated asset base as part of the calculation of the maximum allowable revenue in setting the price of access to the Service.
30. In particular, PNO's High Court Application raises the following grounds of appeal:
- (a) the Full Court erred in concluding that a person who has merely an economic interest in the terms to be imposed by a determination under Part IIIA of the CCA, or has merely caused a person to access a declared service, is a "third party" within the meaning of s 44B or can arbitrate the terms and conditions of another party who is physically accessing the service;
 - (b) the Full Court erred in concluding that a person who has access to one aspect of a declared service can arbitrate the terms and conditions applicable to somebody who has access to a different aspect of the declared service;
 - (c) the Full Court erred in concluding that the Tribunal's determination should apply whenever Glencore makes a representation under s 48(4)(b) of the PAMA Act;
 - (d) the Full Court erred in concluding that ss 44X(1)(e) or 44ZZCA of the CCA requires a determination to take into account any user contributions to a facility; and
 - (e) the Full Court erred in concluding that deductions could be made from the asset base for user contributions without a comprehensive examination of the circumstances in which those contributions were made.
31. PNO's grounds of appeal raise important questions as to the proper construction of the statutory criteria for the making of determinations, including the treatment of user contributions, which are fundamental to the task currently before the Tribunal on remitter. If PNO succeeds in the High Court, that will have significant consequences for the process to be conducted by the Tribunal on the remittal (and for the FCAFC Decision). Further, the outcome may affect the rights of third parties - in particular, the rights of vessel operators currently accessing and using the shipping channels at the Port.
32. **[Redacted]**

³⁵ Draft Recommendation at [6.34].

Confidentiality

33. This submission contains information that is confidential and commercially sensitive to PNO. Information that is confidential to PNO is shaded **blue**.
34. PNO asks that the NCC (including officers of the ACCC designated to perform the duties of the NCC) receive this submission on a confidential basis on the basis set out at section 1.2 of PNO's August Submission.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S Byrnes', with a horizontal line drawn through the middle of the signature.

Simon Byrnes
Chief Commercial Officer