Public version
26 August 2020

Submission on the NSWMC application for a declaration recommendation in relation to services at the Port of Newcastle

Port of Newcastle Operations Pty Limited
PNO

Public Version

26 August 2020

Contents

Submission to NCC on the NSWMC application for a declaration recommendation in relation to the Port of Newcastle

1. Introduction

1.1 Executive summary

1. On 23 July 2020, the New South Wales Minerals Council (**NSWMC**) applied to the National Competition Council (**NCC**) for a recommendation that access to certain services relating to the Port of Newcastle (**Port**) be declared for the purposes of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (the **NSWMC Application**).

2. The NSWMC Application seeks a recommendation from the NCC to the designated Minister that access to the service be declared for a period that is at least 20 years.

3. Port of Newcastle Operations Pty Limited (as trustee for the Port of Newcastle Unit Trust) (**PNO**) submits that the NCC should make a recommendation to the designated Minister under s 44F(2)(b)(ii) of the CCA, that the service the subject of the NSWMC Application not be declared for at least the following reasons:

   (a) s 44CA(1)(a) and (d) of the CCA are not satisfied;

   (b) the reasoning the NCC applied in its Revocation Recommendation dated 22 July 2019 in finding that criterion s 44CA(1)(a) is not satisfied, remains applicable;

   (c) access is already being provided to the relevant service on reasonable terms and conditions;

   (d) declaration will not provide a material increase in competition in dependent markets;

   (e) the NSWMC Application focuses on the tenements market but yet fails to adduce any evidence from a member of the NSWMC or non-member or other owner or proposed owner of development stage tenements that PNO's terms and conditions of access are actually having any impact on their decisions nor articulated any such concerns by reference to the pricing principles adopted by PNO. In any event, Port charges are a very small fraction of the total cost of coal and, as with other dependent markets identified in the application, can have no effect on development-stage (or any other) relevant investment decisions;[1] and

   (f) the analysis contained in the Synergies Report that is relied upon by NSWMC into PNO's actions post revocation in relation to pricing is flawed and, therefore, the conclusions of the Synergies Report are incorrect.

4. The service the subject of the NSWMC Application comprises the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct, and then depart the Port precinct (**Service**). The NSWMC Application states that the Service comprises access to the channel and berthing boxes at the coal terminals at the Port. The NSWMC Application submits that any recommendation by the NCC to the Minister should encompass the terms and conditions of access to the Service in relation to all such coal, whether exported on a FOB or CIF basis.[2] The Service is relevantly the same service as that previously declared and where revocation only recently occurred in September 2019.

5. Thus there is no change to the scope of the Service which was previously declared.

---

[1] See further Attachment 7 to PNO's submission to the NCC dated 18 June 2015.
[2] NSWMC Application at 2.6.

6. Under s 44G of the CCA, the NCC cannot recommend that the Service be declared unless it is satisfied of all the declaration criteria for the Service. Pursuant to this provision, PNO submits that the Service should not be declared. In PNO's submission, s 44CA(1)(a) of the CCA is not satisfied. Access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service **would not** promote a material increase in competition in at least one market, other than the market for the service.

7. The reasoning set out in the prior draft and final recommendations[3] of the NCC recommending that the Service the subject of the NSWMC Application **not** be declared under Part IIIA is correct and applies equally to the NSWMC Application for re-declaration of the Service. In each of those prior recommendations, the NCC found no basis to conclude that criterion (a) was satisfied in relation to the coal export market or any other related market for the following reasons:

   (a) the Port charges that apply to the Service are a very small percentage of the total cost of coal. Even if those charges were to increase significantly, they would remain a very small proportion of the price of coal;

   (b) coal producers face much greater uncertainty from other sources, principally in relation to fluctuations in the price of coal, than they do in relation to the future cost of the Service;

   (c) PNO does not have an incentive to exert market power so as to adversely affect competition in dependent markets. Rather, PNO has an incentive to maintain coal volumes and not price coal producers out of the market, given it is: (i) not vertically integrated; (ii) heavily reliant on coal volumes for its revenue; and (iii) has excess capacity. These economic incentives are reinforced by the Port's contractual obligations to the State of NSW and other regulatory and legal oversight under relevant State and Commonwealth legislation;

   (d) PNO does not have the ability or incentive to adversely affect competition in dependent markets by means of price discrimination between coal producers or coal vessels;

   (e) there is no evidence that declaration would do so, but even if declaration was to bring about an increase in the volume of coal shipped through the Port, it does not follow that this would promote a material increase in competition in the coal export market; and

   (f) in the absence of any material increase in competition in the coal export market, there is no basis to conclude that there would be any increase in competition in any other related market.

8. As the NCC correctly observed in the First Recommendation: "*Declaration under the National Access Regime is not a mechanism for imposition of price regulation and was never intended to be such*".[4] Where pricing merely transfers income or value from one party in a supply chain to another without materially impacting competition in any other market, Part IIIA does not provide a remedy. The focus of the regime is on promotion of competition in markets where the lack or restriction of access to infrastructure services provided by facilities that cannot be economically duplicated would otherwise limit competition.

9. PNO strongly agrees with the NCC's view that port charges are, and are likely to remain, an immaterial component of the delivered cost of coal and do not/will not affect coal export volumes and competition in the coal export market.[5] The difference in the Navigation Service Charge (**NSC**) between that determined by the ACCC ($0.61 per GT) and that set by PNO (either the $1.04 per GT in 2020 as the standard price, or $0.81 per GT under the long term deed offered to port users (**Deed**)) is a tiny fraction of the export price for thermal coal in 2020

---

[3] NCC draft recommendation dated 30 July 2015, NCC Final recommendation re Port of Newcastle application dated 2 November 2015, Council's Recommendation on revocation dated 22 July 2019
[4] at [3.15].
[5] Revocation Recommendation at [7.71].

which drives the price competition in that market and decisions of the purchasers of that product. In making its Revocation Recommendation, the NCC considered it reasonable to think that the NSC might be expected to result in a future with declaration of the Service that may be close to, if not within, the range of $0.41 – 1.36 per GT.[6] The current NSC set by PNO, without declaration, is well within this range - and PNO has neither the ability nor incentive to deny access to the Service, restrict output or charge monopoly prices as explained in section 2.2 below.

10. The NCC's conclusions in respect of criterion (a) above apply equally to the adjacent market for coal tenements for which the Applicant also contends (if that were thought to be a relevant market for the purpose of the declaration criteria).

11. PNO submits that insofar as the NSWMC Application purports to raise relevant new facts arising since revocation in 2019, the Applicants have proceeded on a fundamental misapprehension about the relevant 'factual' in respect of the Service at the Port and fails to recognise that access is already being provided on reasonable terms and conditions. The terms of access offered by PNO since revocation are materially more transparent and non-discriminatory and provide more long term certainty for investment decisions in the coal chain including for end customers than during the period of declaration:

    (a) PNO has publicly committed to ensuring transparent and open access to the land side and port side services and facilities provided by it at the Port, through its open access arrangements for users published on its website. The NSC in 2020 as a standard price for coal vessel (over 600GT), where a bilateral long term price Deed does not apply to the vessel, is $1.0424 per GT;[7]

    (b) PNO has offered Port users heavily discounted long-term pricing arrangements to the standard Schedule of Port Charges fixed by PNO under the PAMA Act, subject to agreeing the terms of a pro forma 10-year Deed.

    [Redacted]

    [Redacted]

    Copies of the respective template Producer Deed and Vessel Agent Deeds, which were sent to every producer on 13 March 2020 as an open offer capable of acceptance, and are still available on PNO's website. These prices start at substantially similar level to the 2019 port charges. Notably, in the absence of any declaration, PNO has offered all port channel users, including all Hunter Valley coal producers, discounted long-term pricing certainty under the terms of a publicly available, voluntary, non-discriminatory long term pricing Deed which incorporates the Part IIIA pricing principles, as if the Port channel service was declared;

    (c) Following negotiations up to late March 2020, PNO has entered into various non-discriminatory access agreements with access seekers who acquire the Service from PNO which apply to 2031. There is already certainty of terms of access to the Service for the industry by reason of these extant long term access agreements with actual access seekers whose vessels use the channels and pay the NSC to PNO. In considering whether criterion (a) is satisfied, the particulars of these extant long term access agreements is an important factor for the NCC to take into account.

12. PNO further submits that s 44CA(1)(d) of the CCA is not satisfied. Access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service **would not** promote the public interest.

13. In recommending revocation in 2019, the NCC took the view that the designated Minister could reasonably form the view that criterion (d) is not satisfied as *"it is possible (but not certain) that*

---

[6] Revocation Recommendation at [6.45].
[7] This price was determined to be economically justified by the ACT in its determination relating to the dispute between PNO and Glencore dated 30 October 2019. On 24 August 2020, the Full Federal Court upheld an appeal of that decision by Glencore, and remitted the matter for re-arbitration by the ACT: *Glencore Coal Assets Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (**FCAFC decision**).

declaration will generate some marginal improvement in the efficient use of and investment in relevant infrastructure. However, this benefit must be set against considerable administrative, compliance and legal costs associated with declaration (and any subsequent negotiation and arbitration of terms and conditions of access under the Part IIIA access regime)."

14. The 'considerable administrative, compliance and legal costs' associated with declaration and the subsequent negotiation and arbitration of terms and conditions of access, are easily demonstrable and have been very substantial. Since the shipping channel service at the Port was first declared in 2016, PNO has been a party to numerous legal and regulatory proceedings and has spent approximately $15 million defending actions by a single coal producer. PNO remains mired in unnecessary and counterproductive litigation arising from that initial declaration, even though services at the Port are presently undeclared. This substantial cost is not in the public interest and no evidence has been provided that the public interest would be served when the threat of declaration is present (as opposed to the threat of arbitration, the result of which have been implemented for all users by PNO).

1.2 Confidentiality

15. This submission (including any annexures) contains information that is confidential and commercially sensitive to PNO. Information that is confidential to PNO is shaded **blue**.

16. PNO asks that the NCC (including officers of the ACCC designated to perform the duties of the NCC) receive this confidential submission and its annexures on a confidential basis in accordance with the NCC's protocol for handling confidential information and the following statutory obligations on the basis set out below:

    (a) there is no restriction on the internal use, including future use, that the NCC or ACCC may make of the information consistent with its statutory functions;

    (b) the confidential information may be disclosed to the NCC's or ACCC's external advisors and consultants on condition that each such advisor or consultant is informed of the obligation to treat the information as confidential; and

    (c) the NCC or ACCC may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with sections 44GB and 155AAA of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

17. PNO has separately provided a public version of this application with confidential information redacted for publication on the public register.

2. Criterion (a) - Declaration would not promote any material increase in competition in any market

2.1 The statutory test

18. The statutory test under section 44CA(1)(a) of the CCA prevents the NCC from recommending declaration of a service unless it is satisfied that:

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

19. The words "*on reasonable terms and conditions, as a result of a declaration*" have been added to criteria (a) by the enactment of the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) since the original declaration of the service at the Port in 2016.

20. As the NCC noted in at [6.3] and [6.5] of its Revocation Recommendation, the new test requires an assessment of whether and the extent to which access on reasonable terms and conditions from declaration is likely to impact on competition in dependent markets and on the public

interest, when compared to the terms of access likely without declaration. These additional words focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition. This requires a comparison of two future scenarios: one in which the Service is declared and access to the Service is through declaration on reasonable terms and conditions, and one in which the Service is not declared and any access to the Service is in the absence of declaration. The NCC is required to look at how the nature and extent of access will change as a result of the declaration before considering the possible impact of this change on the state of competition in dependent markets.

21. The meaning of the term 'reasonable terms and conditions' is clarified by paragraph 12.21 of the 2017 EM which states:

> *What are reasonable terms and conditions is not defined in the legislation. This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the detriment to competition in dependent markets that may otherwise be caused by the exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility.*

2.2 The reasoning the NCC applied in finding that criterion (a) is not satisfied remains applicable

22. The NCC explains its approach to assessing criterion (a) at [7.23] of the Revocation Recommendation. The NCC asks:

(a) does the NCC consider that the provider would have the ability and incentive to deny access to 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 such conduct materially affect competition in a dependent market?

23. The answers to these questions have not changed in the period since the NCC recommended revocation in 2019. In its Revocation Recommendation dated 22 July 2019, the NCC found that criterion (a) was not satisfied for the following reasons[8]:

(a) Under criterion (a), it is not enough to find that PNO has market power, or operates a "bottleneck" facility, in order to be satisfied that declaration of the Service satisfies the statutory criteria. It is only where a material increase in competition would be likely to result in another market that the criterion is satisfied;

(b) PNO is not vertically integrated in any meaningful way into any relevant markets related to coal export activity. This means it is unlikely to have an incentive to deny access to firms operating in related markets (as they are not competitors to PNO); or to provide access on terms and conditions that inhibit the ability of different users of the Service to compete against each other on their merits in these markets. Indeed, PNO is likely to prefer that markets related to the Port are effectively competitive as this is likely to maximise demand (and hence profits) from providing the Service at any given prices it charges;

(c) There are important factors that are likely to act as a constraint on PNO in setting the terms and conditions of access PNO will set in a future without declaration of the Service:

(i) PNO is likely to act in a way that has regard to its ability to maximise its expected profits over the term of the lease. Revenues from coal mining in

[8] See [1.5] to [1.16] of the Revocation Recommendation

the Newcastle catchment will likely remain its most important source of revenue in the near future; and it will be heavily reliant on future investment in coal mining activity in the region. Opportunistic pricing by PNO that "holds-up" existing miners today risks sending a signal to potential miners in the future that PNO will take advantage of them after they make investments, and that they are at risk of not being able to recover sunk costs if they invest in coal mining activities in the Newcastle catchment.

(ii) PNO is, in effect, competing to attract coal mining activity to the Newcastle catchment. Charging excessively high prices for the Service is likely to increase the incentive for some potential future miners to invest in other activities

(iii) The NSW Government would be likely 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.

(d) The charges for the Service would likely be higher in a future without declaration of the Service however the NCC was not satisfied that the possibility of lower prices in a future with declaration of the Service is likely to promote competition in any related markets, given:

(i) The coal export market is already likely to be effectively competitive such that declaration is unlikely to promote a material increase in competition in this market.

(ii) The market(s) for coal tenements is "derivative" of the coal export market, and competition is unlikely to be materially promoted by declaration of the Service.

(iii) While the possibility of higher prices in a future without declaration of Service may lessen the value to firms contemplating exploring/mining coal in the Newcastle catchment such that they would be prepared to pay less for these tenements, this is not the same as saying competition for tenements between prospective explorers/miners will be greater in a future with declaration of the Service. The NCC considers prospective explorers/miners will still be able to compete on their respective merits for tenements in a future without declaration of the Service.

(iv) PNO is not vertically integrated into the provision of container shipping services in any meaningful way that would make it likely to discriminate against any rivals in markets for these services.

In any event, PNO notes that it has voluntarily made available to access seekers and offered to enter into long term access arrangements at a substantial discount to PNO's standard Schedule of Port Charges.

(e) Critically, the NCC considered that charges at the Port are likely to remain a small proportion of international spot prices for coal with or without declaration of the Service. The NCC found that the difference in the NSC between that determined by the ACCC ($0.61 per GT) and that set by PNO ($0.76 per GT) in 2018 represented less than 0.2 of 1 per cent of the export price for thermal coal in 2017 - and it remains less than 1 per cent of the export price of thermal coal as at the date of this submission. Given the coronavirus pandemic and Chinese government policies to avoid Australian coal cargoes, the international spot prices for coal have fallen recently, however the difference in the NSC between that determined by the ACCC ($0.61 per GT) and that set by PNO (either the $1.04 per GT in 2020 as the standard price, or $0.81 per GT under the long term Deed offered to port users) is still a tiny fraction of the export price for thermal coal in 2020 and is not a meaningful consideration in purchase decisions or purchasers of that product.

24. [Redacted]

2.3 Access is already being provided on reasonable terms and conditions

25. Although there is no new material in the NSWMC Application that would affect the validity of the NCC's reasoning as set out above, PNO responds to the theoretical and unsupported allegations put in the NSWMC Application below.

Vessel Open Access Regime

26. PNO currently provides access to the Service and will continue to do so regardless of whether the Service is declared.

27. After declaration was revoked in 2019, PNO has publicly committed to ensuring transparent and open access to the land side and port side services and facilities provided by it at the Port.

28. PNO has accordingly published open access arrangements for users on its website from December 2019, including Vessel Open Access Terms.[9] The open access regime documentation essentially represents an open offer by PNO to vessels to enter and use the Port on published terms and price. The relevant documents include:

    (a) the Vessel Berthing Application;

    (b) PNO's Vessel Standard Terms and Conditions, which forms part of the contractual terms applying to each vessel entering the Port. This document provides for standard terms and conditions of access for vessels proposing to enter and use the Port's channels and berths;

    (c) Port Rules;

    (d) Schedule of Port Charges. This sets out the standard price terms for vessels accessing the Port; and

    (e) Dispute Resolution procedures. This document provides a binding dispute resolution regime for parties wishing to dispute the terms of access offered by PNO, which dispute could be a "price" or "non-price" dispute. For a "price dispute", the dispute resolution procedures include embedded pricing principles to be applied by the mediator or arbitrator when determining a price dispute. The appointed arbitrator would be a commercial arbitrator appointed under the Arbitration Rules promulgated by the Australian Centre for International Commercial Arbitration.

29. The Schedule of Port Charges sets out in the tariff schedule applicable to all coal vessels as the standard price for vessels accessing the Port.

30. Thus, the NSC in 2020 as a standard price for coal vessel (over 600GT), where a bilateral long term price Deed does not apply to the vessel, is $1.0424 per GT.[10]

31. The Applicant's 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*"[11] is unfounded and should not be accepted.

32. Rather, it is clear that, in the absence of Declaration, PNO has already publicly articulated access arrangement framework principles including a reference tariff (through the rate card) and non-price terms for any coal vessel requiring port services.

---

[9] https://www.portofnewcastle.com.au/what-we-do/port-open-access-arrangements/vesselopenaccess/

[10] This price (being the NSC determined by the ACT as at 1 January 2018 ($1.0058), adjusted according to the annual price setting mechanism and true-up determined by the ACCC) was determined to be economically justified by the ACT in its determination relating to the dispute between PNO and Glencore dated 30 October 2019. On 24 August 2020, the Full Federal Court upheld an appeal of that decision by Glencore, and remitted the matter for re-arbitration by the ACT: *Glencore Coal Assets Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (**FCAFC decision**).

[11] NSWMC Application at [9.2]

33. Every vessel that enters the Port is entitled to do so on the basis of the published terms which are transparent and non-discriminatory. The test in criterion (a) is not satisfied where there is already an entitlement to access and effective competition in dependent markets. PNO's published access arrangement provides a base case for the 'factual' when criterion (a) is being assessed against the counterfactual. The factual is not 'no access regime', but rather a situation where PNO publishes and presents reasonable terms and conditions of access via its open access regime.

34. The NSWMC Application states at [9.1] that, "*PNO's new terms and conditions, particularly when contrasted with Glencore's terms and conditions of access obtained under the declaration from the ACCC Determination, provide a unique ability to contrast PNO's terms and conditions of access with and without the declaration for the purposes of assessing against criterion (a)*". This reasoning is fundamentally flawed and entirely ignores that the ACCC Determination is of no relevant force or effect with respect to the NSC following the decision of the Full Federal Court to remit the matter for re-arbitration before the ACT.

35. In setting aside the determination of the ACT and remitting the matter for re-arbitration before the ACT, the Full Court did not make any factual or economic findings contrary to those of the ACT Determination of 30 October 2019. Rather, the Full Court was concerned with the decision making process adopted by the ACT. The relevant matters of fact and contextual economic analysis relating to the scope of the determination, and the extent to which user contributions (if established to the requisite standard) ought to be deducted from the regulated asset base, remain subject to the pending *de novo* re-arbitration by the ACT.

36. Given the upcoming re-arbitration of the matter by the ACT, it cannot be accepted that under declaration, "*PNO would not be able to include user funded expenditure in the regulated asset base as it is now seeking to do*" - as the outcome of that re-arbitration is not yet known (and indeed, has not even begun).[12]

Port users have been offered discounted long-term pricing arrangements

37. In addition to the foregoing transparent non-discriminatory entitlement to access by vessels to the Service, which of itself demonstrates that criterion (a) is not satisfied, PNO has also offered Port users (including coal producers and vessel operators), since revocation, the opportunity to secure a binding commitment to charge access seekers (namely vessel operators) heavily discounted long-term pricing arrangements to the prices fixed under PNO's Schedule of Port Charges, subject to agreeing the terms of a pro forma 10-year Deed.

38. It is important to clarify that neither the applicant nor its member producers are themselves users of the Service. It is only coal vessel operators which actually access and use the shipping channel and berthing box Service at the Port. Notwithstanding that coal producers are not properly characterised as users of the Service (who may have commercial interests in dependent markets), PNO has nevertheless voluntarily offered to provide a commitment long-term pricing arrangements to the actual access seekers to those parties to address their alleged concerns with investment uncertainty. [Redacted]

39. Copies of the respective template Producer Deed and Vessel Agent Deeds, which were sent to every producer on 13 March 2020 as an open offer capable of acceptance, and are still available on PNO's website. These prices start at substantially similar level to the 2019 port charges and offer a heavy discount to the NSC under PNO's Schedule of Port Charges. Again, in the absence of any declaration, PNO has offered all port channel users, including all Hunter Valley coal producers, discounted long-term pricing certainty under the terms of a publicly available, voluntary, non-discriminatory long term pricing Deed **which incorporates the Part IIIA pricing principles**, as if the port channel service was declared.

40. The pro forma long-term Deeds have a term of 10 years, which is the same period for which the ACCC and ACT determination applies. The initial term can be extended by agreement, renewal discussions to commence not later than 3 years prior to expiry of the initial term.

---

[12] NSWMC Application at [9.1]

[Redacted]

41. [Redacted]

42. [Redacted]

43. [Redacted]

44. [Redacted]

45. [Redacted]

46. [Redacted]

47. [Redacted]

48. [Redacted]

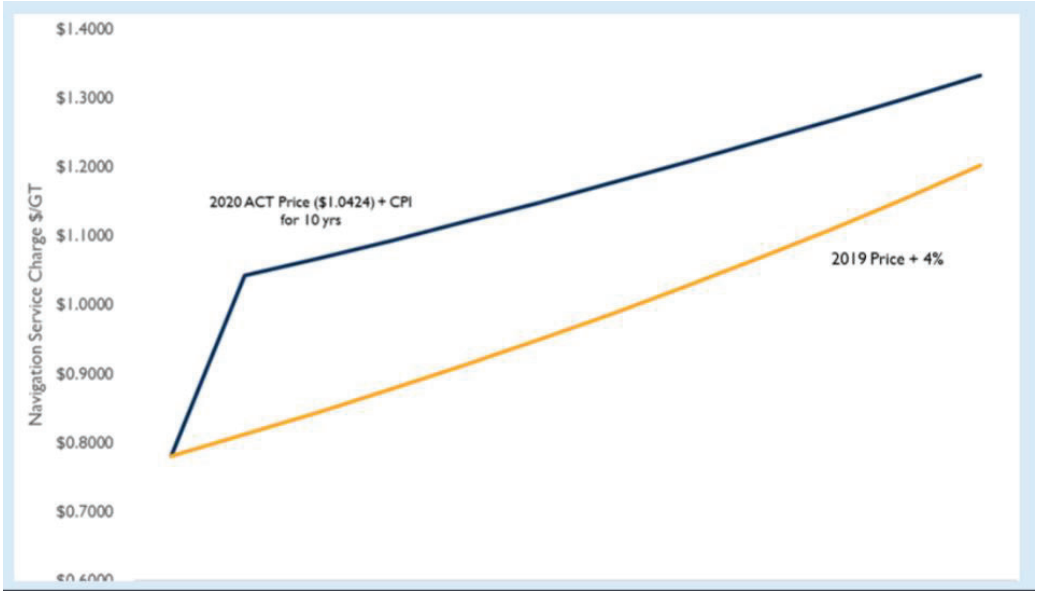
49. The threat of declaration arises is a constant regulatory backdrop to PNO's conduct. If the Applicants have concerns about the terms and conditions of access post the term of any long-term Deed, declaration of the Service could always be sought at a point in time shortly prior to the term of the 10 year Deeds elapsing.

50. The NSWMC Application includes a copy of the original draft pro-forma Deed at Annexure A. This was updated on 13 March 2020 following extensive consultation and constructive feedback received by PNO on earlier drafts from a range of interested parties. Clearly, as the NSWMC Application itself acknowledges, *"the Deed has been superseded by the Producer Deed (and the Vessel Agent Deed)"*.[13] The original draft Deed (being Annexure A to the NSWMC Application) is of no relevance as the terms have now changed and the NCC should have no regard to any submission by the Applicant which relates to a document which is of no relevance. In this Submission, references to the long term Deed are to the Producer Deed[14] (Annexure B to the NSWMC Application) and the Vessel Deed[15] (Annexure C to the NSWMC Application) as currently appear on the PNO website.

51. The current offers have been published transparently on the PNO website, and offer long-term certainty if port users wish to take up the offer. The offer of the long term Deed by PNO to port users is entirely voluntary and is at a substantial discount to the price under PNO's Schedule of Port Charges.

52. The graph below shows the per gross tonne charges from 2019 to 2030 and is indicative only of the forward 10 year price variance between the standard coal vessel pricing and the bilateral price Deed coal vessel pricing (assuming CPI is 2.37-2.50%).

[13] NSWMC Application at 9.2
[14] https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Producer-Deed-13-March-2020_.pdf
[15] https://www.portofnewcastle.com.au/wp-content/uploads/2020/03/OAR-TERMS-Vessel-Agent-Deed-13-March-2020_.pdf



53. PNO is bound by the Deed not to discriminate adversely against any producer/vessel operator on the NSC.

54. Under the terms of the Deed, PNO cannot enter into bilateral agreements or give effect to variations to charges on terms which are materially dissimilar to the relevant provisions of the Deeds which have been entered into with other like port users. This is contrary to the erroneous assertion in the NSWMC Application that, "*PNO has also engaged in price discrimination… and changed the nature of its contractual terms, resulting in a situation where users can no longer be confident of access prices being on uniform terms".*

55. PNO submits that regulatory oversight is not required to enforce the terms of the Deed. The Deed will be subject to the normal rules of contract law and can be enforced like any other agreement between contracting parties. The drafting of the Deed is clear. The relevant provisions state that the charge can only be varied under the Deed where the increased charge is consistent with the Pricing Principles. This gives the Producer rights under this Deed it would not otherwise have because this places PNO under the discipline of having to ensure that it is in a position to justify by reference to the Pricing Principles any variation it proposes to implement.

56. The NSWMC Application's contention that, *"it is clear that in the absence of declaration, PNO has imposed wholly one-sided terms and conditions which shift all material commercial and legal risks onto Port users, and grant PNO an unfettered ability to increase access prices through various re-openers*" (emphasis added)[16] should be rejected. It is simply wrong.

    (a) Under the pro-forma Deed, a variation to the charges covered by the Deed can only be made once a year. A variation can only be made over and above the 4%/CPI increase where it is Material (as that term is defined in the Deed), which is designed to avoid trivial increases.

    (b) In the event of a Permitted Price Dispute (as that term is defined in the Deed) arising, the parties are bound to conduct mediation and, failing the resolution within 28 days, arbitration in accordance with the Australian Centre for International Commercial Arbitration Rules. Relevantly, the mediator must take into account, and the arbitrator must apply, the pricing principles set out in the Deed, which are substantially the same at those set out in the Competition Principles Agreement. These arrangements 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.

[16] at [8.4].

(c) In addition, under 7(c) of the Deed, in order to provide the Producer with visibility of and the opportunity to comment on any prospective increases in the Producer Specific Charges on account of capital expenditure proposed to be incurred by PNO, PNO is under a contractual obligation to prepare and provide to Producers a forward looking 5 year forecast (covering the period 1 January 2020 to 31 December 2024) of its projected capital expenditure that may impact the Producer Specific Charges and meet with the Producer to discuss those forecasts and any potential associated variations to the Producer Specific Charges. This is to be updated annually on a rolling 5 year basis by no later than 31 March each following Contract Year, and PNO is under a contractual obligation to meet with the Producer to discuss each updated 5 year CAPEX Forecast.

57. These provisions, offered by PNO absent declaration, demonstrate PNO's good faith and reasonableness in approach to negotiation with Port users and provide significant benefits to Producers, which the NSWMC Application wholly fails to recognise.

58. In 2019, the NCC considered that, without declaration of the service, PNO and users of the Service would continue to negotiate terms and conditions of access to the service.[17] This is exactly what has happened following revocation - over the past several months, PNO has actively negotiated with a number of port users in relation to the terms of long-term pricing arrangements subject to agreeing the terms of the Deed.

59. Following negotiations up to late March 2020, PNO has entered into a number of non-discriminatory long term access agreements with access seekers who acquire the Service from PNO. With effect from 1 April 2020, these agreements effectively set the charges in respect of navigation services supplied at the port. As explained at pages 11-12 above, there is already certainty to the industry for long-term investment, since PNO already has long term access agreements with actual access seekers whose vessels use the channels and pay the NSC to PNO.

The Counterfactual

60. The NSWMC Application states that, *"we believe that the counterfactual with declaration would see different terms and conditions to those now offered by PNO, with the terms offered under a declaration being far more reasonable"*.[18]

61. This assertion is speculative and should be rejected for the following reasons:

(a) The NSWMC Application states that, "*we believe the pricing to access the Service would be more consistent with that found in the ACCC Determination. In particular, PNO would not have sought to effectively double charge the mining industry by including both the return on and the return of the mining industry's expenditure on channel dredging"*.[19] As explained at pages 11-12 above, the ACCC Determination remains subject to pending re-arbitration *de novo* by the ACT following the FCAFC decision. As a result, the correctness of the ACCC Determination - including its treatment of the 'user contributions' issue remains unknown subject to that re-arbitration.

PNO submits that the assertions in the NSWMC Application with regards to user contributions are inaccurate. Throughout the NSWMC Application, there is reference to PNO seeking to recover, through its pricing, *"approximately $912 million of user funded investments, primarily involving channel dredging by users of the Port"*. In its 30 October 2019 decision, the ACT did not conclude that $912 million of assets in the regulated asset base (**RAB**) were *"dredging works at the Port which had been paid for in the past by users of the Port".* On the contrary, the ACT did not reach such a conclusion, because the basis on which arrangements had been made and the circumstances as they occurred (including whether there were costs to the State) were not established by the evidence before the ACT. The question of whether users had

[17] at [7.163].
[18] NSWMC Application at [9.2]
[19] NSWMC Application at [9.2]

funded dredging works, and if so which works and to what extent, has never been established before the ACT to date. Even if the source of funding and extent of funding of such works could be established, the evidence which was accepted by the ACT established that there had been very significant cost under-recovery by the State over decades (exceeding $8b).

(b) The NSWMC Application also asserts that, "*there would not be an over-reach by PNO as to the data it required exporters to provide on the nature of their cargoes or destinations, as that information is strategic, sensitive and not necessary for PNO to charge fees based on tonnages*".[20] The relevant Deeds require port users to provide basic information as PNO may reasonably require to enable PNO to verify that an applicable vessel is a "Covered Vessel" (and therefore entitled to the benefit of the Covered Vessel NSC) and to enable PNO to properly administer the Deed. PNO submits that there is nothing unreasonable about such requests for information. PNO is bound to keep this information strictly confidential, and as a non-vertically integrated port operator, has no other need or incentive for disclosure of that confidential information other than for that purpose - and the vessels are required to provide their manifest in any event.

(c) The NSWMC Application claims that, "*the Deed includes very vague and general provisions dealing with material adverse change events for PNO's shareholders. It is unclear what these changes could encompass but again in an environment of an access arbitration administered by the ACCC, it is unlikely that the ACCC would permit all material adverse risks to be passed on to users, to hold PNO's shareholders harmless from any commercial risks*".

On the contrary, the provisions of the long-term Deed are clear and reasonable:

(i) The long-term Deed prevents PNO increasing navigation charges unless the increased charge is consistent with a list of Part IIIA[21] pricing principles.

(ii) The navigation charge will remain fixed for the whole 10 year term, except for:

A. annual 4%/CPI variation: Commencing 1 January 2021 the Covered Vessel NSC will be subject to annual CPI escalation at the greater of 4%; and

B. once a year PNO may increase the NSC but only if it can be justified by PNO under the Part IIIA pricing principles.

(iii) PNO has committed to capex transparency by disclosing to port users its rolling 5 year capex plans for comment where it will affect the charges.

(iv) The producer / vessel agent may dispute a proposed price increase if it considers that the proposed increase is not in accordance with the variation provisions. The Deed sets out a dispute resolution process and principles for the arbitrator to apply which are drawn from Part IIIA of the CCA. Given these dispute resolution processes, it is plainly incorrect for the Applicants to claim that "*PNO still has the ability [to] pass on the adverse effects of certain commercial events or shifts in the regulatory landscape to users of the Port, such that is still able to leverage its position as the infrastructure monopolist to shield its shareholders from these material adverse changes*".[22]

(v) Rather, PNO has committed under the long term Deeds to be bound by substantially the same Part IIIA principles that would apply as if it were a declared service.

---

[20] NSWMC Application at [9.2]
[21] ss44X, 44ZZCA
[22] NSWMC Application at 9.4

2.4 No material increase in competition in dependent markets

62. As explained above, PNO already provides access on reasonable terms and conditions, and declaration will not promote a material increase in competition in dependent markets. However, for completeness, we turn to the dependent markets posited by the Applicant.

63. PNO submits that declaration would not promote a material increase in competition in any market, other than the market for the service.

64. The relevant dependent markets were considered in detail by the NCC in its Revocation Recommendation. PNO agrees with the findings of the NCC at [1.13], namely that:

(a) the coal export market - the coal export market is already likely to be effectively competitive such that declaration is unlikely to promote a material increase in competition in this market;

(b) the tenements market - the market(s) for coal tenements is "derivative" of the coal export market, and competition is unlikely to be materially promoted by declaration of the Service. While the possibility of higher prices in a future without declaration of Service may lessen the value to firms contemplating exploring/mining coal in the Newcastle catchment such that they would be prepared to pay less for these tenements, this is not the same as saying competition for tenements between prospective explorers/miners will be greater in a future with declaration of the Service. The NCC considers prospective explorers/miners will still be able to compete on their respective merits for tenements in a future without declaration of the Service; and

(c) the container shipping services market - PNO is not vertically integrated into the provision of container shipping services such that it would be likely to discriminate against any rivals in markets for these services.

The Specialist Services Market

65. The NSWMC Application states that the NSWMC is unclear as to why the NCC only focused on the Tenements Market and the container shipping services market, with no real (substantive) re-examination of the specialist services market (i.e. markets for services such as geological and drilling services, construction, operation and maintenance).[23] PNO considers it is clear from the Revocation Recommendation that the NCC did not focus on the specialist services market because it is closely tied and substantially depends on the 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.

The Tenements Market

66. The NSWMC Application focuses on the tenements market, which is said to include the initial exploration phase, the development phase and the operating phase.[24]

67. The NSWMC Application asserts a theoretical concern, without any supporting factual evidence, that *"potential acquirers of tenements are either prepared to bid less for them or in the case of certain mining opportunities that are likely to involve higher costs, not be prepared to bid for them at all. This is particularly the case for the acquisition of development stage tenements, where users face greater uncertainty, asymmetry and higher access prices for the export of coal, compared to buyers of coal tenements in circumstances where the Port is declared."*

68. No member of the NSWMC, non-member or 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.

---

[23] NSWMC Application at 9.7
[24] NSWMC Application at 8.2

69. In its Revocation Recommendation, the NCC considered the tenements market in detail and concluded 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:

(a) the tenements markets is a derivative of the coal export market;[25]

(b) the market(s) for tenements in the Newcastle catchment exhibits signs of being effectively competitive;[26]

(c) the competition problem identified may be that prospective investors in mining tenements will have less confidence regarding charges that might be set by PNO for the Service, and that these charges will be higher in a future without declaration of the Service. This may lead to less prospective investors being prepared to bid for tenements that may become available for acquisition, thereby reducing competition for these tenements. However, the NCC concluded that at best, the nature of the competition problem is likely to occur only on a periodic basis, and on a tenement-by-tenement basis.[27] In this regard, in circumstances where there is a substantial discount to, and certainty in, the NSC offered by PNO under the long term open access agreements governing access seekers' charges published on its website (referred to in paragraph 2.3 above), it is highly unlikely to arise;

(d) PNO has no incentive to inhibit competition between bidders for tenements. This applies irrespective of whether PNO is able to price discriminate between different miners seeking to export coal through the Port;[28]

(e) a higher price for the Service does not equate to a lessening of competition for tenements. The NCC notes that 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;[29]

(f) A reduction in the number of bidders for a tenement does not equate to a lessening of competition for tenements.[30]

70. The NSWMC Application contends that, *"the reasons outlined for Council's views in* Revocation *Recommendation do not stand having regard to PNO's actions post-revocation"*. These contentions are plainly misconceived given the terms and conditions of access transparently available on the PNO website, as explained in detail in the sections above.

71. The NSWMC Application relies on the Synergies Report and states[31]:

(a) In the context of the coal tenements market, a decision to enter (or re-invest) involves substantial sunk investments.

(b) In a future without declaration, PNO's ability and incentive to exercise market power would give rise to the hold-up problem. The risk of hold-up in the presence of substantial sunk investments is sufficiently material that it would likely discourage efficient firms from entering the coal tenements market. The Synergies Report is concerned that PNO is seeking to negotiate bilaterally with coal producers which will enable it to set producer-specific charges. This conduct demonstrates that PNO has the ability and incentive to set access terms as per a user's circumstance, and there will be an imbalance of negotiating power between PNO and coal producers in the presence of sunk investments.

---

[25] Revocation Recommendation [7.308-7.311]
[26] Revocation Recommendation [7.313 - 7.318]
[27] Revocation Recommendation [7.319 - 7.324]
[28] Revocation Recommendation [7.325 - 7.328]
[29] Revocation Recommendation [7.329 - 7.336]
[30] Revocation Recommendation [7.337 - 7.339]
[31] Synergies Report - p3

(c) In contrast, a future with declaration would constrain PNO's ability and incentive to exercise market power and address the hold-up risk and would likely promote efficient entry (and efficient participation) such that there would be a non-trivial, material improvement in the environment for competition in the Newcastle catchment coal tenements market.

72. The analysis in the Synergies Report is flawed and, therefore, its conclusions are incorrect. It makes the unfounded leap that PNO's refusal to engage in collective bargaining with the NSWMC in relation to the long-term Deeds will automatically result in non-uniform pricing and a lack of transparency, which would then translate into competitive harm.[32]

73. The Synergies Report states that, "*PNO's preference to negotiate bilaterally with coal producers and its actions to refuse to collectively negotiate with coal producers has sent a* clear *signal that potential coal producers would not have transparency of terms provided by PNO to other users"*. This of course fails to take into account the non-discrimination provisions contained in the long-term Deeds which provide a full answer refuting this proposition. In addition, PNO is unlikely to have any incentive to deny access, or provide preferential treatment, to particular categories of users.

74. Furthermore, PNO notes that there is no requirement that all access seekers be afforded the same terms of access and notes that price discrimination is expressly permitted where it aids efficiency in accordance with the pricing principles in section 44ZZCA of the CCA. Furthermore, the PAMA Act allows PNO to price discriminate under s 67, which permits individual negotiated agreements.

75. Consistent with its permitted status under these instruments, it is well accepted that price discrimination may give rise to more efficient outcomes in a dependant market.

76. The NSWMC Application seeks to erroneously rely on the decision of the Queensland Treasurer in relation to the Dalrymple Bay Coal Terminal (**DBCT**) service in relation to tenements. The assessment criteria applied by the QCA and the Queensland Treasurer in section 76 of the Queensland Competition Authority Act 1997 (Qld) (**QCA Act**) are substantially similar to the declaration criteria applied by the NCC under subsection 44CA(1) of the CCA. However, the NSWMC Application fails to recognise the significant factual differences between the Newcastle shipping channel service and the DBCT service, as recognised by the NCC in the Revocation Recommendation at [6.59 - 6.60]. These factual differences remain the same today and are:

(a) There are no evergreen existing user agreements at the Port;

(b) Existing capacity at Dalrymple Bay is fully contracted (and is likely to remain so in the future). This means it may have an incentive to deny access to other potential users in the future and, absent any investment in further capacity in the future, has no ability to increase volumes through its port. In contrast, there is substantial surplus capacity at the Port[33];

(c) The QCA considers that DBCT Management proposes to treat new and existing mines differently (including future users paying more than existing users) and, therefore, will be favouring some producers over others for reasons other than their efficiency. In contrast, PNO has (with the exception of those charges set in the ACCC Determination) not set different charges for exporters of coal in the past. PNO has no intention to do so in the future, as is evidenced by the pricing and offers transparently available on the PNO website; and

(d) Over the period for which declaration is sought, terminal charges at Dalrymple Bay will be significantly higher than channel charges at the Port; and are likely to represent a

---

[32] [Redacted]

[33] PNO has modelled the current channel capacity as in excess of 328 mtpa (compared to actual usage in the range of 167 mtpa). There is no foreseeable channel capacity constraint at PNO.

significantly greater proportion of the price of coal in the export market(s).

3. Criterion (d) - No public interest supporting declaration

3.1 The statutory test

77. Section 44CA(1)(d) provides that in considering whether or not to declare a service, one of the criteria is, "that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest".

78. Section 44CA(3) further clarifies that:

> *Without limiting the matters to which the Council may have regard for the purposes of section 44G, or the designated Minister may have regard for the purposes of section 44H, in considering whether paragraph (1)(d) of this section applies the Council or designated Minister must have regard to:*
>
> (a) *the effect that declaring the service would have on investment in:*
>
> *(i) infrastructure services; and*
>
> *(ii) markets that depend on access to the service; and*
>
> (b) *the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.*

3.2 Criterion (d) is not met

Effect of declaration on investment in infrastructure services

79. As the NCC stated in its Revocation Recommendation at [10.51], in considering section 44CA(3)(a)(i), and consistent with the Hilmer report, the NCC is primarily concerned with whether declaration would undermine the viability of efficient investment decisions; and hence risk deterring future investment in important infrastructure projects.

80. As the NCC correctly noted at [10.53] of the Revocation Recommendation, declaration of any service (and any consequent access regulation achieved via a negotiate-arbitrate regulatory model under Part IIIA) has the potential to alter a service provider's incentive to efficiently invest in maintaining or improving infrastructure necessary to provide the service; and/or inefficiently distort the timing of those investments. This might occur, for instance, if regulated terms and conditions of access set via an arbitration determination unintentionally prevent a service provider from recovering the efficient costs of its past and future investments in the infrastructure necessary to provide a declared service.

81. The NCC noted the risk or regulatory error, and concluded on balance at [10.61] of the Revocation Recommendation that it is possible that declaration of the Service could have an adverse effect on efficient investment in the infrastructure necessary to provide the Service. However, at the time of the Revocation Recommendation, the NCC determined that it was not clear that this effect would be substantial due to the fact that significant investments necessary to provide the Service have already occurred; the Port is unlikely to be capacity constrained over the relevant period of the declaration; and it is unclear how different (if at all) prices for the Service would be in a future with and without declaration of the Service.

82. 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. PNO's ability to raise debt to fund these 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. 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 submits that it is a relevant matter to be taken into account in determining whether declaration is warranted in all the circumstances.

Effect of declaration on investment in dependent markets

83. The NSWMC Application argues that "public interest" can be reasonably equated to the concept of "public benefits", and considers that benefits to the Hunter Valley and broader coal regions would arise from declaration in that, *"there would be more appetite for investment in the broader Hunter Valley region which would be in the public interest… Public benefits would accrue through increased employment in the mining industry which would have flow on effects to the regions in terms of mining support services, associated investment in public sector infrastructure, and health and education services. In the absence of this, there would be an effect on this investment resulting in a likely decline in the regions".*[34]

84. The submissions above relating to the reasonableness of PNO's terms and conditions of access as set out under criterion (a) are applicable here, and are not repeated.

85. PNO agrees with the NCC's observations at [10.63] of the Revocation Recommendation, namely that PNO is not materially vertically integrated into the provision of services in dependent markets. This means PNO:

(a) has no incentive to deny access to users seeking to compete in related markets; and

(b) is likely to prefer that the most efficient miners/investors are successful in bidding for tenements, as this means it is likely more value will be created by their mining activity in the Newcastle catchment. More efficient mining activity in the Newcastle catchment would be likely to maximise demand for the Service at any given price set at the Port; and the consequent profits PNO can make from its long-term lease of the Port.

86. PNO therefore clearly has no incentive to deliberately act to reduce efficient investment in dependent markets.

87. PNO agrees with the NCC's observations at [10.68] that investors or potential investors of coal tenements in the Newcastle catchment will likely face a range of significant uncertainties which will bear upon their investment decisions, including:

(a) regulatory change;

(b) the coal price (from which the ultimate value of a coal tenement is derived);

(c) the risk profile of a particular site (a greenfield site will have reserves of lesser known quality/quantity compared to more mature sites, which tend to attract more market interests); and

(d) ongoing costs (such as labour costs).

88. As the NCC notes, it is likely that 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.

89. It is significant that, as the NCC noted at [10.69] of the Revocation Recommendation, no factual evidence demonstrating which particular efficient investments in mining tenements would not occur in a future without declaration of the Service has been provided by the Applicant. The NSWMC Application again fails to provide such evidence. Broad sweeping statements without any evidentiary foundation about there being "*more appetite for investment in the broader Hunter Valley region"* under declaration are not at all compelling and should be rejected.

Administrative and compliance costs of declaration

90. As the NCC correctly considered at [10.73] of the Revocation Recommendation, the administrative and compliance costs of declaration include the costs of negotiating and arbitrating access disputes. The level of such costs may differ depending on factors such as the

[34] NSWMC Application at [14.1]

likely number of access disputes that may arise in relation to the declared service; the number of parties to these disputes; and the complexity of the issues likely to arise.

91. The 'considerable administrative, compliance and legal costs' associated with declaration and the subsequent negotiation and arbitration of terms and conditions of access, are easily demonstrable in this instance. Since the shipping channel service at the Port was first declared in 2016, PNO has been a party to numerous legal and regulatory proceedings and has spent approximately $15 million defending actions by a single coal producer. PNO remains mired in unnecessary and counterproductive litigation arising from that initial declaration, even though services at the Port are presently undeclared.

92. PNO agrees that even if additional access disputes arbitrated by the ACCC are relatively less costly than the Glencore-PNO Arbitration, 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 ACT re-arbitrations) is sought.

4. Conclusion

93. For the reasons set out above, PNO submits that the declaration criteria in s 44CA(1)(a) and (d) of the CCA are not satisfied.

94. In those circumstances, PNO submits that the NCC should make a recommendation to the designated Minister under s 44F(2)(b)(ii) of the CCA, that the Service not be declared.