

**PUBLIC VERSION**

**By email**

7 September 2020

Mr Richard York  
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National Competition Council  
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Dear Mr York

**Application for declaration of certain services in relation to the Port of Newcastle - Supplementary submission by Port of Newcastle Operations Pty Limited in response to *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145**

1. Port of Newcastle Operations Pty Limited (**PNO**) appreciates your invitation to express its views regarding the relevance of the Full Court of the Federal Court of Australia's decision in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (**FCAFC Decision**) 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. For the reasons set out in this supplementary submission, PNO considers that the FCAFC Decision to be of no relevance to the statutory task currently before the NCC - that is, to consider whether the declaration criteria set out in s 44CA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) are satisfied in respect of the Services.
3. As the NCC has previously concluded, the NCC is to undertake its assessment of the declaration criteria, "*without forming a view on the outcomes of any Part IIIA negotiation or arbitration which may be underway or concluded, such as the Glencore-PNO Arbitration*".<sup>1</sup> This conclusion is consistent with the legislative intention of the access regime in Part IIIA,<sup>2</sup> and PNO's longstanding position on these matters before the NCC.<sup>3</sup>

**FCAFC Decision is an irrelevant consideration under the statutory declaration criteria**

4. In determining whether to recommend to the designated Minister to declare the service the subject of an application for declaration, the NCC must consider whether all the declaration criteria set out in s 44CA of the CCA are satisfied. The NCC cannot recommend declaration unless it is satisfied that all of the declaration criteria are satisfied: s 44G.
5. The declaration criteria in s 44CA are exhaustive. That is, the only matters which are to be taken into account by the NCC in coming to a recommendation to the designated Minister are those enumerated in ss 44CA(1)(a)-(d).
6. There is no reference in the declaration criteria to matters relating to the arbitration of access disputes in respect of a service that was previously declared, and the subject of a new application for declaration before the NCC, preserved by s 44I. It would therefore be an

<sup>1</sup> NCC, *Recommendation: Revocation of the declaration of the shipping channel service at the Port of Newcastle* (22 July 2019) at [6.38].

<sup>2</sup> See *ibid* at [6.43].

<sup>3</sup> PNO, *Submission in response to invitation for further submissions dated 15 October 2018* (29 October 2018).

improper exercise of the NCC's powers under s 44F to take into account irrelevant considerations outside the enumerated statutory criteria in s 44CA.

#### **Bilateral dispute - specific to the parties**

7. The arbitration of an access dispute is a bilateral dispute resolution process between named parties and is not a regime whereby either the ACCC or the Australian Competition Tribunal (**Tribunal**) on a re-determination has general price or terms oversight, or the ability to set general terms of access for all access seekers.
8. The access dispute the subject of the FCAFC Decision was notified to the ACCC prior to the revocation of declaration of the Service on 24 September 2019 (as recommended by the NCC on 26 July 2019). That bilateral dispute relates to the terms and conditions of access to the Service for the applicant in that matter, Glencore Coal Assets Australia Pty Limited (**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.

#### **Access dispute remains on foot pending re-arbitration - and there is no arbitral decision currently in force**

9. In any event, 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.
10. As a result, the effect of the ACCC's determination of 18 September 2018 is suspended by operation of s 44ZO(2), as the parties have each applied for review under s 44ZP. That is, there is no arbitral determination (either of the ACCC or Tribunal) currently in force pending re-arbitration by the Tribunal under s 44ZP. Under s 44ZP, a determination of the Tribunal is a re-hearing of the matter *de novo*, based on the information, reports and things referred to in s 44ZZOAA.
11. It is unfortunate that, in circumstances where the declaration criteria for the Service are not satisfied - as the NCC has concluded on each occasion it has considered these matters, and the designated Minister accepted in October 2019 by acceding to revocation of the declaration - the terms and conditions of access to the Service continue to be the subject of dispute because the objects of Part IIIA to promote effective competition in upstream and downstream markets cannot be achieved where the statutory criteria for declaration are not met.

#### **NCC has accepted that the bilateral access dispute between Glencore and PNO is not relevant to assessment of the declaration criteria**

12. PNO agrees with the NCC's conclusion of December 2018 that outcome of a bilateral arbitration is irrelevant to the NCC's statutory task.
13. The NCC accepted the submissions from PNO on the NCC's approach to the interpretation of the declaration criteria and the NCC's statutory task.<sup>4</sup> The NCC stated that it:<sup>5</sup>

*considers it is appropriate to undertake its assessment of criterion (a) without forming a view on the outcomes of any Part IIIA negotiation or arbitration which may*

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<sup>4</sup> NCC, *Statement of Preliminary Views: Revocation of the declaration of the shipping channel service at the Port of Newcastle* (19 December 2018) at [5.30]-[5.38]; NCC, *Recommendation: Revocation of the declaration of the shipping channel service at the Port of Newcastle* (22 July 2019) at [6.12]-[6.50].

<sup>5</sup> NCC, *Statement of Preliminary Views: Revocation of the declaration of the shipping channel service at the Port of Newcastle* (19 December 2018) at [5.31].

*be underway or concluded, such as the Glencore-PNO Arbitration. The [NCC] does not consider it necessary or appropriate to form a concluded view as to whether the terms set in the ACCC Determination are 'reasonable terms and conditions, as a result of a declaration' contemplated in criterion (a).*

14. The NCC concluded that, in circumstances where the ACCC's determination, "*is the subject of an appeal process, and a concluded view on the merits of this determination has not been made* [the NCC could have] *regard to it only in broad terms as an example of the type of decision that can result from an arbitration under Part IIIA*" (emphasis added).<sup>6</sup> As explained at paragraphs 9 and 10 above, the effect of the FCAFC Decision is to place the parties in the same position as when their respective applications to the Tribunal for review of the ACCC's determination were made in October 2018 - that is, when a concluded view on the merits of this determination had not, and has not, been made.

15. With respect this conclusion is entirely consistent with the Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 which states (EM) (at 12.21):

*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.*

16. The EM makes it clear the assessment of what constitutes 'reasonable terms and conditions' for the purpose of the competition test is meant to be made objectively, having regard to the aims of Part IIIA to promote efficient investment in infrastructure and avoid monopoly pricing that adversely affects competition in dependent markets. The EM explicitly states that the NCC is not required to come to a view on the outcomes of a Part IIIA arbitration or negotiation. The reason for this is that arbitration and negotiation outcomes are specific to the parties, reflecting the fact that Part IIIA establishes a bilateral dispute resolution mechanism rather than a general price setting regime.

17. As PNO observed in its submission to the NCC of 29 October 2018 on the relevance of the ACCC's arbitration determination to PNO's application for revocation of the declaration of the Service, the only potential relevance of the FCAFC Decision (or the ACCC determination or the Tribunal's 30 October 2019 determination) is that it might be considered to provide insight on what constitutes 'reasonable terms and conditions' for the purposes of the declaration criteria.

18. PNO submits that:

(a) The FCAFC Decision expressly confirms (at [5]):

*...it is not [the Full] Court's function to resolve the difficult and complex matters of judgment the Tribunal may be called upon to resolve (and thereby slide into impermissible merits review) but is rather to ensure the decision of the Tribunal accords with the law.*

It therefore cannot be said that the questions of law the subject of the FCAFC Decision have illuminated what might constitute 'reasonable terms and conditions' of access for the purpose of the declaration criteria.

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<sup>6</sup> NCC, *Recommendation: Revocation of the declaration of the shipping channel service at the Port of Newcastle* (22 July 2019) at [6.39].

- (b) Nor can the ACCC's determination of September 2018 be seen as providing any relevant insights for the NCC in circumstances where both parties to the dispute have applied for re-arbitration of the determination before the Tribunal. As set out above, this would be a fundamental misapplication of the declaration criteria and the statutory process that the NCC is obliged to follow.
- (c) Even if the NCC were to consider that either the ACCC's determination or the FCAFC Decision were in some way relevant to the statutory task currently before it (which PNO rejects for the reasons in this submission), those decisions do not support a finding that access (or increased access) to the Service would promote a material increase in competition, for the reasons summarised at paragraph 7 of PNO's submission to the NCC dated 26 August 2020.

**Continuing arbitration of the terms and conditions of access by miners will not have any effect on actual access seekers**

- 19. As explained at paragraphs 37 to 59 of PNO's confidential submission to the NCC dated 26 August 2020, PNO has offered Port users heavily discounted long-term pricing arrangements to the standard Schedule of Port Charges fixed by PNO under the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**), subject to agreeing the terms of a pro forma long-term pricing deed (**Deed**). Following negotiations up to late March 2020, PNO has entered into a number of Deeds with access seekers who acquire the Service from PNO.
- 20. The pro-forma Deed provides the terms for an agreement between PNO (as Port operator) with persons liable to pay charges at the Port. Such agreements are contemplated by s 67 of the PAMA Act, being the source of PNO's authority to levy charges at the Port. Under s 67(3) of the PAMA Act, the terms of any s 67 agreement displaces the charges otherwise fixed by the Port operator under the PAMA Act. This includes the navigation service charge (**NSC**) fixed by PNO in its Schedule of Port Charges under s 50 of the PAMA Act, currently \$1.04/GT.
- 21. A summary of the relevant provisions of the Deed is set out in **Confidential Annexure A** to this submission.
- 22. [Redacted].
- 23. For that additional reason the outcome of the FCFCFA Decision is irrelevant to the Declaration criteria.

**Confidentiality**

- 24. This submission (including any annexures) contains information that is confidential and commercially sensitive to PNO. Information that is confidential to PNO is shaded **blue**.
- 25. PNO asks that the NCC (including officers of the ACCC designated to perform the duties of the NCC) receive this submission (including **Confidential Annexure A**) on a confidential basis on the basis set out at section 1.2 of PNO's submission to the NCC of 26 August 2020.

Yours sincerely

Simon Byrnes  
**Chief Commercial Officer**