

4 September 2020

Mr Richard York
Executive Director
National Competition Council
Melbourne VIC 3000
Email: info@ncc.gov.au

Dear Mr York

NSW Minerals Council – Applications for declaration of services at the Port of Newcastle

I am writing to you, on behalf of Yancoal Australia Limited (**Yancoal**), in response to the invitation by the National Competition Council (**NCC**) for submissions concerning the implications of the decision of the Full Federal Court in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (the **Decision**) in connection with the NCC's consideration of the NSW Minerals Council's application for declaration.

Yancoal submits that the Port of Newcastle services should be declared and considers that the Decision provides additional evidence to support a finding that criterion (a) and (d) are satisfied in the respect of such services. I have set out below our key reasons for reaching that conclusion.

Implications of the Decision

The key issue in the declaration application is evidently whether criterion (a) is satisfied, namely whether access (or increased access) to the service on reasonable terms and conditions, as a result of declaration, will promote a material increase in competition in a dependent market.

There are two ways in which Yancoal considers the Decision impacts on that assessment.

First, it demonstrates that in the absence of declaration, PNO has been charging users an inefficiently high price by charging a return on \$912 million of user funded assets. This is both evidence of PNO's ability and incentive to engage in monopoly pricing, but also of the lack of constraints that have applied to that monopoly pricing in the absence of declaration.

Second, it strongly suggests that on the pricing arbitration between Glencore and PNO being remitted to the Tribunal for re-determination, Glencore will receive a significantly lower price for use of the service than is being provided to all other coal producers through the Tribunal determining how such user contributions should be taken into account – with that lower efficient price applying to all coal Glencore export through the Port (not just where they directly charter a vessel).

Yancoal (likely other non-Glencore coal producers) will not enjoy the outcomes of the Decision or the resulting Tribunal re-determination. That asymmetric outcome arises not for any cost or efficiency based reasons, but

because Glencore sought arbitration during a period in which the service was declared – such that the constraints arising from the declaration produced arbitration only apply to PNO's pricing in respect of Glencore.

Likely outcomes with declaration

Yancoal submits that that the Decision makes clearer that with declaration, the ACCC's previous arbitration determination (rather than that of the Australian Competition Tribunal) is likely to represent the reasonable terms and conditions that would apply where the Port services were declared.

Yancoal's submits that the likely future with declaration involves that same approach being extended to all users, given that the building blocks methodology used to determine the price is not customer specific, all coal users receive the same service, and the ACCC's previous arbitration determination indicated that the Glencore outcome would be a guide for users and PNO in future negotiations.

Likely outcomes without declaration

By contrast, without declaration PNO will continue to engage in monopoly pricing against all coal producers other than Glencore. As discussed below, Yancoal considers the likely level of that pricing will increase well beyond the amounts attributable to charging for user funding assets.

As a result, in a likely future without declaration:

- the inefficient pricing is likely to give rise to inefficient investment decisions by non-Glencore producers; and
- a long-term economic difference will arise between coal producers that will impact on competition in dependent markets due to only Glencore benefiting from efficient pricing and that differential treatment continuing until 7 July 2031.

Promotion of competition

As Yancoal understands the NCC's previous revocation decision, the previous conclusion that criterion (a) was not satisfied turned on two issues:

- that PNO would not have the incentive to engage in monopoly pricing; and
- that the likely difference in price with and without declaration was not considered to be sufficiently material to change investment decisions such that declaration would promote competition.

The first of those conclusions evidently needs to be reconsidered. The findings in the Decision, confirm the concerns that Yancoal has raised in earlier submissions to the NCC. That is, it will be profit maximising behaviour for PNO (which PNO is incentivised to engage in) to continue to raise prices, knowing that coal producers have significant sunk investments and extensive rail haulage, rail access and coal terminal take or pay obligations, such that there will be limited prospects of their volumes meaningfully decreasing in the face of such monopoly pricing.

When that conclusion is reconsidered, it requires the analysis of materiality and impact on competition to also be reconsidered. In that regard, Yancoal submits that extent of likely difference arising from charging for user funded assets alone (in the order of approximately 40 cents per tonne) will itself be significant to investment decisions.

However, the critical issue revealed by the Decision is that, in the absence of declaration, there will be no constraint on PNO engaging in monopoly pricing in respect of all non-Glencore users. There is no evidence to suggest that PNO would be constrained from raising prices even further above efficient levels, i.e. well in excess of any amounts attributable to charging for user funded assets. When considering materiality and impact on competition, the key issue is not the 40 cents per tonne differential arising directly from the decision, but the investment hold-up problem that faces all non-Glencore users. In particular, even if the NCC regarded the current navigation services charges and wharfage charges as not of themselves sufficient to provide a barrier to entry for non-Glencore users in dependent markets, as PNO has the opportunity to reset charges every year without any constraint, non-Glencore users have to take into account a high likelihood of substantial future increases. This will have a chilling effect on investment decisions in coal tenement acquisition and coal project development which involve incurring sunk costs when the future profitability of that investment can be eroded by further monopoly pricing.

As a result, the likely future circumstances are akin to those recently found by the Queensland Treasurer to satisfy criterion (a) in relation to the Dalrymple Bay Coal Terminal service, where the asymmetric pricing outcomes for different users materially impacted on the opportunities and environment for competition in the coal development tenements market. That would follow here because, in the absence of declaration:

- PNO has the ability and incentive to engage in monopoly pricing against non-Glencore users – as the Port services are an essential infrastructure service, with no substitute and without which coal producers' operations in the Hunter Valley are stranded; and
- Glencore would enjoy a long-term efficient price, resulting in Glencore being able to derive greater profitability than other users from investments in the same coal projects – such that they would place higher value on such tenements, thereby create a barrier to other efficient developers competing with Glencore to acquire such tenements.

Accordingly, Yancoal submits that the Decision provides the NCC with new and additional evidence which supports a finding that criterion (a) (and as a result criterion (d)) will be satisfied.

I hope this submission assists in the NCC's consideration of these matters.

Yours sincerely

Mike Dodd
General Manager, Infrastructure
Yancoal Australia Limited