Submission on revocation application for the Port of Newcastle Shipping Channel Service

8 August 2018

Yancoal thanks the National Competition Council (the ***NCC***) for the opportunity to make submissions regarding the NCC's consideration of whether to recommend revoking the declaration of the shipping channel service at the Port of Newcastle, as requested by Port of Newcastle Operations Pty Ltd's (***PNO***) on 2 July 2018.

For the reasons set out below, Yancoal is strongly of the view that the NCC should recommend against revocation, such that the declaration of the shipping channel service is continued.

1 Yancoal

Yancoal Australia Limited (***Yancoal***) is a significant coal producer with interests in a portfolio of coal mines in the Hunter Valley, including:

(a) Hunter Valley Operations;

(b) Mount-Thorley Warkworth;

(c) Moolarben;

(d) Ashton;

(e) Austar;

(f) Donaldson; and

(g) Stratford-Duralie.

All export production from those mines is exported through the Port of Newcastle, requiring access to the Port of Newcastle shipping channel services to which the revocation application relates.

Yancoal is therefore critically concerned with ensuring that the Port of Newcastle channel services remain available to coal producers and their customers on the reasonable terms and conditions that can only be produced through declaration.

2 Context and Background

2.1 Declaration decisions

PNO's revocation application concerns the declaration in 2016 by the Australian Competition Tribunal in *Application by Glencore Coal Pty Ltd (No.2)*[1] of the following service:

> *The provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port [of Newcastle], by 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*

(referred to in this submission as the ***channel services***).

The channel services are used by vessels transporting coal produced in the Hunter Valley and Gunnedah region to export customers, as well as a range of other vessels that use the port.

The declaration was made at the end of a series of decisions seeking to apply the declaration previous criteria to the service, namely:

(a) the NCC, in its Final recommendation of 2 November 2015 (the ***NCC Recommendation***);

(b) the Minister, in its decision of 8 January 2016 (the ***Ministerial Decision***); and

[1] [2016] ACompT 7

(c) the Tribunal, in its decision in *Application by Glencore Coal Pty Ltd*[2] (the ***Tribunal Declaration Decision***).

The Tribunal Declaration Decision ultimately resulted in the declaration of the channel services until 7 July 2031.

Subsequent proceedings by PNO seeking review by the Federal Court of the Tribunal Declaration Decision[3] and a related special leave application to the High Court[4] were not successful, such that the channel services remains declared.

2.2 Unique and opportunistic nature of revocation application

The declaration was made for 15 years. It is fairly unique for the NCC to be receiving a revocation application so soon (just over 2 years) after such a long term declaration has been made. That is particularly the case in the current context, where the circumstances in which the services are being provided not having materially changed since the declaration.

To the best of Yancoal's knowledge the revocation application is also uniquely being made while there is an existing access dispute on foot which is currently being arbitrated by the Australian Competition and Consumer Commission (the ***ACCC***). Based on the statutory timeframes which exist for the arbitration, Yancoal anticipates that the ACCC will hand down a final determination in the near future.

Yancoal appreciates that the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (the ***CCA Amendment Act***) has amended the declaration criteria which were applied in the initial decisions regarding declaration. PNO's application is open in justifying its application for revocation principally on the basis of those amendments.

Yancoal submits that context is relevant to the NCC's consideration in two ways:

(a) first, parts of the reasoning in the previous decisions regarding declaration must now be approached with caution where the relevant criterion or circumstances have changed; and

(b) second, the NCC should consider whether it is appropriate for a long term declaration for a service, which is provided to coal producers and other businesses that make long term investment decisions, to be opportunistically revoked based on a subsequent change in law rather than any underlying change in circumstances.

3 The statutory framework for revocation applications

3.1 The revocation provisions are not identical to the declaration provisions

The NCC is being asked to consider whether it should recommend revocation of an existing declared service under section 44J *Competition and Consumer Act 2010* (Cth) (the ***CCA***).

The NCC has not published a guide to revocation – and the section on revocation in the NCC Declaration of Services guide[5] (the ***NCC Guide***) is relatively limited.

As the NCC Guide notes there is no express statutory procedures the NCC must follow when considering whether to recommend revocation.[6]

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[2] [2016] ACompT 6

[3] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124

[4] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2018] HCATrans 55 (23 March 2018)

[5] NCC, *Declaration of Services: A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018

[6] NCC Guide at [7.9]

While the NCC Guide indicates the NCC 'intends to generally follow a similar process' as to when it considers declaration applications,[7] Yancoal notes that the statutory framework for how such decisions are actually made (as opposed to the process the NCC follows) is quite distinct. As discussed in detail below, section 44F (and 44H) and 44J CCA are not a perfect mirror of each other.

Consequently, even though declaration and revocation applications will typically consider very similar matters (and both will be concerned with whether the declaration criteria are satisfied in respect of the relevant service), it is important at the outset to consider the actual wording and application of section 44J CCA.

Section 44J(1)-(2) CCA is set out below (our emphasis added):

> *(1) The Council <u>may</u> recommend to the designated Minister that a declaration be revoked. The Council must have regard to the objects of this Part in making its decision.*
>
> *(2) The Council <u>cannot</u> recommend revocation of a declaration unless it is satisfied that, at the time of the recommendation:*
>
> *(a) subsection 44F(1) would prevent the making of an application for a recommendation that the service concerned be declared; or*
>
> *(b) subsection 44H(4) would prevent the service concerned from being declared.*

It is clear from the ordinary meaning of that wording that section 44J has two components:

(a) a discretion – (the Council *may* recommend) - as to whether a revocation should be recommended (or not) – with that discretion to be exercised having regard to the objects of Part IIIA CCA; and

(b) a restriction on that discretion (the Council *cannot recommend revocation … unless*) – namely that revocation cannot be recommended unless the NCC is satisfied that the preconditions in section 44J(2)(a) or (b) are met.

3.2 The CCA revocation provisions provide the NCC with a discretion (and are different to the NGL revocation provisions)

Yancoal appreciates that the NCC has had cause on a number of occasions to consider revocation of pipeline coverage under the National Gas Laws (***NGL***).

However, it is worth noting that the structure and wording of section 105 NGL is very different to that in section 44J CCA described above.

In particular, the NGL provides a simple binary test based on whether the NCC is satisfied of the pipeline coverage criteria in respect of the pipeline. This can be seen clearly in the wording of section 105(2) NGL as set out below:

> *(a) if the NCC is satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline – the recommendation must be in favour of the pipeline continuing to be a covered pipeline;*
>
> *(b) if the NCC is not satisfied that all the pipeline coverage criteria are satisfied in relation to the pipeline – the recommendation must be in favour of the pipeline no longer being a covered pipeline.*

[7] NCC Guide at [7.9]

It is clear from the ordinary meaning of that wording that if the NCC is not satisfied that the coverage criteria are met, there is no discretion for the NCC to decide it is nevertheless appropriate to continue the coverage and the NCC must recommend coverage ceasing.

Whereas the contrasting combination of the discretionary wording with the preconditions to a particular recommendation in section 44J CCA (and their evident difference to the NGL wording), clearly suggest that even if the preconditions are met (so that the NCC has the power to recommend revocation under section 44J(2) CCA), it must still go on to determine whether it should exercise its discretion to do so under section 44J(1) CCA – having regard to the object of Part IIIA.

Any other conclusion is simply inconsistent with the clear wording of section 44J(2) CCA.

3.3 A discretion is appropriate in the context of revocation (even though a residual discretion does not exist in the context of declaration)

Yancoal acknowledges that in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[8] (the ***Pilbara Decision***) the High Court determined that a residual discretion did not form part of whether a service should be declared under section 44H CCA.

However, the Pilbara Decision is clearly not precedent for there being no discretion in the context of a revocation decision.

(a) Differences in wording of the declaration and revocation provisions

The wording of section 44F and 44H CCA (regarding declaration) and section 44J CCA (regarding revocation) are different. In particular, section 44F CCA (for the NCC) and 44H CCA (for the Minister) do not contain, in respect of declaration recommendations or decisions, any equivalent of the 'may' wording that so clearly indicates a discretion in section 44J CCA.

By contrast, sections 44F and 44H CCA oblige the NCC and Minister to make a decision and then simply list the declaration criterion as preconditions for a decision to recommend declaration or declare respectively.

It is therefore wholly unsurprising that on reading section 44H CCA as a whole the High Court did not find evidence of the existence of a residual discretion in respect of whether to declare a service.

Finally, in the Pilbara Decision one of the reasons given for rejecting a residual discretion was the lack of criteria by reference to which such a discretion would be exercised. However, section 44J(1) provides that criteria for revocation decisions – with regard to be had to the objects of Part IIIA.

(b) Differences in context of declaration and revocation

In addition, the context of a revocation decision is materially different to the context of the declaration decision that the Pilbara Decision was actually concerned with.

It is perfectly reasonable that once a decision has been made on declaration – reversing it should involve a higher hurdle of demonstrating why it is appropriate to do so.

The differences between declaration and revocation are made apparent when the practical consequences of there being no discretion in the context of a revocation decision are actually considered.

Where, as for this service, the issue of declaration has been considered extensively – by the NCC, the Minister, Tribunal (and subsequent court challenges), it is an absurd result that the

[8] [2012] HCA 36

declaration decision can be overturned by the NCC without any material change in position having occurred.

In this instance it potentially also has the result that the arbitration legitimately commenced by Glencore Coal Assets Australia Pty Ltd (***Glencore***) following the declaration of the channel service could be frustrated before its fruition. While that arbitration is private, Yancoal assumes that the parties to that arbitration and the ACCC (as arbitrator) have spent considerable resources on the arbitration, which will potentially be wasted depending on the timing of the revocation compared to the final arbitration determination. A view that there is no discretion simply incentivises the very delaying tactics (including through dubious judicial review proceedings such as *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission*)[9] that PNO pursued as a method of maximising the prospects of revocation occurring before an arbitration determination can be made.

By way of further example of the likely absurdities of there being no discretion for the NCC, consider the hypothetical position of the NCC and Minister having determined that the access criteria were not satisfied in respect of a service and the Tribunal having decided on review that they were (with the differences in findings being based not on points of law but on differences in how the Tribunal and NCC saw the merits in respect of a criterion). Surely it cannot be the case that in those circumstances the service provider can instantly apply to the NCC for a revocation recommendation and have the decision overturned on the basis of the NCC's and Minister's view of the facts. Such an interpretation would completely undermine the clearly intended finality of the Tribunal Declaration Decision, and result in the potential for a continuous circle of declaration and revocation applications without any change in circumstances. That situation is truly absurd when the intention is to allow infrastructure owners and users to make long term investment decisions with certainty about the applicable regulatory and commercial arrangements.

3.4 The precondition requires NCC to be positively satisfied that the declaration criteria are not met

As discussed above, it is clear that, as a threshold issue, the NCC cannot recommend revocation unless it is satisfied that section 44H(4) CCA would prevent the designated Minister from declaring the service (section 44J(2) CCA).

Section 44H(4) CCA would prevent a declaration decision unless the Minister was satisfied that each of the declaration criterion was met.

That is, before it can make a revocation recommendation, *the NCC must be positively satisfied that one or more of the access criteria in section 44H CCA is not satisfied* (i.e. positively satisfied or a negative result). This submission therefore addresses how each of the declaration criterion apply in respect of the service.

Importantly, however, if the NCC is uncertain about whether a declaration criterion is met, but not positively *satisfied* that it is not met, the pre-condition would not be met, and revocation could not be recommended on that basis.

That contrasts to the declaration context where the NCC must be positively satisfied that the declaration criterion *are met* – such that uncertainty about a declaration criterion in the context of declaration results in the service not being declared.

As noted above, given the context of the previous significant time and cost that will have been incurred in NCC, Ministerial, Tribunal and court processes to reach a declaration – it is not a

[9] [2017] FCA 1330

particularly surprising outcome that the legislature has set the hurdle for revocation higher than it was for the initial declaration.

3.5 Conclusions on the statutory framework concerning revocation

It follows from the above, that the NCC should recommend not revoking the declaration where:

(a) it is positively satisfied each of the four access criterion in section 44H CCA are met;

(b) for any access criteria which it is not positively satisfied are met, it is not positively satisfied that they are not met; or

(c) despite being positively satisfied that one or more of the declaration criteria are not met, it considers that it should exercise the discretion provided by section 44J(1) CCA to not recommend revocation having regard to the objects of Part IIIA.

Each of those issues is considered in detail in the submissions below.

4 Declaration criterion – that are not contested

Given PNO has not put any submissions or evidence before the NCC in respect of criterion (b) or (c) in its application for revocation of declaration, Yancoal considers that it is impossible for the NCC to be satisfied that those criterion are not met.

In any case, Yancoal considers that it is absolutely clear, including through the findings of the NCC, Minister and Tribunal in the decisions in the initial declaration processes, that criterion (b) and (c) are both satisfied in respect of the channel services for the reasons set out below.

4.1 Criterion (b) – meeting foreseeable demand at least cost

Criterion (b) requires:

> *that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:*
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> *(i) over the period for which the service would be declared; and*
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> *(ii) at the least cost compared to any 2 or more facilities (which could include the first mentioned facility);*

As the explanatory memorandum to the CCA Amendment Act (the ***Amendment Act EM***), which recently amended criterion (b), states :

> *[t]he amendment to this paragraph is intended to refocus the test to a 'natural monopoly' test instead of a 'private profitability' test.*

That materially lowers the threshold for criterion (b).

The channel service is a service which has clear natural monopoly characteristics – such that criterion (b) is still clearly satisfied.

The capital costs of dredging to produce an alternative channel, and the environmental and resulting regulatory challenges to doing so are very significant.

Glencore made submissions in its original declaration application (that Yancoal considers are entirely accurate) about the impossibility of economically developing another facility to provide the service – noting PNO's valuation of the existing shipping channel at $2.4 billion at the time and other costs for related rail, conveyor and jetty infrastructure. PNO made no submissions on criterion (b), and each of the NCC, Minister and Tribunal accepted that criterion (b) was satisfied.

For example, the NCC stated in its final recommendation to the Minister:[10]

> *The Council considers that no party (including PNO) has outlined a scenario that overcomes the significant physical and structural impediments to developing another facility to provide the service, let alone the profitability or economic feasibility of such a task. As such, it would appear that the cost of undertaking such an activity would likely be far in excess of any likely income received from the facility.*

Consequently, Yancoal considers it is clear that, even without a detailed project of foreseeable demand, demand is met at least cost by the channel rather than two or more facilities – such that criterion (b) is clearly satisfied.

4.2 Criterion (c) – national significance

Criterion (c) requires:

> *That the facility is of national significance, having regard to:*
>
> *(i) the size of the facility;*
>
> *(ii) the importance of the facility to constitutional trade or commerce; or*
>
> *(iii) the importance of the facility to the national economy.*

Criterion (c) was not amended by the CCA Amendment Act and there is no suggestion that the channel has become any less significant in the last 2 to 3 years. Consequently, the consistent findings that criterion (c) was satisfied by each of the NCC Recommendation, the Ministerial Decision and the Tribunal Declaration Decision remain applicable.

For example, in the Tribunal Declaration Decision, the Tribunal stated (at [47]):

> *'There is no issue about the criteria in s 44H(4)(b), (c) and (e). The Minister was satisfied about them. The parties did not question those conclusions. On this application, for the same reasons as the Minister, the Tribunal is also satisfied about them'*;

Each of those decisions referenced:

(a) the Port of Newcastle being one of the largest coal ports in the world;

(b) coal being Australia's second most valuable export; and

(c) the significant economic contributions of the Hunter Valley coal industry, which relied entirely on exporting from the Port of Newcastle.

The significant coal exports through the Port of Newcastle and the coal royalties that are generated result in significant benefits for both state and federal gross domestic product. For example, coal royalties accounted for $1.776 billion in the 2018 New South Wales state budget. It has been estimated that for every 1% movement in predicted coal export volumes, there is an estimated movement of $17 million from the State budget and for every 1% movement in coal prices, measured in $US, there is a $18 million change in the State budget.[11]

The significance of the channel is only likely to increase with the potential for development of a major container terminal at the Port of Newcastle.

Consequently, Yancoal considers it is abundantly clear that the channel infrastructure is of national significance and criterion (c) continues to be satisfied.

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[10] NCC Recommendation at [5.10] – [5.11]

[11] Ian Kirkwood 'Coal Royalties give NSW budget a $111 million boost' *Newcastle Herald* (online), 19 June 2018 https://www.theherald.com.au/story/5476657/nsw-budget-hunter-coal-royalties-give-bottom-line-a-boost/ (accessed 27/07/2018).

5 Criterion (a) – Interpretation

5.1 What is required for there to be a promotion of a material increase in competition

Criterion (a) has been amended by the CCA Amendment Act so that it now provides:

> *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*

Yancoal acknowledges that that wording is different from the previous wording for criterion (a) that was interpreted by the Tribunal in *Application by Glencore Coal Pty Ltd*.[12] The CCA Amendment Act EM provides that:[13]

> *the amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition*

However, it is important to recognise that part of the wording of the revised criterion (a) remains the same. While the focus is now on declaration rather than access, what is required is that declaration:

> *would promote a material increase in competition*

That wording has not changed from the previous criterion (a), such that the previous law in relation to the meaning of that phrase remains just as relevant to the current criterion (a) and revocation application as it was to the previous criterion (a) and declaration application.

The materiality requirement has been interpreted to mean merely a non-trivial increase (as per the explanatory memorandum to the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth)). Proposals to increase this threshold to the much higher 'substantial increase' raised with the Productivity Commission (in its review of Part IIIA CCA) and the Harper Review panel, were not accepted by the federal government – such that the threshold remains at the low bar of 'non-trivial'.

In relation to what constitutes a promotion of competition, Yancoal notes that the NCC Guide was updated following the amendments to the declaration criteria and continues to describe the NCC's view that the promotion of a material increase in competition involves:[14]

> *an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.*

Yancoal considers that is correct. This interpretation is consistent with the Australian Competition Tribunal's decision in *Re Virgin Blue Airlines Pty Ltd*[15], in which the Tribunal stated (our emphasis added):

> *In our view, we need to be satisfied that if the Airside Service is declared* ***there would be a significant, finite probability that an enhanced environment for competition and greater opportunities for competitive behaviour – in a non-trivial sense*** *– would arise in the dependent market,*

[12] [2016] ACompT 6

[13] CCA Amendment Act EM at [12.19]

[14] NCC Guide at [3.23]

[15] [2005] ACompT 5 at [162]

And similarly:

> *The Tribunal does not consider that the notion of 'promoting' competition in a 44H(4)(a) requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion of 'promoting' competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration*

In reaching this decision, the Tribunal referred to submissions by Virgin Blue, which suggested that:

(a) the requirement that access or increased access *would* promote competition meant *realistically could* and was not to be interpreted as *will* promote competition; and

(b) that the degree of certainty required by the phrase 'would promote competition' was a *significant finite probability*, rather than such a consequence being m*ore probable than not*.[16]

There has not been any judicial consideration in any of the subsequent proceedings concerning criterion (a) which suggest that that interpretation has changed.

Rather in the Tribunal Declaration Decision, the Tribunal stated that:[17]

> *In identifying dependent markets for the purposes of criterion (a), what must be determined is whether any dependent market is distinct from the market for the service, and the effect access will have on the conditions for competition in that dependent market.* ***This includes considering whether access will create or improve the environment in which competition may then flourish****: see Sydney Airport FC at [107].*

Similarly in the Full Federal Court's decision in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal*[18] the court stated that:

> *The decision-maker is required to make a prediction or forecast of the conditions or environment for improving competition in a dependent market*

While PNO appears to acknowledge this interpretation in its submission, it does not pay sufficient attention to the fact that an *'enhanced environment for competition and greater opportunities for competitive behaviour*', is something that can occur through resolving uncertainty, ensuring efficient pricing and removing the potential for differential pricing to distort competition in at least some dependent markets as a continuation of the declaration would do.

5.2 Defining the dependent markets

(a) Markets identified in the declaration decisions

PNO's revocation application refers to the 5 dependent markets referred to in the previous declaration proceedings (and subsequent appeals), being:

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[16] [2005] ACompT 5 at [160].

[17] Tribunal Declaration Decision at [107]

[18] [2017] FCAFC 124 at [86]

(i) A coal export market;

(ii) Markets for the acquisition and disposal of exploration and/or mining authorities;

(iii) Markets for the provision of infrastructure connected with mining operations, including rail, road, power and water;

(iv) Markets for services such as geological drilling services, construction, operation and maintenance; and

(v) A market for the provision of shipping services including shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are part.

For the purposes of these submissions, Yancoal is willing to assume those may be appropriate product market definitions, subject to the following.

Yancoal considers there are likely to be separate thermal and metallurgical coal markets. Thermal and metallurgical coals have different properties which makes them more suitable for particular uses (electricity generation and steel production respectively). As a result the thermal and metallurgical coal markets are driven by different sources of demand, and many of the major customers for one type of coal are not necessarily customers for the other. That approach would also reflect the approach taken by the ACCC where it has had cause to consider coal markets in previous merger decisions. The Hunter Valley is characterised by higher volumes of thermal coal, which as the lower value coal product is more exposed to price increases in the supply chain.

Yancoal also considers there are definitely different markets for coal authorities as distinct from non-coal mineral authorities. That is the case because the demand, supply and valuation for such authorities will be based on the outlook for entirely different commodities. In addition, authorities for coal exploration or mining are issued, and provide rights for exploration or extraction, in relation to coal (not other minerals). The market participants in the coal authorities market are also different – due to including vertically integrated coal customers and pure coal play companies such as Yancoal, Whitehaven, Peabody Energy, Centennial Coal to name a few. Consequently the impact with and without declaration needs to be considered in this narrower coal authorities market.

(b) Geographic boundaries – the Coal Authorities Market

In addition, the geographic boundaries of some of those dependent markets are important and were not considered in any detail in PNO's application (or for that matter any of the previous decisions in the declaration process).

In particular, Yancoal considers it is clear that the exploration and/or mining authorities market (the ***Authorities Market***) is likely to be a relatively narrow geographically bound market.

While it is acknowledged that the NCC Recommendation speculated that *'parties seeking coal mining authorities may likewise be able to consider different locations*',[19] the NCC did not consider it previously necessary to precisely define the geographic market boundaries.

Yancoal submits that the Authorities Market is clearly confined to the Hunter Valley region for a range of reasons which indicate that a coal tenement in the Hunter Valley region is not substitutable for a coal tenement in other regions, and that is important to the satisfaction of criterion (a) where the direct impact of the pricing issues arising from revocation will impact on investment in projects in that region.

[19] NCC Recommendation at [4.69]

Those reasons include:

(a) there are material coal quality differences between coal basins – the Hunter Valley for example has significant thermal and semi-soft coking coal resources (whereas other basis have more of other types of metallurgical coal);

(b) significantly different infrastructure costs (for example even accessing the nearest Gunnedah region coal mines costs significantly more in term of rail access and haulage charges);

(c) different regulatory environments for mining development and approvals (particularly between Queensland and New South Wales), making development time frames and development costs materially different; and

(d) for existing Hunter Valley producers (particularly those with a portfolio of mines), coal authorities in the region will be far more attractive than coal authorities elsewhere due to the ability to:

    (i) use existing contracted capacity, both at the PWCS and NCIG coal terminals and in relation to ARTC's Hunter Valley rail network – where capacity is contracted on a long term evergreen basis (so that the producer can continue to utilise the capacity by a new project ramping up as an existing project reaches the end of its mine life); and

    (ii) redeploy employees and contractors between mines.

As a result of those issues, Yancoal would not consider an authority in a different region a close substitute to which it would switch investment decisions in response to a small but significant non-transitory increase in price of a Hunter Valley coal authority.

5.3 Impact on dependent markets

(a) Flaws in PNO's key assertion

PNO's position in relation to criterion (a) is principally based on the assertion that irrespective of whether the price for channel services will be higher without declaration, because of the small proportion of the costs of coal producers the channel services charges represent, and the other uncertainties coal producers are exposed to, any lower price which applies as a result of declaration will not promote a material increase in competition in any dependent markets.

Yancoal considers there are 4 key flaws in that assertion, namely:

(i) the charges for the channel service are more material to the investment decisions of coal producers than represented by PNO;

(ii) it is not just the materiality of the current level of charges that is relevant, but the future uncertainty about the long term pricing of the channel services (and how material they may become);

(iii) in the absence of declaration, there will be a distortion of competition in a number of dependent markets as it is likely that Glencore will have the benefit of ACCC arbitrated terms (which will continue to apply provided a final determination is made prior to revocation), which will make (for example) coal authorities more valuable to Glencore and place them in an advantageous position compared to other potential acquirers in the Authorities Market; and

(iv) the NCC cannot be positively satisfied that declaration will not promote a material increase in competition – when it does not currently know the terms which would apply in the event of declaration continuing (for which the outcome of the

Glencore ACCC arbitration is likely to be the best proxy), such that any with or without comparison by the NCC without that information is speculative at best.

(b) Materiality of the channel charges

In relation to the materiality of the channel services charges, Yancoal considers that it is misleading to try to characterise the channel charges as immaterial by reference to a proportion of current coal prices or coal producer FOB costs or revenues for a number of reasons.

Firstly, it is really the proportion the channel services charges form of the profit margin of coal producers that is relevant (not the percentage of overall costs). That logically follows, because if a coal producer cannot make a profit it will presumably cease operating or not make the initial investment (which is the impact on competition that PNO alleges will not occur).

As PNO acknowledges, mine costs can vary considerably. For marginal operations the channel services charges reflect a material proportion of their current profit margin. The potential in any future year for the channel services charges to increase dramatically will also have a chilling impact on investment that would otherwise occur that will be magnified from the impact that would occur if there was certainty. The fact that costs are material for at least marginal operations means:

(i) the acquisition of coal authorities less attractive; and

(ii) in time that will lead to a reduction in the volume of supply and quality of the resources definition of authorities being supplied.

Secondly, the materiality needs to be considered against the profit margin at consensus long term coal prices – not the current high coal spot prices. Coal producers understand that coal prices are cyclical, such that investment decisions are made based on a mine needing to be profitable at lower long term coal price forecasts.

It is also misleading to allege, as PNO seeks to infer, that navigation service charges are not as relevant they don't impact on coal producer investment decisions because they are typically paid by the vessel owner. Firstly, some coal is sold on a delivered basis with coal producers directly chartering the vessel (and therefore paying the navigation service charge). Secondly, even for producers that are selling on a FOB basis, higher navigation service charges will directly translate into lower profits for coal producers as the price paid for the coal will not undergo a corresponding increase as it is set in a global market. That is, increases in navigation service charges would be anticipated to result in lower FOB prices being offered for the coal itself at the Port of Newcastle.

(c) Uncertainty

Perhaps even more importantly, the issue is not just about the current price, but the clear uncertainty about what the price will become even over the very near term future.

PNO sets prices annually under the *Ports and Maritime Administration Act 1995* (NSW) (the ***PAMA Act***), and the PAMA Act provides no limits to how those charges can be set or even requires consistency of the methodology with which those charges are calculated.

In other words, PNO will have (in the absence of declaration) an unfettered discretion as to how to set its pricing for the channel service.

The channel is (as discussed in respect of criterion (b)) such a clear natural monopoly that, in the absence of declaration, PNO will be incentivised to raise prices well above current levels. As a monopolist it is simply not correct that PNO will have incentives to maximise throughput – their incentive is to maximise the monopoly profits they earn.

That sort of uncertainty alone deters significant investment in coal exploration and production as mines are long term investments and need to be profitable over the longer term (including in low

coal price environments given the cyclical nature of commodity prices) for investments to be made.

PNO claims there will not be future price uncertainty (with the 2015 changes being alleged to be a one-off 'restructure and realignment'). However, just as there was nothing that prevented those previous material price increases, there would be nothing following revocation which prevents PNO from continuing in the future to make further substantial price increases. Where there are clear economic incentives to increase price and no legal mechanism to stop such increases, the likely future state of dependent markets logically has to be considered on the basis of material price rises.

PNO seeks to assert that the threat of regulatory intervention provides a constraint on the potential price rises. However, any such threat is completely hollow - there is no credible constraint which would change PNO's behaviour. In particular:

(i) the price monitoring regime which exists involves monitoring not regulation and provides no actual constraint on how PNO can price the channel services charges;

(ii) in the counterfactual (the likely state of the market without declaration), there will be no credible threat of re-declaration under the national access regime in Part IIIA CCA – as PNO will have the benefit of a revocation decision from the Minister or Tribunal to provide it with confidence that the service does not meet the declaration criteria; and

(iii) there has been no indication from any level of government that they would be willing to intervene in any other way (and no response to the previous significant price rises), despite users of the channel services and the chairperson of the ACCC advocating for intervention.

Yancoal acknowledges the previous findings that there are other uncertainties faced by coal producers, such as coal prices and foreign exchange. However, what appears to have been largely overlooked in the consideration during the initial decisions regarding declaration is that those uncertainties are both well understood and able to be managed.

In particular:

(i) changes in coal price and foreign exchange rates are market driven, and a result of demand and supply economic fundamentals – such that coal producers (either directly or with the assistance of expert consultants) can reach informed views of the long run prices and exchange rates applicable over a mine's life;

(ii) it is open to coal producers to enter hedging transactions to manage and mitigate the risk of material fluctuations– both as to coal price and foreign exchange transactions;

(iii) it is open to coal producers to enter long term contracts which can remove some of the price uncertainty; and

(iv) it is possible to sell some coal domestically in $A, or seek loans in US$ or seek to procure some cost items in $US to mitigate some of the foreign exchange volatility.

However, none of those protections apply to PNO's charges – which cannot be predicted, and cannot be managed.

Merely looking at the charges as a proportion of costs incurred – ignores that the other costs (and the regulated pricing for ARTC's rail and contractually set pricing for the PWCS and NCIG coal

terminals and rail haulage providers) are all either known, or more predictable or manageable at the time a coal producer is making investment decisions.

(d) Revocation will result in differential pricing

PNO claims that it charges the same price to all coal vessels, and does not price discriminate between coal vessels.

PNO's view (and the NCC's and Minister's previous views), that if there is no impact on volume or competition in coal markets there cannot be any impact on competition in dependent markets, is premised on one unspoken assumption – that price rises will continue to apply equally to all coal producers.

That was true at the time of the NCC Recommendation. However Yancoal considers it is highly unlikely to remain true. That follows because:

(i) as mentioned previously in this submission, Glencore is known to be having a dispute with PNO regarding the terms of access to the channel services, which is now being arbitrated by the ACCC;

(ii) based on the statutory time frames for an arbitration decision to be made by the ACCC, Yancoal understands that such a determination must be very close to being made (if it has not been made already);

(iii) the arbitration is a private one that is only binding as between Glencore and PNO, so even though it is likely to consider issues that would be relevant to all users (such as what constitutes an efficient regulated asset base, how coal producer contributions are taken into account in setting that asset base, and what constitutes an appropriate rate of return), the reasonable terms and conditions determined by the ACCC will not apply to Yancoal or other users;

(iv) there is nothing in Part IIIA which would mean the terms determined by the ACCC would cease to apply in the hypothetical event of a revocation where the final determination by the ACCC in the arbitration occurs prior to the declaration being revoked; and

(v) Yancoal considers it is highly like that those arbitrated terms will set the terms of access for Glencore's use of the channel services for the period of the current declaration (i.e. until 7 July 2031).

Consequently the counterfactual or likely state of dependent markets without declaration is not in fact going back to the position prior to declaration (as might have been assumed in a cursory glance). In fact the counterfactual without declaration will involve:

(i) *Glencore alone* being able to obtain access to the service on the ACCC arbitrated terms (i.e. the very terms that will indisputably be reasonable terms and conditions as a result of declaration); and

(ii) *all other users* have the disadvantageous position of less favourable and far less certain pricing until at least 7 July 2031.

Yancoal acknowledges that is not in any way Glencore's fault – they legitimately commenced the access dispute with a view of obtaining reasonable terms and conditions – the issue is that, in the absence of declaration, PNO will not be required to provide the same reasonable terms and conditions to other users.

The fact that other coal producers (and their customers) will continue to face uncertain and unfavourable unregulated terms of access if the declaration is revoked (with high prospects of material future prices rises and no further access disputes being able to be brought before the

ACCC) will materially distort competition in some dependent markets. It effectively creates a change in the market structure that makes other producers less competitive.

For example, consider the impact on the Authorities Market. When a coal authority is available for acquisition it will be of much greater value to Glencore than to other producers, as Glencore will not face the uncertainty in relation to future channel service charges. Glencore will therefore be willing to pay more for Hunter Valley coal authorities than other producers, making the competition for tenements significantly less. Similarly, Glencore will have more incentives to explore for and develop coal resources than other producers in the region.

This is particularly problematic in the Authorities Market, which is characterised by participation of more marginal companies or new entrants and by its nature involves more marginal projects as typically projects that are lower on the cost curve will already have been developed.

For example, recent acquisitions of tenements (not operating projects) in the Hunter Valley region were:

Date of completion	Acquirer	Project
May 2017	Australian Pacific Coal	Dartbrook
May 2018	MACH Energy	Mt Pleasant

Consequently, Yancoal considers the issue alone clearly demonstrates that declaration promotes a material increase in competition in at least one dependent market such that criterion (a) is satisfied.

For completeness, Yancoal notes that this is also why it is not an answer to criterion (a) that:

(i) markets may be perceived to be workably competitive now (when the arbitration determination has not yet taken effect) or before the declaration – because the likely future state of at least the Authorities market if revocation is granted will not be workably competitive due to the distortion the benefits of declaration only continuing for one user of the service will cause; and

(ii) PNO has incentives to maximise volume of throughput – as once the arbitrated determination and revocation have occurred – it will be the unequal access to the arbitrated terms that is causing the distortion in the market, not how PNO is discriminating against any particular users or acting in a way that reduces aggregate volume of throughput.

(e) The NCC cannot be positively satisfied that criterion (a) is not met when it is required to speculate as to what constitutes 'reasonable terms and conditions'

PNO seeks to muddy the waters as to what reasonable terms and conditions as a result of declaration would constitute. It goes as far as to allege that such terms may be less favourable than those that would otherwise be set by PNO.

Yancoal simply does not believe that for a moment.

If that is in fact the position, PNO can simply disclose the terms that are proposed in the ACCC arbitration and the NCC and stakeholders can assess whether those terms would promote a material increase in competition compared to PNO being free to engage in monopoly pricing without constraints. However, they have chosen not to do so, because they presumably know that the ACCC will determine (or even already has determined) pricing that is more favourable to users.

While the arbitrated terms will not directly apply to another user, it would be strongly anticipated that, if the declaration was not revoked, the ACCC would apply the same methodology in

determining future access disputes, such that (through raising new access disputes) the methodology for determining the 'regulated' pricing would become applicable to other users of the channel services as well.

Consequently, as noted in Yancoal's letter to the NCC of 27 July 2018, any draft or final determination by the ACCC in that arbitration appears highly relevant to the consideration of criterion (a) (and (d)) in respect of the channel services. In particular, the application of the with and without test that is inherent in those criteria, practically requires consideration of such a determination.

The NCC could in theory speculate as to what constituted reasonable terms and conditions. However, Yancoal cannot see how the NCC can be positively satisfied that criterion (a) is definitely not met (which as discussed earlier in this submission is what is required by section 44J(2) CCA in the context of the revocation application, not just have doubt or uncertainty that it would be met) on the basis of such mere speculation.

In considering how speculative an exercise it would be for the NCC, it is worth noting that, while PNO alleges that it sets its terms of access by reference to a conventional building blocks model with 'an appropriate return' and that future port charges will continue to be based on those principles:

(i) no evidence has been provided to substantiate those assertions (including none of the details of that building blocks modelling being provided to allow scrutiny by the NCC or other stakeholders as to whether they are reasonable);

(ii) using a building blocks model is not the same as the asset base being calculated appropriately (that is particularly the case where there are important issues about the treatment of past contributions by coal producers to that asset base, as Yancoal understands would exist here); and

(iii) what PNO considers an 'appropriate return' may very well not be an efficient and appropriate return.

Yancoal considers that it constitutes a failure to provide procedural fairness for stakeholders to not have an opportunity to address this matter in an informed way, and that where it is not available the NCC cannot possibly be positively satisfied that criterion (a) would not be met.

(f) Conclusion on criterion (a)

Given:

(i) the materiality of the charges to the profitability of at least more marginal producers;

(ii) the uncertainty about future pricing which cannot be predicted or managed; and

(iii) the differential impact that will actually be continued following revocation as a result of the arbitrated outcome for one user,

will create a non-trivial impact on investment decisions (particularly in the Hunter Valley coal authorities market) and consequently the environment and opportunities for competitive outcomes, Yancoal considers that criterion (a) is met.

Even if the NCC is not absolutely confident that is not the case, under section 44J(2) CCA the NCC cannot make a revocation recommendation unless it is positively satisfied that declaration would not promote a material increase in competition in a dependent market – and it is hard to see how it could be satisfied of that in the absence of knowing the ACCC's decision in the arbitration so that it could properly consider the likely state of the dependent market with the new terms arising from that decision.

6 Criterion (d) – Public Interest

6.1 Key issues in respect of criterion (d)

PNO alleges that criterion (d) is not satisfied in reliance on the following assertions:

(a) declaration has a chilling effect on investment in infrastructure services;

(b) there is a lack of evidence that continued declaration is likely to have a positive impact on investment in markets that depend on access to the service; and

(c) PNO has incurred significant administrative and compliance costs as a result of declaration.

Yancoal considers it is clear that the arguments at (a) and (b) above (at least) do not withstand scrutiny, and that the incurrence of costs in the course of declaration are principally self-inflicted through PNO's conduct and are not reflective of the likely future costs if the declaration continues. Consequently, none of these points are sufficiently persuasive for the NCC to be satisfied that criterion (d) is not met.

6.2 Interpretation of criterion (d)

Yancoal agrees with PNO's analysis regarding the very wide nature of the matters that can be taken into account in assessing the public interest.

(a) Lack of materiality threshold

While the wording in criterion (d) was changed by the CCA Amendment Act from a 'not contrary to the public interest' test to a 'promote the public interest' test' – the threshold for satisfying criterion (d) remains a low one.

In particular, Yancoal notes that the new criterion (d) continues to not contain any materiality threshold.

The wording of criterion (d) can be contrasted, in that respect, to that of criterion (a) which does expressly provide for a materiality threshold:

> *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*

As explained earlier in these submissions in respect of criterion (a), the reference to 'material' is understood to mean 'not trivial' – such that even for the criterion which has a materiality threshold, it sets a low threshold.

As stated in the Amendment Act EM,[20] the central question associated with this criterion is whether the declaration is likely to generate overall gains to the community.

However, it follows from the analysis above, that the extent of overall gains required in order for criterion (d) to be satisfied are very limited.

(b) Promotion

Similarly while the reference to promotion is new to criterion (d), the requirement for a 'promotion' in the context of criterion (a) (as discussed earlier in this submission) requires merely:

(i) an enhanced environment for competition; and

[20] Amendment Act EM at [12.37]

(ii) a significant finite probability that competition would be promoted.[21]

Consequently, whilst the new construction of criterion (d) requires that the NCC (and ultimately Minister) is positively satisfied that declaration of the service promotes the public interest, this is clearly an assessment of whether declaration would be likely (in the sense of there being a significant finite probability) to generate overall gains (without any materiality requirement being applied to those gains).

7 Criterion (d) – alleged detriments

7.1 Effect of declaration on investment in infrastructure services

Yancoal considers that PNO cannot reasonably argue that declaration of the channel service may have a chilling effect on investment in infrastructure services.

This is demonstrably clear when considering that on 6 February 2018 (being within the period of declaration of the channel service) China Merchants Port Holdings Company Limited (***CMPort***) acquired 50% of the total interest in the Port of Newcastle for a price of AUD$607.5 million.

When announcing the acquisition to the Stock Exchange of Hong Kong, CMPort noted the acquisition as *'the first step… to invest in Oceania'* as well as the further investment opportunities that would be available as a result of the acquisition.

Specifically, the announcement stated:

> *Given the unique position of the Port of Newcastle with precincts containing land resources, the Acquisition will bring opportunities for the Company to further achieve its "Port and Park" development under the "Port-Park-City" ("PPC") model, which aims to operate its core port businesses together with the park development and infrastructure support, thereby achieving a port-centred ecosystem with port operations as its core*,

and in respect of the expected financial returns to be generated by the acquisition:

> *The Company believes that the Acquisition, which represents a fair and reasonable price, will generate positive long-term financial return to the Group.*

That transaction occurred when there was very clearly a material prospect of the service continuing to be declared, given that the transaction was announced after the Tribunal Declaration Decision, while the ACCC arbitration of the access dispute with Glencore was on foot, and before the revocation application had been made.

There has also continued to be significant interest from PNO in developing a container terminal at the Port of Newcastle.

As stated on PNO's website:

> *The Port of Newcastle remains ready to move on the development of a world class container terminal to service regional Australia.* [22]

[21] *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [160].

[22] https://www.portofnewcastle.com.au/News-and-Media/Items/2018/INDUSTRY-OPINION-A-competitive-and-efficient-container-terminal-alternative.aspx

That continued interest is also clear from the submission PNO made in March 2018 to the New South Wales Government on the Draft NSW Freight and Ports Plan which described the terminal as a key economic development opportunity.[23]

The interest in, and commercial momentum for that development have not in any way been dampened by the existing declaration. As has been publicly reported, the main impediment to that terminal's development is the existing contractual arrangements which result in subsidising other ports (which the ACCC is now understood to be investigating).

Additionally, PNO has not provided any examples of investment at the Port of Newcastle which were planned or alleged to have been necessary and have not been carried out because of the existing declaration.

Consequently, Yancoal considers that PNO's statement that declaration of the Service '*may have a chilling investment in infrastructure services… because declaration may curb the returns that would otherwise be achieved by those investing in infrastructure services*' is clearly inconsistent with PNO's own actions and other evidence which exists, is completely unsubstantiated and should not be accepted by the NCC.

7.2 Effect of declaration on investment in markets that depend on access to the Service

PNO asserts that there is no evidence to suggest that:

(a) continued declaration of the service is likely to have a positive impact on investment in markets that depend on access to the service; or

(b) that investment decisions are influenced by port charges.

PNO asserts that investment decisions are more likely to be influenced by more significant sources of uncertainty referred to elsewhere in PNO's submission.

However, PNO does not offer any evidence to demonstrate that declaration does not have an impact on investment in markets that depend on access to the service.

As discussed in respect of criterion (a) above, Yancoal does not accept that the pricing of the channel services is immaterial – particularly for marginal mines and producers, and considers that it is not materiality alone, but materiality combined with uncertainty.

Whilst it is true that coal producers face uncertainties in coal prices and foreign exchange rates – as explained in respect of criteria (a), these are better understood and there are mechanisms such as hedging or long term contracting which can be used to mitigate the volatility.

Whereas only declaration creates the potential for mitigating the volatility and uncertainty risks which exist in relation to the channel services. Resolving that uncertainty is critical to enabling ongoing investment in coal exploration and development in the Hunter Valley region. This is obvious when considering that those investments:

(a) are very long term in nature;

(b) incur significant sunk costs at the outset, meaning that the projects operate at a loss for a significant period; and

(c) rely on certainty of infrastructure costs.

Additionally, Yancoal considers that declaration and the certainty it provides as to price also promote investment in a number of other related markets, including:

[23] https://www.portofnewcastle.com.au/Resources/Documents/2018-03-25-Port-of-Newcastle-Freight-and-Ports-Plan-Submission.pdf

(a) the rail access and rail haulage industries, in consideration of the appeal for investment in coal projects near to or on the ARTC Hunter Valley Coal Rail Network such that below-rail expansions and above-rail haulage services are positively impacted;

(b) through raising interest in development of a bulk container terminal at the Port of Newcastle which would result in substantial flow-on investments due to increases in imports and exports through the Port of Newcastle; and

(c) in other related markets such as those for mining inputs and mining services.

7.3 Administrative and compliance costs

Yancoal considers that PNO cannot reasonably argue that its recent administrative and compliance costs are indicative of the likely future costs that would be incurred if the service remains declared.

The Minister specifically found in the Ministerial Decision that:[24]

> *There was no persuasive evidence that the costs and uncertainties of access regulation at the Port of Newcastle are greater than those usually resulting from an access declaration, and which go beyond what is contemplated by Part IIIA and its negotiate-arbitrate model.*

First, PNO has failed to substantiate the level of costs actually incurred.

Second, any costs incurred by PNO as a result of declaration arise because of PNO's own decision to strategically and vigorously oppose declaration, including through the current request for revocation of declaration which has the effect of significantly increasing any alleged administrative and compliance costs .

Yancoal considers that the appropriate level of costs incurred as a result of PNO's compliance with declaration (or any infrastructure service provider's costs) should be estimated at an economically efficient level that accords with how negotiate-arbitrate regulation would operate in the usual course following a decision not to revoke, rather than allowing an infrastructure provider to seek to win in respect of criterion (d) based on their own excessive incurring of costs. To allow PNO's position on this issue clearly incentivises infrastructure service providers such as PNO to maximise the costs incurred during a period of declaration in an attempt to displace criterion (d) when it is reconsidered – which is clearly not the intended outcome of the declaration criteria and clearly inconsistent with the object of Part IIIA.

Thirdly, it is a misleading comparison to refer to Aurizon Network's costs to seek to justify PNO's position. Aurizon Network operate in a completely different regulatory context – where there is heavier regulation (with approved reference tariffs, regulated access terms and a regulated access undertaking), in part due to Aurizon Network's regulated nature. That will involve a higher level of costs that the negotiate-arbitrate model which operates under Part IIIA.

Yancoal considers that there are a number of factors which indicate the costs of complying with declaration are not as significant as asserted by PNO, including that:

(a) the nature of the channel service being a single common service for all users results in synergies and simplicity of price regulation which minimises costs incurred; and

(b) once pricing structures are set by arbitration, PNO is able to realise efficiency savings in subsequent negotiations and arbitrations by adopting the previous determination and minimising the management time and legal and expert costs incurred throughout that process.

[24] Ministerial Decision at 7.

In addition, whilst PNO may consider its compliance costs would decrease in the absence of declaration, the price of access would significantly increase such that Yancoal is confident that there would be a significant increase in costs when considered in aggregate or from society's perspective.

As such, Yancoal considers that:

(a) PNO has significantly overstated the costs it allegedly incurs as a result of declaration (and in any case, offers no evidence in support of its assertion); and

(b) even in the absence of declaration, the aggregate incremental costs incurred by users of the service would be significantly greater than the efficient costs of administering and complying with the current declaration.

7.4 Public benefits and overall gains from arising from declaration

It is unclear how PNO have reached the conclusion that there are no other matters that would provide a basis for the Minister to be positively satisfied that maintaining declaration of the channel service would promote the public interest.

There are a range of wider public benefits that arise from declaration, including:

(a) efficient use of infrastructure – the NCC has previously recognised that shipping channels are a natural monopoly such that even if the impossibilities of duplicating the channel were overcome, there is no question that the use of a single channel is the more efficient use of infrastructure;

(b) ecologically sustainable development – similarly, even if the impossibilities of duplicating the channel as part of developing a new port precinct were overcome, the use of one larger port and the channel servicing it is far more ecologically sustainable, involving less need for dredging and confining the areas of the coastline which have been developed and through which shipping occurs;

(c) promotion of further investment – efficient pricing of the channel service (and certainty about declaration continuing to provide a pathway to obtain such efficient pricing) will promote further investment in:

  (i) coal production and exploration in the Hunter Valley region (and related services provision to coal producers);

  (ii) a possible future container terminal at the Port of Newcastle; and

(d) higher government royalties – both through the certainty of efficient and reasonable pricing providing increased incentives to invest in production of coal and reducing the deductions that would apply from coal royalty calculations (where channel access costs are permitted deductions) due to the lower costs provided by declaration. Those higher royalties result in a stronger State budget which can be used to provide public and community services.

7.5 Criterion (d) – Conclusion

It is clear from all of the above, that on any cost / benefit analysis (or any other form of overall analysis), declaration produces overall gains and the public benefits of declaration clearly outweigh any public detriment that may arise from declaration continuing.

Accordingly, it is clear that access (or increased access) on reasonable terms and conditions, as a result of a declaration of the service promote the public interest and that criterion (d) is therefore satisfied.

8 Exercise of NCC's Discretion

Based on the analysis above, Yancoal considers that each of the access criteria are satisfied – such that the precondition for a revocation recommendation is not satisfied, and the NCC is required to recommend that revocation not be granted (i.e. the declaration be allowed to continue).

However, even if the NCC is not satisfied that was the case, as discussed earlier in this submission, under section 44J(1) CCA, the NCC retains a discretion as to whether to recommend revocation.

That discretion is required to be exercised having regard to the object of Part IIIA CCA, being to:

> *(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets;*
>
> *(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

The second paragraph of those objects is not particularly relevant to the issues at hand – but the first paragraph is clearly relevant and weighs strongly in favour of recommending against revocation.

Given the clear importance of providing long term regulatory certainty to investors in, and users of, significant infrastructure, it seems clear to Yancoal that the object weighs in favour of recommending against revoking a 15 year declaration after approximately only 2 years of its operation.

Similarly, as set out in this submission in detail in respect of criterion (a), there are numerous issues which would be resolved by continuing the declaration – such as:

(a) removal of uncertainty;

(b) removal of the distorting impact on competition of only Glencore receiving efficient pricing; and

(c) the negotiate-arbitrate model which would exist in declaration placing a constraint on PNO's ability to engage in monopoly pricing,

such that it would promote effective competition in upstream and downstream markets for the declaration to continue.

In addition, while the object is the only mandatory factor to which the NCC must have regard in exercising its discretion under section 44J(1) CCA, Yancoal considers there are a number of other relevant factors that weigh in favour of exercising the discretion to recommend against revocation including:

(a) as discussed in respect of criterion (d) there are also strong public benefits arising from declaration and risks of public detriment in relation to investment and economic activity in the Hunter Valley coal industry and related markets; and

(b) revocation should not be something that should be granted where there has been no change in the circumstances or markets in which the service is provided which justify the change.

9 Conclusion

It follows from the analysis above, that:

(a) the NCC cannot recommend revocation as each of the declaration criterion are satisfied in respect of the service such that the precondition for recommending revocation in section 44J(2) CCA is not met; and

(b) even if that was not the case, the NCC should exercise its discretion to not recommend revocation under section 44J(1) CCA given the disruption to regulatory certain, public benefits that would be taken away by revocation, public detriments which would be caused by revocation and the lack of any change in the circumstances or markets in which the service is provided which would justify a change in approach.