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**AUSTRALIAN COMPETITION TRIBUNAL**

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**Lodgment and Details**

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| Document Lodged: | Submissions |
| File Number: | ACT 1 of 2021 |
| File Title: | APPLICATION FOR REVIEW LODGED BY NEW SOUTH WALES MINERALS COUNCIL UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) OF THE DECISION OF THE DESIGNATED MINISTER UNDER SUBSECTION 44H(1) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH). |
| Registry: | VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL |


REGISTRAR

Dated: 21/06/2021 4:15 PM

**Important information**

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

**COMMONWEALTH OF AUSTRALIA**

***Competition and Consumer Act 2010 (Cth)***

**IN THE AUSTRALIAN COMPETITION TRIBUNAL**

File No: ACT 1 of 2021

Re: Application for review lodged by New South Wales Minerals Council under subsection 44K(2) of the *Competition and Consumer Act 2010* (Cth) of the decision of the designated Minister under subsection 44H(1) of the *Competition and Consumer Act 2010* (Cth)

Applicant: New South Wales Minerals Council

## SUBMISSIONS OF THE NATIONAL COMPETITION COUNCIL

### Introduction

1. The New South Wales Minerals Council (**NSWMC**) has applied for review of the designated Minister's decision not to declare a service (being the service provided by Port of Newcastle Operations Pty Ltd (**PNO**) at the Port of Newcastle (the **Service**)) pursuant to s 44K of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

2. The review is a re-consideration of the matter: s 44K(4). The "matter" is the Minister's decision not to declare the Service.[1] For the purpose of the review, the Tribunal has the same powers as the designated Minister: s 44K(5).

3. The presiding member of the Tribunal may require the National Competition Council (**NCC**) to assist the Tribunal: s 44K(6). These submissions are made by the NCC pursuant to direction 16 of the Tribunal's 8 April 2021 Directions, in accord with s 44K(6).

4. The reconsideration by the Tribunal is based on the information, reports and things referred to in s 44ZZOAA: s 44K(4). This includes anything done as mentioned in s 44K(6): s 44ZZOAA(a)(iii).

5. The task of the Tribunal is to review the Minister's decision by reconsidering that decision.[2] The requirement that the Tribunal review the Minister's decision neither permits nor

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1 *Application by New South Wales Minerals Council (No 2)* [2021] ACompT 3 at [62].

2 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (**Pilbara HC**) at [60] and [65] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) and [154] (Heydon J). See further *Re Application by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* (2013)

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requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared.[3]

6. The designated Minister's powers are set out in s 44H. Relevantly, the designated Minister:

    a. must have regard to the objects of Part IIIA of the CCA in making the decision (s 44H(1A)), and

    b. cannot declare a service unless satisfied of all of the declaration criteria for the service: s 44H.

7. It is not contentious that criteria (b) (that the facility is "uneconomical to duplicate") and (c) (that the facility is "nationally significant") are satisfied. At issue in this reconsideration by the Tribunal are criteria (a) and (d).

8. The NCC's consideration of the issues are set out in detail in its Recommendation to the Minister dated 18 December 2020 (**Recommendation**). The NCC has not identified anything in the material before the Tribunal or the submissions filed by NSWMC and PNO which causes it to alter the views expressed in the Recommendation. In providing assistance to the Tribunal for the purpose of s 44K(6), these submissions address some of the discrete issues raised in the submissions filed by NSWMC and PNO.

**Criterion (a)**

***Amendments to criterion (a)***

9. Criterion (a) (now contained in s 44CA(1)(a)) has been the subject of two amendments that are of immediate significance for the Tribunal's present reconsideration. Prior to passage of the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) (**2006 Act**), criterion (a) required that the NCC, Minister or Tribunal (as applicable) be satisfied that "access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service".

10. As amended by the 2006 Act, the criterion required satisfaction that "access (or increased access) to 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."

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274 FLR 346 at [43]-[49] and [78]-[79] (Mansfield J, Shogren and Steinwall) and *Application by New South Wales Minerals Council (No 2)* [2021] ACompT 3 at [64].

3 *Pilbara HC* at [48].

11. Following further amendment by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), criterion (a) now requires that "access (or increased access) to the service, on reasonable terms and conditions, as a result of 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".

12. The amendments are addressed in the Recommendation at [4.14] – [4.28].

13. The effect of these two amendments is to shift the meaning of criterion (a) significantly from the form considered in *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242; [2005] ACompT 5; *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 155 FCR 124; [2006] FCAFC 146 and *Re Fortescue Metals Group Ltd* [2010] ACompT 2. The first amendment occurred prior to the Tribunal declaring the Service in 2016. In *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [85], the Tribunal said that it:

> … means that the declaration will only occur (if the criteria are all met) where the promotion of competition in the dependent market is material, or non-trivial. The Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth) at Item 16 (p 21) records that the amendment is to be made so that declaration will only occur where the promotion of competition in the dependent market is non-trivial. The Explanatory Memorandum states that the original drafting of criterion (a) did:
>
> > ... not sufficiently address the situation where ... declaration would only result in marginal increases in competition. The change will ensure access declarations are only sought where increases in competition are not trivial.

14. The second amendment (the addition of the words "on reasonable terms and conditions, as a result of a declaration") were added to criteria (a) (and (d))[4] after the Service was declared by the Tribunal in 2016 and the subsequent appeals by Glencore and PNO heard by the Tribunal[5] and the Federal Court.[6]

15. When the Tribunal declared the Service in 2016, it considered that it was bound by the decision in *Sydney Airport Corporation Limited v Australian Competition Tribunal* (2006) 155 FCR 124; [2006] FCAFC 146 to compare the future state of competition in the dependent market with and without 'access (or increased access)' rather than with and without declaration. Adopting that approach, the Tribunal found that criterion (a) was

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4 Previously subsections 44H(4)(a) and 44H(4)(f) of the CCA, respectively. Amended by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

5 See *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 and *Application by Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7.

6 See *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115; (2017) 346 ALR 669; [2017] FCAFC 124.

satisfied. Relevantly, however, the Tribunal went on to state that if it were required to compare the future with and without declaration (rather than with and without access) as is now required by criterion (a):

> it would not be satisfied that increased access would promote a material increase in competition in the coal export market. If that market would not be promoted in that way, it follows that the other four dependent markets would also not be promoted with a material increase in competition in any of them.[7]

16. The effect of the addition of the words "on reasonable terms and conditions, as a result of a declaration" was confirmed by the Full Court in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (**Glencore FC**) at [86]. The Tribunal said:

> In *Sydney Airport* 155 FCR at 132–136 [23]–[32], the Full Court discussed the text and structure of important parts of Part IIIA in the form in which it stood in 2006. Importantly since then, the terms of s 44G and s 44H have been amended by the removal of the criteria for the decisions of the NCC and the designated Minister in s 44G(2) and s 44H(4), respectively and the introduction in 2017 (by Act number 114 of 2017 with effect from 6 November 2017) of s 44CA containing the "declaration criteria". Relevant to the position of the parties here, though not relevant to these applications, was the placement into the declaration criterion in s 44CA(l)(a) of the words "on reasonable terms and conditions, as a result of a declaration of the service" being words that did not previously appear in s 44G(2)(a) or s 44H(4)(a). The introduction of those words was directed to the decision in *Sydney Airport* 155 FCR at 146–148 [76]–[89] that s 44H(4)(a) (and so necessarily s 44G(2)(a)) required a comparison of the future state of competition with the right or ability to access the service with that future state of competition without any such right or ability or with restricted right or ability. It did not require a comparison of the current factual position with a future position. Thus, whilst the effect of the declaration itself on competition (as it factually existed) might be relevant to consider, it was not mandated by the Act. As can be seen from s 44CA(l)(a) the effect of the declaration is now a mandatory consideration.

17. Thus, the additional words added to criterion (a) (and criterion (d)) focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.[8] This requires a comparison of two future scenarios: one in which the Service is declared and access to the Service is through declaration on reasonable terms and conditions, and one in which the Service is not declared and any access to the Service is in the absence of declaration.

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7 *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6, at [157].

8 Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017* at [12.19].

***Incentives and other factors***

18. For criterion (a) to be satisfied it is not enough to find that PNO has some degree of market power, or operates a "bottleneck" facility. Declaration of the Service must promote a material increase in competition in at least one other market. An assessment of whether declaration of the Service satisfies criterion (a) requires consideration of the impact declaration would have on competition in so-called "dependent" markets. When assessing those impacts it is relevant to consider the degree of market power PNO has and the fact that it operates a bottleneck facility. However, a counterfactual assessment of the impact a declaration of the Service would have on competition in dependent markets needs to take into account other factors, including whether or not the service provider has an incentive to deny access and the level of constraint on PNO in setting terms and conditions of access to the Port.

19. PNO is not vertically integrated in any meaningful way into any markets dependent on the market for the Service: see [7.53] of the Recommendation. This means it will not have an incentive to deny access to firms operating in dependent markets as they are not competitors to PNO. Nor does it have an incentive to provide access on terms and conditions that inhibit the ability of different users of the Service to compete on their merits in dependent markets. Further, non-vertically integrated service providers typically benefit from greater levels of competition in dependent markets because demand for their services depends on demand in dependent markets: see [7.51] of the Recommendation.

20. The NCC identified a number of important factors that are likely to provide some level of constraint on the PNO in setting the terms and conditions of access to the Port in a future without declaration of the Service, at [7.31]-[7.74] of the Recommendation.

**Pricing**

21. References to the difference between current access prices and those that were in place prior to privatisation of the Port (see NSWMC at [16]-[19]) should be treated with caution and not regarded as indicative of future prices with declaration of the Service.

22. The test in criterion (a) is forward-looking. The counterfactual analysis for the Tribunal is to compare the likely access terms and conditions (including price) with declaration and the likely terms of conditions (including price) without declaration, which circumstances include the open access arrangements and the Long-Term Access Deeds. That counterfactual assessment indicates that pricing by PNO absent declaration would be within the range of prices set by arbitrators under Part IIIA of the CCA:

a. The price for the Navigation Service Charge (NSC) set in the 10-year Deed offered by PNO (i.e. $0.81 per GT[9]) lies within the range of prices likely to emerge from arbitration of the service (i.e. $0.63 per GT[10] to $1.04 per GT[11]).

b. The price for the NSC set by PNO under its open access arrangement ($1.0424 per GT) is almost identical to that set by the Tribunal in its 2019 arbitration determination (noting this determination has been remitted back to the Tribunal following review by the Full Court of the Federal Court): see Recommendation at [7.86]-[7.93].

23. The NCC accepted that prices might be lower with a declaration, but that the difference would not be so significant as to affect competition in any of those markets in any material way, in particular because:

a. Charges for access to the Service at the Port are likely to remain a small proportion of the overall cost of the production and export of coal from the Hunter Valley catchment. Further, coal producers and exporters face significantly greater uncertainty from other factors that are more likely to influence their future coal mining activities in the Newcastle catchment than the impact of declaration of the Service: see [7.118] - [7.126] of the Recommendation; see also PNO submissions [26(a)] and [26(b)].

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

c. The market(s) for coal tenements is “derivative” of the coal export market, and competition is unlikely to be materially promoted by declaration of the Service. The NCC considers prospective explorers/miners will still be able to compete on their respective merits for tenements in a future without declaration of the Service: see [7.157] of the Recommendation.

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

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9 Prices are expressed in 2020 dollar terms. It is noted that this price was subject to annual inflators equal to the greater of CPI or 4%).

10 The price for the NSC set by the ACCC in its 2018 arbitration determination (converted to 2020 dollars).

11 The price for the NSC set by the Tribunal in its 2019 arbitration determination (converted to 2020 dollars).

24. The absence of vertical integration is important. In *Glencore Coal Pty Ltd* [2016] ACompT 6 at [133], the Tribunal relevantly observed:

> As Hilmer pointed out, unless there is vertical integration the position is that competition in upstream and downstream markets is not necessarily affected. The reason is that the effect of monopoly pricing is simply to raise the price of one of myriad input prices. When one of an industry's costs goes up, there is no presumption of an adverse effect on competition.

**Deeds**

25. The NCC notes PNO's submissions in relation to the operation of the vessel agent deeds at [29], [31], [34], [39], [41] and [43]-[49]. The NCC's consideration of the Deeds include the passages at [7.66]-[7.70], [7.86]-[7.93], [7.122]-[7.123] and [10.34]-[10.45] of the Recommendation.

**Criterion (d)**

26. NSWMC has not addressed the criterion or its application in any detail in its submissions.

27. The NCC considered in detail the meaning and application of criterion (d) in the Recommendation: see [10.16]-[10.44] and [10.47]-[10.62] of the Recommendation.

28. Criterion (d) in its current form requires "that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service, would promote the public interest".

29. The change to the criterion, to make it an 'additional positive requirement', was explained in the Explanatory Memorandum to the *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*:

> 12.37 Subsection 44CA(1)(d) asks if access or increased access to the service as a result of declaration of the service, on reasonable terms and conditions, would promote the public interest. This means that a decision maker must be satisfied that declaration is likely to generate overall gains to the community.
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> …
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> 12.39 Subsection 44CA(1)(d) now constitutes an additional positive requirement which must be met before a service can be declared. However, it is only to be considered when subsections (a), (b) and (c) have been met, and it does not necessarily follow from this result that (d) will also be satisfied.
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> 12.40 Criterion (d) does not call into question the results of subsections 44CA(1)(a), (b) and (c). It accepts the results derived from the application of those subsections, but it enquires whether, on balance, declaration of the service would promote the public interest. It provides for the Minister to consider any other matters that are relevant to the public interest.

30. In considering criterion (d), regard must be had to the matters identified in subsection 44CA(3)(a) and (b). Subsection 44CA(3) provides that '…in considering whether [criterion (d)] applies the Council or the designated Minister must have regard to:

    (a) the effect that declaring the service would have on investment in:

        (i) infrastructure services; and

        (ii) markets that depend on access to the service; and

    (b) the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.'

31. The observations of the Full Court in *Glencore FC* at [86] as to the effect of the words "on reasonable terms and conditions, as a result of the declaration" as they appear in criterion (a), apply equally to the effect of the words in criterion (d): see paragraph 16 above.

32. The NCC considers that the High Court's observations in *Pilbara HC* in respect of the predecessor provision (criterion (f)) remain apt:

> It is well established that, when used in a statute, the expression 'public interest' imports a discretionary value judgment to be made by reference to undefined factual matters. As Dixon J pointed out in *Water Conservation and Irrigation Commission (NSW) v Browning*[12], when a discretionary power of this kind is given, the power is 'neither arbitrary nor completely unlimited' but is 'unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view'. It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.[13]
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> …
>
> The conclusion reached by the Tribunal and by the Full Court about criterion (f) depended upon the assumption that the Tribunal was bound to make its own assessment, on the new body of evidence and material placed before it, of whether access or increased access would be contrary to the public interest. But, as has been explained, that was not the Tribunal's task. Its task was to reconsider what the Minister had decided. And performance of that task directed attention

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12 *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505.

13 *Pilbara HC* at [42].

> immediately to the bases on which the Minister was satisfied that access would not be contrary to the public interest. [14]
>
> …
>
> In neither case is it to be expected that the Tribunal, reconsidering the Minister's decision, would lightly depart from a ministerial conclusion about whether access or increased access would not be in the public interest. In particular, if the Minister has not found that access would not be in the public interest, the Tribunal should ordinarily be slow to find to the contrary. And it is to be doubted that such a finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits.[15]

33. The High Court's observations in relation to deference to the Minister's exercise of discretion are applicable to the Tribunal's reconsideration of the Minister's decision whether to be satisfied that access (or increased access) would promote the public interest. The material before the Tribunal is not sufficient to displace the Minister's exercise of discretion in deciding not to be satisfied that declaration would promote the public interest.

**Objects clause**

34. Section 44AA of the CCA (the 'objects clause') provides:

> The objects of this Part are 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; and
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> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

35. The objects clause was introduced following the review conducted by the Productivity Commission in its Review of the National Access Regime, Report No 17, 28 September 2001 and enacted by the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth).

36. The Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) noted in relation to the introduction of the objects section:

> 1.34 The objects clause in section 44AA is a statement of principle. Decision makers will continue to apply existing specific statutory criteria (such as consideration of public interest and promotion of competition) in regard to the declaration and undertakings access routes, and the principles outlined in Clause 6 of the CPA (such as promotion of competition) in relation to certifications.

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14 *Pilbara HC* at [110].
15 *Pilbara HC* at [112].

37. Sections 44F(2)(b) and 44H(1A) of the CCA require the Council and the Minister, respectively, to have regard to the objects of Part IIIA of the CCA before making a recommendation or decision to declare or not declare a service. The decision maker is to have regard to the objects clause, but the objects do not derogate from the need for the decision-maker to be satisfied of each criterion: see [4.10]-[4.13] of the Recommendation.

**Conclusion**

38. The NSWMC's application to the NCC followed previous considerations of whether to declare a service defined in almost identical terms at the Port by the NCC; designated Ministers; the Tribunal and the Full Court of the Federal Court of Australia.

39. The NCC's analysis for the purpose of the Recommendation occurred in the context of, and took into account, previous consideration of the same issues over a number of years, including the analysis in the NCC's recommendation dated 26 July 2019. Relevantly, for example, in respect of derivative markets, the NCC considered that the relevant facts were not materially different to the facts before the NCC in its Revocation Recommendation (see [7.146] of the Recommendation).

21 June 2021

P D Crutchfield

C van Proctor