National Competition Council
Level 17 Casselden, 2 Lonsdale Street Melbourne 3000 Australia
GPO Box 250 Melbourne 3001 Australia
Telephone 1800 099 470
Website: www.ncc.gov.au

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Australia's Maritime Logistics System Inquiry
Productivity Commission
Locked Bag 2, Collins St East
Melbourne Vic 8003

Via: www.pc.gov.au/inquiries/current/maritime-logistics

Inquiry into the long-term productivity of Australia's maritime logistics system

The National Competition Council (the Council) welcomes the opportunity to make a submission to the Productivity Commission's inquiry into the long-term productivity of Australia's maritime logistics system.

Under the National Access Regime (NAR) set out in Part IIIA of the *Competition and Consumer Act 2010* (CCA), the Council is responsible for making recommendations concerning access to services provided by nationally significant infrastructure.

In its role, the Council has considered a number of applications relating to the declaration of port services and the certification of state access regimes for ports. The purpose of this submission is to draw the Productivity Commission's attention to certain aspects of the Council's considerations in this area that we consider may be relevant to a review of Australia's maritime logistics system.

Application to Declare Certain Services at the Port of Newcastle

The Port of Newcastle (the Port) provides shipping channel services for coal exports in the Hunter Valley region and is largely considered to be a 'bottleneck' facility for miners seeking to export coal to overseas customers. The Port was owned and operated by the New South Wales Government until 2014 when it was privatised, and its functions transferred to Port of Newcastle Operations Pty Ltd (PNO) through a long-term lease arrangement.

Shortly after the Port was privatised, PNO implemented price increases and changes to the charging regime. Because of the price rise and uncertainty in relation to future pricing, in May 2015, Glencore Coal Pty Ltd (Glencore) lodged an application for declaration of a service at the Port under Part IIIA of the CCA. The consequence of declaration is that users of a declared service have a right of access to it. Where users and the provider of the relevant service are not able to agree on the terms and conditions of access to the service, the Australian Competition and Consumer Commission (ACCC) can be asked to arbitrate an access dispute between them.

In January 2016, in accordance with the Council's recommendation, the designated Minister decided not to declare the relevant service. Glencore subsequently applied to the Australian Competition Tribunal (the Tribunal) for a review of the Minister's decision. In May 2016, the Tribunal decided the service should be declared and made orders setting aside the Minister's decision.

In November 2016, the ACCC commenced arbitration of an access dispute between Glencore and PNO in relation to the declared service. In September 2018, the ACCC made a Final Determination resulting in access charges of $0.61 per gross tonne for a Navigation Service Charge (NSC). This represented an approximately 20 per cent decrease on the then price set by PNO of $0.76 per gross tonne. In October 2018, both PNO and Glencore applied to the Tribunal for a review of the ACCC Final Determination.

In the meantime, in July 2018, following amendments to the declaration criteria in section 44CA of the CCA, PNO applied for the declaration of service at the Port of Newcastle to be revoked. In September 2019, following a recommendation made by the Council, the Minister was deemed to have decided to revoke the declaration.

In October 2019, the Tribunal handed down its decision regarding its review of the ACCC's arbitration. While services at the Port were no longer declared by this date, under section 44I(4) of the CCA, if a declaration is revoked, any arbitration process that has begun, or arbitration determination that has been made, prior to the revocation will continue. The Tribunal determined that the NSC payable by Glencore to PNO should be increased to $1.01 per gross tonne - an increase of 65 per cent above the price determined by the ACCC. This led to an unusual situation where the price arbitrated for Glencore was, at the time, higher than the unregulated price set by PNO for other access seekers.

In January 2020, PNO increased the NSC to $1.04 per gross tonne (equivalent to the price determined by the Tribunal when adjusted for inflation). However, PNO also offered users of the service an alternative 10-year pricing commitment (commencing at $0.81 per gross tonne) if they agreed to the terms of a deed.

In July 2020, the Council received an application from the NSW Minerals Council (NSWMC) for declaration of certain services at the Port of Newcastle. Following consideration of the application, the Council recommended the designated Minister not declare the services the subject of the application for declaration. In February 2021, in accordance with the Council's recommendation, the Minister decided not to declare the services.

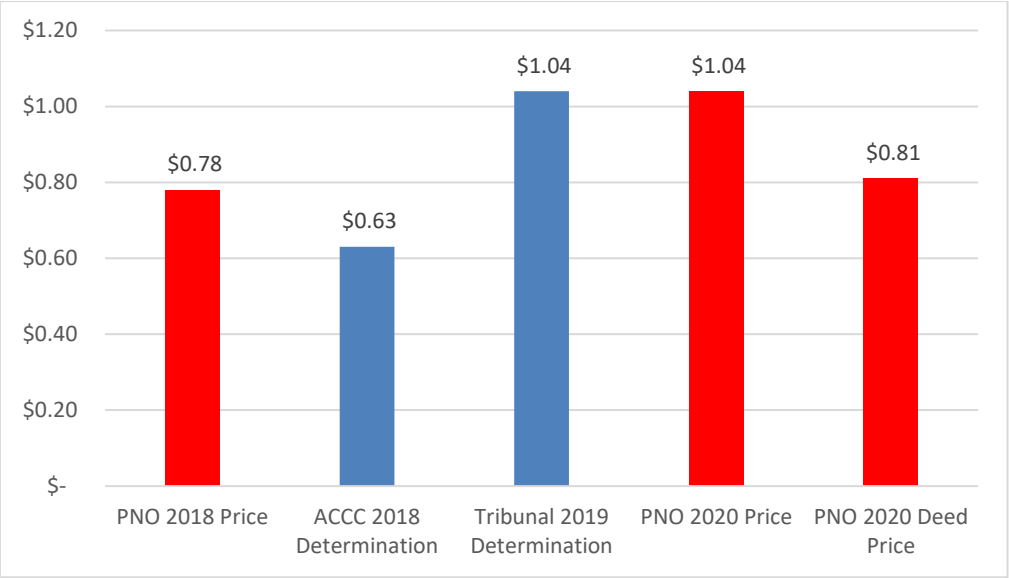
The NSWMC subsequently lodged an application with the Tribunal for a review of the decision in March 2021. In August 2021, the Tribunal affirmed the Minister's decision not to declare the services the subject of the application at the Port of Newcastle.

In relation to the pricing arbitration of the previously declared service, following subsequent appeals to the Federal and High Courts by the ACCC and PNO respectively, the matter has now been remitted to the Tribunal for further determination.

Throughout many years of disputation, PNO's pricing for its NSC has largely been set between the range of prices arbitrated by the ACCC and Tribunal. For comparison purposes, Figure 1 below provides the range of prices in 2020-dollar terms (i.e., adjusted for inflation)[1] set by PNO and determined under regulation for the NSC since 2014. PNO's price offerings are shaded in red. While services at the Port are currently not subject to regulation, it is possible that the prospect of declaration may have helped achieve an outcome not too dissimilar to that one might expect with regulation.

[1] Applying the Sydney All Groups Consumer Price Index number published by the Australian Bureau of Statistics (CPI Sydney) and averaged over four quarter periods.

Figure 1. Navigation Service Charges set by PNO, ACCC and Tribunal (adjusted for inflation)



Application to Extend Certification of the South Australian Ports Access Regime

In January 2021, the Council received an application under s 44NA of the CCA to extend certification of the South Australian ports access regime. The previous certification period for the access regime ran for ten years until May 2021.

To assist in its consideration of the matter, the Council sought submissions from interested parties following receipt of the application and release of the draft recommendation. In response to the submissions received arguing against certification of the access regime, the Council also issued a number of information requests using its powers under s 44NAA of the CCA to seek further information from relevant stakeholders.

Those arguing against certification of the regime expressed concerns that Flinders Ports (the port operator) is vertically integrated into a number of dependent markets in which they compete; and that Flinders Ports is acting in ways that favour it in dependent markets. They argued the access regime is not effective because it is unable to prevent such conduct occurring. They noted the access regime:

- does not contain "ring-fencing" provisions that separate Flinders Ports activities from the activities of its related entities that compete in non-monopoly related markets
- does not contain adequate protections to prevent Flinders Ports using confidential information it may acquire when providing users with access to its services to its competitive advantage when competing against its customers in dependent markets.

In deciding what recommendation to make, the Council must, under s 44M(4) of the CCA:

- assess whether the access regime is an effective access regime by applying the relevant principles set out in the Competition Principles Agreement (CPA) entered into by all Australian governments (as amended on 13 April 2007)
- have regard to the objects of Part IIIA of the CCA
- not consider any other matters.

The Council notes that the CPA provides significant discretion to states and territories in designing access regimes that are effective within the meaning of Part IIIA of the CCA. Therefore, the Council's test for whether an access regime is effective does not assess if the regime itself is ideal or whether a state or territory's regulation of the regime is as comprehensive as it could be.

Following its assessment of the application, in September 2021, the Council recommended to the responsible Minister that the South Australian ports access regime be extended for a ten-year period. On 29 November 2021, the Minister was deemed to have made a decision to certify the access regime for a further ten years.

While the CPA limits the extent to which the Council can directly impact an access regime, the Council does make recommendations where it believes a regime could be improved. In this instance, the Council recommended that the Essential Services Commission of South Australia (ESCOSA) consider whether specific improvements, such as strengthening the ring-fencing and confidentiality provisions, could be made to the regime when it conducts its next scheduled review in 2022. ESCOSA has advised the Council that it is supportive of including these considerations in its 2022 review.

While the Council is unable to mandate changes to an access regime it considers not to be ideal, it notes that historically, where it has made suggestions for improvements, these have been acted upon by the relevant government. The Council is satisfied it can effectively influence the design of an access regime without the need to legislate stronger powers in this regard.

Application to Extend Certification of the Dalrymple Bay Coal Terminal Access Regime

In January 2021, the Council received an application under s 44NA of the CCA to extend certification of the Dalrymple Bay Coal Terminal (DBCT) access regime. The previous certification period for the access regime ran for ten years until July 2021.

Following its consideration, the Council was satisfied that the DBCT access regime met the requirements for certification under the CCA and was therefore an effective access regime. The Council invited interested parties to make submissions on both the application and draft recommendation; however, no submissions were received.

While the Council considers the access regime to be effective, there has been some contention in relation to the Queensland Treasurer's decision to declare coal handling services under the regime. This decision has been subject to judicial review. However, the Council notes its role extends only to assessing the effectiveness of state-based access regimes themselves, and not to an assessment of decisions made by relevant governments under these regimes. The Council does not consider it would be appropriate for it to form and express views on the appropriateness of the Queensland Treasurer's decision with respect to services provided at the DBCT.

The Council sent its recommendation, that the DBCT access regime be extended for a further ten years, to the responsible Minister in July 2021. On 14 September 2021, the Minister was deemed to have made a decision to certify the access regime for a further ten years.

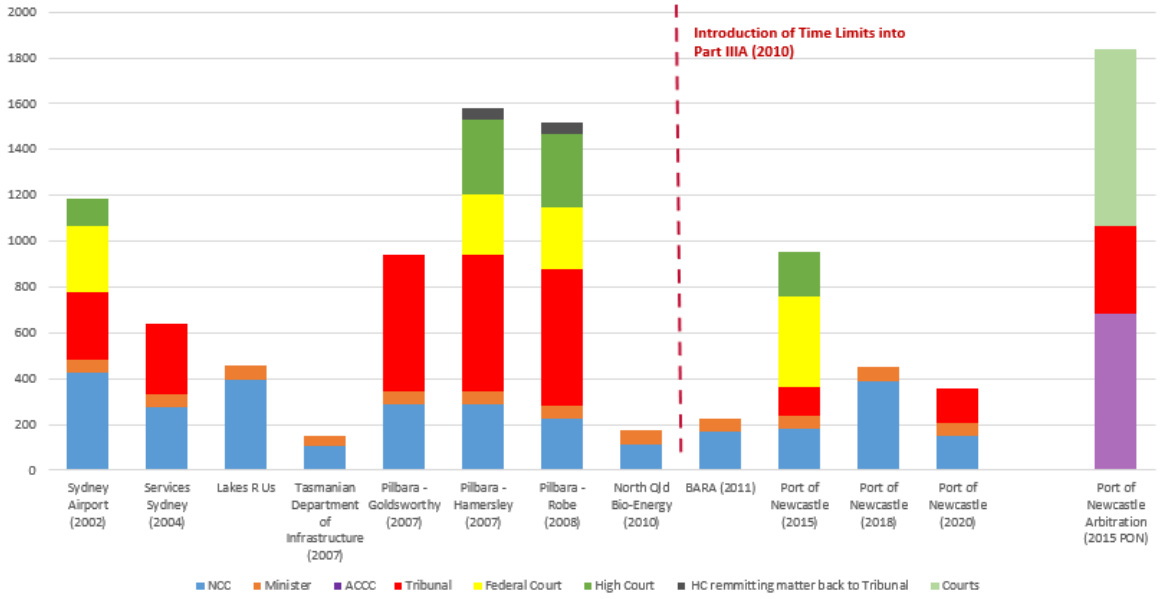
Timeliness of processes under the NAR

While the Council considers that the NAR is well designed to provide access to services on reasonable terms and conditions, it acknowledges that historically some processes under the regime, particularly in relation to railway services in the Pilbara and navigation services at the Port of Newcastle, have become drawn out.

In April 2021, the Council provided a submission to the Treasury's consultation on the timeliness of processes under the NAR. The submission set out the Council's views on options to streamline and add greater certainty to decisions under the NAR.

In its submission, the Council noted that where there have been extended delays in decision-making under Part IIIA of the CCA, this has largely been driven by the length of time associated with Tribunal and court appeals against Ministerial decisions rather than the initial Council recommendation and Ministerial decision processes (Figure 2).

Figure 2. Timeframes for considerations of declaration applications under Part IIIA of the CCA



The Council supported removing the ability for parties to seek merits review by the Tribunal of declaration decisions because, in its view, the current arrangement adds to uncertainty for industry participants and creates unnecessary delays and increased costs in the resolution of matters. Further, matters don't appear to be resolved by the Tribunal as they tend to progress to the Courts regardless.

In relation to limiting repeat applications regarding declaration of the (largely) same service, the Council is of the opinion that current arrangements encourage repeat applications by allowing parties to submit applications in the absence of any test to determine whether circumstances have changed since the matter was last considered. This can lead to the Council continually reconsidering declaration of essentially the same service, resulting in an inefficient use of resources and contributing to lengthy processes and ongoing uncertainty for infrastructure owners and users. In this respect, the Council notes it considered on 3 occasions whether it was appropriate to declare a service at the Port of Newcastle between 2015 and 2020.

Consistent with the views of the Council, in May 2021 the Government announced it would implement reforms to the NAR including:

- removing merits review by the Tribunal of declaration decisions
- limiting new applications for declaration, or revocation of a declaration, of infrastructure where the infrastructure has been the subject of previous declaration or revocation process
- terminating arbitration proceedings and determinations where the underlying declaration is revoked.

Subsequently, in December 2021, the Treasury issued an exposure draft outlining proposed legislative amendments to give effect to these reforms.2

The Council considers that the proposed amendments to the CCA will improve NAR processes for both infrastructure operators and access seekers.

If you would like to discuss this submission, please contact me.
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Yours sincerely,

Richard York
NCC Executive Director

[2] Improving the Timeliness of National Access Regime Processes