AUSTRALIAN COMPETITION TRIBUNAL

Application by New South Wales Minerals Council (No 3) [2021]
ACompT 4

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| Review of: | Decision of the Commonwealth Treasurer under s 44H of the *Competition and Consumer Act* *2010* (Cth) not to declare services at the Port of Newcastle made on 16 February 2021 |
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| File number: | ACT 1 of 2021 |
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| Tribunal: | **JUSTICE** **DR D Abraham (Member)****Prof K Davis (Member)** |
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| Date of determination: | 4 August 2021  |
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| Catchwords: | **TRADE PRACTICES** – application under s 44K(2) of the *Competition and Consumer Act* *2010* (Cth) for review of the decision of the Commonwealth Treasurer under s 44H not to declare the shipping channel service at the Port of Newcastle – consideration of statutory framework for review – consideration of declaration criteria in s 44ZZCA – whether declaration criterion (a) satisfied – whether access on reasonable terms and conditions as a result of declaration would promote a material increase in competition in the coal tenements market in the Hunter Valley – consideration of commercial, regulatory and economic constraints facing the Port – consideration of prices likely to be charged by the Port for the shipping channel service in the future with and without declaration – whether declaration criterion (d) satisfied – decision of the Commonwealth Treasurer affirmed**STATUTORY INTERPRETATION** – meaning of paragraph 44ZZCA(1)(a) – meaning of the phrase “access on reasonable terms and conditions” – meaning of the word “would” – meaning of the phrase “promote a material increase in competition” – time horizon over which criterion to be considered**COSTS** – whetherTribunal is empowered by s 44KB to award costs in a review under s 44K(2) of a decision under s 44H not to declare a service  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) ss 44CA, 44F, 44GC, 44H, 44HA, 44J, 44K, 44KB, 44ZZOAAA, 44ZZOAA, 44ZZOA*Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)*Competition Policy Reform Act 1995* (Cth)*Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth)*Trade Practices Amendment (National Access Regime) Act 2006* (Cth)*Ports and Maritime Administration Act 1995* (NSW) ss 48, 50, 51, 60, 61, 67, 77, 79, 80*Ports and Maritime Administration Regulations 2012* (NSW) |
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| Cases cited: | *ACCC v Pacific National* (2020) 277 FCR 49*Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164*Application by New South Wales Minerals Council (No 2)* [2021] ACompT 3*Application by New South Wales Minerals Council* [2021] ACompT 2*Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1*Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245*Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616*Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194*Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60*East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229*Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194*O’Sullivan v Australian Securities and Investments Commission* (2018) 160 ALD 233*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115*Re Australian Consumers’ Association’s Application* (1987) 82 ALR 115*Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2; 162 FLR 1*Re Fortescue Metals Group Ltd* [2010] ACompT 2; 271 ALR 256*Re Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7; 309 FLR 358*Re Glencore Coal Pty Ltd* [2016] ACompT 6*Re Herald & Weekly Times Ltd* (1978) 17 ALR 281*Re Queensland Co‑operative Milling Association Ltd* (1976) 8 ALR 481*Re Services Sydney Pty Ltd* [2005] ACompT 7; 227 ALR 140*Re Sydney International Airport* [2000] ACompT 1; 156 FLR 10*Re Virgin Blue Airlines Pty Ltd* [2005] ACompT 5; 195 FLR 242*Shi v Migration Agents Registration Authority* (2008) 235 CLR 286*Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124*Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446*Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 |
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| IN THE AUSTRALIAN COMPETITION TRIBUNAL |
| 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  |

DETERMINATION

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| TRIBUNAL: | JUSTICE O’BRYAN (Deputy President)DR D ABRAHAM (Member)PROF K DAVIS (Member) |
| DATE: | 4 august 2021  |

THE TRIBUNAL DETERMINES AND DIRECTS THAT:

1. The decision dated 16 February 2021 by the designated Minister, the Hon Joshua Frydenberg MP, Treasurer of the Commonwealth of Australia, under s 44H(1) of the *Competition and Consumer Act 2010* (Cth) (**Act**), not to declare the service provided at the Port of Newcastle comprising the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the port, by virtue of 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, currently being provided by Port of Newcastle Operations Pty Ltd, be affirmed.
2. Within 14 days after the date of this determination, Port of Newcastle Operations Pty Ltd (**PNO**) is to notify the Tribunal, the New South Wales Minerals Council (**NSWMC**) and the National Competition Council (**NCC**) whether it seeks an opportunity to make further written submissions on the question of the Tribunal’s power under s 44KB(1) of the Act to make an order for costs in this proceeding.
3. If PNO gives notice under direction 2 that it seeks an opportunity to make further written submissions on the question of the Tribunal’s power under s 44KB(1) of the Act:
	1. PNO must file such submissions, and any supplementary submissions on the exercise of the Tribunal’s discretion to make an order for costs (should the Tribunal reach the view that it has power to make an order for costs), limited to 10 pages, within 28 days after the date of this determination;
	2. NSWMC must file any submissions in reply, limited to 10 pages, within 42 days after the date of this determination;
	3. the Tribunal will determine the application for costs on the papers unless PNO or NSWMC indicate in their written submissions that they seek an opportunity to advance oral submissions on the application.

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REASONS FOR DETERMINATION

TRIBUNAL:

# Introduction

1. The Port of Newcastle (**Port**) is one of the larger coal export ports in the world, with coal extracted from the Hunter Valley being shipped through the Port. The Port can be described as a bottleneck facility as coal producers in the Hunter Valley have no practicable alternative to the Port for the export of their coal.
2. In May 2014, the Port was privatised by the grant of a 98 year lease to The Infrastructure Fund (managed by Hastings Funds Management) and China Merchants Group as joint venturers. The Port is now operated by Port of Newcastle Operations Pty Ltd (**PNO**), a company owned by the joint venturers. As the operator of the Port, PNO controls the terms and conditions of access to the Port including, relevantly, the shipping channels and berthing facilities required for the export of coal from the Port.
3. On 23 July 2020, the New South Wales Minerals Council (**NSWMC**) applied to the National Competition Council (**NCC**) under s 44F(1) of the *Competition and Consumer Act 2010* (Cth) (**Act**) asking the NCC to recommend that a service at the Port provided by PNO be declared. The service comprises the provision of the right to access and use all the shipping channels and berthing facilities required for the export of coal from the Port, by virtue of 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 (which we will refer to as the **shipping channel service** for convenience).
4. On 18 December 2020, the NCC provided its final recommendation (**NCC Recommendation**) to the designated Minister, the Hon Josh Frydenberg MP, Treasurer of the Commonwealth of Australia (**Treasurer**). The NCC recommended that the shipping channel service not be declared on the basis that the criteria in paragraphs 44CA(1)(a) and (d) of the Act had not been satisfied. Those criteria are as follows:

(a) 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;

(d) 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.

1. On 16 February 2021, the Treasurer decided under s 44H(1) of the Act not to declare the shipping channel service on the same basis, namely that the criteria in paragraphs 44CA(1)(a) and (d) had not been satisfied. The Treasurer’s decision and reasons for the decision were published the same day in accordance with s 44HA (**Treasurer’s Reasons**).
2. In this proceeding, NSWMC has applied to the Tribunal under s 44K(2) of the Act for a review of the Treasurer’s decision.
3. The principal contention advanced by NSWMC to the NCC and maintained in this review is that, without declaration of the shipping channel service, companies considering investments in the coal tenements market in the Hunter Valley region will face uncertainty with respect to future prices to be charged by PNO for the shipping channel service. The uncertainty will increase the risk associated with making investments in tenements, as compared to access on reasonable terms and conditions as a result of declaration. The elevated risk increases the likelihood that investors will delay their investments until the uncertainty is resolved. The uncertainty will therefore harm the conditions for competition in the coal tenements market. In contrast, access to the shipping channel service on reasonable terms and conditions as a result of declaration will remove or reduce that uncertainty and thereby promote a material increase in competition.
4. NSWMC’s principal contention to the NCC was not supported by any empirical evidence concerning the coal tenements market. NSWMC failed to present to the NCC any financial or quantitative evidence concerning the coal tenements market conditions, structure, prices or expected returns. No financial evidence was presented as to how investment decisions are made in the coal tenements market and how Port charges figure in investment decisions. Instead, NSWMC relied on assertions by a limited number of existing coal mining companies to the effect that investment decisions would be affected if the shipping channel service were not declared, supported by a theoretical economic report from Synergy Consulting.
5. Neither the NCC nor the Treasurer were persuaded by NSWMC’s principal contention. The NCC concluded (at [7.125], [7.126], [7.154] and [7.155]) that:
6. It is not in PNO’s long-term interests for Port users to experience such uncertainty around access charges at the Port if this risks significantly less investment in coal mining activity in the Newcastle catchment.
7. PNO has published open access arrangements that set out terms and conditions of access for coal exports and also offered access prices for coal exports under a long term (10 year) deed. Both the open access arrangements and the deed make provision for dispute resolution. These arrangements assist coal producers in mitigating the risks that may otherwise arise from pricing and other uncertainties at the Port.
8. Coal producers and exporters seeking access to the Port face significant uncertainty from other factors that are more likely to influence their ability to compete in export coal markets, particularly future changes in coal prices, labour costs and taxes. Relative to these factors, charges for the shipping channel service are likely to remain a small proportion of the cost of production and sale of coal for export. The risks associated with uncertainty over access charges for the shipping channel service would not contribute significantly to an investor’s expected valuation of future mining projects in the Newcastle catchment.
9. The Treasurer accepted the conclusions reached by the NCC in the Recommendation.
10. The Tribunal has also reached the conclusion that the criteria in paragraphs 44CA(1)(a) and (d) of the Act have not been satisfied, for largely the same reasons as explained in the NCC Recommendation. The Tribunal therefore affirms the Treasurer’s decision not to declare the shipping channel service.
11. On the assumption that NSWMC would not be successful in its application for review, PNO applied for an order under s 44KB(1) of the Act that NSWMC pay its costs of the proceeding. For the reasons set out below, the Tribunal doubts that it has power under s 44KB(1) to make an order for costs in this proceeding, which is a proceeding for review of the Treasurer’s decision not to declare the shipping channel service under s 44K(2) (and not a proceeding for a review of a declaration under section 44K(1)). However, as neither party addressed the question of power during the hearing, the Tribunal will afford PNO and NSWMC the opportunity to make further written submissions on the question of power (if they so choose) and any supplementary submissions on the exercise of the Tribunal’s discretion (should the Tribunal reach the view that it has power to make an order for costs).

# Statutory framework for the Tribunal’s review

## Nature of the Tribunal’s review

1. In the course of two interlocutory applications made in this proceeding, the Tribunal has summarised the statutory framework that is applicable to the Tribunal’s power to review the Treasurer’s decision under s 44K(2) of the Act: see *Application by New South Wales Minerals Council* [2021] ACompT 2 and *Application by New South Wales Minerals Council (No 2)* [2021] ACompT 3. It is nevertheless appropriate to restate the principal features of the statutory framework which govern the Tribunal’s task in this proceeding.
2. Since it was first enacted, the relevant provisions of Part IIIA have been subject to significant amendment on three occasions: by the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) (**2006 Amendment Act**); by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (**2010 Amendment Act**); and by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**2017 Amendment Act**). It is necessary to keep the amendments in mind when considering earlier Tribunal and Court decisions.
3. Under s 44F(1), a person may apply in writing to the NCC asking the NCC to recommend that a particular service be declared. Section 44F(2)(b) stipulates that the NCC must, after having regard to the objects of Part IIIA of the Act, recommend to the designated Minister that the service be declared (with the expiry date specified in the recommendation) or that the service not be declared. Section 44G provides that the NCC cannot recommend that a service be declared unless it is satisfied of all of the declaration criteria for the service. The declaration criteria are set out below. Section 44GA requires the NCC to make a recommendation within a period of 180 days, although the NCC may extend that period in certain circumstances. Section 44GC provides that the NCC must publish its recommendation under section 44F and its reasons for the recommendation.
4. By s 44D, the designated Minister is defined as the Commonwealth Minister unless the provider of the service is a State or Territory body. At the time of the decision the subject of this proceeding, the relevant Commonwealth Minister was the Commonwealth Treasurer.
5. Under s 44H(1), on receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it. Section 44H(1A) stipulates that the designated Minister must have regard to the objects of Part IIIA in making his or her decision and s 44H(4) stipulates that the designated Minister cannot declare a service unless he or she is satisfied of all of the declaration criteria for the service. Section 44H(9) provides that if the designated Minister does not publish his or her decision on the declaration recommendation within 60 days, the designated Minister is taken, at the end of that 60-day period, to have made a decision in accordance with the declaration recommendation.
6. In the present case, the Treasurer published his decision not to declare the shipping channel service, and the reasons for the decision, within the 60-day period specified by s 44H(9).
7. The Tribunal is empowered by s 44K(2) to review the Treasurer’s decision not to declare the service. Section 44K provides as follows:

**44K Review of declaration**

(1) If the designated Minister declares a service, the provider may apply in writing to the Tribunal for review of the declaration.

(2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister’s decision may be made by the person who applied for the declaration recommendation.

(3) An application for review must be made within 21 days after publication of the designated Minister’s decision.

(4) The review by the Tribunal is a re‑consideration of the matter based on the information, reports and things referred to in section 44ZZOAA.

Note: There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal’s decision on the review (see section 44ZZOA).

(5) For the purposes of the review, the Tribunal has the same powers as the designated Minister.

(6) The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review (including for the purposes of deciding whether to make an order under section 44KA).

(6A) Without limiting subsection (6), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in the notice, within the period specified in the notice, for the purposes of the review.

(6B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) the person who applied for the declaration recommendation; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

(7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.

(8) If the designated Minister decided not to declare the service, the Tribunal may either:

(a) affirm the designated Minister’s decision; or

(b) set aside the designated Minister’s decision and declare the service in question.

(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section).

1. The Tribunal’s review power under s 44K was the subject of detailed consideration by the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (the ***Pilbara case***), while recognising that that case considered s 44K in its form prior to the amendments made by the 2010 Amendment Act.
2. By s 44K(4), the review by the Tribunal is defined as, and limited to, a “re‑consideration of the matter based on the information, reports and things referred to in section 44ZZOAA”. Four aspects of s 44K(4) should be noted.
3. First, the “matter” to be reviewed by the Tribunal is the Treasurer’s decision not to declare the relevant service, not the NCC Recommendation. In the *Pilbara case*, the plurality stated (at [37]):

The “matter” referred to in s 44K(4) was identified in s 44K(1) and (2). In a case where the Minister has declared a service, the “matter” is “the declaration” made by the Minister. In a case where the Minister decided not to declare a service, the matter is “the designated Minister’s decision” not to make a declaration. In both cases, the hinge about which the identification of the “matter” turns is what the Minister has done, not what the NCC did when it made its declaration recommendation. The requirement of s 44K(4) – that the Tribunal review the matter and that the review be “a re-consideration of the matter” – necessitates identification of the Minister’s task. It is that task, and the result of its performance, which is to be subject to “re-consideration” by the Tribunal.

1. Second, the Treasurer’s decision, which is the subject of review by the Tribunal, is defined by s 44H(1). The plurality in the *Pilbara case* described the Minister’s decision-making task as follows (at [45]-[47]):

45 The Minister had only a short time to decide how to respond to a declaration recommendation. While the NCC could extend (s 44GA) the time for making its recommendation about an application for a declaration, the Minister was given sixty days after receiving the NCC’s declaration recommendation to decide whether to declare the service. Section 44H(9) provided that, if the Minister did not publish his or her decision on the declaration recommendation within sixty days after receiving it, the Minister was taken, at the end of that period, to have decided not to declare the service and to have published that decision. In such a case, the Minister would publish no reasons for decision but the NCC’s reasons for recommending a declaration would be published pursuant to s 44GC. If the Minister made a decision, the Act obliged (s 44HA(1)) the Minister to publish that decision and the reasons for it.

46 There is one other aspect of the Act’s treatment of the Minister’s task to which attention should be drawn. The Minister, unlike the Tribunal (s 44K(6)), was given no express power to request any further information, assistance or report from the NCC. The statutory supposition appears to have been that the Minister could and would make a decision on the NCC’s recommendation without any need for further information from the NCC.

47 The content of those provisions of Pt IIIA to which reference has been made suggests that it was expected that, armed with a recommendation from an expert and non-partisan body (the NCC), the Minister would make a decision quickly and would do so according to not only the Minister’s view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made. And it is the Minister’s decision, not the NCC’s recommendation, that was the matter that was to be reviewed by the Tribunal.

1. Third, a review which is a “re-consideration” is a more limited form of review than a “re‑hearing” (as might be conducted by the Tribunal under Part IX of the Act). The plurality in the *Pilbara case* contrasted the two forms of review as follows (at [60] and [65]):

60 When s 101(2) of the Act used “re-hearing” to describe the task of the Tribunal reviewing a determination of the Commission, it was using “re-hearing” in a context wholly divorced from the exercise of judicial power. And when s 44K(4) referred to “re-consideration”, it too used that word in a context divorced from the exercise of judicial power. Nonetheless, some different meaning must presumably be intended by the use of the different words in identifying the review to be undertaken by the Tribunal. The contrast is best understood as being between a “re-hearing” which requires deciding an issue afresh on whatever material is placed before the new decision maker and a “re-consideration” which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6)).

…

65 As has already been noted, the Tribunal treated its task as being to decide afresh on the new body of evidence and material placed before it whether the services should be declared. That was not its task. Its task was to review the Minister’s decisions by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6)…

1. The fourth aspect of s 44K(4) to be noted is the requirement, introduced by the 2010 Amendment Act, that the re-consideration of the Treasurer’s decision is to be based on the information, reports and things referred to in s 44ZZOAA. That section (which was also introduced by the 2010 Amendment Act) relevantly provides as follows:

**44ZZOAA Tribunal only to consider particular material**

For the purposes of a review under this Part, the Tribunal:

(a) subject to paragraph (b), must have regard to:

(i) information that was given to the Tribunal under subsection 44ZZOAAA(3); and

(ii) any information given to the Tribunal in accordance with a notice given under subsection 44ZZOAAA(5); and

(iii) any thing done as mentioned in subsection 44K(6) …; and

(iv) any information or report given to the Tribunal in relation to the review under subsection 44K(6A) … within the specified period; and

 (b) may disregard:

(i) any information given to the Tribunal in response to a notice given under subsection 44ZZOAAA(5) after the period specified in the notice has ended; and

(ii) any information or report of the kind specified in a notice under subsection 44K(6A) … that is given to the Tribunal after the specified period has ended.

1. In the present case, the “information, reports and things referred to in s 44ZZOAA” comprise the following:
2. first, the material that was given to the Tribunal by the Treasurer under s 44ZZOAAA(3) on 21 April 2021, which consisted of a Treasury Ministerial Submission dated 18 December 2020, attaching the NCC Recommendation, and a further Treasury Ministerial Submission dated 12 February 2021, attaching a proposed decision and statement of reasons, together with correspondence to the NCC, NSWMC and PNO notifying them of the Treasurer’s decision;
3. second, the material given to the Tribunal by the NCC pursuant to a notice issued by the Tribunal under s 44K(6A) on 16 June 2021, which consisted of three pro forma deeds offered by PNO to Port users being:
	1. the Port User Pro Forma Long Term Pricing Deed (**Port User Pricing Deed**), which was offered from December 2019; and
	2. the Producer Pro Forma Long Term Pricing Deed (**Producer Pricing Deed**) and the Vessel Agent Pro Forma Long Term Pricing Deed (**Vessel Agent Pricing Deed**), which were offered from March 2020 in replacement of the Port User Pricing Deed,

(collectively, the **Pro Forma Pricing Deeds**), and which were annexed to NSWMC’s original application to the NCC; and

1. third, the material given to the Tribunal by PNO pursuant to a notice issued by the Tribunal under s 44ZZOAAA(5) on 16 June 2021, which consisted of paragraphs 41 to 45 and 50 of PNO’s confidential submission to the NCC dated 26 August 2020 and which related to the Pro Forma Pricing Deeds.
2. It is necessary to say something more about the nature of the Tribunal’s statutory task of reviewing the Treasurer’s decision. As already noted, in the *Pilbara case* the High Court concluded that the statutory task of “re-considering” the decision of the designated Minister is not to decide the issue (whether to declare or not to declare) afresh on whatever material is placed before the Tribunal, but to review the original decision by reference to the material that was placed before the designated Minister. Following the 2010 Amendment Act, the review is to be based on the “information, reports and things referred to in s 44ZZOAA”. The High Court did not elaborate further on the Tribunal’s statutory task of “reviewing” or “re-considering” the decision of the designated Minister.
3. The nature of review or appeal rights depends upon the terms of the statute conferring the rights (see *Tasty Chicks Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2011) 245 CLR 446 at [5] per French CJ, Gummow, Crennan, Kiefel and Bell JJ; *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 (***Shi***) at [25] per Kirby J, at [92] per Hayne and Heydon JJ and at [132] per Kiefel J; *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at [62] per Gummow and Hayne JJ; *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 at [11] per Gleeson CJ, Gaudron and Hayne JJ and at [118] per Callinan J citing *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622 per Mason J, with whose judgment Barwick CJ and Stephen J agreed). In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, Mason CJ, Brennan and Toohey JJ observed (at 261):

In considering the nature of the 'review' contemplated by s25ZAC, it is relevant to note that the expression 'review' is commonly used in the context of judicial control of administrative action and in the context of comprehensive administrative review by an administrative tribunal of administrative decisions. But what emerges from the judicial decisions and, for that matter, from statutes is that 'review' has no settled pre-determined meaning; it takes its meaning from the context in which it appears.

1. As already noted, s 44K(4) describes the Tribunal’s task as a “re-consideration” of the decision of the designated Minister. The ordinary meaning of the word “re-consider” is to consider again. Together, ss 44K(5), (7), (8) and (9) provide that:
2. the Tribunal has the same powers as the designated Minister;
3. the Tribunal may affirm, vary or set aside the decision of the designated Minister and, if the Minister decided not to declare the service, the Tribunal may declare the service; and
4. the Tribunal’s declaration of the service is taken to be a declaration by the designated Minister for all purposes of Part IIIA.
5. The language of those subsections is similar to that found in many statutes that provide for review by an administrative tribunal of administrative decisions including, for example, ss 43(1) and (6) of the *Administrative Appeals Tribunal Act 1975* (Cth). The combined effect of ss 44K(4), (5), (7), (8) and (9) indicate that the Tribunal’s review task is to determine whether the decision made by the designated Minister was objectively the correct or preferable decision to be made: cf *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60 at 78 (Smithers J). In that sense, the Tribunal “stands in the shoes” of the designated Minister: *O’Sullivan v Australian Securities and Investments Commission* (2018) 160 ALD 233 at [36], citing *Shi* at [40], [100] and [134]. However, the Tribunal is to conduct the review and make that determination based on the information, reports and things referred to in s 44ZZOAA, not on whatever material the participants seek to place before the Tribunal.
6. It follows that the Tribunal’s power of review is not limited to the identification and correction of error in the Treasurer’s Reasons. The Tribunal is required to review the Treasurer’s decision not to declare the relevant service, not the reasons for decision. In that respect, the review task is analogous to that required under Part IX of the Act: see for example *Re Queensland Co‑operative Milling Association Ltd* (1976) 8 ALR 481 (***QCMA***) at 486 (Woodward J, Mr J Shipton and Prof M Brunt); *Re Herald & Weekly Times Ltd* (1978) 17 ALR 281 (***Re Herald & Weekly Times***) at 295-296 (Deane J, Mr J Shipton and Mr J Walker); *Australian Consumers’ Association’s Application (Re Media Council of Australia (No 2))* (1987) 82 ALR 115 at 126 (Lockhart J, Prof M Brunt and Dr B Aldrich); *Application by Medicines Australia Inc* [2007] ACompT 4; ATPR 42-164 (***Medicines Australia***) at [135] and [138] (French J, Mr G Latta and Prof C Walsh). As those decisions of the Tribunal make clear, the task of the Tribunal is not to review the reasons of the decision-maker, but the reasons may “prove a convenient reference point for defining the matters which are truly in dispute” (*Re Herald & Weekly Times* at 296). Ultimately, the Tribunal must make its own decision with respect to the application of the statutory criteria, based on the material taken into account by the Treasurer supplemented by any additional material obtained by the Tribunal in exercise of its powers under ss 44K(6), 44K(6A) and 44ZZOAAA(4).

## The applicable statutory criteria

1. The decision of the Treasurer, which the Tribunal is required to reconsider, was made under s 44H which relevantly provides as follows:

**44H Designated Minister may declare a service**

(1) On receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it.

Note: The designated Minister must publish his or her decision: see section 44HA.

(1A) The designated Minister must have regard to the objects of this Part in making his or her decision.

(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the declaration criteria for the service.

1. The objects of Part IIIA are stated in s 44AA as follows:

**44AA Objects of Part**

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

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

1. The declaration criteria are defined by s 44CA as follows:

**44CA Meaning of declaration criteria**

(1) The declaration criteria for a service are:

(a) 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; and

 Note: Market is defined in section 4E.

(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

(i) over the period for which the service would be declared; and

(ii) at the least cost compared to any 2 or more facilities (which could include the first-mentioned facility); and

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy; and

(d) 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.

(2) For the purposes of paragraph (1)(b):

(a) if the facility is currently at capacity, and it is reasonably possible to expand that capacity, have regard to the facility as if it had that expanded capacity; and

(b) without limiting paragraph (1)(b), the cost referred to in that paragraph includes all costs associated with having multiple users of the facility (including such costs that would be incurred if the service is declared).

(3) Without limiting the matters to which the Council may have regard for the purposes of section 44G, or the designated Minister may have regard for the purposes of section 44H, in considering whether paragraph (1)(d) of this section applies the Council or 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.

1. As noted earlier, the Treasurer decided not to declare the shipping channel service on the basis that the criteria in paragraphs 44CA(1)(a) and (d) had not been satisfied. In this proceeding, all participants accepted that the criteria in paragraphs 44CA(1)(b) and (c) were satisfied. Accordingly, it is only necessary for the Tribunal to consider criteria (a) and (d).
2. The declaration criteria in Part IIIA of the Act were amended by the 2017 Amendment Act with effect from 6 November 2017. Prior to the amendment, the declaration criteria were located in s 44H(4). After the amendment, the declaration criteria were relocated to a new s 44CA(1). Each of criterion (a) and (d) were the subject of material revision.

### Criterion (a)

1. When Part IIIA was first enacted by the *Competition Policy Reform Act 1995* (Cth), criterion (a) was expressed as follows: “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”.
2. As first enacted, the criterion focussed on the question whether access would “promote competition”. In *Re Sydney International Airport* [2000] ACompT 1; 156 FLR 10 (***Re Sydney International Airport***), the Tribunal construed that expression as follows (at [106]-[107]):

The Tribunal does not consider that the notion of "promoting" competition in s 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.

We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on "access", which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial.

1. The Tribunal’s explanation of the meaning of the phrase “promote competition” has been consistently followed in subsequent Tribunal decisions: see *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2; 162 FLR 1 (***Re Duke***) at [75]; *Re Virgin Blue Airlines Pty Ltd* [2005] ACompT 5; 195 FLR 242 (***Re Virgin Blue***) at [146]; *Re Services Sydney Pty Ltd* [2005] ACompT 7; 227 ALR 140 at [132]; *Re Fortescue Metals Group Ltd* [2010] ACompT 2; 271 ALR 256 (***Re Fortescue Metals***) at [1060]. In *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201 (***Telstra Corporation***), the Full Court approved that understanding of the phrase when used in an analogous context in the telecommunications access regime in Part XIC of the Act (at [224]-[225]). So too in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 (***Port of Newcastle***), the Full Court used the same explanation of the meaning of the phrase “promote competition” (at [86]). The Tribunal discusses further the phrase “promote competition”, and particularly the meaning of the word “competition”, below.
2. In *Re Sydney International Airport* and the Tribunal decisions that followed, criterion (a) was understood to require an assessment of the effect of declaration on the promotion of competition. In *Re Virgin Blue*, the Tribunal expressed the relevant enquiry as follows (at [148]):

In order to determine whether access or increased access “would promote competition” in a dependent market, it is necessary to undertake an analysis of the future with declaration (which is referred to as the “factual”) as against the future without declaration (which is referred to as the “counterfactual”). As the Tribunal in *Re Sydney Airports Corp* observed at [108], a comparison of the factual and the counterfactual requires a forward-looking analysis which involves a comparison of the competitive conditions and environment likely to arise in the future with and without declaration.

1. However, on application for review of the decision in *Re Virgin Blue*, the Full Court of the Federal Court in *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 (***Sydney Airport***) concluded that criterion (a) required a comparison between access and no access, and limited access and increased access, to the service (at [81]). In other words, the criterion required a comparison of the future state of competition in the dependent market with a right or ability to use the service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service (at [83]). The criterion did not involve an enquiry about the effect of declaration under Part IIIA. As discussed below, criterion (a) was amended by the 2017 Amendment Act to overcome the interpretation in *Sydney Airport* and, to a considerable extent, revert to the interpretation in *Re Virgin Blue*.
2. Criterion (a) was amended by the 2006 Amendment Act, which inserted the phrase “a material increase in” before the word “competition”. Thus, criterion (a) became “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”. In relation to the meaning of the phrase “material increase”, the Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005(Cth) stated (at [1.9]):

The Government has agreed to amend the ‘promote competition’ declaration criteria contained in paragraph 44G(2)(a), to ensure that access declarations are only granted where the expected increase in competition in an upstream or downstream market is not trivial.

1. In *Re Fortescue Metals*, the Tribunal concluded (at [584]) that the inclusion of the phrase “material increase” brought no change to the existing law as the Tribunal had always taken the position that criterion (a) required a non-trivial increase in competition (referring to *Re Duke* and *Re Sydney International Airport*).
2. In *Port of Newcastle*, the Full Court approved the interpretation of criterion (a) adopted in *Sydney Airport* (at [136]), and concluded that the proper construction of criterion (a) was not affected by the amendment made by the 2006 Amendment Act (at [144]). In respect of the phrase “material increase”, the Full Court also noted (at [144]) the statement in the Explanatory Memorandum (reproduced above) to the effect that the criterion only applies where the expected increase in competition in an upstream or downstream market is not trivial.
3. Criterion (a) was amended in a more significant way by the 2017 Amendment Act. Since 6 November 2017, criterion (a) has become “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”. It can be seen that the phrase “access (or increased access) to the service” has now been qualified by the phrase “on reasonable terms and conditions, as a result of a declaration of the service”. This is the first decision of the Tribunal to consider criterion (a) as so amended.
4. On its plain terms, the amended criterion no longer requires a comparison of access and no access. The relevant enquiry has become: what effect would access to the service on reasonable terms and conditions as a result of a declaration of the service have on the promotion of competition in a dependent market? That enquiry invites a comparison of (i) access on reasonable terms and conditions as a result of a declaration of the service and (ii) the circumstances that would be likely to prevail with respect to access in the absence of declaration. While the enquiry is forward looking, the prevailing circumstances relating to access (in particular, whether access is presently given and on what terms) will be relevant to the required forward looking comparison.
5. The foregoing understanding of the amended criterion (a) is confirmed by the relevant extrinsic materials. The Explanatory Memorandum to the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) (**Competition Policy Review Explanatory Memorandum**) explained the background to the amendments as follows:

12.9 The declaration criteria have been examined in a number of cases heard by both the Federal and High Courts. The declaration criteria have been subject to several different interpretations in these cases, with particular implications for how competition in dependent markets should be assessed. For investment to continue to be made in nationally significant infrastructure, it is important that the Regime is easily understood, creates outcomes that are predictable and addresses the economic problem of natural monopoly in markets for infrastructure services.

12.10 The Regime has been reviewed three times, by the Productivity Commission in 2001 and 2013, and then by the Harper Review in 2015. Both the 2013 and 2015 reviews examined the application of the declaration criteria and whether they were achieving the objectives of the Regime. These two reviews involved extensive consultation with the public and the States and Territories.

12.11 The Government decided in 2014 that it would respond to both reviews following the conclusion of the Harper Review.

12.12 The Government decided to implement all of the recommendations of the Productivity Commission as part of its response to the Harper Review. These amendments seek to refocus and clarify the intent of the Regime. In particular, they seek to clarify the declaration criteria that the Council and Minister must be satisfied of in order to recommend that a service be declared, or declare the service, respectively. This then determines when arbitration by the Commission will be available to access seekers or access providers.

1. The Explanatory Memorandum stated, in respect of criterion (a) that:

12.19 The amendments require the Council and the Minister to consider whether access (or increased access) on reasonable terms and conditions as a result of declaration would promote a material increase in competition in a market other than the market for the service. That is, the amendments focus the test on the effect of declaration, rather than merely assessing whether access (or increased access) would promote competition.

1. As stated in the Competition Policy ReviewExplanatory Memorandum, the Government decided to implement the recommendations of the Productivity Commission as part of its response to the 2015 Final Report of the Competition Policy Review chaired by Professor Ian Harper (and commonly referred to as the **Harper Review**). In its Inquiry Report No 66 titled “National Access Regime” (25 October 2013) (**2013 Productivity Commission Report**), the Productivity Commission recommended that criterion (a) be amended so that it “becomes a comparison of competition with and without access on reasonable terms and conditions through declaration” (recommendation 8.1). In summarising its proposed reform to criterion (a), the Productivity Commission said (at p 249):

Criterion (a) should be amended so that it is only satisfied where access to an infrastructure service on reasonable terms and conditions through *declaration* (rather than access per se) would promote a material increase in competition in a dependent market. This amended criterion would require a comparison of the future state of competition under the status quo (including where access may already be available under the status quo) against the future state of competition where access is granted on reasonable terms and conditions through declaration.

A declaration-focused competition test is the most effective way to target the economic problem that the Regime is intended to address. This competition test would not be satisfied where there is already effective competition in dependent markets. It would also not be satisfied where access is already granted to all third parties on reasonable terms and conditions, as declaration would not be expected to alter the terms and conditions of access.

(Original emphasis.)

1. The Final Report of the Harper Review agreed with the Productivity Commission’s recommendation to re-focus criterion (a) on the effect of declaration, but expressed concern that criterion (a) set a low threshold for declaration (at p 433). The Harper Review recommended that criterion (a) should require that access on reasonable terms and conditions through declaration promote a substantial increase in competition in a dependent market that is nationally significant (at p 437). That recommendation was not adopted by Parliament when enacting the 2017 Amendment Act.
2. The foregoing review of the legislative history and text supports the following propositions:
3. Criterion (a) requires an assessment of the effect of access (or increased access) to the service on reasonable terms and conditions as a result of declaration.
4. The criterion requires that such access would promote a material increase in competition in at least one market other than the market for the service. A material increase in competition is promoted if the conditions, opportunities or environment for competition are improved in more than a trivial way.
5. The criterion necessitates a forward looking analysis focussed upon the effect of access as a result of declaration. The necessary comparator is the commercial environment without declaration. An important consideration in applying the criterion is whether access will be, or is likely to be, available without declaration and the commercial features of such access including the nature and scope of access, the terms and conditions of access and any capacity limitations to access. The existing availability of access will be relevant to assessing the likely future availability of access. However, due consideration must also be given to the prospect of future changes in the commercial, regulatory and economic circumstances that might alter the incentives, and likely behaviour, of the service provider.
6. In these reasons, we will use the descriptive phrase “the effects of declaration” as an abbreviation of the statutory criterion which concerns the effects of access (or increased access) to the service on reasonable terms and conditions as a result of declaration. A similar abbreviation is used in the 2013 Productivity Commission Report and the Competition Policy Review Explanatory Memorandum, as seen in the extracts reproduced above. We emphasise, though, that in using that abbreviation we do not lose sight of the statutory criterion.
7. During the hearing, the parties advanced arguments about the proper construction, and approach to the application, of criterion (a). Those arguments are considered below.

### Criterion (d)

1. When Part IIIA was first enacted, criterion (f) (in s 44H(4)) was expressed as follows: “that access (or increased access) to the service would not be contrary to the public interest”.
2. In the *Pilbara case*, the plurality confirmed the breadth of the phrase “public interest” in criterion (f) (at [42], citations omitted):

Criterion (f) was “that access (or increased access) to the service would not be contrary to the public interest”. 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*, 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.

(Original emphasis.)

1. By reason of the breadth of the phrase, the plurality also observed that a Tribunal reviewing the Minister’s decision should be slow to reach a conclusion with respect to criterion (f) to the contrary of the Minister’s conclusion (at [112]):

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.

1. As noted above, the declaration criteria in s 44H(4) were amended by the 2017 Amendment Act and relocated to s 44CA(1). Criterion (f) became criterion (d) in the new section and was rephrased as follows: “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”. Thus, like criterion (a), criterion (d) is now focussed on the effect of access (or increased access) to the service on reasonable terms and conditions as a result of declaration. The new criterion necessitates a forward looking analysis focussed upon the effect of access as a result of declaration and requires that such access would promote the public interest. Consistently with the conclusion of the High Court in the *Pilbara case*, the criterion imports a discretionary value judgment to be made by reference to undefined factual matters confined only by the subject matter, scope and purpose of the Act.
2. As noted above, s 44CA(3) stipulates that, in considering whether criterion (d) applies, the designated Minister must have regard to the following (non-exhaustive) factors:
3. the effect that declaring the service would have on investment in infrastructure services; and markets that depend on access to the service; and
4. the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.
5. The Competition Policy Review Explanatory Memorandum stated, in respect of criterion (d), that:

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.

1. That statement reflected the recommendation in the 2013 Productivity Commission Report that “Criterion (f) should be a rigorous test, which only enables the declaration of infrastructure services where the decision maker is satisfied that declaration is likely to generate overall gains to the community” (at pp 181, 251).

# Background

1. The Port has been the subject of a number of contested declaration decisions since its privatisation in May 2014, which have resulted in previous decisions of the Tribunal and the Full Federal Court. This section briefly summarises that history to contextualise the present application. The background information has largely been drawn from the NCC Recommendation, but includes certain uncontroversial facts that have been drawn from the previous declaration decision of the Tribunal in *Re Glencore Coal Pty Ltd* [2016] ACompT 6 (***Re Glencore Coal***) which were reproduced in the Full Court’s decision in *Port of Newcastle*.

## The Port and the Hunter Valley coal industry

1. Until May 2014, the Port was operated by the State of NSW. It is one of the larger coal export ports in the world, with coal extracted from the Hunter Valley being shipped through the Port. In 2018, the Port handled 158.6 million tonnes of coal with a value of approximately $23.6 billion.
2. In *Re Glencore Coal*, the Tribunal noted that the Hunter Valley coal industry and associated supply chain are the largest coal export operations in the world. The Hunter Valley/Newcastle coalfields produce over 170 million tonnes of saleable coal per year. There are more than 30 operating coal mines in the Hunter Valley operated by 11 coal producers as well as other coal projects in various stages of exploration and development. There are three main rail haulage providers who transport coal from the mines to export terminals at the Port. Coal is then loaded onto vessels at one of the loading terminals.
3. In the 2019 financial year, the Hunter Valley mining sector directly supported 3,282 businesses, directly employed 13,347 people, paid $1.4 billion in wages and salaries and directly spent $4.0 billion on goods and services. In total, about 19.1% of the Hunter Region’s workforce was supported by mining.
4. The NCC described the Port as a bottleneck facility. That description is uncontroversial. In practical terms, the Port facilities, including particularly the shipping channel service, is necessary for the export of coal from the Hunter Valley. Coal producers in the Hunter Valley have no practicable alternative to the Port for the export of their coal.
5. The Port was privatised in May 2014 by the grant of a 98 year lease to the joint venture parents of PNO, The Infrastructure Fund managed by Hastings Funds Management and China Merchants Group. The transaction generated gross proceeds of some $1.75 billion to the State of NSW. PNO operates the Port under a 98-year sublease. As the operator of the Port, PNO controls the terms and conditions of access to the Port including, relevantly, the shipping channels and berthing facilities required for the export of coal from the Port.

## Port charges

1. As the port operator in respect of the Port, PNO is empowered under Part 5 of the *Ports and Maritime Administration Act* *1995* (NSW) (**PAMA Act**) to fix and levy three types of charges on the users of Port services:
2. the navigation service charge, which is payable in respect of general use by a vessel of the Port and its infrastructure, and is paid by the owner of the vessel (as defined in s 48 of the PAMA Act) on each entry by the vessel into the Port calculated by reference to the gross tonnage of the vessel (ss 50 and 51 of the PAMA Act);
3. the wharfage charge, which is payable in respect of the availability of a site at which stevedoring operations may be carried out, and is paid by the owner of the cargo at the time immediately before it is loaded or immediately after it is unloaded at the site by reference to the quantity of cargo loaded or unloaded (s 61 of the PAMA Act); and
4. the site occupation charge, which is payable by occupiers of land-side facilities such as stevedoring at terminals (s 60 of the PAMA Act).
5. Section 67 of the PAMA Act empowers PNO, as the port operator in respect of the Port, to enter into an agreement with a person otherwise liable to pay a charge under Part 5 of the PAMA Act in respect of such charges. It provides as follows:

 **67 Agreements in respect of charges**

(1) The relevant port authority may enter into an agreement with a person liable to pay any kind of charge under this Part.

(2) Such an agreement may make provision for or with respect to—

(a) fixing the amount of any charge payable by the person to the relevant port authority, and

(b) any other matter which the relevant port authority is permitted by or under this Part to determine in respect of the charge, and

(c) any right or privilege which by or under this Part accrues to the person liable to pay the charge, or which the relevant port authority may confer on the person.

(3) To the extent that provision is so made, the agreement displaces any determinations of the relevant port authority in relation to the charge or to the matter, right or privilege concerned.

1. Part 6 of the PAMA Act establishes a price monitoring scheme in respect of charges imposed at various ports in NSW including the Port. Section 77 states the objective of the scheme:

The objective of the price monitoring scheme established by this Part (the *scheme objective)* is to promote the economically efficient operation of, use of and investment in major port facilities in the State by monitoring the prices port operators charge users of those facilities, so as to promote a competitive commercial environment in port operations.

1. By s 79, PNO is required to publish, on its website, a list of the Port charges charged by it (other than charges made pursuant to an agreement under s 67). Under s 80, PNO is required to give prior notice of any change in its charges to the Minister (responsible for the administration of the PAMA Act in NSW) and by publication on its website, and must state the reason for the change. Under s 81, PNO must provide an annual report to the Minister in respect of its charges and the revenue received from the charges.
2. PNO publishes a Schedule of Service Charges that apply to the use of the Port, pursuant to the PAMA Act, which includes the navigation service charge and the wharfage charge.
3. It should be noted that s 50 of the PAMA Act requires that the navigation service charge be calculated by reference to the gross tonnage of the vessel using the shipping channel, and not the quantity of coal shipped on the vessel. Further, the *Ports and Maritime Administration Regulations 2012* (NSW) (**PAMA Regulations**) provide for the conversion of a vessel’s volume into a gross tonnage measurement. Accordingly, the cost of shipping one tonne of coal through the Port is not necessarily the prevailing rate of the navigation service charge. There was no evidence before the Tribunal concerning the average conversion ratio of the prevailing navigation service charge into a cost per tonne of coal shipped through the Port in any given period, and no party submitted that the conversion ratio would make any material difference to the issues arising on the review.
4. In *Re Glencore Coal*, the Tribunal noted that, after PNO assumed the role of Port operator, the price for coal ships using the shipping channels to enter and exit the Port was increased by between approximately 40% and 60% for some vessel types – particularly the larger more efficient vessels (at [16]).

## The declaration of Port services

1. In May 2015, Glencore Coal Pty Ltd (**Glencore**) made an application for the declaration of the shipping channel and berthing service at the Port. In January 2015, the NCC recommended against declaration, and in January 2016 the Treasurer decided not to declare the Port service. In concluding that criterion (a) (as it then was) was not satisfied, the Treasurer took account of the fact that PNO provided access to vessels shipping coal at published prices. Glencore applied to the Tribunal for review of that decision.
2. On 31 May 2016, the Tribunal published its reasons for deciding to set aside the Minister’s decision and make an order to declare the Port service for a period of 15 years, commencing July 2016 and expiring July 2031: *Re Glencore Coal*. That order was made on 10 June 2016: *Re Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7; 309 FLR 358 (***Re Glencore Coal No 2***). In relation to criterion (a), the Tribunal in *Re Glencore Coal* concluded that it was bound to apply the test as stated by the Full Court in *Sydney Airport* (at [100]) and, on that basis, criterion (a) was satisfied (at [112]-[113], [121]). Although unnecessary to its decision, the Tribunal also considered whether criterion (a) would have been satisfied if it were relevant to consider the effect of declaration (with access being provided on reasonable terms and conditions by reason of the declaration) on the promotion of competition, taking into account the likely terms of access in the absence of declaration. The Tribunal concluded that criterion (a) would not have been satisfied on that approach (at [157]). That latter approach is now required to be taken following the amendments made by the 2017 Amendment Act.
3. The Tribunal’s decision in *Re Glencore Coal* was upheld by the Full Court in *Port of Newcastle*.

## Arbitration of Port charges

1. As recorded in the NCC Recommendation, Glencore notified the ACCC of an access dispute with respect to the navigation service and wharfage charges at the Port under Division 3 of Part IIIA of the Act. In its arbitral determination made on 18 September 2018, the ACCC set out the following information concerning PNO’s published rates for the two charges, the rates of the charges proposed by each of PNO and Glencore in the arbitration and the ACCC’s determination of the charges (all in 2018 dollars):

|  |  |  |
| --- | --- | --- |
|  | Navigation service charge ($ per gross tonne | Wharfage charge ($ per revenue tonne) |
| PNO 2015 port pricing schedule | 0.7286 | 0.0720 |
| PNO 2018 port pricing schedule | 0.7553 | 0.0746 |
| PNO proposed pricing | 1.3643 | 0.0746 |
| Glencore proposed pricing | 0.4139 | 0.0746 |
| ACCC determination | 0.6075 | 0.0746 |

1. In determining the initial rates for the navigation service and wharfage charges, the ACCC used a building block model to calculate the maximum allowable revenue that PNO could recover from the two charges. The parties agreed to use the depreciated optimised replacement cost (**DORC**) methodology to value the Port assets and establish the regulated asset base upon which the capital components of the allowed revenue were to be calculated. As noted in the NCC Recommendation, the rate for the navigation service charge determined by the ACCC represented a significant decrease below the rate published by PNO as at 1 January 2018. The term of the determination made by the ACCC coincided with the term of declaration of the shipping channel service, expiring July 2031 (with the arbitral prices to apply from the commencement of declaration, July 2016). Under the determination, the initial prices were to be adjusted over the declaration period as follows:
2. The wharfage charge was to be indexed annually by reference to CPI.
3. The navigation service charge was to be reviewed on an annual and five yearly basis. In the annual review, the inputs to the building block model to be reviewed were limited to the forecast cargo volumes and gross tonnage coal vessels and non-coal vessels for the year. The five yearly review allowed review of the primary integers of the building block model including the roll forward of the regulated asset base, rates of depreciation and the useful life of assets, the weighted average cost of capital, forecast capital expenditure and forecast operating expenditure. In both categories of review, account could be taken of material change events, being a change in law that was expected to cause an increase in costs that would cause a change in the charges of more than 2.5%.
4. It is relevant to note that a material area of dispute between Glencore and PNO in the arbitration before the ACCC was the treatment in the regulated asset base of user funded capital contributions, being historic payments made by Port users to the Port owner which funded, amongst other things, channel dredging to allow larger ships to berth at the Port. Glencore argued that user funded contributions should be deducted from the Port's regulatory asset base, upon which the capital components of Port charges were calculated. The deduction of user funded contributions from the regulatory asset base would reduce the amount of capital costs PNO was able to recover through charges for the navigation service charge.
5. PNO applied to the Tribunal for review of the prices that had been determined by the ACCC. In its arbitral determination made on 30 October 2019, the Tribunal determined an initial arbitral price for the navigation service charge of $1.0058 per gross tonne (as at 1 January 2018) and the rate of wharfage charge agreed in the ACCC arbitration was maintained: *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 (***Re Port of Newcastle Operations***). In its decision, the Tribunal disagreed with the ACCC’s deduction of historic user funded contributions from the regulatory asset base of the Port.
6. Glencore applied to the Full Federal Court for judicial review of the 2019 arbitral decision of the Tribunal. In August 2020, the Full Court determined that the Tribunal’s decision was affected by errors of law, in failing to take into account the value of expansions of capacity to the shipping channels the cost of which was historically borne by Port users, and remitted the arbitral determination to the Tribunal for re-determination: *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 (***Glencore Coal***). The Full Court rejected a submission of Glencore that the Full Court should order that the Tribunal’s determination be varied by substituting the navigation service charge as determined by the ACCC. The Full Court concluded that such an order was not one that could be made by the Court (at [317]). The Full Court further concluded that its findings did not mean that, on remittal, the Tribunal was bound to adopt the navigation service charge as determined by the ACCC, stating (at [320]-[321]):

[320] …the statutory task to be undertaken by the Tribunal required it to have regard to the user contributions and not simply to bring them to account in the manner reasoned by the ACCC in its determination. It is not for this Court on review to undertake that task which involves regard to matters other than user contributions alone.

[321] Therefore, the question of user contributions and any consequence for the access price arising from a determination of that issue is a matter for the Tribunal and that aspect must be referred back to the Tribunal.

1. PNO has subsequently applied for, and been granted, special leave to appeal the Full Court decision to the High Court.
2. As a consequence of the foregoing reviews and appeals, neither the navigation service charge nor the wharfage charge is the subject of an arbitral determination under Division 3 of Part IIIA of the Act, and the current level of those charges are as set by PNO under the PAMA Act.

## The revocation of the declaration

1. Under s 44J of the Act, the NCC may recommend to the designated Minister that the declaration of a service be revoked if it is satisfied that, at the time of the recommendation, the declaration criteria would prevent the service being declared.
2. Following the amendments made to the declaration criteria by the 2017 Amendment Act, in July 2019 the NCC recommended to the Treasurer that the 2016 declaration of Port services should be revoked. The Treasurer did not publish a decision on that recommendation within 60 days of receiving it. As a result, he was deemed by s 44J(7) of the Act to have made a decision that the declaration be revoked. A revocation decision under s 44J is not reviewable by the Tribunal.
3. We note for completeness that the revocation of the 2016 declaration of Port services does not affect accrued rights. Accordingly, Glencore is able to maintain its application, originally made to the ACCC, for an arbitral determination of the navigation service and wharfage charges at the Port.

## PNO’s current charges

1. The NCC Recommendation records that, in December 2019 (and subsequent to the revocation decision), PNO published on its website new “open access” rates for the navigation service and wharfage charges for vessels using the shipping channel service taking effect from 1 January 2020. The “open access” rates published by PNO, available to any coal vessel entering the Port, are a navigation service charge of $1.0424 per gross tonne and a wharfage charge of $0.0802 per revenue tonne. In addition to publishing “open access” rates on its website, PNO also published, and offered on a standing basis, the Pro Forma Pricing Deeds. As noted earlier, the Port User Pricing Deed was published in December 2019 but was replaced by the Producer Pricing Deed and Vessel Agent Pricing Deed in March 2020. The Pro Forma Pricing Deeds were offered as an agreement in respect of the navigation service charge and wharfage charge pursuant to s 67 of the PAMA Act which could be entered into by, relevantly, coal producers or vessel agents. The Pro Forma Pricing Deeds have a 10 year term. Under each of the three deeds, PNO offered a navigation service charge of $0.8121 per gross tonne and a wharfage charge of $0.0802 per revenue tonne, subject to an annual price adjustment (the greater of CPI increases and 4%) and other adjustment terms. It is convenient to reproduce the NCC’s summary of the terms offered by PNO under each set of arrangements (pp 25-26):

**Developments at the Port since the Revocation of the 2016 Glencore Declaration**

*Vessel Open Access Regime*

5.23 In December 2019 PNO published a number of documents which collectively establish formal terms and conditions of open access arrangements at the Port for any vessel seeking to enter the Port and use its facilities. Relevant to the Council's consideration, the open access arrangements provide:

(a) An initial NSC rate of $1.0424 per GT, with effect from 1 January 2020.

(b) That PNO may vary its schedule of charges from time to time, including varying or introducing any new fees or charges. PNO will publish a notice of the proposed change on its website at least 10 Business Days before the variation is proposed to take effect.

(c) As at 13 March 2020, it was PNO's intention to adjust the NSC and wharfage charge for coal vessels annually by an amount equal to the CPI. PNO intends that these charges may also be increased to reflect additional investment by PNO in port services, any increases in government charges or taxes or changes in law and any material change events.

(d) Established a dispute resolution process (mediation and commercial arbitration).

*Port User Deed*

5.24 In December 2019, PNO published a long term pricing Deed which could be entered into by Vessel Agents, Vessel Operators, Coal Producers and free on board coal consignees involved in the shipment of coal from the Port (the Port User Deed). The Port User Deed has now been superseded and is no longer offered by PNO. Its terms included, in part:

(a) An initial term of 10 years.

(b) An initial NSC rate of $0.8121 per GT, with effect from 1 January 2020.

(c) An 'annual adjustment', being the greater of CPI or 4%.

(d) Provided for ad hoc variations to the NSC in response to changes in tax or other law which increased PNO's costs or decreased its revenues.

(e) Provided for ad hoc variations to the NSC in response to material change events (to allow PNO to recover additional costs and to sustain its equity rate of return).

(f) Established a dispute resolution process (mediation and commercial arbitration).

(g) Established 'pricing principles' to be applied in mediation and arbitration. The pricing principles include elements consistent with those the ACCC must take into account when making an arbitration determination under Part IIIA of the CCA.

(h) Established 'excluded disputes' which include disputes about the NSC when the NSC does not exceed the value of $0.8121 plus each subsequent annual adjustment.

(i) Established an 'initial capital base' being the value established by reference to the depreciated optimised replacement cost as at 31 December 2014 of the assets used in the provision of all of the services at the Port and, unless otherwise agreed by PNO, without deduction for user contributions.

(j) Established a number of information requirements.

*Producer Deed and Vessel Agent Deed*

5.25 In March 2020, PNO published the Producer Pro Forma Long Term Pricing Deed and Vessel Agent Pro Forma Long Term Pricing Deed (collectively, the Deed). The Deed replaced the Port User Deed.

5.26 The Deed maintained the terms described at items 5.23 (a) - (c) and (f) - (j) but removed the specific provisions that permitted variation to the NSC in response to tax and law reform and amended the approach to material change events. The Deed also introduced capital expenditure transparency measures and non-discriminatory pricing provisions.

1. Copies of the Pro Forma Pricing Deeds were in evidence before the Tribunal, together with an extract of PNO’s submission to the NCC explaining those documents. It will be necessary to refer to the terms of the Producer and Vessel Agent Pricing Deeds (together, the **Deeds**) in more detail below. However, it should be noted that both the Producer and the Vessel Agent Pricing Deeds constitute an agreement under s 67 of the PAMA Act in respect of the navigation service charge, while only the Producer Pricing Deed governs the wharfage charge. The Producer Pricing Deed enables coal producers to agree the navigation service charge and wharfage charge with PNO in respect of “Covered Vessels” which are defined as a vessel that is loaded with and carries out of the Port (a) the producer’s coal (i.e. coal mined from one of the producer’s mines) and no other coal or (b) the producer’s coal and other coal in respect of which PNO has agreed that the navigation service charge and wharfage charge are the same for that other coal as for the producer, and no other coal. The Vessel Agent Pricing Deed enables vessel agents to agree the navigation service charge with PNO in respect of “Covered Vessels” which are defined as a vessel that is loaded with coal at the Port in respect of which the Vessel Agent is named as the vessel's inward agent in the vessel berthing application lodged with PNO in respect of that vessel's visit to the Port.
2. PNO’s submission to the NCC in respect of the Deeds states that PNO has (through their agents) entered into, with effect from 1 April 2020, deeds with all of the coal vessels calling at the Port. As the Deeds have a 10 year term, the Deeds will determine the charges in respect of navigation services supplied at the Port in respect of the covered vessels for the next ten years (in the absence of another declaration which results in lower charges). The terms of those Deeds are the same as the pro forma Vessel Agent Pricing Deed. As a result, PNO has been charging all coal vessels calling at the Port the navigation service charge as determined in accordance with that pro forma Deed. No charges have been levied on any coal vessel under s 50 of the PAMA Act since that date and PNO does not expect to levy any charges under s 50 of the PAMA Act in relation to any coal vessel for the ten year duration of those s 67 agreements. PNO stated that it has made it clear by way of open offer on its website that the same s 67 agreement is available to any other coal vessel that should choose to call at the Port to carry export coal. This would include operators of vessels that should choose to call at the Port in the future in respect of any new mine which is developed over the period of the term of the pricing arrangement offer.
3. While NSWMC submitted that no coal producer had entered into the Producer Pricing Deed with PNO, it is uncontroversial that coal producers presently have the benefit of the navigation service charge rate in the Vessel Agent Pricing Deeds which applies to all coal vessels using the shipping channel service at the Port.

## Authorisation of collective bargaining

1. In March 2020, the NSWMC and ten mining companies sought authorisation from the ACCC to bargain collectively with PNO in respect of the terms and conditions of access for the export of coal from the Port. The ACCC granted authorisation on 27 August 2020. The authorisation permits the NSWMC and ten of its nominated members to negotiate collectively with PNO in relation to the terms and conditions of access, including price, at the Port. The authorised conduct allows for joint discussion and negotiation of common industry issues. Participation in the collective bargaining is voluntary for all parties and the authorisation does not permit boycotts. As such, PNO may be invited, but is not required, to attend and cannot be compelled to participate in the bargaining process.
2. On 17 September 2020, PNO applied to the Tribunal for review of the ACCC’s determination. The review is yet to be heard by the Tribunal. PNO’s application to the Tribunal for review has the effect that the authorisation has not come into effect (see s 91(1A) of the Act).

# TrEasurer’s Decision

1. On 16 February 2021, the Treasurer decided under s 44H(1) of the Act not to declare the shipping channel service because he was not satisfied that the criteria in paragraphs 44CA(1)(a) and (d) were satisfied. In accordance with s 44HA, the Reasons set out the Treasurer’s reasons for his decision. The Reasons stated that:

In making this decision, I have had regard to:

• the objects of Part IIIA;

• the declaration criteria in section 44CA of the CCA; and

• the NCC's Recommendation provided to me on 18 December 2020.

I have considered the findings and reasoning in the NCC's Recommendation, including the NCC's consideration of the submissions it received, and I accept the conclusions reached by the NCC in the Recommendation. Having considered those conclusions, I have independently decided that I am not satisfied that either paragraph 44CA(l)(a) or (d) are met.

1. In relation to criterion (a), the Reasons record that the Treasurer reached the following conclusions.
2. First, there are likely to be five functionally distinct dependent markets relevant to access to the shipping channel service being:
3. a coal export market (the **coal export market**);
4. markets for the acquisition and disposal of exploration and/or mining authorities (the **tenements market**);
5. markets for the provision of infrastructure connected with mining operations, including rail, road, power and water (the **infrastructure market**);
6. markets for services such as geological and drilling services, construction, operation and maintenance (the **specialist services market**); and
7. a market for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are a party (the **bulk shipping market**).
8. Second, the tenements market, infrastructure market, specialist services market and bulk shipping market are derivative markets of the coal export market. It follows that if declaration is unlikely to promote a material increase in competition in the coal export market, there would be unlikely to be a material increase in competition in any derivative market.
9. Third, the Port is a bottleneck, with Hunter Valley coal producers having no practical alternative to the Port for the export of their coal. This gives PNO considerable bargaining power over coal producers who have sunk costs in the Newcastle catchment.
10. Fourth, PNO’s incentive to deny access to the shipping channel service or otherwise exercise market power is limited for the following reasons:
11. PNO is not vertically integrated into dependent markets in any meaningful way and has no incentive to deny access to firms operating in dependent markets;
12. PNO is not capacity constrained at the Port, nor is it likely to become so over the foreseeable future;
13. PNO has provided an open access arrangement and offered a ten-year deed to coal exporters wishing to use the Port;
14. the potential for regulatory intervention by the NSW Government is likely to provide a low level of constraint on PNO’s pricing absent declaration; and
15. given the importance to PNO of coal mining revenue, and its long lease, where there is the prospect of further investment and continued demand for coal export services, PNO is likely to be mindful of reputational effects caused by its pricing.
16. Fifth, in relation to the coal export market, the market is likely to be effectively competitive and PNO is unlikely to have an incentive to diminish competition in coal export markets or to price discriminate in a way that will inhibit coal exporters’ ability to compete. Port charges are likely to remain a comparatively small component of the cost of production and export of coal, with or without declaration. While there is uncertainty around the price the Tribunal will re‑determine for the navigation service charge in its re-determination of the Glencore-PNO access dispute, the NCC considered that it is not clear that a navigation service charge set with declaration will be materially different to that offered by PNO absent declaration and, in a future without declaration, users are expected to have the option of entering a long-term deed and PNO has also published open access arrangements. Coal producers face uncertainty from factors other than Port charges that are more likely to influence their ability to compete in export coal markets. Therefore, access or increased access to the shipping channel service, on reasonable terms and conditions, as a result of declaration, would not promote a material increase in competition in that market.
17. Sixth, in relation to the other dependent markets, as those markets are derivative of the coal export market, it follows that declaration would not be likely to promote competition in those markets.
18. For those reasons, the Treasurer was not satisfied that access, or increased access, to the service on reasonable terms and conditions, as a result of declaration of the service, would promote competition in any dependent market.
19. In relation to criterion (d), the Reasons record that the Treasurer considered the NCC’s approach and adopted that approach in making his decision. In particular, the Treasurer accepted and adopted the NCC’s conclusions that declaration:
20. is unlikely to significantly affect investment in the infrastructure necessary to provide the shipping channel service as it is unclear how different (if at all) prices for the shipping channel service would be in a future with and without declaration;
21. is unlikely to significantly affect investment in dependent markets;
22. is, on balance, unlikely to materially affect administrative and compliance costs, as these costs are likely to arise in the future both with, and without, declaration; and
23. is not likely to lead to material improvements in productive, allocative or dynamic efficiency relative to the future absent declaration, or materially promote efficiency in dependent markets.
24. For those reasons, the Treasurer was not satisfied that access, or increased access, to the service on reasonable terms and conditions, as a result of declaration of the service, would promote the public interest.
25. In the course of submissions, NSWMC drew attention to the following statement concerning the amendment to criterion (a) made by the 2017 Amendment Act which appeared in a briefing note dated 18 December 2020 to the Treasurer from an officer in the Department of Treasury (the Director of the Competition Unit):

The 2017 amendments were intended to ensure that the [National Access Regime] only applies to vertically-integrated natural monopolies, consistent with the original policy intention.

1. NSWMC submitted that the statement is legally erroneous and reveals a fundamental error in the Treasurer’s decision.
2. The Tribunal accepts that the statement is legally erroneous. The declaration criteria in s 44CA do not exclude the possibility that a service will be declared even though the service provider is not vertically integrated into any dependent market. As discussed below, whether a service provider is vertically integrated into a dependent market will be relevant to the assessment of the declaration criteria, and particularly criterion (a), but it is not a determinative consideration. However, the erroneous statement in the Departmental briefing note has no bearing on the Tribunal’s review. There is nothing in the Treasurer’s Reasons to suggest that the Treasurer based his decision on that statement. Nor does the NCC Recommendation contain a statement to that effect, and the Treasurer stated that he adopted the NCC’s reasoning and conclusions.

# NSWMC submissions

## Overview

1. As noted earlier, it was common ground that declaration criterion (b) and (c) were satisfied. Accordingly, NSWMC’s submissions were directed to criterion (a) and criterion (d).
2. In relation to criterion (a), NSWMC’s submissions were focussed solely on the effect of declaration on the tenements market. It submitted that access (or increased access) to the shipping channel service on reasonable terms and conditions as a result of declaration, by comparison to the counterfactual without declaration under Part IIIA, would promote a material increase in competition in the dependent tenements market for the following reasons:
3. There will be greater certainty for investment in tenements, as market participants will have the assurance of reasonable terms and conditions of access (or increased access) to the shipping channel service against future likely price increases by PNO.
4. Absent declaration, substantial price increases are likely given PNO’s unconstrained market power and its stated views as to the limited time period for operation of coal mining in the Hunter Valley and because of PNO’s major shareholders’ interest in container terminal operations.
5. In addition, the continued or increased participation of smaller coal producers would result in an increased demand for mining licences and result in a material increase in competition in the bidding for the award of mining licences.
6. Declaration is consistent with the objects of Part IIIA as it is likely to lead to greater efficiency in the operation of, use of, and investment in supply chain infrastructure, and will thereby promote an increase in competition in dependent markets with the effect being material in at least the tenements market.
7. In relation to criterion (d), NSWMC submitted that the Treasurer’s conclusions were derivative of the conclusions reached with respect to criterion (a). In particular, the Treasurer did not find that declaration would cause any public detriments such as adverse effects on investment in the facilities used to provide the shipping channel service or in dependent markets, nor increases in administrative and compliance costs. Rather, the Treasurer was not satisfied that declaration would promote the public interest because he considered that declaration would not promote competition in any dependent market and would not promote efficiency. NSWMC submitted that, if the Tribunal were satisfied that declaration would promote a material increase in competition in a dependent market, it should for that reason be satisfied that declaration would promote the public interest. NSWMC further submitted that the following additional public benefits would also arise:
8. The continued or increased participation of major and smaller coal producers would result in an improvement in the opportunities and environment for competition in the provision of the infrastructure (including coal terminals) required for the development of coal projects, including in particular in relation to the development and output from smaller more marginal projects.
9. The continued or increased participation of major and smaller coal producers would also result in further demand in the markets for specialist services in the Hunter Valley region.
10. Declaration would address the prospect of discrimination by a vertically integrated shareholder in PNO (China Merchants Group) which has coal vessels and a possible ability to influence the nature and type of vessels and cost of those vessels accessing the Port.
11. If the Service were declared, PNO would not be able to refuse to meet coal industry representatives in collective bargaining without the threat of arbitration. Such collective bargaining would give rise to public benefits, and accordingly is in the public interest.
12. NSWMC advanced the following submissions in relation to the NCC’s analysis of the effect of declaration on competition in the tenements market (which analysis was adopted by the Treasurer).

## The test to be applied

1. NSWMC submitted that, in its Recommendation, the NCC applied an incorrect test in respect of criterion (a) by enquiring whether declaration would have the effect of increasing competition rather than the effect of improving the conditions for competition. NSWMC submitted that on numerous occasions the NCC framed the enquiry by reference to the effect on competition; for example, at [1.22], the NCC stated: “Criterion (a) requires consideration of the effects on competition in dependent markets (i.e., markets other than the market for the Service), of access or increased access on reasonable terms and conditions as a result of declaration”. NSWMC referred the Tribunal to similar statements at [1.2.6], [7.155] and [7.157].

## “Hold-up” risk of investment

1. NSWMC submitted that, in the future without declaration, market participants in the tenements market will face higher levels of uncertainty with respect to the PNO’s charges (such as the navigation service charge), which increases the risk associated with making investments in tenements, as compared to the future with access (or increased access), on reasonable terms and conditions, as a result of declaration. Further, the increased risk associated with investing in new tenements increases the borrowing costs to finance the investment, which increases the return required on investments. This elevated risk also increases the likelihood that investors will delay their investments until the uncertainty is resolved. This reduces allocative efficiency and the productivity of the Australian economy.
2. NSWMC submitted that the foregoing risks are commonly referred to as the “hold-up” risk of investment. The risk arises when one party makes long-lived investments that are both “sunk” and are specific to transactions with another party. In these instances, the investing party is locked into a relationship with the second party, and the risk arises that the second party will behave opportunistically to expropriate the value of the first party’s sunk investment. Given that investors in tenements make significant long-term, location-specific investments that ultimately depend for viability on access to the shipping channel service, the tenements market is apt to produce “hold-up” risk. In contrast, access to the shipping channel service on reasonable terms and conditions as a result of declaration would materially reduce the level of risk associated with investments in the tenements market. Ensuring that PNO’s access terms and conditions are reasonable would likely promote efficient entry (and efficient participation) such that there would be a non-trivial, material improvement in the environment for competition in the tenements market.
3. NSWMC argued that the likelihood of hold-up risk is supported by evidence given to the NCC by coal mining companies, specifically by Yancoal, Malabar Resources, Bloomfield Group, Glencore and Port Waratah Coal Services. The evidence given by those companies is considered below.

## Competitiveness of the tenements market

1. NSWMC submitted that the NCC’s analysis of the tenements market did not support a conclusion that the market is effectively competitive at present. The NCC based its conclusion on two matters: that there are a large number of licence holders; and that the State’s reforms to how coal tenements can be acquired from the State can be expected to improve the transparency of tenement acquisition and enable greater competition amongst investors seeking to acquire tenements. NSWMC submitted that those two matters do not establish that the tenements market is effectively competitive. NSWMC asserted (without evidence or development of the contention) that there are concerns about the extent of competition in the tenements market.

## Port charges relative to coal mining costs

1. NSWMC did not dispute that the navigation service charge and wharfage charge levied by PNO at the Port are small relative to coal mining costs and that there are a range of commercial and regulatory uncertainties and risks that will impact on decisions of investors or potential investors in the tenements market. NSWMC submitted, however, that it does not follow that reduced uncertainty in PNO’s future Port charges with declaration would not promote a material increase in competition in the tenements market. NSWMC argued that the commercial and regulatory uncertainties and risks faced by coal miners will be faced regardless of the location of the mine. The risk caused by PNO’s ability to increase prices absent the declaration will be specific to coal exporters in the Newcastle catchment area. This will detract from the attractiveness of investing in that area, in comparison to other projects.

## PNO’s ability and incentive to exercise market power

1. NSWMC submitted that criterion (a) does not require demonstration that the service provider has the incentive to deny access to the service or to otherwise exercise market power. While the incentive to exercise market power may be relevant, it is not a controlling nor determinative evaluation (referring to *Re Virgin Blue* at [296]). NSWMC contended that the NCC’s analysis, which was adopted by the Minister, was confined to a consideration of PNO’s incentives to exercise market power.
2. NSWMC further submitted that the NCC’s analysis involved an erroneous assessment of PNO’s ability and incentive to exercise market power. It argued that the starting point for any assessment of PNO’s market power must be that PNO is a monopolist. The Port is a bottleneck facility and Hunter Valley coal producers have no practical alternative to the Port for the export of their coal. As such, PNO is able to set terms and conditions of access to the shipping channel service free of any competitive constraint; it is not constrained from exercising its market power by the availability of substitute facilities, by the countervailing power of users or by the threat of a new facility. It follows that PNO has the ability to exercise market power in the provision of the shipping channel service. Further, PNO’s conduct since the privatisation of the Port, implementing very substantial increases in charges, demonstrates its unconstrained market power.
3. NSWMC argued that the NCC downplayed the extent of PNO’s market power, by focussing on whether PNO has an incentive to “deny access” to any users of the Port. It submitted that the NCC was wrong to conclude that there were other factors that would likely act as a constraint on PNO in setting the terms and conditions of access in a future without declaration being: (i) that PNO is likely to be mindful of harm to its reputation; (ii) the potential for regulatory intervention by the State of NSW; (iii) that PNO is not vertically integrated; (iv) that PNO has offered terms to Port users through the Producer and Vessel Agent Pricing Deeds; and (v) the Port is not capacity constrained.
4. In relation to reputational constraints, NSWMC submitted that PNO’s dealings with coal producers, specifically PNO’s refusal to participate in collective bargaining with coal producers, is inconsistent with the conclusion reached by the NCC.
5. In relation to the likelihood of regulatory intervention by the State of NSW, NSWMC submitted that the State has not intervened in relation to PNO’s setting of new terms and conditions in relation to the shipping channel service to date despite the coal industry’s concerns and there is nothing to suggest this would likely change in the future. PNO is not constrained by regulation as the PAMA Act and PAMA Regulations do not allow the State to intervene and set prices at the Port. While the prices levied by PNO are subject to price reporting to the relevant Minister of the State under Part 6 of the PAMA Act, and the Minister may refer the pricing for investigation to NSW’s Independent Pricing and Regulatory Tribunal (**IPART**), this does not allow IPART to set maximum prices or determine prices relevant to the shipping channel service.
6. In relation to vertical integration, NSWMC submitted that PNO’s 50% shareholder, China Merchants Group, has interests in container terminal operations. If PNO develops a container terminal at the Port, as is its stated intention, PNO may set its charges for the shipping channel service in a manner that sees the coal industry cross-subsidise container freight (by setting port access charges to coal vessels so as to recover part of the capital costs of the development of the container terminal).
7. In relation to the terms of the Producer and Vessel Agent Pricing Deeds, NSWMC submitted that they will not constrain PNO because it is not required to offer the Deeds and is entirely free to withdraw or change the terms of those arrangements at any time. NSWMC observed that PNO has not given an irrevocable undertaking, or a promise by deed poll (a deed binding a single person), not to withdraw its present offer to enter into the Producer and Vessel Agent Pricing Deeds with any coal producer and vessel agent respectively. Further, in contrast to the likely duration of a declaration, the Deeds only have a term of 10 years. NSWMC also submitted that, in any event, the terms of the Producer and Vessel Agent Pricing Deeds are unreasonable (and can be contrasted with reasonable terms and conditions of access as a result of declaration) in the following respects:
8. The navigation service charge rate under the Deeds includes a return on user funded assets which was rejected by the ACCC. While the inclusion of such a return was accepted by a previous decision of the Tribunal, the Full Federal Court concluded that that decision was affected by errors of law.
9. The navigation service charge rate under the Deeds may be increased unilaterally by PNO on an annual basis (in addition to the annual CPI/4% increase) (Item 7(b) of the Deeds). While any such increase must be in accordance with the Pricing Principles (as defined in cl 4.2 of Sch 3 to the Deeds), the Pricing Principles are not identical to the principles that would apply to the arbitration of a dispute under Division 3 of Part IIIA of the Act (by s 44X(1)). In particular, cl 4.2 of Sch 3 does not contain an equivalent principle to that stated in s 44X(1)(e) (the value to the provider of extensions, including expansions of capacity and expansions of geographical reach, whose cost is borne by someone else), which was the subject of the dispute concerning user funded contributions in the Tribunal’s decision in *Re Port of Newcastle Operations* and the Full Court’s decision in *Glencore Coal*.
10. The dispute mechanisms in the Deeds are not reasonable terms and conditions of access and are no substitute for arbitration under Part IIIA of the Act (Items 8 and 9 of the Deeds). In particular, the previous arbitration conducted by the ACCC on the application of Glencore resulted in the adoption of a regulated asset base and building block methodology to determine allowed revenues and prices, with disclosure of relevant financial inputs to the model. In contrast, arbitration in accordance with the ACICA Arbitration Rules (as stipulated by cl 3.3 of Sch 3 to the Deeds) does not necessitate any particular methodology to determining prices or disclosure of financial information.
11. While the Producer Pricing Deed requires PNO to provide capital expenditure forecasts to coal producers on a rolling five-year basis and coal producers have an opportunity to comment, PNO is not obliged to implement any comments (Item 7 of the Producer Pricing Deed).
12. In relation to Port capacity, NSWMC did not dispute that the shipping channel service is not presently capacity constrained, nor is it likely to be in the foreseeable future. NSWMC submitted that it does not follow that PNO’s ability to set the terms and conditions of access, including by way of discriminating on access terms and conditions (including price) between users through bilateral negotiations, is constrained. PNO could charge each mine a different price for the use of Port services and, if it is able to do this effectively, PNO could achieve an outcome in which there is no reduction in throughput.

## Period of declaration

1. NSWMC requested the Tribunal to declare the shipping channel service for a period of 20 years. It argued that a 20 year declaration would provide certainty to participants in the tenements market enabling them to invest in the exploration and development of coal resources in the Hunter Valley knowing that they will be able to access shipping channel services on reasonable terms and conditions under Part IIIA of the Act.

## Decisions of the Queensland Competition Authority

1. In the course of oral submissions, the NSWMC made extensive reference to recent decisions of the Queensland Competition Authority (**QCA**) regarding applications for declaration of services provided by Aurizon Network Pty Ltd (the use of a coal system for providing transportation by rail), Queensland Rail Limited (the below rail service on certain routes) and DBCT Management Pty Ltd (the handling of coal at the Dalrymple Bay Coal Terminal by the terminal operator) pursuant to s 87A of the *Queensland Competition Authority Act 1997* (Qld). NSWMC submitted that those decisions illustrated the proper approach to the issues that arise in this matter and that the approach of the QCA could be contrasted with the analysis undertaken by the NCC, and adopted by the Minister, in this matter.
2. The Tribunal does not find that those decisions of the QCA are of any assistance to the present review. They are administrative decisions made in respect of different types of facilities in different market circumstances. Indeed, in its decision concerning the below rail service provided by Queensland Rail, the QCA referred to the NCC Recommendation in this matter and noted that the service provided by Queensland Rail is materially different from the service provided by PNO (QCA, Part B: Queensland Rail declaration review, p 4). It is unnecessary to refer further to the QCA decisions.

# consideration of criterion (A)

## Meaning of criterion (a)

1. Criterion (a) is 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 discussed earlier, criterion (a) requires a forward looking assessment of the effect of access (or increased access) to the service on reasonable terms and conditions as a result of declaration. An important consideration in applying the criterion is whether access will be, or is likely to be, available without declaration and the commercial features of such access including the nature and scope of access, the terms and conditions of access and any capacity limitations to access.
2. A number of aspects of criterion (a) require further elaboration in order to address arguments advanced by the parties in the proceeding.

### The meaning of “competition”

1. The meaning of the word “competition” in the Act has been explained in many cases. By and large, the cases refer back to the explanation provided by the Tribunal in *QCMA* at 511-512, which made the following points:
2. At its most fundamental, competition is a mechanism for discovery of market information: the types and quantities of goods and services that are demanded and how they may be supplied at least cost. Prices and profits are the signals which register the play of these forces of demand and supply. Competition is also a mechanism for enforcement of business decisions in light of this information: firms disregard these signals at the threat of losing sales to alternative suppliers.
3. Effective competition connotes that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more, because they will be constrained by existing competitors or potential new entrants.
4. Competition expresses itself as rivalrous market behaviour. Effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to customers.
5. While competition is a process rather than a situation, the nature and extent of competition is affected by the conditions of the relevant market, particularly market concentration, the height of barriers to entry, the extent of product differentiation, the character of vertical relationships between customers and suppliers and the extent of vertical integration and the existence of horizontal relationships between suppliers or between customers.
6. Similarly, in *Re Fortescue Metals*, the Tribunal described both the process of competition and the extent of competition. In relation to the process of competition, the Tribunal said (at [1050]):

In economics, the word “competition” (as a process) has many meanings. Stigler’s well-known definition is “rivalry between individuals (or groups or nations) and it arises whenever two or more parties strive for something that all cannot gain”. Under this definition, competition refers to behaviour, and especially to patterns of business behaviour. Relevantly, it relates to behaviour that may affect the price or quality or conditions of sale of goods exchanged in the relevant market. Hence competition may be described as rivalry that amounts to a process that leads to an increase in economic efficiency.

1. In relation to the extent of competition, the Tribunal said (at [1051]):

The extent of competition is another matter. Economists describe markets as perfectly competitive, effectively competitive or imperfectly competitive (such as monopolies or oligopolies). The state of competition in a market is the result of internal and external factors which bear upon the nature and extent of the rivalry. Hence, in *Application by Chime Communications Pty Ltd (No 2)* (2009) 257 ALR 765; [2009] ACompT 2, the tribunal said (at [48]):

[48] In the Tribunal’s view a market is sufficiently competitive if the market experiences at least a reasonable degree of rivalry between firms each of which suffers some constraint in their use of market power from competitors (actual and potential) and from customers. The criteria for such competition are structural (a sufficient number of sellers, few inhibitions on entry and expansion), conduct-based (for example no collusion between firms, no exclusionary or predatory tactics) and performance-based (for example firms should be efficient, prices should reflect costs and be responsive to changing market forces).

### The meaning of “promote a material increase in competition”

1. As noted earlier, the Tribunal in *Re Sydney International Airport* concluded that the notion of "promoting" competition in criterion (a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That interpretation of the phrase has been followed in subsequent Tribunal decisions, was approved by the Full Court in an analogous context in *Telstra Corporation* and was also adopted by the Full Court in *Port of Newcastle*. Despite that, PNO contends that the amendments made to criterion (a) by the 2006 Amendment Act, which introduced the words “material increase in”, altered the meaning of the criterion. PNO argued that criterion (a) requires the decision maker to be satisfied that declaration would result in an increase in competition in a dependent market.
2. The Tribunal considers that the Full Court decision in *Port of Newcastle* requires it to reject PNO’s contention. Even if that were not the case, the Tribunal would not accept PNO’s contention. The ordinary meaning of the word “promote” is to support, encourage, facilitate or further. The ordinary meaning is consistent with the use of the word in its statutory context. The object of the national access regime in Part IIIA is to 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 (s 44AA(a)). The creation of such rights of access, on reasonable terms and conditions under Part IIIA, may remove or reduce a barrier or impediment to competition in a dependent market. As explained by the Tribunal in *Re Sydney International Airport*, the notion of promoting competition refers to enhancing the conditions or environment for competition in a dependent market by creating rights of access on reasonable terms and conditions.
3. Contrary to PNO’s submission, the 2006 amendment to criterion (a) did not alter the meaning of the word “promote”. The relevant phrase changed from “promote competition” to “promote a material increase in competition”. Each phrase is introduced by the verb “promote”. In support of its contention, PNO relied on the statement in paragraph 1.9 of the Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005 (Cth) to the effect that the amendment was made “to ensure that access declarations are only granted where the expected increase in competition in an upstream or downstream market is not trivial”. That statement does not indicate a different meaning of the word “promote”. The notion of promoting an increase in competition by creating rights of access is entirely consistent with the notion of expecting an increase in competition as a result of access.
4. Finally, it should be observed that the distinction sought to be drawn by PNO is more semantic than real. Any difference between enhancing the conditions or environment for competition and increasing competition is subtle. As the Tribunal explained in *QCMA* (at 512), competition is a process, not a situation and expresses itself as rivalrous market behaviour (quoted in *Re Virgin Blue* at [145]). In the ordinary course, if the conditions or environment for competition are enhanced it can be expected that competition will be increased.

### The meaning of “would”

1. Criterion (a) requires that access as a result of declaration *would* promote a material increase in competition. The meaning of the word “would” was considered by the Tribunal in *Re Virgin Blue.* The access seeker, Virgin Blue, submitted that the phrase “would promote competition” meant that “there is a significant finite probability, rather than that such a consequence be ‘more probable than not’” (at [160]), whereas the facility owner, Sydney Airports Corporation Ltd, submitted the opposite. The Tribunal accepted the submission of Virgin Blue and expressed the view that the phrase required the Tribunal to be satisfied that there would be a “significant, finite probability” of competition being promoted (at [162]).
2. PNO contends that the Tribunal’s interpretation of the word “would” in *Re Virgin Blue* was incorrect. PNO argued that the word has its ordinary meaning, which is the conditional tense of the verb “will”. The Tribunal accepts that contention and, respectfully, does not agree with the interpretation adopted in *Re Virgin Blue*.
3. The meaning of the word “would” in criterion (a) was not addressed by the Full Court in *Sydney Airport*. Subsequently, in *Port of Newcastle*, the Full Court stated (at [86], in respect of criterion (a) prior to its amendment by the 2017 Amendment Act) that:

Criterion (a) requires the decision-maker to be satisfied that if an event or circumstance (access or increased access to the service) happens, then a state of affairs *will follow* (the promotion of a material increase in competition in a dependent market). The decision-maker is required to make a prediction or forecast of the conditions or environment for improving competition in a dependent market with access or increased access on the one hand, and without access or increased access on the other. The latter circumstance is often referred to (perhaps not entirely accurately) as the counterfactual. (Emphasis added.)

1. In the above passage, the Full Court adopted the ordinary meaning of the word “would” (if access is given, a promotion of competition will follow).
2. The word “would” is commonly used in the Act as many of the provisions of the Act address the future competitive consequences of particular conduct. Recently, in *ACCC v Pacific National* (2020) 277 FCR 49 (***Pacific National***), the Full Court considered the meaning of the phrase “if the acquisition would have the effect, or would be likely to have the effect, of substantially lessening competition in any market” in s 50 of the Act. The plurality (Middleton and O’Bryan JJ) observed that the section contains two legal standards: the section is contravened if the acquisition *would* have the effect of substantially lessening competition and the section is also contravened if the acquisition *would be likely* to have the effect of substantially lessening competition (at [220]). In respect of the first legal standard, “would have the effect of substantially lessening competition”, the plurality considered that the standard conveyed certainty (i.e. the consequence will follow), although the legal standard must be proved to the civil standard of proof, on the balance of the probabilities (at [223]). In respect of the second legal standard, “would be likely to have the effect of substantially lessening competition”, the plurality considered that the longstanding interpretation of the phrase as a likelihood that is less than probable should not be overturned (at [243]).
3. Consistently with the approach adopted in both *Port of Newcastle* and *Pacific National*, the Tribunal considers that the word “would” in criterion (a) should be construed in accordance with its ordinary meaning. In a civil administrative context, the word requires the decision maker to be satisfied that, if the service is declared and access given on reasonable terms and conditions, a material increase in competition will be promoted by that access.
4. In the present matter, though, the Tribunal considers that the same ultimate conclusion on criterion (a) must be reached whether the word “would” is interpreted as the conditional tense of the verb “will” (which, in a civil administrative context, requires the Tribunal to be satisfied on the balance of probabilities) or is interpreted as including a “significant finite probability” that is less than 50%.

### The meaning of “access … as a result of declaration”

1. In assessing whether access (or increased access) to the service on reasonable terms and conditions as a result of declaration would promote a material increase in competition, it is necessary to assess whether access is likely to be available without declaration and the commercial terms of such access. In the present case, and as discussed below, an important part of the argument focussed upon the existing terms of access to the shipping channel service at the Port, particularly under the Producer and Vessel Agent Pricing Deeds, and whether those terms of access would remain available in the future and, if they do, the degree to which the terms will constrain price increases in the future. NSWMC submitted that there is no certainty that, in the future, PNO will continue to offer access under the terms of the Deeds and, even if it does, the terms of the Deeds afford no certainty as to the navigation service charge and the wharfage charge in the future because PNO has the ability to increase the charges. In response, PNO submitted that the determination of access prices at the Port in an arbitration under Part IIIA as a result of declaration has been demonstrated to involve considerable disputation and uncertainty, with the Glencore initiated arbitration currently before the High Court. Indeed, PNO submitted that the future without declaration (pricing determined by the Deeds) is more certain than a future with declaration.
2. In the NCC Recommendation, the NCC observed that there is a degree of uncertainty regarding precisely what terms and conditions, including price, of access might be set for the shipping channel service as a result of declaration (at [7.78]). To some extent, the NCC appears to have taken that into account as a factor in applying criterion (a).
3. The Tribunal considers that criterion (a) does not permit the comparison advocated by PNO and seemingly adopted by the NCC. The position would be different if the criterion referred to whether “declaration” or “access as a result of declaration” would promote a material increase in competition. Instead, the criterion refers to access on reasonable terms and conditions as a result of declaration. The assumption inherent in the language of criterion (a) is that declaration will result in access to the relevant service on reasonable terms and conditions. The phrase “on reasonable terms and conditions” is not defined in the Act. The Competition Policy Review Explanatory Memorandum stated (at [12.21]):

This is an objective test that may involve consideration of market conditions. It does not require that the Council or Minister come to a view on the outcomes of a Part IIIA negotiation or arbitration. The requirement that access is on reasonable terms and conditions is intended to minimise the detriment to competition in dependent markets that may otherwise be caused by the exploitation of monopoly power. Reasonable terms and conditions include those necessary to protect the legitimate interests of the owner of the facility.

1. While experience shows that access as a result of declaration may involve considerable disputation with resulting delays and cost, criterion (a) requires the decision maker to assume that declaration will result in access on reasonable terms and conditions. In relation to price terms, the appropriate assumption is that prices would be determined in accordance with the principles specified in Division 3 of Part IIIA (specifically, s 44X) and would provide the facility owner with a normal expected rate of return. The matter that must be assessed is whether that outcome, which is to be assumed, will promote a material increase in competition. The enquiry necessarily focusses on the future market and commercial circumstances without declaration (in particular, whether access is likely to be available and the likely terms of access) in order to assess whether access as a result of declaration would promote a material increase in competition.
2. For those reasons, the Tribunal has had no regard to arguments concerning the uncertainty of future access terms and conditions as a result of declaration. The Tribunal makes the assumption that such access terms and conditions will be determined and will be reasonable. The Tribunal notes for completeness, though, that the delay and costs associated with disputes over the terms and conditions of access under Part IIIA are not ignored in the declaration criteria. Section 44CA(3)(b) requires the decision maker, in the context of assessing criterion (d) (promotion of the public interest) to have regard to the administrative and compliance costs that would be incurred by the provider of the service if the service is declared.

### The time horizon

1. Any evaluation of markets, competition and the expected behaviour of economic actors depends upon the time horizon specified for the evaluation. The parties did not address the Tribunal as to the time horizon that is relevant to the assessment of criterion (a), but the Tribunal considers it important to be clear about the time horizon to be applied in its evaluation. The criterion requires that access as a result of declaration would promote a material increase in competition in a dependent market, which requires that the conditions, opportunities or environment for competition are improved in more than a trivial way. The criterion is necessarily forward looking and invites the question: over what time horizon should the potential for improvement be assessed?
2. The NCC expressed the view (at [4.23]) that “when making judgements about likely future conditions and the environment for competition, it is necessary to look beyond short-term static effects” and that “it is appropriate to consider the effects of declaration on investment incentives in dependent markets and for the service provider, and the effects of foreseeable changes in technology and/or market conditions”. The Tribunal agrees with that view.
3. The economic issues with which Part IIIA is concerned indicates that the time horizon relevant to the assessment is across the medium term. By “across”, we mean that the effects of declaration should be assessed having regard to the present market conditions, opportunities and environment and forecasting how those conditions, opportunities and environment may evolve and change into the medium term with and without declaration. The object of Part IIIA is economic: to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in dependent markets. The infrastructure liable to declaration under Part IIIA is typically long-lived. Most significantly, changes in the terms of access to the infrastructure may not have immediate effects on competition in dependent markets and may only have effects in the medium term. This is because firms in dependent markets may have sunk costs. Provided the terms of access do not result in dependent market firms’ marginal costs exceeding their marginal revenues, the terms may have no immediate effect on existing firms’ consumption or production decisions. However, over the medium term, the terms of access may decrease the existing firms’ incentives to undertake further investment or otherwise increase consumption and production in the dependent market and may deter entry by new firms.
4. What constitutes the medium term in a given case may vary depending on the characteristics of the industries that are the subject of consideration. However, we consider that the assessment of the medium term should be guided by one practical consideration: over what time period is it feasible to make reasonable predictions about the conditions, opportunities or environment for competition in relevant dependent markets with and without declaration? In the present proceeding, the Tribunal defines the medium term as 10 to 15 years. In that regard, it should be noted that the refusal of declaration at a given point in time, based on the information available to the decision-maker at that point in time, does not preclude future applications for declaration. Indeed, there is no legislative restriction on the number of applications that can be made over time. Accordingly, if the decision-maker’s predictions about the conditions, opportunities or environment for competition in relevant dependent markets with and without declaration across the medium term prove to be inaccurate, an access seeker may apply again for declaration of the relevant service. Contrary to a submission advanced by NSWMC, an access seeker should feel no lack of confidence in making a future application if it can be demonstrated that the behaviour of the facility owner, or some aspect of the conditions, opportunities or environment for competition in relevant dependent markets, are materially different from that previously predicted.

## How access may affect the conditions and environment for competition in dependent markets

1. Part IIIA of the Act was first enacted in response to recommendations made in Chapter 11 of the 1993 report of the Independent Committee of Inquiry into a National Competition Policy (the ‘Hilmer Report’). That chapter explained (at p 239) that some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically, and occupy strategic positions in an industry such that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets. The Hilmer Report referred to facilities displaying those characteristics as "essential facilities". It is also common to use the description “bottleneck facility”, an expression we prefer to use in this matter.
2. The Hilmer Report described two broad categories of economic problems that may arise with bottleneck facilities (at pp 240-241). The first is where the owner of the facility is not competing in upstream or downstream markets. The Hilmer Report expressed the view that, in those circumstances, the owner of the facility will usually have little incentive to deny access. However, the owner of the facility may be able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency. The Hilmer Report indicated that monopoly pricing issues could be addressed, where appropriate, through price monitoring or surveillance, implying that monopoly pricing is not an issue to be addressed by the recommended access regime. We will return to that point. The second category of economic problem described in the Hilmer Report is where the owner of the facility is vertically integrated with potentially competitive activities in upstream or downstream markets. The Hilmer Report expressed the view that, in those circumstances, the potential to charge monopoly prices may be combined with an incentive to inhibit competitors' access to the facility.
3. The Productivity Commission, in the 2013 Productivity Commission Report, described the economic problems that may arise with bottleneck facilities in similar terms (at pp 6 – 7 ), stating:

Where there is an enduring lack of effective competition in markets for infrastructure services, a provider might deny access to, or restrict output and charge monopoly prices for, its infrastructure service. This can reduce economic efficiency where access to the service is required for third parties to compete effectively in dependent (upstream and downstream) markets. As a consequence, transactions that would enhance community wellbeing may not proceed.

Both vertically integrated and vertically separated infrastructure service providers can have an ability and incentive to engage in monopoly pricing of access. Incentives to deny access to some or all access seekers will be heightened where service providers are vertically integrated — that is, where service providers also operate in markets upstream or downstream of the facility. A vertically integrated monopolist may deny access to its infrastructure services to an upstream or downstream competitor if that increases total profits across its operations.

The only economic problem that access regulation should address is an enduring lack of effective competition, due to natural monopoly, in markets for infrastructure services where access is required for third parties to compete effectively in dependent markets. Access regulation should not be used to avoid the duplication of infrastructure per se, or to address wider social and economic issues such as income distribution or environmental concerns.

1. The Tribunal agrees that where the owner of a bottleneck facility is vertically integrated with potentially competitive activities in upstream or downstream markets, there may be commercial incentives to deny or restrict access to the bottleneck facility by third parties for the purpose of protecting profits in the relevant dependent market. The denial or restriction of access may take many forms including: a refusal to supply access to the facility; a constructive refusal to supply access by offering a price that renders access uneconomic; imposing restrictions on access as to quantity or other terms that either render access uneconomic or that inhibit the manner and extent of access. The denial or restriction of access may harm the conditions or environment for competition in dependent markets by preventing or limiting entry to such markets or expansion or other competitive behaviour in such markets.
2. However, and as recognised by the Productivity Commission, where the owner of a bottleneck facility is not vertically integrated, there remains the potential for the facility owner to set terms of access that harm the conditions or environment for competition in dependent markets. For example, in *Re Sydney International Airport*, the Tribunal considered whether a tender process by which Sydney International Airport made available access to the airport for the provision of ramp handling services (the loading and unloading of freight and passenger baggage at the aircraft on the apron) was harmful to competition in the market for such services. The Tribunal reached the conclusion that the treatment of incumbent suppliers in the tender process biased the selection criteria towards entities with similar operating characteristics and economics as the main incumbents, which in turn effectively precluded competitive entry by lower cost operators offering a novel or different mix of service and price (at [124], [145]). The Tribunal ultimately concluded (at [149]) that a future with declaration offered the opportunity for a range of competitive behaviour and outcomes (in the market for ramp handling services) that were superior in depth and variety than available without declaration. In *Re Virgin Blue*, the Tribunal considered whether Sydney Airport’s method of charging fees to airlines for airside services had discriminatory effects on the airlines (according to their different business models) and thereby harmed the conditions or environment for competition. The Tribunal reached the conclusion (at [222]) that Sydney Airport changed the basis of its airside charges to a methodology which it had been told by Virgin Blue was inefficient and anti-competitive when it also knew that Qantas believed it would give it a competitive advantage over Virgin Blue and wanted it changed for that reason. As each of *Re Sydney International Airport* and *Re Virgin Blue* make clear, criterion (a) does not require proof that the facility owner intended to harm the conditions or environment for competition in the dependent market. The Tribunal discusses the separate question of the facility owner’s incentives to offer particular terms of access below.
3. An important question that arises in this proceeding is whether, and in what circumstances, “mere” monopoly pricing by a non-vertically integrated facility owner may harm the conditions or environment for competition in a dependent market. By “monopoly pricing”, we mean simply that the facility owner increases the price for access to the facility above that consistent with a normal expected rate of return. As noted above, the Hilmer Report implied that monopoly pricing by a non-vertically integrated facility owner was not an issue to be addressed by the recommended access regime. However, the Productivity Commission acknowledged in the 2013 Productivity Commission Report that, in some circumstances, monopoly pricing may affect competition in dependent markets. Under the heading “What about monopoly pricing?”, the Productivity Commission commented (at p 173):

The Commission agrees that where the terms of access are so ‘inadequate or unreasonable’ they disrupt competition in dependent markets, the consequent efficiency losses represent a problem that access regulation should address. However, competition can be an imprecise proxy for efficiency in some circumstances, particularly with regard to monopoly pricing. This may be the case where monopoly pricing by an infrastructure service provider does not affect the level of competition in dependent markets. For example, in the Virgin Blue case, the NCC considered that even a large increase in airside service charges by Sydney Airport would not reduce demand sufficiently to cause an exit from the market or a contraction in the number of flights offered on Sydney routes such that competition would be adversely affected. It therefore recommended against declaration on the basis that it would not promote competition (NCC 2003).

The Commission considers that it is appropriate that criterion (a) — reframed to consider the effect of declaration rather than access — allows for declaration where the prevailing terms and conditions of access are so poor that they disrupt competition in another market.

1. In this context, it is necessary to distinguish between the efficiency consequences of monopoly pricing by the facility owner and the consequences for competition in dependent markets. As the Productivity Commission observed in the passage cited earlier, an infrastructure service provider charging monopoly prices for access to their infrastructure can lead to allocative inefficiency where output in a dependent market is lessened as a result. However, the reduction in output and associated allocative inefficiency cannot be equated with a reduction in the conditions or environment for competition or competition itself. As observed by the Tribunal in *Re Glencore* (at [133]), the effect of monopoly pricing is simply to raise the price of one of myriad input prices to a dependent market and, when one of an industry’s costs goes up, there is no presumption of an adverse effect on competition. Similarly, the Tribunal in *Re Virgin Blue* accepted (at [208]) the contention of Sydney Airport that the impact that a change in tariff structure has on airlines’ costs must be distinguished from an impact on competition (while observing that the extent of competition in the dependent market can still be inhibited by the imposition of a discriminatory charge). An increase in an industry’s cost structure has no necessary effect on the degree of rivalry or the competitive process in the dependent market, because the increase in the cost structure does not affect the market structure and behavioural factors that determine the competitive process.
2. The Tribunal therefore agrees with the following statement of principle of the NCC (at [7.12]):

Criterion (a) is not met merely by establishing that a service provider is a natural monopolist with respect to the provision of a service, possesses market power or is able to charge a price above what would be charged in a competitive market for the service. For instance, even where lower prices for access to a service may arise in a future with declaration of a service, compared to a future without declaration, this does not necessarily mean that competition will be promoted in a dependent market. This might be the case if, for example, a lower price for access would lead to little or no change in consumption or production decisions with respect to the service the subject of a declaration application. In these circumstances, a lower price for access may merely have the effect of redistributing the economic surplus generated within a supply chain. Criterion (a) will not be satisfied by establishing that regulated access will result in a different distribution of rents between access seekers and a provider of a service.

1. Indeed, a transfer of economic rents between parties in a supply chain, which does not affect the willingness of existing producers to consume or produce, will not have an adverse effect on allocative efficiency, let alone an adverse effect on competition, in the dependent markets. However, even if monopoly pricing were to cause a reduction in consumption or production, that will not *necessarily* affect the conditions or environment for competition in the dependent market.
2. The Tribunal emphasises though, that each case is fact specific and depends upon the nature of the facility, the nature and extent of competition in the dependent markets, and the potential significance of access prices (and increases in the access prices) to competition in the dependent markets. The Tribunal acknowledges the possibility that, in a given case, the potential for “mere” monopoly pricing may cause firms to exit a market or prevent firms from entering a market or otherwise create circumstances where it is possible to conclude that there has been a material decrease in the conditions or environment for competition in the market.

## Framework for the evaluation

1. The foregoing discussion of the meaning of criterion (a), and the manner in which access may affect the conditions and environment for competition in dependent markets, sets the framework for the evaluation of criterion (a). The criterion requires an assessment, across the medium term, of the effect on the promotion of competition of access (on reasonable terms and conditions) as a result of declaration, which necessitates a comparison with the market and commercial circumstances without declaration.
2. Without being exhaustive, the necessary steps in the assessment are:
3. first, identify the relevant service to be declared and the relevant dependent markets;
4. second, examine the nature and extent of competition in the market for the relevant service (if any) and in the relevant dependent markets;
5. third, evaluate whether, to what extent and on what terms the relevant service provider is likely to provide access to the service in the future without declaration and how any such access may impact on the conditions or environment for competition in the relevant dependent markets; and
6. finally, evaluate whether access as a result of declaration will promote a material increase in competition in a dependent market in comparison to access (if any) without declaration.
7. In the present case, there is no dispute with respect to the first step of the analysis. The relevant service to be declared is the shipping channel service and, while numerous dependent markets were identified by the NCC, NSWMC’s application for review is focussed on the promotion of competition in the coal tenements market. The consideration of the issues is therefore directed to the coal tenements market, although it will be necessary to refer to the overall supply chain for the export of coal from Australia.

## The shipping channel service

1. A description of the Port of Newcastle and the shipping channel service has been provided earlier in these reasons. To recap, the Port is one of the larger coal export ports in the world, with coal extracted from the Hunter Valley being shipped through the Port. In 2018, the Port handled 158.6 million tonnes of coal with a value of approximately $23.6 billion. The Hunter Valley coal industry and associated supply chain are the largest coal export operations in the world, producing over 170 million tonnes of saleable coal per year with more than 30 operating coal mines operated by 11 coal producers as well as other coal projects in various stages of exploration and development. There are three main rail haulage providers who transport coal from the mines to export terminals at the Port. Coal is then loaded onto vessels at one of the loading terminals. The Port is operated by PNO under a 98-year sublease. As the operator of the Port, PNO controls the terms and conditions of access to the Port including, relevantly, the shipping channels and berthing facilities required for the export of coal from the Port.
2. It is uncontroversial that the Port is a bottleneck facility for coal producers in the Hunter Valley. As stated by the NCC (at [7.33]‑[7.34]):

7.33 The Port is a bottleneck: Hunter Valley coal producers have no practicable alternative to the Port for the export of their coal. While some coal is exported through Port Kembla, that port is not currently an effective competitive constraint on PNO.

7.34 As the Port is a bottleneck, PNO has considerable bargaining power over Hunter Valley coal producers who have already sunk costs in exploration and extraction in the Newcastle catchment, where these producers have no other economically viable means to load coal for export markets. This enables PNO to set terms and conditions of access to these coal producers free from any constraint from alternative nearby providers of coal export terminal services.

1. PNO did not contest that conclusion. However, it does not follow from that conclusion that PNO has unconstrained market power. A key issue that arises on the review is the extent of PNO’s market power, specifically its ability and incentive to set terms and conditions of access in a manner that would negatively impact the competitive conditions in the coal tenements market. That issue requires an examination of all commercial, regulatory and economic factors bearing upon PNO as supplier of the shipping channel service and the extent to which those factors constrain PNO’s commercial decisions.
2. NSWMC submitted that where, as in the present case, the facility that provides the relevant service is a bottleneck facility (it cannot be bypassed), the necessary starting point for the analysis is the unarguable ability for the facility owner to set terms and conditions of access that harm competitive conditions in dependent markets. NSWMC argued that, in a practical sense, the facility owner bears the burden of persuading the Tribunal that it is constrained to act in a manner that will not harm competitive conditions. The Tribunal accepts that submission to a point. However, the Tribunal considers that it is wrong to start with any *a priori* position. All of the commercial, regulatory and economic factors bearing upon the facility owner in respect of the supply of the relevant service, and upon suppliers in dependent markets, must be assessed in order to arrive at a conclusion in respect of criterion (a). It is necessary to examine the available information concerning the existing industry structure, behaviour and performance, and contemplated and foreseeable changes to structure, in order to make reasonable predictions about future industry behaviour.

## The coal tenements market

1. In its application to the NCC, NSWMC identified the coal tenements market as markets for the acquisition and disposal of exploration and/or mining authorities and submitted that the coal tenements market should be divided into:
2. early stage exploration licences - the market for trading exploration licences for coal in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield;
3. advance stage exploration licences that are likely to be developed into operating coal mines - the market for the supply and acquisition of late stage exploration licences in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield, and parts of the Western Coalfield catchment; and
4. operating coal mines, typically mining licences - the market for the supply and acquisition of operating mines in the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfield.
5. It is relevant to note that the coal tenements market, as identified and defined by NSWMC, might be described as an “asset market”. It is a market for the acquisition and disposal of exploration and/or mining authorities. That observation has some significance for considering the likely effect of an increase in charges for the shipping channel service at the Port. As discussed below, an increase in charges may affect the valuation of such exploration and/or mining authorities without any necessary effect on the conditions or environment for competition in the market for the acquisition and supply of such authorities.
6. The NCC explained (at [7.130]-[7.132]) that a ‘tenement’ or ‘exploration authority’ is the right under licence to carry out prospecting, exploration or mining activity in respect of a specific piece of land. Such licences are required because all mineral resources in Australia are owned by the Crown. In NSW, all exploration and mining activity must be conducted in accordance with an authority issued under the *Mining Act 1992* (NSW). Acquiring rights to mineral deposits generally begins with acquiring an ‘exploration licence’, which grants an exclusive right to search for specific resources in a defined area. An exploration licence enables the licence holder to explore areas where mineral and petroleum resources may be present, to establish the quality and quantity of those resources, and to investigate the viability of extracting the resource. If valuable minerals have been discovered, the owner of the exploration licence may then apply for a production/mining lease. A mining lease permits the business to mine for minerals over a specific area of land. The grant of an exploration licence does not guarantee the grant of a mining lease. As part of the process of applying for a mining lease, the applicant (the exploration licence holder) must go through a separate assessment process (including an environmental impact assessment and extensive public consultation).
7. The NCC reached the conclusion (at [7.146(a)]) that, while it is possible that the geographic scope of the coal tenements market extends beyond the Newcastle catchment, it is not necessary to determine precisely the geographic scope in order to assess whether declaration would be likely to promote a material increase in competition in this market. The NCC reasoned that, if declaration would not promote a material increase in competition where a narrow geographic view of the market is applied, it is even less likely that declaration would promote a material increase in competition in a more broadly defined geographic market. The NCC therefore analysed whether declaration would be likely to promote a material increase in competition in a market for coal tenements in the Newcastle catchment. No participant in the review sought to persuade the Tribunal that that approach was erroneous, and the Tribunal considers that the approach is appropriate.
8. The NCC concluded (at [7.147]) that the coal tenements market is effectively competitive. It observed that there are a large number of licence holders, which suggests that the holding of tenements in the Newcastle catchment is not significantly concentrated in the hands of only one or two market participants. The NCC also observed that there appears to also be a number of holders of existing licences that have significant market capitalisations, including multi‑nationals with diversified operations. The NCC considered that reforms to how coal tenements can be acquired from the State of NSW can be expected to improve the transparency of tenement acquisition and enable greater competition amongst a large pool of potential investors seeking to acquire tenements in the Newcastle catchment (which will not necessarily be limited to existing investors in the Newcastle catchment).
9. NSWMC argued that the matters referred to in the preceding paragraph were an insufficient foundation for the NCC’s conclusion that the coal tenements market is effectively competitive. The Tribunal agrees that other factors may have a bearing on an assessment of the competitiveness of the coal tenements market, including a more detailed examination of market concentration and barriers to entry in particular. However, NSWMC did not refer the Tribunal to any evidence adduced by it before the NCC that would contradict the NCC’s assessment. In the absence of such evidence, the Tribunal is not persuaded that there is any reason to doubt the NCC’s conclusion.
10. A significant majority of the coal produced from mines in the Hunter Valley is thermal coal sold in export markets. The NCC referred (at [7.114]) to its revocation recommendation in which it observed that coal is traded and shipped internationally and Australian coal exporters participate in this international trade and compete against coal produced and sold through other ports in Australia and overseas. Export coal miners from the Newcastle catchment are likely to be price takers: that is, decisions by individual coal miners regarding how much coal they will export in any given period are unlikely to materially affect prices for coal in overseas export markets. In the present application, the NCC did not receive any submissions suggesting that the coal export market is not effectively competitive (see [7.115]).

## Access without declaration

1. In this section, the Tribunal considers whether, to what extent and on what terms PNO is likely to provide access to the shipping channel service to coal vessels in the future without declaration and how any such access will impact on the conditions or environment for competition in the coal tenements market. The section commences by considering PNO’s ability and incentive to exercise market power in setting the terms of access to the shipping channel service, and particularly the commercial, regulatory and economic factors that may afford or constrain the exercise of market power. The section then considers PNO’s commercial behaviour to date and the extent to which it has constrained its future pricing discretion by the Producer and Vessel Agent Deeds.

### Ability and incentives to exercise market power

1. As stated earlier, it is uncontroversial that the Port is a bottleneck facility for Hunter Valley coal producers. There is no alternative means to export coal produced from the Hunter Valley.
2. As discussed above, the owner of a bottleneck facility has the potential ability to harm competition in an upstream or downstream dependent market by denying access to services provided by the facility or by setting terms and conditions of access that adversely affects competition in dependent markets. However, whether the owner of a bottleneck facility is likely to behave in that manner requires an assessment of the constraints and incentives that are likely to affect the facility owner’s behaviour. A consideration of the constraints and incentives facing the facility owner is not, as NSWMC submitted, an enquiry as to idiosyncratic and subjective attitudes of the facility owner; rather, it is an enquiry as to objective market conditions that are likely to influence and constrain the behaviour of a rational profit-maximising facility owner. As the Tribunal observed in *Re Virgin Blue* (at [296]), the facility owner’s past conduct provides a basis for judgment as to its future conduct. Respectfully, we would not endorse the Tribunal’s further statement that it is unnecessary to consider the facility owner’s incentives to act in a manner that harms competition. We consider that a facility owner’s past conduct provides a basis for judgment as to its likely future conduct assuming there has been no change to the commercial, regulatory and economic factors bearing upon the facility owner. A prediction about the future conduct of a firm based upon past conduct is soundly based if due regard is had to the factors that influenced the firm’s past conduct and are likely to influence its future conduct.
3. Also as discussed above, there are two different circumstances in which economic problems may arise with bottleneck facilities: one is where the owner of the facility is vertically integrated with potentially competitive activities in upstream or downstream markets and the other is where the owner of the facility is not competing in upstream or downstream markets. NSWMC contends that both circumstances exist in the present matter. The first is said to arise because one of PNO’s joint venture owners, China Merchants Group, has interests in container terminals. The second circumstance is associated with NSWMC’s principal concern about the “hold-up” risk of investment: that uncertainty over PNO’s future pricing decisions, and the risk that investments will be subject to “hold-up” (the extraction of economic rents from the investment by PNO increasing prices), will result in a deferral of investment. It is necessary to consider whether such circumstances are likely to arise having regard to the commercial, regulatory and economic factors bearing upon PNO.
4. In what follows, we describe the main commercial, regulatory and economic factors bearing upon PNO and which may afford or constrain its market power in the supply of the shipping channel service. Those factors are: vertical integration; asset life and dependence on upstream customers; capacity constraints; PNO’s position within the coal supply chain; and the threat of future regulation of the Port. Those factors were considered in the NCC Recommendation.

#### Vertical integration

1. The Tribunal does not accept NSWMC’s submission that PNO is vertically integrated in any relevant sense. The submission is premised on the contention that PNO has an incentive to favour the interests of one of its joint venture owners, China Merchants Group, over the interests of coal producers using the Port. There are two difficulties with the premise. First, it ignores PNO’s other joint venture owner, The Infrastructure Group, whose interests can be expected to be the maximisation of long run profits at the Port. Second, it assumes that the China Merchants Group will derive a financial benefit from the development of container terminal capacity at the Port (other than as a joint venture owner of the Port). The mechanism by which that would occur and the likelihood of it happening were not explained or supported by evidence. Further and in any event, and as acknowledged by NSWMC in its submissions, the proposed development of additional container capacity at the Port is forecast not to be completed for 15 years.
2. In all the circumstances, the contention that PNO is likely to set charges for coal producers at the Port across the medium term so as to cross-subsidise the development of container terminal capacity has no reasonable foundation. The Tribunal therefore has no reason to doubt the correctness of the NCC’s conclusion that PNO is not vertically integrated in any meaningful way (at [7.53]):

The Revocation Recommendation considered the commercial interests of certain of PNO’s owners in bulk carrier vessels and container liners and concluded that these interests are indirect and in the (then) circumstances would be unlikely to materially impact PNO’s operations at the Port. While noting the submissions of the NSWMC and stakeholders regarding PNO’s proposed expansion of container terminal services at the Port, the Council does not consider that PNO is vertically integrated into dependent markets in any meaningful way.

#### Asset life and dependence on upstream customers

1. PNO (and its joint venture owners) purchased a 98-year lease over the Port that commenced in 2014. The Tribunal agrees with the conclusion of the NCC (at [7.43]) that PNO has an incentive to contract with Port users in a way that has regard to its ability to maximise its expected profits over the term of the lease (which we will refer to as long run profit maximisation). If PNO were to set prices in a way that reduced future investment in coal mining activity in the Newcastle catchment, this may reduce the future profits it can earn from its operation of the Port.
2. The NCC noted (at [7.55]-[7.56]) that the major part of the Port’s current business is export coal and the provision of services for containers remains a small proportion of the Port’s activities. In 2019, the Port received 2,296 ships, 1,813 of which were coal vessels (approximately 80%); the remaining 483 ships providing shipment of other products (including containers). In response to a submission that the Port has an incentive to transition its business away from coal toward containers, the NCC acknowledged (at [7.47]) that the global transition to other forms of energy generation can be expected to affect future coal production and exploration in the Hunter Valley and the future utilisation of the Port. Nevertheless, having regard to documents such as the June 2020 *Strategic Statement on Coal Exploration and Mining in NSW* released by the NSW Government, the NCC concluded (at [7.49]) that coal export activities are the major source of revenue at the Port and are likely to remain so in the short-to-medium term. The NCC expressed the view that, while PNO may wish to increase the level of container terminal services provided at the Port into the future, it will not want demand for coal export terminal services to decline.
3. While NSWMC maintained the submission before the Tribunal that PNO will seek to transition the Port’s business away from coal exports towards containers, NSWMC accepted that the current timeframe for any redevelopment of a container terminal is 15 years. On the evidence before it, the Tribunal has no reason to doubt the NCC’s conclusion that coal export activities are currently the major source of revenue at the Port and are likely to remain so across the medium term. It follows that revenues at the Port in the medium term are highly dependent on coal mining activities, and PNO’s business has a high degree of dependence on the ongoing viability of coal mining in the Hunter Valley.

#### Capacity constraints

1. The NCC observed (at [7.54]) that, if the Port is not capacity constrained, it will be likely to set terms and conditions of access for unrelated groups of users (e.g. coal exporters and container terminal service providers) independently of each other. If, however, the Port were to become capacity constrained, its profit maximising set of prices for different groups of users may change. For instance, if container terminal service users generated greater levels of marginal profit than coal exporters, the Port would likely have an incentive to increase the level of container terminal services it provides at the expense of coal export terminal services. The Tribunal agrees with those observations.
2. The NCC referred (at [7.55]) to data provided by PNO about present and forecast capacity at the Port which indicated that the shipping channel can accommodate the safe movement of over 10,000 vessels per annum, vessel movements in 2017 were less than 50% of its capacity and, by 2031, PNO forecast the Port may receive up to 3,666 vessels per annum. On that basis, the NCC concluded that the Port is not presently capacity constrained and is unlikely to become capacity constrained in the foreseeable future (at [7.59]). That conclusion was not disputed.

#### Commodity supply chain

1. In its 2013 Report, the Productivity Commission discussed the incentives and expected behaviour of a facility owner within a commodity export supply chain. The Commission observed (at pp 89-92) that, where Australian exporters have no ability to affect world prices, private incentives to maximise profits will generally be aligned with the efficient use of export infrastructure. Operators of commodity export facilities have an incentive to operate efficiently because they do not have any capacity to affect downstream prices where Australian suppliers are price takers in bulk commodity export markets.
2. In the present matter, the Treasurer’s Reasons expressed the view that, because the coal tenements market (amongst other markets) is a derivative market of the coal export market, if declaration is unlikely to promote a material increase in competition in the coal export market there would be unlikely to be a material increase in competition in the coal tenements market. The NCC Recommendation expressed a similar view (at [1.26] and [7.148]-[7.151]). While the Tribunal ultimately agrees with this conclusion, it is necessary to explain why this is likely to be the case.
3. There is no dispute in the present matter that the coal export market is effectively competitive and that the prices for coal in overseas export markets are unlikely to be materially affected by the volume of coal supplied from the Newcastle catchment. In other words, the Hunter Valley coal supply chain is in competition with other coal supply chains within Australia and around the world and is a price taker in world markets. In the long run, international competition between the Hunter Valley and other actual and potential coal supply chains will tend to limit all participants in the supply chain (miners, port, rail and shipping) to normal expected returns on investments (adjusted for any supernormal returns associated with, for instance, specialised capital or grades of coal resources).
4. It is certainly feasible that pricing decisions of PNO could adversely impact the valuation of tenements in the coal tenements market notwithstanding that the coal export market is effectively competitive and the coal tenements market is derivative of the coal export market. Given that the current navigation service charge is small relative to the other production costs of Hunter Valley coal producers (which are set out below), it is reasonable to assume that, in the short run, the demand from Hunter Valley coal producers for the shipping channel service is highly inelastic over a significant range of the navigation service charge. It is also reasonable to assume that the incremental cost of additional vessel movements is a very small proportion of PNO’s costs. Consequently, in principle, PNO could increase its short run profits from coal vessels by increasing the price for the shipping channel service to the level at which coal producers began to reduce their output and the consequent demand for Port services. Setting the navigation service charge at or above that level could cause coal mining and export from the Hunter Valley to become uneconomic for some mines, which would harm allocative efficiency.
5. However, PNO’s position as operator of the Port assets (under a 98 year lease) within the Hunter Valley coal supply chain, in which the coal export market is effectively competitive and coal producers are price takers, significantly constrains PNO’s pricing behaviour. As noted above, given the asset life of the Port, PNO has an incentive to set prices in a way that has regard to its ability to maximise its expected profits over the term of the lease. If PNO were to increase prices in a manner that caused coal mining and export to decline, it is likely that its long term revenue and profits would be adversely affected, leaving the Port with even greater spare capacity which is highly unlikely to be utilized in the near term by other potential users of its services. Similarly, if PNO were to increase prices to users such that their marginal costs were just covered by marginal revenue (the price received in the coal export market), production and coal export may continue at existing levels, but existing coal miners would not receive an adequate return on their past investment. In turn, this would cause prices in the secondary markets for coal tenements to fall and there would be no activity in the primary market for exploration and development of new coal tenements, since it would not be possible to recover sunk and fixed costs. Again, such outcomes are likely to impact negatively on PNO’s long term profits.
6. For those reasons, the Tribunal agrees with the conclusions of the NCC (at [7.43]) that:

… where PNO prices in a way that reduces future investment in coal mining activity in the Newcastle catchment, this may reduce future profits it can earn from its operation of the Port. This is likely to be an important consideration over the long-term duration of PNO’s lease, as future investors who have not made sunk investments yet will have the option to invest in other opportunities, including in developing coal mines in other areas not served by the Port. In this context, harm to PNO’s reputation as the operator of the Port can be expected to impact on its commercial returns.

and (at [7.44]) that:

…pricing today by PNO to maximise its short-term profits (by, for instance, expropriating or ‘holding-up’ those miners that have already sunk costs in coal exploration/mining) would risk sending a signal to potential future investors that it might act in the same way after they make sunk investments in the future. Where investors fear PNO might act in this way in the future, they may be less likely to invest in coal exploration/mining activity in the Newcastle catchment in a way that would reduce PNO’s profits over the longer term.

1. As noted above, the NCC concluded that, while the global transition to other forms of energy generation can be expected to affect future coal production and exploration in the Hunter Valley, coal export activities are likely to remain the major source of revenue at the Port in the short-to-medium term. Accordingly, across the medium term, PNO’s pricing behaviour would be expected to be constrained by its position within the Hunter Valley supply chain which is exposed to international competition in the coal export market. In so far as PNO sets prices higher than is necessary to recover its long run costs, it would be likely to harm the competitive position of Hunter Valley coal producers and the associated supply chain, thereby deterring future investment in the coal tenements market and, as a consequence, reducing demand for its shipping channel service.

#### The threat of regulation

1. In its Recommendation, the NCC considered the level of constraint on PNO’s commercial behaviour that may be provided by other regulatory or government policy actions in the absence of declaration. In that respect, the NCC noted that the NSW Government has a clear interest in the continued development and operation of coal mining in the Newcastle catchment, given its significant economic contribution to the State, and that the PAMA Act and PAMA Regulations provide a degree of transparency over the charges levied by PNO and a price monitoring framework (at [7.36]). The NCC noted, though, that the PAMA Act and PAMA Regulations do not directly limit or regulate the level at which prices may be set by PNO for services provided to users of the Port and those laws are not certified as effective access regimes under Part IIIA of the Act (at [7.37]). The NCC also noted that, while the lease arrangements between the State of NSW and PNO include provisions designed to ‘constrain’ the behaviour of PNO, these arrangements are private contractual arrangements between the two parties and any third party with concerns about PNO’s behaviour would have to rely on the State of NSW taking action in order to obtain redress (at [7.38]). The NCC concluded as follows (at [7.39]):

On balance, the Council expects the NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in dependent markets; or otherwise harm the public interest. Such an intervention might be via the terms of PNO’s lease, under the terms of the PAMA Act by referral to IPART; or by introducing new statutory restrictions. The Council considers that the threat of such action by the NSW Government would be likely to provide a low level of constraint on PNO when it sets its terms and conditions of access in a future without declaration of the Service. The Council further considers the effect of this constraint falls well short of that which would result from an access regime capable of certification. The Council considers that these constraints are not a substitute for the type of access regulation contemplated by the National Access Regime.

1. The Tribunal has no reason to doubt the NCC’s conclusion that possible regulatory intervention by the NSW Government is no substitute for the type of access regulation contemplated by the national access regime in Part IIIA of the Act.
2. An issue not expressly addressed by the NCC is whether the threat of declaration under Part IIIA is presently acting, and will in the future act, as a constraint on PNO’s commercial behaviour. The Tribunal considers that, although it has decided to affirm the Treasurer’s decision not to declare the shipping channel service in the present review, the ongoing threat of declaration is a relevant constraint on PNO’s commercial behaviour and ought not to be lessened by the Tribunal’s decision. As the Tribunal has sought to emphasise, the application of criterion (a) in the context of a service provided by means of a bottleneck facility requires a close examination of the commercial, regulatory and economic factors bearing upon the facility owner. Those factors can change over time. In the present case, the evidence shows that in the medium to long term the Port’s business may transition, to some extent, away from thermal coal toward container cargo. Such a change in the market environment may in the future affect the commercial constraints on PNO’s behaviour in respect of coal vessels. The refusal of an application for declaration today does not prevent another application being made at a later point in time. If at that time the market environment and PNO’s behaviour has altered, a different conclusion on declaration may be reached.

#### Summary of relevant factors

1. In similar manner to the NCC (at [7.72]-[7.73]), the Tribunal considers that there are a range of factors that are likely to constrain PNO’s market power across the medium term in setting prices for the shipping channel service. PNO’s primary incentive is to maximise long term profits. In doing so, it can be expected to take account of the facts that: it holds a lease of the Port for 98 years; its dominant source of revenue over the medium term will be from coal exports; it has substantial unused capacity at the Port; coal export markets are competitive and the coal supply chain, of which the Port forms a part, is a price taker in coal export markets; and the shipping channel service will remain susceptible to declaration in the future should PNO’s pricing behaviour cause competitive harm in dependent markets. In the circumstances, PNO would be expected to set prices so as to recover long run costs, but not to further increase prices in a manner that would lessen future investment in the coal tenements market or coal production more generally.

### Evidence of PNO’s commercial conduct to date

1. The following section considers PNO’s commercial behaviour to date. The Tribunal’s overall assessment is that PNO’s commercial conduct appears to be consistent with the expected behaviour of a rational facility owner, within a commodity export supply chain for which the final commodity market is competitive and in which the supply chain (as a whole) is a price taker, and which seeks to maximise long run profits. Further, as discussed below, PNO has offered to commit itself, and has committed itself, over the medium term, through the Pro Forma Pricing Deeds, to rates of the navigation service charge and wharfage charge that provide a reasonable degree of pricing certainty to coal producers.
2. The Tribunal has drawn the following conclusions from the evidence.

#### No denial of access

1. First, there is no evidence that PNO has denied access to the shipping channel service to any coal producer.

#### PNO’s refusal to participate in collective bargaining

1. Second, NSWMC placed some emphasis on PNO’s refusal to participate in collective bargaining with coal producers, submitting that the refusal was evidence of market power. The NCC accepted that PNO has considerable bargaining power over Hunter Valley coal producers, but concluded that PNO’s refusal to participate in collective bargaining is not indicative of market power (at [7.42]).
2. Collective bargaining is not a feature of competitive markets and the refusal to bargain collectively is not, of itself, indicative of market power. Rather, collective bargaining is typically a response to an actual or perceived imbalance in bargaining power. If a group of firms perceive that a common supplier has substantial bargaining power, the firms may seek to bargain collectively with the supplier to redress the imbalance. Under certain market conditions, collective bargaining may result in terms and conditions of supply that better reflect efficient market outcomes. However, collective bargaining may also have detrimental effects on efficiency, particularly in so far as it introduces inefficient price uniformity or rigidity.
3. As a bottleneck facility for Hunter Valley coal producers, the Port (through its operator, PNO) has a degree of market power. It is understandable that coal producers perceive that they will have more equal bargaining power with PNO if they are able to bargain collectively. However, collective bargaining does not guarantee terms and conditions of supply that better reflect efficient market outcomes. Further, it cannot be concluded that the terms and conditions of access offered by PNO to coal producers are (or will be in the future) unreasonable or inefficient merely because PNO has refused to participate in collective bargaining with coal producers.
4. One concern expressed by coal producers is that PNO’s refusal to participate in collective bargaining means that PNO is free to engage in price discrimination in the supply of the shipping channel service. Whether or not price discrimination in the supply of the shipping channel service would result in inefficient pricing, the concern expressed by coal producers is not evident in PNO’s pricing practices to date. PNO has announced uniform “open access” rates for the navigation service and wharfage charges, and has offered Producer and Vessel Agent Pricing Deeds with uniform pricing and non-discrimination provisions.
5. For those reasons, the Tribunal does not consider that PNO’s refusal to participate in collective bargaining with coal producers is a material factor in applying criterion (a). It can be assumed that, without declaration, PNO will continue to refuse to bargain collectively with coal producers. However, that behaviour does not have a material bearing on the question whether declaration would promote a material increase in competition.

#### PNO’s pricing behaviour to date

1. The third conclusion drawn by the Tribunal is that the evidence concerning PNO’s pricing behaviour to date does not demonstrate unconstrained market power.
2. NSWMC placed considerable emphasis on increases in the rates of the navigation service and wharfage charges since the Port was privatised in 2014. It submitted that the increases demonstrated that PNO had unconstrained market power to increase prices and, left unregulated, PNO would continue to exercise that market power and increase prices into the future. NSWMC also submitted that the prices and terms of access offered under the Pro Forma Pricing Deeds are not comparable to reasonable terms of access that would be afforded as a result of declaration.
3. The Tribunal does not accept that the increases in the navigation service charge and wharfage charge since privatisation demonstrate unconstrained market power. It cannot be assumed that the rates of the two charges prior to privatisation, when the Port was state-owned, were set at economically efficient levels. Indeed, the subsequent arbitration of those charges by the ACCC indicates that they were not (with the rate of charges determined by the ACCC being above the pre-privatisation level). It is only necessary to consider the navigation service charge because the rate of the wharfage charge was ultimately agreed between PNO and Glencore in the arbitration (and was the rate adopted by PNO in its 2018 pricing schedule). In relation to the navigation service charge, the ACCC’s determined rate of $0.6075 per gross tonne was less than the rate adopted by PNO in its 2018 pricing schedule of $0.7553 per gross tonne. The Tribunal, on review of the ACCC determination, considered that the ACCC should not have adjusted the DORC valuation of the Port’s regulatory asset base by the value of user funded contributions and determined a rate of $1.0058 per gross tonne. The Tribunal’s decision was subsequently set aside by the Full Federal Court which considered that the decision was affected by errors of law in respect of the treatment of user funded contributions. PNO has appealed the Full Court’s decision to the High Court. While the outcome of the legal challenges and any necessary re-determination of the navigation service charge by way of arbitration is not presently known, it is significant that the rate of that charge levied by PNO since privatisation lies within the bounds determined by the ACCC and the Tribunal by way of arbitration under Division 3 of Part IIIA. That is inconsistent with a conclusion that the rate of the navigation service charge levied by PNO since privatisation demonstrates unconstrained market power.
4. As noted earlier, in December 2019, PNO published on its website a new “open access” rate for the navigation service charge of $1.0424 per gross tonne for vessels using the shipping channel service taking effect from 1 January 2020. The NCC confirmed that that rate is almost identical to that determined by the Tribunal in its 2019 arbitration determination (at [6.36]). PNO also published, and offered on a standing basis, the Pro Forma Pricing Deeds constituting an agreement in respect of the navigation service charge pursuant to s 67 of the PAMA Act. As noted earlier, the Port User Pricing Deed, which was published first, has been replaced by the Producer and Vessel Agent Pricing Deeds. The Deeds have a 10 year term. Under the Deeds, PNO offered an initial navigation service charge of $0.8121 per gross tonne (in 2020 dollar terms), subject to an annual price adjustment of the greater of CPI increases and 4%. Assuming a 4% annual increase, the navigation service charge will be $1.1559 per gross tonne in 2029 (at [7.89]).
5. The evidence shows that PNO has entered into Vessel Agent Pricing Deeds in respect of all of the coal vessels calling at the Port. As a result, PNO has been charging all coal vessels calling at the Port the navigation service charge calculated in accordance with those Deeds.
6. Thus, as at the beginning of 2020, the relevant facts relating to PNO’s pricing behaviour can be summarised as follows:
7. The declaration of the shipping channel service under Part IIIA had been revoked.
8. In an earlier arbitration conducted under Division 3 of Part IIIA, the ACCC had determined a rate for the navigation service charge of $0.6075 per gross tonne (in 2018 dollars), equivalent to $0.63 per gross tonne in 2020 dollars. On review, the Tribunal determined a rate for the navigation service charge of $1.0058 per gross tonne (in 2018 dollars), equivalent to $1.04 per gross tonne in 2020 dollars.
9. PNO published its standing rate for the navigation service charge of $1.0424 per gross tonne, being a rate equivalent to the Tribunal determination. It also published a lower rate of $0.8121 per gross tonne (in 2020 dollar terms) offered on the terms of the Producer and Vessel Agent Pricing Deeds that included price escalations. It is apparent that the lower rate is approximately the mid-point of the ACCC and Tribunal arbitrated prices.
10. PNO has entered into Vessel Agent Pricing Deeds in respect of all of the coal vessels calling at the Port and has been charging all coal vessels calling at the Port the navigation service charge calculated in accordance with those Deeds.
11. NSWMC advanced a number of criticisms of the pricing terms and conditions offered publicly by PNO from December 2019.
12. First, NSWMC submitted that the “open access” navigation service charge rate of $1.0424 per gross tonne and the lower rate of $0.8121 per gross tonne under the Deeds includes a return on user funded contributions which was rejected by the ACCC. The fact that prices charged by PNO include a return on user funded contributions does not demonstrate that such prices are likely to have a negative impact on the conditions or environment for competition in the coal tenements market on a forward looking basis. While NSWMC is critical of the fact that PNO’s current rate of navigation service charge includes a return (in whole or in part) on the value of historic user funded contributions, it did not submit that the current rate was such as to impact negatively the conditions or environment for competition in the coal tenements market. Further, there is no evidence to suggest that the current rate is having any such effect. The Tribunal also notes that the navigation service charge levied by PNO under the Deeds does not include a full return on the user funded contributions identified by the ACCC. The rate is set approximately mid-way between the rate determined by the ACCC (which excluded a return on user funded contributions) and the rate determined by the Tribunal (which included such a return).
13. Second, NSWMC submitted that there is no guarantee that PNO will continue to offer the Producer and Vessel Agent Pricing Deeds in the future. It noted that PNO had not given any undertaking to do so, whether by way of deed poll or otherwise. The Tribunal accepts that submission as far as it goes, but the Tribunal does not consider that it goes very far. The Producer and Vessel Agent Pricing Deeds are published on PNO’s website as a standing offer. The Vessel Agent Pricing Deed has been entered into by vessel agents for all coal vessels currently shipping coal from the Port. Thus, those Deeds will be in effect for the next 10 years and PNO will be obligated to set the navigation service charge at rates determined in accordance with those Deeds over that period. It is possible that at some point in the coming years PNO will cease offering the Deeds. However, that would not affect the ongoing operation of the existing Deeds. As discussed further below, the Tribunal does not consider that it is necessary to speculate about prices that may be charged at the expiry of the current Deeds (i.e., in about 2030). The Tribunal considers that the prospect of declaration of the shipping channel service will remain open if the terms and conditions of access offered by PNO can be shown to be harmful to competition in any dependent market at that time.
14. Third, NSWMC submitted that the navigation service charge under the Deeds may be increased unilaterally by PNO on an annual basis. NSWMC accepted that any coal producer or vessel agent who is a party to the Deeds may object to a price increase and that the dispute is subject to arbitration based upon the pricing principles set out in the Deeds. However, NSWMC argued that the pricing principles are not identical to the principles that would apply to the arbitration of a dispute under Division 3 of Part IIIA of the Act (by s 44X(1)). It is necessary to consider NSWMC’s criticisms of the pricing principles in more detail by reference to the terms and conditions of the Deeds.

#### The terms and conditions of the Producer and Vessel Agent Pricing Deeds

1. The Producer Pricing Deed enables coal producers to agree the rates of both navigation service and wharfage charges with PNO in respect of vessels carrying the producer’s coal, while the Vessel Agent Pricing Deed enables vessel agents to agree the rate of the navigation service charge with PNO in respect of coal vessels for which the agent is the vessel’s inward agent. In response to a question, PNO submitted that if a producer and a vessel agent had entered into Deeds that, on their terms, were applicable to a shipment of coal and the Deeds contained different rates for the navigation service charge, the rate that would ultimately be charged by PNO would be the lower rate. The Tribunal accepts that that is the practical effect of the Deeds.
2. The terms and conditions of the Producer and Vessel Agent Pricing Deeds are materially the same. The following terms and conditions of the Deeds are significant:
3. The Deeds have an initial term of 10 years. Not later than 36 months prior to the expiry of the initial term, either party may issue a written notice to the other requesting that the parties enter into discussions with respect to agreeing pricing arrangements to apply following the expiry of the initial term. The parties must then commence discussions regarding such pricing arrangements and must continue such discussions in good faith for a period of up to 6 months (or such other period as they agree in writing). Thus, the Deeds contemplate a process by which the parties will commence negotiations of the charges to apply after the expiry of the initial term 36 months before that date. The Tribunal observes that, if the parties are unable to reach agreement in the allotted 6 month period, the producer or vessel agent has the benefit of the Deed for a further 30 months, which provides ample opportunity to renew an application for declaration of the service if considered appropriate at that time.
4. Under the Deeds, PNO represents that the rate of the navigation service charge levied under the Deed, including variations, will not adversely discriminate against the producer or vessel agent by comparison with the navigation service charge applicable to like circumstances to other producers or vessel agents (as the case may be) who have entered into materially similar deeds. PNO also covenants that it will not enter into an agreement with any other producer or vessel agent (as the case may be) concerning the navigation service charge to apply over the initial term, or give effect to any variations made to that charge, which are materially dissimilar to the relevant provisions of the Deed.
5. The rate of the navigation service charge during the initial term may be adjusted in two ways. First, the rate is adjusted annually by the greater of the applicable annual CPI increase (if any) and 4%. Second, PNO may increase the navigation service charge for other reasons if the resulting increase is material (greater than 5%) and the increase is consistent with the pricing principles defined in cl 4.2 of Sch 3 of the Deeds. PNO must provide written notice of any proposed variations to the navigation service charge not later than 45 days before the proposed date for commencement of the proposed variation. If the proposed variation is made on the second basis, PNO must also issue a copy of a report prepared by an independent appropriately qualified professional which sets out the opinion of that person, and the material facts (including all relevant cost, capital expenditure and revenue data) on which that opinion was based, as to whether the proposed variation is consistent with the pricing principles. The counterparty may issue a price objection notice to PNO within 14 days and the dispute must be resolved in accordance with the dispute resolution process set out in the Deeds. The dispute resolution process contemplates discussions between senior representatives of the parties, followed by mediation if necessary. If the dispute cannot be resolved by agreement between the parties, either party can refer it to arbitration to be conducted in accordance with the ACICA Arbitration Rules. The arbitrator is required to apply the pricing principles set out in the Deeds.
6. Under the Deeds, PNO undertakes to prepare and provide to the coal producer or vessel agent (as applicable) on an annual basis a forward looking 5 year forecast of its projected capital expenditure that may impact the applicable charges and meet with the coal producer or vessel agent to discuss those forecasts and any potential associated variations to the applicable charges. The Deeds states expressly that PNO is not obliged to implement any comments made by the coal producer or vessel agent. NSWMC criticised that provision, but the Tribunal does not consider that there is anything untoward or exceptional about the provision. The Deeds require PNO to keep the coal producer or vessel agent informed of capital expenditure projections and consult in relation to those projections. If PNO proposes a variation to the navigation service charge, the coal producer or vessel agent is entitled to object and have the variation reviewed by an independent arbitrator applying the pricing principles defined in cl 4.2 of Sch 3 of the Deeds.
7. The pricing principles defined in the Deeds closely follow the mandatory considerations that the ACCC must take into account under s 44X(1) of the Act when conducting an arbitration or terms and conditions of access under Division 3 of Part IIIA, but they are not identical. It is necessary to consider the differences.
8. Section 44X(1) provides as follows:

The Commission must take the following matters into account in making a final determination:

(aa) the objects of this Part;

(a) the legitimate business interests of the provider, and the provider’s investment in the facility;

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;

(e) the value to the provider of extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else;

(ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(g) the economically efficient operation of the facility;

(h) the pricing principles specified in section 44ZZCA.

1. The objects of Part IIIA are set out in s 44AA and have been reproduced earlier. The pricing principles in s 44ZZCA are as follows:

The pricing principles relating to the price of access to a service are:

(a) that regulated access prices should:

(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and

(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:

(i) allow multi-part pricing and price discrimination when it aids efficiency; and

(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.

1. The pricing principles in cl 4.2 of Sch 3 of the Deeds are as follows (noting that PNO is designated as PON in the Deeds):

The matters that must be taken into account by a mediator and applied by the arbitrator in resolving a Permitted Price Dispute are:

(a) the provisions in Item 7 of this deed (but only in relation to whether the requirements of Item 7(a) or 7(b)(i) are met (not in relation to the requirement in Item 7(b)(ii) that any proposed increase in the Covered Vessel NSC is consistent with the Pricing Principles, which will be measured solely by reference to the remaining principles below);

(b) PON's legitimate business interests and investment in the Port or Port facilities, including a reasonable opportunity to recover over the Leasehold Period the efficient cost of the service provided at the Port, which recovery shall include:

(i) the value of its Initial Capital Base and any updates thereof, including efficient additional capital investments;

(ii) a reasonable rate of return, commensurate with the commercial risks involved on the value of all assets comprising its Initial Capital Base and any updates thereof, including efficient additional capital investments; and

(iii) the return over the Leasehold Period of the total value of the assets comprising its Initial Capital Base and any updates thereof, including efficient additional capital investments;

(c) the revenue expected to be derived from all users of the service;

(d) the costs to PON of providing the service (including the costs of any necessary modification to, or extension of, a Port facility) but not costs associated with losses arising from increased competition in upstream or downstream markets;

(e) the economic value to PON of any additional investment that the Vessel Agent (or any other user of the service) or PON has agreed to undertake;

(f) the interests of all persons holding contracts for use of any relevant Port facility or otherwise having rights to use the service;

(g) firm and binding contractual obligations of PON or other persons (or both) already using any relevant Port facility;

(h) the operational and technical requirements necessary for the safe and reliable provision of the service;

(i) the economically efficient operation of any relevant Port facility;

(j) the benefit to the public from having competitive markets;

(k) that prices should allow multi-part pricing and price discrimination when it aids efficiency;

(l) that prices should not allow a vertically integrated service provider to set terms and conditions that would discriminate in favour of either its upstream or downstream operations, except to the extent that the cost of providing services to others would be higher; and

(m) that prices should provide incentives to reduce costs or otherwise improve productivity.

1. The “Initial Capital Base” referred to in cl 4.2(b) is defined to mean the value established by reference to the DORC, as at 31 December 2014, of the assets used in the provision of all of the services at the Port and, unless otherwise agreed by PNO, without deduction for user contributions. In context, the reference to “user contributions” must refer to historic user funded contributions (i.e. contributions which pre-date the DORC valuation date of 31 December 2014) and alludes to the dispute in respect of user funded contributions in the Glencore arbitration. In its 2018 arbitral determination, the ACCC adopted the same capital base (ie the DORC valuation as at 31 December 2014, indexed to 2018) save that the ACCC deducted its assessment of historic user funded contributions.
2. It can be seen that the pricing principles in cl 4.2 of Sch 3 of the Deeds address most of the considerations stated in s 44X(1), with some of the considerations being reproduced in identical language, some reproduced with minor variations and some addressed with more material variations. Paragraphs (aa) and (ea) of s 44X(1) are not addressed in cl 4.2 of Sch 3 of the Deeds, but NSWMC did not contend that the omission of those considerations was significant.
3. NSWMC criticised the pricing principles in paragraph (b) and (e) of cl 4.2. NSWMC’s concerns with respect to each principle are related.
4. The pricing principle in paragraph (b) of cl 4.2 is an amalgam of the mandatory consideration in s 44X(1)(a) and the statutory pricing principle in s 44ZZCA(a). The opening phrase, PNO's legitimate business interests and investment in the Port or Port facilities, is materially the same as the consideration in s 44X(1)(a). Those interests are then stated to include the “recovery of efficient cost” principle, which is based upon the pricing principle in s 44ZZCA(a). The two matters are closely connected and, in itself, there can be no concern about locating the “recovery of efficient cost” principle as a subset of the “legitimate business interests” consideration. The core of NSWMC’s criticism is that the pricing principle in paragraph (b) of cl 4.2 requires the arbitrator to adopt the Initial Capital Base, as defined, as the capital base upon which the capital components of the allowed return are to be determined (the return on capital and the return of capital). As noted above, the Initial Capital Base is defined by reference to the DORC valuation of the assets used in the provision of all of the services at the Port as at 31 December 2014 and, unless otherwise agreed by PNO, without deduction for user funded contributions. While the principle allows the Initial Capital Base to be updated (for example, by reference to depreciation or efficient additional capital investments), the principle prevents the arbitrator from adjusting the DORC valuation as at 31 December 2014 by the value of historic user funded contributions unless PNO agrees.
5. The pricing principle in paragraph (e) of cl 4.2 is based upon the mandatory consideration in s 44X(1)(e). NSWMC’s criticism is that the pricing principle in paragraph (e) of cl 4.2 is expressed as forward looking (referring to the value of investments that a person has agreed to undertake), whereas the consideration in s 44X(1)(e) arguably applies to historic investments. On that basis, NSWMC again submitted that the arbitrator is precluded by paragraph (e) of cl 4.2 from taking into account the capital value of historic user funded contributions.
6. PNO did not contend that NSWMC’s interpretation of paragraphs (b) and (e) of cl 4.2 was erroneous in any way. For the purposes of this application, the Tribunal assumes the correctness of NSWMC’s interpretation, while recognising the potential for debate in any future pricing arbitration under the Deeds. It follows that the Tribunal accepts that a pricing arbitration conducted under the Deeds may produce a different outcome to a pricing arbitration conducted under Division 3 of Part IIIA of the Act, by reason of the inclusion or exclusion of historic user funded contributions in the valuation of the capital base of the Port used to determine allowed revenue. However, three matters must be noted.
7. First, at this time it is not certain that a pricing arbitration conducted under Division 3 of Part IIIA of the Act would exclude historic user funded contributions in the valuation of the capital base of the Port. As discussed earlier, the ACCC determined that such costs should be excluded, but another Tribunal determined that the costs should not be excluded. The Tribunal’s determination was set aside by the Full Court on the basis of errors of law, and the determination was remitted to the Tribunal for reconsideration. The Full Court’s decision is currently on appeal by PNO to the High Court. Even if the appeal is dismissed, the Full Court’s decision does not pre-determine the Tribunal’s reconsideration of the treatment of historic user funded contributions or its assessment of the value of such contributions.
8. Second, even if it be the case that a pricing arbitration conducted under Division 3 of Part IIIA of the Act would exclude historic user funded contributions in the valuation of the capital base of the Port whereas a pricing arbitration under the Deeds would not, that does not demonstrate that prices set under the Deeds are likely to have a negative impact on the conditions or environment for competition in the coal tenements market on a forward looking basis. Critically, and as NSWMC submitted, historic user funded contributions have been built into PNO’s current rate of the navigation service charge. The available evidence does not demonstrate that the current rate of the navigation service charge is having a negative impact on the competitive environment in the coal tenements market.
9. Third, looking forward, the pricing principle in paragraph (e) of cl 4.2 requires an arbitrator to take account of the economic value to PNO of investments that a person has agreed to undertake. The Tribunal expects that a Port user would not in the future agree to fund capital investments at the Port without first reaching an agreement with the Port about the financial return on the investment, whether by way of an adjustment to the Port charges or otherwise. Further, any future user funded capital investments at the Port would be required to be taken into account by the arbitrator in any dispute with respect to future price variations. In that respect, future user funded contributions can be expected to be treated in the same manner in an arbitration conducted under the Deeds and in an arbitration conducted under Division 3 of Part IIIA of the Act.
10. It follows, in the Tribunal’s view, that the differences identified by NSWMC between the pricing principles defined in cl 4.2 of Sch 3 to the Deeds and the equivalent principles that must be applied in an arbitration under Division 3 of Part IIIA will not have a negative impact on competition in the coal tenements market. While the inclusion or exclusion of historic user funder contributions in the capital base of the Port is the subject of significant dispute between PNO and coal producers who use the Port, it has not been demonstrated that the financial magnitude of the difference is likely to impact negatively on competition in the coal tenements market.
11. For completeness, the Tribunal notes another potential difference between the pricing principles defined in paragraph (b) of cl 4.2 of Sch 3 to the Deeds and the equivalent principles that must be applied in an arbitration under Division 3 of Part IIIA. The difference concerns the ability of the arbitrator to re-open the DORC valuation of the Port assets by, for example, re-assessing the optimised replacement cost of the Port assets at some future point in time. Under paragraph (b) of cl 4.2 of the Deeds, the capital base upon which PNO’s capital return is to be determined is described as “the value of all assets comprising its Initial Capital Base and any updates thereof, including efficient additional capital investments”. The meaning of that phrase may be open to debate. The Tribunal understands the phrase to indicate that the arbitrator may update the DORC valuation over time by reference to depreciation, efficient additional capital investments and asset disposals. It is less clear whether the word “update” allows the arbitrator to re-assess the optimised replacement cost of the Port assets, including by deducting the value of redundant assets. In contrast, the equivalent principles that must be applied in an arbitration under Division 3 of Part IIIA do not expressly restrict the ability of the ACCC to re-assess the value of the capital base upon which the capital return is to be determined. While the Tribunal has identified this point of possible difference between a price arbitration under the Deeds and a price arbitration under Division 3 of Part IIIA, the Tribunal places no weight upon that consideration in making its decision. That is for two reasons, which may be related. First, NSWMC made no submissions in respect of that point of possible difference. Second, the question whether and in what circumstances it would become appropriate, in the context of a price arbitration under Division 3 of Part IIIA, to re-open the DORC valuation of the Port assets by, for example, re-assessing the optimised replacement cost of the Port assets at some future point in time is a complex question. It raises a number of competing considerations having regard to the principles that must be applied under Division 3 of Part IIIA. To contemplate such a re-assessment occurring in the medium term would involve considerable speculation. In the Tribunal’s view, such speculation does not materially bear upon the Tribunal’s present assessment of criterion (a).
12. NSWMC also criticised the dispute mechanisms in the Deeds, submitting that they are not reasonable terms and conditions of access and are no substitute for arbitration under Part IIIA of the Act. In that respect, NSWMC observed that the previous arbitration conducted by the ACCC on the application of Glencore resulted in the adoption of a regulated asset base and building block methodology to determine allowed revenues and prices, with disclosure of relevant financial inputs to the model. NSWMC submitted that arbitration in accordance with the ACICA Arbitration Rules (as stipulated by cl 3.3 of Sch 3 to the Deeds) does not necessitate any particular methodology to determining prices or disclosure of financial information.
13. The Tribunal agrees that the dispute resolution provisions of the Deeds do not mandate the use of a building block methodology to determine allowed revenues and prices. However, nor does arbitration under Division 3 of Part IIIA. While a building block methodology is commonly used by regulatory authorities when seeking to determine efficient costs and prices, and was used by the ACCC in the Glencore initiated arbitration, such an approach is not the only methodology that can be applied. For the reasons explained above, the pricing principles required to be applied to resolve a pricing dispute under the Deeds follow closely the principles to be applied in an arbitration under Division 3 of Part IIIA. Further, the pricing principle in cl 4.2(b), which directs attention to Port’s capital base, a reasonable rate of return on capital and a return of capital over the term of the Port lease, lend themselves to a building block methodology for determining allowed revenue and prices.
14. As to the disclosure of information for the purposes of any arbitration, two matters can be noted. First, and as referred to earlier, under the Deeds PNO has undertaken to provide to the coal producer or vessel agent (as applicable) on an annual basis a forward looking 5 year forecast of its projected capital expenditure that may impact the navigation service charge and meet with the coal producer or vessel agent to discuss those forecasts and any potential associated variations to that charge. Further, when proposing any variation to the navigation service charge, PNO has undertaken to provide a report prepared by an independent appropriately qualified professional which sets out the opinion of that person, and the material facts (including all relevant cost, capital expenditure and revenue data) on which that opinion was based, as to whether the proposed variation is consistent with the pricing principles. Second, the ACICA Arbitration Rules afford an arbitrator broad powers in relation to the procedure to be applied in an arbitration, including the power to require the production of relevant documents and information.
15. For those reasons, the Tribunal considers that the dispute mechanisms in the Deeds are consistent with reasonable terms and conditions of access and are reasonable substitutes for arbitration under Part IIIA of the Act.

#### Overall conclusions about PNO’s pricing behaviour

1. The Tribunal draws the following three conclusions from the above discussion of the evidence of PNO’s pricing behaviour to date. First, it can be inferred that PNO considers that its long run profits will be maximised by setting the rate of the navigation service charge in accordance with the Pro Forma Pricing Deeds (and the “open access” arrangements if a Port user is unwilling to agree to the terms of the Pro Forma Pricing Deeds). It can be assumed that the prices so charged cover PNO’s assessment of its long run costs. Second, the Pro Forma Pricing Deeds provide a reasonable degree of pricing certainty to coal producers. While the Deeds allow PNO to propose adjustments to the rate of the navigation service charge, any such adjustment is subject to arbitration applying pricing principles which are similar to those governing arbitrations under Division 3 of Part IIIA. Third, there was no substantive evidence before the NCC that the prices currently being charged by PNO under its open access arrangements or the Pro Forma Pricing Deeds are having any detrimental impact on investment and competition in the coal tenements market.

## Comparing the effect of access with declaration to access without declaration

1. As explained above, criterion (a) requires the Tribunal to assume that declaration of the shipping channel service will result in access on reasonable terms and conditions. The matter that must be assessed is whether that outcome will promote a material increase in competition in a dependent market (here, the coal tenements market). The enquiry necessarily focusses on the future market and commercial circumstances without declaration in order to assess whether the effect of declaration would promote a material increase in competition.
2. The Tribunal accepts that the rate of the navigation service charge across the medium term may differ depending on whether the shipping channel service is declared or not declared. However, as noted by the NCC (at [7.93], [7.122]), it is not certain whether the rate will be higher or lower without declaration or with declaration.
3. Without declaration, for at least the current term of the Vessel Agent Pricing Deeds, the navigation service charge will largely be determined in accordance with those Deeds (as all coal vessels presently using the Port are covered by those Deeds). Under those arrangements, the starting rate of the navigation service charge is the mid-point of the ACCC and Tribunal arbitrated rates. That rate implicitly includes a partial return on historic user funded contributions. The rate of the navigation service charge is subject to an annual increase of the greater of CPI and 4%. There is the possibility of other adjustments, but those adjustments are subject to arbitration. The rate to be charged after the expiry of the Deeds is not known, but the Deeds enable a period of negotiation over price during the third last year of the term, affording access seekers an opportunity to apply for declaration at that time if they consider that the price proposed by PNO is unreasonable.
4. With declaration, the precise level of the navigation service charge is uncertain. Criterion (a) requires the Tribunal to assume that the rate will be reasonable. The ACCC has previously determined that a reasonable rate of navigation service charge should be based on the DORC value of the Port assets excluding the value of historic user funded contributions (as assessed by the ACCC), while the Tribunal has previously determined that a reasonable rate of navigation service charge should be based on the DORC value of the Port assets without that deduction. The Tribunal considers that a reasonable rate of navigation service charge as a result of declaration lies within those bounds, but it is unnecessary to be more precise. The NCC formed the same conclusion (at [6.35]).
5. For the purposes of its evaluation, the Tribunal accepts that the rate of the navigation service charge in the future may be higher if the shipping channel service is not declared by reason of the inclusion of a return on historic user funded contributions. However, the inclusion or exclusion of a return on the value of historic user funded contributions is largely irrelevant to the assessment of criterion (a). It is not sufficient for NSWMC to demonstrate that reasonable terms and conditions of access to the shipping channel service as a result of declaration would be at a price lower than access without declaration. It is necessary to demonstrate that, in comparison to reasonable terms and conditions of access to the shipping channel service as a result of declaration, the terms of access without declaration would negatively impact the conditions or environment for competition on a forward looking basis. NSWMC did not submit that the current rate was such as to negatively impact the conditions or environment for competition in the coal tenements market, and there is no evidence to suggest that the current rate is having any such effect.
6. The principal argument advanced by NSWMC on this application is that declaration would remove, or materially reduce, the “hold-up” risk of investment in the coal tenements market in the Hunter Valley and thereby promote a material increase in competition in that market. NSWMC argued that, in the future without declaration, participants in the coal tenements market will face higher levels of uncertainty with respect to the navigation service charge which will increase the risk associated with making investments, as compared to the future with declaration. NSWMC argued that the elevated risk increases the likelihood that investors will delay their investments until the uncertainty is resolved and that delay reduces allocative efficiency and the productivity of the Australian economy.
7. The Tribunal accepts that the asserted “hold-up” risk of investment will not be present in circumstances where access to the shipping channel service is given on reasonable terms and conditions as a result of declaration. Having considered the available evidence concerning the Port, the coal export market and the coal tenements market as set out above, however, the Tribunal is not persuaded that the “hold-up” risk of investment will arise in the absence of declaration. That is for five reasons.

#### Absence of financial analysis

1. First, NSWMC’s hold-up risk contention was not supported by any empirical evidence concerning the coal tenements market. NSWMC failed to present to the NCC any financial or quantitative evidence concerning the coal tenements market conditions, structure, prices or expected returns. No financial evidence was presented as to how investment decisions are made in the coal tenements market and how Port charges figure in investment decisions.
2. The only evidence relied on by NSWMC in support of its hold-up risk contention consists of generalised assertions by various coal producers which were summarised in the NCC Recommendation as follows:
3. Yancoal submitted that PNO’s prices were “inefficiently high” because they include a return on user funded contributions (at [6.17](a)). Yancoal acknowledged that PNO’s prices will not cause coal volumes to decrease (at [6.18]), but submitted that the ability to increase prices in the future gives rise to a significant hold-up problem for investment in the coal tenements market (at [6.20]).
4. Malabar Resources and Bloomfield Group both submitted that PNO should not be entitled to charge a price that includes a return on user funded contribution (at [6.21] and [6.22]. They also submitted that the risk of PNO levying higher navigation service charges makes the Hunter Valley an increasingly unattractive market for coal mining investment (at [7.106]) and [7.142]).
5. Glencore submitted that the differential between the navigation service charge determined by the ACCC (being $0.61 per gross tonne) compared to the current navigation service charge being offered by PNO is likely to give rise to a risk of hold-up of investment in development stage coal tenements in the Hunter Valley region (at [7.141]).
6. Port Waratah Coal Services submitted that the inability to forecast shipping channel access charges and future returns with any degree of certainty increases the potential for hold-up of new investments or cancellation of proposed investments (at [7.143]).
7. A central aspect of the complaints made by the coal producers was that PNO’s current prices (particularly the navigation service charge) include a return on historic user funded contributions, which coal producers consider is unjustified and involves a transfer of economic surplus in favour of PNO. The Tribunal infers that coal producers wish to prevent such a transfer and perceive that declaration of the shipping channel service under Part IIIA is a means to that end. However, a transfer of economic rents between participants in a supply chain does not necessarily involve any allocative efficiency effects in dependent markets, and does not necessarily involve negative impacts on competition in dependent markets. For the reasons discussed above, the inclusion or exclusion of a return on the value of historic user funded contributions is largely irrelevant to the assessment of criterion (a).
8. Absent from the evidence presented to the NCC by NSWMC and the coal companies referred to above is any financial analysis of the impact of the rates of the navigation service and wharfage charges on returns in the coal mining sector in the Hunter Valley. The Tribunal expects that coal exploration and mining companies regularly undertake detailed financial analysis and forecasting in respect of all significant investments, whether in respect of minerals exploration, mine development or production. The Tribunal also expects that, as the peak industry body for the NSW mineral’s industry, NSWMC would regularly collate financial and economic analysis of that kind to assist in policy development and industry advocacy. Despite that, no such evidence was presented to the NCC. The Tribunal considers that generalised assertions are no substitute for proper financial and economic analysis. For that reason, the Tribunal places little weight on the assertions made.

#### PNO’s incentives

1. Second, it is not in PNO’s long-term interests for Port users to experience such uncertainty around access charges at the Port if this risks significantly less investment in coal mining activity in the Newcastle catchment. As discussed earlier, PNO’s position within the Hunter Valley coal supply chain, in which the coal export market is effectively competitive and coal producers are price takers, significantly constrains PNO’s pricing behaviour. PNO has an incentive to set prices in a way that has regard to its ability to maximise its expected profits over the term of the lease, which would require it to take account of the negative effect on future investment of any attempt to extract economic rents through price increases in the short term.

#### PNO’s pricing behaviour and the effect of the Deeds

1. Third, PNO’s pricing behaviour since the revocation of the previous declaration is inconsistent with NSWMC’s principal concern.
2. The “open access” rate of the navigation service charge published by PNO in December 2019 was set at a rate equivalent to that determined as reasonable by the Tribunal (albeit under a decision that was set aside by the Full Federal Court).
3. More significantly, PNO also offered access terms under the Pro Forma Pricing Deeds. By those Deeds, PNO agrees to bind itself, and has bound itself, for a period of 10 years to a starting rate of navigation service charge which is the mid-point of the rates determined by the ACCC and the Tribunal. The Deeds provide for an annual increase in the navigation service charge and other adjustments to be made pursuant to arbitration to be conducted pursuant to pricing principles which are similar to those that would be applied in an arbitration under Division 3 of Part IIIA. PNO has entered into Vessel Agent Pricing Deeds in respect of all of the coal vessels calling at the Port.
4. Both the open access arrangements and the Pro Forma Pricing Deeds make provision for dispute resolution. Those arrangements assist coal producers in mitigating the risks that may otherwise arise from pricing and other uncertainties at the Port.

#### Investment risks in the coal tenements market

1. Fourth, the navigation service charge represents only a small proportion of the overall cost of the production and sale of coal for export from the Hunter Valley. The risks associated with uncertainty over access charges for the shipping channel service would not contribute significantly to an investor’s expected valuation of future mining projects in the Newcastle catchment.
2. The NCC Recommendation included publicly available information about the average production costs per tonne disclosed by Hunter Valley coal producers in the 2019 reporting period, which were as follows ([7.120]):

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Glencore | BHP | Peabody Energy | Whitehaven Coal | Yancoal |
| $47.00 | $69.94 | $47.17 | $67.00 | $61.00 |

1. As observed by the NCC, the navigation service charge represents only a small component of the overall cost of the production and sale of coal for export from the Hunter Valley (at [7.118]). The NCC also observed (at [7.126]) that coal producers face commercial uncertainty from a range of factors including coal (export) prices, labour costs and taxes. The NCC concluded that the investment uncertainty that arises from those factors is far more significant to investment decisions than any uncertainty over charges for the shipping channel service (given its relative proportion of production costs or sale prices), and that uncertainty associated with the charges for the shipping channel service would not contribute significantly to an investor’s expected valuation of future mining projects in the Newcastle catchment.
2. It would have been helpful if the NCC Recommendation had contained further information and data concerning fluctuations in relevant costs, prices and taxes over time, correlated with investments in the coal tenements market in the Hunter Valley. However, the NSWMC did not provide financial data to the NCC to support its assertions with respect to investment uncertainty and the Tribunal has no reason to doubt the NCC’s conclusions with respect to the relative insignificance of the navigation service charge on investment decisions in the coal tenements market.
3. The Tribunal does not accept, in absolute terms, PNO’s submission that the fact that the navigation service charge is only a small proportion of the overall cost of production and sale of coal means that the charge could never impact negatively on investment decisions in the coal tenements market. The Tribunal agrees with the view expressed by the NCC (at [7.121]) that a range of financial data will inform a decision to invest in the coal tenements market and that expectations of cost are a material consideration that inform expectations of profitability. Nevertheless, the relative size of the navigation service charge compared to the overall cost of production and sale of coal is relevant to an assessment of the materiality of the “hold-up” risk, particularly in light of PNO’s pricing behaviour and the effect of the Pro Forma Pricing Deeds that have been entered into. Taken together, the Tribunal considers that the prospect of PNO increasing the rate of the navigation service charge to an extent that would give rise to a material effect on future investment decisions is remote.

#### The threat of future declaration

1. Fifth, notwithstanding the Tribunal’s decision in the present proceeding to affirm the Treasurer’s decision not to declare the shipping channel service, PNO will continue to face an ongoing threat of declaration which will be a continuing constraint on PNO’s commercial behaviour. That threat will be most relevant in the third last year of the current Vessel Agent Pricing Deeds, at which time the parties have an opportunity to negotiate an extension of the term of the Deeds. PNO’s proposed terms of access at that time will be able to be assessed by relevant Port users, and the negotiations will occur under the threat of a renewed application for declaration.

## Conclusion on criterion (a)

1. Having regard to all of those matters, the Tribunal is not persuaded that, across the medium term, any difference between the rate of the navigation service charge with and without declaration would have any material impact on the conditions or environment for competition in the coal tenements market. In particular, the Tribunal is not persuaded that, without declaration, participants in the coal tenements market face a material “hold-up” risk of investment across the medium term by reason of PNO increasing the rate of the navigation service charge. It follows that declaration would not affect any such risk.
2. In all the circumstances, the Tribunal is not satisfied that access (or increased access) to the shipping channel service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in the coal tenements market or any other dependent market. In those circumstances, the Treasurer’s decision not to declare the shipping channel service must be affirmed.

# consideration of criterion (d)

1. NSWMC’s submissions with respect to criterion (d) were dependent on the Tribunal being satisfied in relation to criterion (a). In circumstances where the Tribunal is not satisfied in relation to criterion (a), there is no need to consider criterion (d) further.
2. Nevertheless, the Tribunal records its general agreement with the following findings of the NCC with respect to the mandatory considerations in s 44CA(3):
3. In relation to investment in Port infrastructure (used to provide the shipping channel service), the risk of error (thereby deterring future investment) may arise in both regulatory arbitration and in commercial arbitration and, while it is possible that declaration of the shipping channel service could have an adverse effect on efficient investment in Port infrastructure, it is possible that this risk is also present absent declaration (at [10.29]). On balance, it is not clear that the risk of deterring future investment in the Port is substantial (at [10.30]).
4. In relation to investment in the coal tenements market, there is a range of commercial and regulatory uncertainties that will impact on investment decisions and, relative to these, uncertainty arising from the difference in the pricing of access to the shipping channel service with and without declaration would be unlikely to be material (at [10.38]).
5. The administrative and compliance costs that would arise if the shipping channel service were declared are unlikely to be materially different if the service were not declared (at [10.44]).

# conclusion and costs

1. In conclusion, for the reasons given above, the Tribunal affirms the Treasurer’s decision not to declare the shipping channel service at the Port.
2. On the assumption that NSWMC would not be successful in its application for review, PNO applied for an order of costs against NSWMC under s 44KB(1). At the hearing of this matter, PNO and NSWMC made submissions as to whether the Tribunal should exercise a discretion to award costs against NSWMC and in favour of PNO. Neither party addressed the question whether s 44KB empowered the Tribunal to award costs in a review of a decision not to declare a service under s 44K(2), as opposed to a review of a declaration under s 44K(1).
3. Section 44KB relevantly provides as follows:

**44KB Tribunal may order costs be awarded**

1. If the Tribunal is satisfied that it is appropriate to do so, the Tribunal may order that a person who has been made a party to proceedings for a review of a declaration under section 44K pay all or a specified part of the costs of another person who has been made a party to the proceedings.
2. …
3. If the Tribunal makes an order under subsection (1), it may make further orders that it considers appropriate in relation to the assessment or taxation of the costs.
4. The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.
5. If a party (the first party) is ordered to pay some or all of the costs of another party under subsection (1), the amount of the costs may be recovered in the Federal Court as a debt due by the first party to the other party.
6. It can be seen that s 44KB(1) empowers the Tribunal to order that a person who has been made a party to *proceedings for a review of a declaration under section 44K* pay all or a specified part of the costs of another person who has been made a party to the proceedings. Thus, the power is only enlivened in the context of a proceeding for a review of a declaration under section 44K.
7. Under s 44H(1), the Minister is empowered to make one of two decisions: to declare the relevant service or not to declare the relevant service. The right to apply to the Tribunal under s 44K to review the designated Minister’s decision reflects the binary decision-making power of the Minister under s 44H. Subsection 44K(1) provides that, if the designated Minister declares a service, the provider may apply in writing to the Tribunal for *review of the declaration*. Subsection (2) provides that, if the designated Minister decides not to declare a service, an application for *review of the designated Minister’s decision* may be made by the person who applied for the declaration recommendation.
8. On its literal terms, s 44KB(1) refers only to a proceeding for a review of a declaration; it does not refer to a proceeding for a review of a decision not to declare a service. The present proceeding is of the latter kind. There was no declaration and, accordingly, this proceeding does not involve a review of a declaration.
9. There is no apparent ambiguity in the language of s 44KB(1). If the legislature had intended the power to award costs in s 44KB(1) to extend to proceedings under s 44K(2), the subsection could have been expressed in a number of ways to refer to proceedings under either ss 44K(1) or (2) – for example “proceedings for a review of a decision of the designated Minister under section 44K”.
10. There is no obvious reason why the legislature would confine s 44KB(1) to proceedings for a review of a declaration and exclude proceedings for a review of a decision not to declare a service. In that regard s 44KB(1) can be contrasted with a number of other provisions, such as ss 44I(2) and 44KA(2), which also apply when there is an application and proceedings for a review of a declaration. Those sections empower the Tribunal to make an order staying the operation of the declaration, whereupon the declaration will not begin to operate until the Tribunal makes its determination on the review. Section 44W(4A) is to similar effect.
11. The extrinsic materials do not assist in explaining the purpose of the limitation in s 44KB(1). Section 44KB was inserted into the Act by the 2010 Amendment Act. Indeed, the extrinsic materials suggest that the limitation was unintentional. The Explanatory Memorandum to the Trade Practices Amendment (Infrastructure Access) Bill 2009 explained the object of the section as follows (at [5.8] and [5.14]):

5.8 Unlike most court proceedings, and unlike matters arising in the Tribunal in relation to the regulation of gas pipelines, there are no provisions for costs to be paid or awarded with respect to applications to the Tribunal for review of a decision-maker’s decision in relation to a declaration application. Requiring unsuccessful applicants to pay costs should reduce incentive for delaying tactics, frivolous review applications or other inappropriate behaviour. This amendment was proposed by the NCC in its Annual Report 2007-08 as a means to reduce the substantial costs and delays currently experienced during review proceedings.

…

5.14 The Tribunal has a discretion to order that a party pays all or part of the costs of another party in a review of a declaration decision under section 44K.

1. Paragraph 5.8 assumes that the proposed s 44KB(1) will apply to “applications to the Tribunal for review of a decision-maker’s decision in relation to a declaration application”. Paragraph 5.14 likewise assumes that the proposed section will apply to “a review of a declaration decision under s 44K”. The language used in the Explanatory Memorandum is sufficiently broad to cover reviews under ss 44K(1) and (2). However, that language is not the statutory language.
2. Section 44KB was considered by the Tribunal in *Re Glencore Coal No 2*. Like the present proceeding, *Re Glencore Coal* was a proceeding under s 44K(2) for review of a decision made by the designated Minister (the Acting Federal Treasurer) not to declare the shipping channel service at the Port. Glencore was successful in its application for review and applied for an order of costs against PNO. The Tribunal declined to order costs. It appears that no party questioned the power of the Tribunal to make an order for costs under s 44KB(1) in a proceeding for review of a decision not to declare a service. The Tribunal did not address the issue and proceeded on the assumption that s 44KB(1) empowered it to make an order for costs, commenting that: “Clearly s 44KB was inserted to provide the Tribunal with a discretion to order costs in reviews of decisions of the Minister to declare, or not to declare, a service under Pt IIIA of the Act” (at [5]).
3. As presently advised, the Tribunal doubts that it has power under s 44KB(1) to make an order for costs in this proceeding, which is a proceeding for review of the Treasurer’s decision not to declare the shipping channel service under s 44K(2). However, as neither party addressed the question of power during the hearing, the Tribunal will afford PNO and NSWMC the opportunity to make further written submissions on the question of power and any supplementary submissions on the exercise of the Tribunal’s discretion (should the Tribunal reach the view that it has power to make an order for costs).

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| I certify that the preceding two hundred and seventy eight (278) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice O'Bryan, Dr D Abraham and Prof K Davis. |

Associate:

Dated: 4 August 2021