



PORTS UPDATE

Focus: Port of Newcastle wins a round in latest declaration stoush; ACCC agitates for changes to National Access Regime

March 2021

On 16 February 2021 the Federal Treasurer rebuffed the latest attempt to regulate shipping channel services at the Port of Newcastle, refusing to 'declare' the services under the National Access Regime. The application for declaration was made by the New South Wales Mineral Council (**NSWMC**) and follows numerous previous considerations of whether the port should be regulated.

While this might mark the end of the battle to regulate the port for now, the ACCC is continuing to agitate for changes to the National Access Regime which could see the test for declaration widened to capture monopolies even where declaration would not promote a material increase in competition in a downstream or upstream markets.

Mineral Council rebuffed

On 23 July 2020, the NSWMC made an application to the National Competition Council (NCC) that the shipping channel services used by NSW coal miners be declared under the National Access Regime in the Part IIIA of the *Competition and Consumer Act 2010* (CCA).

If declared, PNO would be required to negotiate access and where a negotiated outcome was not possible, access seekers could refer the matter to be arbitrated by the ACCC.

The NSWMC's application took aim at the previous conclusion of the NCC that the port operator, Port of Newcastle Operations (PNO), would have commercial incentives not to exercise its market power, pointing to the fact that PNO had increased the charges for access to the port from January 2020 following the Australian Competition Tribunal's redetermination of the ACCC's access charges applying to Glencore.

However, these arguments failed to land with the Treasurer adopting the NCC's recommendation and deciding last month not to declare the service, consistent with the 2019 decision to revoke the declaration of the service. Ultimately, the application failed because the NSWMC could not satisfy two of the four criteria that must be established to declare the service – criteria (a) and (d).

“PNO is, in effect, competing to attract coal mining activity to the Newcastle catchment. Charging excessively high prices for the Service is likely to increase the incentive for some potential future miners to invest in other activities (e.g. investing in coal mining activity in other parts of Australia, or overseas) rather than coal mining in the Newcastle catchment.”

— National Competition Council



Criterion (a) – promoting competition in upstream or downstream markets

Criterion (a) requires the NCC to be satisfied that declaration would promote a material increase in competition in a market other than the market for the service. The NCC found that while the port was a bottleneck facility there were a number of important factors that provide a constraint on PNO. In particular the NCC considered that:

- Given the long 98 year lease PNO has to operate the port, it was unlikely that PNO would undertake opportunistic pricing that 'holds up' existing miners as it would risk sending a signal to future potential users of the port that PNO would take advantage of them after they make investments.
- PNO is, in effect, competing to attract coal mining to the Newcastle catchment and charging excessive prices would be likely to increase the incentive for potential future miners to invest elsewhere.
- The NSW government would be likely to intervene if PNO imposed excessive price increases which in turn provides a low level constraint on PNO.

The NCC ultimately concluded that declaration was unlikely to materially affect competition in any dependent market. The NCC noted that it was not satisfied that any price difference between that offered by PNO and that which would be determined by the ACCC would promote a material increase in competition, in particular because the NCC considered:

- The coal export market is likely to be effectively competitive and PNO is unlikely to have the incentive to diminish competition in this market given coal exports account for a substantial portion of activity at the port and PNO is incentivised to maximise demand for its service.

- While the possibility of higher prices in a future without declaration of the service may lessen investors' expectations of profitability of a tenement in the Newcastle catchment, this would not result in a material impact on the competitive process for those tenements and prospective explorers/miners would still be able to compete on their respective merits for tenements in a future without declaration.
- PNO is not vertically integrated into the provision of container shipping services in any meaningful way that would make it likely to discriminate against any rivals in dependent markets.

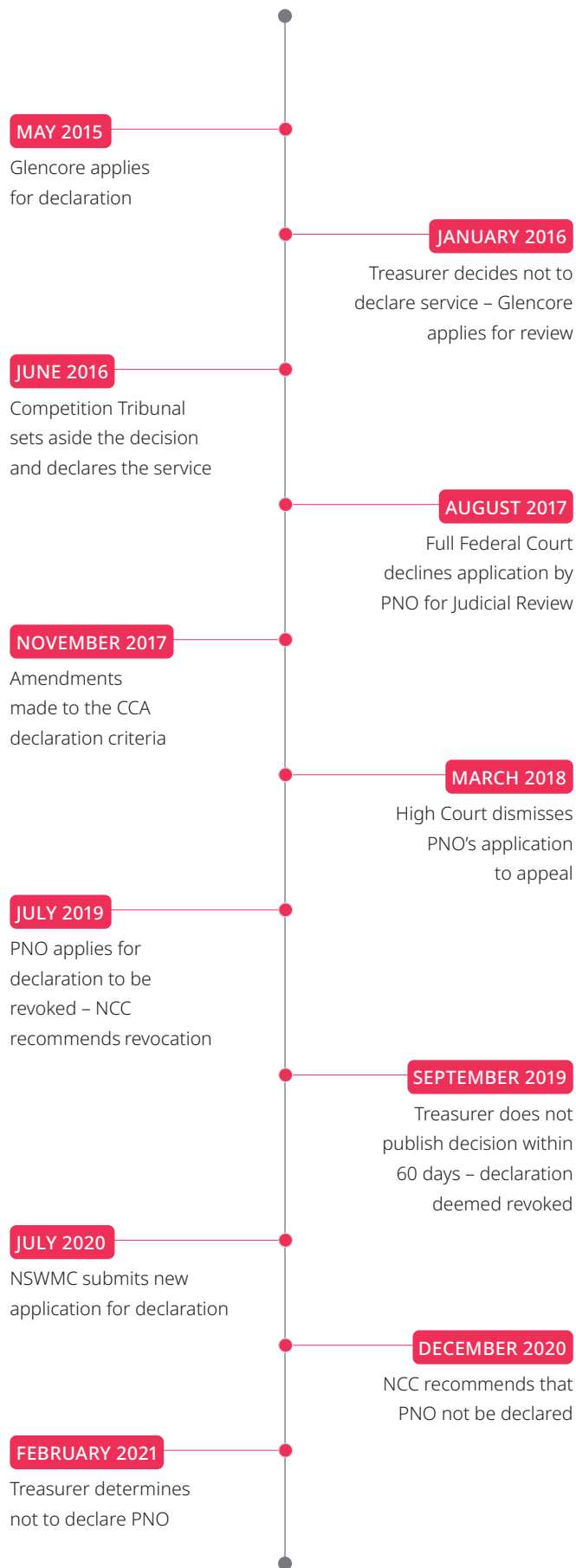
The NCC also noted that access charges at the port were likely to remain a small proportion of the overall cost of production and export for coal in the region and that miners face far greater uncertainty in from other factors that are more likely to influence their future coal mining activities.

Criterion (d) – net public benefit

Criteria (d), in essence, requires the NCC to be satisfied that declaration would deliver a net public benefit. The NCC considered that even if the charges offered by PNO without declaration were less than without declaration, it was not satisfied that the magnitude of any such difference would be likely to promote the public interest.

Given that criteria (a) and (d) were not satisfied, the NCC recommended that the service not be declared, and the Treasurer determined not to declare the service. While the NCC has clearly considered the matter afresh, on the whole its reasoning is consistent with its previous considerations of the declaration status of the port.

[Read the NCC's final recommendation and the Treasurer's final decision](#)



A potted history of declaration at the Port of Newcastle

The NSWMC application was the third time that the NCC and Treasurer considered the declaration status of PNO in just over 5 years. The declaration history of the Port of Newcastle is summarised in the diagram on the left.

Glencore first applied for declaration in May 2015. The Treasurer decided not to declare the service in 2016 which kicked off a series of appeals which culminated with the service being declared in June 2016.

While appeal avenues were being exhausted by PNO the federal government was busy tinkering with the declaration criteria to clarify that criterion (a) required an assessment of the competition effects of *declaration*, rather than the competition effects of gaining *access* (or increased access) as had been interpreted by the courts.

With the amendments in place, PNO was ready to go another round and made an application to the NCC seeking that declaration be revoked on the basis that criterion (a) was not satisfied. The NCC agreed and declaration was revoked in September 2019 – though, not before Glencore had referred an access dispute to be arbitrated by the ACCC. The appeals of the ACCC's decision are still before the courts.

Finally, the NSWMC application was rejected by the Treasurer in February 2021 bringing the matter to an end after almost 6 years.

In the media release accompanying the decision on the NSWMC application the Treasurer raised concerns about the time the processes had taken:

“It has become apparent that the National Access Regime could benefit from an examination to ascertain whether the length of time that processes under the Regime can take is appropriate and consistent with [its] objective.

I have tasked the Department of the Treasury with undertaking that examination and reporting to me in the first half of this year.”

— Josh Freydenberg – Federal Treasurer

So does the Treasurer's most recent decision finally put the regulatory status of the Port of Newcastle to bed? Perhaps not.

ACCC continues to agitate for changes to national access regime

Currently, the National Access Regime is broadly targeted at monopoly infrastructure providers who make use of their market power (typically by denying access or increasing access prices), which in turn harms competition in other markets. At the commencement of the regime the primary harm that the regime was intended to address was monopoly infrastructure providers who were vertically integrated into dependent markets and could either deny access or use price increases/discrimination to harm competitors in upstream and downstream markets.

However, in recent years the ACCC has been strongly advocating for changes to the National Access Regime to see the declaration criteria broadened to capture monopolies even where there is no impact on competition – applying a ‘market power’ test.

While to date there has been no indication that change is in the wind from the corridors of power, the ACCC has doubled down on its calls for change this year.

In a speech last Tuesday announcing the ACCC’s priorities ACCC Chair Rod Sims put monopoly infrastructure operators firmly in the crosshairs, claiming that the current regime is not working and explaining that the ACCC would continue to advocate for changes in 2021. Read the full speech [here](#).

“One of the legislated objectives of the National Access Regime is to promote the economically efficient operation, use and investment in infrastructure by which monopoly services are provided. Our current regime is not meeting that objective in relation to stand-alone monopoly infrastructure. Given the economic damage to the businesses using such infrastructure, this is not consistent with the objective of efficiency and is an unnecessary drag on the economy. We will continue to advocate in 2021 to have these issues addressed.”

— ACCC Chair Rod Sims

With the ACCC being a vocal proponent for regulation at the Port of Newcastle, along with recent enforcement action against NSW Ports, it seems that port regulation is likely to be on the ACCC’s agenda for some time to come.

No doubt if the ACCC’s calls for change are considered, bottleneck ports will have another fight on their hands.

Key contacts

Our team has a breadth of experience in the ports sector including in acting for the ACCC in the Port of Newcastle arbitration proceedings. We also have extensive experience acting for infrastructure service providers, including ports, in declaration processes under both the national access regime and state based access regimes. If you have any questions regarding the above developments and their implications for your business, please don’t hesitate to contact our team.



Simon Uthmeyer

Partner

T +61 3 9274 5470

simon.uthmeyer@dlapiper.com



Fleur Gibbons

Partner

T +61 3 9274 5840

fleur.gibbons@dlapiper.com



Sophia Grace

Special Counsel

T +61 3 9274 5121

sophia.grace@dlapiper.com



Kade Sheely

Solicitor

T +61 3 9274 5007

kade.sheely@dlapiper.com