

GLENCORE

Submissions to Competition Review

Revitalising Competition Policy Consultation Paper

September 2024

GLENCORE

Executive Summary

- Australia's coal sector is one of the country's leading export earning industries. The coal sector depends on multi-user monopoly infrastructure for access to world markets, and the financial viability of current and future investments depends on the terms on which this infrastructure can be accessed.
- Coal will remain an important part of the Australian economy notwithstanding progress towards net zero both as a source of essential energy and an indispensable input to steelmaking and other industrial activities.
- Glencore supports improved regulation of the relevant monopoly infrastructure assets, particularly those developed as public monopolies.
- Glencore submits that regulation should not be confined to vertically integrated monopolies or circumstances where access to infrastructure has a substantial impact on dependent markets.
- Shifting economic rent from investors in productive mining assets to the owners of monopoly infrastructure assets has the effect of reallocating resources to sectors of the economy which are not competitive and therefore lack an incentive to invest in improving productivity.
- Reallocating revenue from the mining sector also reduces the resources available for investment in mining operations which are major employers and sources of economic activity, both directly and indirectly.
- Allowing monopoly infrastructure owners to appropriate a greater share of income from mining operations will not result in any additional investment or employment in those businesses, but will reduce the mining sector's ability to continue to invest and therefore represents an overall negative impact to the Australian economy and a brake on improvements to Australian productivity.
- Glencore believes that enhancement of the Structural Reform of Public Monopolies Principle and the Access to Services Provided by Means of Significant Infrastructure Facilities Principle have the potential to enhance economic regulation, overall levels of investment and the Australian economy and Australian productivity.

Introduction to Glencore

Glencore is one of Australia's largest coal producers. We operate a mixture of open cut and underground coal mines across New South Wales and Queensland, providing work for almost 10,000 people.

Coal is one of Australia's largest export industries that delivers significant socioeconomic value to workers, their families, suppliers and local communities across Australia.

We are a responsible miner of coal that has a track record of operational excellence. Our coal business is well positioned to supply the high quality coal required to meet global steel production.

Context for Glencore's submissions

Glencore appreciates the opportunity to comment on the Revitalising National Competition Policy Consultation Paper. Glencore's main interest is as a major user of monopoly export infrastructure, much of which originated as public monopolies which were subsequently subject to privatisation, some of which remains in public ownership. See the Appendix for an overview of relevant infrastructure assets.

The mining sector is exposed to highly competitive world markets. As the provider of commodity goods to competitive seaborne markets with generally low barriers to entry, the sector is a price taker. However, mining is capital intensive and requires a commitment to investment in long term assets and the ability of the sector to support economic development depends on the confidence with which such investments can be made. The availability and price of export infrastructure is a key risk faced by producers since available export capacity is essential in order to be able to operate.

Historically, coal development on the East coast of Australia was characterised by significant investment by State Governments in shared export infrastructure which was used by a variety of coal producers (as well as other industries in some cases). Long life mining assets were developed in the expectation that this infrastructure would continue to be available on similar terms. In some cases, the export infrastructure was in fact directly funded by the industry in the expectation that it would continue to be made available, for example the users of the Port of Newcastle funded the dredging necessary for the Port Waratah Coal Services and Newcastle Coal Infrastructure Group terminals.

However, the NSW and Queensland State Governments each subsequently embarked on various privatisations. The approaches to regulation of the assets has varied significantly.

After privatisation, the new private owners of these assets were no longer motivated by the same concern for economic development as the State Governments which had originally developed these assets. Even in the absence of vertical integration, the

interests of a private owner will be to maximise the revenue generated by the asset. This need not imply the maximisation of the use of the facility. This is particularly the case when the existing users of the facility have no choice but to continue to use the facility in order to realise returns on their already sunk investments in production capacity.

Simplified Example:

Assume that a coal terminal is able to provide up to 100mtpa of export capacity at a fixed cost of \$150m per annum.

Charge of \$2/ tonne for 100mtpa of usage = \$200m in gross revenue, \$50m profit before tax

Charge of \$5/ tonne for 50mtpa of usage = \$250m in gross revenue, \$100m profit before tax

Charging \$3/ tonne more doubles profit even though throughput is halved and the costs of the coal terminal are fully fixed.

The shifting of economic revenue from a trade exposed sector to the monopolist infrastructure provider, or even the risk that such a shift will occur in the future, reduces the incentive for new investment by the export producers, given the reduction in economic returns which can be expected from the new investment. This uncertainty of pricing outcomes is particularly troublesome for an exporter who is already hugely exposed on the revenue side to global markets and can dissuade further investment in unstable jurisdictions.

Reductions in investment in Australian production may not have any significant impact on globally competitive sectors such as the seaborne coal market. However, it is likely to have an impact on investment in Australian production. It is ongoing investment in production which ultimately produces economic activity and employment in Australia through the leverage effect of such spending. Shifting revenue to the owners of monopoly infrastructure is a pure economic gain for that sector and is not likely to generate additional economic activity or employment.

Our submission in response to this consultation will therefore focus on the Questions about the Structural Reform of Public Monopolies Principle (specifically as it relates to the privatisation of public monopolies) and the Questions about the Access to Services Provided by Means of Significant Infrastructure Facilities Principle.

Accompanying these submissions is a detailed report from Synergies Economics in relation to the Port of Newcastle privatisation.

Glencore is aware of and supports the submissions made by the NSW Minerals Council.

Questions about the Structural Reform of Public Monopolies Principle

6 Do you think any potential changes to the Structural Reform Principle or its implementation should be considered? If so, what are those changes and why are they important?

Recommendations

Glencore recommends that:

- Prior to the privatisation of any public monopoly of National significance, it should be made subject to an appropriate regulatory regime.
- The regulatory regime should be reviewed and approved by a body which is independent of the Government undertaking the privatisation process.
- The regulatory regime should include a procedure for new or expanding users to obtain access to the facility and should provide predictable pricing in relation to the cost of such access.
- The regulatory regime should take into account the historic pricing of the facility as well as user funded investment that has occurred in the past. Price resets for existing infrastructure capacity (for example, through the use of a Depreciated Optimised Replacement Cost to revalue existing infrastructure without any further investment or change in the nature of the services provided) should be avoided.
- Price monitoring should not be considered as an effective form of regulatory regime.

Submissions

Glencore submits that particular care should be taken in relation to the privatisation of public monopoly infrastructure. Given the nature of public monopoly infrastructure, the privatisation creates a potential instrument for the new owners to transfer economic rent from the users of the infrastructure to themselves. Governments are incentivised to impose minimal (or no) regulation so as to maximise this ability to extract economic rent and therefore the price which is paid for the asset being privatised.

If a stable, predictable regulatory structure is imposed prior to a privatisation process being undertaken, this will provide certainty not only for the existing and future users of the infrastructure but also for the potential purchasers of that infrastructure. A transparent approach is better aligned with ensuring the most economically efficient outcome.

Case Study – Port of Newcastle

The obvious case study which illustrates the problems arising from privatisation is the Port of Newcastle privatisation by the State of NSW in 2012, leading to

significant price increases being announced in 2014. The State of NSW did not impose regulation, only price monitoring, and in fact the terms of the privatisation provided protection to the buyer in the event that regulation was subsequently imposed.

As outlined in more detail in the submissions of the NSW Minerals Council, Glencore then began a process to seek regulation of the Port of Newcastle, beginning with an application to the National Competition Council in May 2015 leading to the declaration of the service (after an appeal by Glencore of the initial decision of the Acting Treasurer to the Australian Competition Tribunal) in May 2016. This decision was unsuccessfully appealed by the Port of Newcastle.

The pricing determination process was referred to the ACCC in November 2016, and went through an ACCC decision, an appeal to the Australian Competition Tribunal, and further appeals to the Full Federal Court and the High Court, resulting in a pricing outcome in April 2022.

In the meantime, Port of Newcastle applied for the revocation of the declaration of its services. The National Competition Council recommended the declaration and since the Minister did not make their own decision, a deemed decision to revoke occurred in September 2019 (although this did not affect the decision in the pricing dispute with Glencore). The NSW Minerals Council made a fresh application for declaration in July 2020, but this application was rejected by the Minister and an appeal refused by the Australian Competition Tribunal in August 2021.

Obviously, the process illustrates the difficulties of only moving through the process of determining the correct regulatory and pricing approach after privatisation. Less obviously, Glencore's ability to pursue these regulatory avenues depended critically on the fact that it was not possible for the Port of Newcastle to refuse to service Glencore's customers' vessels during these various regulatory processes. Were it not for the particular circumstances in relation to the scheduling of vessels into the Port, it might have been impossible to use these regulatory processes at all.

Case Studies – Aurizon Network and DBCT

*Both Dalrymple Bay Coal Terminal (**DBCT**) and Aurizon Network have been regulated by the Queensland Competition Authority regime since their privatisation. Although there have been significant challenges with the regulation of each of these assets, and the Queensland access regime has required amendment to introduce a mandatory undertaking process, in general the regulatory processes have succeeded in maintaining a much greater certainty for users and access seekers in respect of access terms and pricing (although the*

adoption of a “negotiate-arbitrate” approach by the QCA in relation to DBCT has reduced pricing certainty for users of that terminal).

Questions about the Access to Services Provided by Means of Significant Infrastructure Facilities Principle

7 Has the Access Principle been operating effectively? If not, why not?

8 Are there any issues with the Access Principle that have not been identified in this paper?

9. Do you think any potential changes to the Access Principle or its implementation should be considered? What are they and why are they important?

Recommendations

Glencore recommends that:

- The process for imposing access regulation on monopoly infrastructure should be streamlined, particularly in relation to assets originally developed as public multi user monopolies. A timely and predictable process is essential to provide a functional remedy for users. As we recommended in relation to question 6, this regulatory process should be applied prior to any public monopoly of National significance being sold into the private sector.
- The declaration criteria should not require the demonstration of an impact in a dependent market. This narrow focus on competition impacts disregards other important economic impacts of monopolistic pricing.
- Access pricing should take account of historic investment (including by users) and historic recovery of such investment. Asset pricing for existing multi user monopoly assets should not be based on a reassessment of asset values (such as through a Depreciated Optimised Replacement Cost assessment) which creates a step change in pricing. An inflated sale price achieved on privatisation should not be used as the basis of calculating user charges. Consider alternative arbitration approaches such as “pendulum arbitration” in relation to particular pricing elements.

Submissions

The cases in which Glencore has dealt with the Access Principles relate entirely to public monopoly infrastructure which has been developed on a multi-user basis and subsequently privatised after users have invested in production assets which are dependent on continued access to the infrastructure. The Access Principles have not operated effectively in these cases. The Access Principles are drafted in such a way as they can be applied to all infrastructure regardless of whether it is developed privately

or publicly, but this disregards the reality that virtually all nationally significant monopoly infrastructure has been developed by Government.

The most obvious case study is the Port of Newcastle. The Port of Newcastle was not only a de facto monopoly but is in fact a statutory monopoly created by the State of New South Wales, which gave assurances to potential bidders that they would not be subject to regulation. From this case, it is obvious that where a public monopoly is privatised without regulation in place, the operation of the Access Principles does not provide timely recourse to ongoing users of that infrastructure. These challenges were only possible due to the particular circumstances which meant that the operator of the Port of Newcastle was not able to deny access to the Port for Glencore's customers' vessels. In cases of privatisation where users do not have an ongoing right of access, users may be forced to accept whatever terms they are offered for access since it is commercially impossible to close down existing operations while the regulatory processes play out (even if such processes ultimately result in access being available on reasonable terms and conditions).

Another example where the Access Principles have not operated effectively is the Dalrymple Bay Coal Terminal. Although initially privatised with regulation from the Queensland Competition Authority reviewed whether that regulation should continue to apply.¹ The QCA recommended that DBCT should not continue to be declared and would therefore no longer be subject to regulation. This recommendation was reached based on the lack of a substantial impact on a dependent market, in line with the Access Principles and their focus on competition in a dependent market as a criterion of declaration. Fortunately, the Queensland Treasurer did not ultimately follow this recommendation and DBCT continues to be regulated.

Despite the fact that in these cases studies neither Port of Newcastle nor DBCT is vertically integrated,² and the fact that it has been difficult to demonstrate that access to this infrastructure has a substantial impact on a dependent market, Glencore believes that it is in the national interest for such important export monopoly infrastructure to be regulated to prevent private owners exploiting the opportunity for economic rents at the expense of the investors in the production facilities which depend on the monopoly export infrastructure to access world markets. If regulation does not prevent private owners from doing so, then this process is likely to chill economic activity by depressing investment in the productive parts of the economy and shifting value to Government-created or Government-mandated monopolies. The impact of cases of egregious failure of the regulatory model, such as the Port of

¹ [Declaration reviews \(qca.org.au\)](http://qca.org.au)

² Noting that Brookfield the majority owner of DBCT previously sought to acquire Asciano leading to vertical integration with the Pacific National rail haulage operations servicing the terminal. [Brookfield consortium - proposed acquisition of Asciano Limited | ACCC](#)

Newcastle privatisation, is not confined to the specific industry which is damaged but produces a wider perception of regulatory risk which may have a chilling effect on investment in unrelated sectors.

Another specific area in which the Access Principles have not operated effectively is in the pricing principles which are applied to resolve disputes in relation to access to monopoly infrastructure. The principles which are to be applied as set out in section 6(4)(i) of the Competition Principles Agreement and implemented in legislation provide for a wide range of potential outcomes which render the outcome of any access dispute highly unpredictable for any access seeker. For access seekers which have not yet invested in businesses which depend on the monopoly infrastructure this situation is bad enough, since it is difficult to determine whether it is even worth embarking on a lengthy and expensive process to have regulation applied when the pricing outcome that will be achieved is so uncertain. This is particularly the case given the information asymmetry between the access seeker, who may have virtually no information about the cost structures of the business, and the monopoly owner which will have access to all relevant information. For investors in businesses which have been developed on the basis of continued access to multi-user public monopolies, to face a complete discontinuity in pricing for no change in service represents an inefficient and inequitable transfer of economic rent.

Glencore would submit that in the case of historically multi user facilities, the decision should take account of actual historic investment and historic recovery of those investments through past pricing to prevent over-recovery of investments from the users of the infrastructure (for example, through recovery of investment which had already been fully funded by users, such as occurred in the Port of Newcastle case when user funded dredging which had been paid for by the coal industry formed part of the Optimised Replacement Cost of the shipping channel assets). Although economic theory might suggest that the repricing of asset values (for example via a Depreciated Optimised Replacement Cost or Optimised Replacement Cost model), such processes are highly theoretical and subject to complex hypothetical arguments, for example about what current technologies would have been able to be employed if the facility were reconstructed (which were not actually employed in constructing the facility) and what the cost of complying with current regulations would be (which were not actually complied with in the construction of the facility).

Although the Competition Principles Agreement as it currently stands states that access to the facility should be by agreement where possible, Glencore would submit that the regulatory tariff setting approach taken by the Queensland Competition Authority in respect of Aurizon Network (and previously in respect of DBCT) is more efficient. Given that agreement of prices with a monopolist owner of infrastructure is unlikely, in most cases this will create a push towards price arbitration. This favours the

infrastructure owner as against users, since the infrastructure owner will be in possession of all information and able to enjoy economies of scale in relation to multiple pricing arbitrations. It may be possible for users to obtain ACCC approval to negotiate collectively, but in respect of the Port of Newcastle the application for such an ACCC authorisation was opposed by operator of the Port and was unable to be obtained by users.

Glencore would also submit that the process of regulatory price determination can become a prolonged battle between economic experts which incentivises each side to take an extreme position on the basis that the decision maker will likely be influenced to set a price approximately halfway between the positions of the access seeker and infrastructure owner. This is particularly true in the case of determining the regulatory rate of return and depreciation periods. Glencore would submit that consideration should be given to “pendulum arbitration” in respect of these pricing variables, in which the arbitrator must choose the pricing position put forward by one of the parties rather than setting a price. This provides an incentive for each party to propose a price which is reasonable and complies with the applicable principles in an attempt to ensure that the arbitrator selects their pricing proposal.

Appendix

Asset	Type of infrastructure	State	History
Abbot Point Coal Terminal	Coal terminal	QLD	Developed as a public monopoly – privatised without regulation in 2011
Dalrymple Bay Coal Terminal	Coal terminal	QLD	Developed as a public monopoly – privatised with regulation in 2001
Wiggins Island Coal Terminal	Coal terminal	QLD	Privately developed under State concession
RG Tanna Coal Terminal	Coal terminal	QLD	Public monopoly
Central Queensland Coal Network (Aurizon)	Rail network	QLD	Developed as a public monopoly – privatised with regulation in 2010
North Queensland Bulk Ports	Port authority	QLD	Public monopoly
Gladstone Port Corporation	Port authority	QLD	Public monopoly
Hunter Valley Coal Network (ARTC)	Rail network	NSW	Public monopoly, subject to regulation
PWCS	Coal terminal	NSW	Privately developed under State lease
NCIG	Coal terminal	NSW	Privately developed under State lease
Port of Newcastle	Port authority	NSW	Developed as a public monopoly – privatised without effective regulation in 2012 (price monitoring only)