



NSW MINERALS COUNCIL
PO Box H367
Australia Square, NSW 1215

T 02 9274 1400
nswmining.com.au
ABN: 42 002 500 316

Director
National Competition Policy Unit
Competition Taskforce Division
Treasury
Langton Cres
Parkes ACT 2600

By email: nationalcompetitionpolicy@treasury.gov.au

23 September 2024

Dear Director,

Revitalising National Competition Policy : Consultation Paper 2024

The New South Wales Minerals Council (**NSWMC**) welcomes the opportunity to provide feedback on the Treasury's Consultation Paper in relation to Revitalising National Competition Policy.

The NSWMC is the leading industry association representing the minerals industry of New South Wales and providing a united voice for its members.

The NSWMC provides its feedback in relation to three principles in the context of ongoing competition, access and pricing issues in relation to the Port of Newcastle:

- the Structural Reform of Public Monopolies Principle;
- the Access to Services Provided by Means of Significant Infrastructure Facilities Principle;
and
- the Prices Oversight Principle

Please see **enclosed** the NSWMC submission which demonstrates that there is significant gap in the law in relation to the conduct of unregulated non-vertically integrated natural monopolies which usually takes the form of excessive pricing or price gouging.

Such conduct can result in very serious economic harm to businesses and consumers and the National Competition Policy should address this as a matter of good economic policy.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Stephen Galilee", with a large, sweeping flourish at the end.

Stephen Galilee
CHIEF EXECUTIVE OFFICER

CC: ACCC Chair , Ms Gina Cass-Gottlieb
The Hon Jo Haylen, NSW Minister for Transport



SUBMISSION TO THE COMPETITION REVIEW TASKFORCE

REVITALISING NATIONAL COMPETITION POLICY : CONSULTATION PAPER AUGUST 2024

BACKGROUND

1. The New South Wales Minerals Council (**NSWMC**) is the leading industry association representing the state's minerals industry and providing a united voice for its members.
2. The NSWMC welcomes the opportunity to provide this submission to the Competition Taskforce Revitalising National Competition Policy Consultation Paper released in August 2024.
3. The NSWMC provides its feedback in relation to three principles in the context of ongoing competition, access and pricing issues in relation to the Port of Newcastle:
 - a. the Structural Reform of Public Monopolies Principle;
 - b. the Access to Services Provided by Means of Significant Infrastructure Facilities Principle; and
 - c. the Prices Oversight Principle

EXECUTIVE SUMMARY

4. This submission seeks to highlight a significant gap in the law in relation to the conduct of unregulated non-vertically integrated natural monopolies. That conduct, which usually takes the form of excessive pricing or price gouging, is currently not addressed by competition law or regulation yet it can result in very serious economic harm to businesses and consumers.
5. This can be contrasted to the position in the US and EU where such conduct is regulated and/or prohibited. Despite concerns being voiced by the ACCC, Government and other stakeholders for many years about this issue, Australia's competition law continues to be unfit for purpose.

6. This submission examines the Port of Newcastle as an example of an unregulated non-vertically integrated natural monopoly and its recent price gouging conduct which has left businesses with no legal or regulatory avenues but to pay higher prices. While the economic impacts in this case may differ to other cases, the law should deal with this issue as a matter of good economic policy.
7. The NSWMC considers that the law should be reformed in one of the following ways:
 - a) a standalone prohibition under the *Competition and Consumer Act 2010* (Cth) (**CCA**) against excessive pricing or price gouging;
 - b) amendments to section 46 of the CCA ensure that excessive pricing or price gouging can constitute a misuse of market power;
 - c) introduction of a Part IIIB regime to the CCA to regulate non-integrated infrastructure service providers with significant market power, focusing on the regulation of pricing; or
 - d) other stringent pricing regulation and controls either under the CCA or state-based legislation rather than light-handed price monitoring which is meaningless yet still involves regulatory costs.

PRIVATISATION WITHOUT REGULATION

8. Competition and productivity across many markets in Australia are negatively impacted by the presence of unregulated non-vertically integrated natural monopolies, such as airports, toll roads and ports.
9. This issue has arisen in recent years due to the privatisation by state governments of infrastructure assets to improve efficiency and productivity and generate revenue for other government priorities. That privatisation however, which effectively gives the new owner a monopoly over an infrastructure service in a particular market, is not always met with adequate access or pricing regulation. This means the new owner is unconstrained in increasing prices for the infrastructure service not simply to recoup the funds paid for the asset but to maximise revenue.
10. Where privatisation occurs without appropriate regulatory protections or laws, the new owner has every incentive to engage in monopoly pricing which causes very serious economic harm to businesses and consumers.

11. The issue was recognised in the Hilmer Report¹ and cited by the High Court as follows²:

Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term 'natural monopoly', electricity transmission grids, telecommunication networks, rail tracks, major pipelines, ports and airports are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus 'essential facilities' in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets. ...

Where the owner of the 'essential facility' is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency.

12. The issue was also succinctly addressed by former Chair of the ACCC, Mr Rod Sims:

"privatising assets without allowing for competition or regulation creates private monopolies that raise prices, reduce efficiency and harm the economy."³

THE PORT OF NEWCASTLE

The importance of port facilities

13. Ports play an indispensable role in the efficient movement of goods, serving as critical hubs for international trade and domestic distribution through which a vast majority of Australia's imports and exports pass.
14. Ports significantly influence the nation's economic health and competitive standing globally. Efficient port operations facilitate the swift, economic and reliable transfer of goods, reducing transit times and costs, which benefits businesses and consumers alike.

Privatisation

15. In May 2012, the NSW Government privatised the Port of Newcastle, transferring certain functions that were previously carried out by the Port Authority NSW to the new port operator, Port of Newcastle Operations Pty Limited (**PON**) as trustee for the Port of Newcastle Unit Trust trading as "Port of Newcastle".

¹ Independent Committee of Inquiry, *National Competition Policy: Report by the Independent Committee of Inquiry* (Report, 25 August 1993) ('Hilmer Report').

² *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 [14].

³ Australian Competition and Consumer Commission, 'Privatise for efficiency, or not at all' (Media Release, 30 July 2021) <<https://www.accc.gov.au/media-release/privatise-for-efficiency-or-not-at-all>>.

-
16. PON is a joint venture owned by The Infrastructure Fund (managed by Hastings Funds Management) and China Merchants Group. The Port of Newcastle was sold for \$1.75 billion, or 27 times annual earnings.
 17. PON's lease includes a licence to operate the shipping channel and berthing facilities at the Port of Newcastle, providing the only commercially viable means of exporting coal from coal miners in the Newcastle catchment, including the Hunter Valley, Gunnedah Basin, Gloucester Basin, Newcastle Coalfield and parts of the Western Coalfields. The Port of Newcastle also facilitates exports of fertilizer and grain.
 18. As operator of the Port of Newcastle, PON controls the terms and conditions of access to the channel and berths including vessel scheduling, property management, port development and pricing for navigation services charges relating to vessel movements, wharfage charges for cargo movements, security and utility charges and site occupancy charges.

Regulation

19. At the time of privatisation, the NSW Government recognised that in the absence of a regulatory framework, a private port operator would run its operations to maximise profits and returns to its shareholders and would not be obliged to support competition in port operations or trade, unless those actions align with an objective to maximise profits.⁴
20. Nevertheless, the NSW Government considered that the ability of PON to charge its users monopoly prices would be constrained by the *Ports and Maritime Administration Act 1995 (PAMA Act)*, the CCA, and countervailing power of customers.
21. The facts outlined below indicate that the above laws and considerations have not constrained PON as anticipated.

The Part IIIA cases

Glencore application for declaration

22. Under Part 5 of the PAMA Act, PON as the operator of the Port of Newcastle, is permitted to fix a navigation service charge, which is payable by the owner of a vessel or cargo using the shipping channel at Port of Newcastle.⁵
23. In 2014, PON unilaterally increased prices for services at the Port of Newcastle by up to 60 per cent or more on some users, effective 1 January 2015.⁶

⁴ NSW Treasury, *Submission to the National Competition Council Glencore's application for Declaration of Shipping Channel Services at the Port of Newcastle* (June 2015) 5.

⁵ See sections 50, 51 of the *Ports and Maritime Administration Act 1995* (NSW).

⁶ The prices varied based on whether a user was a coal vessel or non-coal vessel, and in relation to the size of such vessels. Glencore calculated that the aggregate impact of these amendments is an increase in prices for coal vessels of approximately 60% for Handymax, Panamax and Post Panamax vessels and 26% for Capesize vessels.

-
24. In response to this, in May 2015, Glencore Coal Pty Limited (**Glencore**), a Hunter Valley coal producer and user of these Port of Newcastle services, made an application to the National Competition Council (**NCC**) under Part IIIA of the CCA seeking declaration of the following service provided by PON (the **Service**):

The provision of the right to access and use the shipping channels (including berths next to the wharves as part of the channels) at 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.

25. On 10 November 2015, the NCC made a recommendation to the Treasurer that the relevant Service not be declared.
26. On 11 January 2016, the Acting Treasurer made a decision not to declare the Service.
27. On 29 January 2016, Glencore applied to the Australian Competition Tribunal (**Tribunal**) for a review of the decision not to declare the services at the Port of Newcastle.
28. On 31 May 2016, the Tribunal determined the Service should be declared and entered orders to this effect on 16 June 2016 (**Declaration of the Service**).
29. The Declaration of the Service provided any third party, including Glencore, with a legal right to negotiate terms and conditions (including pricing) of acquisition of the Service. Failing agreement with PON, the third party could request that the ACCC arbitrate the terms and conditions (including pricing) of access to the Port of Newcastle.
30. On 14 July 2016, PON applied to the Federal Court of Australia for judicial review of the Tribunal's decision but this application was dismissed on appeals to both the Full Court of the Federal Court and the High Court.
31. On 4 November 2016, following a failure to reach agreement in terms and conditions (including pricing) of access to the Port of Newcastle, Glencore referred the matter to the ACCC for arbitration.
32. On 18 September 2018, the ACCC, as arbitrator, issued its Final Determination of the access dispute, finding the charges payable by Glencore as at 1 January 1 2018 on access to the Service were as follows:
- navigation service charge: \$0.6075 per gross tonne; and
 - wharfage charge: \$0.0746 per revenue tonne.

-
33. In calculating these charges, the ACCC excluded user-funded contributions from PON's asset value because it did not represent costs to PON for providing the Service and would result in users paying these costs twice (due to financial contributions made in the past by users of the Port of Newcastle in respect of the its initial construction).
 34. In October 2018, both Glencore and PON applied to the Tribunal to conduct a "re-arbitration" of the dispute.
 35. On 30 October 2019, the Tribunal varied the ACCC's determination by refusing to exclude the user-funded contributions and consequently increasing the navigation service charge from \$0.6075 to \$1.0058 per gross tonne.
 36. In November 2019, Glencore and the ACCC separately applied to the Full Federal Court for a review of the Tribunal's decision on the terms of access by Glencore to services at the Port of Newcastle, primarily including the charge for ships entering the port to export Glencore's coal.
 37. In August 2020, the Full Federal Court dismissed the ACCC's case but allowed Glencore's appeal, finding the Tribunal had erred in failing to take regard of the user contributions in their determination of the appropriate level of costs.⁷
 38. On 26 March 2021, PON appealed to the High Court.
 39. On 8 December 2021, the High Court remitted the matter back to the Tribunal to re-determine based on their finding that the Tribunal had not erred in not deducting the user contributions to PON assets which effectively reinstated the Tribunal's determination of the initial navigation service charge of \$1.0058⁸
 40. On 5 April 2022, the Tribunal made the determination in the form sought by PON, reinstating the initial navigation service charge of \$1.0058 per gross tonne.

Changes to Part IIIA and PON revocation application

41. While the Glencore case was proceeding through the court process, legislative amendments to Part IIIA of the CCA were introduced in 2017, following various court decisions as well as reviews into the National Access Regime by the Productivity Commission (2013) and the Harper Review (2015).
42. The relevant legislative change amended one of the declaration criteria on the basis that it had become too easy to declare infrastructure services provided by a monopoly service providers under Part IIIA of the CCA.

⁷ *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194.

⁸ *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39; 2CLR 565.

-
43. Once the amendment became effective, on 2 July 2018, PON lodged an application with the NCC for a recommendation that the Declaration of the Service at the Port of Newcastle made by the Tribunal on 16 June 2016 be revoked.
44. In coming to its decision, the NCC applied the new criterion, namely that "...access to the service on reasonable terms and conditions as a result of declaration is not likely to promote a material increase in competition in any market other than the market for the Service,"⁹ On 26 July 2019, the NCC recommended that the Minister revoke the Declaration of the Service.
45. As the Minister did not publish a decision on the revocation recommendation within 60 days, under section 44J(7) of the CCA, on 24 September 2019, it was deemed that the Minister's decision was to revoke the Declaration of the Service.

NSWMC application for declaration

46. In July 2020, the NSWMC lodged with the NCC a new application for declaration of access to the shipping channel provided by PON.
47. On 18 December 2020, the NCC recommended that the designated Minister not declare the services provided by PON at the Port of Newcastle.¹⁰ In doing so, the NCC observed that:
- a) the PAMA Act and regulations do not act to directly limit or regulate the level at which prices may be set; and
 - b) while arrangements between PON and the NSW Government include provisions designed to constrain the behaviour of PON, any third party with concerns about that behaviour would need to rely on the NSW Government taking action.
48. On 16 February 2021, the Minister decided not to declare the services.
49. On 8 March 2021, the NSWMC made an application to the Tribunal for review of the decision of the Minister's decision not to declare the services.
50. On 4 August 2021, the Tribunal affirmed the Minister's decision not to declare the shipping channel service.¹¹

⁹ National Competition Council, *Revocation of the declaration of the shipping channel service at the Port of Newcastle* (Recommendation, 22 July 2019) 4.

¹⁰ The service that was the subject of the NSWMC Application comprised 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, 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.

¹¹ *Application by New South Wales Minerals Council* (No 3) [2021] ACompT 4.

Further price increases and collective bargaining authorisation

51. Following the revocation of the declaration of services provided by PON at Port of Newcastle in September 2019, PON increased the navigation service charge by over 33% commencing January 2020, with no change to the nature or quality of the services provided to customers.
52. PON also offered users an 'alternative' arrangement with slightly lower prices. However, the 'alternative' arrangement includes mechanisms for further price increases, with little transparency on how these further price increases are justified, and very little ability for Port of Newcastle users to obtain the data needed to understand such price increases or to dispute them.
53. Additionally, the offer included a price "re-opener" for anything that may impact the equity returns of the shareholders of the Port of Newcastle, including if there is a downturn or decrease in customer demand, or even taxation changes. This meant that all operating, legal and commercial risk is shifted from PON to users.
54. Significantly, the proposed price increases also proposed recovering approximately \$912 million of expenditure on channel dredging which was paid for by the mining companies prior to 2014. This meant users would ultimately pay for the dredging works twice - through the initial direct funding to complete the works, and through PON's proposed increased fees.
55. On 6 March 2020, to address the imbalance in negotiating power between the mining companies and PON at the Port of Newcastle and given the recent significant price increases, the NSWMC and a number of affected member companies lodged an application to the ACCC seeking authorisation to collectively bargain with PON on pricing and access principles.
56. On 27 August 2020, the ACCC granted authorisation to the NSWMC and ten coal producers, allowing them to collectively negotiate in respect of the terms and conditions of a proposed 10-year deed with PON including navigation service and wharfage charges.
57. PON formally declined the request to deal with the collective and on 17 September 2020, PON applied to the Tribunal for a review of the ACCC authorisation.
58. On 18 February 2022, the Tribunal set aside the ACCC's determination.

Most recent price increases

59. On 14 March 2024, PON announced that it would increase its wharfage fees for all port users by 200%, effective 1 April 2024.
60. PON also informed users that the wharfage charges will continue to rise by over 400% between 2024 and 2026 without any commensurate increase in the nature or quality of the services provided.

-
61. Since 2014, PON has also increased its navigation service charge by around 186%, and its wharfage charge by 343%. During the same period CPI has risen by around 30% with an average annual inflation rate of around 2.7%.
62. The increases will affect all users, but particularly Hunter Valley coal exporters which make up over 90 per cent of the Port of Newcastle's exports and income base.
63. In addition to raising significant concern over the scale and timing for implementation of the price increases, concern was raised around the limited and isolating nature of consultation undertaken by PON. More recently PON has made efforts to improve consultation and engagement with the coal producers.

Other ports

64. The NSWMC understands that the same issues are prevalent at other ports in Australia, namely a lack of adequate regulation on pricing which has resulted in excessive pricing for port services at privatised port facilities in Australia.
65. For example:
- a) There is no external oversight regarding pricing at the privately owned Port of Brisbane or the privately-owned ports of NSW, including Port Botany and Port Kembla.
 - b) Regional ports in Victoria are no longer the subject of price regulation.
 - c) Ports in South Australia and the Northern Territory are subject to price monitoring only.
 - d) While Port of Melbourne has strong price regulation, the state regulator recently found that Port of Melbourne breached pricing orders by charging excessive rents, such that the current regulatory framework did not have adequate incentives for compliance.¹²
66. In contrast, access to and pricing for the Dalrymple Bay Coal Terminal (**DBCT**) is regulated by the Queensland Competition Authority. This more stringent form of regulation has ensured that the pricing for services at the DBCT are significantly lower than Port of Newcastle.

¹² Essential Services Commission, *Inquiry into Port of Melbourne compliance with the pricing order 2021* (Web Page, 28 January 2022) <
<https://www.esc.vic.gov.au/transport/port-melbourne/port-melbourne-compliance-pricing-regulations/inquiry-port-melbourne-compliance-pricing-order-2021>>.

INADEQUACY OF CURRENT LAWS

Overview

67. The above price increases over the last decade by PON demonstrate it has unfettered and unconstrained ability to increase prices for monopoly services at Port of Newcastle. These price increases are very significant in percentage terms and are not attributable to cost increases or corresponding increases to the nature and quality of the services provided. They represent excessive pricing or price gouging behaviour by an unregulated non-vertically integrated natural monopoly.
68. Current competition law and regulation is not fit for purpose to address this issue.

Part IIIA of the CCA

69. The summary of the Part IIIA cases above in combination with the significant price increases implemented by PON clearly demonstrates that this form of access regulation is not working.
70. Firstly, the length of time for a final decision to be provided and the cost of the process are prohibitive. It is estimated that parties in total incurred over \$10 million in legal and third party fees alone (not including diverted management time, etc).
71. Secondly, while the decision of the High Court in the Glencore application has been relied upon by PON to justify its price increases (that is, PON says that its price increases are consistent with the access pricing principles in that decision), the size and frequency of the increases mean that those principles are flawed and do not represent appropriate price regulation. The fact of the matter is that PON is able to engage in excessive pricing or price gouging despite the High Court's decision.

The PAMA Act

72. The NSW Government has previously considered that the PAMA Act is likely to constrain PON from charging monopoly prices at the Port of Newcastle.
73. Section 51, 61 and 62 of the PAMA Act allow PON to fix navigation service charges and wharfage charges on a per tonnage basis. Section 67 of the PAMA Act allows PON to make agreements for these charges separate to what it may publish but no agreements have been reached with any coal producer.

74. Part 6 of the PAMA Act contains the price monitoring scheme, the object of which 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.”¹³
75. Part 6 of the PAMA Act imposes various notice requirements on PON, including that it must:
- a) publish a list of its port charges and the standard rates for other charges associated with the use of facilities at the port; and
 - b) in respect of any proposed change in service charges:
 - i) notify the Minister in writing at least 20 business days before the change is proposed; and
 - ii) publish notice of any changes to port charges at least 10 business days before the change is proposed to be made.
76. Part 6 of the PAMA Act however does not impose any limitations on the prices charged by PON for these services.
77. Accordingly, in light of the significant price increases from PON, the PAMA Act does not constrain PON from charging monopoly prices at the Port of Newcastle.

Independent Pricing and Regulatory Tribunal Act 1992 (NSW)

78. The Independent Pricing and Regulatory Tribunal (**IPART**) was established and is governed by the provisions of the *Independent Pricing and Regulatory Tribunal Act 1992 (NSW)* (**IPART Act**).
79. IPART’s functions are to investigate pricing conduct, industry and competition and other functions.
80. Part 3 of the IPART Act contains IPART’s functions in relation to price determinations, which includes investigations and reports, including functions under section 13A of the IPART Act to ‘fix’ the maximum price for the government monopoly service or to set the methodology for fixing the maximum price for the government monopoly approach.
81. Section 11 of the IPART Act provides that IPART is to conduct investigations and make reports to the Minister on the determination of the pricing for a government monopoly service supplied by a government agency (specified in Schedule 1 to the IPART Act) and periodic review of pricing policies in respect of government monopoly services supplied by such an agency.¹⁴

¹³ PAMA Act s 77.

¹⁴ *IPART Act 1992 (NSW)*, s 11.

82. Under Schedule 1 to the IPART Act, government agencies for which IPART has standing reference includes Port Corporations or other relevant port authorities within the meaning of Part 5 of the PAMA Act. While it is clear that PON falls under the definition of “government agency”, the application of PON as a “government monopoly service” is limited by section 4(1) of the IPART Act, which provides:

*For the purposes of this Act, a **government monopoly service** is a service supplied by a government agency and declared by the regulations or the Minister to be a government monopoly service.*

83. Section 4(2) of the IPART Act provides that a service may be declared to be a governmental monopoly service if the Minister certifies that it is a service:

- a) for which there are no other suppliers to provide competition in the part of the market concerned, and
- b) for which there is no contestable market by potential suppliers in the short term in that part of the market.

84. Section 4(5) of the IPART Act provides:

To avoid doubt the service for which a navigation service charge under Part 5 of the Ports and Maritime Administration Act 1995 is payable is capable of being declared to be a government monopoly service. The relevant port authority (within the meaning of that Part) is taken to be the supplier of that service.

85. Despite Parliament’s intention that a navigation service under the PAMA Act could be declared as a government monopoly service, this service at the Port of Newcastle has not been declared.

86. In addition, the IPART Act provides that the NSW Premier may refer the pricing of PON to IPART for investigation.

87. On 27 March 2024, the NSWMC formally requested that the NSW Premier make such a referral.

88. On 29 April 2024, the Minister for Transport of NSW on behalf of the NSW Premier stated that the NSW Premier would not make this referral because under the PAMA Act, the role of the NSW Government “is to monitor price increases rather than approve them”. The Minister for Transport of NSW concluded that the matter should be raised at the Commonwealth level.

89. For the reasons above, IPART also has no ability to constrain PON from charging monopoly prices at the Port of Newcastle.

Misuse of market power under section 46 of the CCA

90. High pricing alone is not necessarily a competition law concern as it might simply reflect the ability to maximise profits in times of high demand or the provision of superior goods or services. High pricing within a market (including by a monopolist) may also encourage new entry resulting in increased competition.
91. However, where there is no real prospect of meaningful entry into a market and no prospect of a monopoly being undermined through market forces, excessive pricing may cause significant harm to business and consumers without appropriate laws and regulations.
92. Part IV of the CCA prohibits a range of anti-competitive practices but none of these deal with excessive pricing or price gouging, including by a vertically separated monopolist.
93. Indeed, it has been expressly recognised that excessive pricing or price gouging is unlikely to constitute a misuse of market power in contravention of section 46 of the CCA because the conduct is unlikely to have the purpose or effect of substantially lessening competition in a market.
94. The Inquiry into Price Gouging and Unfair Pricing Practices stated:¹⁵

In short, firms are free to charge as much as they like. They can price gouge lawfully as long as there is no unlawful collusion.

95. Similarly, the ACCC has noted:¹⁶

monopoly pricing that is not prohibited by the CCA (e.g., where a non-vertically integrated infrastructure owner extracts monopoly rents from all access seekers equally) has no other mechanism to address it, meaning there is no credible threat of regulation.

Other provisions of the CCA

96. There are no other provisions of the CCA that are likely to deal with excessive pricing or price gouging.
97. Such conduct is unlikely to be captured by any other competition law prohibitions or the Australian Consumer Law in Schedule 2 to the CCA. For instance, many users of the services at the Port of Newcastle are not small business for the purposes of the unfair terms regime (which might otherwise prohibit unilateral excessive pricing) and the conduct is unlikely to constitute unconscionable conduct.

¹⁵ *Inquiry into Price Gouging and Unfair Pricing Practices chaired by Professor Allan Fels AO Reporting to the Australian Council of Trade Unions* (Final Report, February 2024) 2.

¹⁶ Australian Competition and Consumer Commission, 'The Dangers of Monopolists Without Constraint' (Media Release, 30 September 2019) <<https://www.accc.gov.au/media-release/the-dangers-of-monopolists-without-constraint>>.

98. Accordingly, there are no other existing legal or regulatory avenues to constrain PON from charging monopoly prices at the Port of Newcastle.

ACCC AGREES THAT THE LAW IS INADEQUATE

99. In addition to the statements made above, the current and former Chairs of the ACCC have voiced their concerns that the current law is unfit for purpose because it does not prohibit excessive pricing or price gouging by non-vertically monopoly infrastructure owners.

100. For example, former ACCC Chair, Rod Sims has made the following comments specifically about the Port of Newcastle:

[T]he current interpretation of light-handed regulation of monopoly infrastructure, which in essence has come to mean price monitoring, is not only ill-conceived in economic theory, it has failed in practice.”¹⁷

In 2014 the Port of Newcastle was privatised for \$1.75 billion, amounting to a multiple of 27 times earnings. Pre privatisation, it was making around \$20 million. Less than a year later, the new owner revalued its port assets to \$2.4 billion. At around the same time the new owner increased the navigation charges by 40 per cent, which increased their profit or cash flow by about \$20 million—that is, they more or less doubled it... As you would expect the monitoring regime covering the Port of Newcastle has had no visible impact in dealing with this price increase.¹⁸

101. Mr Sims has also noted the negative impacts on the economy and international competitiveness if this issues was left unaddressed:

[A]ny monopoly pricing will ultimately be paid for by users and consumers, and damages the productivity of Australia’s economy, impeding growth, international competitiveness and living standards”.¹⁹

102. Separately, Mr Sims stated in response to PON’s revocation of declaration application:

Should the declaration be revoked, the Port of Newcastle will be an unregulated monopolist that is able to determine the terms and conditions of its access with little constraint... It would be reasonable to expect that, without regulation, further price increases at the port would follow and this would be a bad outcome for users and the economy.²⁰

¹⁷ Rod Sims (ACCC), ‘Speech on How did the light handed regulation of monopolies become no regulation?’ (Speech, Gilbert + Tobin Regulated Infrastructure Policy Workshop, Melbourne, 29 October 2015) <<https://www.accc.gov.au/about-us/media/speeches/speech-on-how-did-the-light-handed-regulation-of-monopolies-become-no-regulation>>.

¹⁸ Rod Sims (ACCC), ‘Speech on How did the light handed regulation of monopolies become no regulation?’ (Speech, Gilbert + Tobin Regulated Infrastructure Policy Workshop, Melbourne, 29 October 2015) <<https://www.accc.gov.au/about-us/media/speeches/speech-on-how-did-the-light-handed-regulation-of-monopolies-become-no-regulation>>.

¹⁹ Rod Sims (ACCC), ‘Ports: What measure of regulation keynote address’ (Speech, Ports Australia Conference, Melbourne, 20 October 2016) <<https://www.accc.gov.au/about-us/media/speeches/ports-what-measure-of-regulation-keynote-address>>.

²⁰ Australian Competition and Consumer Commission, ‘ACCC concerned by NCC’s draft recommendation on Port of Newcastle’ (Media Release, 19 December 2018) <<https://www.accc.gov.au/media-release/accc-concerned-by-nccs-draft-recommendation-on-port-of-newcastle>>.

103. In response to the view from PON that the decision of the High Court in the Glencore application allows it to increase prices in the way that it has, Mr Sims noted that:

*The ACCC is extremely concerned that following the High Court's decision regarding the calculation of the navigation charges at the Port of Newcastle, the law, as it stands, means [PON] will receive a return on assets that it did not invest in, and some port users could end up paying twice",*²¹

104. More recently, in March 2024, former ACCC Chair, Graeme Samuel likened the situation with Port of Newcastle with airports. Mr Samuel stated:

*Airports have no incentive to provide satisfactory services or reasonable prices... that's why the airlines have been trying to get something in place to constrain their monopoly power."*²²

105. Mr Samuel also noted:

*For the ports it's the same thing, and Sims came out and said you cannot keep privatising these assets. Ultimately what governments are found to be doing is acting in the interests of their budgets... knowing that the highest possible price is achieved by bequeathing to the new owners monopoly power."*²³

106. In February 2024, former ACCC Chair, Professor Allan Fels, released a price gouging report²⁴ noting that airports held monopoly power and have been "enabled to overcharge" due to pricing being unregulated.²⁵

107. In its February 2024 submission to the Review, the ACCC stated the "Port of Newcastle was a stark example where no adequate regulatory framework led to an unconstrained monopoly that could charge inefficiently high prices."²⁶

108. More recently, on 4 June 2024, at a Senate Estimates Hearing, current ACCC Chair Gina Cass-Gottlieb was questioned about the lack of regulatory oversight on pricing of non-vertically integrated monopolies, specifically referencing PON.

109. Senator McDonald referred to NSWMC's concerns with the Port of Newcastle and a recommendation made by former ACCC Chair Mr Sims that a new Part IIIB should be included in the CCA to address such concerns.

²¹ ACCC, 'High Court rules on determining access charges for Port of Newcastle' (Media Release, 9 December 2021) <<https://www.accc.gov.au/media-release/high-court-rules-on-determining-access-charges-for-port-of-newcastle>>.

²² Tansy Harcourt, "The real cost of super fund monopolies from sky to sea" *The Australian* (8 March 2024) <<https://www.theaustralian.com.au/business/financial-services/big-super-funds-are-clipping-the-ticket-on-the-cost-of-living-crisis/>>.

²³ Tansy Harcourt, "The real cost of super fund monopolies from sky to sea" *The Australian* (8 March 2024) <<https://www.theaustralian.com.au/business/financial-services/big-super-funds-are-clipping-the-ticket-on-the-cost-of-living-crisis/>>.

²⁴ Australian Council of Trade Unions and Professor Allan Fels, *Inquiry into Price Gouging and Unfair Pricing Practices* (Report, February 2024) <https://www.actu.org.au/wp-content/uploads/2024/02/InquiryIntoPriceGouging_Report_web9-1.pdf>.

²⁵ *Ibid*, 8.

²⁶ ACCC Submission to Treasury Competition Review (13 February 2024) 9.

110. Ms Cass-Gottlieb confirmed that the NSWMC's concerns reflected the ACCC's concerns and that the ACCC would pursue this issue, highlighting that Part IIIA has proven inadequate for dealing with monopolies that lack vertical integration:

We have recommended as part of a National Competition Policy Review, we have identified that Part IIIA has been shown to be seriously wanting where there is not vertical integration, where there is a capacity through monopoly to exploit customers in increased price, and we are proposing that there needs to be a regulatory framework that will enable, where it is appropriate for intervention, appropriate regulation.²⁷

111. The ACCC has also repeatedly²⁸ expressed concern over the inadequacy of current regulation, specifically in relation to non-vertically integrated monopoly infrastructure. Notably, the ACCC has raised the need for a 'Part IIIB access regime', noting;

"Just as we do not want vertically integrated monopolies denying access to their competitors, we do not want non vertically integrated infrastructure exercising their market power to raise prices to users and so damage the economy,"²⁹

POSITION UNDER US AND EU LAWS ADDRESSES PRICE GOUGING

US position

112. While the *Sherman Act* and other federal legislation in the US are yet to prohibit excessive pricing or price gouging, on 5 March 2024, the White House announced the establishment of a new "Strike Force on Unfair and Illegal Pricing" (**Strike Force**) to hold accountable "corporations . . . when they try to rip off Americans . . . while keeping prices high."³⁰
113. Business media gave wide coverage to the announcement and quoted the heads of the Department of Justice (**DOJ**) and Federal Trade Commission (**FTC**), who will co-chair the Strike Force, as saying that aggressive price enforcement is coming.
114. This Strike Force will strengthen interagency efforts to root out and stop illegal corporate behaviour that hikes prices on American families through anti-competitive, unfair, deceptive, or fraudulent business practices. DOJ and FTC, along with other agencies on the Strike Force, will focus their collaborative efforts on key sectors where corporations may be violating the law and keeping prices high, including prescription drugs and health care, food and grocery, housing, financial services and more.³¹

²⁷ "NSWMC, 'ACCC backs reforms to tackle Port of Newcastle's price gouging' (Media Release, 5 June 2024) <<https://www.nswmining.com.au/news/2024/6/accc-backs-reforms-to-tackle-port-of-newcastle-s-price-gouging>>

²⁸ E.g. Rod Sims, 'Market Power in the COVID-19 era (Speech, National Press Club, 21 October 2020)

²⁹ Sims, R, Press Release regarding Speech at the Australasian Transport Research Forum, 30 September 2019, accessed via <https://www.accc.gov.au/media-release/the-dangers-of-monopolists-without-constraint>

³⁰ Press Release, White House, Fact Sheet: President Biden Announces New Actions to Lower Costs for Americans by Fighting Corporate Rip-Offs (Mar. 5, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/05/fact-sheet-president-biden-announces-new-actions-to-lower-costs-for-americans-by-fighting-corporate-rip-offs/>.

³¹ Press Release, White House, Fact Sheet: President Biden Announces New Actions to Lower Costs for Americans by Fighting Corporate Rip-Offs (Mar. 5, 2024),

115. In addition, thirty US states have banned price gouging conduct which includes limiting percentage increases on prices,³² prohibiting unconscionable price increases³³ and prohibiting increases above what is necessary.³⁴

EU position

116. Article 102 of the *Treaty on the Functioning of the European Union (Treaty)* prohibits abusive conduct by companies that have a dominant position on a particular market, provided such conduct may affect trade between Member States.

117. Specifically, Article 102(a) of the Treaty prohibits companies from directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions on customers.

118. Though excessive pricing cases under article 102 are rare, European courts have found that a price is excessive if ‘it has no reasonable relation to the economic value of the product supplied’.³⁵ Courts have determined this question by reference to a two-stage test:

- a) the difference between the dominant company’s costs actually incurred and the price actually charged must be excessive; and
- b) the imposed price must be either unfair in itself or when compared to the price of competing products.³⁶

FAILURE TO ADDRESS THIS ISSUE RESULTS IN SIGNIFICANT ECONOMIC HARM

Background

119. Laws that allow an owner of non-vertically integrated natural monopoly infrastructure to engage in excessive pricing or price gouging can result in serious economic harm to businesses and consumers.

<https://www.whitehouse.gov/briefing-room/statements-releases/2024/03/05/fact-sheet-president-biden-announces-new-actions-to-lower-costs-for-americans-by-fighting-corporate-rip-offs/>.

³² States that use a “percentage increase cap limit” are Arkansas, California, Maine, New Jersey, Oklahoma, Oregon and West Virginia.

³³ States that use an “unconscionable price limit” standard are Alabama, Florida, Idaho, Indiana, Iowa, Massachusetts, Missouri, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, Texas, Vermont, Virginia and Wisconsin.

³⁴ States that use an “outright ban” on price-gouging are Connecticut, Georgia, Hawaii, Kentucky, Louisiana, Mississippi and Utah.

³⁵ *United Brands Company and United Brands Continentaal BV v Commission of the European Communities (C 27/76)* [1978] ECR 1978-00207, 250 (‘*United Brands*’).

³⁶ *United Brands*, 251-252; Commission of the European Communities, *Case COMP/A.36.568/D3 – Scandlines Sverige AB v Port of Helsingborg*, 23 July 2004, [147].

120. For example, when monopoly prices are passed to consumers this contributes to high levels of inflation and declines in real wages and household disposable incomes.³⁷

Airports

121. The issue is illustrated by monopoly pricing by airports which have been progressively privatised since the 1990s. Airports charge fees for aeronautical services such as access to landing strips and terminals but they are generally not subject to any form of price regulation over aeronautical charges.

122. While there is some competition in the downstream airline market, each airline pays the airport the excessive and unregulated fees and charges it determines. These costs naturally are passed through to consumers in the form of higher airfares.

123. In the 2021-22 Airport Monitoring Report', the ACCC explained:

Each airport, just as any other private business in Australia, seeks to maximise its profits. As monopolies that are not constrained by competition, airports seek to achieve this by charging monopoly prices, while limiting output and service levels. Airports may also under or over invest in their infrastructure and lack incentives to operate efficiently or to adopt innovative technologies and service models. Such actions hamper productivity and lead to efficiency losses to the detriment of consumers and the broader Australian economy.³⁸

124. The circumstances of individual airports demonstrate the price gouging conduct and resultant economic harms:

- a) Sydney Airport has increased the airport charge by 36% between 2018-19 and 2021-22.³⁹ Airlines have also claimed the lack of mandatory negotiation or arbitration frameworks have allowed Sydney Airport to display monopolistic behaviour.⁴⁰
- b) At Brisbane Airport, revenue per passenger has increased by 36% over the last decade⁴¹ while airline profits remain strong. Major airlines have raised concerns about large infrastructure spending by Brisbane Airport being used to further increase airport charges.⁴²

³⁷

https://www.oecd-ilibrary.org/sites/ce188438-en/1/3/1/index.html?itemId=/content/publication/ce188438-en&_csp_=f8e326092da6dbbbef8fbfa1b8ad3d52&itemIGO=oe&itemContentType=book#section-d1e946-6539cc9538

³⁸ ACCC, *Airport Monitoring Report 2021-22* (Report, August 2023), 15.

³⁹ Rhiannon Shine, 'Australia's aviation sector has been accused of price-gouging, but airlines say 'monopolistic' airport operators are driving up cost' *ABC News* (Online, 26 March 2024) <

<https://www.abc.net.au/news/2024-03-26/australias-monopolistic-airports-overcharging-airlines/103634144>>.

⁴⁰ Lucas Baird and Elouise Fowler, 'Sydney Airport deal boosts case for arbitration: Alan Joyce' *Australian Financial Review* (Online, 9 November 2021) <

<https://www.afr.com/companies/infrastructure/monopoly-airport-owners-just-cause-for-arbitration-joyce-20211109-p597eg>>.

⁴¹ Rhiannon Shine, 'Australia's aviation sector has been accused of price-gouging, but airlines say 'monopolistic' airport operators are driving up costs', *ABC News*, (Article, 26 March 2024) <

<https://www.abc.net.au/news/2024-03-26/australias-monopolistic-airports-overcharging-airlines/103634144>> .

⁴² Jenny Wiggins, 'Virgin Australia goes to war over airport 'gold plating'' *Australian Financial Review* (Online, 13 May 2024) <https://www.afr.com/companies/infrastructure/virgin-australia-goes-to-war-over-airport-gold-plating-20240509-p5jb6w>.

- c) In 2019, Dr Alison Roberts, CEO of A4ANZ, criticised the government’s stance for favouring monopoly airport operators over consumers, noting that the absence of reform would mean Australians could face continued exploitation at airports through high parking fees, overpriced food, and increased taxi and rental car surcharges.
- d) In 2022, in determining a dispute between Qantas and Perth Airport concerning airport charges, the Supreme Court of Western Australia held that Perth Airport was a monopoly provider of services and had exercised its “substantial market power” in the negotiation process.
- e) Since January 2024, Virgin Australia passengers have not been able to access aerobridges at Darwin Airport because it has not agreed to a 40 per cent rise in the airport’s fees. This is an ongoing dispute that is yet to be resolved.
- f) On 30 April 2024, Bonza Aviation, a new entrant into the Australian aviation industry, entered voluntary administration. Bonza was faced with access concerns at Sydney Airport including airport fees and pricing.⁴³
- g) In May 2024, Virgin Australia complained about “excessive price rises”, as some airports increased annual fees by 45 per cent⁴⁴ which “gets directly passed on to consumers.”⁴⁵

Container terminal access charges

Overview

125. Container terminals at major ports such as the Port of Melbourne, Port of Brisbane, Port Botany and Port Kembla exercise unconstrained market power by unilaterally increasing terminal access charges by very significant percentages.

126. In 2018, former ACCC Chair Rod Sims stated in 2018 that:⁴⁶

[T]he use of infrastructure charges means that stevedores can earn a greater proportion of their revenues in a market in which their market power is stronger relative to the more competitive market in which they provide services to shipping lines

...

[I]f stevedores do not face a competitive restraint on their prices, it will leave consumers paying higher charges for goods and make exporters less competitive”.

⁴³ Michael Sainsbury, ‘The Bonza fiasco shows action must be taken on Qantas’ market monopoly’, *Crikey*, (Web Page, 1 May 2024) < <https://www.crikey.com.au/2024/05/01/bonza-airline-failure-qantas-jetstar-market-concentration/>>.

⁴⁴ Jenny Wiggins, ‘Virgin Australia goes to war over airport ‘gold plating’’, *The Australian Financial Review* (Article, 13 May 2024) <<https://www.afr.com/companies/infrastructure/virgin-australia-goes-to-war-over-airport-gold-plating-20240509-p5jb6w>>.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

127. In the ACCC's 2022-2023 Container stevedoring monitoring report, the total operating profits of the industry was \$481.6 million⁴⁷ up from \$90.9 million as reported in the ACCC's 2018-2019 Container stevedoring monitoring report.
128. In December 2022, in its final report into Australia's maritime logistics system, the Productivity Commission recommended the Government introduce a mandatory industry code to require container terminal operators to notify the ACCC and industry of planned fee changes, with the ACCC empowered to reject unjustified increases.

Port of Melbourne

129. The absence of effective regulation at the container terminal at the Port of Melbourne has allowed DP World to increase terminal access charges for full export containers by 52.52% raised concerns, with fees set to rise to \$190.80 for import containers and \$175.70 for exported containers, compared to just \$3 per container in 2017.⁴⁸
130. On 4 March 2024, Patrick Terminals announced its intention to increase terminal access charges on imports from \$170.50 to \$204.60 per container and \$136.40 to \$146.65 for exports.⁴⁹
131. In relation to the DP World price increases, former ACCC Chair Graeme Samuel stated that the privatisation of Australian ports created "rampant high prices" and that the Federal Government must "start imposing some controls" as there is "there is no justification for price rises of that nature."⁵⁰
132. According to the Freight & Trade Alliance, these surcharges have substantially increased the cost of international trade, as transport companies lack the leverage to negotiate or avoid these fees.
133. An independent review of the Victorian ports system in November 2020⁵¹ considered that formal price regulation should be back onto the table should terminal access charges emerge as a key driver of increased stevedore profitability.

⁴⁷ ACCC, *Container stevedoring monitoring report* (Report, December 2023), 40.

⁴⁸ ACCC, 'Competition reduces stevedores' profitability, but infrastructure charges are up' (Media Release, 30 October 2018) <<https://www.accc.gov.au/media-release/competition-reduces-stevedores%E2%80%99-profitability-but-infrastructure-charges-a-re-up>>.

⁴⁹ Patrick Terminals, Notice of Intention to change Landside & Ancillary Charges: Effective from 4 March 2024 (4 January 2024) <<https://ctaction.com.au/wp-content/uploads/2024/01/0104-Patrick-Terminals-Landside-Charges-Notice-of-Intention-4-January-2024.pdf>>.

⁵⁰ Ibid.

⁵¹ Victorian Government, Department of Transport, *Independent Review of the Victorian Ports System*, (Report, November 2020) <https://content.vic.gov.au/sites/default/files/2023-09/ports-review-word_0.docx>.

Port Botany

134. In January 2024, DP World increased the Terminal Access Charge at Port Botany for export containers by 38.8% from \$115.20 to \$159.90. The charge on import containers was also increased by 25.5% from \$143.20 to \$179.70.
135. Similarly, Patrick Terminals increased their Terminal Access Charge by 22.5% from \$155.20 to \$190.15. The charge on export containers increased by 7.5%.

Port of Brisbane

136. Following the privatisation of the Port of Brisbane in 2010, the terminal infrastructure levy has increased by 2000% from \$4.95 to \$110.⁵²
137. In January 2024, DP World increased the Terminal Access Charge on export containers by 37.5%. The charge on import containers was increased by 26.2%.

Conclusion

138. Significant increases in terminal access charges have detrimental effects on consumers and the broader economy. These charges tend to be passed down the supply chain, leading to higher prices for goods. For consumers, this means a reduction in purchasing power as they must spend more on the same products and services, disproportionately affecting low and middle-income households and exacerbating income inequality.
139. In addition to direct pass through of increased monopoly cost to consumers (exacerbated by a lack of competition in the downstream markets or due to the essential nature of the goods/services involved), there are more indirect consumer and economy-wide impacts of monopoly/excessive pricing.
140. For example:
- a) Excessive returns for monopolies such as ports can result in overinvestment by the monopolist (in pursuit of returns) the cost of which is ultimately borne by customers.
 - b) Increased charges (for example terminal access charges) can negatively impact business operations, particularly for small and medium-sized enterprises which depend on the efficient movement of goods. These increased charges can lead to lower margins, which in turn has an impact on growth and innovation.

⁵² Greig Taylor, 'The privatisation of Australia's container ports has failed miserably' *UNSW Business Think* <<https://www.businessthink.unsw.edu.au/articles/australia-container-ports-privatisation-productivity>>.

-
- c) The ability for a monopoly provider to impose excessive charges within a supply chain that requires significant investment can create (or exacerbate) 'hold up' problems for market participants. Particularly in industries such large scale grocery/grain export, mining and energy the investing party is vulnerable to the counterpart exploiting their improved bargaining position, and where quasi-rents/ROIs are effectively expropriated. This can stifle innovation, reduce productivity, and ultimately harm economic growth. Additionally, it creates an environment of uncertainty and mistrust, where businesses are hesitant to engage in projects that require large, upfront investments.
 - d) Excessive pricing within Australian supply chains (including logistics providers) elevates the costs of exporting goods, making Australian products less price-competitive on the global market. Higher export costs can lead to a decline in demand for Australian goods abroad, negatively affecting the country's trade balance and reducing export revenues.
 - e) Excessive returns contribute to inflation within the broader Australian economy, placing direct pressure on Australian households and resulting in 'corrective measures' (such as interest rate rises) which disproportionately impact working households.
 - f) Monopoly pricing stifles competition in related markets. Consumers are also harmed by the negative impact monopoly pricing has on new entrants in dependant markets, that are less able to absorb monopoly pricing further up the supply chain and must pass on full price increases to consumers in order to remain competitive and ultimately failing to offer a viable alternative to established players.
141. More broadly, higher terminal access charges can lead to inefficiencies and delays in the supply chain. If shipping lines decide to reduce the number of port calls in Australia due to higher costs, it can lead to longer shipping times and reduced service frequency. This can affect the reliability and predictability of the supply chain, making Australian goods less dependable in terms of delivery times. International buyers might prefer sourcing from countries with more stable and predictable supply chains, further diminishing Australia's competitive edge.
142. In 2022, the Productivity Commission found that inefficiencies at Australia's major container ports directly cost the Australian economy about \$600 million a year, stating:
- ...ports play a vital role in linking Australian producers and consumers with world markets. The bulk of Australia's goods trade passes through ports. This included nearly all imports and most exports (both by value and volume). These imported goods include important inputs into Australian production and include many of the goods purchased by Australian consumers. Efficient and dependable ports provide greater certainty to importers and exporters, and reduce the cost and time involved.*

PROPOSED SOLUTIONS

143. The above submissions demonstrate that current competition law and regulation does not appropriately address excessive pricing or price gouging especially by owners of natural monopoly non-vertically integrated infrastructure. This results in significant economic harm to businesses and consumers.
144. The NSWMC considers that the law should be reformed in one of the following ways:
- a) a standalone prohibition under the CCA against excessive pricing or price gouging;
 - b) amendments to section 46 of the CCA ensure that excessive pricing or price gouging can constitute a misuse of market power;
 - c) introduction of a Part IIIB regime to the CCA to regulate non-integrated infrastructure service providers with significant market power, focusing on the regulation of pricing; or
 - d) other stringent pricing regulation and controls either under the CCA or state-based legislation rather than light-handed price monitoring which is meaningless yet still involves regulatory costs.
145. It should be noted that the Inquiry into Price Gouging and Unfair Practices recommended that there should be a new and express prohibition on excessive pricing (for example in section 46 of the CCA and providing the ACCC with powers to conduct more extensive investigations into pricing and market behaviours).⁵³
146. The Inquiry found that exploitative pricing practices could be observed in various industries, such as electricity, banking, aviation, and pharmaceuticals that revealed a competitive landscape characterised by pricing practices aimed at maximising benefits for producers or suppliers, often to the detriment of consumers. The Inquiry considered that the price gouging behaviour would continue to contribute to increased inflation.
147. This approach is particularly appealing in light of the current cost of living crisis being experienced in Australia, inflationary pressures being driven by excessive profits and the lack of lead time required for implementation.

23 September 2024

⁵³ *Inquiry into Price Gouging and Unfair Pricing Practices chaired by Professor Allan Fels AO Reporting to the Australian Council of Trade Unions* (Final Report, February 2024).