

By email

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CONSULTATION ON REVITALISING NATIONAL COMPETITION POLICY

1. Port of Newcastle Operations Pty Limited (**PNO**) welcomes the opportunity to respond to the consultation paper on *Revitalising National Competition Policy* (the **Consultation Paper**), in particular the points raised under the 'access to services provided by means of significant infrastructure facilities principle'. Clause 6 of the CPA seeks to promote competition in upstream and downstream markets through economically efficient access to services provided by significant monopoly infrastructure (**Access Principle**).
2. PNO (as trustee for the Port of Newcastle Unit Trust) has been the lessee from the State of New South Wales of the Port of Newcastle since 30 May 2014 under a 98-year lease. The Port of Newcastle is the largest port on the east coast of Australia, and one of the largest bulk export ports in the world. The Port of Newcastle is an infrastructure facility of national significance to Australia. PNO has significant experience with the practical operation of the National Access Regime (**NAR**), including the complex and lengthy processes that can eventuate.

Executive Summary

3. Question 7 of the Consultation Paper asks whether the Access Principle has been operating effectively. Under the Access Principle, the Commonwealth was required to legislate for an access regime to enable third-party access to services provided by significant infrastructure facilities in the circumstances set out in the Principle. This was done through the creation of the NAR under Part IIIA of the Competition and Consumer Act 2010 (Cth) (**CCA**).
4. PNO considers that, in substance, Part IIIA is fit for purpose and that the Access Principle has operated effectively. However, from PNO's own recent practical experience of the NAR processes as an access provider during the period 2017 to 2022, PNO considers that there are opportunities to enhance the efficiency of the operation of the NAR by removing

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some duplicative elements, namely Australian Competition Tribunal review of the merits of Ministerial declaration and revocation decisions, and to limit repeat declaration and revocation processes within a short period in infrastructure market terms.

5. Question 8 of the Consultation Paper asks whether there are any issues with the Access Principle that have not been identified in the Consultation Paper. PNO has not identified that there are additional issues to be raised from its recent experience of the regime.
6. Question 9 of the Consultation Paper asks whether there are any potential changes to the Access Principle or its implementation to be considered. The Consultation Paper notes that the Access Principle was “designed to mitigate the competition impacts of infrastructure monopolies rather than address broader economic harms of monopoly pricing; although, rebalancing negotiating power on access terms is an important function of access regimes.”
7. Access under the NAR is a very significant impact on private property rights. PNO strongly believes that it is appropriate that the focus of the Access Principle is on the impacts of infrastructure services which have been declared under the specified criteria, to rebalance the negotiating power on access terms as between access provider and access seeker within a negotiate/arbitrate framework - that is - the minimum necessary regulatory intervention.
8. PNO submits that no case has made out for amending the Access Principle to include any form of explicit ex ante price regulation for non-vertically integrated natural monopoly facilities that do not meet the Part IIIA declaration criteria. This is demonstrated by the fact that even in the absence of declaration, PNO is setting prices to align with the regulatory pricing principles. To return to a form of statutory ex ante price control would be a retrograde step which risks chilling infrastructure investment through regulatory error and should be strongly resisted.

In revitalising the Access Principle, it is appropriate to consider amendments to Part IIIA to increase the efficiency of its processes

9. Question 7 of the Consultation Paper asks whether the Access Principle has been operating effectively. PNO considers that, in substance, the Access Principle has operated effectively and that Part IIIA is fit for purpose. Essential facilities may be “declared” under Part IIIA if they satisfy the declaration criteria in the CCA. Declaration under the NAR gives rise to an enforceable right of access to a nominated service or facility and terms which include prices which confirm to well recognised regulatory pricing principles. PNO submits that the application of the current declaration criteria under Part IIIA accurately identifies both the relevant infrastructure services and the situations in which regulatory intervention is required.
10. It is appropriate that the Access Principle be refreshed to reflect the wording of Part IIIA of the CCA. Given the changes to Part IIIA over the years (including changes to the declaration criteria), the wording of the Access Principle should be amended for consistency.

11. Though the substance has operated effectively, parts of the review processes in the post-declaration operation of Part IIIA could be amended to increase their efficient implementation and/or operation. Having regard to PNO's practical experience of the NAR, PNO considers that there are two opportunities:
- (a) to remove the ability of the Australian Competition Tribunal to review the merits of declaration and revocation decisions; and
 - (b) to limit repeat declaration and revocation processes. Merits and judicial reviews of initial determinations results in prolonged resolutions and can hinder or delay business investment as essentially the same process is repeated.
12. The decision to grant such access rights necessitates an assessment of significant economic and public interest factors based on the statutory criteria for declaration. In PNO's view, these considerations are appropriately addressed by the relevant Minister, drawing on the expert, independent advice of the National Competition Council. PNO submits that removing the Tribunal's capacity to review declaration and revocation decisions will lead to quicker resolutions. Appropriate safeguards are retained by ensuring that parties are permitted to pursue judicial review of NAR decisions.
13. PNO also submits that there should be limits set out in the Access Principle on the ability for applicants to make repeat applications to the Council to recommend that a service be declared (or revocation of a declaration), where a declaration (or revocation) decision has recently been made in respect of the same, or substantially similar service. PNO was subject to substantially similar applications in the context of applications for declaration lodged by Glencore Coal Assets Australia Pty Ltd (**Glencore**) (in 2015) and the New South Wales Minerals Council (in 2020), where the latter application was described by the Council, the Tribunal and the High Court of Australia as being "*almost identical*",¹ raising issues "*extensively canvassed in earlier decisions*",² and "*materially identical*"³ to the first declared service (which was the subject of revocation less than 6 months before the second application was made). Imposing a limitation on such applications, subject to a material change of circumstance exception, strikes a suitable balance by streamlining processes under the NAR and reducing administrative burdens, while also ensuring that the objectives of the NAR always remain accessible.

¹ National Competition Council, *Application for declaration of certain services at the Port of Newcastle* (Recommendation, 18 December 2020) at [3.3].

² *Application by New South Wales Minerals Council (No 4)* [2021] ACompT 5 at [82].

³ *Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39 at [52].

The focus of the Access Principle should remain on mitigating the competition impacts of infrastructure monopolies rather than seeking to address monopoly pricing

14. Question 9 of the Consultation Paper asks whether there are any potential changes to the Access Principle or its implementation to be considered. The Consultation Paper notes that the Access Principle was “designed to mitigate the competition impacts of infrastructure monopolies rather than address broader economic harms of monopoly pricing; although, rebalancing negotiating power on access terms is an important function of access regimes.” PNO strongly submits that the focus of the Access Principle should remain on the competitive impacts of infrastructure monopolies. For services declared under the declaration criteria, it is crucial to rebalance negotiating power over access terms as between access providers and access seekers. PNO contends that there is no justification for amending the Access Principle to incorporate any form of explicit price regulation for non-integrated monopoly facilities that do not meet the Part IIIA declaration criteria.
15. Taking PNO as an example, it already faces a range of pricing constraints over its pricing including:
 - (a) PNO's own incentives – PNO has no incentive to set prices in a way that harms its access seekers, for example pricing in a way that would reduce coal production and exports. The Port is operating substantially below capacity. As a result, PNO has an interest in encouraging investment by port users so as to maximise long-term exports. There is a strong push to diversify the import and export tasks at the Port to take advantage of the spare capacity in the channels.
 - (b) The lease arrangements between the State of NSW and PNO – which include provisions designed to ‘constrain’ the behaviour of PNO. As the National Competition Council (**NCC**) noted in December 2020 when it recommended that the shipping channel service at the Port of Newcastle not be re-declared, the NSW Government would be likely to “intervene if PNO imposed excessive price increases” including via the terms of PNO’s lease, referral to IPART or new restrictions.⁴
 - (c) The ongoing threat of declaration under the NAR – PNO continues to face an ongoing potential for declaration under the NAR set out in Part IIIA which acts as a continuing constraint on PNO’s commercial behaviour and pricing, as has been noted by the Australian Competition Tribunal in 2021.⁵
16. These constraints can be seen to work in practice. Even in the absence of declaration, PNO has provided and will continue to provide users with access to the Port’s services on terms

⁴ See [https://ncc.gov.au/images/uploads/NCC - NSWMC application for declaration - Final Recommendation.pdf](https://ncc.gov.au/images/uploads/NCC_-_NSWMC_application_for_declaration_-_Final_Recommendation.pdf) at page 6, [1.24].

⁵ Application by New South Wales Minerals Council (No 3) [2021] ACompT 4 at [198] and [262].

that are reasonable, based on established regulatory pricing principles, and which were endorsed as such by the ACT and the High Court following the access dispute initiated by Glencore which concluded in 2022 and has consulted transparently with users as to the charges for its services (even though it is no longer supplying a declared service).⁶

17. While there is no obligation (whether statutory, contractual or otherwise) for PNO to provide transparency in relation to PNO's proposed charges for its services at the port, PNO has provided substantial detailed information to port users in three rounds of engagement in relation to its pricing to demonstrate that it is adhering to the regulatory pricing principles in Part IIIA of the CCA.
18. This engagement has involved the provision by PNO of detailed information concerning the price setting process for port charges from 2024, and invitations to producers and diversified trade customers to provide feedback and ask questions in relation to that process. PNO has sought to explain the methodology and inputs underpinning its charges.
19. By setting prices in this manner, PNO has ensured that there is no need for recourse to the NAR, because PNO is already conforming in setting prices in 2024 for the service to the pricing principles set out in that regime at s44ZZCA and s44X of the CCA.
20. PNO submits that it would not be appropriate to amend the Access Principle to address monopoly pricing and agrees with conclusions made by Commissioner Dr Stephen King in his July 2021 Productivity Commission Conference Paper on 'Part IIIB – Why there is no economic case for additional access regulation'⁷ as set out below:

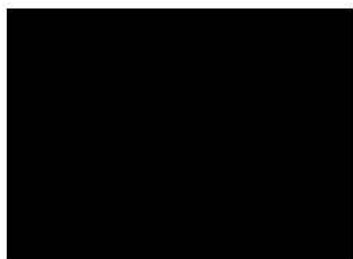
... the effective 'declaration' of the Port of Newcastle, say through a Part IIIB, could change the bargaining position between the port and the coal miners. The miners, like Glencore, would be able to seize a higher share of the economic rents associated with the Hunter-valley coal export supply chain. However, as shown by the NCC, these transfers would not have any competitive impact. It is also highly unlikely that these transfers would reduce any future investment hold-up problem. Both the port and miners have significant on-going relationship-specific investments. They have strong incentives to avoid the mutual loss of profit associated with reductions in investment due to hold-up. In this situation, requiring that the Port of Newcastle and its associated coal miners be subject to compulsory negotiation and arbitration, as envisaged under Part IIIB, at best, would simply lead to a transfer of rents. At worst, it would crowd out alternative approaches to reduce hold-up and potentially distort supply contracts.

⁶ https://www.portofnewcastle.com.au/wp-content/uploads/2024/08/Port_of_Newcastle_Port_Pricing_Framework_Aug24.pdf

⁷ Stephen King, 'Part IIIB - Why there is no economic case for additional access regulation', Productivity Commission Conference Paper (July 2021), p15 <https://www.pc.gov.au/research/supporting/access-regulation/partIIIB-access-regulation.pdf>

Should we be able to further assist you in relation to the matters set out above, please contact me.

Yours sincerely



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