AUSTRALIAN COMPETITION TRIBUNAL

Application by Glencore Coal Pty Ltd [2016] ACompT 6

|  |  |
| --- | --- |
| Review from: | **THE DECISION BY THE COMMONWEALTH TREASURER UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) IN RELATION TO THE APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY PORT OF NEWCASTLE OPERATIONS PTY LTD** |
|  |  |
| File number: | ACT 1 of 2016 |
|  |  |
| Tribunal: | **MANSFIELD J (PRESIDENT)**  **MR RF SHOGREN (MEMBER)**  **MR R STEINWALL (MEMBER)** |
|  |  |
| Date of decision: | 31 May 2016 |
|  |  |
| Catchwords: | **COMPETITION** – Application for review of a decision by the Minister under s 44K(2) of the *Competition and Consumer Act 2010* (Cth) not to declare a service – where service is the right of access and use of monopoly infrastructure provided by the Port of Newcastle Operations Pty Ltd – where Minister not satisfied of criterion (a) of s 44H(4) – proper construction of s 44H(a) – meaning of “access (on increased access)” – whether application of criterion (a) requires counterfactual comparison of a future with access and a future with restricted access – whether “access” entails a legal and enforceable right to access – whether access would promote a material increase in competition in at least one dependent market – whether increased access would promote a material increase in competition in at least one dependent market – existence of residual discretion in relation to that particular criterion – where Notice of Contention that the decision should be affirmed on the additional ground that criterion (f) is not satisfied – application of criterion (f) |
|  |  |
| Legislation: | *Competition and Consumer Act 2010* (Cth)  *Ports and Maritime Administration Act 1995* (NSW)  *Trade Practices Amendment (National Access Regime) Act 2006* (Cth)  *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth)  *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth)  *Independent Pricing and Regulatory Tribunal Act 1992* (NSW)  *Ports and Maritime Administration Regulation 2012* (NSW) |
|  |  |
| Cases cited: | *Re Application by Robe River Mining Co Pty Ltd*  *Hamersley Iron Pty Ltd* (2013) 274 FLR 346  *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242; [2005] ACompT 5  *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517  *Sydney Airport Corporation v Australian Competition Tribunal* (2006) 155 FCR 124  *Re Fortescue Metal Group Ltd* (2010) 271 ALR 256; [2010] ACompT 2  *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379  *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57  *Re* *Telstra Corporation Ltd* (2006) ATPR 42-121  *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237  *Scott v Davis* (2000) 204 CLR 333  *Jacob v Utah Construction and Engineering Ltd* (1966) 116 CLR 200  *Ratcliffe v Walters* (1969) 89 WN (NSW) Pt 1 497  *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395  *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45  *Federal Commissioner of Taxation v Salenger* (1988) 19 FCR 378  *Public Service Association of SA Inc v Industrial Relations Commission of SA* [2011] SASCFC 14  *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 192 ALR 701  *Application by Chime Communications Pty Ltd (No 3)* [2009] ACompT 4 |
|  |  |
| Date of hearing: | 3 and 4 May 2016 |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 174 |
|  |  |
| Counsel for Glencore Coal Pty Ltd: | AC Archibald QC with N DeYoung |
|  |  |
| Solicitor for Glencore Coal Pty Ltd: | Clifford Chance |
|  |  |
| Counsel for Port of Newcastle: | J Kirk SC with CG Arnott |
|  |  |
| Solicitor for Port of Newcastle: | Webb Henderson |
|  |  |
| Counsel for the National Competition Council: | RCA Higgins |
|  |  |
| Solicitor for the National Competition Council: | Ashurst |

DIRECTIONS

|  |  |  |
| --- | --- | --- |
|  | | ACT 1 of 2016 |
|  | | |
| RE: | APPLICATION FOR REVIEW OF THE DECISION BY THE COMMONWEALTH TREASURER UNDER SUBSECTION 44K(2) OF THE COMPETITION AND CONSUMER ACT 2010 (CTH) IN RELATION TO THE APPLICATION FOR DECLARATION OF A SERVICE PROVIDED BY PORT OF NEWCASTLE OPERATIONS PTY LTD | |
| BY: | GLENCORE COAL PTY LTD | |

|  |  |
| --- | --- |
| JUDGES: | MANSFIELD J (President)  mr rf SHOGREN (member)  mr r STEINWALL (MEMBER) |
| DATE OF DIRECTION: | 31 MAY 2016 |

THE TRIBUNAL DIRECTS THAT:

1. Glencore Coal Pty Ltd, after consultation with Port of Newcastle Operations Pty Ltd and the National Competition Council, submit to the Tribunal a Minute of the terms of the Determination appropriate to be made in the light of the Reasons for Decision published this day.

RIBUNAL:

1. This is an application by Glencore Coal Pty Ltd (Glencore) for review of a decision made by the Hon Mathias Cormann, the Acting Federal Treasurer (the Minister) not to declare certain services provided by Port of Newcastle Operations Pty Ltd (PNO) by means of the shipping channels at the Port of Newcastle (the Port).
2. On 13 May 2015, Glencore made an application (the application) to the National Competition Council (NCC) for a recommendation pursuant to s 44G of Pt IIIA of the *Competition and Consumer Act 2010* (Cth) (the Act) in respect of the following service (the Service):

The provision of the right of access and use of the shipping channel (including berths next to walls as part of the channel) at the Port, by virtue of which vessels may enter the Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.

1. On 2 November 2015, the NCC issued its Final Recommendation to the relevant Minister under s 44F of the Act. It recommended that the Service not be declared on the grounds that it did not meet the requisite criterion in s 44G(2)(a) of the Act. In other respects, the NCC was satisfied that the criteria specified in s 44G(2)(b)-(f) were satisfied.
2. On 8 January 2016, the Minister published his decision under s 44H(1) of the Act. He decided not to declare the Service, on the same basis as that recommended by the NCC, namely that he was not satisfied that criterion (a) of s 44H(4) was established.
3. On 29 January 2016, Glencore applied to the Tribunal under s 44K(2) of the Act for review of the Minister’s decision.

# background

1. Much of the background material is not contentious.
2. The Port has been used for commercial shipping for many, many years. It is one of the larger coal export ports in the world. Shipping channels are the only means by which vessels can gain entry to and exit from the Port. It is not contested in submissions that the shipping channels at the Port are the only commercially viable option for the export of coal from the Hunter Valley region in New South Wales. Nor was there any dispute in the course of submissions that the shipping channels are a natural “bottleneck” monopoly. In practical terms, the Service is necessary for the export of coal from the Hunter Valley.
3. The Hunter Valley coal industry and associated supply chain are the largest coal export operations in the world. The Hunter Valley/Newcastle coalfields produce over 170M tonnes of saleable coal per year.
4. The Hunter Valley coal supply chain is made up of coal producers (or mines), above rail haulage providers, the Australian Rail Track Corporation which provides below rail (track) infrastructure, three export port terminals (being Carrington and Koorangang Island Terminals) operated by Port Waratah Coal Services (PWCS) and Newcastle Coal Infrastructure Group Terminal (NCIG), port managers and the Hunter Valley Coal Chain Coordinator. There are more than 30 operating coal mines in the Hunter Valley operated by 11 coal producers as well as other coal projects in various stages of exploration and development. There are three main rail haulage providers who transport coal from the mines to three terminals at the Port. Coal is then loaded onto vessels at one of the loading terminals.
5. Until May 2014, the Port was operated by the State of NSW. In the decade or so prior to that period, NGIC paid very significant sums to the State of NSW for dredging the channels and a further very substantial payment is anticipated from PWCS for the dredging associated with a proposed terminal T4 when it is developed.
6. As the NSW Mineral Council submitted to the NCC on 16 June 2015, the Hunter Valley coal industry is presently facing fragile market conditions. There has been more than a 30% drop in coal prices over the last two years or so, causing coal producers or many of them to re-evaluate their operations. As the mining boom has ended, both larger and smaller coal producers are focusing on the economic viability of their operations. It is said that this slowdown has had a considerable impact on the mining and related industries, workforce, local businesses and community in the Hunter Valley who depend upon the continued investment in mining projects. At a general level, of course, that is a sensible and understandable observation.
7. In May 2014, the joint venture parents of PNO, Hastings Funds Management and China Merchants Group entered into a long term lease arrangement with the State of NSW for the privatisation of the Port assets, including the shipping channels, that is the Service. The transaction generated gross proceeds of some A$1.75B to the State of NSW. PNO has subsequently revised its valuation of the channels in its accounts to A$2.4B.
8. As the new port operator from May 2014 onwards, PNO controls the terms and conditions of access to the Service. PNO has and may exercise the statutory powers conferred under Pt 5 of the *Ports and Maritime Administration Act 1995* (NSW) (PMAA) in order to levy charges on the vessels which use the Service. On each occasion a vessel enters the shipping channels, it incurs liability to pay usage charges for use of the channels at rates determined by PNO. PNO has the express entitlement under the lease of the Port from the State of NSW to exclude access to the channels if the shipping charges are not paid.
9. In some cases of bottleneck infrastructure, there is a certified access regime or other effective regulatory framework for “managing” the prices set by the monopoly owner or operator of that infrastructure for the use of the particular infrastructure. There is no such structure in place in relation to PNO. The prices levied by PNO are subject to price-reporting to the relevant Minister of the State of NSW under Pt 6 of the PMAA, and the Minister may refer the pricing for investigation to the New South Wales Independent Pricing and Regulatory Tribunal (IPART). It is common ground that the IPART regime is not a certified or effective access regime: if it were, s 44G(2)(e)(ii) of the Act would mean that the NCC could not recommend the Service, because it would not be satisfied that there was no other appropriate access regime. That question did not arise in the NCC consideration or its recommendation.
10. Nor does the PMAA provide Glencore, or any access seeker in relation to the Service, with any right to negotiate the terms and conditions of access or to provide for any enforcement process if agreement as to the terms of access cannot be reached.
11. After PNO assumed the role of Port operator, the price for coal ships using the channels to enter and exit the Port was increased by between approximately 40% and 60% for some vessel types – particularly the larger more efficient vessels. Price increases also occurred for non-coal vessels. It is said, without demur, that those price increases were not accompanied by any change in the nature or quality of the Service. It is also said, again without demur, that the price increases were imposed by PNO without significant consultation with users of the Service.

# THE LEGISLATION

1. The National Access Regime established by Pt IIIA of the Act provides a regime to facilitate, if appropriate, third parties obtaining access or increased access to services provided by means of significant infrastructure facilities of national significance: see *Re Application by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* (2013) 274 FLR 346 (*Pilbara Tribunal No 2*)at [3]. The rationale underlying the regime is that access or increased access to certain facilities with natural monopoly characteristics is required to encourage competition in related markets: *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242; [2005] ACompT 5 at [2] (*Sydney Airport Tribunal*).
2. The background to the introduction of Pt IIIA has been set out by the Full Court of the Federal Court in *Rail Access Corporation v New South Wales Minerals Council Ltd* (1998) 87 FCR 517 at 518-519 and in *Sydney Airport Corporation v Australian Competition Tribunal* (2006) 155 FCR 124 at [3]-[21] (*Sydney Airport FC*). It is not necessary to repeat that background except in the few respects addressed and referred to in the course of these reasons.
3. It should, however, be noted that Pt IIIA as in force in relation to the *Sydney Airport Tribunal* decision was amended by the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth)(the 2006 Amending Act), including by the insertion of s 44AA setting out the objects of the Act. They are to:

(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

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

1. In *Re Fortescue Metal Group Ltd* (2010) 271 ALR 256; [2010] ACompT 2 (*Pilbara Tribunal No 1*) at [1065], it is said that those objects give effect to, or reflect, a “contestable market theory” so that, in certain circumstances, the threat of entry may constrain even a monopolist from exercising its market power to the detriment of consumers. The NCC says that *Pilbara Tribunal No 1* at [818] described that as being a market effectively competitive where no individual firm (or group of firms) is exercising significant market power and the price is not above the competitive price.
2. The NCC says that those objects identify the focus of the access regime under Pt IIIA as being upon promotion of competition in markets where the lack or restriction of access to infrastructure services provided by facilities that cannot be economically duplicated would otherwise limit competition.
3. It is also noted that Pt IIIA of the Act was further amended by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) but it is not said that those amendments are significant for present purposes.
4. Part IIIA of the Act is then divided into separate and distinct processes. Division 1 deals with preliminary matters. Division 2, which contains the process presently under consideration, provides a process by which a particular service, as defined in s 44B, may be declared. Part IIIA, Div 3 then provides for a second and separate stage, following the declaration stage, by a process for negotiating terms of access to the declared service, and if no agreement is reached for arbitration by the Australian Competition and Consumer Commission (ACCC). It is not necessary to remark on the other Divisions in Pt IIIA. This second stage may be utilised by any third party unable to agree with the service provider on aspects of access to the declared service.
5. It is also noted that s 44B defines “third party” in relation to a service as meaning “a person who wants access to the service or wants a change to some aspect of the person’s existing access to the service”.
6. Division 2, relating to the declaration of services, itself involves two stages. The first is the request either by the Minister or by any other person to the NCC to recommend that a particular service be declared: s 44F.
7. The NCC has certain procedural and substantive obligations to comply with before providing its recommendation to the Minister as to whether or not to declare the Service. The NCC cannot recommend to the Minister that a service be declared unless it is satisfied that all the criteria specified in s 44G(2) are established. Those criteria are mirrored in s 44H(4) as they apply to the Minister.
8. As noted above, the NCC in this matter recommended to the Minister that the Service not be declared, because it was not satisfied of the criterion in s 44G(2)(a). That is the same criterion as specified in s 44H(4)(a). It was satisfied of the criteria in s 44G(2)(b)-(f).
9. Section 44H empowers the Minister, in certain circumstances, to declare the service or to decide not to declare the service. The Minister is obliged to have regard to the objects of Pt IIIA in making his or her decision: s 44H(1A).
10. Relevantly for present purposes, s 44H(4) provides:

(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

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

(i) the size of the facility; or

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

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

(e) that access to the service:

(i) is not already the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under section 44NB); or

(ii) is the subject of a regime in relation to which a decision under section 44N that the regime is an effective access regime is in force (including as a result of an extension under s 44NB), but the designated minister believes that, since the Commonwealth Minister’s decision was published, there have been substantial modifications of the access regime or of the relevant principles set out in the Competition Principles Agreement;

(f) that access (or increased access) to the service would not be contrary to the public interest.

1. At issue before the Tribunal in this matter, in particular, is the meaning and application of s 44H(4)(a) and (f), that is whether the criteria so specified in those two subclauses in the circumstances of this application are met.
2. The Minister is obliged by s 44HA to publish his reasons for his decision.

# THE ROLE OF THE TRIBUNAL

1. It is common ground that the Tribunal is to review the decision of the Minister on the merits under s 44K, as a reconsideration based on the material before the Minister: see s 44K(2) and (4), and s 44ZZOAA. The nature of the reconsideration was explained in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (*Pilbara HC*) at [60] and [65]. In accordance with that decision of *Pilbara HC*, the Tribunal adopted that course, for example, in *Pilbara Tribunal No 2* at [43]-[49] and [78]-[79].
2. On such an application, the NCC has the role of assisting the Tribunal pursuant to s 44K(6). Its submissions therefore, apart from explaining the basis of its Final Recommendation, address the statutory scheme, the proper construction of criterion (a) in the light of the *Sydney Airport FC* decision and the decision of the Full Court of the Federal Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 (*Pilbara FC*) and of the High Court in *Pilbara HC*; the application of the meaning of criterion (a) to the present factual material; and finally the proper construction of criterion (f) in the light of its consideration by the High Court in *Pilbara HC* and the application of that criterion to the present factual material.
3. The requirement to address criterion (f) arises from the Notice of Contention given by PNO on 7 March 2016, asserting that the decision of the Minister should be affirmed on the additional ground that, pursuant to the criterion in s 44H(4)(f), the Minister should not have been, and the Tribunal should not be, satisfied that access (or increased access) to the Service would not be contrary to the public interest.

# THE ISSUES

1. Glencore put its contention on two bases:
2. Issue 1:

On its proper construction, criterion (a) requires a comparison between the future state of competition in a dependent market or markets with access, and without access, and that the criterion is readily satisfied in this case because, at present, Glencore does not have “access” to the Service. As access to the Service, in practical terms, is an essential step in the dependent market of producing and exporting coal from the Hunter Valley region, and with PNO possessing monopoly power in relation to access and pricing for the Service for that and other dependent markets with no commercially viable alternatives to the use of the Service in order to compete in that dependent market, Glencore says it simply follows that criterion (a) is satisfied.

1. Issue 2:

In the alternative, it says that criterion (a) is satisfied on the basis that increased access to the Service would promote a material increase in competition in a dependent market, and it nominated to the NCC six dependent markets.

1. As noted, in its Notice of Contention, PNO submits that the decision of the Minister should be affirmed on the additional ground that criterion (f) is not satisfied because it is not apparent that access (or increased access) to the Service would not be contrary to the public interest: Issue 3.

# THE MINISTER’S REASONS

1. The Minister accepted that there are likely to be five functionally distinct dependent markets relevant to access to the Service, which he described as:
2. a coal export market;
3. markets for the acquisition and disposal of exploration and/or mining authorities;
4. markets for the provision of infrastructure connected with mining operations, including rail, road, power and water;
5. markets for services such as geological and drilling services, construction, operation and maintenance; and
6. a market for the provision of shipping services involving shipping agents and vessel operators, of which ships exporting coal from the Port of Newcastle are a part.
7. There is no need to revisit that step in his decision-making. It was not contentious. The submissions on this application focused on the coal export market for the purposes of Glencore’s first contention. Its second and alternative contention invited attention to the other accepted dependent markets.
8. The Minister did not accept Glencore’s contention that there is also a distinct market for financing of coal mining projects (including the expansion of existing projects) in the Hunter Valley. He noted that finance for Hunter Valley coal projects is available through a range of financing markets both within Australia and internationally; that there is no evidence that there is a limited pool of substitutable financiers or financial instruments for coal projects in the Hunter Valley; and that there is no evidence that those financing coal mines in the Hunter Valley are unable to finance a range of other projects that are part of a similar class of assets.
9. Glencore revisited that part of the Minister’s reasons when addressing its alternative contention.
10. The Minister accepted, on the face of PNO’s contention to the contrary, that the dispute was an access dispute (rather than simply a pricing dispute such that a declaration under Div 2 of Pt IIIA was not available at all).
11. Consequently, he said he would compare increased access on reasonable terms and conditions as determined under Div 3 of Pt IIIA with the counterfactual of “limited access” under which the Service is not declared. The first step appears to reflect the observation of the Full Court in *Pilbara FC* at [112], dealing there solely with its application under criterion (f) rather than criterion (a).
12. The Minister also accepted that PNO provides a bottleneck service so its charges for the provision of the Service to coal producers in the Hunter Valley are an inevitable component of costs of export, and that the coal producers are price takers so they cannot pass those costs to consumers (that is, to the purchasers of the exported coal), and that PNO’s ability to vary its charges in the future may create cost uncertainty.
13. However, he was not satisfied that declaring access to the Service would promote a material increase in competition in any of the five dependent markets, because he found:
14. there is insufficient evidence that the identified dependent markets are currently not workably competitive;
15. the navigation charges represent a small fraction of the overall coal price at present and even if the charges are increased significantly in future, it will remain a minor cost element;
16. coal producers currently manage a range of uncertainties in their businesses, many of which are likely to be far greater than that which exists in relation to navigation charges;
17. PNO has a 98-year lease on the Port and is heavily reliant upon coal as the largest share of its throughput;
18. PNO has contractual obligations with the State of NSW to maintain the Port as a major seaborne gateway; and
19. PNO is not vertically integrated into any dependent market in a way that affects its business decisions.
20. Having made those findings, he concluded that the terms of access to the Service provided by PNO are not a material factor in whether dependent markets will remain workably competitive in future. He observed that PNO is heavily reliant on coal exports for its revenue and has contractual obligations to improve productivity and efficiency at the Port to keep it a major seaborne gateway, so it does not have an incentive to diminish the long-term output of the Hunter Valley coal industry. Finally, he said there are no material concerns of vertical integration that would lead PNO to favour any participants in dependent markets.
21. The Minister was not, therefore, satisfied of the criterion (a) in s 44H(4).
22. There is no issue about the criteria in s 44H(4)(b), (c) and (e). The Minister was satisfied about them. The parties did not question those conclusions. On this application, for the same reasons as the Minister, the Tribunal is also satisfied about them.
23. The Minister was satisfied of criterion (f). His reasons are referred to in detail when considering the contention of PNO, later in these reasons.
24. Additionally, but having regard to his decision on criterion (a), the Minister considered whether a decision not to declare the Service would be consistent with the objects of Pt IIIA referred to above.
25. Finally, again on a topic about which there is no issue, the Minister found in terms of s 44H(2) that it would not be economical for anyone to develop another facility that would provide part of the Service. He said that he agreed with, and accepted, the NCC’s conclusion that it may be possible that berthing facilities might be developed in conjunction with the construction of additional coal terminal facilities which could provide part of the Service. However, he also accepted the NCC’s view that there is sufficient uncertainty about the timeframe on which these facilities might be built and whether they would be profitable that it cannot be concluded at this point in time that it would be economical for anyone to develop another facility to provide part of the Service.
26. The Tribunal has also considered the material submitted to the Minister by the NCC on that topic. For the same reasons, it has reached the same view. There was no submission that it should not do so.
27. The Tribunal now turns to consider the contentions briefly outlined above.

# CONSIDERATION

## Issue 1

1. It is plain, as the NCC says, that s 44H(4) prescribes a number of criteria which must be satisfied before either the NCC or the Minister, or the Tribunal, may declare a service. There must be a degree of satisfaction of certain objective facts and on qualitative assessments: *Re* *Telstra Corporation Ltd* (2006) ATPR 42-121 at [20], [46], and [172]. It is plain that, in reaching or not reaching that level of satisfaction, there is no onus of proof because of the nature of administrative decision-making: *Evans v Secretary, Department of Families, Housing, Community Services and Indigenous Affairs* (2012) 289 ALR 237 at [18]. Nevertheless, in a practical sense, an applicant for a declaration (perhaps, other than the Minister) has a responsibility to adduce evidence which may or should be sufficient to lead to the NCC and/or the Minister reaching a level of satisfaction on each of the criteria in s 44H(4).
2. Upon an application, the NCC is clearly not confined to the information provided by the applicant. It may seek additional information: s 44FA, and it may seek public submissions: s 44GB. It is not surprising that the NCC, in this instance, pursued such enquiries. The responses, including from PNO, are within the material relevant to the determination of the Tribunal.
3. It should also be noted that, once a decision-maker is satisfied of the relevant facts or judgments, there is no residual discretion in relation to that particular criterion or more broadly under s 44H(4) not to make the declaration sought: *Pilbara HC* at [115]-[119] and [192]-[193].
4. There was considerable debate in the course of submissions about the expression “access (or increased access)” in s 44H(4)(a). The NCC contention is that there is a disjunction of the notions of access and increased access, recognising that one or other of those concepts will be appropriate, depending upon whether the parties already have some degree of access to the service. It also says, perhaps not controversially, that the quantitative verb “increased” qualifying the concept of “access” reveals that the difference between the two concepts is one of degree rather than of time. Its point is that the inquiry is conducted along a continuum on which rights of access do not obtain, obtain on such nugatory terms as not to constitute access (constructive refusal), obtain to a limited but genuine extent, or obtain in an unimpeded manner. Hence, it says that where some degree of access does exist, the inquiry should focus upon increased access and then invites a counterfactual comparison of a future with access and a future with the restricted rights of access.
5. However, as its starting point, despite Glencore (and other users of the Service) having usage of the Service, Glencore said that it did not have “access” to the Service at all because it had no legal (arguably statutorily enforceable) right to do so. The resolution of that question in favour of Glencore is said to have been determined by the proper application of *Sydney Airport FC*. It is therefore appropriate to consider that decision carefully in the light of the competing submissions about its effect.
6. The Tribunal notes the caution expressed by counsel for the NCC that a judgment should not be read as an enactment, supported by the observation of McHugh J in a dissenting judgment in *Scott v Davis* (2000) 204 CLR 333 at [108]. That case concerned the issue of vicarious liability for the negligence of the pilot of a light plane, causing injury. The decisions to which his Honour referred to in that paragraph were decisions concerning vicarious liability for the negligence of a driver of a motor car, causing injury. His Honour at [109] also observed that he was considering a matter at common law rather than a matter of statutory construction. Consequently, the Tribunal does not see that the remark of McHugh J at [108] that:

In *Broome v Cassell & Co Ltd* [1972] AC 1027 at 1085, Lord Reid pointed out that judgments should not be read “as if they were provisions in an Act of Parliament” or that it was a function of judges “to frame definitions or to lay down hard and fast rules”. His Lordship continued at [1085]:

It is their function to enunciate principle and much that they say is intended to be illustrative or explanatory and not to be definitive.

dictates that it should do other than apply the decision of the Full Court in *Sydney Airport FC* if it determines the legal issue which the Tribunal is required to consider. Indeed, the Tribunal is bound to do so.

1. *Sydney Airport* *FC* involved the judicial review of a decision of the Tribunal under Pt IIIA of the Act to declare a service in connection with the use of facilities at Sydney Airport.
2. At the relevant time, Sydney Airport was leased by the Commonwealth to Sydney Airport Corporation Ltd (SACL), so SACL provided the “airside” services at the airport to the air carriers, including all movement between runways and passenger arrival and departure gates and maintenance, equipping and re-equipping of the aircraft.
3. From 1 July 2003, SACL began levying aeronautical charges for the airside services on the basis of passenger numbers rather than (as previously) on the maximum take-off weight of the aircraft. By reason of the nature of the businesses carried on by Qantas and Virgin, the change significantly advantaged Qantas over Virgin.
4. Virgin then applied to the NCC under s 44F(2) for a recommendation that the airside service be declared. In November 2003, the NCC recommended to the relevant Minister that the airside service not be declared. On 29 January 2004, the relevant Minister decided not to declare the airside service.
5. Consequently, Virgin sought review of that decision by the Tribunal, and the Tribunal on 12 December 2005 determined to set aside that decision, and to declare the airside service (for a five year period): *Sydney Airport Tribunal*.
6. It is important to note that during this period, Virgin in fact had “access” to, that is was able to and did use, the airside service provided by SACL. That fact must inform a proper understanding of the decision in *Sydney Airport FC*, as discussed hereafter.
7. For the purposes of the judicial review of the Tribunal’s decision in *Sydney Airport FC* concerning the criterion in s 44H(4)(a), the “market for the service” was the market for aeronautical services in Sydney, and the Tribunal’s finding that the relevant dependent market was the carriage of domestic air passengers into and out of Sydney was not challenged.
8. It is helpful to note briefly the way the Tribunal reached its conclusion, having regard to the extensive and competing submissions of the parties on this application as to what the Full Court in *Sydney Airport FC* decided, and how (if at all) it should be applied by the Tribunal on this application. As the Full Court observed at [55], the submissions of Virgin, Qantas, SACL and the NCC on that application in the Tribunal were mirrored in their respective submissions to the Full Court.
9. In *Sydney Airport Tribunal*, the Tribunal at [137]-[144] said that the term “access” in criterion (a) is a noun meaning a “right or ability or opportunity” to make use of the service, and “increased access” is an “enhanced right, ability or opportunity” to make use of the service. It said that “access” means more than physical access, and includes the terms and conditions on which physical access is available. It noted that, as Virgin was really seeking different terms for the use of the service (the opportunity to engage in the second stage of arbitration under Div 3 of Pt IIIA following declaration), Virgin was seeking increased access by seeking different terms for access to the service.
10. To address the element of promotion of competition in criterion (a), the Tribunal then considered the dependent market future with declaration as against the future without declaration (as described by the Full Court in *Sydney Airport FC* at [56], and as *Sydney Airport Tribunal* at [153]-[157] of that Tribunal’s reasons show) that analysis involved a review of the conduct of SACL in the relevant period having regard to its monopoly power, and any constraints on the exercise of that power.
11. As a result of that analysis of the past and present conduct of SACL, the Tribunal made findings about the likely future without declaration at [519] of its reasons, and consequently it concluded that increased access to airside services would promote competition in a dependent market.
12. As appears at [69] of *Sydney Airport FC*, SACL contended that s 44H(4)(a) had not properly been engaged, as there had in fact been no denial or restriction of access to the service. SACL said that the supply of the service had not in fact been denied or restricted, so no question of access or restricted access arose, and there was no justification for any counterfactual analysis. That proposition was finally rejected by the Full Court in *Sydney Airport FC* at [76]-[80]. It concluded at [79] that:

The whole scheme of Part IIIA, when understood against the background to its passing, is antithetical to s 44H(4)(a) operating to limit the possibility of declaration except where it can be demonstrated as a fact that the service provider has in the past denied or restricted access to the service or supply of the service.

1. As the parties to this application acknowledged, the Full Court then said at [80] that that reasoning was enough to lead to the dismissal of the SACL application, so that conclusion represents the ratio decidendi of the Full Court in *Sydney Airport FC*.
2. However, the Full Court proceeded at [81]-[88] with a considered analysis of, and adoption of, the submission of Virgin (both to the Tribunal and to the Full Court) that the relevant inquiry in s 44H(4)(a) is “between access and no access and limited access and increased access”. It is not necessary to consider whether declaration of the service would promote competition, but rather to consider whether access or increased access would promote competition.
3. It is necessary to see how that conclusion was reached, and more importantly for present purposes how it was applied in [91] of the reasons of the Full Court. Certain of the reasons reflect steps there taken by the Tribunal.
4. After noting that the two stage approach in Pt IIIA (as set out in Div 2 and 3) does not necessarily lead to access or increased access for anyone, the Full Court in *Sydney Airport FC* at [83]-[85] continued:

… But “access” is an ordinary English word. Taking into account the context and background, we think that in this part of s 44H, the word “access” is being used in its ordinary English sense. Virgin is correct in its submission that all s 44H(4)(a) requires is a comparison of the future state of competition in the dependent market with a right or ability to use service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.

We do not accept the Tribunal’s basis for rejecting the submission that it would be unrealistic to undertake a counterfactual analysis which discounts the fact that Virgin has access. That, with respect, is not the point. The terms of s 44H(4)(a) do not incorporate the requirement for comparison with what is factually the current position in any given circumstances. Once a declaration is made any potential user can take advantage of it. Thus, it is an unnecessary constriction of a provision by way of precondition, to engage in a detailed factual enquiry heavily dominated by the past and the present.

That is not to say that what has happened in relation to the service, how the provider has behaved and the degree to which it can be said that monopolistic behaviour has or has not impeded the efficient operation of the market in question may not be relevant considerations attending the making of the decision. For instance, if it can be demonstrated that the service has been provided in a manner that can be described as fair, even-handed and in a way most likely to maximise vigorous competition in the downstream market, that may be a powerful and relevant consideration as to why no declaration should be made. Thus, it may be that a with and without declaration counterfactual (or some aspect of it) can be seen as relevant to the decision at hand. That enquiry is simply not mandated by the pre-condition of satisfaction in s 44H(4)(a).

1. As can be seen, the word “access” is being used in an ordinary sense in those passages, to describe the fact that Virgin continued to be able to use the service (on the SACL terms). It is clearly said that an inquiry into how Virgin is using or receiving access to the service in fact is not an inquiry required or authorised by s 44H(4)(a). If there were any qualification of that proposition in the wording of the last sentence of [84], it is eliminated by the last sentence of [85] and the observation as to their irrelevancy in [94]. Hence, in our view, the counterfactual addressed at the end of [83], that is the assessment of the future state of competition of the dependent market without any right or ability or with a restricted right or ability to use the service was to be made without reference to the fact of usage of the service by Virgin or the way in which that usage was given.
2. That view as, we think, is clearly expressed by the Full Court in [86] and [87]:

This construction of s 44H(4)(a) conforms to the purpose of Part IIIA revealed by the background and context: see in particular the Hilmer Report, the COAG explanatory material referred to above and clause 6 of the Competition Principles Agreement referred to above. None of this material reveals any necessity to examine the current state of access or to engage in an enquiry based on assessing the future with and without declaration. The essential precondition discussed was that access (that is in its ordinary meaning) was necessary to permit effective competition in a downstream or upstream market.

Nor does the use of the phrase “increased access” lead to the conclusion that the base for the analysis is the current state of affairs. There was no separate treatment of the phrase in the background material. Access was discussed in the COAG explanatory material as the ability of buyers to purchase the use of essential facilities on fair and reasonable terms. Increased access can be seen as nothing more than an increased or enhanced ability to do so.

1. It is further confirmed by the Full Court’s consideration of what it should then do in relation to the Tribunal’s decision, having accepted Virgin’s contention. That is apparent from [91]-[92]:

Virgin submitted that, on its alternative construction, which we favour, it is clear that s 44H(4)(a) would be satisfied. It submitted that this conclusion could be easily reached because (as substantially found by the Tribunal)

1. Sydney Airport is a natural monopoly and SACL exerts monopoly power;
2. the Airside Service is a necessary input for effective competition in the dependent market;
3. neither Bankstown nor Richmond Airport could provide the service; and
4. the parent company of SACL had the first right of refusal to build and operate any second major airport within 100 km of the Sydney CBD.

Further, there was no real debate among the experts before the Tribunal that, given the strategic nature of Sydney as Australia’s largest city and a significant gateway to international air travel, access to Sydney Airport is essential to compete in the domestic passenger market.

In these circumstances, there appears little doubt that on Virgin’s alternative argument s 44H(4)(a) must have been satisfied here.

1. The feature of that analysis is that it did not involve any consideration of the nature and extent of the access or usage that Virgin had had in the past and continued to have had during the period of the proceeding.
2. As that analysis and approach is a carefully considered view of the Full Court, the Tribunal will apply it, subject to consideration of the contentions that it is not applicable to the present application by reason of the 2006 Amending Act 2010 amendments to Pt IIIA of the Act, or to the consequences of the *Pilbara HC* decision.
3. The 2006 Amending Act came into force after the events to which the *Sydney Airport* *Tribunal* case related and *Sydney Airport FC* considered the Act as in force before its enactment.
4. As noted earlier in these reasons, the 2006 Amending Act introduced s 44AA to the Act, setting out the objects of Pt IIIA. Secondly, and more importantly for present purposes, is that s 44H(4)(a) was amended by the insertion of the words “a material increase in” after the word “promote”. Parallel amendment was made to s 44G(2)(a). The only other amendments which might touch on the present application, are the insertion of s 44H(1A) also noted above, the procedural obligations on the Minister under s 44HA and the iterative obligation under s 44H(5)(9a) as then introduced requiring the Minister to have regard to the objects of Pt IIIA. The submissions made no point about those further amendments.
5. *The Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) refined the procedural obligations of the NCC under Div 2 of Pt IIIA. The submissions did not identify any further amendments of significance to the present issues. There was some amendment to repeal parts of ss 44F, 44G and 44H (Part 1, Sch 5, Items 4-10 of that Act), which are noted simply for the purpose of recording that they have not been overlooked.
6. The Tribunal does not consider that the reasoning of the Full Court in *Sydney Airport* *FC* becomes inapplicable or less appropriate to the present issues by reason of any of those amendments.
7. The introduction of the objects of Pt IIIA expresses objects which are consistent with the approach of the Full Court in *Sydney Airport FC*.
8. The amendment to s 44H(4)(a) means that the declaration will only occur (if the criteria are all met) where the promotion of competition in the dependent market is material, or non-trivial. The Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth) at Item 16 (p 21) records that the amendment is to be made so that declaration will only occur where the promotion of competition in the dependent market is non-trivial. The Explanatory Memorandum states that the original drafting of criterion (a) did:

… not sufficiently address the situation where … declaration would only result in marginal increases in competition. The change will ensure access declarations are only sought where increases in competition are not trivial.

1. It did not propose any change to the expression “access (or increased access)” or to the word “promote”. It may require a more robust, rather than a merely technical, measure of whether access (or increased access) would promote competition in a dependent market. It does not, by refining that measure, undermine or suggest that the reasoning of the Full Court in *Sydney Airport* *FC* is no longer apt and/or that that decision should not be followed by the Tribunal.
2. Additionally, it was said, the Tribunal need not follow the *Sydney Airport FC* decision, because it was made on a premise – the availability of a residual discretion under s 44H – which is not (or no longer) valid following the decision in *Pilbara HC*.
3. In the Full Court’s reasons in *Sydney Airport FC* at [85] and [94] reference is made to the potential relevance of the conduct of the service provider. The proposition is apparently that such conduct may inform the decision whether or not to make the declaration, even if the criterion in (a) is satisfied (and by inference if the other criteria in s 44H(4) are satisfied). Those references must be on the basis that the NCC in its recommendation, and the Minister in the decision whether or not to declare the service, has a residual discretion after consideration of the specified criteria. Para [85] is set out above. Para [94] is at the point of the Full Court considering whether it should dismiss the application (thereby affirming the Tribunal’s declaration of the service) where it regarded the Tribunal’s approach to criterion (a) as erroneous. The Full Court, again apparently on the basis of there being a residual discretion, said that the matters the Tribunal took into account were:

Relevant to the enquiry as a whole as to whether to declare the service, even though they were irrelevant to a consideration of s 44H(4)(a).

1. As such consideration clearly would have led the Tribunal to making the determination in its (perceived) discretion, the Full Court simply dismissed the application.
2. It has now been authoritatively determined by *Pilbara HC* that there is no such residual discretion in the NCC, the Minister, or the Tribunal: see *Pilbara HC* per French CJ, Gummow, Crennan, Kiefel and Bell JJ at [119]; Heydon at [193].
3. Consequently, it is said, it is now appropriate for the Tribunal to proceed on the basis that those “discretionary considerations” are relevant (and were regarded by the Full Court in *Sydney Airport FC* as relevant), that they must have a “home” in the criteria in s 44H(4)(a)-(f), and that the appropriate “home” is in criterion (a). If the Tribunal proceeds on that basis, so the argument runs, it must treat the *Sydney Airport FC* decision as having been made in error, because of the assumption of a residual discretion in the decision-maker meant that it wrongly understood the scope of criterion (a).
4. The Tribunal does not take that step because it is clear from the Full Court in *Sydney Airport FC* (including from [94]) that criterion (a) does not accommodate those “discretionary matters” as the source of the residual discretion (before the High Court’s rejection of it in *Pilbara HC*). Any such discretion was thought to reside in s 44H generally or possibly criterion (f). Therefore, even if *Sydney Airport FC* suffered from the residual discretion error (subsequently identified in *Pilbara HC*), it does not undermine the comments made there in relation to criterion (a). The Tribunal’s consideration of the Full Court’s reasons leave it convinced that the reasoning of the Full Court on the proper consideration and application of criterion (a) does not permit it to decline to follow *Sydney Airport FC* concerning criterion (a).
5. Finally, it was argued that the grounds upon which the *Sydney Airport FC* decision are based have sufficiently moved, as a result of the decision in *Pilbara FC* and in *Pilbara HC* as to make it plain that *Sydney Airport FC* is no longer a binding and applicable authority upon the Tribunal.
6. In support of that contention, senior counsel for PNO pointed out that in the analysis of the background and context to Pt IIIA in *Sydney Airport FC* remarked firstly at [37]:

… that it is necessary for the fact of access (in its ordinary meaning) to be relevant to effective competition in another market (upstream or downstream).

1. It was also pointed out that the Full Court said at [38] that the requirements of s 44H(4) are not apparently exhaustive of the relevant considerations, including some similar focus required by s 44H(2), but that:

… s 44H(4) is a statutory statement of necessary matters, it is not expressed to be a list of the only considerations that may be relevant to be considered.

And, as a further comment on that observation, it was said at [39] that that comment is relevant “when one comes to consider the meaning and content of s 44H(4)(a)”, because after the considerations in s 44H(4) and (2) are addressed:

… the decision to be made whether or not to declare a service may be affected by a wide range of considerations of a commercial, economic or other character not squarely raised by, nor falling within the necessary pre-conditions in, s 44H(4).

1. Counsel then referred to the approach adopted by the Tribunal in *Pilbara Tribunal No 1* in relation to the decision in *Sydney Airport FC*, in particular at [1048]-[1068]. The Tribunal there was not confronted by the submission now made by Glencore as to its primary submission. It was there seeking to apply the *Sydney Airport FC* decision – the course of its reconsideration of the very complex factual material. It is not necessary to do other than to observe, therefore, that the Tribunal as presently constituted does not consider that the reasons of the Tribunal in *Pilbara Tribunal No 1* were intended to, or should be applied so as to, suggest that *Sydney Airport FC* was wrongly decided or should no longer be followed.
2. Similarly, such contentions were not made by counsel, or considered, in *Pilbara FC* where the focus was upon the criteria in s 44H(4)(b) and (f).
3. The decision of the Full Court in *Pilbara FC* was reversed by the High Court in *Pilbara HC*, but not in relation to the proper meaning and application in s 44H(4)(a). In short, it can be said that the High Court concluded:
4. that the extensive reconsideration by the Tribunal of the Minister’s decision had miscarried because the reconsideration should have been confined to the material before the Minister; and
5. that the criteria under s 44G(2) and s 44H(4) were an exhaustive list of the considerations bearing on a declaration decision, so that there was no residual discretion to decide not to declare a service if those criteria were met.

It also disapproved of the Tribunal’s approach to the criterion in s 44H(4)(f) in *Pilbara Tribunal No 1*, an aspect which will be considered further when addressing the contention of PNO.

1. In *Pilbara HC*, there was no need to address the proper construction or application of criterion (a). At the point of addressing the asserted existence of a residual discretion, the plurality (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) at [115]-[119] referred to *Sydney Airport FC* only to note that it was relied on in argument in support of the exercise of the asserted discretion, as did Heydon J (who agreed with the plurality on this point at [193]). There was no consideration of whether, in any other respect, that conclusion meant that *Sydney Airport FC* should not otherwise be followed.
2. In those circumstances, it is clear that this Tribunal must continue to apply s 44H(4)(a) as interpreted and applied in *Sydney Airport FC*. The decision in that case has not been overruled either expressly or impliedly by the High Court: see *Jacob v Utah Construction and Engineering Ltd* (1966) 116 CLR 200 per Barwick CJ at 207; *Ratcliffe v Walters* (1969) 89 WN (NSW) Pt 1 497 at 505 per Street J. That now was reinforced by *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at [17] per Gaudron, McHugh, Gummow and Hayne JJ; and *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at [39] per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ.
3. See also the observations of French J (as he then was) in *Federal Commissioner of Taxation v Salenger* (1988) 19 FCR 378 at 387-388. The proposition put on behalf of PNO is similar to that rejected by the Full Court of the Supreme Court of South Australia in: *Public Service Association of SA Inc v Industrial Relations Commission of SA* [2011] SASCFC 14 per Doyle CJ at [6], and by the Full Court of this Court in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2002) 192 ALR 701 at [131] per Black CJ and Hely J.
4. For those reasons, the Tribunal rejects the submission. It will follow and apply the decisions of the Full Court in *Sydney Airport FC* in relation to criterion (a).
5. The consequence is that the expression “access (or increased access)” in s 44H(4)(a) requires the analysis imposed by *Sydney Airport FC*. It is a compendious expression, as the NCC submitted, but it is an expression used in a way which precludes the comparison with whatever usage or access the service provider does or will provide voluntarily or with the terms on which the service provider provides voluntarily such usage or access. On that analysis of *Sydney Airport FC*, it is not necessary to explore any refined meaning of the terms used by the Full Court of “right”, “ability” or “opportunity” or whether or not they constitute a hendiadys (as raised in submissions).
6. The Tribunal has not overlooked the contentions of PNO and the NCC that there are, nevertheless, other indicia in the text and context of s 44H and in Pt IIIA generally which would support a different construction of s 44H(4)(a).
7. It does not address those contentions in detail because it considers that it should apply *Sydney FC* as the Tribunal understands it. It has also not overlooked the PNO contention that the primary focus of Glencore in its application does not clearly express its primary contention as the basis for the application. It was not, however, said that the Tribunal should not entertain the contention.
8. The Tribunal turns to apply s 44H(4)(a) in that light. Having regard to the 2006 Amending Act, it is necessary to consider whether access would promote a material increase in competition in at least one dependent market. As noted above, the threshold of materiality will require a non-trivial increase in competition. While the counterfactual character of the exercise to be undertaken may not have changed, the qualitative assessment involved has plainly changed.
9. In identifying dependent markets for the purposes of criterion (a), what must be determined is whether any dependent market is distinct from the market for the service, and the effect access will have on the conditions for competition in that dependent market. This includes considering whether access will create or improve the environment in which competition may then flourish: see *Sydney Airport FC* at [107]. The Tribunal agrees with the NCC submission that “market” as used within Pt IIIA has a sense broader than when used within s 4E. By reason of s 44H(4)(a), relevant dependent markets may, geographically, be within or outside Australia. Otherwise, the analysis of market definition remains constant within the Act. The identification of markets in Pt IIIA is typically concerned with functionally distinct markets. Analysis of the functional dimension of a market identifies the stage of production, within a supply chain, at which the relevant economic activities occur. In order to consider the implications for competition in respect of certain conduct, one begins with the activities under consideration and then identifies adjacent activities in the supply chain (labelled upstream and downstream by economists). Upstream markets are markets for input factors, such as raw materials. In downstream markets these inputs are commercialised to produce outputs. In this analysis, it is not generally appropriate to consider whether one function ought to be substituted for another, because activity at each functional level complements activity at adjacent levels.
10. In this matter, there was no contention that Glencore had identified five relevant dependent markets, as accepted by the Minister and as set out above.
11. The additional dependent market which Glencore asserted, but which was not accepted to exist by the Minister, is a market for the financing of coal mining projects in the Hunter Valley. That was raised as a specific issue in the application: para 5(b).
12. That topic was addressed only briefly in the written submissions of Glencore: para 6.15 (and by incorporation, its submission to the NCC of 9 September 2015 and a letter from Rob Yeates and Associates Pty Ltd of 6 May 2015), and in oral submissions.
13. The Tribunal is not persuaded that there is a separate market for the financing of coal producers in the Hunter Valley. Obviously, financiers broadly speaking are indifferent to particular geographical limitations or to particular industry limitations. There is no evidence that financiers or any particular niche of financiers to industry in Australia have a particular focus on financing coal producers in the Hunter Valley. It is, on the other hand, clear enough also that financiers, when deciding whether to finance particular enterprise proposals and in the course of due diligence assessments for financing proposals, will be alert to the constraints applicable or potentially applicable to a category of actual or proposed enterprises such as coal producers in the Hunter Valley, including shipping access pricing. However, for the same reasons as those of the Minister, the Tribunal does not think that there is shown to be a separate market of the character asserted by Glencore. In particular, looked at from the viewpoint of the coal producers, there is no cogent historical data to suggest that the privatisation of the Port (or like bottleneck facilities) has in the past period impeded in any material way access to investment funding either by direct investors or by bank financing. Dr Yeates does not assert to the contrary.
14. The consideration of criterion (a) in the present circumstances, in accordance with the approach in *Sydney Airport FC* at [91], is quite straightforward.
15. To paraphrase *Sydney Airport FC* at [91] and [92]: the Service providing access to the shipping lanes is a natural monopoly and PNO exerts monopoly power; the Service is a necessary input for effective competition in the dependent coal export market as there is no practical and realistically commercial alternative; so access to the Service is essential to compete in the coal export market. In the circumstances (subject to one issue, arising from the amendment to s 44H(4)(a) referred to above), s 44H(4)(a) must have been satisfied.
16. In *Sydney Airport Tribunal*, the Tribunal said at [107] that “the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial.
17. It is of course now necessary to apply the qualitative test of a material increase in competition, following the 2006 Amending Act.
18. In applying that test, it was argued that even applying *Sydney Airport FC* as urged by Glencore, criterion (a) would not be satisfied. It may be assumed that, at present and foreseeably, the charges of PNO for access to the Service are a relatively minor cost element in the overall cost of coal production and export. Counsel for Glencore responded that it is not a necessary consequence that access (or increased access) would not promote a material increase in competition in the coal export market on that basis. The certainty of the prospect of access on terms fixed by agreement or by arbitration under Div 3 of Pt IIIA would likely remove the risk of PNO imposing terms of access which would or could, he submitted, largely absorb the profit margin otherwise available to coal producers in the Hunter Valley, and which in turn in a buyers’ market (where, as it is commonly accepted, the coal producers are price takers) may lead to the reduction in the number of producers or in the quality of coal produced or in the capital investment in coal production so in the coal production capacity of the Hunter Valley. All or any of those factors, or a combination of them, (it is argued) may have a measurable and not insignificant impact on the capacity of coal producers in the Hunter Valley competing in the market for the production and export of coal. However, more simply, without declaration, there is no entitlement to access (or enforceable opportunity for access) from PNO to the Service.
19. The Tribunal was also referred, in this context, to other information about the significance of Hunter Valley coal production and its significance, including the Treasury Ministerial Submission of 25 November 2015. It is briefly referred to at the commencement of these reasons for decision.
20. To revert to the approach to criterion (a) as stipulated by *Sydney Airport FC*, it is necessary to see if there is an entitlement or opportunity for access or increased access under the existing state of affairs.
21. The PMAA entitles PNO to fix and impose charges for the Service: ss 50 and 51, and to make agreements in respect of charges: s 67. It does not prescribe that any potential user has a statutory right of access to the Service.
22. The Lease from the State of New South Wales is for 98 years. It should be noted that the State’s Objective is for the Port to be a major seaborne gateway for the State: cl 8.1, so it requires PNO to ensure the capacity of the Port to provide access to shipping: cl 8.2. Not surprisingly, it allows for the refusal of current access if past payment of charges has not been made: cl 8.6. Clause 8.7 recognises that those provisions do not prevent PNO fixing and imposing charges under the PMAA. Clause 10 ensures access to Port Regulators. It does not give any rights to third parties (including Glencore) to access the Service. Nor does it oblige PNO to provide access to all users of the Port (subject to payment of the prescribed rates).
23. Consequently, and notwithstanding the submissions of PNO and the NCC to the contrary, the Tribunal is satisfied that – adopting the approach mandated by the *Sydney Airport FC* decision – access to the Service would promote a material increase in competition in the market for the export of coal from the Hunter valley. That view is reached even though, as counsel for PNO says, PNO has an incentive to maximise the revenue from the provision of the Service (but perhaps by the balancing of volume and charges) and the Port is not capacity constrained. It is reached because, as the Full Court in *Sydney FC* said, in the absence of access (or increased access), the capacity to serve the coal export market is not to be measured against the actual existing usage but the entitlement to usage of the Service (to the extent it may exist.

## Issue 2

1. Glencore’s alternative contention is put on the basis that it accepts that it has access (in a conventional sense) to the Service because PNO does provide that access to shippers on the terms PNO has fixed. It then says that it should be given increased access by a declaration. The declaration would give it (and shippers, and any relevant third party: defined in s 44B of the Act) the opportunity to negotiate with PNO as to the terms of access and, if negotiation is unsuccessful, to have the question of increased access the subject of arbitration by the ACCC under Div 3 of Pt IIIA.
2. That, in substance, is the question the Minister addressed in his reasons.
3. It is accepted that the present terms which PNO offers for the use of the Service do not, in substance, amount to a constructive refusal to provide access.
4. For the purposes of criterion (a), the dependent markets referred to above are relevant.
5. It was accepted that, in a practical sense, the coal export market (using the Service as the gateway means of shipping coal from the Hunter Valley) was an appropriate starting point. The other markets asserted are, in turn, derivative from that market. On the other hand, the coal export market is a worldwide one, so the issue of whether increased access to the Service would promote a material increase in competition in that market is a real one. Indeed, senior counsel for PNO asserted that the monopoly power of PNO in the Service, exercised to impose charges which were unreasonably high, would not attract a declaration because any blockage of the use of the Service by what shippers might see as excessive pricing, if removed by a declaration and the negotiation and arbitration processes under Div 3, would still not promote a material increase in competition in that market.
6. That proposition is in a sense a theoretical one, because PNO itself has the economic motivation of ensuring the use of the Service at commercially optimal levels.
7. The Minister considered whether there are any separate but dependent markets in which competition may be promoted in a material degree by increased access to the shipping channel service, as would be the result of a declaration. He proceeded on the basis that increased access would constitute access on reasonable terms and conditions as may be determined at the second stage of the Pt IIIA process: see *Sydney Airport FC* at [85]. In determining whether competition in an upstream or downstream market would be materially promoted, this state of affairs is compared to the counterfactual of “limited access” under which the service is not declared, that is the present state of affairs.
8. On this contention, coal exporters and other parties wishing to use the Service at the Port are taken to have access to the Service by the current and future expected usage. The Minister properly then considered a future with access (access on reasonable terms and conditions as may be determined at the second stage of the Pt IIIA process) and compared that with a counterfactual of limited access where the Service was not declared.
9. That did not involve the identification of the specific terms of access that might result from an arbitration being determined or the assumption that the arbitration would result necessarily in improved access to the Service: see *Sydney Airport FC* at [85].
10. The argument of Glencore is that coal producers are price takers and are unable to pass on increased costs to consumers. It also said that PNO’s increased charges have increased costs for producers which may affect their capacity to produce coal for export, and further that PNO has the ability to increase its charges into the future, and that ability also may create costs uncertainties. The Minister accepted those matters.
11. Glencore then said that the coal mining industry in the Hunter Valley is facing fragile market conditions. It pointed to information that, due to the downturn in the coal export market, some Hunter Valley mines have closed permanently or suspended operations indefinitely, and that many coal producers in the Hunter Valley are operating on a cash flow negative basis. Thus, it said, while the current shipping charge may be only a small component of the overall costs of exporting coal, the increase is nonetheless significant for many producers as it represents a substantial component of their margins. That point was also made in the submissions of The Bloomfield Group dated 16 June 2015 and dated 2 September 2015, of Whitehaven Coal Ltd dated 4 September 2015, and of the NSW Mineral Council dated 31 August 2015. The Tribunal was taken to that material.
12. Glencore added a further reason supporting, it said, increased access by a declaration. That is the significance of the uncertainty posed by unregulated potential future price increases and the impact of that uncertainty on the state of competition in the dependent markets. As there is the real prospect of future significant price increases by PNO, as it has unfettered monopoly power over access and rates for access to the channels, the fact that it too may have a commercial incentive to increase throughput does not mean that it does not have an incentive to charge monopoly prices so that an access regime is not warranted. In support of that, Glencore relied on the Hilmer Report at p 241 but at that point the Report says that where the essential facility is not vertically integrated, the question of “access pricing” is substantially similar to other monopoly pricing issues, and may be subject, where appropriate, to the prices monitoring or surveillance process. Glencore also relied on the RBB Economics Report dated 10 September 2015 at p 3 where it is said that the unfettered exercise of monopoly power is usually presumed to have adverse effects on competition. That statement is both imprecise and sweeping. Adverse effects on competition in what markets? The Tribunal is not persuaded by that statement, at that level of generality. At the least, an explanation would be needed of the mechanism that, in principle, would cause specific adverse effects on competition. The RBB Economics Report acknowledges that “whether an increase in access charges at the Port of Newcastle will give rise to adverse competitive effects in the related export coal market therefore requires a detailed assessment of likely supply-demand conditions”, which the Report does not provide. As Hilmer pointed out, unless there is vertical integration the position is that competition in upstream and downstream markets is not necessarily affected. The reason is that the effect of monopoly pricing is simply to raise the price of one of myriad input prices. When one of an industry’s costs goes up, there is no presumption of an adverse effect on competition.
13. Glencore submitted that the impact on competition in the dependent markets is created by the uncertainty of future monopoly price increases by PNO: raising barriers to entry, blunting incentives to invest in expansion and new development of mines or associated infrastructure and impairing the ability of Hunter Valley coal producers to compete effectively in the coal export market.
14. It may be accepted that PNO has the ability, and might have the incentive (depending on whether current prices in its view are already at the profit-maximising level) to further increase the charges for access to the Service in the future. Following its lease, it has already introduced significantly higher access charges.
15. Glencore puts its position as follows:

Following the privatisation of the Port and PNO’s announced price increases, the very real risk faced by producers (and financiers of producers) in the Hunter Valley is that any increased profits which might be generated by future investments can be expected to be expropriated by PNO as the gatekeeper to the export supply chain. For example, if coal prices were to increase, there would be nothing to prevent an unregulated PNO from increasing charges to take a share of the additional revenues. In effect, producers (and their financiers) would be exposing themselves to downside risk with a lower prospect of upside since it can be expected that PNO can increase access charges further.

1. That submission is supported by the report from RBB Economics of 10 September 2015 (as noted) and by the letter from Synergies Economic Consulting of 1 September 2015, where an attempt is made to estimate the additional charges which PNO may seek to impose (above the recent current increase) based on PNO’s target rate of return and cost base, and which Synergies Economic Consulting says at pp 3-4 may represent (on Glencore’s calculation) 3-6% of the total exported coal price. That is explained in Table 1 to the Synergies Economic Consulting letter setting out its methodology, its detailed calculations and its detailed conclusions. The Tribunal found that exercise to be of little use, as it proceeded on the basis of no analysis of the impact of a price rise on coal export volumes. That is, it does not attempt to estimate PNO’s profit-maximising price. Either a price rise would have an impact on coal export volumes, in which case the estimates are of questionable value, or it would not, in which case the claim of any competitive impact is seen to be empty.
2. At a more general level, Glencore said that if the Service were declared, there will be greater certainty for investment in existing mines, expansion of those mines or the development of new mines, as there will be a regulated price path subject to reasonable and legitimate price increases, which would make those dependent markets materially more competitive than if access to those markets was subject to unfettered pricing power by an unconstrained monopoly infrastructure provider; that the continued or increased participation of smaller coal producers would result in an increased demand for mining authorities and result in a material increase in competition in the bidding for the award of mining authorities; that the continued or increased participation of major and smaller coal producers would result in an improvement in the opportunities and environment for competition in the provision of the infrastructure (including a new coal terminal) required for the development of coal projects, including in particular in relation to the development and output from smaller more marginal projects; and that the continued or increased participation of major and smaller coal producers would also result in further demand in the markets for specialist services in the Hunter Valley region.
3. The Tribunal does not consider it necessary to address the impacts asserted in relation to derivative markets. If the impact of increased access on the coal export market is not such as to satisfy the Tribunal that it would promote a material increase in competition in that market, it is difficult to see how there would be the flow-on effects on the derivative markets as noted above. The Tribunal was not taken to material specifically concerning those derivative markets or any of them which would indicate a material increase in competition by increased access independently of the coal export market (and the asserted consequences to competition in that market) if the declaration was made. Senior counsel for Glencore in oral submissions, whilst not abandoning the relevance of the derivative markets, focused largely on the coal export market itself.
4. Those contentions are, in essence, the same as the contentions considered by the NCC, and addressed in its Final Determination to the Minister, and by the Minister. They are also addressed in the Treasury Submission of 25 November 2015.
5. PNO takes from the reports submitted to the NCC by Glencore, and referred to above, the fact that the coal production market in the Hunter Valley is already highly competitive, and has remained so despite the takeover of the Port by PNO and the increase in charges which it has already implemented.
6. In the advice from Rob Yeates and Associates Pty Ltd of 6 May 2015, it is noted that coal exports through the Port have increased by some 80% over the last five years (although the coal industry is “currently subdued and prices are depressed”); that at least one coal producer is seeking development consent for increased coal export terminal capacity to meet forecast future demand; and that there are presently six coal mines being prepared for development or expansion (at a cost of up to $20B). His conclusion that financiers will recognise, in their due diligence, the fact of the risk of increased shipping charges for use of the Service, and that “Regulating this monopoly service should alleviate the risk”, is of little weight in the light of that information, suggesting healthy investment prospects.
7. RBB Economics more specifically says, applying conventional economic theory, that increases in access charges will affect the shape of the supply curve both in the short run by affecting the production costs of marginal coal producers and in the medium to long term by dampening incentives to invest. It should be noted that the author Dr Bishop addresses the negative proposition, ie whether competition will be materially lessened by leaving things as they stand rather than making a declaration, rather than directly addressing the specific question of whether the declaration will materially improve competition in a relevant market. That might be of only semantic consequence. However, in relation to what he describes as the NCC presumption that because charges for the Service represent only a small proportion of total costs, an increase in charges will not have a material impact on competition in the market for coal production and export, he says: “Although in principle that might be the case, it cannot be presumed”. Thus, the difference in the propositions addressed may be more than semantic. His thesis is that even small charges in marginal costs “can” adversely affect coal production and therefore coal prices. He also says the NCC wrongly focused on the effect of the currently implemented charging changes, and ignored the potential adverse effects of any future increases in charges. Thirdly, he emphasises (as Glencore did in submissions) the uncertainty of future charging levels available to PNO as a bottleneck monopoly service provider.
8. Dr Bishop identifies first the static consequence of charging increments, as contributing to the closure of some mines (presumably then including that other mines will not increase output) so as to have “adverse effects on competitive outcomes” in the coal production and export market. And second, the dynamic adverse consequence on competition of blunting investment in expanded production capacity. That is no more than a set of theoretical propositions, unsupported by data that might inform the possible magnitude of the effects claimed.
9. PNO contended that those views, whilst noteworthy, were not sufficient to lead the Tribunal to the level of satisfaction required by criterion (a) having regard to the whole of the evidence. PNO said that Hunter Valley benchmark coal prices have ranged between US$20/t to US$180/t over the last several years, and have been trending downwards in recent times. There are a range of material factors that can impact on coal mining production costs, some of which are listed in the NCC Final Recommendation, and in PNO’s response to the NCC under s 44F which was before the Tribunal. Even if the charges for the Service, if not subject to a declaration, are largely unconstrained, at a theoretical level, there are very real and practical commercial reasons why its charging rates should not impede the opportunity for coal producers in the Hunter Valley to export coal, using the Service.
10. The Tribunal’s view is said by PNO to be further informed by the Report of HoustonKemp, Economists, of 1 October 2015 prepared for PNO.
11. In many respects, it is also a set of propositions. On the assumptions made (largely based on PNO’s instructions as to how it restructured the charges for the Service from 1 January 2015), it suggests that “there is no evidence that PNO has or will set prices that would exceed those that could be expected from an arbitration applying the relevant principles” (at p 3), and (at p 4) that any arbitration by the ACCC could lead to significantly higher prices. The analysis of the effect of declaration on price “volatility” is more evidently argumentative. The latter conclusions are premised on its conclusions on those two aspects. But in any case, the Report cannot overcome the expectation that a natural monopoly provider of an “essential service” will charge a price higher than the “efficient” price for that service, which is often thought of as the competitive price, at least in the non-natural monopoly setting.
12. Apart from the description of the Report of the basis of PNO’s decision for the current charging rates and the economic “building block” approach which might be taken by the ACCC in the event of an arbitration under Pt IIIA Div 3, the Tribunal does not think that Report advances its consideration, although it does cast doubt on the analysis in the RBB Economics Report.
13. Before addressing the submissions further, it is convenient to deal with a separate issue raised by Glencore. The Tribunal agrees with the Minister that PNO is not vertically integrated into any dependent market in a materially significant way.
14. PNO is an equally owned joint entity of China Merchant Union (CMU) and The Infrastructure Fund; managed by Hastings Fund Management (TIF). TIF is not said to have any relevant vertical integration. CMU is itself jointly owned in equal shares by Guoxin International (GX) and by China Merchants Group (CMG). GX is not said to have any relevant vertical integration. CMG is the largest shareholder of China Merchant Energy Shipping Co Ltd (CMES), an entity listed on the Shanghai stock exchange. Once that relationship is understood, as the NCC said in submissions and in its Final Recommendation, there is no such relationship as might affect the business decisions of PNO as to its charges in any material way. Apart from the remoteness of that relationship, TIF as a 50% owner of PNO would not countenance the favourable subsidy by PNO of any charges to CMES vessels entering the Port. It is very unlikely that CMU, given its ownership structure would take any steps to do so.
15. The Tribunal notes other submissions supporting Glencore’s contention.
16. The Bloomfield Group letter of 16 June 2015 to the NCC does not really advance the matter. It is a relatively small coal producer. Although it agreed with Glencore’s argument to the NCC in favour of a declaration, its focus was on ensuring the charging structure did not lead to differential pricing for users of the Port. Peabody Energy Australia Pty Ltd is a large coal producer in the Hunter Valley (and elsewhere). By its letter to the NCC of 18 June 2015 it too supported Glencore’s application. Its main focus was that charging increases by PNO may affect the competitive nature of the Hunter Valley in relation to the “global coal seaborne market” rather than secure long term access to the Service and “greater mutual prosperity” for producers and service providers. The Tribunal has noted certain other submissions at [136] above.
17. The Minister’s approach started with the finding that the dependent markets are “workably competitive” at present. That is so, it seems, based upon the current charging structure of PNO. The Minister also accepted that there is a significant prospect of PNO further increasing its charges in the relatively proximate future, and that the prospect of it doing so would generate some uncertainty, and therefore some hesitancy, in any decision-making by a coal producer about the nature and extent of any further capital investment (and possibly, too, an increase in the financing cost for such investment). The Minister also noted that there are commercial constraints on PNO in deciding its future charging structures, as its commercial interests are served by the need to have the Service used to generate revenue. Nevertheless, there is obviously (on the material) a commercial motivation to charge as much for the provision of the Service as possible (having regard to the value of the assets of PNO and the need to provide an appropriate return on its investment) consistent with ensuring the maximum economic usage of the Service. PNO is in a position to leverage its charging structure, so long as it does not do so to the extent that the coal export market does not diminish, and ideally increases. As one expert report pointed out, those two factors are not particularly elastic; that is, production and export levels do not directly change by reason of charging rates for the Service.
18. In short, PNO has an incentive to maximise its profits. It has a commercial objective to recover its efficient costs of providing the Service, and a commercial imperative to maximise trade volumes through the Port. Excess capacity in the Port accords PNO an incentive to encourage growth. Hunter Valley coal export volumes have grown from 67.8 million tonnes per annum (mtpa) in 2000 to 159.4 mtpa in 2014, and were forecast to be 164 mtpa in 2015. There is evidence that PNO has modelled increased channel capacity. There is also evidence, as noted, of further terminal capacity being planned.
19. In its Final Recommendation, the NCC accepted that coal producers have limited ability to pass on increases in port charges, and that demand for the shipping channel service is relatively inelastic. However, there is a practical constraint on PNO of ensuring that coal producers continue to supply into a highly competitive market. That is, if price rises imposed by PNO made some coal producers uncompetitive globally, and led to some operations ceasing in the Hunter Valley, this could reduce volumes and revenues for PNO. While it is possible that this may not constrain PNO if other producers remained that could absorb the price increases, it is more likely that PNO would have an incentive to maximise the flow of coal through the Port so as to capture as much of the benefits from this coal export market as possible. Consequently, it does not necessary follow from an ability to increase prices that there will be a reduction in coal production that impacts competition in the coal export market because PNO has the commercial motivation to ensure that the Service supports the ongoing coal export market and its expansion.
20. As to uncertainty in relation to PNO’s future charging increases, the Tribunal agrees with the Minister that, compared to the significant uncertainty they face from changes in coal prices, other costs and regulation, any such uncertainty is likely to be very small. It would concern charges that are a very small component of the overall cost of delivered coal, while coal producers also face significant uncertainty from changes in the price of coal, ongoing costs (for example labour costs) and changes in regulation, such as those dealing with carbon emissions. Removing the uncertainty about Port access charges is not likely to promote a material increase in competition in a dependent market.
21. For those reasons, the Tribunal has the same view as the Minister. If it were wrong about the correct approach to s 44H(4)(a) as addressed in Issue 1, it would not be satisfied that increased access would promote a material increase in competition in the coal export market. If that market would not be promoted in that way, it follows that the other four dependent markets would also not be promoted with a material increase in competition in any of them.
22. However, in view of the conclusion the Tribunal has reached on Issue 1 concerning criterion (a), it is necessary to consider the contention of PNO.

## Issue 3: The Contention of PNO

1. PNO gave notice that it contended that the Minister’s decision should be affirmed by the Tribunal on the further or alternative ground that access (or increased access) to the Service would not be contrary to the public interest. That is, PNO’s contention is that the criterion in s 44H(4)(f) is not satisfied, so in any event the declaration should not be made.
2. The grounds for that contention are that:
3. there are constraints on the prices PNO can charge under the scheme enacted by the PMAA, supported by the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), along with the contractual relationship between PNO and the State, and the benefit of these constraints should be weighed against the increased compliance and administration costs, risks and uncertainties associated with making a declaration under Pt IIIA of the Act;
4. there is a public interest in facilitating, and not undermining, the operation of a light-handed regulatory approach of the kind applicable to PNO for a facility such as the Port, and there is also a public interest in not readily interfering in the arrangements made between an entity such as PNO and the State in relation to a facility such as the Port; and
5. in considering this criterion, the Minister did not weigh up (and the Tribunal should weigh up) all costs and benefits to the public interest of providing access (or increased access) under the Act, where those costs outweigh the benefits.
6. In the Minister’s reason for his decision, he said that he had regard to the potential costs and benefits that may arise from declaring access to the Service. In considering whether increased access would be contrary to the public interest, he did not find persuasive the evidence that the costs and uncertainties of access regulation at the Port are greater than those usually resulting from an access declaration, and which go beyond what is contemplated by Pt IIIA and its negotiate-arbitrate model in the event of declaration of the Service, and that price-monitoring regulation is not an effective substitute for access regulation, and does not perform the role that Pt IIIA intended. The Minister also noted that investment decisions on significant infrastructure are made with the full knowledge that other parties may seek to declare the services provided by that infrastructure under Pt IIIA, and that there was no persuasive evidence that access regulation would have material impacts on the Hunter Valley coal chain or “Capacity Framework Arrangements”.
7. It is of course accepted that, in addressing each of the criteria in s 44H(4), the Minister and the Tribunal should have regard to the objects of Pt IIIA as expressed in s 44AA of the Act.
8. PNO in its submission to the NCC explained its pricing structure from 1 January 2015, and how it was arrived at. Following the 2014 Lease with the State of NSW, PNO removed the two tiered navigation services charge and replaced it with a flat rate/GT for coal vessels; it removed the maximum navigation services charge for large coal vessels; and it introduced a 3.9% increase on other statutory charges at the Port. Within that submission is reference, at various points, to the pricing structure being influenced by the “threat of regulation” (as expressed in its submissions) and of price monitoring. It explains in its submission why it says that the State of NSW has adequate safeguards over pricing, because of the regulation of the Port under the PMAA and the *Ports and Maritime Administration Regulations 2012* (NSW), imposing a “light-handed” price monitoring regime, and the relevant NSW Minister’s power to seek a report with respect to PNO’s pricing or other matters through the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW).
9. PNO also drew attention to the report of HoustonKemp of 1 October 2015 (submitted with the PNO response to the NCC of 2 October 2015). At a relatively high level of analysis, and accepting the PNO propositions to which it refers as to how PNO fixes its pricing, it is said there is little reason to expect that an arbitration under Div 3 of Pt IIIA following a declaration under Div 2 would result in a materially different pricing structure. It is noted that HoustonKemp at 4 of that Report assert the risk, based on Synergies’ analysis that the declaration could result in significant price increases if, in an arbitration, “the ACCC was to apply a building block approach using Synergies’ assumptions”. That Report has been referred to above. The Tribunal notes that in *Sydney Airport Tribunal* at [151]-[152] it said that it should not surmise on the outcome of any arbitration; see also *Sydney Airport FC* at [60] where that view is noted.
10. The Tribunal is mindful of the observations of the plurality in the High Court in *Pilbara HC* at [111] that, in making a decision on matters of public interest, it should recognise that, on such matters, the Minister is likely to have an informed and significant perspective.
11. It is one thing to assert that there are some existing constraints on PNO in relation to its pricing structures. That may be accepted. Indeed, even as a bottleneck monopoly supplier, as noted it has an incentive to maximise usage of the Port to ensure its revenue is maximised, and would take that into account when fixing its prices. It is a further step, however, to fail to be satisfied that, by reason of those matters, the making of the declaration (and in that sense to provide access or increased access to the Service) would not be contrary to the public interest. The fact is that, at present, there are no direct regulatory constraints on PNO’s pricing structures. The understandable commercial incentive to maximise its profitability, and its revenue, may be served in different ways at different times, depending upon the strength of the coal export market. The fact remains (as noted above) that coal miners supplying coal into that market from mines in the Hunter Valley have no real practical alternative to using the Service, and in more profitable times (accepting what has been said about the present state of that industry) be vulnerable to charging changes imposed by PNO for access to the Service to absorb to a significant degree the profitability of exporting coal produced from the Hunter Valley.
12. The Tribunal agrees with the Minister that any existing practical price constraints on PNO under the legislation referred to, and under the contractual leasing arrangement between PNO and the State of NSW, do not provide an effective substitute for access regulation. Given the terms under which any arbitration by the ACCC under Div 3 of Pt IIIA would be applied, and the applicable pricing principles require that regulated access prices be set to meet the efficient cost of providing access and include a return on investment commensurate with the regulatory and commercial risk, the Tribunal is not satisfied that the declaration would cause any adverse effect on incentives or obligations to invest or discourage efficient investment and costs to PNO as the provider of the Service. It has taken into account the fact that declaration would expose PNO to the processes available under Div 3 of Pt IIIA and the costs associated with that. There is no evidence that those costs would be of particular overall significance.
13. That addresses the matters raised by PNO on this issue. There is in any event much to be said for the perspective put by the NCC in its submissions.
14. As the plurality observed in *Pilbara HC* at [112], in reconsidering the Minister’s decision, the Tribunal would not “lightly depart from a ministerial conclusion about whether access or increased access would not be in the public interest”. The plurality further observed there that: “if the Minister has not found that access would not be in the public interest, the Tribunal should ordinarily be slow to find to the contrary”. And, the plurality there said, it is “to be doubted that such a finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits”. The overall balancing of costs and benefits does not persuade the Tribunal that making the declaration would not be in the public interest.
15. Hence, rather than conducting an examination of the costs and benefits of access (or increased access), criterion (f) requires the Tribunal to address anything that has not been considered under the aegis of criteria (a)-(e) that renders or might render access or increased access contrary to the public interest; criterion (f) should not be used to call into question the results obtained by the application of criteria (a)-(e): see eg per Heydon J in *Pilbara HC* at [188].
16. It is sufficient for present purposes for the Tribunal to indicate that, having regard to the matters raised by PNO in its submissions, no detriment to the public interest by the making of a declaration of the Service has been identified and made out and the Tribunal, to the contrary, is satisfied that access (or increased access) to the Service would not be detrimental to the public interest. It is not necessary, in the circumstances, to consider the extent to which the matters identified in *Sydney Airport FC* by the Full Court, might be matters that, in other circumstances, may arise when criterion (f) is considered.
17. It is not directly the Tribunal’s role to determine whether there is error in the Minister’s consideration of that criterion. However, as that is part of PNO’s submission, it is appropriate to make some observations about that. Firstly, as the Minister said in the introductory section of his reasons that he had regard to the objectives specified in s 44AA. The fact that he did not specifically advert to those objectives when addressing criterion (f) does not support the conclusion that he did not consider them when addressing criterion (f). Secondly, as the Tribunal has done, it was appropriate for the Minister to consider what evidence there was of the costs and uncertainties of access regulation, and to consider the effectiveness of what PNO said were the price monitoring and transparency processes applicable to PNO absent any declaration, because those matters were raised by PNO. It is not apparent that his consideration of those matters was not in the context of the objectives of Pt IIIA. To the extent that it is said that criterion (f) also requires the competitive analysis required by criterion (a), the Tribunal does not agree that such duplication is intended. It agrees with the NCC submission that criterion (f) directs attention to whether there are matters other than those specified in criterion (a)-(e) which might involve a detriment to the public interest and so might be a contra-indicator to the making of a declaration. Both the Minister and the Tribunal considered the matters properly raised by PNO on that aspect. For the reasons given, the Tribunal has the satisfaction required by criterion (f), as did the Minister.

# CONCLUSION

1. For the reasons given, the Tribunal is satisfied of each of the matters specified in s 44H(4)(a)-(f). It considers that its appropriate determination under s 44K(8) is to set aside the Minister’s decision and to declare the Service.
2. As the parties wished to make submissions as to costs under s 44KB, the Tribunal will allow any party seven days to make a written submission as to costs, and any party from whom costs are sought a further seven days to make a written responsive submission. In the first period of seven days, the Tribunal directs Glencore, as the successful party on this application to consult with PNO and the NCC and to submit a minute of the declaration properly to give effect to these reasons for decision. It will formally make that declaration at the same time as it gives a ruling on any costs application.

|  |
| --- |
| I certify that the preceding one hundred and seventy-four (174) numbered paragraphs are a true copy of the Reasons for Decision herein of the Honourable Justice JR Mansfield, Mr RF Shogren and Mr R Steinwall. |

Associate:

Dated: 31 May 2016