GLENCORE COAL PTY LTD

Submission to the National Competition Council in response to the application by Port of Newcastle Operations Pty Ltd for revocation of declaration of the shipping channel service at the Port of Newcastle

Response to NCC request for submissions in response to a Report by NERA Economic Consulting dated 8 April 2019

This submission is dated 26 April 2019

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2 Background

The National Competition Council (**NCC**) has sought submissions in relation to a report by NERA Economic Consulting **(NERA)** dated 8 April 2019 **(NERA Report)** in relation to the NCC's consideration of the application for revocation of the declaration of the shipping channel service (**Service**), at the Port of Newcastle (**Port**), by Port of Newcastle Operations (**PNO**) dated 2 July 2018 (**Revocation Application**).

The NERA Report is also in response to an economic report prepared by Synergies Economic Consulting **(Synergies)** dated 4 February 2019 lodged on behalf of Glencore Coal Pty Ltd **(Glencore).**

Glencore has previously made submissions in relation to the Revocation Application and Glencore does not repeat those arguments again in this submission but nonetheless maintains and presses those views.

Attached to this submission as Annexure A is a report from Synergies responding to matters raised by the NERA Report in the time available. We note that Glencore requested additional time in which to respond and the NCC did not agree to that request, providing Glencore with an additional two business days only.

In Glencore's view it is apparent that the eight-page NERA Report is critically flawed because it is based on factual misconceptions and assumptions that lack foundation in the New South Wales and global mining industry. It is therefore devoid of any probative value as an independent economic analysis. In our view no reasonable decision maker should place any reliance on such a report. In contrast, Synergies has provided a properly reasoned analysis supported by conventional economic logic and factual foundation in the mining industry, and their views are to be preferred.

Price discrimination

NERA appears to accept the NCC's view that PNO lacks the ability to price discriminate between its customers. However, in practice PNO is able to exercise price discrimination by entering into commercially negotiated agreements with particular customers, in a similar manner to the agreement to be entered into with Glencore as a result of the ACCC price arbitration. Previous submissions by Yancoal also suggest they have started this process. NERA's conclusion that PNO is likely to rely on a uniform price is therefore not supported by an accurate assessment of the factual position.

One of NERA's key arguments is that PNO will be constrained in raising prices because of the concern that the developers of new mines (including small miners), would not invest in developing production within its catchment area and it suggests would invest elsewhere in Australia or overseas. Even if NERA is correct that such a constraint exists, the NERA Report does not provide an adequate analysis of its impact. In fact, NERA does not appear to have conducted any financial analysis of the likely impact of any such constraint on PNO's commercial decision making, and therefore the NERA Report cannot provide any reliable assessment of how such a potential pricing constraint would impact PNO's behaviour where the shipping channel ceased to be declared. In fact, it may be that the gains from increasing revenue from existing mines would massively outweigh any potential future losses from discouraging future investment. Nor is it the case that pricing would have to rise to a level which prevents future development before having a substantial impact on the tenements market – again this question is not analysed by NERA.

In any event, this alleged constraint on PNO pricing only exists on the assumption that PNO continues to offer uniform pricing. If this conclusion is not correct, then PNO could overcome any such concern in relation to the developers of new mines by offering differential pricing. The conclusion is not correct – and in fact we know as a matter of certainty that differential pricing will apply once Glencore's pricing arbitration is finally determined.

Extent of coal tenements market

NERA's approach to defining the coal tenements market is wholly inadequate for an assessment of this market for competition purposes. NERA limits itself to asking the question whether a hypothetical buyer could invest in another tenement rather than acquiring one in the Hunter Valley. On this approach, it is hard to see how the coal tenement market could be limited to any particular commodity or geography. Indeed, given the hugely varying characteristics of coal mining investments in which the hypothetical investor is deemed to be interested (e.g. metallurgical v thermal, domestic v export, sovereign risk, position on cost curve, coal quality, asset life), it is difficult to see why the market should not be extended to all mining tenements for any commodity globally, or perhaps all investment opportunities globally. This cannot be a correct approach. NERA has avoided the question of the options available to sellers of tenements and whether a hypothetical monopsonist could profitably reduce the price of tenements and NERA's conclusion on the extent of the market is not supported by any economically valid analysis.