

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

Further Response to NCC Request for Further Submissions dated 15 October 2018 in relation to PNO's Application dated 2 July 2018 and Submission of 17 September 2018

29 October 2018

1. Introduction

- 1.1. The National Competition Council (**NCC**) has sought further comments from interested parties about whether, and if so, how the NCC should have regard to the final determination by the Australian Competition and Consumer Commission (**ACCC**) dated 18 September 2018 (**Final Determination**), when considering whether to make a revocation recommendation in light 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**).
- 1.2. We note that Glencore Coal Pty Ltd (**Glencore**) has previously responded on 5 October 2018 (**Glencore Response**) to the submission and non-confidential documents provided on 17 September 2018 by PNO, in response to the NCC's 4 September letter to PNO. In the Glencore Response, we raised several matters in relation to PNO's Revocation Application in respect of which Glencore could not elaborate on fully at the time, as the Final Determination was not yet published. This further submission sets out why the ACCC's analysis and reasoning in its Final Determination are relevant to PNO's Revocation Application. We will not otherwise revisit in any detail the subject matter of Glencore's past submissions in this submission.
- 1.3. The ACCC published the public version of its Final Determination on 8 October 2018. As previously noted by Glencore and other interested parties, it is important that the NCC fully and properly consider the Final Determination in considering whether to make a revocation recommendation. This view is shared by the ACCC. In the covering letter to the ACCC submission to the NCC dated 8 August 2018, the ACCC Chairman stated:

"The NCC would also be aware that the ACCC was notified in 2016 of an access dispute between Glencore and the Port of Newcastle in relation to access to the shipping channel service. I am advised by the Commissioners conducting the arbitration that the ACCC's consideration of the access dispute is well-advanced.

The outcomes of that consideration may be relevant to the NCC's assessment of the effects of declaration of the shipping channel service. The ACCC may well need to put in further submissions to the NCC on the Revocation Recommendation at the conclusion of the arbitration process".

1.4. As explained in more detail below, the Final Determination defeats various assertions made by PNO that criterion (a) and (d) are not satisfied. The Final Determination also demonstrates the significance of the declaration continuing in circumstances where continuing the declaration provides the only meaningful constraint on PNO's behaviour as an infrastructure monopolist, and also provides certainty to coal producers in conducting their business and making long-term commercial decisions as to their investment in the Hunter Valley.

2. The Final Determination defeats PNO's assertions as to Criterion (a)

2.1. In support of its submission that criterion (a) would not be satisfied, PNO made the following assertions that are defeated by the Final Determination.

2.2. Firstly, *"PNO submits that criterion (a) is not satisfied because there is no basis to conclude that the terms and conditions will vary materially as between the future with declaration and the future without declaration"*.¹ Contrary to this assertion, the terms and conditions of access as determined by the ACCC in the Final Determination reflect a material difference to the current terms and conditions of access.

2.3. In particular, the ACCC determined the Navigation Service Charge to be \$0.61 per gross tonne (compared to the current rate of \$0.76) – this represents a significant reduction of approximately 20% to the current charges. Further, the proposed Navigation Service Charge by PNO as submitted to the ACCC for the purposes of the arbitration was \$1.36 and PNO noted that *"[f]uture Port charges absent declaration will continue to be based on these principles [i.e. by reference to a conventional building blocks model]"*² which indicates that, in the absence of a declaration, the Navigation Service Charge is likely to increase to \$1.36

¹ PNO Revocation Application, page 17.

² Ibid.

in the future for other users. The Final Determination is 50% lower. Such a difference is clearly material.

- 2.4. In addition, the Final Determination involves a term of access that is consistent with the term of the declaration to 7 July 2031 and that the ACCC arbitration determination puts in place pricing processes and transparency requirements on PNO that would not otherwise exist. These other non-price terms represent a further material difference between the terms and conditions with and without declaration. These were terms that PNO had otherwise previously declined any attempt by Glencore to negotiate.
- 2.5. Secondly, PNO submitted that "*[t]here is no evidence that the current terms are unreasonable, or that "reasonable terms and conditions", such as may be available through any arbitration, would be more favourable to users than the terms currently imposed by PNO*".³ Again, the Final Determination defeats this assertion.
- 2.6. The ACCC analysis shows that PNO's current and proposed future charges are excessive and unreasonable. In this respect, Glencore notes PNO's submission at paragraph 6.3 of its original application that:

"PNO's current terms generate an expected return well below an estimated maximum allowed revenue that may be established in an arbitration if the Service remains declared".

- 2.7. This has clearly not transpired. PNO's original submission to the NCC also stated that:

"PNO's terms of access are set by reference to a conventional building blocks model for determining the efficient cost of providing the Service (including an appropriate return)."

- 2.8. Glencore was aware from the arbitration process that it was not the case that PNO's regulatory model was "conventional". In any event, we believe that on any objective view the inclusion of approximately A\$912 million of "user contributions" in the optimised

³ Ibid.

replacement cost value of the Service of A\$2.169 billion is objectively "unreasonable" and the ACCC was entitled to deduct that amount. Accordingly, Glencore believes that the ACCC's Final Determination of what are reasonable access terms and conditions of access, demonstrates that the terms that would otherwise be imposed by PNO absent declaration are likely to be unreasonable contrary to PNO's submissions (see paragraph 6.3 of the PNO Submission dated 2 July 2018).

2.9. Glencore also notes that the ACCC found in the Final Determination that the access terms and conditions that it determined were consistent with the legitimate interest of the owner of the facility (see section 2.2.2 of the ACCC Statement of Reasons).

2.10. Thirdly, PNO submitted that "*even if it is assumed that the reasonable terms and conditions as a result of declaration will be more favourable for users ... than the terms and conditions in the future without declaration, criterion (a) would still not be satisfied because those terms would not promote a material increase in any dependent markets*".⁴ Again, the ACCC took a contrary view. The Final Determination of the ACCC notes that:

*"It is not contested between the parties that the Service is the only commercially viable option for the export of coal from the Hunter Valley region in NSW, and that the shipping channels are a natural 'bottleneck' monopoly. Access to the Service is essential for Glencore to export its goods and compete in international markets (section 44X(1)(c)). The terms of Glencore's access to the Service can promote competition in related markets, including participants in the Hunter Valley coal chain."*⁵

2.11. The ACCC's views in the Final Determination should be respected. The ACCC is Australia's competition agency and has a deep knowledge of the coal industry from the many matters that it has worked on in the Hunter Valley and throughout Australia. It is well placed to provide an independent regulatory assessment of the promotion of competition through these new access terms and conditions.

⁴ Ibid, page 3.

⁵ ACCC Final Determination, page 23.

3. The Final Determination defeats PNO's argument as to Criterion (d)

- 3.1. The ACCC Final Determination also defeats PNO's argument as to criterion (d).
- 3.2. Contrary to PNO's arguments, the ACCC in their Final Determination noted that:

"The 'public interest' is not defined in the Act. The ACCC has historically taken a broad interpretation to concepts like public interest (and the more familiar public benefit test). The public interest criterion looks beyond the immediate interests of service providers and potential third party users, exploring the extent to which a determination contributes to the improved welfare of other parties and the broader community.

*The Port is the world's largest coal export port, and the only economically viable means of exporting coal produced in the Hunter Valley. The Commission considers any access dispute determination to facilitate effective access to the Service at the Port has the potential to enhance the efficiency of Australian-based coal producers, such as Glencore, competing with rivals for the sale of coal to overseas customers. Coal exports make a significant contribution to domestic economic activity and therefore enhances the welfare of Australians."*⁶

- 3.3. As can be seen from the paragraphs above (and more generally the ACCC's assessment of the section 44 CA (3)(a) criteria in the Final Determination), the ACCC is of the view that the terms and conditions in the Final Determination facilitates effective access to the Service and has the potential to increase the efficiency of Australian-based coal producers, thereby enhancing the welfare of Australians, with no adverse impact on PNO.
- 3.4. Again, the ACCC's view should be respected. Given the ACCC's role as Australia's primary economic competition regulator and the extensive resources the ACCC allocated to the arbitration that extended for approximately one year, the ACCC is well placed to independently make these factual findings and assessment as to public interest.

⁶ Ibid, page 15.

- 4. Arbitration permitted by the declaration provides the sole means of constraining PNO and also provides greater certainty for all coal producers dealing with this infrastructure monopoly**
- 4.1. More generally, and in addition to the matters referred to above with respect to criterion (a) and (d), the Final Determination highlights two matters which fundamentally undermine PNO's revocation application.
- 4.2. Firstly, as we previously noted in the Glencore Response, and as noted under section 44AA(b) of the CCA, the Final Determination provides a framework and guiding principles that may be relevant and referred to by other access seekers in their future negotiations with PNO. Indeed, the ACCC noted in the Final Determination that: "*the Commission acknowledges that its consideration of those issues and the principles raised by the application of the methodology as set out in this Statement of Reasons, may be relevant and referred to by other users in their future negotiations with PNO*".⁷
- 4.3. As such, and having regard to the duration to which the Final Determination applies for any other access seeker (up until 7 July 2031), continuing declaration can be seen to provide a real and meaningful constraint on the behaviour of PNO in the future. In contrast, should the declaration be revoked, PNO as an infrastructure monopolist will be able to act in an unconstrained manner as it has done in the past. It is only through declaration that PNO is constrained and through other users of the Service can obtain long-term access rights on reasonable terms and conditions (like Glencore).
- 4.4. Secondly, continuing the declaration will allow users of the Service to obtain certainty in conducting their businesses and making long-term plans (including making long-term investment commitments and entering into long-term contracts). This has been recognised by the ACCC, which noted in the Final Determination that the terms and conditions of the determination "*provides the parties with certainty over the period of the declaration, and therefore assists the legitimate business interests of PNO (section 44X(1)(a)) as well as the*

⁷ Ibid, page 16.

interests of those who have rights to use the Service (section 44X(1)(c))".⁸ In the absence of the declaration, and access to the Service on a long term basis (like the Final Determination), coal miners will face commercial uncertainty as to future charges for the Service and may choose not to enter into certain long-term investments or contractual arrangements, which could potentially harm their operations and the performance of the Hunter Valley and the Australian coal industry in general.

- 4.5. The importance of certainty in access and ability to seek an arbitrator in dealing with PNO cannot be underestimated. For example, Glencore notes that Port Waratah Coal Terminal in its submission to the NCC in this matter raised the issue as to the renegotiation of the lease of one of its coal terminals, the Carrington coal terminal. This factual situation is an important matter for the NCC to consider and highlights the certainty that the declaration provides (and the ACCC Final Determination has provided to Glencore's operations) and the reason why the declaration benefits all users of the Service.
- 4.6. Therefore, it is important that the NCC considers PNO's revocation application against a factual background where it is accepted that PNO is an infrastructure monopolist and would have an ability to act in an unconstrained manner. Importantly, in the absence of the declaration and the ability to arbitrate, access seekers will not have an ability to obtain reasonable terms and conditions of access to the Service, which will thereby impede their ability to conduct commercial mining operations having regard to their long-term investment and commercial strategies, which situation would be to the detriment of the Hunter Valley and Australia's coal exporting industry in general.
- 4.7. Finally, Glencore notes it disputes other elements of PNO's submission dated 2 July 2018 relating to its commercial arrangements with the State of NSW and regulatory oversight by IPART for reasons of matters that are set out in the confidential version of the ACCC Final Determination. PNO has claimed confidentiality over those sections shown as redacted in the ACCC public version of the Final Determination. Glencore sought complete disclosure of the Final Arbitration Determination to refute PNO's submissions made to the NCC.

⁸ Ibid, page 30.

Having regard to those matters we see no prospect of IPART regulation. We further believe that material over which PNO has claimed confidentiality should have been disclosed by PNO to the Tribunal in the original declaration application in 2016 as they demonstrate that the State of NSW had no incentive to see PNO's charges being constrained. We encourage the NCC to obtain the unredacted version of the ACCC Final Determination given that it is PNO which has sought the revocation and therefore it should not prevent the NCC from seeing all relevant information.