

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 Statement of Preliminary Views dated 19 December 2018

4 February 2019

1 Details of Submitter

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2 Background

The National Competition Council (**NCC**) has issued a Statement of Preliminary Views dated 19 December 2018 in relation to its consideration of 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**).

Glencore Coal Pty Ltd (**Glencore**) has previously made submissions in relation to the Revocation Application and while it would not appear that the NCC has accepted those submissions, 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 detailed report from Synergies Economic Consulting addressing matters raised by the NCC's Statement of Preliminary Views. Accordingly, in this covering submission itself we wish to make several points in relation to the NCC's approach and process in this matter.

Glencore does not believe that the NCC's views of the likely approach to be taken by PNO as to pricing in the future at the Port can be sustained. We have previously requested that the NCC obtain the actual cost modelling and data that the Australian

Competition and Consumer Commission (**ACCC**) obtained from PNO in the Glencore/PNO arbitration (**Arbitration**) that we believe provides a contrary picture as to PNO's future pricing. That material has now been provided by the ACCC to the Australian Competition Tribunal (**Tribunal**) as part of Glencore's and PNO's appeal of the ACCC's Final Determination in the Arbitration (**Final Determination**). Given that PNO is the applicant in the Revocation Application we do not believe that any process by the NCC in relation to this matter is sustainable without taking into account that material. The NCC knows it exists and it has been packaged up by the ACCC and given to the Tribunal. That data is clearly relevant as the NCC has claimed that PNO's future pricing will be efficient but has not reviewed or seen PNO's cost model to make any such finding. Indeed, the analysis by the ACCC in its Final Determination suggests that PNO's pricing is not efficient as the NCC claims as the ACCC has disallowed approximately \$900 million of PNO's claimed regulatory asset base as expenditures in fact expended by third parties in the coal industry. Accordingly, Glencore submits there is, in fact, no basis for the NCC's preliminary findings that PNO will be commercially constrained and will price efficiently.

To be clear, Glencore believes that any NCC recommendation will be flawed unless it considers that data that the ACCC has taken into consideration. It is readily available and is material that is from the applicant in the Revocation Application and is therefore highly relevant. Glencore submits the NCC cannot turn a blind eye to its existence and contents.

Similarly, including with regard to this material, Glencore does not see that there is any basis for the NCC to have formed its preliminary views as to PNO's future pricing behaviour being constrained as a commercial matter. The ACCC which has had access to that data has formed a contrary view.

ACCC media Release dated 19 December 2018

The ACCC is extremely concerned about the potential removal of regulation of the shipping channel service at the Port of Newcastle following the release of the National Competition Council's (NCC's) preliminary view to recommend that the Treasurer revoke declaration of the service.

The port provides the only commercially viable means of exporting coal from the Hunter Valley region in New South Wales. The port was privatised in 2014 via a 98-year lease to Port of Newcastle Operations.

The NCC's preliminary view that the declaration should be revoked would mean the terms and conditions of access to the Port would be unregulated.

Since June 2016, the ACCC has been able to independently arbitrate pricing disputes between the Port and its users, if parties cannot agree on terms.

“Removal of regulation of the port would be an extremely disappointing outcome and would have significant implications for all users of monopoly infrastructure,” ACCC Chair Rod Sims said.

“Should the declaration be revoked, the Port of Newcastle will be an unregulated monopolist that is able to determine the terms and conditions of its access with little constraint.”

“It would be reasonable to expect that, without regulation, further price increases at the port would follow and this would be a bad outcome for users and the economy, particularly given the history here,” Mr Sims said.

“I have repeatedly stated my concerns about privatisations by state governments that have boosted proceeds at the expense of appropriate regulation and competition. Users and consumers ultimately bear the cost of such decisions.”

“It is important that the bar for regulation is not unduly raised,” Mr Sims said.

Glencore also submits that the NCC has not given proper consideration or weight to the ACCC's Final Determination. While the Final Determination applies as between Glencore and PNO, the ACCC went to lengths, as it should as the arbitrator, to establish principles that would apply to any other access seeker. The NCC appears to seek to down play the ACCC's Final Determination both as to substance and relevance in the NCC's Statement of Preliminary Views. It would appear the NCC has not fully appreciated the ACCC Final Determination and in particular the ACCC'S Arbitration Report where it states:

"Further, while any potential future dispute between an access seeker and PNO in relation to access to the Service would need to be decided on merits, the ACCC considers that the approach taken in the current dispute provides a useful framework and guiding principles in the parties' negotiations"¹

In relation to Glencore's previous submission and requests to the NCC to make public the material provided to the NCC by PNO in relation to the proposed container terminal to be developed at the Port, Glencore maintains that such material should be disclosed. It is highly inappropriate that an expert's report from Houston Kemp on behalf of PNO should be kept as confidential by the NCC, the existence of which report was only discovered by Glencore under FOI requests. It is most unsatisfactory for the NCC not to have provided appropriately redacted material or at least to have explained what information it received

¹ Arbitration Report, Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, 18 September 2018, page 2.

from PNO. To be provided with a completely redacted expert report raises real concerns on process, particularly as it is inconsistent with the NCC's own guidelines on the acceptance of confidential material.

Finally, Glencore notes the substantial number of submissions from industry that have been made on this matter and the limited weight that has been given to them by the NCC, the NCC preferring the submissions from PNO without what we believe is appropriate testing. We refer to our observations on the user funding expenditure on channel dredging as one example, but the lack of any proper inquiry on the nature and extent of PNO's vertical integration is another example. This perhaps highlights that the NCC's role is to make recommendations on policy and that it is not positioned nor well equipped, as are actual independent regulators, to engage in factual and market inquiries. Glencore believes that this matter raises legitimate questions as to the NCC's role.