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National Competition Council Preliminary Views on the Application to Revoke the Declaration of Shipping Channel Services at the Port of Newcastle

NSW Minerals Council Submission – February 2019

1 About the NSW Minerals Council

The NSW Minerals Council (NSWMC) is the leading industry association representing the NSW minerals industry, providing a united voice for our members.

Many of the NSWMC's members are active in the coal mining industry in the Hunter Valley, either as producers, explorers or service providers. Our members include large and small coal miners. A full list of NSWMC members is provided in Annexure A to this submission. Glencore Coal is a member of NSWMC.

Mining has and will continue to be a key economic driver for the State of New South Wales. That is why NSWMC works closely with government, industry groups and business and community leaders to foster a sustainable mining industry in NSW.

Mining is NSW's largest single export industry, directly employs more than 20,000 people, directly injects more than \$10 billion a year in salaries and business purchases and is forecast to deliver a record \$2 billion in royalties in the current financial year.

2 Introduction

NSWMC makes this submission in response to the Statement of Preliminary Views (Preliminary Views) of the National Competition Council (NCC) dated 19 December 2018 in relation to the application by Port of Newcastle Operations Pty Ltd (PNO) dated 2 July 2018 (Application) for revocation of the declaration of the shipping channel service (Service) at the Port of Newcastle (Port).

NSWMC, on behalf of its members, strongly disagrees with the Preliminary Views of the NCC. NSWMC has made previous submissions to the NCC in relation to its views on this matter and is disappointed that they do not appear to have been taken into account by the NCC in the conclusions that it has reached in the Preliminary Views. This new submission will not repeat our previous submissions in full again, though we continue to hold the views expressed in those previous submissions. We urge the NCC to fully address the arguments we have raised but will, in this new submission, focus only upon the key issues summarised in section 10 of the NCC's Preliminary Views.

3 Declaration criteria (a) and (d)

In relation to criterion (a), NSWMC remains of the view that were it not for regulatory constraints imposed by the declaration and therefore the ability for mining companies to have recourse to arbitration, PNO would continue to seek to impose terms and conditions of access (including as to

price) on coal exporters that would be materially worse than those at this time. The action that Glencore has taken, which we have commented on further below, in reliance on the declaration, has benefits for all our members. NSWMC's members can seek to reduce access prices based on the terms and conditions obtained by Glencore from its arbitration, which terms are not volume based and would appear in principle to apply to any access seeker. In addition, PNO is aware that it is unlikely to be able to increase charges for the Services in a manner inconsistent with the ACCC determination. Accordingly, the NSWMC submits that the NCC should not recommend revocation of the declaration, as the declaration and the opportunity to have terms and conditions of access arbitrated by the Australian Competition and Consumer Commission (**ACCC**) provides an essential constraint on PNO for the benefit of all NSWMC members in a procompetitive manner.

3.1 Timing for application of test

As a starting point for this submission, NSWMC continues to disagree with the approach set out in paragraph 10.6 of the NCC's Preliminary Views in applying the Part IIIA test as if the test needed to be satisfied at this time. Clearly, there currently is a declaration in force as a result of an extensive period of litigation between PNO and Glencore and an arbitration determination that the ACCC believes will have application more broadly to any access seeker who disputes their terms and conditions of access imposed by PNO. This existing declaration needs to be considered by the NCC.

3.2 Examples of lack of supporting evidence

NSWMC is troubled by the lack of factual basis for the views expressed by the NCC in the Preliminary Views that are inconsistent with the broad range of submissions from the coal industry. In addition, the NCC's views are also inconsistent with those of the ACCC and other regulators.

In relation to the NCC's views that *"the Council does not consider that PNO is likely to increase charges to a level or set access terms in a way that would result in inefficient operation of the Service if the Declaration is revoked"*, NSWMC believes that the views of the ACCC Chairman on whether PNO would raise prices to an inefficient level are more realistic as to what would occur in the absence of declaration.

The ACCC Chairman Mr Sims stated in the ACCC media release dated 19 December 2018 that: *"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."* Mr Sims went on to say that:

"It would be reasonable to expect that, without regulation, further prices 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 and the ACCC have a good knowledge of this industry, the ACCC has undertaken an arbitration of the access dispute between PNO and Glencore for over a year and the ACCC is clearly acting with the appropriate degree of independence. The ACCC's independence is, for example, shown by the ACCC, in a separate matter, supporting PNO in relation to reducing any fetters on competition in relation to container trade. The ACCC in both cases is promoting the long term interests of Australian consumers. This suggest that the ACCC's views should be followed and given more weight than they appear to be given by the NCC.

NSWMC has several smaller mining and exploration companies as its members. The ACCC's arbitration determination (which could only be made because there is a declaration in place), even though it applies only for Glencore, determines the regulated asset base and therefore effectively sets a price band for all users, including small miners. Removal of the constraint of the declaration will inevitably create uncertainty as to what PNO will charge those miners and will also inevitably give rise to a reluctance to invest in mining tenements by those miners, given they would not know what PNO would seek to charge in the future. This would give rise to a clear and substantial negative impact on

competition in the mining tenements market that has been identified in numerous submissions, not just NSWMC's submissions.

In relation to criterion (d), NSWMC submits that to recommend a revocation of the declaration would lead to substantial public detriments in the form of reduced economic activity due to PNO being unconstrained, which would harm any future investment and employment in the Hunter Valley region. The ACCC has made this argument very persuasively.

To take another example, we refer to the comments in the Preliminary Views as to what prices may be charged by PNO in the future. It is instructive that the NCC has not sought to obtain from the ACCC the detailed modelling and data that the ACCC has obtained from PNO in the arbitration. That modelling and data allowed the ACCC to provide an arbitration determination that has a building block model that would apply to access applications by all coal exporters. Good regulatory practice in our view should have resulted in the NCC requesting the same material that was provided to the ACCC before the NCC could venture with any confidence as to its conclusion that PNO's future pricing would be efficient. That the ACCC, which has that data, does not hold the view that PNO's pricing would be efficient is instructive.

A concerning omission in the NCC analysis is that it makes no comment on the facts revealed by the ACCC arbitration determination that PNO has sought to "double dip" and add to its cost base the third party coal industry expenditure on dredging of the channel at the Port. For PNO to seek to recover costs that it did not incur is of course highly problematic. For this to only be disclosed through the arbitration highlights the lack of transparency and constraint that PNO would enjoy if the declaration was removed. It also clearly highlights that in the absence of the declaration PNO would price inefficiently as a monopolist by appropriating expenditures in the hundreds of millions of dollars by other parties.

The actual amount that the ACCC appears to have disallowed in relation to this double counting is \$912 million - see para 4.10 of PNO's submission to the Tribunal of a total ORC value of \$2.169 billion. See: http://www.competitiontribunal.gov.au/data/assets/pdf_file/0016/53224/ACT2-of-2018-application.pdf

3.3 Approach of other independent regulators

The NCC's Preliminary View is inconsistent with the approach taken by other independent regulators dealing with the coal industry on a day to day basis. Our members that have operations in Queensland have noted that the Queensland Competition Act has similar provisions to the declaration criterion under Part IIIA of the Competition and Consumer Act (Cth) (2010) (**CCA**). The Queensland Competition Authority's (**QCA**) draft findings on a similar situation involving Dalrymple Bay in Queensland are at odds with the legal analysis and reasoning of the NCC.

For example, the QCA has approached its equivalent legal test based on the current factual situation, without trying to undertake a hypothetical application as if the current situation did not exist, as the NCC has sought to do. See: <http://www.qca.org.au/Other-Sectors/Access/To/Infrastructure/DeclarationReviews/In-Progress/2020-Declaration-Review>

NSWMC prefers the analysis and approach of the QCA, which is clearly set out on its website. The QCA obtained its own expert evidence including in relation to the impact of declaration on competition in mining tenements. The QCA has found, in similar circumstances to those being considered by the NCC, that the monopoly position of the terminal owner would materially impact investment incentives and that declaration promotes competition in other markets, including the mining tenements market.

3.4 Potential container terminal operations

The NCC's approach on the application would also appear to be flawed in not seeking to properly consider issues that are important to safeguarding the future of the mining industry if PNO, with the ACCC's assistance, does succeed in being able to operate a container terminal at the Port. The NCC's

para 6.24 is telling as it is not realistic or practical. For example, an *Australian Financial Review* article on 1 December 2018 headed "*Chinese ships will come to Newcastle, not Botany if \$100 fee dumped: Craig Carmody*", states in part:

"Connections count

Mr Carmody who was in China and Hong Kong last week, said he had met with Chinese shipping lines who had told him they were prepared to call at Port of Newcastle instead of Port Botany under certain conditions.

... Mr Carmody declined to specify the conditions but said China Merchants Port Holdings 50% ownership of Port of Newcastle was helping the port develop relationships with Chinese shippers. China Merchants operates in about 38 ports globally and handles about 100 million containers annually."

It does not appear that the NCC has undertaken any assessment to understand the nature of the commercial relationships that exist that are referenced in the article and, in particular, the ability of PNO to be influenced by vertical or other relationships that may see container traffic and Port operations favoured over coal exports. For example, this may see the establishment of container terminal operations being subsidised by the mining industry. NSWMC does not oppose the development of a container terminal. However, in order to properly assess the issues we would suggest that the NCC should undertake a more extensive analysis.

Significantly the China Merchants Group also has container shipping operations so the NCC has not fully appreciated or considered the vertical integration issues that may arise – see: <http://www.cmport.com.hk/en/>

Increased clarity by the NCC as to the factual position would be welcomed as at times in the NCC's Statement of Views it is suggested that PNO's container volumes would not be significant and therefore questions from vertical integration need not be explored, but that is not consistent with the material made public by PNO on its website or in public statements.

Given that the NCC has not considered the possibility of discrimination in favour of container trade over the mining of commodities in bulk, issues arise as to the appropriateness of the NCC's analysis on vertical integration and proposed recommendations more generally. In any event the existence of vertical integration alone should be a significant determinant in maintaining the declaration of the Service from a legal and public policy perspective.

Full Members

Alkane Resources Ltd
Anchor Resources Limited
Australian Pacific Coal Limited
BHP Billiton
Bengalla Mining Company Pty Ltd
The Bloomfield Group
Centennial Coal Company Ltd
China Molybdenum Co
Clean Teq
Evolution Mining
Fortescue Metals Group Ltd
Glencore Coal (NSW) Pty Limited
Gloucester Resources Ltd
Heron Resources Limited
Hillgrove Mines Pty Ltd
Idemitsu Australia Resources Pty Ltd
Iluka Resources Pty Ltd
Kepco Bylong Australia Pty Ltd
Mach Energy Australia Pty Ltd
Newcrest Mining - Cadia Valley Operations
New South Resources Pty Ltd
Omya Australia Pty Ltd
Peabody Energy Australia
Regis Resources Limited
South 32 Illawarra Coal Holdings
Shenhua Watermark Coal Pty Limited
Shoalhaven Coal Pty Ltd
Silver Mines Ltd
Spur Hill Management Pty Ltd
Thiess Pty Ltd
Whitehaven Coal Limited
Wollongong Coal Limited
Wyong Areas Coal Joint Venture
Yancoal Australia Limited

Associate Members

Aecom Australia Pty Ltd
Ampcontrol Pty Ltd
ARTC - Australian Rail Track Corporation
Ashurst
Aurizon Holdings LTD
Baccus Resources Pty Ltd
B Marheine Holdings Ltd
Cancer Council NSW
Centre for Mined Land Rehabilitation
Civeo Pty Ltd
Coal Services Pty Ltd
ElectraNet
Emeco International Pty Ltd
Emmerson Resources
EMM Consulting

EMS Group Pty Ltd
Genesee & Wyoming Australia Pty Ltd
Gold and Copper Resources Pty Limited
Golden Cross Resources Ltd
Helix Resources Ltd
Herbert Smith Freehills
Hunter Business Chamber
Hughes Mining Services
Hansen Bailey Pty Ltd
Jodama Pty Ltd
Jervois Mining Limited
Sydney Mining Club
Jennmar Australia
Johnson Winter Slattery
L McClatchie Pty Ltd
McCullough Robertson
Mitsubishi Development Pty Ltd
MRS Services Group Pty Ltd
NuCoal Resources Ltd
NSW Aboriginal Land Council
Niche Environment & Heritage
Newcastle Coal Infrastructure Group
Orica Australia Pty Ltd
Pacific National Pty Ltd
Paradigm Resources Pty Ltd
Peel Mining Ltd
PricewaterhouseCoopers
Port Waratah Coal Services Limited
Hetherington Exploration and Mining Title Services Pty Ltd
Hughes Mining Services
Rangott Mineral Exploration Pty Ltd
Quarry Mining & Construction Equipment P/L
Rimfire Pacific Mining NL
Resource Strategies Pty Ltd
RW Corkery and Company
Seyfarth Shaw Australia
Silver City Minerals Limited
Sparke Helmore Lawyers
Sada Pty Limited
UNSW Mining Engineering
TAFE NSW – Illawarra Institute
Thomson Resources Ltd
Toptung Limited
Umwelt (Australia) Pty Limited
University of Wollongong
XCoal Energy and Resources