

# GLENCORE

Mr Richard York  
Executive Director  
National Competition Council

24 November 2020

Dear Mr York

## **Application for declaration of certain services at the Port of Newcastle**

### **1. Introduction**

This submission by Glencore Coal Assets Australia Pty Ltd (**Glencore**) responds to the draft recommendation dated 30 October 2020 (**Draft Recommendation**) by the National Competition Council (**NCC**) in relation to the application made by the New South Wales Minerals Council (**NSWMC**), seeking declaration of the channel services (**Services**) at the Port of Newcastle (**Port**) pursuant to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Application**). Glencore is a member of the NSWMC and supports the Application for the declaration.

Glencore has the benefit of having had an access dispute with the operator of the Port, Port of Newcastle Operations (**PNO**) arbitrated before the Australian Competition and Consumer Commission (**ACCC**) resulting in a determination by the ACCC dated 18 September 2018 (**ACCC Arbitration Determination**). Glencore also has the benefit of the Full Federal Court decision of Chief Justice Allsop, Beach and Colvin JJ dated 27 August 2020 (**Full Federal Court Decision**) that set aside the Tribunal Determination dated 30 October 2019 (**Tribunal Arbitration Determination**). Given this, Glencore is therefore not as directly affected as other Hunter Valley coal industry participants exporting from the Port. However, we note that this separate Glencore access matter, which started in May 2015 in a declaration application to the NCC, is still proceeding through the Courts and is on its way to the High Court for a second time.

Given Glencore's involvement in the initial declaration and the above litigation, Glencore wishes to address what it considers to be some legal and factual errors and omissions in the Draft Recommendation. To the extent we do not address any matter in this submission, no assumption should be made that we otherwise agree with the positions expressed by the NCC in the Draft Recommendation.

### **2. The background to the access litigation between Glencore and PNO and the NSWMC fresh declaration application**

Glencore, is supportive of the NSWMC's application for declaration of the Services, as Glencore believes that it is important that Australia's coal exports are efficient and in the case of coal exports from the Hunter Valley, are not the subject of extraction of

monopoly infrastructure rents by PNO that affect the competitiveness of our export industries.

It is the NSW mining industry that takes the risk of mining coal and exporting coal on international markets with attendant trade risks. These risks include exploring for coal, mining coal, raiiling coal and then exporting from the industry owned coal terminals at the Port.

In comparison PNO takes virtually no risks, "clipping the ticket" as the coal vessels have no option other than to transit the shipping channels. PNO's risk profile is not comparable to that of the mining industry.

The mining industry also makes a vastly greater contribution than PNO to the economy of New South Wales and Australia, employing some 22,000 people directly in the Hunter Valley in mining jobs and 89,000 in indirect jobs (see section 11.2 of the NSWMC Application to the NCC).

PNO has previously made much of the fact that it was only Glencore that brought an access dispute with PNO. However, the coal industry was watching the lengthy litigation between Glencore and PNO, and was shocked that the Treasurer did not reject the NCC recommendation to revoke the declaration of the Services. It was only because of that revocation that the NSWMC has applied separately for the declaration of the Services. The NSWMC Application should send a strong signal that the coal industry did not accept the NCC revocation recommendation as being commercially realistic.

After PNO acquired the lease to operate the Port for a purchase price of approximately \$1.74 billion, PNO increased the asset base to \$2.4 billion. The increased asset base does not take any account of the user funded expenditure at the Port. PNO then used that expanded asset base to increase charges on Port users. That has led to the access dispute between Glencore and PNO.

In particular, Glencore believes that it is not appropriate that the Hunter Valley coal industry should be charged for the (at least) \$912 million in user funded expenditure that largely comprises expenditure in dredging the channels at the Port that the State of NSW imposed on the industry funded and operated coal terminals, Port Waratah Coal Services (**PWCS**) and Newcastle Coal Infrastructure Group (**NCIG**), as part of planning approvals for building or expanding their terminals.

The principle is simple, PNO should not be able to charge the coal industry for \$912 million in user funded expenditure by including it in its asset base if it did not make that expenditure itself.

### **3. The Full Federal Court Decision and the remittal of the matter to the Tribunal to make a determination in accordance with the Full Federal Court orders**

The Full Federal Court remitted the issues for determination to the Tribunal to redetermine the matters on scope. The Decision also required that the Tribunal must take into account user funding in its determination as directed by the Full Federal Court.

PNO did not seek a stay from the Full Federal Court of its decision, nor a stay from the High Court. Accordingly, unless and until the High Court makes a ruling to the contrary, the Full Federal Court decision applies.

We have noted the NCC's consideration of the impact of the Full Federal Court Decision and what will occur in the Tribunal in the Draft Recommendation. In our view the NCC's analysis of the Full Federal Court decision as a matter of law is largely incorrect.

First, in relation to scope. Glencore has succeeded in the Full Federal Court on scope of the ACCC arbitration and we see no prospect of a change in that position as it is a fairly straightforward question of maritime law as determined by the Full Federal Court and we respectfully note the Court included the respected maritime lawyer Chief Justice Allsop.

Second, we do not agree with the propositions put forward by PNO as to user funding which the NCC seems to have accepted without qualification. The matters in relation to user funding were determined on the evidence before the ACCC and it is unlikely in our view the Tribunal will wish to accept any attempt to introduce new evidence by PNO.

In many respects however the NCC's consideration of the matter is not to the point. If the Services were again declared, the coal industry would have the time and ability to put forward additional evidence on user funding to further reduce the PNO asset base.

***The most relevant point is that the Full Federal Court was very clear on the principle that Glencore succeeded on in relation to Part IIIA, that it is not economically efficient, nor consistent with the Part IIIA pricing principles, for PNO to charge for what it did not itself spend.***

Accordingly, if there is a declaration, the Hunter Valley coal industry would have the ability to have the ACCC arbitrate access disputes and PNO would not be entitled to earn a return on user funded infrastructure. In this respect Glencore notes the statements made by PNO's own barrister Cameron Moore SC in the Glencore Full Federal Court Appeal matter at page 15 of the Transcript dated 3 July 2020 (page attached):

*Of course, with a declaration there, and with the prospect of arbitration looming and the ACCC looking over your shoulder. The facility owner is in a much readier frame of mind to engage in a negotiation, knowing that if they don't reach terms that are materially beneficial to the parties, they are going to have terms imposed on them. But yes, ultimately if they negotiate - arbitrate model, that if terms are not able to be agreed by those who are using the service, who are actually carrying out the activities which require the access, then those people will have an arbitration.*

#### **4. Draft Recommendation analysis as to constraints imposed on PNO by NSW Govt is wrong**

Glencore takes issue with the NCC's analysis as to the existence of commercial, regulatory or some form of reputational constraints on PNO that would in some form or other ameliorate or moderate its market power. While Glencore notes the acceptance by

the NCC at 7.57 that PNO has market power, Glencore sees no constraints on PNO and that is why it sought declaration.

The Draft NCC recommendation provides:

***Overall conclusions***

*7.57 The Council considers that PNO has market power when contracting with Port users that have already sunk costs in the Newcastle catchment when those users seek to export coal via the Port. PNO would not have market power in respect of other users of the Port, including those yet to make sunk investments in the Newcastle catchment.*

*7.58 PNO has granted Deed holders a contractual right of access to the Service. PNO has the ability to deny access to the Service to non-Deed holders. However, given the risk of reputational harm to its long term return on investment, lack of meaningful vertical integration, and current underutilisation of capacity at the Port, it would not have the incentive to deny access to the Port.*

*7.59 In the absence of declaration PNO can be expected to price services at the Port to maximise its profits over the long term. The potential for regulatory intervention by the State of NSW is likely to provide some level of constraint on PNO's future pricing in a future without declaration of the Service, although this is not likely to be as effective as that envisaged under the National Access Regime. The Council also considers that PNO is unlikely to have a strong incentive to price its services in a way that materially affects competition in a dependent market. The risk of reputational harm and the implications of this for PNO's long term return on investment, PNO's lack of meaningful vertical integration, and the current underutilisation of capacity at the Port are each likely to reduce its incentive to behave in this way.*

First, in relation to paras 7.58 and 7.59, prior to bringing the application to the NCC in 2015, Glencore sought to engage with the NSW Government as to PNO's initial price increases because NCC processes and the litigation that has transpired subsequently, are costly and time consuming processes. The NSW Government indicated in 2015 it was unwilling to intervene as it had privatized the Port.

Second in our litigation we have seen no evidence that PNO has taken anything other than an extremely robust position with its customers. The evidence of seeking to force them to enter into the producer deed and in particular accept the provisions of the producer deed that force them not to challenge user funding, is a strong example of commercial pressure exerted by PNO.

Glencore believes that the NCC is misapplying Part IIIA if, having identified that PNO does have market power, and given the absence of any real constraints on PNO, the NCC does not then recommend declaration. The NCC should find that declaration would impose constraints through the threat of ACCC arbitration (as PNO's barrister has acknowledged above) to find a material increase in competition in dependent markets

In relation to the threat of NSW Govt regulation the Draft Recommendation provides:

7.35 *The Council has previously observed, however, that the PAMA Act and PAMA Regulations do not currently act to directly limit or regulate the level at which prices may be set by PNO for services provided to users of the Port; and that these instruments are not certified as effective access regimes under Part IIIA of the CCA.*

7.36 *Further, while the lease arrangements between the State of NSW and PNO include provisions designed to 'constrain' the behaviour of PNO, these arrangements are effectively private contractual arrangements between the two parties. Any third party with concerns about PNO's behaviour would have to rely on the State of NSW taking action in order to obtain redress. The Council expects that taking such steps would entail a significant time and cost commitment by the State of NSW.*

7.37 *On balance, the Council expects the NSW Government would be likely to intervene if PNO imposed excessive price increases or other access limitations that had the potential to have a material adverse impact on competition in the dependent markets; or otherwise harm the public interest. Such an intervention might be via the terms of PNO's lease, under the terms of PAMA Act by referral to IPART; or by introducing new statutory restrictions. While the threat of such action by the NSW Government would be likely to apply some level of constraint on PNO when it sets its terms and conditions of access in a future without declaration of the Service, the Council considers the effect of this constraint falls well short of that which would result from an access regime capable of certification. The Council considers that these constraints are not a substitute for the type of access regulation contemplated by the National Access Regime"*

Glencore has no confidence that the State of NSW will intervene in this matter. Indeed the letter from Port Authority of NSW to the ACCC in the NSWMC collective bargaining application, discloses a payment mechanism that has not previously been disclosed by PNO, which highlights why the State of NSW will have no incentive to intervene to restrain PNO pricing excessively as it obtains a financial gain from that.

The Port Authority Letter dated 16 April 2020 (see [https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20Port%20Authority%20of%20NSW%20-%2016.04.20%20-%20PR%20-%20AA1000473%20-%20NSWMC%20-%20Final%20Version\\_0.pdf](https://www.accc.gov.au/system/files/public-registers/documents/Submission%20by%20Port%20Authority%20of%20NSW%20-%2016.04.20%20-%20PR%20-%20AA1000473%20-%20NSWMC%20-%20Final%20Version_0.pdf)) provides as follows:

*As noted above, Port Authority provides a variety of services to PNO, including to ensure safe Port operations. Port Authority receives a quarterly fee from PNO for those services, which (for recent and future years) is calculated as a fixed proportion of the Navigation Charge that PNO receives from its customers, i.e. Port users. (Port Authority does not receive any proportion of PNO's Wharfage Charges). Accordingly, to the extent that the proposed collective bargaining conduct results in PNO receiving reduced Navigation Charge revenue from the Applicants, Port Authority's fee will similarly reduce.*

**5. PNO Producer Deeds and NCC Draft Recommendation analysis that they would represent the terms and conditions of access in the absence of declaration**

Glencore does not agree with the NCC analysis in the Draft Recommendation as to the PNO producer deeds. The NCC clearly misunderstanding the process as between the producer deeds and the shipping agent deeds.

First, as we have noted earlier in this submission the Full Federal Court has confirmed that under a declaration the producers can nominate to access the Services in a different manner and that PNO's pricing must take user funding into account. The PNO standard form shipping agent deeds and producer deeds do not allow arbitration or any other form of dispute resolution in relation to user funding at the current time.

If the Services were declared, and therefore there was an ability to have the ACCC arbitrate access disputes, the pricing of the NSC is likely to be materially different. Perhaps, equally importantly, there would be much greater certainty over future capital expenditure at the Port and greater certainty on future price paths.

The behaviour of shipping agents (who are not exposed to the economic impact of the NSC) is not indicative of the behaviour of major export industry participants who bear the cost of the increases in NSC imposed through the impact on the price that customers are willing to pay for Newcastle coal.

Accordingly, Glencore believes that the NCC's analysis as to the counterfactual in the absence of declaration misunderstands the current situation and also the future position with declaration because the NCC does not understand the problematic nature of the agreements that PNO is seeking to force the industry to sign. In any event we do not believe that the NCC fully appreciates how different the situation would be with ACCC declaration.

This is what the Draft Recommendation states:

***In a future without declaration, terms and conditions will be negotiated against a backdrop of commercial arbitration***

*7.66 The Council considers that in the absence of declaration, Port users can obtain access to the Service under the open access arrangements and, by entering into a deed, vessel agents and coal producers can obtain a long term contractual right of access to the Service. PNO has submitted that a number of vessel agents have already entered into deeds and accordingly have obtained a long term contractual right of access to the Service. As noted at paragraph 7.56, the Deed and open access arrangements provide certainty to Port users, and that the Deed provides materially greater certainty than the open access arrangements.*

*7.67 The NSWMC submits that, because Port users can only obtain an entitlement or legal right to the Service by way of declaration, access to the Service on reasonable terms 129 Section 44ZP(1), CCA. 50 and conditions as a result of declaration would 'surely' promote a material increase in competition in a dependent market. 130*

*7.68 The Council notes that the word 'access' is to be given its ordinary and grammatical meaning and its meaning is not to be restricted to legal right or entitlement. The Full Court described the ordinary meaning of access in the context of access to a service as a 'right or ability' to use a service.*

*7.69 The Council further notes that, prior to the Amendment Act (see Chapter 4 above), on the basis of the pre-2017 declaration criterion (a) (the 'old' section 44H(4)(a) of the CCA), the Full Court rejected the notion that the word 'access' meant a declaration under Part IIIA, noting that such a meaning would readily lead to the conclusion that a comparison between a 'future with a declaration' and a 'future without a declaration' is to be taken into account. Rather, the applicable test under the pre2017 declaration criteria (a) required a counterfactual analysis between 'access' and 'no access' and between 'limited access' and 'increased access', and this analysis precluded a consideration of whatever usage or access the service provider does or will provide voluntarily and under which terms in the absence of declaration.*

*7.70 As set out in Chapter 4 of this Draft Recommendation, the Amendment Act materially changed the wording of declaration criterion (a) in that it now requires that access (or increased access) to a service on reasonable terms and conditions as a result of declaration (rather than access per se) will promote a material increase in competition in a dependent market. This test requires a counterfactual analysis 'with/without' declaration and mandates the Council to consider any existing or likely future access arrangements in a future without declaration, including any contractual access arrangements (such as in the present case, the open access arrangements and the long-term deed).*

While we may disagree with the base position from which the NCC is assessing the counterfactual with declaration and the terms and conditions which currently apply, we would hope that having regard to this submission (and the comments from PNO's barrister referred to earlier) that the NCC may appreciate that the NSW coal producers would anticipate a very different set of terms and conditions of access if the Services were declared.

## **6. The need for factual investigation**

As a final point, in this matter, as far as we can determine, the NCC has conducted no investigations, meetings or interviews that would normally be the case for a factual investigation of a complex matter such as this involving substantial exports from Australia. As a result, even if we did not have the concerns that are identified in detail in this letter, we find it difficult to envisage how the NCC could weigh the evidence that has been presented. This is a very important issue and we ask that transparency is provided as to the factual investigations undertaken by the NCC to reach its findings of fact.

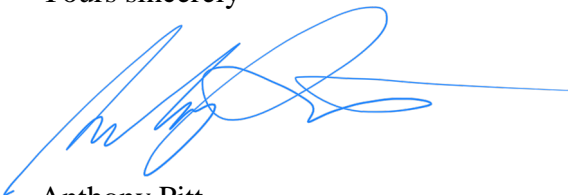
## **7. Conclusion**

Glencore remains of the view that if the Services were declared that not only would the NSC be materially different as user funded expenditure would be properly taken into consideration, but also that any ACCC arbitrated terms and conditions of access would create greater certainty as to PNO's future expenditure and create greater certainty on

future price paths that in turn would create greater certainty for investment by coal producers and therefore a material increase in competition in the dependent markets identified by the NSWMC in its Application, thereby satisfying criteria (a).

Finally, we note that the NCC was not convinced that criteria (d) was satisfied in that it was in the public interest to declare the Services. In Glencore's view, there are clear benefits to the Hunter Valley, NSW and Australian economy from imposing constraints on the market power that the NCC has acknowledged that PNO has, by declaring the Services, and in particular through the threat of ACCC arbitration if there is not a negotiated outcome. In a situation where PNO is otherwise seeking to force the Hunter Valley coal industry to accept its producer deeds on a take it or leave it basis, the imposition of such reasonable constraints in the absence of any other constraints on PNO, is manifestly in the public interest.

Yours sincerely



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negotiated, were complaining about the increase in prices that they were having to bear, they really can't get any access for a large part of the business.

5 MR MOORE: Well, as I indicated yesterday, in one sense, that is not an entirely accurate characterisation, with respect because they can get the benefit if people who are using the service say, "We want a cheaper price." But - - -

10 BEACH J: So all of those people have to come and bring their own application. So every person who is operating some ship from wherever, each of them have to make an individual application to come along and get that, and that is the only way you can get into the regime.

15 MR MOORE: Or negotiate, where you have a declared system. But that in a sense, when your Honour puts that, is an extreme proposition. That is how access regimes work. People who are accessing the service have to come along and say, "Well, I would like access to the service." Of course, with a declaration there, and with the prospect of arbitration looming, and the ACCC looking over your shoulder. The facility owner is in a much readier frame of mind to engage in a negotiation, knowing that if they don't reach terms that are mutually beneficial to the parties, 20 they're going to have terms imposed on them. But yes, ultimately if they negotiate – arbitrate model, that if terms are not able to be agreed by those who are using the service, who are actually carrying out the activities which require the access, then those people will have an arbitration.

25 ALLSOP CJ: Mr Moore, do we – sorry. Well, that all depends upon what "user" means, and "use" means, and you will come to that.

MR MOORE: That's - - -

30 ALLSOP CJ: And I was about to say, Mr Moore, when you come to it.

MR MOORE: Yes.

35 ALLSOP CJ: You – I would have thought subject to your submission, one must accept that this declaration, how – whatever the – I will start again. Whatever the strength of the point made by Beach J on the first day, or the point raised by Beach J on the first day, as to how one construes the declaration as a public document in ....., and subject to that point, this is a declaration of access, and an arbitration. Now, a port which is one of the largest coal – dry bulk ports in the world, I think the largest 40 coal port in the world. And however one identifies the context and ....., That is all there might be, that is or might be. The kind of background circumstance seems to be, you would seek to understand what does the "right of access" mean?

45 MR MOORE: Your Honour, I understand that, and I have to deal with that. But we also have to look at what, in effect, are the charges that are being levied, what is the – what does the State have to say about the, and what are they being levied for.