

GLENCORE

Mr Richard York
Executive Director
National Competition Council
Level 17, Casselden
2 Lonsdale Street
Melbourne VIC 3000

25 August 2020

Dear Mr York

Application for declaration of certain services at the Port of Newcastle

This submission by Glencore Coal Assets Australia (**Glencore**) responds to the invitation by the National Competition Council (**Council**) to make submissions in relation to the application made by the New South Wales Minerals Council (**NSWMC**) seeking declaration of 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 reasons outlined in this submission. While Glencore has the benefit of the arbitration determination by the Australian Competition and Consumer Commission (**ACCC**) dated 18 September 2018, it is awaiting the outcome of the Full Federal Court proceedings brought by Glencore and the ACCC in relation to the inclusion of approximately \$912 million user funded expenditure in the asset base of Port of Newcastle Operations Pty Ltd (**PNO**) and Glencore, and the industry will not have the benefit of that outcome should Glencore and the ACCC be successful. Further, Glencore does not believe that users have the benefit of reasonable terms and conditions of access at the current time such that declaration would benefit the industry as a whole. In particular this submission deals with the following;

- the circumstances where PNO has refused to collectively negotiate with users to resolve critical industry issues between users and PNO;
- the declaration criteria in Part IIIA of the CCA are satisfied, noting in particular that declaration is likely to promote a material increase in competition in dependent markets;
- declaration is necessary to ensure the efficient operation of monopoly coal export infrastructure which is an important component of the coal export supply chain, noting that the coal export industry is a key contributor to the Hunter Valley region and the NSW economy in difficult economic circumstances given that PNO as a monopoly infrastructure provider where PNO has the ability to act in an unconstrained manner.

1. Background – terms of access to the Port following revocation of declaration

As the Council would be aware, the Port is located at the end of a multi-user export supply chain that involves an extensive rail network from multiple mine sites that culminates at industry-owned coal loading terminals located at the Port. As a practical matter, the Port is

the only economically efficient means for mining companies to export bulk commodities such as coal from the broader Hunter Valley region as described in the Application.

As the Council would also be aware, declaration of the Port was deemed to be revoked on 24 September 2019. While we have noted the Council's previous reasoning in its recommendation to revoke the declaration, being that PNO would not have the commercial incentives to adversely affect competition in certain markets and that it is not a vertically integrated monopolist, the commercial reality that has transpired is that PNO increased access charges from 1 January 2020 and sought to impose a contractual framework in the form of proposed deeds on users of the Port, which are annexed to the Application.

The terms and conditions of access imposed under such deeds are materially different to the terms on which access would be provided under declaration, and reflect PNO's rationale that it is entitled to recover, through its pricing, approximately \$912 million of past user funded expenditures.

Glencore notes that the issue of user funding is one which is currently before the Federal Court of Australia. However, even should Glencore and the ACCC be successful in these proceedings, any finding by the Court to disallow PNO from including the \$912 million of user-funded expenditures in its regulated asset base will be limited to Glencore (as it was party to the arbitration proceedings which are the subject of appeal) and will not be available to other users of the Port, despite the issue of user funding being a critical one to the coal industry given the significant investment and sunk costs users have expended at the Port.

In such circumstances where the Port is not subject to declaration or any effective regulatory oversight, there is a real likelihood that PNO will act in an unconstrained manner (as it has done post-revocation) which will have a chilling effect on investment in the coal export industry in the Hunter Valley region. This will have significant negative implications for the NSW coal industry and therefore the State economy given the contribution of coal exports to NSW in revenue terms, as outlined in section 4.

This industry concern is reflected in ACCC Chairman Rod Sims's speech, where he notes the commercial incentives of a monopolist to maximise profits by raising prices, even if this means reduced volumes or less use of their service.¹

2. PNO has refused to engage with the NSW coal industry on legitimate industry issues

As the Council may be aware, on 5 March 2020, NSWMC lodged an authorisation application with the ACCC seeking authorisation of proposed collective bargaining conduct (**Authorisation Application**).² The Authorisation Application sought to provide users of the Port with an opportunity to discuss key industry issues and negotiate with PNO, including in relation to the terms and conditions proposed by PNO under the various deeds referred to above.

The ACCC issued an interim authorisation to allow this to occur and a draft determination noting the public benefits associated with that proposed negotiation. On 29 April 2020,

¹ See <https://www.accc.gov.au/speech/accc-perspectives-on-transport-issues> .

² See <https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/new-south-wales-minerals-council-nswmc> .

NSWMC wrote to PNO requesting an initial meeting with PNO to commence negotiations on industry issues dealing with PNO's operation of the Port. However, PNO declined the request for an initial meeting and indicated that it does not support collective bargaining, despite individual negotiations not culminating in any successful resolution of industry issues to date.

Accordingly, Glencore is of the view that users currently do not have access to the Port on reasonable terms and conditions, and that declaration is necessary having regard to PNO's unfettered market power and the reasoning set out in the Application.

3. Declaration is necessary and will promote a material increase in competition in relevant dependent markets

For the reasons set out in the Application, Glencore considers that the declaration criteria set out in Part IIIA of the CCA have been satisfied.

In particular, Glencore notes the decision of the Queensland Treasurer in relation to the Queensland Competition Authority's declaration review of the Dalrymple Bay Coal Terminal service, where he found that the Deed Poll and Access Framework proposed by the monopoly infrastructure operator, either alone or in combination with the threat of declaration, were not sufficient to constrain its ability and incentive to exercise market power. Similarly, the contractual framework proposed by PNO in the form of the deeds, either alone or in conjunction with the *threat* of declaration do not sufficiently constrain PNO's ability and incentive to exercise its monopoly power for the duration of the proposed deeds and beyond.

As such, Glencore considers that declaration is necessary to provide users with long-term certainty as to the terms and conditions of access to the Port, in turn driving a material increase in competition in relevant dependant markets, including the coal tenements market(s). Glencore shares the concern expressed at section 9.9 of the Application, being that the differential between the access price determined by the ACCC compared to the current access price offered by PNO is likely to give rise to a risk of hold-up of investments in development stage coal tenements in the Hunter Valley region, which in turn has material impacts on competition in other markets such as the specialist services market.

4. The coal export industry is a key contributor to the State and delivers significant benefits to NSW and the Hunter Valley region

As noted in the Application, the coal mines exporting through the Hunter Valley employ the vast majority of the 22,000 people directly employed by the NSW coal mining industry. Based on data collected by the NSWMC, the NSW mining industry directly spent \$13.7 billion in the NSW economy in 2018-2019, which included \$2.5 billion in wages and salaries; \$8.9 billion in goods, services and community contributions; and \$2.3 billion in state government payments, such as royalties and taxes.

There have been recent substantial falls for prices of all coal types which have significant negative impacts upon coal producers' revenue and ability to continue to invest in the Hunter Valley region. The government forecast is for Australian thermal coal exports to drop from an estimated \$20 billion in 2019-2020 to \$16 billion in 2020-2021.³ Noting the conditions faced by the coal industry, Glencore considers that declaration is necessary to ensure the efficiency

³ <https://publications.industry.gov.au/publications/resourcesandenergyquarterlyjune2020/documents/Resources-and-Energy-Quarterly-June-2020.pdf> (page 53).

of coal exports, by providing regulatory oversight over the terms and conditions of access imposed by coal infrastructure service providers such as PNO.

Yours sincerely



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