GLENCORE

Mr Richard York
Executive Director
National Competition Council
Melbourne VIC 3000

7 September 2020

Dear Mr York

Application for declaration of certain services at the Port of Newcastle

1. Introduction

This submission by Glencore Coal Assets Australia (**Glencore**) responds to the invitation by the National Competition Council (**Council**) dated 28 August 2020 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**) and in particular the judgment of the Full Court of the Federal Court of Australia handed down on 24 August 2020 (**Federal Court Judgment**).

2. Federal Court Judgment

As the Council noted in its email of 28 August 2020, the Federal Court set aside the decision of the Australian Competition Tribunal (**Tribunal**) of 30 October 2019 in relation to an arbitration determination between Glencore and PNO and remitted the matter back to the Tribunal. Glencore notes the Federal Court found that:

(a) the Tribunal had erred in law by misconstruing the terms of the declared Service applicable to Glencore (the **Scope Argument**); and

(b) the Tribunal had erred in law by allowing Port of Newcastle Operations Pty Ltd (**PNO**) to include user funded expenditure in the regulatory asset base in setting its navigation service charge (**NSC**) charged to Glencore (the **User Funding Argument**).

The Scope Argument is essentially whether Glencore can nominate coal vessels directly to PNO, which vessels are exporting Glencore coal so that the relevant vessels have the benefit of the arbitrated price for transiting the channels at the Port. PNO had previously claimed that the vessels within scope were only those directly chartered by Glencore, whereas the Federal Court has ruled that a practical approach should be taken for situations where Glencore is exporting coal and takes responsibility for paying the vessel channel transit charges.

The User Funding Argument related to a simple proposition by Glencore under Part IIIA of the CCA, that PNO cannot charge based on expenditure (i.e. user funded expenditure) it did not make.

Glencore has applied to the Tribunal for a case management hearing to have these matters finalized expeditiously, given this matter is in relation to a Part IIIA declaration process started by Glencore in May 2015.

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3. **Implications for NSWMC Application**

Glencore wishes to address the Council's request for submissions relating to the Federal Court Decision and also notes paragraph 35 of the submission from PNO dated 26 August 2020, in particular PNO's claim that:

> "... *the Full Court did not make any factual or economic findings contrary to those of the ACT Determination of 30 October 2019. Rather the Full Court was concerned with the decision making process adopted by the ACT.*"

The Federal Court Decision dealt with *errors of law* made by the Tribunal. The Full Court comprised Chief Justice Allsop, Justice Beach and Justice Colvin and in their unanimous judgment they provided respectful, but strong guidance to the Tribunal in relation to its consideration of factual matters and importantly the legal interpretation of important concepts in Part IIIA.

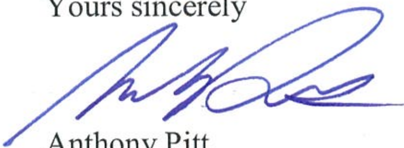
The Federal Court has made it clear that Glencore as a coal exporter has the ability to make nominations to PNO for coal vessels using the channels at the Port. In our view, that translates in the circumstances of the NSWMC's Application for declaration of the Services, that if declared, coal producers should similarly be able to nominate vessels to PNO and to do so irrespective of PNO's proposed access deeds.

In relation to user funded expenditure, the Federal Court has provided guidance to the Tribunal in its review as to the proper construction of the pricing principles relevant to Part IIIA. In particular that PNO should not be permitted to claim user expenditures it did not make. That would therefore mean that should the Services be declared based on NSWMC's Application, then all coal producers will have the ability to have the ACCC arbitrate an access dispute to remove those expenditures that PNO has included in its asset base that it did not make.

Glencore does not wish to canvass PNO's various arguments as to its proposed access deeds in this submission, but would simply note for current purposes, questions as to whether PNO should in good conscience continue with them when they expressly seek to carve out the ability to arbitrate user funded expenditure given the Federal Court Decision. We also note they provide no mechanism for a user to actually object to planned future capital expenditure and possible "gold plating" of the Port, whether through "user" funded expenditure related to a container terminal, or otherwise.

Glencore continues to be of the view that if the Services were declared, then PNO would be subject to regulatory constraints imposed by the threat of access disputes being arbitrated by the ACCC, and Port users would have the benefit of materially more reasonable terms and conditions of access leading to a material increase in competition in the relevant markets identified by the NSWMC in the Application.

Yours sincerely



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