

Privileged & Confidential

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

20 November 2020

Dear Mr York

Re: Draft recommendation by the NCC to not declare the Port of Newcastle

This submission by Malabar Resources Ltd (**Malabar**) is in regard to the draft recommendation of the National Competition Council (**NCC**) dated 30th October 2020 to not declare the channel services (**Services**) of the Port of Newcastle (**Port**) operated by the Port of Newcastle (**PON**).

Malabar is an Australian public company with around 150 shareholders, (most of whom reside in NSW). We are not a global company. Our sole assets, (acquired over the past decade), are coal development tenements in the Upper Hunter Valley in NSW, namely;

- (i) 100% of the Spur Hill Underground Coal tenement (acquired 2012),
- (ii) 100% of the Maxwell Underground Coal tenement (acquired 2018), and;
- (iii) 100% of the Drayton Mine tenements and the associated infrastructure, re-named "Maxwell Infrastructure" (acquired 2018).

We have raised around \$100 million to acquire the tenements and progress development approvals. Our tenements are not in production.

The globally competitive logistics of the Hunter Valley from these tenements to the Port was a key reason for acquiring these assets.

We are currently in the final stages of obtaining Development Approval for the Maxwell Underground Coal Project (**Project**).

On 30th September 2020, the NSW Government released its Whole of Government Assessment Report on the Project, stating that it is in the public interest and can proceed. This Project will produce up to 7 million tonnes per annum of high quality export coal.

The Project has been referred to the NSW Independent Planning Commission (**IPC**) to make the final determination.

The cost of gaining approvals is very expensive and time-consuming.

Our Project has enormous potential to support both the Upper Hunter and the broader NSW economy as we move in to the post-COVID-19 recovery phase. The Project will create 250 new jobs during construction and support local businesses and suppliers. Once construction is complete it will generate a further 350 direct new jobs (and many more indirect jobs), delivering \$55 million in

wages into the local economy each year, and generate \$1 billion to \$1.2 billion of royalties for the NSW State Government over the initial 26 years of the Project.

The capital cost to develop the Project is in excess of \$500 million. We will be raising the capital from a combination of debt and equity.

Given the current circumstances of low coal prices and reduced number of financial institutions able to fund coal projects, then it is imperative that our Project is financially competitive for the foreseeable future, and we have certainty in regard to operating costs.

The greater costs being levied by the PON and the lack of long-term certainty of the cost of their Services are of great concern to us.

Malabar does not believe that users of the Port have the benefit of reasonable terms and conditions of access. Specifically;

- (a) The PON is an operator of monopoly infrastructure and therefore the PON has the ability to extract as much value from us as possible. This creates significant disincentives to invest in the Hunter Valley. (We do not share the NCC's views that PON would not seek to extract as much revenue as is possible from us).
- (b) The PON has announced that it will develop a container terminal. In the context of its 98-year lease this would suggest that PON is likely to have less commercial concerns how it treats the coal industry and instead will seek to extract as much as possible from the industry while it seeks to build and develop the container terminal;
- (c) The PON, in the absence of declaration, has no incentive to negotiate with the coal industry, as demonstrated by it declining to meet NSWMC's representatives to collectively bargain in relation to legitimate industry issues such as; access terms, user funding issues, and future capital expenditure (e.g. the container terminal) and how that would affect charges imposed on the coal industry. To date the PON has not taken into consideration any impact on its reputation arising from its negotiation position;
- (d) The PON is actively seeking to develop a container terminal. This means that;
 - i. given PON's major shareholder, China Merchants, investments in and operates container terminals, then PON will become vertically integrated, and;
 - ii. the PON will have the incentive to favour container terminal operations over coal terminal and coal export operations.

The PON has not acted in a manner that suggests it will engage with coal producers in relation to future pricing certainty. This is of significant concern to us as we seek to fund our Project;

The PON has refused to engage with the coal industry as to future capital expenditure which may see the coal exporters charged more which will increase uncertainty in investments (such as our Project) in the Hunter Valley contrary to the NCC's predictions.

All of these matters mean that it is appropriate that there be regulatory oversight of the PON by the Services being **declared** so that there is transparency and increased certainty as to the access terms and conditions.

The approach taken by the NCC as to the existence of commercial and regulatory constraints on the PON in the absence of declaration lacks real world perspective and is inconsistent with the views of the ACCC as to the likely commercial incentives of the PON. Further, the NCC's views are not supported by the statements made by the PON's own barrister Cameron Moore SC in the Glencore Full Federal Court Appeal matter at page 15 of the Transcript dated 3 July 2020:

"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."

The NCC has misconstrued the ability of the NSW Government to intervene as there is no actual ability to do so under the IPART legislation noting that the PON has to consult with the NSW Government, but the NSW Government has no power to intervene and set pricing.

PON's refusal to collectively bargain is an important example that the PON can act without constraint. There is no evidence that the PON feels constrained in relation to the coal industry. The submissions and material that were considered as part of the ACCC collective bargaining authorisation application, demonstrate that the PON has no intention to negotiate terms and conditions as to access, pricing or user funding, and that there is no evidence that the Producer Deeds, which the NCC appears to suggest ameliorate PON's market power, are in fact workable. If the Services were declared and arbitration was possible, those terms and conditions of access including the Producer Deeds, would be negotiated or subject to ACCC arbitration.

Conclusion

Without declaration, Malabar is exposed to PON's unconstrained decision-making with no safeguards to protect a substantial number of jobs and investment. The NCC and Federal Treasurer now have an opportunity to establish safeguards through declaration.

Without declaration of the Port, the cost of funding the Maxwell Underground Coal Project will be impacted because of; (i) the potential for unfettered cost increases, (ii) the potential imposition of commercially unreasonable terms, by the Port, and, (iii) the lack of certainty in the future pricing of the Services.

Malabar considers that declaration is necessary to protect our business and jobs by providing regulatory oversight over the terms and conditions of access imposed by the PON.

It is a concern that a foreign state-owned enterprise will be given unfettered ability to extract unreasonable profits from a local Australian company that is endeavouring to develop new exports for the benefit of Australians via wages, taxes and royalties. We have **no alternative** but to ship through the Port.

A handwritten signature in black ink, reading "Wayne Seabrook". The signature is written in a cursive style and is slanted upwards to the right.

Yours sincerely,
Wayne Seabrook

Chairman Malabar Resources Ltd

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