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Dear Mr York

Application for declaration of certain services at the Port of Newcastle

This submission by Malabar Coal Ltd (**Malabar**) responds to the invitation by the National Competition Council (**NCC**) in relation to the application made by the New South Wales Minerals NCC (**NSWMC**) seeking declaration of the Port of Newcastle (**Port**) pursuant to Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Application**).

Malabar supports the Application for the reasons outlined below.

1. Background

Malabar is an Australian public company with around 150 shareholders, (most of whom reside in NSW). We are not a global company, rather are a local business with a leadership team that has a track record of developing mines in Australia.

Our sole assets, (that we 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 now-closed Drayton Mine and the associated infrastructure – re-named “Maxwell Infrastructure” (acquired 2018).

Our tenements are not in production. The globally competitive logistics of the Hunter Valley from our tenements to our customers’ ships that will berth at the Port was a key reason for acquiring these assets.

We are currently in the process of seeking Development Consent for the Maxwell Underground Coal Project. This Project will produce up to 7 million tonnes per annum of high quality export coal and directly employ around 350 people. The capital cost to develop the Project is in excess of \$500 million.

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

2. Terms of access to the Port following revocation of declaration

As the NCC would be aware, the Port is located at the end of a logistics chain that involves an extensive rail network that culminates at industry-owned coal loading terminals at the Port.

The Port is the only route for Malabar to export coal from our tenements.

Declaration of the Port was revoked on 24 September 2019. While we have noted the NCC's previous reasoning to revoke the declaration, being that Port would not have the commercial incentives to adversely affect competition, the commercial reality that has transpired is that Port 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.

As the Port is not subject to declaration or any effective regulatory oversight, there is a real likelihood that Port will act in an unconstrained manner (as it has done post-revocation) which will impact negatively on investment in the coal export industry in the Hunter Valley region.

This will have significant negative implications for local, state and the Federal economies given the contribution of the coal industry and exports in terms of jobs and revenue.

3. Port has refused to engage with the NSW coal industry on legitimate industry issues

Earlier this year, the NSWMC applied to the ACCC to seek authorisation of collective bargaining. The ACCC issued an interim authorisation to allow this to occur. NSWMC then requested a meeting with Port to commence negotiations.

However, the Port declined the request on the basis that it does not support collective bargaining. This is despite individual negotiations not culminating in any successful resolution of industry issues to date.

Malabar 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 Port's unfettered market power.

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

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

In particular, Malabar 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 Port does not constrain Port's ability and incentive to exercise its monopoly power.

As such, Malabar 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.

We share 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 Port 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.

5. The coal export industry is a key contributor and delivers significant benefits

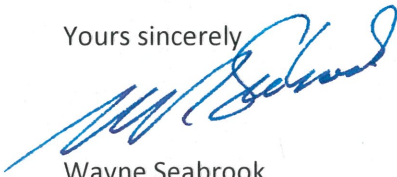
As noted in the Application, the coal mines exporting through the Hunter Valley employ the vast majority of the 22,000 people directly employed by the NSW coal mining industry. Based on data collected by the NSWMC, the NSW mining industry directly spent \$13.7 billion in the NSW economy in 2018-2019, 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.

6. Conclusion

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

Malabar considers that declaration is necessary to ensure the efficiency of coal exports, by providing regulatory oversight over the terms and conditions of access imposed by coal infrastructure service providers such as the Port of Newcastle.

Yours sincerely



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