NSW MINERALS COUNCIL
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5 September 2020

Mr Richard York
Executive Director
National Competition Council
Melbourne VIC 3000

Dear Mr York

Public submission-Application for Declaration of certain services at the Port of Newcastle

1. Purpose of Submission

This submission responds to the invitation by the National Competition Council (**NCC**) dated 28 August 2020 to make a submission in relation to the decision by the Full Court of the Federal Court of Australia in Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal [2020] FCAFC 145, that was published on 27 August 2020 (**Federal Court Decision**).

Thank you for the opportunity to make a submission concerning the Federal Court Decision. The Federal Court Decision is very important in relation to Part IIIA of the Competition and Consumer Act 2010 (Cth) (**CCA**), not only because it is a unanimous decision of the Full Court which comprised Chief Justice Allsop and Justices Beach and Colvin JJ, but also because it makes some important legal findings relevant to the NCC's consideration of NSWMC's application for the declaration of certain services at the Port of Newcastle (**Port**).

2. Final Determination of the ACCC in relation to collective bargaining

This submission briefly notes the final determination by the Australian Competition & Consumer Commission (**ACCC**), also published on 27 August 2020 to allow members of the NSWMC the opportunity to collectively bargain with Port of Newcastle Operations (**PNO**). The ACCC media release of 27 August 2020 stated relevantly as follows:

> *"Port of Newcastle Operations (PNO) offers coal producers a 10-year deed for access to the port. The mining companies sought approval to collectively negotiate the terms and conditions of this deed with PNO, and discuss and negotiate industry-wide issues, such as proposed capital expenditure at the port and the allocation of costs.*
>
> *"The ACCC believes that collective bargaining is likely to generate public benefits, including enabling coal producers to have greater input into the terms and conditions of access, and increasing transparency around capital expenditure plans and cost allocation at the port," ACCC Commissioner Stephen Ridgeway said.*

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"This would ultimately provide greater certainty for the delivered price of Hunter Valley coal, more timely resolution of industry-wide issues, and facilitate more efficient investment decisions across the industry."

This ACCC determination (available here on the ACCC's website: https://www.accc.gov.au/public-registers/authorisations-and-notifications-registers/authorisations-register/new-south-wales-minerals-council-nswmc is included by reference in NSWMC's application to the NCC and highlights the reasonable approach that the industry is seeking with PNO. There is no intention to prevent PNO developing its container terminal at Newcastle, but simply to have a transparent understanding of past and future expenditures and to negotiate reasonable terms and conditions of access to the Port as per the ACCC media release.

PNO's refusal to engage with the NSW coal industry, and as explained in the application to the NCC, PNO's continued insistence on seeking a return on an expanded asset base that includes the NSW coal producers' own expenditure at the Port of some $912 million, is brought into sharp focus by the Federal Court Decision. The Federal Court Decision sets aside the decision of the Australian Competition Tribunal (**Tribunal**) of 30 October 2019 and requires the Tribunal to take the user-funded expenditure of $912m into account in setting charges for Glencore in relation to the Glencore/PNO access arbitration determination.

Importantly for this matter, while the Federal Court Decision is only binding on Glencore and PNO, the underlying economic principle that PNO should not be able to earn a return on expenditures it actually did not make, reinforces the legitimacy of the coal industry's request to PNO to negotiate reasonable terms and conditions of access (including a proper consideration of the industry's past expenditure at the Port) with PNO.

3. Federal Court Decision on the nature of the Service

NSWMC notes the Federal Court Decision in relation to the scope of the Services at the Port the subject of Glencore's litigation. Of particular significance, NSWMC welcomes the very sensible and practical approach to construction of the relevant "Service" and purposive approach to consideration of Part IIIA of the CCA, which is particularly relevant to the application for declaration. The Full Court of the Federal Court construed the Service, having regard to the intention behind the declaration, being to assist coal exporters in the economically efficient export of coal from the Port and having regard to practical matters in the shipping and export of coal (see paras 158 to 169 of the Federal Court Decision). That practical approach to the Service and the export of coal is precisely what has been requested and submitted by NSWMC in its application to the NCC in this matter.

Following the Federal Court Decision it is hoped that there would no longer be anything contentious relating to the description of the Service relevant to the Port and the exporting of coal from the Port. This would include the ability of coal producers to negotiate those terms and conditions of access with PNO, including nominating to PNO coal vessels using the Port irrespective of the contractual shipping arrangements between the coal producer and the producer's customer.

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4. Federal Court Decision on user funded capital expenditure

NSWMC does not address this issue in relation to user-funded expenditure in any detail in this submission as the Full Court is clear that such expenditure needs to be taken into consideration by the Tribunal (i.e. reducing the asset base) in setting charges for Glencore in respect of its arbitration determination under Part IIIA of the CCA (see in particular paras 288 and 289 of the Federal Court Decision).

The factual amount of the user-funded capital expenditure to be taken into consideration by the Tribunal in relation to Glencore is not necessary to debate in this matter. Instead it is the proposition by the Federal Court that such industry expenditure needs to be taken into consideration by PNO in setting efficient charges, which is the very issue that PNO is refusing to discuss with the NSW coal industry as noted above. This refusal by PNO is problematic given the industry no longer has the ability to have disputes on terms and conditions of access arbitrated by the ACCC because the declaration of the Port was revoked in late 2019 as a result of the NCC's previous recommendation.

In summary, it would appear from section 2.3 and in particular paragraph 35 of PNO's most recent submission to the NCC dated 26 August 2020, that in the absence of declaration of the Port, PNO is intending to continue to charge all users of the Port (perhaps other than Glencore which has the benefit of the arbitration and the impending reconsideration of the matter by the Tribunal) charges that are based on a capital base which includes user-funded capital expenditure that PNO itself did not spend. Furthermore, the Federal Court has found the inclusion of these amounts by PNO in its asset base to be economically inefficient and inconsistent with the pricing principles set out in Part IIIA.

5. Conclusion

PNO has refused to negotiate with the coal industry in relation to the inclusion of user-funded expenditure in its capital base. Furthermore, the various deeds that PNO put forward to shipping agents and coal producers, as noted by the ACCC above, expressly removes that expenditure from the scope of negotiation between the parties and allows PNO to continue to charge based on the inclusion of that user-funded expenditure.

NSWMC again submits that refusal by PNO to engage with the NSW coal industry in relation to user funded expenditure highlights:

A. The market power of PNO; and
B. The likelihood that PNO will continue to use its market power to extract terms and conditions (including price) from coal producers given they have no option but to export through the Port.

Further, the position that Glencore may now enjoy as a result of the Federal Court Decision under the ACCC arbitration determination when the Port was declared, demonstrates the consequences of the Services being declared compared with non-declaration.

It is clear that if the Services were declared, any access disputes between coal exporters and PNO as to terms and conditions, and particularly the inclusion of user funded

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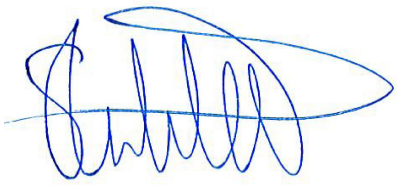
expenditure in PNOs asset base could be subject to arbitration by the ACCC.

Declaration would provide the possibility of arbitration by the ACCC, creating an environment where reasonable terms and conditions would most likely be reached through negotiation processes. Failing this, either party could request arbitration by the ACCC and have reasonable terms and conditions imposed, similar to what has occurred as part of the Glencore arbitration.

NSWMC believes that as a result of declaration of the Services, competition would be materially increased in dependent markets, as stated in NSWMC's application to the NCC. This is because PNO would be subject to constraint due to the declaration and would therefore enter into, or be required by the ACCC to enter into, more reasonable terms and conditions of access that would materially increase competition in relevant markets.

Yours sincerely



Stephen Galilee
CHIEF EXECUTIVE OFFICER