HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

BETWEEN: PORT OF NEWCASTLE OPERATIONS PTY LIMITED ACN 165 332 990

Appellant

and

GLENCORE COAL ASSETS AUSTRALIA PTY LTD ACN 163 821 298

First Respondent

AUSTRALIAN COMPETITION TRIBUNAL

Second Respondent

AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Third Respondent

# FIRST RESPONDENT'S SUBMISSIONS

## Part I: Publication

1. The first respondent (**Glencore**) certifies that these submissions are in a form suitable for publication on the internet.

## Part II: Issues

2. Two issues arise on the appeal.

3. The *first* — which is relevant to the first to third grounds of appeal — concerns whether Glencore is a "third party" seeking access to the "Service" for the purposes of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

4. The *second* — relevant to the fourth and fifth grounds of appeal — concerns the extent to which contributions made to the value of a facility by those other than the owner of the facility should be taken into account when determining the regulated access price under s 44X(1) of the CCA.

## Part III: Section 78B notice

5. Glencore certifies that it is unnecessary for any notice to be given under s 78B of the *Judiciary Act 1903* (Cth).

## Part IV: Material facts

6. Glencore is the largest exporter by volume of coal from the Port of Newcastle (**Port**). Glencore exports approximately 85% of coal mined by it to global markets including

Japan, South Korea, Taiwan, China, and Europe, and competes at those destinations with coal exported from other countries, such as Indonesia.[1]

7. The Port is the only commercially viable means of exporting coal from the Hunter Valley.[2] The coal berths and the shipping channels at the Port are a natural "bottleneck" monopoly.[3] Glencore's coal is mined and moved by rail to the Port, where it is exported by vessel. The vessels must be able to enter, dock and depart the Port so that the coal can be loaded and shipped. That is, to continue to compete internationally for exported coal, Glencore requires access to and use of the whole Service, being the Port comprising its berths and shipping channels.[4]

10 8. In 2014, the appellant (**PNO**) acquired a long-term lease of the Port and was appointed as the operator of the Port under the *Ports and Maritime Administration Act 1995* (NSW) (**PMA Act**). As the operator, PNO came within the definition "relevant port authority" (s 47) for the purposes of Part 5 of the PMA Act (paragraph (a1) for navigation service charges, and paragraph (e1) for wharfage charges).[5]

9. Under Part 5 of the PMA Act, the relevant port authority has the power to fix particular charges, including a navigation service charge (**NSC**) under s 51 and a **Wharfage Charge** under s 62. PNO has no power to impose any charges for the use of the Port other than under and in accordance with the PMA Act.

(a) The NSC is payable: in respect of the general use by a vessel of a designated port
20 and its infrastructure, apart from relevantly port access for cargo at the interface between the vessel and land-based facilities for the purpose of stevedoring operations (s 50(1)(c)); on each entry by the vessel into any designated port (s 50(2)(a)), whether entry to the waters of a port is by sea or from the land (s 50(3)); and by the owner of the vessel (s 50(4)).

(b) The Wharfage Charge is payable: in respect of availability of a site (which is widely defined, see s 59) at which stevedoring operations may be carried out

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1 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 (**Tribunal Reasons**), [9] (Core Appeal Book (**CAB**) 13).

2 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 382 ALR 331; [2020] FCAFC 145 (**Full Court Reasons**), [13] (CAB 176). See also *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 (**PNO v ACT**), 134 [89].

3 PNO v ACT (2017) 253 FCR 115, 118 [11].

4 Full Court Reasons, [11], [13] (CAB 176).

5 See Tribunal Reasons, [10] (CAB 13, 14); Full Court Reasons, [97] (CAB 199).

(s 61(1)); calculated by reference to the quantity of cargo loaded or unloaded at the site (s 61(2)); and payable by the person who, immediately before it is loaded, is the owner of the cargo (s 61(3)(b)).

(c) Who is the "owner" of the vessel or the cargo is given an extended meaning by s 48 of the PMA Act, and includes any person who exercises any of the functions of such an owner or who represents to the port authority that the person has those functions or accepts the obligation to exercise those functions (s 48(4)(b)).

10. For a significant proportion of the coal that Glencore exports, it does so on vessels that it neither owns nor charters by an arrangement referred to as "Free on Board" (**FOB**).[6] This has the result that, with respect to those arrangements and subject to the deeming provision in s 48(4)(b), Glencore is not the "owner" of the vessel for the purpose of s 50. However, whether Glencore takes responsibility for arranging the transporting vessel under its export contract, or whether that responsibility is assumed by the purchaser of the coal, two things follow: *first*, the market structure and dynamics are such that, in substance, Glencore bears the economic burden of the NSC imposed by PNO in the form of lower delivered coal prices;[7] and *secondly*, both Glencore and the purchaser of the coal require access to the Service, including the Port's berths and shipping lanes, to effect their transaction. Consequently, Glencore's ability to compete in the international coal exporting market is impacted by the Wharfage Charge and the NSC imposed by PNO in respect of vessels loading and carrying Glencore's coal, whether or not Glencore charters the vessel.[8]

11. Where Glencore represents to the port authority that it accepts the obligation to exercise the functions of the vessel owner, then by virtue of s 48(4)(b) and s 67 of the PMA Act, it can negotiate with the authority with respect to fixing the amount of any charge payable by the person to the authority, among other things.

12. After PNO assumed the role of Port operator, it implemented a restructure of the Port charges, resulting in increases of between 40% and 60% for some vessel types.[9]

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6 Full Court Reasons, [135] (CAB 208).
7 Tribunal Reasons, [134] (CAB 40, 41).
8 PNO v ACT (2017) 253 FCR 115, 134 [89].
9 Tribunal Reasons, [10] (CAB 13, 14).

Following that restructure, in May 2015, Glencore made an application for certain services at the Port to be "declared" for the purposes of Part IIIA of the CCA.[10]

13. In the ordinary course, PNO has levied the Wharfage Charge on the coal exporter and the NSC on the shipping agent representing the vessel. It has levied the NSC in this way without knowing the identity of the actual vessel owner or the nature of any charter arrangements that may be in place with respect to the vessel.[11]

14. In June 2016, on the application of Glencore, the Second Respondent (**Tribunal**) declared the following service provided by PNO at the Port (**Service**) pursuant to s 44K(8) of the CCA: "[T]he provision of the right to access and use the shipping channels (including berths next to the wharves as part of the channels) at the [Port], by virtue of which vessels may enter the Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct".[12]

15. The Service was drafted to capture Glencore's operations as a coal exporter in the context of its need to access and use the shipping channels and the berths at the Port. The Service necessarily includes the operations of loading and exporting coal.

16. Following declaration of the Service, Glencore attempted to negotiate with PNO as to the terms and conditions by which it could access the Port. In particular, it sought to negotiate a reduction of the NSC.[13] No agreement was reached and on 4 November 2016, Glencore notified the third respondent (**Commission**) under s 44S(1) of the CCA of the existence of an access dispute in relation to the Service.

17. On 18 September 2018, the Commission issued its determination of the access dispute pursuant to s 44V(1)(a) of the CCA. The Commission's determination is relevant to this appeal in two respects. The *first* concerns the scope of the determination. The Commission confined the application of the determination to circumstances where Glencore, either directly or by agent, chartered a vessel to enter the Port and load its coal, or where Glencore qualified as an owner of a vessel loading

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10 Tribunal Reasons, [12] (CAB 14).

11 Affidavit of Michael Douglas Dowzer affirmed 5 October 2017, [16]-[18] (First Respondent's Further Materials (**RFM**) 8, 9). See also affidavit of Anthony Evan Pitt affirmed 20 October 2017, [36] (RFM 29, 30). See also *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* (2017) 350 ALR 552; [2017] FCA 1330 (**PNO v ACCC**), [49] (Jagot J).

12 Full Court Reasons, [88] (CAB 197).

13 Tribunal Reasons, [15] (CAB 14).

its coal at the Port by operation of s 48(4)(b) of the PMA Act.[14] That is, the Commission excluded from the determination's ambit circumstances where: Glencore physically accessed the berths and loaded its coal, the NSC was payable, Glencore was economically burdened by the price of NSC (as fixed by PNO), but Glencore did not arrange the vessel.

18. The *second* relevant respect was the calculation of the regulated access prices for the NSC and Wharfage Charge. The Commission determined, by construing s 44X(1)(e) of the CCA,[15] that the NSC payable by Glencore to PNO was to be $0.6075 per gross tonnage as at 1 January 2018, being a *reduction* of approximately 20% from the price that would otherwise have been charged by PNO.[16] The Commission determined the applicable Wharfage Charge to be $0.0746 per revenue tonne, which was an agreed figure.[17] The Commission arrived at the NSC by valuing the assets required to provide the Service using a tool known as the "Depreciated Optimised Replacement Cost" (**DORC**) methodology (an agreed approach), from which it deducted the value of contributions made by third parties to improve the Port throughout its life.[18]

19. On application to the Tribunal, Glencore sought to challenge the scope of the determination and the calculation of the NSC.[19]

20. On 30 October 2019, the Tribunal[20] held that the determination should be confined to apply where Glencore is the owner or charterer of the vessel but *not* where Glencore qualifies as an owner by operation of s 48(4)(b) of the PMA Act.[21] As to the NSC, the Tribunal determined that no deduction for user contributions should have been made and increased the NSC payable by Glencore to PNO to $1.0058 per gross tonne, being an *increase* of approximately 66% from the price determined by the Commission and an *increase* of approximately 33% from the price determined by PNO.[22] The Tribunal arrived at its increased NSC price by a single step — by

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14 Tribunal Reasons, [24] (CAB 16), [120] (CAB 37).
15 Tribunal Reasons, [199] (CAB 59).
16 Tribunal Reasons, [23] (CAB 16), being $0.7553.
17 Tribunal Reasons, [23] (CAB 16).
18 Tribunal Reasons, [165] (CAB 50), [166] (CAB 50), [169] (CAB 51). The assets included in the DORC value were: pre-construction costs; channels and berth boxes; reclamation bunding materials; breakwaters; Navaids; riverwalls and revetments; revetments under wharves; wharves and jetties (pilots' jetty); buildings (pilots' helicopter base); plant and equipment: see Commission Final Determination, 140 (RFM 172).
19 Tribunal Reasons, [119] (CAB 36, 37).
20 Middleton J (President), Mr Shogren (Member), Dr Abraham (Member).
21 Tribunal Reasons, [155] (CAB 48), [158] (CAB 48), [610] (CAB 141).
22 Tribunal Reasons, [364] (CAB 88), [610] (CAB 141).

allowing PNO to include in the "asset base" (which was used to arrive at the regulated price) an amount of $912 million for the value of dredging at the Port whose cost had been paid for in the past by users of the Port.[23] The peculiar result was that a monopoly infrastructure provider was entitled to charge under a declared access regime a higher NSC than it sought to do without declaration.

21. Glencore appealed to the Federal Court (s 44ZR(1) of the CCA). There were two issues on appeal. *First*, the scope of the determination and the extent to which Glencore is a "third party" seeking access to the Service. Central to this ground was the proper construction of the terms of declaration of the Service when understood in the light of the CCA's text, context, and purpose and the provisions of the PMA Act. *Secondly*, whether the Tribunal was wrong in its view that no deduction for user contributions should be made in calculating the NSC.[24]

22. On 24 August 2020, the Full Court of the Federal Court[25] set aside the Tribunal's decision and remitted the matter to the Tribunal for determination according to law. The Full Court held that Glencore was a party seeking access to the Service in respect of *all* vessels carrying its coal, whether or not it was in control of the vessel.[26] The Full Court also held that the Tribunal was incorrect to include the amount of user contributions in the calculation of the NSC, and that such an approach was contrary to the correct construction of s 44X(1)(e) of the CCA.[27]

## Part V: First Respondent's argument

### Issue 1 — *Glencore as a "third party" under Part IIIA*

*Ground 1 — Economic access (Notice of Appeal (**NOA**), [2] (CAB 309))*

23. PNO's first ground is essentially concerned with whether, for the purposes of this access dispute under Part IIIA, Glencore is a "third party" in relation to the Service.

24. Part IIIA provides for a two-stage process by which third parties may obtain access to infrastructure owned by others.[28] First, a particular "service" may be "declared"

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23 Tribunal Reasons, [265] (CAB 71), [364] (CAB 88).
24 Full Court Reasons, [4] (CAB 174).
25 Allsop CJ, Beach J, Colvin J.
26 Full Court Reasons, [159] (CAB 215).
27 Full Court Reasons, [254] (CAB 243).
28 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 (**Pilbara**), 392 [5], 393 [6]; *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 (**Sydney Airport**), 132 [25], 135 [29].

(Division 2 of Part IIIA),[29] following which access to the service can be sought either through agreement, or by arbitrated determination, between the provider and third party (Divisions 3 and 4 of Part IIIA). In considering the extent to which Glencore fits within this scheme, it is necessary first to consider the statutory provisions relevant to the determination, and then the terms of the Service itself.

*Legislative scheme*

25. Division 3 of Part IIIA of the CCA provides a scheme for dealing with access disputes where terms of access cannot be agreed. Under s 44S, where a third party is unable to agree with the provider on one or more aspects of access to a declared service, the provider or third party may notify the Commission of the dispute for the purposes of arbitrating and providing a final determination under s 44V. Under s 44V(2), the Commission has jurisdiction to "deal with any matter relating to access by the third party to the service", including specifying the terms and conditions of the third party's access to the service (s 44V(2)(c)).

26. The parties to the arbitration of the access dispute are the "provider" of a service, the "third party", and "any other person" who has a sufficient interest (s 44U). "[T]hird party" and "provider" are defined in s 44B: "third party", in relation to a service, means a person who wants access to the service or wants a change to some aspect of the person's existing access to the service; "provider", in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service. "[S]ervice" is defined in s 44B as meaning a service provided by means of a facility and includes relevantly the use of an infrastructure facility such as a road or railway line, and handling or transporting things such as goods or people (paragraphs (a) and (b) of the definition).

27. Although the term "access" is used throughout Part IIIA, it is not defined in Part IIIA or elsewhere in the CCA. However, it has been given its ordinary meaning and must be understood in the light of the context and purpose of the Part.[30] In particular, it must be understood in a way that is consistent with the objects of Part IIIA: to promote the economically efficient operation of, use of and investment in the

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29 See Pilbara (2012) 246 CLR 379, 393 [7].

30 Sydney Airport (2006) 155 FCR 124, 147 [83]; PNO v ACT (2017) 253 FCR 115, 133 [86].

infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets (s 44AA(a)).

28. Of particular contextual relevance to Part IIIA is the Hilmer Report,[31] in particular Ch 11 of that report, which is entitled "Access to 'Essential Facilities'". The animating principle of the access regime was to ensure effective competition: "access to the facility was essential to permit effective competition and the declaration was in the public interest having regard to the significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness".[32] The Hilmer Report also recognised that, where an economic activity exhibited natural monopoly characteristics, such that a competitor could not duplicate it economically (for example, a port), it could occupy a strategic position in an industry. In those circumstances, it would be an essential facility in the sense that "access to the facility [would be] required if a business [were] to compete effectively in upstream or downstream markets".[33] If unregulated, the monopolist facility owner could use its monopoly position to "charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency".[34]

29. Following the recommendations of the Hilmer Report, in 1994 the Council of the Australian Governments (**COAG**) released a package of draft legislation that included an access regime. There the need for the regime was explained, noting that the term "access" means "the ability of suppliers or buyers to purchase the use of essential facilities on fair and reasonable terms".[35] Also included in this package was a draft intergovernmental agreement between all Australian governments dealing with and entitled "Competition Principles".[36] The Competition Principles echoed the views in the Hilmer Report, in particular cl 6.1(b) providing that the Commonwealth would introduce a regime for third party access to significant infrastructure facilities where access to the service was necessary "in order to permit effective competition in a downstream or upstream market".[37]

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31 National Competition Policy Review, *National Competition Policy* (1993) (**Hilmer Report**).
32 Hilmer Report, xxxii; Sydney Airport (2006) 155 FCR 124, 126 [3].
33 Hilmer Report, 240.
34 Hilmer Report, 241.
35 See Sydney Airport (2006) 155 FCR 124, 129 [14].
36 See Sydney Airport (2006) 155 FCR 124, 130 [18].
37 See Sydney Airport (2006) 155 FCR 124, 130 [18].

30. In 1995, the Competition Policy Reform Bill 1995 (Cth) was introduced into Parliament and then passed as the *Competition Policy Reform Act 1995* (Cth). That Bill inserted Part IIIA into the *Trade Practices Act 1974* (Cth). The Explanatory Memorandum to the Bill stated at [182], among other things, that in determining whether access would promote competition, regard could be had to Australian and international markets, for example that access might facilitate the entry of Australian businesses into overseas markets.[38]

31. The context of the CCA does not assist PNO. Rather, it emphasises the centrality of economic concerns to the legislation. The key point to be taken from the extrinsic materials relevant to Part IIIA — the Hilmer Report, the draft legislation issued by COAG, the Explanatory Memorandum, and the Competition Principles — is that it is necessary for the fact of access, in its ordinary meaning, to be relevant to effective competition in another market, upstream or downstream.[39] That is, the need to use a facility will be considered "access" for the purposes of Part IIIA where that use or access is required for a business to compete effectively in its relevant market.

*Service*

32. Glencore sought the declaration of the Service. The Service, as defined, reflects the way that Glencore did (and does) access and use the Port. It comprised two activities that are unavoidably related and are of economic significance to Glencore, and to the nation. The *first* activity concerns Glencore's actions (having entered the Port precinct and unloaded its coal at the Port terminals) in using the wharves and adjacent berths to load its coal onto vessels that must necessarily transit through the shipping channels of the Port. The *second* concerns Glencore's right to access and use shipping channels and berths to export its coal through the Port.

33. How Glencore in fact accesses and uses the Port is relevant to the determination of this ground in this case, because it informed the definition of the Service.

34. The Service is essential to Glencore's participation in the coal export market. Glencore can only compete in the market by its coal being shipped from the Hunter Valley. The only way to do that is to access or use the Port. Glencore accesses or

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38 See Sydney Airport (2006) 155 FCR 124, 131 [20].
39 See Sydney Airport (2006) 155 FCR 124, 136 [37].

uses the Port when its export of coal brings vessels through the Port. That will occur in three circumstances:

(a) *First*, when Glencore is the charterer of the vessel directly or by agent. In such a case, Glencore may or may not have physical control of the vessel depending on the type of charter, but Glencore is accessing the Port by the shipping channels and berths.

(b) *Secondly*, when Glencore loads its coal and makes a representation under s 48(4)(b), rendering it liable for both the Wharfage Charge and the NSC. In that case, it does not have physical control of the vessel. But this will not change the fact that it accesses the shipping channels and berths in the same way as it does when it enters a voyage or time charter arrangement.

(c) *Thirdly*, when Glencore's export arrangements have brought vessels through the Port to the berths to enable Glencore to load them with its coal, and the vessels then depart the Port. In that case, it makes no difference that the charter of the vessel has been arranged by the purchaser of the coal, since it is Glencore's export of coal which has brought the vessels through the Port (and, thereby, the Service), and Glencore is physically accessing the berths to load its coal.

35. In each case, Glencore is a party who "wants access" to the Service, in that it needs access to the Port to export coal. Put another way, whenever Glencore is exporting coal through the Port, it is necessarily accessing or using the shipping channels and berths. The situation is the same whether the arrangement is a FOB arrangement, a "Cost, Insurance and Freight" (**CIF**) arrangement, or some hybrid of the two. At all times, Glencore needs, and gains, access to the berths and shipping channels.

36. The Service must be read as a whole, and recognising that for a coal exporter the use of the berths to load its coal necessitates the use of the *whole* Service; otherwise Glencore cannot export its coal. The Service must also be read in a way that reflects that the declaration is a purposive instrument declared to advance the economic objectives of s 44AA of Part IIIA of the CCA.

*Glencore as a "third party"*

37. PNO contends that physical control of the vessel as it transits the channels and berths, not a "mere economic interest", is necessary to be a "third party" seeking access for

the purposes of Part IIIA.[40] That is, it asserts that Glencore is not a third party as defined in s 44B where it does not physically access the shipping channels of the Port because it does not charter the vessel. This submission should be rejected for at least three reasons.

38. *First*, physical control of the vessel is not necessary having regard to the object and purpose of the provisions, and in any event it is an unworkable criterion as some, but not all, forms of charter may give physical control.[41]

39. *Secondly*, it is inaccurate to characterise Glencore as having a "mere" economic interest in accessing the Service, in particular the shipping channels. The practical and commercial reality of Glencore's operations is that, even where it does not charter the vessel carrying its coal, its export arrangements are what drives the need for Port access for both the seller and the buyer.[42] Moreover, it still bears the ultimate economic cost of port charges. The result is that the cost of the NSC affects Glencore's ability to compete efficiently. That is the very reason why Glencore sought to negotiate the price of the charge. Indeed, its predicament falls within the very circumstance that was contemplated by the Hilmer Report giving rise to the eventual enactment of Part IIIA — that the need to use a facility will be considered "access" for the purposes of Part IIIA where that use or access is required for a business to compete effectively in its relevant market.

40. *Thirdly*, PNO's view of the term "third party" proceeds from an unduly narrow construction of the term "access". There is no textual hook in the definition of "third party" that supports a construction of access as only physical access. That is, "access is a concept that is broader than physical access, and includes the terms and conditions on which such physical access is available".[43]

41. What the definition requires is that the party "wants access" or "wants a change to some aspect of the person's existing access" to the service. Here, Glencore was already accessing the Service and wanted to change aspects of that access.[44] The Full

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40 Appellant Submissions, [24].
41 Full Court Reasons, [149] (CAB 211).
42 Full Court Reasons, [158] (CAB 214, 215).
43 *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242; [2005] ACompT 5, [138] (see also [137]-[140]). The Tribunal's decision was later overturned, but its observations with respect to "access" were not affected.
44 Tribunal Reasons, [15] (CAB 14, 15).

Court correctly observed that an exporter is accessing or using the shipping channels when, by its sale arrangement, it causes a vessel to enter the Port; and this will be so when it sells CIF or FOB, irrespective of whether it owns, demise charters, time charters, or voyage charters the vessel.[45] And, further, it physically accesses at least a part of the Service (being the berths) in every instance where Glencore coal is exported, regardless whether on a CIF or FOB basis.

42. That "access" is undefined does not compel the conclusion that Parliament intended the narrow meaning contended for by PNO. To understand "access" in that way would place an impermissible gloss on the statute. At all times, the task of understanding what constitutes "access" must be directed towards the objectives in s 44AA of Part IIIA. The term has been left unqualified in the legislation and in that way is able to capture and adapt to the particular economic situation within which Part IIIA is to be applied. It must necessarily be broad and adaptable to the circumstances of the particular economic activity. The Full Court accepted Glencore's submission that, in a practical sense, it was accessing the Service to export its coal and bearing the economic cost of the charges for the physical use of the Service by the vessels chartered by its customers carrying its coal.[46] That is, Glencore accessed and used the Port in a practical sense. The Full Court's reasoning is to reject the notion of physical access as the *sole* criterion capable of bringing a party within the concept of a "third party" for the purposes of Part IIIA. The Full Court did so because to consider access and use in that way is impractical, unduly narrow, and contrary to the economic objectives of the CCA.

43. The Full Court's approach is consistent with the purposive nature of the declaration. As a purposive instrument, it is concerned with the public interest in the promotion of competition.[47] Here, the purpose of declaring the Service was to promote "material increase in competition in the market for the export of coal from the Hunter [V]alley".[48] Understanding "access" to mean "physical access" does not serve the objectives of Part IIIA. An overly literal or pedantic adherence to that way of utilising the Service is only productive of a result inconsistent with those objectives.[49]

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45 Full Court Reasons, [158] (CAB 214, 215).
46 Full Court Reasons, [157] (CAB 214).
47 *Rio Tinto Ltd v Australian Competition Tribunal* (2008) 246 ALR 1; [2008] FCAFC 6, [60].
48 See *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [121].
49 *Rio Tinto Ltd v Australian Competition Tribunal* (2008) 246 ALR 1; [2008] FCAFC 6, [59].

*Ground 2 — Physical access to part of a service (NOA, [3] (CAB 309))*

44. By the second ground of appeal, PNO contends that the Full Court was wrong to rely on the fact that PNO imposed the Wharfage Charge on Glencore to ground a finding that Glencore was accessing the Service.[50]

45. There is no substance to this ground, which proceeds from a misconstruction of the definition of Service and a misunderstanding of the Full Court's analysis and reasoning in this respect.

46. It cannot be disputed that Glencore accesses and uses berths, adjacent to wharves, to load its coal, that the definition of Service includes those berths in the shipping channels of the Port, and that the Wharfage Charge is levied for that access and use.[51]

47. The Full Court referred to and relied on the Wharfage Charge in the context of considering the scope and purpose of the Service. It examined the Tribunal's analysis of the construction of the Service, noting that the Tribunal considered that the words appearing after the phrase "by virtue of which" were secondary to the words that appeared before that phrase such that the words describing the activity of loading and unloading coal at the Port were secondary to the vessel accessing and using the shipping channels. The Full Court correctly rejected this construction.[52]

48. The Tribunal's construction does not reflect the purpose of the Service and unduly segregates the activities the subject of the Service. As explained mentioned, the Service as declared was intended to capture Glencore's activities and economic need to access the Port. For that reason, it encompasses the activities of vessels carrying Glencore's coal accessing and using the shipping channels as an essential part of the export process, just as it encompasses the coal being loaded and unloaded from those vessels at the Port. Consistently with Glencore's use of the Port, the Service is defined in a way that recognises each aspect and does not ascribe primacy to any one aspect. Both activities are essential to Glencore competing in the international coal export market.

49. Once that is accepted, it follows and is entirely logical that the Full Court would consider the fact that Glencore is liable to PNO for the Wharfage Charge for physical

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50 Full Court Reasons, [154] (CAB 213).

51 Full Court Reasons, [153] (CAB 213), [154] (CAB 213), [157] (CAB 214). See also Commission Final Determination, 140 (RFM 172).

52 Full Court Reasons, [152] (CAB 212, 213), [153] (CAB 213).

use of the berths for loading its coal is indicative of Glencore accessing or using the Port.[53] So too does the fact that both charges relate to an asset base that includes the dredged berths, the dredged channels, and the revetments that support them.[54] That Glencore engages in physical use of the Service, as well as a practical or economic access or use, does not create any tension with the legislation and nor should it prevent Glencore's activities being recognised as those that access and use the Port. On the contrary, as the Full Court correctly stated, viewing the physical activities or access together with the economic access or use is "entirely in accordance with the purpose of the declaration of the Service".[55]

10 50. PNO's attempt to characterise the Wharfage Charge as relevant to the arbitration only as a "balancing item" in the calculation of the NSC is incorrect.[56] The Wharfage Charge was an integral part of the calculation of Glencore's access and use of the Service. As the Commission explained in its determination, the parties agreed to use a "Building Block Methodology" (**BBM**), which involved calculating the "Maximum Allowable Revenue" (**MAR**) that the business may recover over a specified period, having regard to the efficient costs of providing the Service (including an appropriate "return" on capital).[57] The purpose of this was to derive charges or unit prices from the MAR using volume forecasts. These forecasts were to provide a basis on which to model future price charges. The Wharfage Charge is
20 an integral part of this calculation, as it was a charge imposed by PNO in relation to the Service. That is, it was one of two charges that constituted the MAR that PNO was able to recover for the Service.

51. Being charged for berthing and loading and unloading coal at the berths would have no value unless the vessel could also depart and access the shipping channels.

52. Further, PNO attempts to confuse the purpose for which the Wharfage Charge was levied. It vaguely states that it is not "entirely clear" if the Wharfage Charge was levied in respect of the Service, when no such contention was raised below.[58] In so doing, it misrepresents the Service as relating only to the use of the shipping

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53 Full Court Reasons, [157] (CAB 214).
54 See Commission Final Determination, 140 (RFM 172).
55 Full Court Reasons, [155] (CAB 213).
56 Appellant Submissions, [33].
57 Commission Final Determination, 32 (RFM 64).
58 Appellant Submissions, [33]. No such contention was raised at the arbitration, the Tribunal, or the Full Court.

channels. It does not. As explained above, the Service taken as a whole encompasses both activities of navigating the shipping channels and loading and unloading at the berths, and the Wharfage Charge was properly directed towards that part of the Service relating to the use of berths needed for loading and export.

53. As noted above, under s 61 of the PMA Act, the Wharfage Charge is payable "in respect of availability of a site at which stevedoring operations may be carried out" (s 61(1)); site includes the air above and the water and dredged sea bed below the berth (s 59(2)); it is to be calculated by reference to the "quantity of cargo loaded or unloaded at the site" (s 61(2)); and it is payable by the owner of the cargo, depending on whether they are loading or unloading the cargo at the site (s 61(3) and (4)). Considering that the Service is expressed in terms of vessels entering the Port precinct to "load and unload" at relevant terminals, it is impossible to see how the Wharfage Charge could not be integral to the Service.

54. It should be noted that not all services associated with the Wharfage Charge were within the Service. As explained by the Commission, "while the services provided at the leased wharves, including the coal loading terminals berths, are all within the Service, the services provided at common user wharves includes additional services that are not within the Service. PNO notes that, for this reason, the Wharfage Charge is higher at common user wharves".[59] For the purposes of the BBM, only an allocated portion of the Wharfage Charge at the common user berths were attributed to the Service and that portion equated to the amount of the Wharfage Charge at the berths that was used as part of the Service.[60] Recognising that not all of the services with respect to the Wharfage Charge fell within the Service, PNO proposed to levy the amount of the Wharfage Charge "at the lower amount used for leased berths in order to reflect the direct costs of providing access to the Service".[61]

55. Accordingly, the Wharfage Charge as calculated was assessed and determined based on the extent to which it was relevant to the Service. The Full Court was right to consider the Wharfage Charge as a charge for accessing the Service and as indicative of Glencore accessing the whole Service.

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59 Commission Final Determination, 177 (RFM 209).
60 Commission Final Determination, 177 (RFM 209).
61 Commission Final Determination, 178 (RFM 210).

56. There is one final point to be made. The Full Court correctly observed that the effect of both the Tribunal's view that Glencore is not a third party for Part IIIA purposes unless it owns or charters the vessel, and of PNO's contention that Glencore is not a third party unless it physically controls the navigation of the vessel, would be that Glencore would be deprived not only of the determination of the NSC but also of the Wharfage Charge.[62] That would be a perverse result.

*Ground 3 — Representations under s 48(4)(b) of the PMA Act (NOA, [4] (CAB 309))*

57. The third ground of appeal contends that the Full Court was wrong to conclude that the determination should apply where Glencore makes a representation under s 48(4)(b) of the PMA Act to the effect that it is deemed an owner of the vessel carrying its coal for the purposes of the PMA Act. PNO seeks to challenge this aspect of the Full Court's reasons on the same grounds as the first ground of appeal.[63]

58. The Commission determined that a person who qualifies under s 48(4)(b) as the owner of a vessel that accesses the Service will be liable to pay the NSC, and that person will be a third party for the purpose of Part IIIA. The Tribunal rejected this view, and Glencore's application to the Full Court contended that the Tribunal erred in doing so.[64] Before the Full Court, both Glencore and the Commission pressed this contention, and the Full Court accepted it.[65]

59. The Full Court also relied on s 48(4)(b) insofar as it provided an ability for Glencore to resolve any practical and commercial issues that may arise where the owner of the vessel does not have the benefit of the arbitrated terms of the Service.[66]

60. This was consistent with the Full Court's view that Glencore was accessing the Service by reason of both its economic and physical access of the Service, as explained above. In such circumstances, the Full Court was observing that, to the extent that any practical or commercial difficulties arose between Glencore and the owner of the vessel carrying its coal where Glencore's arbitrated price for the NSC applied, Glencore would be entitled to make a representation under s 48(4)(b)

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62 Full Court Reasons, [149] (CAB 211).
63 Appellant Submissions, [42].
64 Full Court originating application, [2.1(b)] (CAB 163).
65 Full Court Reasons, [163]-[166] (CAB 216, 217); Glencore's Full Court submissions, [65] (RFM 258, 259); Glencore's Full Court reply submissions, [21] (RFM 270, 271); see also Full Court Transcript Day 1 T47:11-20 (RFM 319), T48:36-45 (RFM 320), T62: 17-28 (RFM 334); Full Court Transcript Day 3 T186:1-9 (RFM 379).
66 Full Court Reasons, [162] (CAB 216).

rendering it liable for the NSC, with the result that there could be no doubt that PNO could impose the NSC on Glencore. The Full Court's observation was correct.

61. Further, PNO seeks to raise doubt about the soundness of the Full Court's reasoning in this respect by suggesting that the operation of s 48(4)(b) was not raised by Glencore in the proceedings below.[67] There is no substance in that observation. The point was raised and argued in the Full Court.

62. Further, the operation of s 48(4)(b) was the subject of contested argument in both the Commission and Tribunal proceedings. In its submissions to the Commission before the final determination, PNO accepted that Glencore would have the right to access and use the shipping channel where it made a representation under s 48(4)(b).[68] However, it later resiled from that position.[69] In the unsuccessful judicial review application brought by PNO, Jagot J rejected PNO's position and noted Glencore's capacity to negotiate access in a number of ways, including in the manner contemplated by the PMO Act.[70]

***Issue 2 — Deduction of user contributions***

*Ground 4 — Statutory requirement to take user contributions into account (NOA, [5] (CAB 310))*

63. The fourth ground of appeal contends that the Full Court was wrong to reverse the Tribunal's decision to include the cost of user contributions in the calculation of the NSC. In particular, PNO asserts that the Full Court was wrong to find that: (i) s 44X(1)(e) of the CCA requires the Commission to "take account of historical user contributions"; and (ii) the concept of "efficient costs" referred to in the pricing principles for access disputes in s 44ZZCA required more than a consideration of a measure of costs that would prevail in a competitive market, requiring also a consideration of whether there had been historical user funded contributions.[71]

64. This ground of appeal is ultimately concerned with the approach to the question of how the asset base of the Port should be valued and brought to account in determining access charges. The Commission originally approached this task by taking the

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67 Appellant Submissions, [40].
68 Commission Final Determination, 20 (RFM 52).
69 Commission Final Determination, 20 (RFM 52), 21 (RFM 53).
70 PNO v ACCC (2017) 350 ALR 552; [2017] FCA 1330, [50].
71 Appellant Submissions, [49].

methodology agreed between the parties — the DORC methodology — and considering the view of the efficient hypothetical entrant. It determined that "an efficient entrant as assumed under the DORC framework would seek to avoid any capital cost it need not incur for the provision of the service, which would include any capital costs that were funded by users — regardless of the identity of the contributor and the amount of their contribution".[72]

65. In considering the price to be arrived at in the final determination, the Commission was bound by the matters listed in s 44X(1), including the value to the provider of extensions "whose cost is borne by someone else" (s 44X(1)(e)). In addition to this, under s 44X(2), in arriving at the determined price, the Commission was permitted to "take into account any other matters that it thinks are relevant". At all times, the Commission's approach was to be informed by the objects of Part IIIA (s 44X(1)(aa) and s 44AA(a)), and the pricing principles contained in s 44ZZCA — both of which are underpinned by notions of economic efficiency.

66. Both the parties and the Tribunal agreed that the DORC methodology was an appropriate tool of analysis for the purposes of s 44X.[73] Accepting that, it was then the Commission's task to arrive at a determination that took into account the matters set out in s 44X(1), as well as taking into account any other matters that it thought were relevant and the pricing principles under s 44ZZCA.

67. As the Full Court correctly stated, the use of DORC as a valuation tool could not be determinative of the statutory task and could not justify a disregard of the statutory provisions, as the Tribunal wrongly assumed.[74] Further, as the Full Court observed, there is nothing in the Tribunal's reasons that precisely articulates why in real world circumstances, where there have been user contributions that contributed valuable extensions or expansions to the facility, it is inconsistent with economic efficiency to make allowance for user contributions.[75] On the other hand, the principle relied on by the Commission in its determination was that a service provider is not to benefit through increased revenue from a user's contribution.[76] As the Commission explained to the Tribunal, it is commonplace in regulatory regimes for user

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72 Tribunal Reasons, [186] (CAB 56).
73 Tribunal Reasons, [267] (CAB 71), [268] (CAB 71).
74 Full Court Reasons, [197]-[203] (CAB 227, 228), [217] (CAB 234), [254] (CAB 243).
75 Full Court Reasons, [216] (CAB 233, 234).
76 Tribunal Reasons, [237] (CAB 66).

contributions to be excluded from valuations of the asset base.[77] In an effectively competitive market, a service provider would not charge a user for assets that the user had funded without the threat of being entirely displaced by efficient entrants.[78]

68. In this respect, it was proper for the Commission to give effect to the objects of Part IIIA and reduce the asset base by the value of costs borne by those other than PNO. Indeed, s 44X(1)(e) required such an approach. The statutory scheme does not permit PNO to earn a return on amounts it had not paid. It is irrelevant to the statutory question whether the user derived a benefit by making the contribution.

69. In taking this approach, the Commission's reasoning in excluding user funded assets was consistent with the matters to be taken into account in s 44X(1) and the pricing principles in s 44ZZCA(a), and in any case it was permissible to the extent such considerations fell within s 44X(2).

*Ground 5 — How user contributions should be considered (NOA, [6] (CAB 310))*

70. By the fifth ground of appeal, PNO asserts that to the extent user contributions were to be excluded from the DORC methodology, those contributions should have been excluded by undertaking a comprehensive examination of all historical costs.

71. What PNO means by a comprehensive historical examination needs to be understood. There was extensive evidence before the Commission, which it accepted, as to the amount of user contributions in the past. This evidence was not challenged, or barely challenged, by PNO. Rather, what PNO did was to argue that these user contributions should be offset in various ways, such as by offsetting losses from historical port operations or by bringing to account benefits that users allegedly derived from the dredging works.[79]

72. PNO's argument finds no textual support in the requirements of s 44X(1) or the pricing principles in s 44ZZCA(a) and should be rejected.

73. As the Full Court correctly observed, the Tribunal's conclusion in this respect is predicated on a view about what is required as a matter of law if user contributions are to be brought to account. In other words, the conclusion assumes that the terms of s 44X(1) operate such that no regard is to be had to past consideration unless a

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77 Tribunal Reasons, [236] (CAB 66).
78 Tribunal Reasons, [235] (CAB 66).
79 Full Court Reasons, [183] (CAB 222).

comprehensive evaluation of allegedly offsetting benefits to users is undertaken.[80] There is nothing in the language of s 44X(1) that supports that view, and for the reasons given above in respect of the fourth ground of appeal, the Commission's approach to deducting user contributions was consistent with the requirements of s 44X(1) and s 44ZZCA.

74. Further, PNO had several opportunities before the Commission to respond to the extent to which user contributions would be taken into account in calculating the asset base. This issue was given significant time in the arbitration and the parties were aware of the extent to which user contributions would be taken into account.

10 75. For example, PNO had been on notice since August 2017 of the fact that the arbitration between Glencore and PNO would involve the extent to which deductions should be made from the asset base to take into account user contributions. PNO also had the opportunity (but chose not) to file further evidence and submissions with the release of the Commission's draft determination before it made its final determination. In addition, the Commission approached the question of user funding by reference to a large amount of evidence and submissions.[81]

76. Considering those matters, and the Commission's statutory task as set out in s 44X(1), the Court should conclude that there is no basis for discerning any error.

**Part VI: Notice of contention or cross-appeal**

20 77. Not applicable.

**Part VII: Estimate of hours**

78. The estimate for the presentation of the First Respondent's oral argument is 2 hours.

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80 Full Court Reasons, [286] (CAB 250).
81 Commission Final Determination, 108 fn 359 (RFM 140).

**ANNEXURE**

1. *Competition and Consumer Act 2010* (Cth) (current version as at 3 March 2021).
2. *Ports and Maritime Administration Act 1995* (NSW) (current version as at 22 January 2021).
3. *Competition Policy Reform Act 1995* (Cth) (as enacted).
4. *Trade Practices Act 1974* (Cth) (version as at 17 August 1995).