HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **PORT OF NEWCASTLE OPERATIONS PTY LIMITED**

Appellant

and

GLENCORE COAL ASSETS AUSTRALIA PTY LTD

First Respondent

AUSTRALIAN COMPETITION TRIBUNAL

Second Respondent

AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Third Respondent

FIRST RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS

Part I: Certification

1. This outline of submissions is in a form suitable for publication on the internet.

Part II: Outline

A. Grounds 1 and 2 (scope of the Part)

2. ***Core submission***. Recognition of Glencore as a "third party" is consistent with the purpose of the Declaration, the definition of the Service, and the CCA. Glencore's access to the Service arises from: (a) its entry into export sales transactions that require a vessel to enter the Port and be loaded, (b) its loading of coal at the Port (and incurring of the Wharfage Charge), (c) the fact that loading is not possible unless a vessel transits through the Port to the berth, and (d) that export is not possible unless a vessel transits from the berth to a foreign port: FC [17], [135], CAB 177, 208.

3. ***The Declaration***. The Declaration is a purposive instrument that facilitates "*the exercise of the statutory right to access services ... in order to advance the objects of s 44AA*": (FC [92]-[93], CAB 198). It is concerned with Glencore's access to essential integrated elements of its export supply chain (loading and transit) that use the Port. There is no limitation in the language of the defined Service that points to physical use of the channels or control of the vessel as a prerequisite to access.

4. ***Construing Pt IIIA***. The text, context and purpose of Pt IIIA support broader meanings of "access" and "third party" than the Appellant's physical use or control criterion.

5. The CCA does not define "access". There is a general definition of "third party" (s 44B). Each concept has ample flexibility to ensure the Part can apply to situations where the objectives in ss 2 and 44AA are advanced: FC [46], CAB 185.

6. PNO's narrow reading of "access" equates it with physical use and is incongruent with the natural and ordinary meaning. "Access" is not bound up with physical use or control; its natural meaning is wide – a way, means, ability or opportunity of approaching something.[1]

7. The narrow meaning is inconsistent with the objects of the Part and its context. Part IIIA seeks to promote the economically efficient operation and use of infrastructure and thereby promote effective competition in downstream markets. Those objectives are hindered by a narrow physical limitation, but advanced where a party who wants access to the Service to carry out steps that form an essential part of its supply chain to an upstream or downstream market can invoke the provisions of the Part.

8. Other sections point against a physical limitation: see ss 44S and 44V. None of the actions permitted by s 44V(2) are confined to "use", let alone "physical use". See also the Hilmer Report: FC [35], CAB 181.

9. ***The Full Court's reasoning***. The FC did not hold those with an "economic interest" to be "third parties". Rather, it used "economic" in contradistinction to the Appellant's direct physical control thesis: FC [149], CAB 211.

10. The FC recognized that Glencore does not have a mere economic interest. It relied on Glencore's direct and immediate transactional engagement in the sale and export of its coal. It is that transaction that both requires and causes coal to be loaded and shipped and that necessitates access to the Service by Glencore: FC [155], CAB 213.

11. The FC's analysis does not bring every entity with an economic interest within Pt IIIA. Glencore's direct and immediate transactional involvement means it was and is accessing the shipping channels and berths: FC [158], CAB 214-215. Further, it directly uses the Service through its loading of coal from the berths, which falls squarely within the scope of the Service: FC [88], CAB 197; FC [154], CAB 213.

12. ***Tribunal's orders***. PNO does not challenge the Tribunal's order (CAB 141 [610]). That order accepts that physical access is not necessary: "... *where Glencore owns*

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[1] *Re Virgin Blue Airlines* (2005) 195 FLR 242 at [138], extracted at *Port of Newcastle v Australian Competition Tribunal* (2017) 253 FCR 115 at 128 (JBA, T18).

or, either directly ***or by agent, charters*** *...*" (CAB 141 [610]). Other than via a demise charter, Glencore will not be in physical control of the vessel (see FC [115]-[128]). No distinction is drawn by the Tribunal between the different charter types.

B. Ground 3 (*Ports and Maritime Administration Act 1995* (NSW))

13. The FC's holding that s 48(4)(b) enabled Glencore to resolve any practical issues arising where it is not in physical control of the vessel is consistent with the Court's views about access: FC [162]-[164], [167], CAB, 216-217. The relevance of s 48(4)(b) is not to the construction of the CCA, but to the commercial reality underlying Glencore's use of the Service: FC [95], [111], CAB 199, 203.

C. Grounds 4 and 5 (user funding)

14. Both the ACCC and the FC held that user funding of assets used to provide the Service must be taken into account. That follows from ss 44X(1)(e) and (h) and 44ZZCA(1). It also follows from s 44X(1)(a), (b), (c) and (g).

15. The Tribunal treated DORC as foreclosing in effect foreclosed consideration of user funding. That was wrong. DORC is merely one of several possible valuation tools. It sets a value for existing assets according to optimized replacement cost as at the date of valuation. It is not forward looking and does not foreclose or satisfy ss 44X(1) and 44ZZCA(1): FC [200]-[203], [254].

16. The FC's construction of s 44X was orthodox and correct. Those conclusions flow from the text of the section, the objects of the Part, the context of the provision and the five grounds stated by the FC: FC [241]-[254], CAB 240-243. "Extensions" in s 44X(1)(e) is directed to physical assets used to provide the Service where the two prescribed conditions are met. PNO seeks to read an additional limitation into the provision (subs at [53]). There is no basis to do so. The language of the section is unqualified and ss 44V and 44W do not support it.

17. Where a cost is borne by someone else, that matter must be taken into account to determine whether the provider can fix a price, or recover on, a capital cost it is not bearing: FC [51]-[52], CAB 187 and [251]-[252], CAB 242.

Dated: 6 September 2021

Neil J Young **Nicholas De Young** **Mark P Costello**