

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, GORDON, STEWARD AND GLEESON JJ

PORT OF NEWCASTLE OPERATIONS PTY
LIMITED

APPELLANT

AND

GLENCORE COAL ASSETS AUSTRALIA
PTY LTD & ORS

RESPONDENTS

*Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia
Pty Ltd*

[2021] HCA 39

Date of Hearing: 7 September 2021

Date of Judgment: 8 December 2021

S33/2021

ORDER

- Vary the orders of the Full Court of the Federal Court of Australia made on 24 August 2020 by inserting a new order 5: "The determination according to law by the Tribunal on remitter pursuant to order 1 be confined to redetermining the scope of the Navigation Service Charge."*
- Appeal otherwise dismissed.*

On appeal from the Federal Court of Australia

Representation

C A Moore SC with D J Roche for the appellant (instructed by Clayton Utz)

N J Young QC with N P De Young QC and M P Costello for the first respondent (instructed by Clifford Chance)

S B Lloyd SC with C M Dermody for the third respondent (instructed by DLA Piper)

Submitting appearance for the second respondent

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Port of Newcastle Operations Pty Limited v Glencore Coal Assets Australia Pty Ltd

Trade practices – Competition – Access to services – Where declared service under Pt IIIA of *Competition and Consumer Act 2010* (Cth) ("Act") for provision of right to access and use certain infrastructure at Port of Newcastle ("Port") – Where operator of Port fixed navigation service charge and wharfage charge under *Ports and Maritime Administration Act 1995* (NSW) for use of certain port infrastructure – Where access dispute concerned amount of navigation service charge and wharfage charge – Whether Australian Competition Tribunal ("Tribunal") erred in determining range of circumstances in which navigation service charge payable – Whether Tribunal erred in determining amount of navigation service charge – Meaning of "access" in Pt IIIA of Act – Construction of s 44X(1)(e) of Act – Application of pricing principles in s 44ZZCA of Act.

Words and phrases – "access", "access dispute", "competition", "declaration of a service", "depreciated optimised replacement cost", "essential facility", "navigation service charge", "physical use", "pricing principles", "provider", "regulated asset base", "service", "third party", "use", "user contributions".

Competition and Consumer Act 2010 (Cth), Pt IIIA, ss 44X(1)(e), 44ZZCA.
Ports and Maritime Administration Act 1995 (NSW), ss 48(4), 50, 51, 67.

1 KIEFEL CJ, GAGELER, GORDON, STEWARD AND GLEESON JJ. This is
an appeal by special leave from a decision of the Full Court of the Federal Court
(Allsop CJ, Beach and Colvin JJ)¹ given on an appeal on questions of law from a
decision of the Australian Competition Tribunal². The appeal raises issues of
statutory construction central to the operation of Pt IIIA of the *Competition and
Consumer Act 2010* (Cth) ("the Act").

2 The appellant is Port of Newcastle Operations Pty Limited ("PNO"). Since
2014, PNO has been the lessee from the State of New South Wales of the Port of
Newcastle and has been the "operator" of the Port under the *Ports and Maritime
Administration Act 1995* (NSW) ("the PMA Act").

3 The Port is one of the largest coal exporting ports in the world. The Port is
the only commercially viable means of exporting coal from more than 30 operating
coal mines in the Hunter Valley.

4 PNO, in its capacity as operator of the Port, relevantly controls use by those
involved in the export of coal of two categories of facility at the Port. One is the
loading berths, located at the three terminals at the Port, at which ships are loaded
with coal for export. The other is the shipping channels, through which ships
entering the Port must pass to reach the loading berths and through which ships
once loaded must again pass to exit the Port. The shipping channels were
constructed by dredging and associated public works undertaken by the State of
New South Wales at various times over the course of more than a century before
the State leased the Port to PNO.

5 The first respondent is Glencore Coal Assets Australia Pty Ltd
("Glencore"). It is the largest producer of coal in the Hunter Valley. It owns or
operates roughly a third of the mines producing the coal that is exported through
the Port.

6 To facilitate the export through the Port of the coal that Glencore produces
at its mines, Glencore has entered into a series of long term "take or pay" contracts
with downstream service providers. It has organised for the coal to be transported
from the mine to the Port under long term contracts both with rail haulage
providers and separately with Australian Rail Track Corporation, which provides

1 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020)
280 FCR 194.

2 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1.

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use of the track. It has organised for the coal then to be loaded onto ships berthed at one of the three terminals located at the Port, under a long term contract with the coal loader operating at that terminal.

7 Most of the coal produced by Glencore that is by those means transported by rail from the mine to the Port and there loaded onto ships berthed at a terminal is sold by Glencore to overseas buyers under "free on board" ("FOB") contracts. Under a standard FOB contract, the seller is required to deliver the goods sold onto a ship nominated by the buyer at the named port of shipment. The buyer bears all shipping and subsequent costs. The buyer is typically the charterer of the ship, the terms on which the ship is chartered by the buyer being a matter of separate contractual arrangement between the buyer and the owner or operator of the ship. Some of the coal is sold by Glencore to overseas buyers under "cost, insurance and freight" ("CIF") contracts. Under a standard CIF contract, the seller is required to contract for and pay the costs and freight necessary to bring the goods to the named port of destination and is required to contract for insurance cover against the buyer's risk of loss or damage to the goods. The seller is typically the charterer of the ship, the terms on which the ship is chartered by the seller being a matter of separate contractual arrangement between the seller and the owner or operator of the ship.

8 The other respondents to the appeal are the Tribunal and the Australian Competition and Consumer Commission ("the ACCC"). The Tribunal has appropriately entered a submitting appearance. The ACCC has chosen to present submissions which support the decision of the Full Court. Whether the litigious posture of the ACCC is consistent with the principle in *R v Australian Broadcasting Tribunal; Ex parte Hardiman*³ was touched on but not developed in the course of the hearing. The absence of further consideration in these reasons of the posture of the ACCC should be understood as neither condemnation nor condonation.

9 To allow the issues raised in the appeal to be understood, it is appropriate to set out the scheme of Pt IIIA of the Act and to note the relevant provisions of the PMA Act before going on to record the procedural history and to examine the reasoning of the Tribunal and of the Full Court.

3 (1980) 144 CLR 13.

Part IIIA of the Act

10 Part IIIA of the Act is headed "Access to services". The Part was inserted into the Act, then known as the *Trade Practices Act 1974* (Cth), by amendment in 1995 ("the 1995 Act")⁴. Insertion of the Part implemented a provision of the Competition Principles Agreement⁵ agreed to by the Council of Australian Governments ("COAG") that year in accordance with a recommendation in the report two years earlier of the National Competition Policy Review chaired by Professor Fred Hilmer ("the Hilmer Report")⁶. Introduction into the Commonwealth Parliament of the Bill for the 1995 Act was preceded by release by COAG for public comment of a package of material containing an exposure draft both of the Bill and of the Competition Principles Agreement ("the Information Package")⁷.

11 Following an extensive review by the Productivity Commission in 2001⁸, Pt IIIA was amended in 2006 ("the 2006 Act")⁹. Aspects of the Part in the form inserted by the 1995 Act were considered by this Court in 2008¹⁰. Other aspects of the Part in the form amended by the 2006 Act were subsequently considered by this Court in 2012¹¹. Following a further review of the Part by the Productivity

4 *Competition Policy Reform Act 1995* (Cth).

5 Competition Principles Agreement, 11 April 1995, cl 6.

6 *National Competition Policy* (1993), ch 11.

7 *National Competition Policy: Draft Legislative Package* (1994).

8 Productivity Commission, *Review of the National Access Regime*, Report No 17 (2001).

9 *Trade Practices Amendment (National Access Regime) Act 2006* (Cth).

10 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145.

11 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379.

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Commission in 2013¹² and consideration of the Part in the context of a more general review of competition policy undertaken by the Competition Policy Review chaired by Professor Ian Harper which reported in 2015 ("the Harper Review")¹³, the Part was amended most recently in 2017 ("the 2017 Act")¹⁴.

12 Part IIIA is economic and pro-competitive in its orientation. The first of its two express objects, inserted by the 2006 Act following a recommendation of the Productivity Commission in 2001, is to "promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets"¹⁵. That is the principal object of the Part. It alludes to the operation of its central provisions.

13 The second of the two express objects, also inserted by the 2006 Act following a recommendation of the Productivity Commission in 2001, is to "provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry"¹⁶. It alludes not to the operation of central provisions of the Part but to provisions which apply the framework and principles established by the Part in the pursuit of the principal object to facilitate industry-specific access regimes¹⁷ and to guide the structure and content of State and Territory access regimes¹⁸. For present purposes, the second object can be put to one side.

12 Productivity Commission, *National Access Regime*, Inquiry Report No 66 (2013).

13 Competition Policy Review, *Final Report* (2015).

14 *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

15 Section 44AA(a) of the Act.

16 Section 44AA(b) of the Act.

17 Section 44F(1)(b) and Div 6 of Pt IIIA of the Act.

18 Section 44F(1)(a) and Div 2A of Pt IIIA of the Act.

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14 The expression of the principal object of the Part clarifies the solution which Pt IIIA provides to what was identified in the Hilmer Report as "the 'essential facilities' problem". The Hilmer Report explained the problem as follows¹⁹:

"Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term 'natural monopoly', electricity transmission grids, telecommunication networks, rail tracks, major pipelines, ports and airports are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus 'essential facilities' in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets. ...

Where the owner of the 'essential facility' is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derive monopoly profits at the expense of consumers and economic efficiency."

15 The classic example of the essential facilities problem is provided by the facts in *United States v Terminal Railroad Association of St Louis*²⁰. Getting into or out of St Louis by rail required the use of either of two bridges spanning the Mississippi River. An association of railroad companies acquired control of both bridges. They charged non-members the same price as they charged themselves. The price, however, was a monopoly price that disadvantaged non-members.

16 Discussions of the essential facilities problem in a regulatory context often refer to an essential facility having natural monopoly characteristics, access to which is needed to compete effectively in an upstream or downstream market, as a "bottleneck facility" or "bottleneck monopoly". The metaphor is apt to describe the kind of facility with which Pt IIIA is concerned. The metaphor was taken up

19 Hilmer Report at 240-241 (footnotes omitted).

20 (1912) 224 US 383.

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by the Tribunal in 2000²¹, by the Productivity Commission in 2001²² and by the Harper Review in 2015²³.

17 Division 1 of Pt IIIA sets out a number of definitions. Three of those definitions, contained within s 44B, are central to Pt IIIA's solution to the essential facilities problem. The first is the definition of "service", which is relevantly as follows:

"**service** means a service provided by means of a facility and includes:

(a) the use of an infrastructure facility such as a road or railway line;

..."

The second is the definition of "provider", which is as follows:

"**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."

The third is the definition of "third party", which is as follows:

"**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."

18 The term "access", which appears in the heading to Pt IIIA and in the third of those definitions and throughout Pt IIIA, is undefined. The meaning to be attributed to the undefined term in the context of the Part is central to the resolution of issues in the appeal that will be examined in due course.

19 At this point, it is convenient simply to record an explanation of the term given by COAG in commentary on the Bill for the 1995 Act forming part of the

21 *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 at 37 [82].

22 Productivity Commission, *Review of the National Access Regime*, Report No 17 (2001) at 2, 38-39.

23 Competition Policy Review, *Final Report* (2015) at 72-74.

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Information Package. Linking the proposed statutory use of the term to the essential facilities problem identified in the Hilmer Report, COAG explained²⁴:

"The term 'access' means the ability of suppliers or buyers to purchase the use of essential facilities on fair and reasonable terms. An essential facility is a transportation or other system which exhibits a high degree of natural monopoly; that is, a competitor could not duplicate it economically. A natural monopoly becomes an essential facility when it occupies a strategic position in an industry such that access to it is required for a business to compete effectively in a market upstream or downstream from the facility. Possible examples of such facilities are electricity transmission lines, gas pipelines, water pipelines, railways, airports, telecommunication channels and sea ports. Such facilities can be owned by private or public sector organisations."

To that contextual explanation of the meaning of "access", it will be appropriate in due course to return.

20 Part IIIA sets out to achieve its principal object of promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided, and of thereby promoting effective competition in upstream and downstream markets, by setting up a regulatory process by which a third party can gain access to a service provided by means of a facility. The regulatory process involves two distinct stages.

21 The first stage of the process involves the declaration of a service for the purpose of the Part. Division 2 allows any person to ask the National Competition Council ("the NCC") to recommend that a particular service be declared²⁵. Following consideration of the request by the NCC and the making by the NCC of a recommendation, one way or the other, the "designated Minister", who might be a Minister of the Commonwealth or of a State or Territory²⁶, is obliged to declare

24 *National Competition Policy: Draft Legislative Package* (1994) at 1.10.

25 Section 44F of the Act.

26 Section 44D of the Act.

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or decide not to declare the service²⁷. The decision of the designated Minister, either way, is subject to merits review by the Tribunal²⁸.

22 The declaration of a service, if made by the designated Minister or by the Tribunal on review, must be published²⁹ and must be included in a public register maintained by the ACCC³⁰. The declaration, once made, operates prospectively for such period as is specified in the declaration³¹ unless earlier revoked³².

23 The criteria governing the decision of the designated Minister or of the Tribunal on review, to declare or not to declare a service, have altered as a result of the 2017 Act. Before the 2017 Act, the first of the criteria of which the designated Minister or the Tribunal needed to be satisfied in order to declare a service – "criterion (a)" – was "that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service"³³. As a consequence of the 2017 Act, criterion (a) has been recast. Now it requires satisfaction "that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service"³⁴.

24 That change to criterion (a) has changed the analysis required to be undertaken by the NCC in making a recommendation, by the designated Minister in deciding to declare or not to declare a service, and by the Tribunal on review of

27 Section 44H of the Act.

28 Section 44K of the Act.

29 Sections 44HA and 44K(9) of the Act.

30 Section 44Q(b) of the Act.

31 Section 44I of the Act.

32 Section 44J of the Act.

33 Former section 44H(4)(a) of the Act.

34 Section 44CA(1)(a) of the Act.

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a decision of the designated Minister. Formerly, the analysis involved comparing the extent of future competition in an upstream or downstream market if there was access with the same if there was no access³⁵. Latterly, the analysis involves a comparison of the extent of future competition in an upstream or downstream market were there to be declaration of the service with the same if there was no declaration of the service.

25 The 2017 Act affected the events relating to the subject matter of the appeal in ways that will be noted in explaining the procedural background to the appeal. No party to the appeal has argued that the change to criterion (a) altered the underlying meaning of the term "access". As will be seen, criterion (a) in the form in which it now stands as a result of the 2017 Act nevertheless has a bearing on how the term "access" is best to be understood.

26 The second stage of the regulatory process, dealt with in Div 3, involves a third party gaining "access" to the service declared through conferral of what has been described as "an enforceable right to negotiate"³⁶. The provision conferring that right is s 44S(1):

"If a third party is unable to agree with the provider on one or more aspects of access to a declared service, either the provider or the third party may notify the [ACCC] in writing that an access dispute exists, but only to the extent that those aspects of access are not the subject of an access undertaking that is in operation in relation to the service."

27 Notification of an access dispute in the exercise of the right conferred by s 44S(1) has the effect of commencing an arbitration before the ACCC. The parties to that arbitration are the provider and the third party as well as "any other person who applies in writing to be made a party and is accepted by the [ACCC] as having a sufficient interest"³⁷.

35 *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124 at 146-148 [76]-[89]; *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 at 133-134 [86]-[89].

36 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 156 [17].

37 Section 44U of the Act.

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28 Unless it terminates the arbitration, the ACCC is obliged to make a written final determination "on access by the third party to the service"³⁸. Amongst the circumstances in which the ACCC is permitted to terminate the arbitration are where it considers the notification of the dispute to have been vexatious and where it considers the subject matter of the dispute to be trivial, misconceived or lacking in substance³⁹.

29 The permitted scope of the final determination to be made by the ACCC, and the considerations that must be taken into account in making it, are set out in some detail in Div 3.

30 Section 44V(2) provides in part:

"A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:

- (a) require the provider to provide access to the service by the third party;
 - (b) require the third party to accept, and pay for, access to the service;
 - (c) specify the terms and conditions of the third party's access to the service;
 - (d) require the provider to extend the facility;
- ..."

Section 44V(2A) adds:

"Without limiting paragraph (2)(d), a requirement referred to in that paragraph may do either or both of the following:

- (a) require the provider to expand the capacity of the facility;
- (b) require the provider to expand the geographical reach of the facility."

38 Section 44V(1) of the Act.

39 Section 44Y of the Act.

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31 Section 44W(1) provides in part:

"The [ACCC] must not make a determination that would have any of the following effects:

...

- (d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility), without the consent of the provider;
- (e) requiring the provider to bear some or all of the costs of extending the facility (including expanding the capacity of the facility and expanding the geographical reach of the facility);
- (ea) requiring the provider to bear some or all of the costs of maintaining extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility);

..."

32 Section 44X(1) provides in part:

"The [ACCC] must take the following matters into account in making a final determination:

- (aa) the objects of this Part;
- (a) the legitimate business interests of the provider, and the provider's investment in the facility;
- (b) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (c) the interests of all persons who have rights to use the service;
- (d) the direct costs of providing access to the service;
- (e) the value to the provider of extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else;

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...

- (f) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (g) the economically efficient operation of the facility;
- (h) the pricing principles specified in section 44ZZCA."

33 Section 44ZZCA, to which reference is made in s 44X(1)(h), provides in part:

"The pricing principles relating to the price of access to a service are:

- (a) that regulated access prices should:
 - (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
 - (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

...

- (c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity."

34 The final determination made by the ACCC is subject to review by the Tribunal at the request of any party to the arbitration⁴⁰. The review by the Tribunal is "a re-arbitration of the access dispute", for the purposes of which the Tribunal

40 Section 44ZP(1) of the Act.

has the same powers as the ACCC⁴¹. The result of the review is a decision of the Tribunal, either affirming or varying the final determination⁴².

35 The final determination, as made by the ACCC or as it might be affirmed or varied by the Tribunal on review, operates to bind the parties to the arbitration for the period specified in the determination⁴³, subject to variation by consent⁴⁴, and must be recorded in a public register maintained by the ACCC⁴⁵.

36 A party to a final determination that has been affirmed or varied by the Tribunal on review has a right to "appeal" to the Federal Court from the decision of the Tribunal⁴⁶. That "appeal", which is in truth a proceeding in the original jurisdiction of the Federal Court⁴⁷, is "on" and therefore limited to "a question of law"⁴⁸. A question of law on an appeal can include a question about whether the decision of the Tribunal to make the final determination was arrived at by a process of reasoning that was compliant with s 44X(1).

37 The final aspect of the scheme of Pt IIIA to be noted is the power⁴⁹ and jurisdiction⁵⁰ conferred on the Federal Court to enforce a final determination. On the application of a party to the determination, the Federal Court can enforce the

41 Section 44ZP(3) and (4) of the Act.

42 Section 44ZP(6) of the Act.

43 Section 44ZO of the Act.

44 Section 44ZU of the Act.

45 Section 44ZZL of the Act.

46 Section 44ZR(1) of the Act.

47 Section 19(2) of the *Federal Court of Australia Act 1976* (Cth).

48 Section 44ZR(1) of the Act. See *Haritos v Federal Commissioner of Taxation* (2015) 233 FCR 315 at 348-349 [85], quoting *Brown v Repatriation Commission* (1985) 7 FCR 302 at 304.

49 Section 44ZZD(1) of the Act.

50 Section 15C of the *Acts Interpretation Act 1901* (Cth).

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determination by injunction, by order for compensation or by other appropriate order, if satisfied "that another party to the determination has engaged, is engaging, or is proposing to engage in conduct that constitutes a contravention of the determination".

The PMA Act

38 The rights, obligations and powers of PNO as the operator of the Port are regulated under the PMA Act. That includes imposing limits on the kind of charges that PNO is permitted to fix and to recover.

39 In relation to use of the navigation channels and loading berths at the Port, the PMA Act limits PNO to fixing and recovering "navigation service charge" and "wharfage charge".

40 The navigation service charge that can be fixed by PNO⁵¹ is in respect of "the general use" by a vessel of the Port, imposed by reference to the gross tonnage of the vessel, on each entry of the vessel into the Port⁵². The charge therefore covers the use by the vessel of navigation channels. The charge is payable by the "owner" of the vessel. The meaning of "owner" for this purpose is extended by s 48(4) of the PMA Act to include a person who, "on the person's own behalf or on behalf of another", "(a) exercises any of the functions of the owner of the vessel" or who "(b) represents to [PNO] that the person has those functions or accepts the obligation to exercise those functions".

41 The wharfage charge that can be fixed by PNO⁵³ is payable in respect of "availability of a site at which stevedoring operations may be carried out"⁵⁴, and therefore covers the availability of a loading berth. The charge is calculated by reference to the quantity of cargo loaded or unloaded at the site and is payable by

51 Section 51 of the PMA Act.

52 Section 50 of the PMA Act.

53 Section 62 of the PMA Act.

54 Section 61(1), read with s 47(1) (definition of "stevedoring") and s 59 (definition of "site"), of the PMA Act.

the person who is the owner of the cargo immediately before it is loaded or unloaded⁵⁵.

42 Section 67 of the PMA Act permits PNO to enter into an agreement with a person who is liable to pay either navigation service charge or wharfage charge. The agreement into which PNO is permitted to enter can make provision for, or with respect to, fixing the amount of either kind of charge payable by that person. To the extent that provision is made in an agreement, the agreement displaces the amount of the charge otherwise determined by PNO.

43 The mechanism in s 67, in combination with the capacity for Glencore to make use of the extended meaning of "owner" in s 48(4)(b) so as to become liable to pay the navigation service charge even when it sells FOB, means that an obligation pertaining to the amount of the navigation service charge or wharfage charge payable by Glencore to PNO as the result of the final determination of an access dispute under Pt IIIA can be fashioned so as to be able to be performed within the scope of the PMA Act. No question of "operational inconsistency"⁵⁶ between Pt IIIA of the Act and the PMA Act arises for consideration in the appeal.

Procedural history

44 Following increases in amounts fixed as navigation service charge and as wharfage charge after PNO became operator of the Port in 2014, Glencore in 2015 asked the NCC to recommend declaration of the service provided by PNO by means of the shipping channels and loading berths at the Port. The NCC recommended against that declaration. The designated Minister, who was then the Acting Treasurer, decided not to make the declaration.

45 Glencore applied to the Tribunal for review of the decision of the Acting Treasurer. The outcome of the review was that the Tribunal in 2016 set aside the decision of the Acting Treasurer and declared a service identified in the following terms⁵⁷:

55 Section 61(2) and (3) of the PMA Act.

56 *cf The Commonwealth v Western Australia* (1999) 196 CLR 392 at 417 [61]-[62], 439-440 [139].

57 *Application by Glencore Coal Pty Ltd [No 2]* [2016] ACompT 7.

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"[T]he provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port of Newcastle (Port), by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct."

That declaration will be referred to in these reasons as "the Declaration". The service identified in the Declaration will be referred to as "the Service". The Declaration was for a period specified to expire in 2031.

46 In deciding to make the Declaration, the Tribunal found the Service to be "a necessary input for effective competition" in what the Tribunal identified to be the "market for the export of coal from the Hunter Valley". Applying criterion (a) as it then stood, the Tribunal concluded that access to the Service would promote a material increase in competition in that market, and in other identified dependent markets, in comparison to the competition that would exist were there to be no access to the service⁵⁸.

47 An application by PNO for judicial review of the decision of the Tribunal to make the Declaration was dismissed by the Full Court of the Federal Court in 2017⁵⁹. So, the initial declaration stage of the regulatory process ended.

48 Glencore had in the meantime triggered the second stage of the regulatory process by notifying the ACCC of the existence of an access dispute in relation to the Service. Glencore had described the dispute in its notification to the ACCC as follows:

"Although PNO is currently providing access (and maintaining that it will always do so) the terms of access, in particular the navigation service charges for coal vessels, are unreasonable and Glencore is seeking to negotiate with PNO on reducing these charges to approximately their pre-privatisation levels Glencore submits that, at the very least, an economically efficient charge is likely to be significantly lower than the rates which are currently being applied by PNO."

58 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [113], [121].

59 *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115.

49 The notification of the access dispute had commenced an arbitration to which Glencore and PNO were parties. The ACCC made its final determination on the access dispute in 2018.

50 Glencore then applied to the Tribunal for review of the ACCC's final determination. The outcome of that review was the decision of the Tribunal in 2019, which varied that final determination⁶⁰. That decision will be referred to in these reasons as "the Tribunal Decision". The final determination as varied by the Tribunal will be referred to as "the Final Determination".

51 Glencore appealed from the Tribunal Decision to the Full Court. Finding errors of law in the Tribunal Decision, the Full Court set aside the Tribunal Decision and remitted the matter to the Tribunal for determination according to law⁶¹. It is from that decision of the Full Court, which will be referred to as "the Full Court Decision", that PNO now appeals to this Court.

52 Before turning to examine the Tribunal Decision and the Full Court Decision, something more must be recorded about the complicated procedural history. Following the 2017 Act, the NCC recommended revocation of the Declaration. As the Treasurer – being the designated Minister at the time – did not publish a decision on the recommendation within the requisite time period, the Declaration was revoked by operation of a deemed decision of the Treasurer⁶². Then, in 2020, the New South Wales Minerals Council, an industry body of which Glencore is a member, asked the NCC again to recommend declaration of a service identified in terms materially identical to the Service. The NCC recommended against declaration, and in 2020 the Treasurer, as designated Minister, decided not to make a declaration. The New South Wales Minerals Council then applied to the Tribunal for review of the decision of the Treasurer.

53 After the grant of special leave to appeal from the Full Court Decision, the Tribunal decided to affirm the decision of the Treasurer⁶³. Applying criterion (a)

60 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [610].

61 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194.

62 See s 44J(7) of the Act.

63 *Application by New South Wales Minerals Council [No 3]* [2021] ACompT 4.

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in its current form, the Tribunal was not satisfied that access on reasonable terms and conditions as a result of declaration of the service would promote a material increase in competition in another market in comparison with the circumstances likely to prevail in the absence of declaration⁶⁴.

54 Glencore and PNO have made clear that it is common ground that the revocation of the Declaration in 2017 has had no effect on the arbitration of the access dispute which Glencore notified to the ACCC in 2016⁶⁵. It appears to be common ground that the revocation of the Declaration will have no effect on the operation or enforcement of the final determination of that access dispute that will result either from the Tribunal Decision being restored (if this appeal is allowed and the Full Court Decision is set aside) or from a decision to be made by the Tribunal in the future (if this appeal is dismissed and the order remitting the matter to the Tribunal made by the Full Court is left to stand)⁶⁶. The appeal can therefore be taken to continue to bear on the rights of the parties.

Tribunal Decision

55 The Final Determination, which resulted from the Tribunal Decision, was expressed to govern both the wharfage charge and the navigation service charge payable by Glencore to PNO for a period commencing in 2018 and expiring in 2031. The wharfage charge as determined in the Final Determination will be referred to in these reasons as "the Wharfage Charge". The navigation service charge as determined in the Final Determination will be referred to as "the Navigation Service Charge".

56 The Wharfage Charge was uncontroversial at the time of the Tribunal Decision and remains uncontroversial. The Wharfage Charge was the subject of agreement between Glencore and PNO reached in the course of the arbitration and was not in dispute in the re-arbitration before the Tribunal.

57 The Navigation Service Charge was controversial at the time of the Tribunal Decision in two respects. The first concerned the range of circumstances in which

64 *Application by New South Wales Minerals Council [No 3] [2021] ACompT 4 at [263]-[264].*

65 See s 44I(4)(a) of the Act.

66 See s 44I(4)(b) of the Act.

the Navigation Service Charge was to be payable by Glencore to PNO. The second concerned the calculation of the amount of the Navigation Service Charge.

Scope of the Navigation Service Charge

58 In the final determination reviewed by the Tribunal, the ACCC had determined that the navigation service charge was to be payable by Glencore to PNO in either of two circumstances. One was where Glencore, either directly or by an agent, chartered a ship to enter the Port and load its coal. The other was where Glencore brought itself within the extended meaning of "owner" in s 48(4)(b) of the PMA Act by representing to PNO that it had the functions of the owner, or accepted the obligation to exercise those functions, in order for a ship to enter the Port and load its coal.

59 In the Final Determination, the Tribunal confined the scope of the Navigation Service Charge to the circumstance where Glencore owns or, either directly or by an agent, charters a ship to enter the Port and load its coal. The Final Determination thereby extended the Navigation Service Charge to circumstances where Glencore sold its coal CIF but excluded the Navigation Service Charge from circumstances where Glencore sold its coal FOB.

60 The Tribunal arrived at its decision to confine the scope of the Navigation Service Charge taking a narrow view of what was meant by "[t]he provision of the right to access and use the shipping channels" in the description of the Service in the Declaration. Implicit in the Tribunal's adoption of that narrow view was an acceptance by the Tribunal of a submission by PNO to the effect that the reference to "access" within the description of the Service in the Declaration is closely tied to physical use. The Tribunal appears to have been persuaded to the view that, for a "service" constituted by a "use" of an infrastructure facility, no more than one person can answer the description of a "third party" who wants "access" to that "service" in connection with a particular vessel⁶⁷.

Amount of the Navigation Service Charge

61 The controversy about the amount of the Navigation Service Charge was relatively narrow and highly technical. To make the controversy intelligible,

67 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [148]-[158].

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something needs to be said about the methodology to which the controversy was related.

62 Before the ACCC and before the Tribunal, Glencore and PNO agreed that the appropriate methodology to determine the amount of the navigation service charge to be payable by Glencore to PNO was a "building block model" ("BBM"). The BBM on which they agreed was a modified version of the Australian Energy Regulator's publicly available "Post-Tax Revenue Model". According to the agreed BBM, the amount of the navigation service charge to be payable by Glencore to PNO was to be based on a "maximum allowed revenue" ("MAR") to be allowed to PNO. The MAR was to consist of a number of components – the building blocks.

63 The main building block of the MAR was a "return on capital" ("ROC"), to be calculated by applying a "weighted average cost of capital" ("WACC") to the value of the "regulated asset base" ("RAB"). The RAB comprised the assets required to provide the Service. The parties were agreed that the RAB was valued appropriately using a "depreciated optimised replacement cost" or "DORC" methodology, according to which the assets required to provide the Service were to be valued at the cost of replacing the remaining useful life of those assets.

64 DORC methodology does not measure the cost of replacing assets in fact used to provide a service. Rather, it measures the cost that a hypothetical new entrant would incur to replace the assets using the latest technology in order to provide the service in the most up-to-date and cost-efficient way. The methodology in that way seeks to emulate what would happen to the value of the assets required to provide a service in a hypothetical competitive market for the service where the service provider faced competition from an efficient new entrant.

65 The purpose of valuing the RAB at DORC when using the BBM was thereby to exclude monopoly profit from the ROC and in turn from the MAR.

66 The controversy between the parties concerned whether the RAB, arrived at using DORC methodology, should be adjusted downwards, thereby reducing the MAR. The downwards adjustment, proposed by Glencore and resisted by PNO, was to take account of the historical circumstance that some of the original investment made by the State of New South Wales in creating the shipping channels and associated public works now used by PNO to provide the Service could be argued to have been funded by "user contributions" in the form of levies and charges imposed by the State on past users of the Port.

67 The ACCC had thought that such an adjustment was appropriate. Having calculated the optimised replacement cost of the RAB at \$2.17 billion, the ACCC deducted \$912 million to account for what it calculated to be the optimised replacement cost of user contributions, to arrive at an adjusted optimised replacement cost of \$1.26 billion. The ACCC then depreciated that adjusted optimised replacement cost to arrive at a DORC value of the RAB of \$1.16 billion. The consequence of valuing the RAB at \$1.16 billion was that the navigation service charge payable by Glencore to PNO was determined to be \$0.6075 (as at 1 January 2018).

68 The ACCC had explained its reasons for making that adjustment as follows⁶⁸:

"The [ACCC] considers that deducting user funded capital contributions from the DORC value used to establish PNO's initial RAB is in the interests of those who have a right to use the Service (section 44X(1)(c)) because it will ensure that users do not pay for the same assets twice: once through their initial investment and again through PNO's charges. This in turn promotes the economically efficient operation of, use of and investment in the Service (sections 44X(1)(aa) and (g)) and also takes into account the value to PNO of extensions where the cost has already been borne by users (section 44X(1)(e)). At the same time, the DORC value net of user contributions ensures that PNO is able to earn sufficient revenue to recover its efficient costs (sections 44X(1)(h) and 44ZZCA(a)(i)), which is in the legitimate business interests of PNO and its investment in the facility (section 44X(1)(a))."

69 The Tribunal took a different view. In relation to the construction of s 44X(1)(e), it took the view that "this factor is directed at situations where the determination requires the provider to extend the facility (for example by extending a train line to a third party's mine) and is not applicable here"⁶⁹. In consequence, it thought that s 44X(1)(e) "does not of itself require the deduction of user contributions", though it added that "at the very least, the circumstances of

68 ACCC, *Final Determination: Statement of Reasons – Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd* (18 September 2018) at 136.

69 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [54].

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the contribution need to be examined"⁷⁰. It thought that adjusting the DORC downwards by reference to user contributions to arrive at an RAB could not generate efficient charges and was unwarranted in the circumstances⁷¹. It thought that "precluding a return on all the assets that are part of the facility (sunk or not) would send a signal to future investors in other natural monopoly assets that they risked having their investment, once made, treated as sunk, with future returns confiscated"⁷². It thought that disputation over the treatment of user contributions could not be resolved by "simplistic claims that users should not have to pay twice" and that "[o]nly clear indications of an understanding by the access provider and an expectation by the access user that future pricing would be adjusted in some way for the value of those assets could justify excluding them from the RAB"⁷³. There was, it noted, "no evidence of any such understandings or expectations"⁷⁴.

70 The Tribunal added that "even if some regard was had to the financing of particular dredging projects (for instance), this would need to be done as part of a comprehensive examination of historical matters" which "would include the benefits provided by the State in return for contributions, the history of under-recovery by the State, the question of which users would be entitled to the benefit of any contributions and the users' expectations"⁷⁵. It recorded that none of those matters were capable of being considered on the material before it⁷⁶.

71 The Tribunal accordingly restored the optimised replacement cost of the RAB to \$2.17 billion, which it then depreciated to arrive at a DORC value of \$2.08 billion. The result of valuing the RAB at \$2.08 billion instead of \$1.16 billion was to increase the Navigation Service Charge payable by Glencore to PNO in

70 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [300].

71 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [278].

72 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [354].

73 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [359]-[360].

74 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [361].

75 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [365].

76 *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [365].

accordance with the Final Determination from \$0.6075 to \$1.0058 (as at 1 January 2018).

Full Court Decision

72 The Full Court took the view that the reasoning adopted in the Tribunal Decision to arrive at the Final Determination was affected by errors of law in relation to both the scope of the Navigation Service Charge and the amount of the Navigation Service Charge.

Scope of the Navigation Service Charge

73 The Full Court found that, in confining the scope of the Navigation Service Charge to circumstances where Glencore chartered a ship to enter the Port and load its coal, the Tribunal had taken an unduly physical view of what was meant by "the provision of the right to access and use the shipping channels" in the description of the Service in the Declaration.

74 The Full Court said⁷⁷:

"Our fundamental disagreement with the Tribunal and the basis of our view that it misconstrued the Service, and thus asked itself the wrong question, is that access to and use of the shipping channels are not limited to, or indeed even governed by, the notion of physical access or use by the control and navigation of the vessel entering and leaving the Port to carry the coal. The broad context of the purpose of the declaration as directed to the relevant dependent market of the production, sale and export of coal makes that limitation or focus inappropriate. Access and use can be relevantly economic though connected closely and clearly, indeed immediately, to the physical activity involved. No particular general principle is at play here. Coal is exported in ships in respect of which any exporter may or may not have a particular or direct contractual arrangement. Whether or not an exporter makes any particular arrangement directly in controlling the physical or commercial deployment of the vessel does not affect a conclusion as a matter of meaning of the text of the Service that the exporter is accessing or using the shipping channels when, by its sale arrangement, it causes a vessel to enter the Port. It does so, that is it causes a vessel to enter the Port, when it sells CIF or FOB, irrespective of whether

77 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 229 [158].

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it owns, demise charters, time charters, or voyage charters the vessel, or not, as the case may be."

75 The Full Court identified an alternative basis on which it considered that the Tribunal had erred. The Service, as the Full Court saw it, was indivisible. There was no dispute that Glencore accessed that part of the Service which comprised use of the loading berths where Glencore sold FOB. There was also no dispute that, in respect of its access to that part of the Service, Glencore was liable to pay the Wharfage Charge. If Glencore accessed that part of the Service which comprised use of the loading berths, as the Full Court saw it, Glencore also necessarily accessed the other part of the Service, which comprised the shipping channels needed to get to and from the loading berths⁷⁸.

76 The Full Court added the following observation⁷⁹:

"If, as we consider to be the case, Glencore is accessing and using the Service and shipping channels, the determination through a bilateral arbitration can, under s 44V(2), set the terms of access as between Glencore and PNO such that another person who may have a right of access to the shipping channels to carry Glencore's coal and who may be subject to the [Navigation Service Charge], can, through Glencore be given the ability or option of taking up Glencore's arbitrated price. The precise mechanism need not be set out here, save to say that it would need to be a product of the arbitrated bilateral rights and obligations between Glencore and PNO and conform practically to the workings of the Port and the PMA Act. This would ensure the benefit to Glencore of the arbitrated terms of access, and if for its own commercial reasons a shipowner or charterer wanted to pay more (for some preferential access, or its own commercial reasons otherwise) it would not be bound to take Glencore's arbitrated price. That may or may not be a commercial issue for Glencore: to be solved either in its contractual arrangements with the buyer or the shipowner or by making a representation for the purposes of s 48(4)(b) of the PMA Act. Such an arrangement falls entirely within the clause 'any matter relating to access by

78 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 229-230 [159]-[160].

79 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 230 [162].

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[Glencore]' in the chapeau to s 44V(2). The working out of such arrangements in the terms would be a matter for the Tribunal in the re-arbitration."

The Full Court further added⁸⁰:

"Nor would there be any exceeding of the reach of Pt IIIA. The terms of access of Glencore are being fixed by determination which includes a mechanism of delivering an equivalent price to another party whose access overlaps or coincides with Glencore's access, so as to provide terms of access *for Glencore*. To require PNO to give the relevant shipowner a mechanism to take a [navigation service charge] of not more than \$X as one of the terms and conditions of access by Glencore to the Service is only to ensure, or to make more likely, that Glencore will obtain the economic benefit of the declaration of the Service for its access to the Service."

Amount of the Navigation Service Charge

77 The Full Court went on to find that, in declining to arrive at an RAB by adjusting the DORC downwards by reference to user contributions, the Tribunal misconstrued and misapplied the mandatory consideration in s 44X(1)(e) and the pricing principle in s 44ZZCA(a)(ii) of the Act when determining the amount of the Navigation Service Charge.

78 The requirement of s 44X(1)(e) to take into account "the value to the provider of extensions ... whose cost is borne by someone else" was construed by the Full Court as requiring account to be taken of "instances where the cost has been borne by someone other than the provider or access seeker [and] where the extension was not the outcome of the exercise of rights conferred by Part IIIA itself"⁸¹. On that construction, according to the Full Court, the Tribunal "was obliged to take into account the present value to PNO of extensions being borne by others by reason of past user contributions". It followed that, "[b]y approaching

⁸⁰ *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 231-232 [167] (emphasis in original).

⁸¹ *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 250 [243].

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the issue in the way that it did, the Tribunal closed out that possibility in a manner that was not consistent with the correct interpretation of s 44X(1)(e)"⁸².

79 The pricing principle in s 44ZZCA(a)(ii) – that regulated access prices should "include a return on investment commensurate with the regulatory and commercial risks involved" – was construed by the Full Court to require "the formulation of an appropriate conclusion as to the value of the extent of the investment to be used in the assessment of the extent of return". This, according to the Full Court, the Tribunal "failed to do ... because of its view that a capital value determined in accordance with the agreed DORC methodology (without adjustment for any user funded contributions) was a value that would conform to the statutory requirement. That was not necessarily so."⁸³

Issues

80 In its appeal to this Court, PNO challenges the reasoning adopted by the Full Court in discerning legal error on the part of the Tribunal both in relation to the scope of the Navigation Service Charge and in relation to the amount of the Navigation Service Charge.

81 In relation to the scope of the Navigation Service Charge, PNO argues that the Full Court was wrong to characterise Glencore, when selling FOB, as a "third party" in relation to the Service within the meaning of Pt IIIA of the Act. The statutory reference to "access", PNO argues, connotes some measure of control over physical activity. Mere economic benefit from the physical activity of another is not enough. When selling FOB, Glencore is not a person who wants "access" to that part of the Service which comprises use of the shipping channels. The only person who wants "access" to use of the shipping channels in that circumstance is the owner or charterer of the ship, with whom Glencore has no contractual relationship and in respect of whom it therefore has no control.

82 In relation to the amount of the Navigation Service Charge, PNO argues that the Full Court misconstrued s 44X(1)(e) and overstated the effect of s 44ZZCA(a)(ii) of the Act.

82 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 252 [254]. See also at 258 [288].

83 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 254 [267].

83 For the reasons which follow, PNO's argument about the scope of the Navigation Service Charge is to be rejected, while its argument about the amount of the Navigation Service Charge is to be accepted.

Scope of the Navigation Service Charge

84 The issues concerning the scope of the Navigation Service Charge are best addressed by construing the meaning of "access" in the context of Pt IIIA of the Act before turning to construe the Service as identified in the Declaration.

The meaning of "access" in the context of Pt IIIA

85 The principles of statutory construction are familiar. Oftentimes they can seem banal. The task of construing "access" in the context of Pt IIIA of the Act is nonetheless assisted by noticing four of those principles and highlighting their present significance.

86 First, Pt IIIA is "always speaking in the present"⁸⁴. One corollary is that the 1995 Act, the 2006 Act and the 2017 Act must now be read together⁸⁵ "as a combined statement of the will of the legislature"⁸⁶. Another corollary is that meaning must now be attributed to the ongoing reference to "access" having regard to how well a potentially attributable meaning fits within the scheme of Pt IIIA as that scheme has emerged from the totality of those amendments. Here, the fact that notification of the access dispute predated the 2017 Act arguably means that the Act as it stood before the 2017 Act governed the substantive rights in issue in the re-arbitration before the Tribunal⁸⁷. Certainly, the reference to "access" in the description of the Service can only be understood in the context of the Act at the

84 *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148 at 174. See *Aubrey v The Queen* (2017) 260 CLR 305 at 321-322 [29]-[30]; *R v A2* (2019) 269 CLR 507 at 552 [141], 562 [169].

85 Section 11B(1) of the *Acts Interpretation Act 1901* (Cth).

86 *Commissioner of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463; *Plaintiff S297/2013 v Minister for Immigration and Border Protection* (2014) 255 CLR 179 at 186 [25].

87 Section 7(2) of the *Acts Interpretation Act 1901* (Cth); *Esber v The Commonwealth* (1992) 174 CLR 430 at 438-441.

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time the Declaration was made in 2016. Be that as it may, the operation of the 2017 Act cannot be ignored in assessing the fit of a potentially attributable meaning within the scheme of the Part⁸⁸.

87 Second, the ongoing reference to "access" in the text of Pt IIIA must be construed in the context of the Part as a whole within a broader context that includes the course of the legislative history of the Part and extrinsic materials pertaining to that legislative history. Understanding that broader context "has utility if, and in so far as, it assists in fixing the meaning of the statutory text"⁸⁹.

88 Third, as has been repeatedly emphasised in the context of Pt IIIA, "access" is "an ordinary English word" to be understood "in its ordinary English sense"⁹⁰. That "access" retains its ordinary English meaning is common ground on the appeal. The contest between the parties is as to the applicable shade of ordinary meaning. The constructional choice presented accordingly "turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies"⁹¹.

89 Fourth, the constructional choice falls to be made in the application of the principle of purposive construction⁹² reflected in the statutory instruction that "the interpretation that would best achieve the purpose or object" of a Commonwealth Act "is to be preferred to each other interpretation"⁹³. Application of that principle

88 *Grain Elevators Board (Vict) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86; *Masson v Parsons* (2019) 266 CLR 554 at 573-574 [28].

89 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503 at 519 [39]; *Thiess v Collector of Customs* (2014) 250 CLR 664 at 671 [22].

90 *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 at 130 [72], explaining *Sydney Airport Corporation Ltd v Australian Competition Tribunal* (2006) 155 FCR 124.

91 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531 at 557 [66]; *SAS Trustee Corporation v Miles* (2018) 265 CLR 137 at 149 [20].

92 *Thiess v Collector of Customs* (2014) 250 CLR 664 at 672 [23].

93 Section 15AA of the *Acts Interpretation Act 1901* (Cth).

requires that the term "access", no less than the term "service", be construed "in a way that would advance the attainment of the large national and economic objectives of Pt IIIA"⁹⁴.

90 The ultimate choice is therefore as to the shade of ordinary meaning of the term "access" that best gives effect to Pt IIIA's object of promoting the economically efficient operation of, use of and investment in the infrastructure by which services are provided and of thereby promoting effective competition in upstream and downstream markets.

91 The 2017 Act takes on this significance in making that choice. Before the 2017 Act, it could be said in somewhat generic terms that "the access referred to in criterion (a)" – and by implication the "access" referred to elsewhere in Pt IIIA – "is access by any third party"⁹⁵. Now, as a result of the 2017 Act, it is apparent that the mechanism through which the relevant object of the Part is sought to be achieved must be considered to be the "access" that a "third party" is given to a declared "service" by operation of the right to negotiate that s 44S(1) confers as a consequence of declaration.

92 Starting therefore with the definitions of "third party" and "service" in s 44B, two things are immediately apparent. One is that "access to [a] service" is not the same as "the use of an infrastructure facility". The use of an infrastructure facility is a "service". "Access" to that service is not the same as the service itself: it is a different and wider concept; "access" can include "use" but "access" is not limited to "use". The other is that, to be a "third party" in relation to the service, a person need be no more than a person who "wants access to the service".

93 Moving next to the incidents of the right to negotiate that s 44S(1) confers on a person who wants "access" to a declared service, it is apparent that the content of whatever "access" to a service comprising the use of an infrastructure facility that might be obtained through the exercise of the right to negotiate is circumscribed by the nature of the right. The outcome of the exercise of the right to negotiate is limited in the first instance to what might be determined by agreement between the person and the owner or operator of the facility. In default

94 *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at 161 [42]; *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379 at 418 [97].

95 *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 at 146 [140].

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of agreement, the outcome of the exercise of the right is limited to what might be determined in an arbitration to which the person and the owner or operator are parties.

94 Of course, some other interested person might volunteer to join a negotiation, so as to become a party to an agreement. Or some other interested person might choose to apply to become a party to an arbitration, so as to become bound by its final determination. Otherwise, the most that can come out of the exercise of the right to negotiate in relation to a declared service is a set of bilateral obligations, arrived at by agreement or determination by arbitration of disagreement, between a person who wants "access" to the use of the facility and the owner or operator of that facility.

95 Nothing in Div 3 confines the bilateral obligations that might be agreed or imposed by a final determination of an access dispute to obligations concerning the use of the facility by the person who wants "access" to the use of the facility or to obligations concerning the use of the facility by someone who is in an ongoing contractual relationship with that person. To the contrary, as s 44V(2) is at pains to spell out, a determination can "deal with any matter relating to access by the third party to the service".

96 The right of a third party to negotiate in relation to a declared service in that way replicates what might be expected to occur if the owner or operator of the facility by which the service in question is provided were operating in a competitive market, rather than being in a position to exercise monopoly power. In a competitive market, the threat of new entry would incentivise the owner or operator of the facility to negotiate towards agreement with any person in a given chain of supply who sincerely wanted to ensure the ability of that person, or of any other person in the chain of supply, to use the facility on reasonable terms and conditions. Were the owner or operator to refuse to negotiate on the basis that the person was not to be the actual user of the facility, the person would have the incentive and ability to look to making an agreement with the owner of a competing facility in order to secure the chain of supply.

97 Of the range of potential meanings that the term "access" is capable of bearing as a matter of ordinary English⁹⁶, the meaning that appears best to result in the right to negotiate operating to achieve the relevant object of promoting the economically efficient operation and use of, and investment in, the infrastructure by which services are provided is "[t]he right or opportunity to benefit from or use a system or service"⁹⁷. In respect of a person who is a competitor in a sufficiently connected upstream or downstream market there is no reason to confine or further refine that meaning.

98 The meaning accords with the straightforward explanation given by COAG in 1994 in the Information Package already quoted that "[t]he term 'access' means the ability of suppliers or buyers to purchase the use of essential facilities on fair and reasonable terms"⁹⁸. The nature of an essential facility – a "bottleneck facility" – is that its use by someone in a supply chain is needed to compete effectively in a market that is upstream or downstream from the facility. To a supplier or buyer who is a competitor in that upstream or downstream market who wants to ensure that the use of the bottleneck facility is on fair and reasonable terms, it cannot matter which person in the supply chain actually uses that facility.

99 To deny the right to negotiate to a competitor in a sufficiently connected upstream or downstream market who sincerely wants an opportunity to benefit from the use of an infrastructure facility by someone else, would have the potential to constrain the economically efficient operation and use of that infrastructure facility. In circumstances where the person is reliant on the use of the infrastructure facility by someone who is part of the person's chain of supply to an upstream or downstream market but is not someone with whom the person has a direct ongoing contractual relationship, the denial of the right to negotiate would have the potential to constrain the ability of that person to engage in effective competition in that upstream or downstream market. In both of those respects, the denial of the right to negotiate is antithetical to the achievement of the express object of the Part.

100 The latter point is well enough illustrated by the circumstances of the present case. As is obvious, and as was for good measure spelt out in evidence

96 See *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115 at 128 [67], quoting *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 at 270 [137].

97 *Oxford English Dictionary*, 3rd ed (2011), published online March 2021.

98 *National Competition Policy: Draft Legislative Package* (1994) at 1.10.

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placed before the Tribunal, wharfage charge pertaining to the use of the loading berths at the Port and navigation service charge pertaining to the use of the shipping channels at the Port both contribute to the landed cost of coal sold by Glencore to a buyer. That is so whether the coal is sold CIF (in which case the charterer of the ship physically using the shipping channels is typically Glencore) or FOB (in which case the charterer of the ship physically using the shipping channels is typically the buyer). To extend to Glencore the right to negotiate about the amount of the navigation service charge that might be fixed by PNO when Glencore sells CIF, but to deny to Glencore the right to negotiate about the amount of the navigation service charge that might be fixed by PNO when Glencore sells FOB, would be to constrain and distort the contractual choices available to Glencore as a competitor in the downstream market in which it sells its coal.

101 The right to negotiate that arises from an expansive understanding of the meaning of "access" no doubt allows for the imagination to conjure the occurrence of multiple access disputes over access to the same service initiated by third parties at multiple points in a supply chain. Extrapolating from the circumstances of the present case, it is possible to imagine persons other than Glencore also invoking the right to negotiate with PNO about the amount of the navigation service charge applicable to the use of the shipping channels by a particular ship carrying coal sold by Glencore – for example, the shipowner and the overseas buyer, and even a customer of the overseas buyer.

102 To imagine the prospect of practical mischief resulting from multiple access disputes is quite unreal. Once access is determined on reasonable terms and conditions, the bottleneck is unblocked. All in the supply chain benefit. The incentive for someone else in the supply chain to go to the trouble and incur the expense of invoking the right to negotiate in the hope of achieving a better arbitrated outcome must be slight. Trivial or vexatious attempts to invoke the right to negotiate can be put to one side on the basis that they are readily capable of being weeded out in the exercise by the ACCC of its power to terminate an arbitration. If overlapping substantive arbitrations of disputes over access to the same service were ever to occur, those disputes would be required to be determined by the same arbitrator – the ACCC – applying the same statutory criteria. This would mean that the chance of inconsistent final determinations would for practical purposes be non-existent.

103 None of that is to suggest that any person who might in any way benefit economically from the use of a service provided by means of an essential facility will be a "third party" having a right to negotiate with the provider of the service. The ripples of economic affection can be far reaching. Having regard to the principal object of Pt IIIA, economic effects felt outside the chain of supply

leading to competition in an upstream or downstream market lie beyond the scope of the Part.

The Service as described in the Declaration

104 The Declaration, it will be recalled, relevantly described the Service as "the provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port". Plainly, the introductory reference to "the provision of the right to access" is surplusage. Having regard to the structure of the definition of "service" set out in s 44B of the Act, the service declared by the Declaration is "the use" of an infrastructure facility constituted by the shipping channels, which are treated for the purposes of the Declaration as including the berths.

105 In circumstances where Glencore wants to ensure that it can continue to enjoy the economic benefit that it unquestionably gets from the ability of ships, loading and carrying the coal that it sells to overseas buyers, to use the shipping channels and berths at the Port, Glencore is a person who wants "access" to the Service. Glencore is thereby a "third party". By operation of the Declaration, Glencore as a "third party" has a right to negotiate with PNO about the amount of the navigation service charge that PNO might fix for the Service. That is so whether Glencore sells FOB or CIF.

106 By exercising the right to negotiate through notifying an access dispute about the amount of the navigation service charge payable in respect of ships carrying the coal that it sells to overseas buyers either FOB or CIF, Glencore became entitled to an arbitrated bilateral outcome. The outcome to which Glencore became entitled was no less than could have been achieved without arbitration had PNO been willing to reach an agreement with Glencore about the amount of the navigation service charge payable by Glencore as permitted under the provisions of the PMA Act.

107 The Full Court was, on that basis and to that extent, correct to conclude that the Tribunal had erred in law in treating the permissible scope of the Final Determination as confined to circumstances where Glencore exercised some measure of control over the physical activity of moving a vessel through a shipping channel. The Full Court was therefore correct to set aside the Tribunal Decision and to remit the matter to the Tribunal for redetermination of the Final Determination.

108 Equally, however, the arbitrated outcome to which Glencore became entitled by exercising the right to negotiate was no more than could have been

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achieved without arbitration had PNO been willing to reach an agreement with Glencore about the amount of the navigation service charge payable by Glencore as permitted under the provisions of the PMA Act. The Full Court would have been incorrect to the extent that its additional observations, already quoted⁹⁹, might indicate that the Tribunal's re-arbitration of the access dispute could result in a determination governing the circumstances in which PNO would seek and accept payment of the Navigation Service Charge from a person other than Glencore in respect of the particular use of the shipping channels by a particular ship carrying coal sold by Glencore.

109 Subject to the constraints of tort and competition law, and to the provision of contractual consideration, one person can ordinarily enter into a binding contract with another person about the price at which that second person will offer a service to a third person. The third person will then become liable to pay the price to the second person under a separate contract that will be formed between the second person and the third person if and when the offer is made and accepted.

110 Here, however, the terms of the PMA Act do not permit PNO to enter into that kind of bilateral arrangement having potential consequences for a third person. It will be recalled that s 67 of the PMA Act relevantly goes no further than to permit PNO to enter into an agreement about the amount of the navigation service charge with a person who is liable to pay the navigation service charge. Absent any other person with a sufficient interest having chosen to become a party to the arbitration of the access dispute between PNO and Glencore, the only person who has the potential to become liable to pay the Navigation Service Charge as a result of the Final Determination is Glencore. When Glencore sells FOB, Glencore can answer the description of a person who is liable to pay the Navigation Service Charge only by acting to bring itself within the extended meaning of "owner" of a vessel in s 48(4)(b) of the PMA Act so as to accept the obligation to pay the Navigation Service Charge.

111 The Tribunal on remitter must therefore be confined to determining the circumstances in which the Navigation Service Charge will be payable by Glencore to PNO. In respect of the particular use of the shipping channels by a particular ship carrying coal sold by Glencore, the concern of the Tribunal will be to work out a practical mechanism to govern when and how Glencore will invoke

⁹⁹ See *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 230 [162] and 231-232 [167], quoted at [76] above.

s 48(4)(b) of the PMA Act to represent to PNO that it accepts the obligation to pay the Navigation Service Charge.

112 There is no occasion to consider the additional basis on which the Full Court concluded that the Tribunal had erred in law, which involved construing the Declaration's description of the Service as describing one indivisible use of shipping channels and loading berths. Turning as it did on the peculiar wording of a now revoked statutory instrument, that additional basis for the Full Court's conclusion raises no issue of principle.

Amount of the Navigation Service Charge

Section 44X(1)(e) of the Act

113 The obligation imposed on the Tribunal by s 44X(1), to take specified matters into account in making the Final Determination, was an obligation to "give weight" to each of those matters as a "fundamental element"¹⁰⁰ of the decision-making process in which the Tribunal engaged to arrive at the Final Determination. Provided the Tribunal so took each of the specified matters into account, how the Tribunal factored each of them into its decision-making process was a matter for it¹⁰¹ subject to the implied condition that its decision-making power be exercised within the bounds of reasonableness¹⁰². No issue of unreasonableness has been raised in the present case.

114 It will be recalled that the Full Court found the Tribunal had misconstrued and misapplied s 44X(1)(e). For reasons to be explained below, the Full Court erred in its own construction of that provision. Before addressing the proper construction of s 44X(1)(e), it may be instructive to say something about the methodology that ought to be adopted by a court reviewing a decision of the Tribunal to determine whether that decision was affected by an erroneous construction.

115 Were the reference in s 44X(1)(e) to "extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone

100 *R v Hunt; Ex parte Sean Investments Pty Ltd* (1979) 180 CLR 322 at 329.

101 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

102 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36; *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439 at 445 [3].

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else" apt to encompass the creation by the State of New South Wales of the shipping channels and associated public works now used by PNO to provide the Service funded by "user contributions" from past users of the Port, a legal foundation would exist for an argument that the Tribunal, in refusing to make an allowance for the value to PNO of the shipping channels and associated public works so created, misconstrued s 44X(1)(e) in making the Final Determination in a manner that was "material" to its decision "in the sense that the decision which was in fact made by the Tribunal might have been different if the error of law had not occurred"¹⁰³. Evaluation of that argument would involve an examination of the extensive reasons that the Tribunal gave for choosing not to make an allowance by adjusting the DORC downwards by reference to "user contributions" to arrive at an RAB. That reasoning would not be "construed minutely and finely with an eye keenly attuned to the perception of error" in examining whether the Tribunal in fact acted upon a misconstruction of the provision¹⁰⁴. Consideration of the materiality of any misconstruction upon which it might be found to have acted would then fall to be undertaken mindful that the Tribunal "is constituted by a judge of the Federal Court and two experts"¹⁰⁵, making it "well fitted to decide the issues of fact and opinion to be resolved by it", and mindful that the curial supervisory jurisdiction to correct for error of law "ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power"¹⁰⁶.

116 When s 44X(1)(e) is read within the context of Div 3 of Pt IIIA as a whole, however, it is apparent that its reference to "extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone

103 *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* (2020) 94 ALJR 182 at 192 [40]; 375 ALR 98 at 109.

104 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

105 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 62 [15].

106 *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1184 [114]; 198 ALR 59 at 84 (footnotes omitted); *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at 62 [16].

else" is a reference only to extensions undertaken for the purpose of providing a third party with access in the context of Div 3 itself. In particular, s 44X(1)(e) can be seen to form part of a coherent self-contained statutory scheme. The service provider can be required under s 44V(2)(d) to extend a facility (including under s 44V(2A) by expanding the capacity or geographical reach of the facility). But by s 44W(1)(e) and (ea) the service provider cannot be required to bear any of the costs of the extension of the facility. The third party, or an associated entity, can therefore end up bearing the costs of the extension of the facility. But by s 44W(1)(d) the third party cannot become the owner of the extension without the consent of the service provider. Section 44X(1)(e) operates in those circumstances to redress the balance by requiring the value to the service provider of an extension of the facility for which the service provider bears no cost to be brought to account in the final arbitral determination of an access dispute between the service provider and a third party. The use of the present tense in s 44X(1)(e) confirms that operation. The "someone else" to whom it refers is simply someone other than the service provider. That might be the third party in dispute with the service provider. Or it might be one or more other third parties who are currently bearing the costs of the extension of the facility by reason of one or more previous arbitral determinations. Or it may be one or more of their associated entities.

117 Legislative history confirms that reading. Specifically, s 44X(1)(e) as originally enacted can be seen to have been framed in a manner consistent with a policy objective set out in the Competition Principles Agreement¹⁰⁷ by which COAG had agreed that any dispute resolution body established by a State or Territory should, when deciding disputes as to third party access to services provided by means of essential infrastructure facilities, take account of "the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake". While the language of s 44X(1)(e) was different, as the Full Court pointed out¹⁰⁸, and while s 44X(1)(e) forms part of a Commonwealth legislative scheme not that of a State or Territory, there is no reason to think that there was a different policy intent. The policy was consistent in 1995, and was consistently followed through in the subsequent amendment of s 44X(1)(e) in 2017.

107 Clause 6(4)(i)(iii).

108 *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 at 207 [51].

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118 The 2017 Act amended s 44X(1)(e) by inserting the bracketed words. It did so as part of a suite of amendments which included the insertion of s 44V(2A) and of s 44W(1)(ea). The suite of amendments gave effect to a recommendation of the Productivity Commission in 2013 that Pt IIIA should be amended "to confirm the prevailing interpretation by the [Tribunal] that the terms 'extend', 'extensions' and 'extending' in sections 44V, 44W and 44X include expansions of a facility's capacity"¹⁰⁹. The Productivity Commission had gone on in the recommendation to explain the intent of the amendment to be "that when making an access determination, the [ACCC] can require a service provider to expand the capacity of its facility (in addition to being able to require a geographical extension) and that the safeguards in sections 44W and 44X apply to directed capacity expansions". The Explanatory Memorandum for the 2017 Act correspondingly stated¹¹⁰:

"The intent of these amendments is to clarify that the [ACCC] can require a service provider to expand the capacity of its facility (as well as being able to require a geographical extension) when making an access determination. The amendments also clarify that the safeguards in sections 44W and 44X apply to directed capacity extensions."

119 The construction of s 44X(1)(e) to which the Full Court was persuaded cannot be sustained.

Section 44ZZCA(a)(ii) of the Act

120 Section 44X(1)(h) obliged the Tribunal to take the pricing principles specified in s 44ZZCA into account in making the Final Determination.

121 The Tribunal in fact took the pricing principle specified in s 44ZZCA(a)(i) into account when it adopted the BBM allowing for an MAR providing for an ROC to be calculated by reference to an RAB valued using a DORC methodology. The Tribunal in fact took the pricing principle specified in s 44ZZCA(a)(ii) into account when it took regulatory and commercial risk into account in determining the WACC considered appropriate to be used as the applicable ROC. Section 44ZZCA(a)(ii) simply did not bear on the issue addressed by the Tribunal

109 Productivity Commission, *National Access Regime*, Inquiry Report No 66 (2013) at 35.

110 Australia, House of Representatives, *Competition and Consumer Amendment (Competition Policy Review) Bill 2017*, Explanatory Memorandum at 109.

concerning whether the RAB as valued using a DORC methodology should be adjusted downwards by reference to user contributions.

122 The Full Court was mistaken to think that the application, through s 44X(1)(h), of s 44ZZCA(a)(ii) required more of the Tribunal than what the Tribunal in fact did.

Conclusion

123 The upshot is that the Full Court was wrong to discern legal error on the part of the Tribunal in relation to the amount of the Navigation Service Charge, but that the Full Court was right to discern legal error on the part of the Tribunal in relation to the scope of the Navigation Service Charge. The Tribunal's error in relation to the scope of the Navigation Service Charge was alone sufficient to justify the order of the Full Court setting aside the Tribunal Decision and remitting the matter to the Tribunal for determination according to law. That order must stand. For the avoidance of doubt, it will be supplemented with a direction making clear that the Tribunal will be confined on remitter to redetermining the scope of the Navigation Service Charge. For reasons already given, the redetermination of the scope of the Navigation Service Charge according to law will not extend beyond determining when and how Glencore will be obliged to pay the Navigation Service Charge to PNO consistently with the terms of the PMA Act.

124 As Glencore and PNO have each had a significant measure of success on the appeal, each should bear its own costs of the appeal and there should be no disturbance of the orders for costs made by the Full Court. The ACCC should bear its own costs in any event.

125 In the result, the orders made by the Full Court will be varied to include a direction confining the Tribunal on remitter to redetermining the scope of the Navigation Service Charge. The appeal will otherwise be dismissed with no order as to costs.