

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL and has been accepted for lodgment pursuant to the Practice Direction dated 3 April 2019. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Submissions

File Number: ACT 2 of 2018 and ACT 3 of 2018

File Title: Applications under section 44ZP of the Competition and Consumer Act 2010 (Cth) for review of the arbitration determination by the Australian Competition and Consumer Commission in relation to an access dispute between Glencore Coal Ltd and Port of Newcastle Operations Pty Ltd.

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 3/03/2021 9:30 AM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Nos: ACT 2 & 3 of 2018

Re: Applications under section 44ZP of the *Competition and Consumer Act 2010 (Cth)* for review of the arbitration determination by the Australian Competition and Consumer Commission in relation to an access dispute between Glencore Coal Ltd and Port of Newcastle Operations Pty Ltd.

Applicants Port of Newcastle Operations Pty Limited (ACN 165 332 990)
and
Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)

**SUBMISSIONS OF PORT OF NEWCASTLE OPERATIONS PTY LTD
ON INTERLOCUTORY APPLICATION**

INTRODUCTION

1. Pursuant to s 44ZZOAAA(4) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the Tribunal may request such information as it considers “reasonable and appropriate for the purposes of making its decision”. Such a request must be made by written notice given to the person specifying the information requested and the period within which it must be produced: CCA, s 44ZZOAAA(5).
2. On 14 December 2020, the Tribunal directed Port of Newcastle Operations Pty Ltd (**PNO**) to file and serve by 26 February 2021 any application for the Tribunal to issue a notice pursuant to s 44ZZOAAA(5) (**Notice**), together with a copy of the proposed notice, any affidavits or documents referred to in the notice (in so far as the notice is addressed to PNO or a related company), and any evidence and submissions in support of that application.
3. PNO now seeks a variation of direction 1 of the Tribunal's directions dated 14 December 2020, and consequent orders including that the hearing of PNO's application for the Tribunal to issue the Notice listed for 30 March 2021 be vacated.
4. PNO's interlocutory application is supported by an affidavit of Bruce Lloyd affirmed 25 February 2021 (**Lloyd 4**).

PNO's SPECIAL LEAVE APPLICATION

5. In circumstances where the High Court will hear PNO's application for special leave to appeal from the Full Court's decision (S171/2020) on 12 March 2021 (as notified to the Tribunal by PNO on 9 February 2020), it is PNO's **primary submission** that the appropriate course is for the Tribunal to await the determination of PNO's special leave application before taking any further material steps in the redetermination, including in relation to PNO's present application.
6. If special leave is granted, PNO submits that this matter should be adjourned until the High Court has heard and determined the appeal. As noted in PNO's submissions dated 16 November 2020 (at [56]):

[PNO's special leave] application concerns both aspects of the matters that have been remitted to the Tribunal for further determination in light of the decision of the Full Court, being: (a) the scope of the determination; and (b) the treatment of alleged user contributions. PNO's grounds of appeal raise important questions as to the proper construction of the statutory criteria for the making of determinations, including the treatment of user contributions, which are fundamental to the task currently before the Tribunal on remittal. If PNO succeeds in the High Court, that will have significant

consequences for the process to be conducted on the remittal. It might render it otiose. It might require a different process entirely. Further, the outcome may affect the rights of third parties - in particular, the rights of vessel operators currently accessing and using the shipping channels at the Port.

7. The Tribunal has determined that, in the circumstances of this matter, it is appropriate for the Tribunal to await the determination of the High Court appeal process before conducting the remitted review: *Application by Port of Newcastle Operations Pty Ltd* [2020] ACompT 3 at [14]. As the Tribunal observed:

if the Tribunal were to conduct the review before the High Court appellate process is completed, there is a prospect that the remitted review would be nullified in whole or in part by the High Court. In a worst case scenario, if the High Court were to set aside the decision of the Full Court but determine the issues in a different way to the Tribunal's original decision, the Tribunal may be required to conduct a third review of the same issues. Such a course would impose wasted costs on the Tribunal and the parties.

8. If special leave is refused, PNO should be required to file its application and supporting material by 19 March 2021, and the matter should be re-listed for case management in the week commencing 22 March 2021 with a view to PNO proceeding with its application for the Tribunal to issue it with the Notice.

WORK UNDERTAKEN BY PNO TO DATE TO COMPLY WITH DIRECTION 1

9. Lloyd 4 at [9]-[10] sets out the information and documents which PNO expects would be requested by a Notice were it to be issued, while PNO's efforts to comply with direction 1 to date are detailed in Lloyd 4 at [17]-[46].
10. In accordance with the Tribunal's directions of 14 December 2020, PNO has prepared and is ready to file two affidavits in response to two proposed items previously notified to the Tribunal in the draft notice attached to PNO's submissions dated 26 November 2020 – see Lloyd 4 at [12]-[15], as well as Mr Lloyd's explanation of minor variations that PNO has made to these items in light of recent developments at [10(a)-(b)]. Copies of the unsworn affidavits are annexed to Lloyd 4.
11. PNO has previously made submissions about the necessity and relevance of the information sought by items 1 and 2 of the Notice in its submissions dated 26 November 2020 (at [10]-[29]).
12. Further, since 14 December 2020, PNO has been taking steps to identify the kinds of primary records that may be available in the possession, power or control of PNO that have not

previously been adduced in evidence before the ACCC or Tribunal in these proceedings, and which identify or provide information in relation to:

- (a) the volume or type of material dredged;
- (b) the price paid for the dredging and/or the identity of the party or parties who paid for the dredging; or
- (c) the use of spoil or other value sharing,

for each of the five historical expansion projects at the Port of Newcastle in respect of which the ACCC made a deduction to the DORC value (as identified at pages 131-2 of the ACCC's statement of reasons).

13. The extensive work PNO and its instructing solicitors have undertaken since 14 December 2020 has in broad terms involved:
 - (a) identifying, digitising and analysing historic hydrographic surveys in relation to each of the five historic expansion projects, which have not previously been in evidence before the ACCC or Tribunal, or available to the parties' experts;
 - (b) conducting targeted searches of PNO's electronic document management system (**DMS**) and reviewing over 8,300 documents extracted from PNO's DMS that may contain material of the kind referred to in paragraph 12;
 - (c) pursuing avenues of enquiry with third parties in relation to relevant primary records of the kind referred to in paragraph 12 which may be in their possession, power or control; and
 - (d) engaging with PNO's experts in relation to other matters which may be reasonable or necessary for the Tribunal to request information for the purposes of making its decision.
14. PNO has also been engaged in numerous other activities to identify potentially relevant material. Certain of those activities have not led to the identification of further material, and so there is no need to consider them further.

REASONS WHY PNO REQUIRES AN EXTENSION OF TIME

15. PNO requests an extension of time to comply with direction 1 for the reasons below, which are outlined in Lloyd 4.
16. *First*, PNO and its instructing solicitors have had difficulty obtaining sufficient time with Counsel briefed in this matter to settle the material – see Lloyd 4 at [5]-[8].

17. *Secondly*, despite its best efforts, PNO requires a short additional period of approximately 3 weeks to complete preparation of the additional information and documents which would be requested by its proposed notice. This is on the basis that:
- (a) Mr Robert Kelly (Survey Manager, PNO) estimates that he requires approximately 1.5 weeks to finish identifying the relevant hydrographic surveys for the relevant projects, which are probative as to the volume of material dredged during the expansion projects – see Lloyd 4 at [27];
 - (b) PNO requires approximately 2 weeks to complete its review of the documents sourced from PNO's DMS – see Lloyd 4 at [33];
 - (c) Dr Simon Ward (Executive Advisor at GHD Advisory, formerly of AECOM and the author of AECOM's expert engineering reports on which PNO relied in the ACCC arbitration proceedings) requires an additional period of some weeks to finish digitising and analysing the hydrographic surveys identified by Mr Kelly, and to prepare his expert engineering report calculating the volume of material removed for each of the five projects – see Lloyd 4 at [43]; and
 - (d) PNO's engaged experts similarly require a period of some weeks to prepare their expert reports into the other matters that PNO expects to apply for the Tribunal to request by way of a notice under s 44ZZOAAA(5).

REASONS WHY THE TRIBUNAL SHOULD GRANT THE EXTENSION

18. The reasons why the information and documents sought by the Notice which PNO expects to apply to have the Tribunal issue are reasonable and appropriate for the Tribunal to request are properly a matter for the submissions in support of that application.
19. In summary, PNO submits that the material which PNO wishes to adduce:
- (a) was not before the ACCC or Tribunal previously;
 - (b) is the best evidence in order for the Tribunal to analyse the relevant matters in accordance with the relevant criteria in s44X(1);
 - (c) is available to put before the Tribunal; and
 - (d) should be before the Tribunal now.
20. It is not appropriate in these submissions on an extension of time to rehearse in any detail the arguments that will be addressed in due course on any contested application for the Tribunal

to make a request under s 44ZZOAAA(5). However, in relation to the question of the utility of the further work being undertaken, the following brief points are made.

21. *First*, each of the parties' expert engineers estimated the volume of material removed during each of the dredging projects based on incomplete primary data and extrinsic material. The hydrographic surveys which are presently being collated and digitised show depth soundings of the relevant areas immediately before and after the relevant dredging projects. These primary records have never been in evidence before the ACCC or Tribunal in their entirety, nor available to the parties' experts. The primary dredging records are the best evidence available to the Tribunal. It would be undesirable for the Tribunal's task (which involves a re-arbitration, not a review of the ACCC's process) to proceed on a false factual basis.
22. Insofar as PNO will seek to have the Tribunal request an expert engineering report in relation to these hydrographic surveys, as explained in Lloyd 4 at [39], and demonstrated by the sample surveys contained in Annexure BLL-3, the raw data contained in the surveys themselves is not a sufficient basis, on its own, to allow the volume of material removed as part of each dredging project to be readily ascertained. An expert engineering report is required to digitise, compile and analyse the surveys. This involves building volumetric models of the relevant sections of the Port's channels and berth immediately before and after relevant dredging projects, which will enable a much more accurate calculation of the volume of material dredged than was previously possible.
23. *Secondly*, it is very likely that there will be documents from PNO's DMS which are presently undergoing further review, which have not previously been in evidence and which will provide further information in relation to:
 - (a) the volume or type of material dredged;
 - (b) the price paid for the dredging and/or the identity of the party or parties who paid for the dredging; or
 - (c) the use of spoil or other value sharing,which are all matters which will assist the Tribunal in making its decision.
24. Considerable effort and expense have already been expended by PNO in gathering and reviewing this material, which process is nearly complete.
25. *Thirdly*, insofar as the Notice may request an expert report into actual data in relation to the Port in the period 2018-2020, PNO submits that the Tribunal would have benefit from having actual information which is now available, which was not available at the time the Building

Block Model (**BBM**) was developed by the ACCC. Specifically, the ACCC used a number of forecast variables in its BBM. One example is the volume of coal and non-coal exports in that period, in respect of which actual data now exists and is available. That actual data is materially different from the forecast volume of exports which was used in the ACCC model in 2018. Receipt of this actual data into evidence would enable the Tribunal to undertake a more accurate calculation.

26. *Fourthly*, the Full Court has directed the Tribunal to take into account the present value to PNO of extensions whose cost was borne by others.¹ In light of this direction, PNO considers it reasonable and appropriate, and necessary, for the Tribunal to consider evidence in relation to the actual value to PNO of those extensions over time. This evidence has not previously been put before the ACCC or Tribunal, so there is presently no basis on which the Tribunal can comply with the Full Court's direction.
27. *Finally*, there is no material prejudice to Glencore in granting the extension. The Tribunal has accepted that awaiting the conclusion of the High Court appellate process will not cause any substantive prejudice to Glencore: T[14]; see also affidavit of Bruce Lloyd affirmed 5 October 2020. It naturally follows that an additional 3 weeks at this interlocutory stage, including in circumstances where there is a possibility of a substantive appeal in the second half of 2021, will not cause material prejudice to Glencore.
28. For the above reasons, PNO submits that the Tribunal should make the orders sought by PNO's interlocutory application.

DATED: 2 March 2021

Cameron Moore SC

Declan Roche

Peter Strickland

Counsel for Port of Newcastle Operations Pty Ltd

¹ The relevant passages of the Full Court's reasons directed that the Tribunal is "obliged to take into account the present value to [PNO] of extensions being borne by others by reason of past user contributions"; reasons at [252]; and "[t]here may be aspects of the past that bear upon a conclusion at the relevant time as to whether the cost that has been met in the past that is represented by the present value of an extension might properly be said to be cost that "is borne"", at [289].