

NOTICE OF LODGMENT
AUSTRALIAN COMPETITION TRIBUNAL

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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 Commissioner in relation to an access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



REGISTRAR

Dated: 3/11/2020 4:25 PM

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)

File No: ACT 2 of 2018

Re: Application by Port of Newcastle Operations Pty Ltd 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

Applicant: Port of Newcastle Operations Pty Ltd

AND

File No: ACT 3 of 2018

Re: Application by Glencore Coal Assets Australia Pty Ltd 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

Applicant: Glencore Coal Assets Australia Pty Ltd

GLENCORE'S SUBMISSIONS ON SCOPE OF DETERMINATION

INTRODUCTION

1. These submissions are made on behalf of Glencore pursuant to paragraph 1 of the Tribunal's directions made on 6 October 2020 in support of the attached orders that it says the Tribunal should make in relation to the question of the scope of the determination.
2. The ACCC's final determination made under s 44V of the *Competition and Consumer Commission Act 2010 (Cth)* (**Act**) addresses two charges, which PNO levies on Port users as the 'relevant port authority' under the *Ports and Maritime Administration Act 1995 (NSW)* (**PMA Act**):
 - (a) First, the 'Navigation Service Charge' (**NSC**), which is payable under s 50(1) of PMA Act in respect of the general use by a vessel of the Port and its infrastructure.

The charge is payable by the ‘owner’ of the vessel (s 50(4)). Under ss 48(2) and (4), the ‘owner’ of a vessel is defined to include a person registered as the vessel’s owner; a person who chartered the vessel; or a person who, whether on the person’s own behalf or on behalf of another, exercises any of the functions of the owner of the vessel or represents to the relevant Port authority that the person has those functions or accepts the obligation to exercise those functions; and

- (b) Second, the ‘Wharfage Charge’, which is payable under s 61(1) of the PMA Act in respect of the availability of a ‘site’ at which stevedoring operations may be carried out at the Port. The ‘site’ relevantly includes the air space above and the water below the coal berths and adjacent wharves. The charge is payable, in the case of cargo that is loaded at the site, by the person who, immediately before it is loaded, is the owner of the cargo (s 61(3)).
3. The ACCC Final Determination provided for the scope of the determination in relation to the above charges to be limited to one or both of the following situations:
- (a) where Glencore, either directly or by agent, charters the vessel to enter the Port precinct and load Glencore coal; and
 - (b) where Glencore makes a representation to PNO of the kind referred to in s 48(4)(b) of the PMA Act that it has the functions of the owner of the vessel, or accepts the obligation to exercise those functions, to enter the Port precinct and load Glencore coal.
4. The first limb has never been in dispute. However, it does not apply to the vast majority of Glencore coal exported from the Port (which is exported on a ‘Free on Board’ basis where Glencore is not the charter).¹ In its determination made 30 October 2019, the Tribunal varied the ACCC’s final determination to exclude the second limb.²
5. The Full Court set aside the Tribunal’s determination and remitted the matter back to the Tribunal to be determined according to law.³ In accordance with the Full Court reasons (see below), the Tribunal should reinstate the second limb and vary the determination to

¹ See *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (FCAFC Judgment) at [135]. As to the meaning of ‘Free on Board’, see FCAFC Judgment at [129]-[135], and [133] in particular.

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

³ See FCAFC Judgment.

provide for an additional third limb which Glencore has sought all along and which was embraced by the Full Court.

FULL COURT REASONS ON SCOPE

6. As to scope, the Full Court held, *inter alia*, that:
- (a) the Tribunal was in legal error in confining the terms of the determination to instances where Glencore was the party in control of the ship;⁴
 - (b) 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;⁵
 - (c) the coal exporter is accessing or using the shipping channels when, by its sale agreement, it causes a vessel to enter the Port – that is, irrespective of whether it owns, demise charters, time charters or voyage charters the vessel, or not, as the case may be;⁶
 - (d) the Tribunal was in error in excluding the second limb of the scope of the determination found by the ACCC;⁷
 - (e) the submissions of PNO in relation to the second limb were necessarily founded on the narrow interpretation of the Service⁸ with which the Court disagrees, being physical access to the shipping channels by the party who controls the navigation of the ship.⁹ Contrary to PNO's arguments, there is no real fear of arbitrage or uncertainty, the determination would be confined to ships carrying Glencore coal, however that might be defined; and we see no encroachment on the legitimate interests of PNO;¹⁰
 - (f) the determination of Glencore's terms of access must include a mechanism making the determined access price available both to Glencore and to any ship owners that carry Glencore coal through the Port of Newcastle. The purpose and object of this

⁴ FCAFC Judgment at [159].

⁵ FCAFC Judgment at [158].

⁶ *Ibid.*

⁷ FCAFC Judgment at [163].

⁸ As defined in FCAFC Judgment at [147].

⁹ FCAFC Judgment at [164].

¹⁰ FCAFC Judgment at [165]-[166].

mechanism is to ensure that Glencore will obtain the economic benefit of the determined access price;¹¹ and

- (g) the precise wording of the term of access described in sub-paragraph (d) above is to be determined by the Tribunal on remitter, but it can take the form of a condition in Glencore's access determination:
- (i) allowing Glencore to nominate the ship owners that can use the Service to carry its coal through the Port at the determined access price;¹² or
 - (ii) giving ship owners carrying Glencore coal through the Port the ability or option through Glencore to take up Glencore's determined access price as the applicable NSC;¹³ or
 - (iii) requiring PNO to give all ship owners carrying Glencore coal through the Port the right to pay a NSC that is no greater than the determined access price under Glencore's determination.¹⁴

7. In conclusion, the Full Court said:¹⁵

“For the above reasons, we respectfully conclude that the Tribunal misconstrued the terms of the declared Service and so asked itself the wrong question. It is, however, for the Tribunal, not this Court, to fashion the scope of the terms. We would set aside the determination and remit the matter to the Tribunal to fix the terms of the scope of the determination in the light of these reasons. The working out of arrangements in the terms of access for Glencore to stipulate a mechanism by which the determined access price would apply to ships carrying coal from Glencore's mine would also be a matter for the Tribunal in the re-arbitration.”

FORM OF ORDERS

First limb

8. The first limb has never been in contention and is pressed by Glencore.¹⁶

¹¹ FCAFC Judgment at [167].

¹² FCAFC Judgment at [159].

¹³ FCAFC Judgment at [162].

¹⁴ FCAFC Judgment at [167].

¹⁵ FCAFC Judgment at [169].

¹⁶ Before the Tribunal, PNO argued the issue was simply whether the scope of the Final Determination "should be confined to circumstances where Glencore charters a vessel to enter the precinct and load Glencore coal": PNO's Originating Application to Tribunal for Review dated 8 October 2018 at [5.2] (emphasis added).

Second limb

9. The second limb was granted by the ACCC but excluded by the Tribunal. The Full Court expressly rejected the Tribunal's approach, saying: "*we respectfully consider that the Tribunal was in error in excluding the second inclusive limb of the scope of the determination found by the ACCC*".¹⁷
10. That being so, Glencore is entitled to reinstatement of the second limb. In those cases where Glencore brings itself within s 48(4)(b), it is accessing the Service because it is exercising functions of the owner of the vessel or cargo within the Port or, by means of representation or acceptance, it is legally liable for the exercise of those functions and/or the payment of Port charges. The Full Court made it plain that Glencore is entitled to a determination that deals with any matter relating to access by it as an access seeker, including situations where it is not the party in control of the ship.¹⁸
11. In the attached orders, Glencore has made minor modifications to the second limb so as to better accord with the terms of the PMA Act and to clarify the meaning of Glencore coal. These changes are made with a view to avoiding future disputes between the parties. As the Full Court said, the "*working out of arrangements in the terms of access for Glencore to stipulate a mechanism by which the determined access price would apply*" is a matter for the Tribunal in this re-arbitration.¹⁹
12. As to the PMA Act, the attached orders incorporate two sub-paragraphs (see [2.1(b)]) to reflect the fact that Glencore may make a representation to PNO under s 48(4)(b) of the PMA Act in respect of either or both:
 - (a) ownership of a vessel – that is, for the purposes of the NSC, it has the functions of the owner of the vessel, or accepts the obligation to exercise those functions, to enter the Port precinct and load Glencore Coal; and
 - (b) ownership of cargo – that is, for the purposes of the wharfage charge, it has the functions of the owner of cargo consisting of Glencore Coal, or accepts the obligation to exercise those functions.

¹⁷ FCAFC Judgment at [163].

¹⁸ FCAFC Judgment at [159].

¹⁹ FCAFC Judgment at [169].

13. In a new paragraph of the orders (see [2.1A(b)]), “Glencore Coal” has been defined in accordance with the position before the ACCC as any coal produced from mines owned (in whole or in part) or operated by Glencore.²⁰ For the avoidance of any doubt, “Glencore” has also been defined to pick up all related body corporates within the meaning of s 50 of the *Corporations Act 2001* (Cth) (see [2.1A(a)]). These definitions are consistent with the Full Court's focus on economic access of the Port by Glencore, as is occurring whenever 'Glencore is selling and loading coal'.²¹

Third limb

14. The third limb at [2.1(c)] of the attached orders was embraced by the Full Court. It provides for the application of the determination in the specific circumstances directed by the Full Court – that is, in circumstances where Glencore accesses the berths at the Port and/or a site at which stevedoring operations are carried out, and loads Glencore Coal onto vessels that have travelled, and will travel, through the Port.²²
15. In that respect, the Full Court held:

[154] [...] Access to and use of the shipping channels is by not only the economic access and use of the channels and berths, but also the physical use of the berths (being part of the shipping channels) by use of adjacent wharves for which the WhC is paid, as part of the Service.

...

[157] [...] Glencore pays for and seeks access to the site. This is shown by the fact that the WhC is covered by the Tribunal's determination. Part of the MAR is allocated to the WhC. Glencore is physically accessing or using the berth by the use of the immediately adjacent wharf and water below adjacent to the revetments, in loading the ship at the berth. The WhC is a product of the PMA Act, but it is regulated by the determination and that is so because it concerns the access and use of "berths next to wharves as part of the channels". In our respectful view, that part of the Service is accessed or used by Glencore both physically and economically, whenever Glencore is selling and loading coal. So, the Service is accessed or used.²³

16. The new paragraph [2.1(c)] has been drafted so as to be limited to “Glencore Coal”. In addition, and again for the purposes of seeking to avoid disputes, the new limb has been

²⁰ ACCC's Final Determination: Statement of Reasons dated 18 September 2019, p 22.

²¹ FCAFC Judgment at [157].

²² See Glencore's Originating Application to Federal Court for Review dated 27 November 2019 at [2].

²³ It follows that the determination should apply wherever Glencore is accessing the berths at the Port and/or a site which stevedoring operations are carried. In those circumstances Glencore is an access seeker and is entitled to a determination that deals with that aspect of its access. The third limb therefore does no more than ensure that where Glencore physically accesses the Service, the determination applies. Any controversy as to whether Glencore does physically access the Service by the berth, the adjacent wharf, and water below the revetments, was plainly settled by the Full Court in Glencore's favour.

confined to “Glencore Nominated Vessels”: defined as (see [2.1A(c)]) any vessel nominated by Glencore to PNO as carrying Glencore Coal where the vessel owner or shipping agent has advised Glencore it wishes to take up the NSC which is the subject of this determination when carrying Glencore Coal. This form of access accords with the Full Court reasons (see paragraph 6(g) above).

17. The requirement that the vessel owner or shipping agent must have advised Glencore it wishes to take up the regulated NSC addresses PNO’s assertion that PNO has entered into long term contracts with shipping agents at the Port (a matter that was not before the Tribunal within the meaning of s 44ZZOAA of the Act) and Glencore’s proposed access would create uncertainty about which terms apply. As drafted, there can be no problem in this regard. If Glencore nominates a vessel, PNO will know that the owner/shipping agent wants to take up the determined NSC price when carrying Glencore Coal (rather than any other price) and PNO will then be obliged to charge the owner/shipping agent the determined NSC price.
18. The foregoing orders give effect to the Full Court's reasons and its clear focus on practicality. More specifically, the orders "*conform practically to the workings of the Port and the PMA Act*".²⁴ There is no warrant for PNO to seek to interfere with the shipping arrangements as determined between Glencore and its customers for Glencore Coal.

3 November 2020

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²⁴ FCAFC Judgment at [162].