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: 16/11/2020 5:51 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)**

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 APPLICATION FOR TRIBUNAL TO REQUEST FURTHER INFORMATION

Provided pursuant to the direction of the Tribunal made 6 October 2020

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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. At the last case management hearing on 6 October 2020, the Tribunal directed Port of Newcastle Operations Pty Ltd (**PNO**) to file and serve by 13 November 2020 any application for the Tribunal to issue a notice pursuant to s 44ZZOAAA(5).

3. PNO now requests that the Tribunal issue it with the attached s 44ZZOAAA(5) notice concerning information relevant to the revocation of the declaration of the Service in September 2019, and PNO's recent agreements with shipping agents for coal vessels calling at the Port (the **Notice**). What follows below are the reasons why it is "reasonable and appropriate" for the Tribunal to request this information, which in short is because it has critical relevance to the period, and the terms and conditions, of the access determination that the Tribunal must make.

4. PNO also requests an extension of time for filing a further application for a s 44ZZOAAA(5) notice concerning information relevant to user contributions. It is likely to be "reasonable and appropriate" for the Tribunal to request such information given the Full Court's reasons. However, in the time available since 6 October 2020, it has not been possible for PNO to ascertain with precision what that information would be and where it may be located. Thus, PNO needs a short additional period to prepare its application.

5. Importantly, this extension of time would not cause any prejudice to Glencore, because the dispute ultimately is one about money. In fact, there would be some utility in this course. Not only would an extension enable PNO to identify with precision the information that the Tribunal ought to request, it would also mean that Commonwealth resources are not wasted in the meantime by taking any material steps in the redetermination before PNO's application to the High Court for special leave has been determined.

6. PNO's application in both respects is supported by an affidavit of Bruce Lloyd affirmed on 16 November 2020 (**Lloyd**).

NOTICE CONCERNING REVOCATION AND CURRENT TERMS AND CONDITIONS

Nature of the Notice

7. The attached Notice seeks information concerning the following matters:

    7.1 the fact that on 23 September 2019 the declaration of the Service at the Port was revoked, and the reasons for that revocation, as described in the recommendation of the National Competition Council (**NCC**) dated 22 July 2019;

    7.2 the terms and conditions on which coal vessel operators access the channels at the Port, including PNO's current standard terms and conditions and the bilateral access arrangements it has with shipping agents for those vessel operators; and

    7.3 the number of vessels which visited the Port in 2019, including the number of coal vessels.

8. PNO needs three weeks to respond to the Notice for the reasons set out at Lloyd [10].

9. The issue for the Tribunal is whether requesting this information is "reasonable and appropriate". This is to be addressed by having regard to the relevance of the information sought, and other factors such as whether the information would fill a gap in the Tribunal's knowledge[1], whether it would materially expand the scope of the re-determination[2], and whether it was not reasonably able to have been provided previously to the ACCC.[3] Each of these matters is addressed below.

Relevance of information sought concerning revocation of declaration

10. On 26 July 2019, the NCC recommended to the Treasurer under s 44J(1) of the CCA that the declaration of the Service at the Port be revoked: Lloyd [80]. The NCC did so because it was no longer satisfied that criterion (a) of the declaration criteria in s 44CA(1) was met. In other words, the NCC was not satisfied that access (or increased access) to the Service at the Port, on reasonable terms and conditions, as a result of declaration would promote a material

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[1] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT1 (**Tribunal reasons**) at [110] – [111].

[2] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT1 at [107].

[3] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT1 at [106].

increase in competition in at least one market, other than the market for the Service: see NCC report at [1.5] (Lloyd [80], page 11 of Exhibit BLL-2).

11. The NCC's reasons for this conclusion were that it considered that:

    11.1 PNO is unlikely to have an incentive to deny access to firms operating in related markets, because it is not vertically integrated into markets relating to coal export activity: see NCC report at [1.7] (Lloyd [80], pages 11 to 12 of Exhibit BLL-2);

    11.2 there are important factors that are likely to constrain PNO in setting terms of access to the Service, including that the Port is competing to attract coal mining activity to the Newcastle catchment, and that if it were to impose excessive charges, this likely would attract NSW Government intervention: see NCC report at [1.9] (Lloyd [80], page 12 of Exhibit BLL-2);

    11.3 lower charges for the Service were unlikely to promote competition in related markets, including because the coal export market is already likely to be effectively competitive: see NCC report at [1.13] (Lloyd [80], page 14 of Exhibit BLL-2); and

    11.4 any charges at the Port are likely to remain a small proportion of international spot prices for coal in any event, with or without declaration of the Service: see NCC report at [1.14] (Lloyd [80], page 14 of Exhibit BLL-2).

12. The Treasurer did not make any decision in response to the NCC's recommendation. This meant that on 23 September 2019, the Treasurer was taken to have made a decision to revoke the declaration pursuant to s 44J(7): Lloyd [81], page 185 of Exhibit BLL-2].

13. The revocation itself does not prevent the Tribunal from re-determining the dispute between Glencore and PNO. This is because s 44I(4) provides that revocation does not affect the arbitration of an access dispute notified before the revocation.

14. Nevertheless, the revocation of declaration, and the NCC's recommendation, has particular significance for the re-determination in at least two important respects.

15. *First*, the fact that the Service is no longer declared is relevant to the *period* for which the access determination should apply. Section 44X(1)(aa) requires the Tribunal to take into account the objects of Part IIIA in making an access determination. This directs attention to 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: s 44AA(a). The Tribunal also must take into account the public interest in having competition in markets: s 44X(1)(b). What is significant about this is that these objects can only be achieved while the Service is declared, because the period of declaration is the only period for which the Treasurer has been satisfied that regulated access would promote competition. In other words, as a matter of principle, an access determination will not achieve the relevant objects if it extends beyond this period, because the requirement that declaration meet the Part IIIA criteria for that extended period has not been met.

16. This proposition was recognised by the ACCC in its Final Determination. It considered it appropriate to "align the duration of the arbitrated terms of access with the period of the declaration of the Service" (at p30). Further, although it is ultimately a matter for the Tribunal, there are strong factual indications that if the access determination were to extend beyond the period for which the Service was declared (ie. beyond 23 September 2019), it would not promote the objects of Part IIIA. This is because the NCC has concluded that declaration would no longer promote competition in related coal export markets. Accordingly, the Tribunal ought to have regard to the date on which the declaration of the Service was revoked, and the NCC's recommendation, in its re-determination.

17. *Secondly*, the fact that the Service is no longer declared is also relevant to the efficacy of particular terms and conditions of access. For example, the dispute resolution clause of the ACCC's Final Determination ultimately relies on a fresh arbitration being notified pursuant to s 44S of the CCA if the parties cannot reach agreement (cl. 14.4).[4] This clause no longer works, because neither party can notify an access dispute under s 44S now that the Service is not declared. Accordingly, it is relevant and important for the Tribunal to have before it the fact of revocation, so it can formulate meaningful and workable terms of access on the re-determination.

Relevance of information concerning current terms of access

18. One practical consequence which flows from the Full Court's decision is that the Tribunal will need to fashion some mechanism by which the terms of the access determination will somehow be made available to ships carrying Glencore's coal when Glencore does not own or

[4] See the ACCC's Final Determination at Annexure 'A' of *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT1.

has not chartered (including via an agent) the ship. The Full Court[5] (at [162]) contemplated that this could involve providing ships carrying Glencore's coal with an "option" of taking up Glencore's arbitrated price, or "arrangements in 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" (at [169]). The Full Court said that working out these arrangements is a matter for the Tribunal, and that it would need to "conform practically to the workings of the Port and PMA Act" (at [162]).

19. This analysis will involve complexity, particularly if, contrary to the submissions above, the Tribunal considers that the period for the determination should extend beyond 2019. This is because of:

    19.1 the existence of other contractual arrangements between PNO and shipping agents that commenced in January 2020 (the **Agent Deeds**): see Lloyd [78]-[79], pages 239 to 255 of Exhibit BLL-2; and

    19.2 the consequence of those alternative arrangements being that the amount being charged for access to the shipping channels is not a navigation service charge fixed under ss 50 and 51 of the *Ports and Maritime Administration Act 1995* (NSW) (**PMA Act**), but rather is an amount payable pursuant to s 67 of the PMA Act: see Lloyd [79].

20. In other words, if the Tribunal is to develop a mechanism that conforms to the workings of the Port and the PMA Act, it will need to grapple with how PNO's existing arrangements with shipping agents can practically co-exist with ships having an option to take up an arbitrated navigation service charge (**NSC**) when carrying Glencore's coal. This consideration will need have regard to the factors set out in s 44X(1), which especially include PNO's legitimate business interests pursuant to s 44X(1)(a). To take but a few examples of the complexities this issue would raise:

    20.1 if ships carrying Glencore's coal are given the option of taking up the arbitrated NSC, the Tribunal would need to consider whether this charge can simply replace the different charges under the Agent Deed, notwithstanding that one is a NSC

[5] *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145.

fixed under s 50 and 51 of the PMA Act, and the other is a charge payable be agreement pursuant to s 67 of the PMA Act;

20.2 if the arbitrated NSC replaces the different charge under the Agent Deed, the Tribunal would need to consider whether it is practical, fair, or efficient, for PNO and the shipping agents to have any or all of the other terms of the Agent Deed continuing to apply in circumstances where the price for the service is changed; and

20.3 in particular, given the Agent Deed represents a bargain reached in good faith and at arms' length between PNO and the shipping agent, the Tribunal would need to consider whether it is appropriate that shipping agents can take advantage of those same terms in exchange for a lower arbitrated NSC.

21. This analysis can only be performed if the Tribunal has before it PNO's current terms and conditions of access for coal vessels entering the port.

22. In addition, PNO has entered into Agent Deeds with *all* shipping agents for coal vessels calling at the Port, who each did so as agent for the vessel operator: Agent Deed, item 13 (see Lloyd [82], page 244 of Exhibit BLL-2). In other words, whenever Glencore owns or charters a ship to carry its coal, the ship is bound by the Agent Deed. This raises an issue, including potentially under s 44Y(1)(d), as to whether there is any utility in determining an arbitrated NSC for those vessels when there is effectively already an existing contract between PNO and Glencore covering those ships. Once again, the Tribunal can only consider this issue properly if it has before it the Agent Deeds, and information concerning the extent to which these deeds apply to coal vessels entering the Port.

Other matters relevant to whether the Notice is "reasonable and appropriate"

23. Quite apart from relevance of the information requested in the proposed Notice, there are further reasons why it is "reasonable and appropriate" for the Tribunal to issue it.

24. *First*, the information is new, and only came into existence after the ACCC published its Final Determination in 2018. It was not possible at that time for PNO to have provided it to the ACCC. Accordingly, it cannot be said that it would be unreasonable for the Tribunal to request this information now: cf. Tribunal reasons [105].

25. *Secondly*, the fact that the information is new means that requesting it now would not minimise the incentive for parties to place all relevant material before the ACCC in future access

disputes: cf. Tribunal reasons [107]. There is no sense in which requesting this information would cut across the efficiency of the arbitration framework contemplated by Part IIIA.

26. *Thirdly*, the information requested by the proposed Notice is confined, and of very limited scope. There is no prospect that it would result in any "material broadening" of the re-determination task which confronts the Tribunal: Tribunal reasons [107].

27. *Fourthly*, if the Tribunal does not have the information requested by the proposed Notice before it, there will be a significant gap in the Tribunal's knowledge. Indeed, if the Tribunal were unable to take into account the fact that declaration of the Service has been revoked, it would be operating under the erroneous assumption that the Service will continue to be declared until 2031.

28. *Fifthly*, contrary to Tribunal's reasons at [111], there is nothing in the statutory language of s 44ZZOAAA(4) or (5) that precludes the Tribunal from requesting *new* information that did not exist at the time of the ACCC's determination. The text of s 44ZZOAAA(4) provides the Tribunal with broad power to request "such information" as it considers "reasonable and appropriate". In other words, the only limitation on this power is that it be reasonable and appropriate to request the information. There is no mandatory exclusion of new information, or any category of information for that matter, and there is no reason to think that new information could never be reasonable and appropriate to request. Further, s 44ZZOAAA(7) provides that the relevant information can include information that could not reasonably have been made available to the decision maker at the time the decision under review was made. There is therefore no statutory intention to confine the Tribunal's review to the material before the ACCC – on the contrary.

29. For all of these reasons, it is reasonable and appropriate to issue the Notice.

EXTENSION OF TIME FOR A NOTICE CONCERNING USER CONTRIBUTIONS

30. Four matters support granting an extension of time for PNO to file an application for a further s 44ZZOAAA(5) notice concerning information relating to user contributions: the fact that there is likely to be information that is reasonable and appropriate to request; the fact that PNO was not able to complete the task of identifying this information with precision and who may hold it in the time available; the fact that an extension would not cause Glencore any prejudice; and the fact that there is significant utility in this course in any event. Each matter is addressed in turn.

Likely to be reasonable and appropriate to request user contribution information

Implications of the Full Court's decision for the Tribunal's task

31. In the context of user contributions, the parties were in agreement before the ACCC on the high level details of various expansion projects that had been undertaken at the Port by State and non-State entities: ACCC determination, p108 (Lloyd [18], [21], at page 1278 of Confidential Exhibit BLL-2). What the dispute principally focussed on was (1) the amount of material dredged during these projects, and (2) whether there ought to be any deduction for user contributions at all in light of the proper approach to the treatment of alleged user contributions, particularly in light of the complexities involved in certain historical matters, as well as such as mutual exchanges of value provided by the State and the history of under-recovery of economic costs by the Port.

32. In its Final Determination, the ACCC accepted that there had been user contributions that had increased Port capacity, and that the ORC value should be adjusted to reflect those contributions (at p133). The ACCC considered that the ORC value should be adjusted by the "proportion" of capital costs attributed to those expansions that were user funded (at p135). To do that, the ACCC essentially accepted Glencore's estimate of the percentage accounted for by user funded contributions (at p136).

33. However, what the ACCC did not do was make any findings as to the amount of material that was actually dredged during the relevant expansion projects. It simply noted the dispute between the parties and said that Glencore had provided "reasonable estimates" (at p132). This is significant, because it is plain from Glencore's expert reports that it derived the ORC percentage referable to user contributions from its methodology that involved multiplying the volume of material dredged (for the Port as a whole and for user funded dredged material) by a cubic per metre dredging cost for the particular kind of material that was dredged.[6] In addition, the ACCC did not make any findings about the extent of the mutual exchanges of value put forward by PNO (at 134), or the extent of historical under-recovery at the Port (at 135). It simply rejected that these matters were relevant to identifying the net cost of expansions borne by persons other than PNO.

[6] Lloyd [40(d)], [41]; Synergies Economic Consulting report, "Port of Newcastle Charges for Declared Channel Service Responsive Report", 12 June 2018, p36 (Tables 5 and 6) (at page 898 of Confidential Exhibit BLL-1); Arup report, "Port of Newcastle – Arbitration Declared Service DORC Report", 27 May 2018, pp 14 - 15, 23 – 25, 28, 36 (at pp 243 - 244, 252 - 254, 257, 265 of Confidential Exhibit BLL-1).

34. When the matter came before the Tribunal, it rejected the inclusion of any deduction from the ORC for user funded assets, as a matter of principle. The Tribunal considered that excluding user funded assets from the ORC was inconsistent with Part IIIA, unless there were clear indications of an understanding between the provider and the user that future pricing would be adjusted to account for user funded expansions (at [278], [359] – [360]).

35. The Tribunal (at [365]) also held that even if some regard was to be had to the financing of particular projects, it would require a comprehensive examination of historical matters. This included benefits that were provided by the State in return for user contributions, the history of under-recovery by the State, and user expectations (concerning the terms on which their contributions were provided). The difficulty was that the Tribunal could not do this analysis, because "[n]one of these matters were considered properly by the ACCC nor could they be on the material before it". In other words, there was a considerable "gap" in the Tribunal's knowledge in this respect.

36. The Tribunal otherwise found that there had been very significant cost under-recovery at the Port in the period 1990 – 2014, by at least $8 billion (which was much larger than any alleged user contributions), and that it was "beyond belief" that there was any proper cost recovery prior to that period: at [326] – [337]. This is significant, especially where the alleged "user contribution" is in fact a project undertaken by the State and the subject of a levy. For example, if a person is charged $1 for Port access that costs $10, and is then charged an extra $1 for Port access that costs an extra $1, then one cannot treat the extra asset in isolation, and say that the person pays $1 for an asset that costs $1. Rather, the person is paying $2 for an asset that costs $11. That is particularly so when the new "asset" is a deepening of an existing channel – it is not a separate asset at all.

37. The Full Court (at [286] – [288]) found that the Tribunal erred in concluding that it could disregard user contributions if it lacked the material before it to undertake a comprehensive analysis of historical matters. However, this finding does not mean that the re-arbitration is simply a case of restoring the ACCC's original determination on deductions for user contributions (see [320]). To the contrary, at [289] the Court observed that it was "not enough to show that there had been contributions in past". Aspects of the past may bear upon whether a cost that has been met in the past that is represented by the present value of an extension might properly be said to be a cost that "is borne" by someone else within the meaning of s 44X(1)(e). In addition, the Tribunal will need to consider whether a "balancing of competing considerations" is required in order to have regard to user contributions in light

of the factors in s 44X(1) and the principle that the provider be able to earn a rate of return commensurate with the regulatory and commercial risks involved (s 44ZZCA(a)(ii)).

38. What follows from this is that the Tribunal will need to re-determine the user contributions issue for itself. This will require the Tribunal to have regard to certain historical matters. For example, in determining whether and to what extent costs are "borne" by someone else, the Tribunal will need to make factual findings. In particular, it will need to determine the volume of material that was dredged with user funding, and the *net* cost that is borne by users in the relevant sense. This will require having proper regard to historical matters such as the extent of mutual exchanges of value, the under-recovery of economic costs by the Port at relevant times, and the existence of any arrangements between State and non-State entities in relation to the relevant expansion projects.

The gaps in the Tribunal's knowledge

39. As noted above, none of the kinds of matters that would need to be addressed in balancing the relevant competing considerations were considered properly by the ACCC, nor could they be on the material before it (as the Tribunal touched upon at [365]). As demonstrated by Mr Lloyd's affidavit, there appear to be at least the following key gaps in the material before the Tribunal, and there may be further gaps once the work outlined by Mr Lloyd is complete.

40. *First*, as to the 1968 dredging of the Swing Basin in the South Arm, Glencore contended before the ACCC that approximately 1.4 million cubic metres was dredged and should be treated as user funded: Lloyd [28]. By contrast, PNO contended that BHP only undertook one component of the project and estimated based on survey data that BHP removed 475,859 cubic metres: ACCC Determination, p110 (page 1388 of Confidential Exhibit BLL-1). What was missing were primary documents concerning the project that would record:

    40.1 the roles played by and the arrangements between BHP and the State entities in relation to the project;

    40.2 the volume of material that was dredged for each component of the project, including plans and specifications;

    40.3 the extent of mutual exchanges of value (which included the use of a common contractor and apparent co-ordination of the scheduling of works between BHP and State entities); and

40.4 the extent of the Port's economic cost under-recovery at that time: Lloyd [32], [68].

41. The Tribunal needs this information so it can make factual findings concerning the volume of material dredged and the *net* cost borne by someone else (ie. BHP) on this project. Further inquiry is required in order to ascertain whether primary documents exist that would shed light on the State's contribution to BHP's component of the project, and the size and scope of BHP's component of the project.

42. *Secondly*, as to the dispute between the parties over the volume of material that was dredged during other user funded projects, the ACCC had before it competing expert reports containing estimates of the dredged volumes. What the ACCC did not have, for example, was the underlying survey data, charts and reasoning of PNO's expert AECOM in relation to these matters: Lloyd [34], [37]. Nor did it have primary records, including those of Mr Hoogerwerf in relation to the harbour deepening project, in relation to the amount of material dredged, because the experts essentially used estimated or "assumed" figures for these amounts: Lloyd [20], [26], [35], [38]. The Tribunal needs the underlying survey data, charts and primary records so it can make factual findings concerning the volume of material dredged. In the first instance, this will require further inquiry with PNO's expert in order ascertain what primary records would have existed at the time and may be available now, and also the underlying materials referred to in AECOM's report: Lloyd [76(a)].

43. *Thirdly*, the harbour deepening project between 1977 and 1983 that Glencore relies on as a user contribution is one that was undertaken by the State with a levy imposed on users. While PNO provided the ACCC with some evidence of its economic cost under-recovery between 1975 and 1983, it was not complete. Nor was there material before the ACCC concerning the basis of the arrangements at the time, such as Port correspondence with, or announcements to, users: Lloyd [59]. Such primary materials would be relevant to the competing considerations that the Tribunal must take into account in assessing the extent of the cost borne by someone else on this project. Further inquiries to locate this material need to be undertaken.

44. *Fourthly*, overall, there appears to be a lack of primary materials recording the mutual exchanges of value between the State and users such as the coordination role played by the State, and relating to the significant under-recovery of economic costs during the period when these projects occurred (between 1960 and 2010): Lloyd [75]. The Tribunal needs this material so it can make findings on the *net* cost borne by someone else in relation to these expansions.

Reasons why it is likely reasonable and appropriate to fill these gaps

45. Having regard to the Tribunal's task, three matters make it clear that it is likely going to be reasonable and appropriate for the Tribunal to request further information of the kind identified above once PNO has completed its inquiries.

46. *First*, what the analysis in Mr Lloyd's affidavit demonstrates is that there are gaps in the Tribunal's knowledge relevant to the factual issues it will need to determine. These gaps ought to be filled, so that the Tribunal has a proper foundation on which to determine whether, and to what extent, any of the expansions to the Port involve costs "borne" by persons other than PNO, and the application of the other s 44X factors.

47. *Secondly*, as a result of the Full Court decision, it is apparent that much of the previous debate miscarried, including the focus on the QCA principles and whether user contributions are recoverable as a matter of principle. So did the Tribunal's conclusion that it could sidestep the issue on the basis that it lacked sufficient material.

48. *Thirdly*, requesting the information canvassed above should not materially expand the scope of the Tribunal's task on re-determination. On the contrary, it should make the Tribunal's task easier, by ensuring it has the information it needs for assessing the extent to which costs of expansions are "borne" by persons other than PNO.

49. All of these matters militate in favour of granting the extension of time requested.

PNO has not had sufficient time

50. Another matter that supports an extension of time is the fact that PNO has not had a sufficient time for identifying the gaps relevant to the user contributions issue, and the information that may be available to fill those gaps. To explain why, it is important to bear the following matters in mind. There are over 500 documents in the record before the Tribunal: Lloyd [16]. PNO's current solicitors were not its solicitors before the ACCC or during the Tribunal hearing (Lloyd [2]), so they have had review the record in order to identify the gaps. This has involved running key word searches over the documents in the record to isolate documents potentially relevant to user contributions. This process identified over 50 relevant documents for review, all of which were reviewed: Lloyd [16], [19]. This process has been

performed in the time since 6 October 2020, and there remains further work to be done in order to complete the analysis of the gaps in the record before the Tribunal: Lloyd [19], [76].

51. In addition, Mr Lloyd considers that further steps will need to be taken in order to identify with precision the information and documents that may be available to fill those gaps, and who might hold these documents. These will include re-engaging with PNO's former experts (to understand what kinds of potentially relevant documents may have existed at the time and what documents should be obtained), further review of PNO's own records (to identify documents potentially relevant to the various gaps in the record) and making inquiries of third parties such as the State of New South Wales and BHP (in order to ascertain what documents they might hold): Lloyd [76]

52. Mr Lloyd estimates that these steps will take a short further period to complete: Lloyd [77]. Accordingly, an extension of time out to be granted. It is not envisaged that the extension of time will need to be long. Intensive analysis is ongoing as at the date of these submissions and, as a result, PNO expects to be in a position to provide a specific proposed completion date to the Tribunal at the case management hearing on 27 November.

No prejudice to Glencore

53. A further matter that supports the extension of time is that there would not be any prejudice to Glencore. The dispute is ultimately one about money, namely whether the NSC that PNO has charged Glencore since 17 June 2016 ought to have been lower. As noted on the last occasion, the difference in annual charges going forwards between the regulated NSC determined by the ACCC, and the s 67 charge under the Agent Deed would be approximately $10 million over the entirety of Glencore's coal carried through the Port: Lloyd [83]. This is a very modest amount in the context of Glencore's revenue and profits from coal exports set out in Mr Lloyd's affidavit, and there no suggestion that Glencore urgently requires payment for any overcharge resulting from the regulated NSC not having been implemented. Further, if the Tribunal accepts that the access determination should not extend beyond the date on which declaration was revoked, the determination will have no ongoing application. The dispute will be purely historical.

An extension of time has utility

54. Finally, there would be practical utility in granting the extension in two respects.

55. *First*, the re-determination process would be much better served if PNO is able to identify with precision the information and documents that the Tribunal should request by reference to material that is either known to exist or is likely to exist. This will likely means that the s 44ZZOAAA(5) notice that is ultimately issued will elicit a smaller number of documents, in contrast to what may be received if a broader request were to be issued.

56. *Secondly*, PNO's special leave application to the High Court has not yet been determined: Lloyd [92]. As noted on the last occasion, that 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 remitter. 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.

57. In these circumstances, it remains the appropriate course to await the determination of the special leave application before taking any material steps in the redetermination.

DATED: 16 November 2020

Cameron Moore SC
Declan Roche
Peter Strickland
Counsel for Port of Newcastle Operations Pty Ltd