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:	Affidavit
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

COMMONWEALTH OF AUSTRALIA
AUSTRALIA
AUSTRALIAN COMPETITION TRIBUNAL

REGISTRAR

Dated: 8/03/2021 9:05 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 Assets Australia Ltd and Port of Newcastle Operations Pty Ltd
Applicants:	Port of Newcastle Operations Pty Limited and Glencore Coal Assets Australia Pty Ltd

AFFIDAVIT

I, Dave Poddar, of 1 O'Connell Street, Sydney, New South Wales, solicitor, affirm:

1. I am a partner at Clifford Chance, the solicitors for Glencore Coal Assets Australia Pty Ltd (**Glencore**) in these proceedings. I have carriage of this matter for Glencore and am authorised to make this affidavit on Glencore's behalf.

2. I have personal knowledge of the facts and matters referred to in this affidavit, except where indicated otherwise.

3. I make this affidavit in support of the directions sought by Glencore on 5 March 2021 in relation to the interlocutory application by Port of Newcastle Operations Pty Ltd (**PNO**) (**PNO's Application**) dated 2 March 2021.

4. PNO's Application seeks, *inter alia*:

   (a) a three-week extension of time for PNO to file its application for the Tribunal to issue a s 44ZZOAAA(5) notice, by varying Direction 1 of the Tribunal's Directions dated 14 December 2020 (**Directions**) (annexed and marked "**DP-1**"); and

   (b) to vacate the hearing date of 30 March 2021 as listed by the Tribunal on 18 December 2020 pursuant to Direction 4 of the Directions.

Filed on behalf of (name & role of party) Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)
Prepared by (name of person/lawyer) Dave Poddar
Law firm (if applicable) Clifford Chance LLP
Tel 02 8922 8033 Fax (02) 8922 8088
Email dave.poddar@cliffordchance.com
Address for service (include state and postcode) Level 16, 1 O'Connell Street, Sydney NSW 2000

5. The directions sought by Glencore are that:

   (a) Direction 1 of the Directions be amended to provide PNO an extension of time until 12 March 2021, a two-week extension (and two weeks from when PNO said their counsel was again available);

   (b) Directions 2 and 3 of the Directions be amended to provide Glencore and the ACCC to file their submissions and evidence on 26 March 2021 (noting that it would largely be Glencore having to provide any evidence);

   (c) The hearing of PNO's application on 30 March 2021 be retained; and

   (d) Glencore and PNO have liberty to apply (thereby being practical that should special leave be granted, the hearing on 30 March could be vacated).

6. Direction 1 of the Directions, which arose from a case management hearing, required PNO to file its evidence and supporting material on or before Friday, 26 February 2021.

7. In this respect, Tribunal's **Reasons** dated 14 December 2020 (annexed and marked **"DP-2"**) relevantly provided at paragraph 5:

> For the reasons explained below, the Tribunal has come to the view that the remitted review should not be listed for hearing at this time, while the decision of the Full Federal Court remains subject to an application for special leave to appeal to the High Court. Nevertheless, practical steps can be taken in the meantime to resolve any procedural or preliminary disputes relating to the hearing of the remitted review so that, once the appellate process has been completed, any necessary re-determination can be conducted promptly.

8. PNO's Application followed correspondence from PNO to the Tribunal to materially the same effect on 25 February 2021. That correspondence was made without any advance notice by PNO to Glencore. PNO also filed, the day before it was required to put on its application, the Affidavit of Bruce Lloyd affirmed 25 February 2021, which is extensive (approximately 404 pages including annexures) and was provided the evening before PNO's evidence was due under Direction 1.

9. On 26 February 2021, I sent an email to PNO's solicitors (annexed and marked "**DP-3**") stating that Glencore opposes PNO's Application for an extension of time and that PNO should endeavour to file its further application for a s 44ZZOAAA(5) notice as soon as practicable.

10. On 4 March 2021, following service of PNO's Application on 2 March 2021, I wrote to PNO's solicitors (annexed and marked "**DP-4**") outlining Glencore's position on PNO's Application, and enclosing Glencore's proposed directions. The letter stated, *inter alia*:

    (a) PNO's explanation for its delay – difficulties obtaining sufficient time with its counsel – is not satisfactory, as PNO was on notice of the timetable since at least 18 December 2020 and that was and is something within PNO's control;

    (b) PNO's submissions in support of PNO's Application mischaracterise the Tribunal's reasons in *Re Application by Port of Newcastle Operations Pty Ltd (No 2)* [2020] ACompT 3 which, among other things, was predicated on ensuring that if any

special leave application to the High Court was rejected the hearing before the Tribunal would not be delayed (noting the special leave application on 12 March 2021 was a date contemplated at the case management hearing); and

(c) Glencore is willing, notwithstanding PNO's repeated and continual non-compliance with timetabling directions made by the Tribunal, to consent to an extension of time in which PNO should file its material, but that the hearing date of 30 March is not lost and provided revised orders contained in the proposed directions in the interests of moving forward constructively.

11. If PNO's Application to vacate the hearing date is granted, I am concerned that it will not be possible to obtain another date available for Glencore's Senior Counsel in the near future. I understand that Glencore's Senior Counsel in these proceedings, Mr Young QC, is not available on the following dates:

(a) Between 12 April 2021 and 21 April 2021; and

(b) Between 1 May 2021 and 31 July 2021.

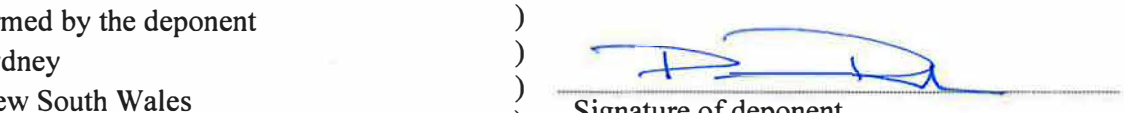
12. I also understand that Glencore's other Senior Counsel, Mr De Young QC, is not available between 1 April 2021 and 30 April 2021.

13. In these circumstances, Glencore submits that the Tribunal should retain the hearing date of 30 March 2021. In this regard, I also note that:

(a) The date for hearing PNO's foreshadowed application for a notice under s 44ZZOAAA(5) was listed almost three months ago on 14 December 2020; and

(b) That hearing date was agreed by the parties having regard to Senior Counsel's availability (and indeed the special leave application has now been set down for 12 March 2021, a date that PNO's Counsel anticipated (see transcript page 51, line 15 (annexed and marked **"DP-5"**)).

Affirmed by the deponent)
at Sydney)
in New South Wales)
on 8 March 2021)
Before me:)



Signature of deponent

Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

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 Assets Australia Ltd and Port of Newcastle Operations Pty Ltd
Applicants:	Port of Newcastle Operations Pty Limited and Glencore Coal Assets Australia Pty Ltd

ANNEXURE CERTIFICATE
DP-1

This is the Annexure marked "DP-1" referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 8 March 2021.

Before me:

Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Filed on behalf of (name & role of party) Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)
Prepared by (name of person/lawyer) Dave Poddar
Law firm (if applicable) Clifford Chance LLP
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COMMONWEALTH OF AUSTRALIA

***Competition and Consumer Act 2010* (Cth)**

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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 (ACN 165 332 990)

AND

File No:	ACT 3 of 2018
Re:	Application by Glencore Coal 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 (ACN 163 821 298)

DIRECTIONS

TRIBUNAL:	Justice O'Bryan (Deputy President) Dr D Abraham Prof K Davis
DATE OF ORDER:	14 December 2020
WHERE MADE:	Melbourne

THE TRIBUNAL DIRECTS THAT:

1. By 26 February 2021, Port of Newcastle Operations Pty Ltd (**PNO**) is to file and serve any application for the Tribunal to issue a notice pursuant to s 44ZZOAAA(5) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) together with:

   (a) a copy of the proposed notice;

(b) in so far as the proposed notice is addressed to PNO or a related company, any affidavits and documents referred to in the notice that it wishes the Tribunal to have regard to pursuant to s 44ZZOAA(a)(ii) of the CCA in the review (upon remittal of the review by the Federal Court of Australia); and

(c) submissions and any evidence to be relied upon in support of the application.

2. By 12 March 2021, Glencore is to file and serve submissions and any evidence to be relied upon in opposition to PNO's application.

3. By 19 March 2021, the Australian Competition and Consumer Commission is to file and serve any submissions to be relied upon in relation to PNO's application.

4. The matter be listed for the hearing of PNO's application and further case management on a date to be fixed.

Date entered: 14 December 2020

REGISTRAR
Australian Competition Tribunal

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 Assets Australia Ltd and Port of Newcastle Operations Pty Ltd
Applicants:	Port of Newcastle Operations Pty Limited and Glencore Coal Assets Australia Pty Ltd

ANNEXURE CERTIFICATE
DP-2

This is the Annexure marked "DP-2" referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 8 March 2021.

Before me:

Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Filed on behalf of (name & role of party) Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)
Prepared by (name of person/lawyer) Dave Poddar
Law firm (if applicable) Clifford Chance LLP
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AUSTRALIAN COMPETITION TRIBUNAL

Application by Port of Newcastle Operations Pty Ltd (No 2) [2020] ACompT 3

Review from:	The arbitration determination by the Australian Competition and Consumer Commission under section 44ZP of the *Competition and Consumer Act 2010* (Cth) in relation to an access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd
File number:	ACT 2 of 2018 ACT 3 of 2018
Tribunal:	**O'BRYAN J (Deputy President)** **DR D ABRAHAM (Member)** **PROF K DAVIS (Member)**
Date of Determination:	14 December 2020
Catchwords:	**CASE MANAGEMENT** – determination of the Tribunal set aside by the Federal Court and remitted to the Tribunal for re-determination in accordance with law – where an application has been made to the High Court of Australia seeking special leave to appeal from the decision of the Federal Court – whether the Tribunal should proceed to hear the remitted matter before the High Court application has been determined – whether the Tribunal should allow an extension of time for Port of Newcastle Operations Pty Ltd to make an application for the issue of a notice under s 44ZZOAAA(5) of the Competition and Consumer Act 2010 (Cth)
Legislation:	*Competition and Consumer Act 2010* (Cth)
Cases cited:	*Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 382 ALR 331
Date of hearing:	10 December 2020
Registry:	Victoria
Category:	Catchwords
Number of paragraphs:	21

Counsel for Port of Newcastle Operations Pty Ltd:	Mr CA Moore SC with Dr DJ Roche
Solicitor Port of Newcastle Operations Pty Ltd:	Clayton Utz
Counsel for Glencore Coal Assets Australia Pty Ltd:	Mr N De Young SC and Mr C Henderson
Solicitor Glencore Coal Assets Australia Pty Ltd:	Clifford Chance
Counsel for Australian Competition and Consumer Commission:	Ms C Dermody
Solicitor for Australian Competition and Consumer Commission:	DLA Piper Australia

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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**
BY:	**PORT OF NEWCASTLE OPERATIONS PTY LTD (ACN 165 332 990)** Applicant

AND **ACT 3 of 2018**

RE:	**APPLICATION BY GLENCORE COAL 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**
BY:	**GLENCORE COAL ASSETS AUSTRALIA PTY LTD (ACN 163 821 298)** Applicant
TRIBUNAL:	**O'BRYAN J (Deputy President)** **DR D ABRAHAM (Member)** **PROF K DAVIS (Member)**
DATE OF DIRECTIONS:	**14 DECEMBER 2020**

THE TRIBUNAL DIRECTS THAT:

1. By 26 February 2021, Port of Newcastle Operations Pty Ltd (**PNO**) is to file and serve any application for the Tribunal to issue a notice pursuant to s 44ZZOAAA(5) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) together with:

   (a) a copy of the proposed notice;

(b) in so far as the proposed notice is addressed to PNO or a related company, any affidavits and documents referred to in the notice that it wishes the Tribunal to have regard to pursuant to s 44ZZOAA(a)(ii) of the CCA in the review (upon remittal of the review by the Federal Court of Australia); and

(c) submissions and any evidence to be relied upon in support of the application.

2. By 12 March 2021, Glencore is to file and serve submissions and any evidence to be relied upon in opposition to PNO's application.

3. By 19 March 2021, the Australian Competition and Consumer Commission is to file and serve any submissions to be relied upon in relation to PNO's application.

4. The matter be listed for the hearing of PNO's application and further case management on a date to be fixed.

REASONS FOR DIRECTIONS

Introduction

1 This matter has been remitted to the Tribunal for re-determination in accordance with the conclusions of the Full Court of the Federal Court of Australia in its decision made on 24 August 2020: *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 382 ALR 331.

2 The parties disagree about the timing of the re-determination, in light of the application that has been filed by Port of Newcastle Operations Pty Ltd (**PNO**) in the High Court of Australia seeking special leave to appeal from the decision of the Full Federal Court. In short, Glencore Coal Assets Australia Pty Ltd (**Glencore**) seeks to press on with the hearing of the remitted review while PNO argues that the hearing should await the finalisation of its application for special leave to appeal and, if special leave is granted, the hearing of the appeal. PNO has also foreshadowed an application to seek to adduce further evidence at the hearing of the remitted review (more technically, an application for the Tribunal to exercise its powers under s 44ZZOAAA(5) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to request the provision of further information).

3 The matter came before the Tribunal for case management on 6 October 2020 at which time procedural directions were made. At that time, it was contemplated that PNO's special leave application might be determined by the time the matter was next listed before the Tribunal.

4 The matter returned before the Tribunal for further case management on 10 December 2020. At that date, and as at the date of these reasons, PNO's special leave application has not been determined. The parties remained apart on the appropriate course that should be followed by the Tribunal in these circumstances and advanced arguments in favour of their preferred course. At the conclusion of the case management hearing, the Tribunal reserved its decision.

5 For the reasons explained below, the Tribunal has come to the view that the remitted review should not be listed for hearing at this time, while the decision of the Full Federal Court remains subject to an application for special leave to appeal to the High Court. Nevertheless, practical steps can be taken in the meantime to resolve any procedural or preliminary disputes relating to the hearing of the remitted review so that, once the appellate process has been completed, any necessary re-determination can be conducted promptly.

Background

6 On 4 November 2016, Glencore notified the Australian Competition and Consumer Commission (**ACCC**) under s 44S of the CCA of an access dispute in relation to the declared shipping channel service provided by PNO, which activated the ACCC's arbitration powers under Part IIIA of the CCA. In part, the dispute concerned the rates of the Navigation Service Charge and Wharfage Charge levied by PNO.

7 On 18 September 2018, the ACCC made a final determination of the dispute under s 44V of the CCA. Significantly, clause 1.2 of the ACCC determination provided that the Navigation Service Charge and Wharfage Charge, as determined by the ACCC, would be backdated so as to apply from 8 July 2016 with interest being payable on any amount overpaid to PNO by Glencore having regard to the ACCC determination.

8 On 8 October 2018, PNO filed an application for review of the ACCC's determination pursuant to s 44ZP of the CCA (ACT 2 of 2018). On 9 October 2018, Glencore also filed an application for review (ACT 3 of 2018). By virtue of s 44ZO(1) of the CCA, the determination of the ACCC did not come into effect (by reason of the application for review made to the Tribunal).

9 On 30 October 2019, the Tribunal (constituted by Middleton J, Mr R Shogren and Dr D Abraham) made a determination under s 44ZP of the CCA by which it varied the determination of the ACCC in two respects. The first concerned the vessels using the shipping channels that were within the scope of, and were able to benefit from, the determination (the "scope" issue). The second concerned the calculation of the applicable Navigation Service Charge payable by Glencore to PNO, and specifically whether "user contributions" should be taken into account in the calculation (the "user contribution" issue).

10 On 24 August 2020, the Full Federal Court set aside the determination of the Tribunal and remitted the applications to the Tribunal for re-determination according to law. As a consequence of the Full Court's decision, there is no longer an arbitration determination in effect.

11 On 25 September 2020, PNO filed an application with the High Court of Australia seeking special leave to appeal from the whole of the decision of the Full Federal Court.

Whether the review should be conducted before the determination of the appeal

12 Glencore argues that PNO's position on the remittal involves a procedural irregularity in that PNO has not sought a stay of the decision of the Full Federal Court but asks the Tribunal to stay its own proceeding. Glencore submits that, in the absence of any order staying the orders made by the Full Federal Court, the Tribunal is bound to give effect to the decision of the Full Court and should proceed to conduct the review by way of remittal. Glencore further submits that it will suffer prejudice by reason of delay by the Tribunal in conducting the remitted review because of uncertainty with respect to the final determination of the scope of the shipping services that will become subject to the access arrangements. Glencore argues that there may be practical difficulties in backdating the determination to apply to the broader scope of shipping services for which Glencore will contend in the remitted review.

13 The Tribunal accepts the submission of Glencore that the decision of the Full Federal Court is binding on the Tribunal. However, the Tribunal does not consider that PNO's position on the remittal involves a procedural irregularity, or that the fact PNO did not seek a stay of the Full Court's decision in some manner disentitles it from making case management submissions to the Tribunal. The Full Court's decision has come into effect which means that the Tribunal's determination has been set aside and there is currently no effective determination of the notified dispute. The dispute is now before the Tribunal. However, the proper management and conduct of proceedings before the Tribunal is a matter for the Tribunal in the discharge of its functions and powers under the CCA. In exercising those powers, the Tribunal is conscious that the review that is to be conducted under Subdivision F of Division 3 of Part IIIA of the CCA is a re-arbitration in which the Tribunal has the same powers as the ACCC, and that s 44ZF directs the ACCC to act as speedily as a proper consideration of the dispute allows. Nevertheless, the Tribunal does not consider that speed is the only factor to consider in the management of this proceeding. The Tribunal also regards as relevant the costs of the proceeding on the parties and the public (through the work of the Tribunal) and the desirability of avoiding wasted costs, as well as the potential for prejudice to be caused to a party by delay.

14 Having considered the evidence and submissions filed by the parties, the Tribunal considers that, in the circumstances of the present matter, it is appropriate for the Tribunal to await the determination of the High Court appeal process before conducting the remitted review. That is for three primary reasons. First, the Tribunal accepts the submission of PNO that the remitted review will involve complex issues of fact and economic principle and that the remitted review

will involve the consideration of a large body of documentary evidence and occupy at least 5 hearing days. That will impose substantial costs on the parties and the Tribunal (and thereby, the public). Second, 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. Third, the Tribunal considers that awaiting the conclusion of the High Court appellate process will not cause any substantive prejudice to Glencore. Both the original ACCC determination and the Tribunal's determination provided for the backdating of the relevant charges that were determined as part of the dispute. The Tribunal also accepts PNO's submission that the monetary value in dispute between the parties is not large in comparison to Glencore's revenues from the sale of coal that is shipped from the Port of Newcastle.

15 For those reasons, the Tribunal will not list the remitted review for hearing immediately, but will nevertheless seek to progress the preparation of the proceeding for a hearing as soon as practicable after the completion of the appellate process.

PNO's application to adduce further evidence

16 Section 44ZZOAA of the CCA limits the material to which the Tribunal may have regard in conducting a review of an ACCC arbitration determination under Part IIIA of the CCA. In general terms, the Tribunal is confined to the information that the ACCC took into account in connection with the making of the arbitration determination (see ss 44ZZOAA(a)(i) and 44ZZOAAA(3)(c)). However, the Tribunal may issue a written notice to a person requesting that person to give to the Tribunal such information that the Tribunal considers reasonable and appropriate for the purposes of making its review decision (see ss 44ZZOAAA(4) – (7)). Any information given to the Tribunal pursuant to such a notice must be taken into account by the Tribunal in conducting the review (see s 44ZZOAA(a)(ii)).

17 The considerations that would ordinarily inform the exercise of the Tribunal's discretion to give a notice under s 44ZZOAAA(5) were the subject of consideration by the Tribunal in the original review. The Tribunal observed ([2019] ACompT 1 at [105]-[107]):

> 105 As a starting proposition, where a party before the Tribunal urges it to request

> information that could reasonably have been made available to the ACCC before it made a final determination, it would not be reasonable for the Tribunal to request such information. This is because in order for the arbitration before the ACCC to have meaning, it is critical that the parties place before the ACCC all of the material that they consider to be relevant to the determination of the access dispute.
>
> 106 In considering making any request for information, the Tribunal should also keep firmly in mind that the CCA provides for the Tribunal to make a decision within 180 days from when the application for review is made: s 44ZZOA. Although this period can be lengthened, either by agreement of relevant persons or by the Tribunal extending the time in which it has to make a decision, it is an indication that the Tribunal should be able, and should endeavour, to make decisions within that period unless there are exceptional circumstances. In this way, the time period in which it is intended that a decision will be made (referred to as the 'expected period' or the 'consideration period') should inform whether any request for 'new' information is reasonable and appropriate.
>
> 107 Therefore, whether it is 'reasonable and appropriate' to request information will be necessarily informed by a consideration of the text and context of the ss 44ZZOAAA(4) and 44ZZOAA, including:
>
> - that the primary material on which the review is to be based is that which was before the ACCC when it made the determination, which indicates that the review process before the ACCC is to be a meaningful one, and one in which the parties have every incentive to place the material that they consider to be relevant to the resolution of the dispute before the ACCC; and
> - the limited timeframes in which the Tribunal has to make a decision, which indicates that it is not intended that there be any material broadening of the information that was before the ACCC when it made its final determination.

18 PNO has filed evidence and submissions indicating that it considers that there may be information relevant to the Tribunal's remitted review that was not before the ACCC in the original arbitration determination. Some of that material appears to be historical, while some of the material appears to be more recent and post-dates the ACCC determination.

19 At the case management hearing on 6 October 2020, the Tribunal gave directions for PNO to make any application for the issue of a notice under s 44ZZOAAA(5) of the CCA by 13 November 2020. PNO complied with that direction in relation to the "scope" issue but seeks an extension of time in relation to the "user contribution" issue. In support of the application for an extension of time, PNO has filed evidence explaining why it has taken longer to investigate the availability of potentially relevant material on that issue than PNO originally anticipated.

20 Having considered that evidence, the Tribunal is satisfied that it is reasonable to afford PNO an additional period of time in which to make an application to the Tribunal for the issue of a notice pursuant to s 44ZZOAAA(5) of the CCA. The Tribunal considers that it is reasonable

to give PNO until 26 February 2021 to bring forward any such application. The Tribunal then proposes to hear any such application as a preliminary issue. The application is unlikely to cause additional delay in the hearing of the remitted review because the Tribunal has concluded that it is preferable not to conduct the remitted review until the appellate process has been concluded.

21 In so far as PNO intends to request the Tribunal to issue a notice to produce information to PNO itself, the Tribunal will also direct that any affidavits or documents that are the intended object of the notice must also be filed and served by 26 February 2021, so that they can be considered in the course of hearing the application.

I certify that the preceding 21 (twenty-one) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice O'Bryan.

Associate: 

Dated: 14 December 2020

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 Assets Australia Ltd and Port of Newcastle Operations Pty Ltd
Applicants:	Port of Newcastle Operations Pty Limited and Glencore Coal Assets Australia Pty Ltd

ANNEXURE CERTIFICATE
DP-3

This is the Annexure marked "DP-3" referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 8 March 2021.

Before me:

Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Filed on behalf of (name & role of party) Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)
Prepared by (name of person/lawyer) Dave Poddar
Law firm (if applicable) Clifford Chance LLP
Tel 02 8922 8033 Fax (02) 8922 8088
Email dave.poddar@cliffordchance.com
Address for service (include state and postcode) Level 16, 1 O'Connell Street, Sydney NSW 2000

From:	Poddar, Dave (Antitrust-SYD)
To:	Lloyd, Bruce; Grace, Sophia; Arnold, Philip (Antitrust-SYD); Wilkinson-Hayes, Joely; Gibbons, Fleur; Fu, Angel (Antitrust-SYD); Ledden, Isabella (Antitrust-SYD)
Cc:	Richmond, Elizabeth; Karunakaran, Shameela; Fritz, Damiano; Barber, Dylan; Grahame, Scott; Gvozdenovic, Michael (Antitrust-SYD)
Subject:	RE: [EXT] ACT 2 and 3 of 2018 Applications under s 44ZP by Port of Newcastle Operations Pty Ltd and Glencore Coal Assets Australia Pty Ltd
Date:	Friday, 26 February 2021 6:23:34 PM

Dear Bruce
Thank you for your email.
It should be reasonably clear that Glencore opposes the application for an extension of time by PNO and that we are of the view that there was no reasonable excuse why PNO should not have been in a position to have filed its evidence by today.
We will review the material that you have filed, but please note that in the meantime our position is that PNO should file its evidence as soon as practicable.
We will seek to find a reasonable way forward and will send you proposed orders, but it may be that we ask your client to be prepared, at the very least, to file the day after the Special Leave Application (if that is not granted).

Thank you
Regards

Dave Poddar
Partner
Head of Antitrust, Asia Pacific
CLIFFORD CHANCE
Level 16, No. 1 O'Connell Street
Sydney NSW 2000 Australia
Direct: +61 2 8922 8033
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email: dave.poddar@cliffordchance.com

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Friday, 26 February 2021 5:29 PM
To: Grace, Sophia <Sophia.Grace@dlapiper.com>; Arnold, Philip (Antitrust-SYD) <Philip.Arnold@CliffordChance.com>; Wilkinson-Hayes, Joely <Joely.Wilkinson-Hayes@dlapiper.com>; Poddar, Dave (Antitrust-SYD) <Dave.Poddar@CliffordChance.com>; Gibbons, Fleur <Fleur.Gibbons@dlapiper.com>; Fu, Angel (Antitrust-SYD) <Angel.Fu@CliffordChance.com>; Ledden, Isabella (Antitrust-SYD) <Isabella.Ledden@CliffordChance.com>
Cc: Richmond, Elizabeth <erichmond@claytonutz.com>; Karunakaran, Shameela <SKarunakaran@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>

Subject: [EXT] ACT 2 and 3 of 2018 Applications under s 44ZP by Port of Newcastle Operations Pty Ltd and Glencore Coal Assets Australia Pty Ltd

Dear Colleagues

We refer to the correspondence below from his Honour's EA, requesting that the parties confer in relation to our client's application for an extension of time, and appropriate timetabling directions for a short hearing in respect of that application.

Our client intends to file the **attached** interlocutory application for the request for extension of time set out in our letter to his Honour's Associate of 25 February 2021.

We would be grateful if you could indicate:

1. whether your clients consent to or oppose the directions sought by PNO; and

2. if your client wishes to be heard on that application, your clients' availability to appear next week.

Counsel for PNO is available next week, other than in the morning of Tuesday, 2 March, for the hearing requested by his Honour in respect of PNO's application.

Regards

Bruce Lloyd

Bruce Lloyd, Partner
Clayton Utz
Level 15, 1 Bligh Street, Sydney NSW 2000 Australia | D +612 9353 4219 | F +612 8220 6700
blloyd@claytonutz.com | **www.claytonutz.com**

From: EA - O'Bryan J <EA.OBryanJ@fedcourt.gov.au>
Sent: Friday, 26 February 2021 2:54 PM
To: Lloyd, Bruce <blloyd@claytonutz.com>
Cc: CompetitionTribunal Registry <CompetitionTribunalRegistry@fedcourt.gov.au>; Associate O'BryanJ <Associate.OBryanJ@fedcourt.gov.au>; Grace, Sophia <Sophia.Grace@dlapiper.com>; Arnold, Philip (Antitrust-SYD) <philip.arnold@cliffordchance.com>; Wilkinson-Hayes, Joely <Joely.Wilkinson-Hayes@dlapiper.com>; Gibbons, Fleur <Fleur.Gibbons@dlapiper.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Karunakaran, Shameela <SKarunakaran@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Dave.Poddar@CliffordChance.com; Fu, Angel (Antitrust-SYD) <angel.fu@cliffordchance.com>; Isabella.Ledden@CliffordChance.com
Subject: RE: ACT 2 and 3 of 2018 Applications under s 44ZP by Port of Newcastle Operations Pty Ltd and Glencore Coal Assets Australia Pty Ltd

External Email

UNCLASSIFIED

Dear Mr Lloyd

I refer to your email below and attachments. Justice O'Bryan has asked me to convey that any request by your client for an extension of time will require an application to be filed. His Honour requests the parties to confer in relation to the application and appropriate timetabling directions for a short hearing in respect of the application to be conducted via Microsoft Teams. Once his Honour receives those directions, he will take steps to convene a hearing of the Tribunal at the earliest convenient date.

Yours sincerely

Nicole Young | Executive Assistant to the Hon Justice O'Bryan
Federal Court of Australia | 305 William Street Melbourne VIC 3000
t. +61 3 8600 3618 | e. ea.obryanj@fedcourt.gov.au | www.fedcourt.gov.au

Please ensure all official correspondence to Chambers is copied to associate.obryanj@fedcourt.gov.au

FEDERAL COURT OF AUSTRALIA

From: Lloyd, Bruce <blloyd@claytonutz.com>
Sent: Thursday, 25 February 2021 7:19 PM
To: EA - O'Bryan J <EA.OBryanJ@fedcourt.gov.au>; Associate O'BryanJ <Associate.OBryanJ@fedcourt.gov.au>
Cc: CompetitionTribunal Registry <CompetitionTribunalRegistry@fedcourt.gov.au>; Grace, Sophia <Sophia.Grace@dlapiper.com>; Arnold, Philip (Antitrust-SYD) <philip.arnold@cliffordchance.com>; Wilkinson-Hayes, Joely <Joely.Wilkinson-Hayes@dlapiper.com>; Gibbons, Fleur <Fleur.Gibbons@dlapiper.com>; Richmond, Elizabeth <erichmond@claytonutz.com>; Karunakaran, Shameela <SKarunakaran@claytonutz.com>; Fritz, Damiano <dfritz@claytonutz.com>; Barber, Dylan <dbarber@claytonutz.com>; Grahame, Scott <sgrahame@claytonutz.com>; Dave.Poddar@CliffordChance.com; Fu, Angel (Antitrust-SYD) <angel.fu@cliffordchance.com>; Isabella.Ledden@CliffordChance.com
Subject: ACT 2 and 3 of 2018 Applications under s 44ZP by Port of Newcastle Operations Pty Ltd and Glencore Coal Assets Australia Pty Ltd

Dear Associate
Dear Ms Young

Please see attached a letter on behalf of Port of Newcastle Operations Pty Ltd, together with a zip folder containing the enclosures to the letter (which include an affidavit for filing).

We would be grateful if you could bring the letter to the Tribunal's attention.

The solicitors for the other parties are copied to this correspondence.

Regards

Bruce Lloyd

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[CC]Personal[/CC]

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 Assets Australia Ltd and Port of Newcastle Operations Pty Ltd
Applicants:	Port of Newcastle Operations Pty Limited and Glencore Coal Assets Australia Pty Ltd

ANNEXURE CERTIFICATE
DP-4

This is the Annexure marked "DP-4" referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 8 March 2021.

Before me:

Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Filed on behalf of (name & role of party) Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)
Prepared by (name of person/lawyer) Dave Poddar
Law firm (if applicable) Clifford Chance LLP
Tel 02 8922 8033 Fax (02) 8922 8088
Email dave.poddar@cliffordchance.com
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C H A N C E

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Our ref: 21-41004587
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Mr Bruce Lloyd
Clayton Utz
Level 15, 1 Bligh St
Sydney NSW 2000

4 March 2021

Dear Mr Lloyd

ACT 2 & 3 of 2018: ***Re Application by Port of Newcastle Operations Pty Limited; Re Application by Glencore Coal Assets Australia Pty Ltd***

1. We refer to your client's interlocutory application and supporting submissions filed on 2 March 2021 and your earlier letter to the Associate to Justice O'Bryan of 25 February 2021.

2. Our client opposed and continues to oppose your client's third application for an extension of time. As we advised on 25 February 2021, your client should file its application and supporting material without delay.

3. As outlined below from [6], the explanation advanced as to why your client failed to comply with the Tribunal's **Directions** of 14 December 2020 is not satisfactory. Counsel availability was and is something wholly within your client's control. In any event, your counsel team appear to now be available, having signed your client's latest submissions supporting the request for an extension of time. As we outline below from [11], those submissions mischaracterise the Tribunal's **Reasons** which was predicated on the likely short period of time between the remittal of the matter to the Tribunal and any special leave application to the High Court, any costs not being wasted or thrown away because your client would be preparing and filing its evidence, and ensuring that if special leave was rejected the hearing before the Tribunal would not be delayed.

4. While the Reasons sought to balance the delay between remittal and the determination of special leave as against the harm to Glencore in not having the matter efficiently progressed, that balance may now have shifted due to the harm caused by the trade issues with China and the need to find alternative markets for coal which, at a granular

level, impact particular operating mines in the Hunter Valley. As you know, the harm occasioned to Glencore by the delay of this matter was not only in relation to the differential in rates imposed by PNO, but the choice by coal customers of where they may buy coal from based on the overall cost of the coal including shipping. That is, the relevant prejudice therefore also includes the overall lost sales of entire shipments.

5. As outlined below from [16], Glencore is willing – notwithstanding that your client is presently in breach of the Directions – to consent to an extension of time until 12 March 2021 for your client to file its application and supporting material. In order to ensure the efficient resolution of that application, the hearing on 30 March 2021 should be retained, with Glencore and the ACCC to file its submissions and evidence on 26 March 2021, and Glencore having liberty to seek to vacate that hearing depending on the scope of evidence referred to in your client's application and assuming special leave is not granted. If special leave is granted, your client can apply to vacate the hearing on 30 March 2021. We believe that this proposed course is the fairest way to deal with your client's non-compliance without further prejudicing Glencore.

Your client's interlocutory application for an extension of time

6. Your client's interlocutory application – which we note followed an informal request to the Tribunal that was made without any consultation with the parties, and was filed the day before your client was required to put on its application – seeks orders that:

   (a) PNO have until 19 March 2021 to file its application and supporting material with the Tribunal (an extension of 21 days);

   (b) the hearing of 30 March 2021 be vacated and re-listed; and

   (c) the proceedings be listed for a case management hearing in the week commencing 22 March 2021.

7. The reason for this third request for an extension of time is explained in your affidavit affirmed 25 February 2021 as involving "difficulties obtaining sufficient time with Counsel". We do not see this as an adequate basis for delay. In relation to this point:

   (a) *First*, this is not a case where the unavailability of counsel has left your well-resourced client unrepresented, or where it would be genuinely unfair to proceed. Your client is represented by your firm of solicitors and has presumably enjoyed the input of its counsel team in relation to its pending application since at least 5 October 2020 when it was directly foreshadowed to the Tribunal.

(b) *Second*, nor is this a case where the unavailability of each of your counsel is attributable to illness or some other unforeseeable factor, such that the Tribunal should indulge the application. With the exception of Mr Roche, and without any criticism of your counsel, the evidence appears to be that your counsel team have simply had conflicting matters. It was incumbent upon your client, in light of counsels' pending hearing and trial commitments, to move swiftly to ensure counsel input was received at an appropriate time.

(c) *Third*, it is a function of the independent Bar that they will usually have multiple cases underway simultaneously and it is not unusual for a party to be deprived of its counsel of choice because of the date of the listing. However, this is not a case in which your client would be deprived of its counsel in respect of a *hearing*.

8. In these circumstances, it would not be inconsistent with natural justice for the Tribunal to refuse your client's request for an extension of time.

Your client's inability to comply with numerous timetable orders relating to its foreshadowed application

9. It is necessary to have regard to the lengthy background to your client's foreshadowed application:

(a) On 24 August 2020, the Full Court of the Federal Court of Australia made orders remitting the matter for determination by the Tribunal.

(b) On 25 September 2020, PNO filed an application with the High Court seeking special leave to appeal from the Full Court's decision.

(c) On 5 October 2020, PNO provided submissions to the Tribunal in which it identified steps that it suggested would require further evidence. PNO stated that "…the process identified above will almost certainly require consideration of factual material that was not before the Tribunal previously". In that letter, PNO asserted that "[h]aving regard to the nature of that task, it will need at least 4 weeks to do this, and then further time for the material to be provided in response to any notice".

(d) On 6 October 2020, Mr Moore SC submitted to the Tribunal at case management hearing that PNO would need until 13 November 2020 in order to file its application for the Tribunal to issue a notice. That date was justified on the basis that counsel for PNO was "about to start a 3-week hearing and my solicitors probably would like me to actually have some input into it". See

T19:6-19. Directions were subsequently made requiring PNO to file its application by 13 November 2020.

(e) On 16 November 2020, your client filed, late, a notice pursuant to s 44ZZOAAA(5) and also requested an "extension of time for filing a further application for a s 44ZZOAAA(5) notice concerning information relevant to user contributions". PNO submitted that it needed "a short additional period to prepare its application". PNO specifically submitted that "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 2020".

(f) On 20 November 2020, the 27 November 2020 fixture was vacated as PNO's counsel had a hearing in respect of another matter.

(g) On 9 December 2020, you affirmed and filed an affidavit in which you deposed that "[t]his work [of identifying the material that will be the subject of the notice] is ongoing, and I estimate that PNO will require a period of approximately six weeks to conclude its analysis of this material".

(h) On 10 December 2020, your counsel submitted at case management conference "…in a practical and realistic way, we will need certainly until the end of February to complete that task to properly formulate the matters that we may need to rely on". The Directions appear to have been made by the Tribunal in reliance upon that submission, and the evidence in your affidavit.

10. In short, your client originally thought the notice could be filed by early November 2020. It has sought, and received, two extensions of time. It now seeks a third.

Your client's failure to comply with the Reasons and Directions is causing delay

11. While your client attempts to link the extension of time to the High Court special leave application, there is no logical nexus. The Tribunal's reasons in *Re Application by Port of Newcastle Operations Pty Ltd (No 2)* [2020] ACompT 3 were to the effect that the matter should not be listed for hearing before that application is resolved. It was not to the effect that your client should not be required to put on its application before the resolution of that application.

12. The Tribunal's position was clearly stated at paragraphs [5] and [15] (emphasis added):

[5] … *the Tribunal has come to the view that the remitted review should not be listed for hearing at this time, while the decision of the Full Federal Court remains subject to an application for*

special leave to appeal to the High Court. ***Nevertheless, practical steps can be taken in the meantime to resolve any procedural or preliminary disputes relating to the hearing of the remitted review so that, once the appellate process has been completed, any necessary re-determination can be conducted promptly****.*

[15] *... the Tribunal will not list the remitted review for hearing immediately, but will* ***nevertheless seek to progress the preparation of the proceeding for a hearing as soon as practicable after the completion of the appellate process****.*

13. The Tribunal thereby made plain that while the matter should not be listed for hearing before the special leave application before the High Court, all other necessary steps – including PNO's application – should be "resolved" by taking "practical steps" "as soon as practicable".

14. The Tribunal gave "three primary reasons" (at [14]) as to why it was appropriate to await the determination of the High Court appeal process before conducting the remitted review. None of those reasons referred to, or have any relevance to, PNO's foreshadowed application. Indeed, at paragraphs [20] and [21] of the Reasons, the Tribunal concluded that it was "reasonable to give PNO until 26 February 2021 to bring forward any such application".

15. The reality of the situation is that your client was directed to put on its application within a reasonable timeframe so that the matter could proceed promptly to resolution following the special leave application. But for your client's delay, the application could be (or could have been) resolved ahead of the determination of the special leave application.

Next steps

16. Glencore is entitled – as is any litigant – to the just, speedy and efficient resolution of this dispute. In circumstances where PNO has not advanced any reasonable basis for the serious delay in advancing its application, it should not enjoy further extensions. That is particularly so where, as here, your client has already had an opportunity to file a s 44ZZOAAA(5) application and has done so: see above at [9(e)].

17. That said, in the interests of moving forward constructively, Glencore is willing to consent to orders that require PNO to file and serve its s 44ZZOAAA(5) application by **12 March 2021**. This provides PNO with a two-week, rather than three-week, extension in default of the Tribunal's Directions. Glencore's draft directions **retain the 30 March 2021 hearing** date in order to ensure the efficient resolution of that application, and provide for Glencore and the ACCC to file their submissions and evidence on or before 26 March 2021. Glencore is also given liberty to apply to seek to vacate that hearing

given your repeated and continual non-compliance with the Directions and to account for the scope of evidence referred to in your client's application. Your client is also given leave to apply if special leave is granted. In short, the proposed directions accord with procedural fairness and do not prejudice any party.

18. We accordingly **enclose** amended draft directions. Please confirm by 4pm on **5 March 2021** whether your client consents to the enclosed draft orders.

19. This letter is without prejudice to our clients' rights, which are reserved.

Yours sincerely

Dave Poddar
Partner
Clifford Chance

cc: Fleur Gibbons and Sophia Grace, DLA Piper

COMMONWEALTH OF AUSTRALIA

***Competition and Consumer Act 2010* (Cth)**

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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 Limited

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

DIRECTIONS

TRIBUNAL:	Justice O'Bryan (Deputy President)
DATE OF ORDER:	[X] March 2021
WHERE MADE:	Melbourne

THE TRIBUNAL DIRECTS THAT:

Pursuant to s 103 of the *Competition and Consumer Act 2010* (Cth), the Tribunal's directions dated 14 December 2020 be varied as follows:

1. The date in direction 1 be amended to 12 March 2021.

2. The date in directions 2 and 3 be amended to 26 March 2021.

3. The matter be listed for the hearing of PNO's application on 30 March 2021.

4. Liberty to apply on three days' notice.

Date entered:

Registrar
AUSTRALIAN COMPETITION TRIBUNAL

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 Assets Australia Ltd and Port of Newcastle Operations Pty Ltd
Applicants:	Port of Newcastle Operations Pty Limited and Glencore Coal Assets Australia Pty Ltd

ANNEXURE CERTIFICATE
DP-5

This is the Annexure marked "DP-5" referred to in the affidavit of Dave Poddar affirmed at Sydney in New South Wales on 8 March 2021.

Before me:

Signature of witness

Michael John Gvozdenovic

Solicitor of the Supreme Court of New South Wales

Filed on behalf of (name & role of party) Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)
Prepared by (name of person/lawyer) Dave Poddar
Law firm (if applicable) Clifford Chance LLP
Tel 02 8922 8033 Fax (02) 8922 8088
Email dave.poddar@cliffordchance.com
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AUSCRIPT

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TRANSCRIPT OF PROCEEDINGS

O/N H-1349580

AUSTRALIAN COMPETITION TRIBUNAL

JUSTICE O'BRYAN, Deputy President
DR D. ABRAHAM, Member
PROF K. DAVIS, Member

No. ACT 2 of 2018
No. ACT 3 of 2018

APPLICATION BY PORT OF NEWCASTLE OPERATIONS PTY LTD and APPLICATION BY GLENCORE COAL ASSET AUSTRALIA PTY LTD

MELBOURNE

10.22 AM, THURSDAY, 10 DECEMBER 2020

MR C.A. MOORE SC appears with MR D.J. ROCHE for Port of Newcastle Operations Pty Ltd
MR N.J. DE YOUNG QC appears for Glencore Coal Assets Australia Pty Ltd
MS C. DERMODY appears on behalf of the Australian Competition and Consumer Commission

THIS PROCEEDING WAS CONDUCTED BY VIDEO CONFERENCE

HIS HONOUR: Thank you. I will take appearances.

MR C.A. MOORE SC: May it please the court, I appear with my learned friend, DR ROCHE, for the Port of Newcastle.

HIS HONOUR: Thank you, Mr Moore.

MR N.J. DE YOUNG QC: If the tribunal pleases, I appear on behalf of Glencore.

HIS HONOUR: Thank you, Mr De Young.

MS C. DERMODY: May the tribunal please, I appear for the ACCC.

HIS HONOUR: Thank you, Ms Dermody. And I indicate to the parties that, of course, you have two new tribunal members in this matter; myself and Professor Davis. The parties will understand that both myself and Professor Davis have endeavoured to read the underlying decision, and the Full Court decision, and of course familiarise ourselves with the matters, as far as we are able. Of course, Dr Abraham has the history of the matter, which gives him an advantage. Having said that, of course, undoubtedly there may be points of detail that certainly I'm not entirely across, and that – the parties will have to bear with myself and Professor Davis to that extent.

The tribunal also has before it, of course, all the matters – all the papers that have been filed since the appeal, including the papers that were filed in connection with the previous case management hearing, and the papers more recently filed, and I have also had the opportunity to read the transcript of the last directions hearing – just – so that can be assumed by the parties. I will allow – give the parties an opportunity to address their – there remains, to my mind, one very significant issue that was canvassed on the last occasion, and still needs, I think, to be canvassed on this occasion, which is, should the tribunal proceed to hear the remitted matter, notwithstanding the application for leave to appeal to the High Court.

That – I must say, that is a matter that, obviously, exercised the tribunal on the last occasion, and continues to exercise the tribunal's mind on this occasion, and I will need to hear further from the parties on that. The subsidiary question, of course, that – in a sense that relates to the first order being sought by Glencore today, which I think is, effectively, to set the matter down for hearing. The other matter, which, in one sense, is subsidiary to that, are the questions relating to the adducing of further evidence in any remitted hearing, and, of course, there's two categories of that, broadly aligned with the two issues: with the scope issue and, what I have called, the price issue, or the user-contribution issue – but ultimately, it goes to price.

And I can see from the proposed orders filed by Glencore that Glencore is proposing that that issue actually be determined at any remitted hearing, with the anticipation that, as I understand, the Port of Newcastle will simply put on the material that it wishes to adduce. And then there will be a fight about whether it ought to be allowed to rely upon that material actually at the substantive hearing: or, at least, that's what I have gleaned so far from the orders. Now, I just went through that little overview, just so that the parties have some appreciation of what the tribunal understands at this stage, and the material before the tribunal. And I will now hand over, in whichever order the parties think is appropriate, to deal with the issues.

MR DE YOUNG: Mr Moore, can I deal with a short point before handing over to you on that wider question?

MR MOORE: Of course.

MR DE YOUNG: And the short point is this, your Honour, just to clarify one thing that your Honour said. Our proposal to stand over the application to adduce further evidence is limited to the application that's presently being made - - -

HIS HONOUR: I see.

MR DE YOUNG: - - - which is of a very confined kind and relates only, as we understand it, to scope, and we don't, with – for reasons I can develop later on, we submit it's far too late for any wider application to be put on, as to the pricing issue.

HIS HONOUR: I understand.

MR DE YOUNG: Just wanted to clarify that point.

HIS HONOUR: Yes. No, I understand. Well, that's helpful just in understanding where the debate will go. Thank you. In terms of the first question, Mr De Young, about the tribunal proceeding to hear the remitted matter, pending the High Court appeal or without knowing the outcome of the special leave, as I say, that continues to vex the tribunal. I understand that no date has been given for the special leave application at this stage; is that correct? I know it's Mr Moore's application but - - -

MR DE YOUNG: That's correct, your Honour.

HIS HONOUR: Yes, yes. Is there anything further that you wish to say about that topic today? I know it was canvassed before the tribunal on the last occasion and obviously I've had regard to the authorities that were referred to and what was discussed on the last occasion but this case is unusual – well, it's not unusual in this sense but it differed from the – many of the cases that we sometimes see in the authorities, I think, Mr De Young, that you took the tribunal to on the last occasion but, of course, this is not waiting for a related proceeding on a similar point or anything like that. What, effectively, Glencore is asking the tribunal to do is to hear the remitted matter but, in circumstances where there is an application for leave to

appeal which might become an actual appeal, if the appeal was heard and determined adversely to Glencore and, of course, the Full Court's orders were set aside then what the tribunal will then have done will, I think, become a nullity. It will have proceeded to rehear the matter based on the errors decided by the Full Court and points of law decided by the Full Court.

But, if the High Court ultimately determines that the Full Court was in error, well, then the whole remittal I think would become a nullity. And, of course, there's the prospect that the High Court might not agree with the tribunal's original decision but come up with a new middle ground which might require then the matter to be heard for a third time. And it is that prospect that what Glencore is urging the tribunal to do, which is, in a sense, before the appellate process has been completed from the tribunal's first decision, urge it to go on and make a second decision on the remittal with the prospect that that might prove to be an erroneous course, if the High Court so says, and we might, you know, in the worst-case scenario, end up with three goes at it which, of course, would strike anyone as terribly wasteful of everybody's time and money, including the tribunal. That's the matter that vexes the tribunal. Is there anything further you wish to say about that?

MR DE YOUNG: Yes, there is, your Honour, probably a few things. The – just as a matter of procedure this morning, it – I was proposing to say them in response to what Mr Moore had to say. I'm happy – I'm happy to do it now but I didn't want to - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - upset Mr Moore by jumping in on his application before he had a chance to advance it. I know - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - he will be cross with me if I do that.

HIS HONOUR: I understand. That – well, look, because that's – in a sense, this question does determine a lot of things. It may not mean the tribunal does nothing, as occurred on the last occasion, but it still is a matter that is of very real concern to the tribunal. But perhaps I should allow Mr Moore to address the tribunal first on that question. Thank you.

MR MOORE: Thank you, your Honour. Your Honour will have seen from the transcript that his Honour Middleton J shared your Honour's concern and what proceeded to occur was, in effect, a process designed to ensure that the tribunal had a slightly better idea as to what was the nature of the beast - - -

HIS HONOUR: Yes.

MR MOORE: - - - as his Honour put it that – that might be heard. What is tolerably clear, however, we – we submit is that the remitter itself is – is not a short and straightforward matter. And if PNO obtains special leave and succeeds on appeal then the entire exercise will be wasted or, as your Honour has observed, respectfully, pertinently, the even worse outcome of having to do it a third time on some yet different basis would really be potentially problematic, not just in terms of wasted time and cost but also in terms of having, on that – on that eventuality, three different decisions on three different legal bases seems a slightly unattractive matter as a – as a question of the administration of justice and proper administration. And, in those circumstances, we do say the preferable course is to await the determination of the application for special leave.

In terms of the situation of the parties – and I will come back in a moment to why we say it's not a straightforward matter but the situation of the parties is also somewhat unusual in this area of discourse because, although, of course, this is a question about a declared service and access to declared service, there is no question about access in the present case. Everyone has access to the Port of Newcastle. There is no complaint about access. There's no complaint about any non-price terms of access, no allegation of discrimination or anything like that. And that does make it quite an unusual situation in terms of access to potentially monopoly or regulated infrastructure. And so we really are dealing with a dispute about money. And, as we observed on the last occasion, it's not even about money, it's about the timing of money because the tribunal backdated its determination on the last occasion and no doubt Glencore would seek a similar backdating on this occasion.

And so it's really – what is the difference over a particular period between what Glencore is paying and what it says it ought to be paying in circumstances where there could be no suggestion, for example, that my client is not good for the money, if I could put it that way, and where the amounts at issue, as was clear on the last occasion, are really very small compared to the amount of revenue from the sale of coal and other – other contextual factors in the industry. And, at the present case, the situation is, of course, that the Full Court has set aside the determination. So there is no current determination but there is access and no suggestion that there won't continue to be access as I have indicated and there always was access. And there was, I should mention, one small issue raised by our learned friends on the last occasion that related to the scope question.

And it was said that if, in effect, the tribunal didn't immediately proceed to do something then somehow Glencore could be prejudiced in relation to the arrangements that might need to be made for other people having the – the benefit of – sorry, of Glencore having the benefit of the access price where other ships might be calling at the port. However, that issue we also suggest has rather gone away because, when one has a consideration of the form of the order that Glencore has propounded in the meantime for scope, and I don't know whether your Honour and the tribunal have access to that order but - - -

HIS HONOUR: Yes. We - - -

MR MOORE: - - - Glencore was – filed that order. And paragraph 2.1 of that proposed order, the paragraph numbering being that which would slot into the existing determination - - -

HIS HONOUR: Yes.

MR MOORE: - - - proposes a form of order that, in 2.1C, simply proposes that when – where Glencore accesses the berths at the port and/or a site at which stevedore operations are carried out and loads Glencore coal onto a Glencore-nominated vessel that has travelled and will travel through the port then that will be, in effect, within the scope of the determination. Now - - -

HIS HONOUR: Yes.

MR MOORE: - - - there may be debate in due course as to whether that's an appropriate order, and we would say something in due course. But certainly on the form of order that Glencore is seeking, no question about timing really arises because that would just be an operative fact that would or would not occur and Glencore would receive the relevant price, including potentially on a backdated basis if it fell within that category. So – so no - - -

HIS HONOUR: Yes.

MR MOORE: - - - real question of prejudice seems to arise.

HIS HONOUR: Well, it's - - -

MR MOORE: So we are - - -

HIS HONOUR: If I – if I could just - - -

MR MOORE: Yes.

HIS HONOUR: - - - just ask a question about that but - - -

MR MOORE: Yes.

HIS HONOUR: - - - that was the one area that I could conceive that prejudice might arise from delay which is simply that both the practicality of implementing a Glencore's proposal if that was to be ultimately found to be the appropriate proposal in the arbitration and whether they would be any difficulty first, in Glencore keeping a records, today or in the past, of ships that fit within this category of Glencore nominated vessels and therefore making adjustments, because no doubt, there are many of these vessels that are arriving and they are now receiving the price that is the subject of the evidence from Mr Lloyd that the Port of Newcastle has referred to and that there would probably have to be some adjustment now.

So that is one question, just about by delay with the tribunal being making what Glencore is seeking impractical or impossible – really impractical – to implement. It is a question that is on my mind and perhaps one related question – and I know this is something ultimately Glencore probably will wish to address on – but, does delay affect decisions that ship owners or buyers of coal, whoever is chartering the ships at the moment, affect decision that they might be making at the moment, in terms of contractual dealings with the port, in circumstances where the decisions might be different if it wasn't delayed and a new regime was set up. So that's what is crossing the tribunal's mind.

MR DE YOUNG: Yes, and that is why I raised this topic, your Honour, and cannot – and I address your Honour's specific questions – as to the very last of them; the answer is no. The tribunal will have seen from the material – we want the tribunal to obtain, through the formal mechanism – that there are arrangements with all agents that represent vessels in the port. There is no suggestion that there are any further arrangements that need to be made, or that is likely to be any change to those arrangements. So currently, ships that call at the port have the benefit of, in effect, discounted rates of access compared to the rates that the tribunal set in the tribunal's decision, but not as discounted as the rates which Glencore seeks to obtain as the result of the tribunal process, as we apprehend, but there is no suggestion that anyone is taking any step, or is entering into, or refraining from entering into, contracts on any basis, because that, in effect, has occurred. All of the agents have entered into contractual arrangements with the port, there is we understand no vessel who is not represented by an agent who has entered into these arrangements, so that is – that has occurred.

In terms of any other administrative matters, for the reasons that I started to address, there is absolutely no reason why, Glencore, for example, cannot firstly, take a record of which vessels are taking its coal, because it was – he'd noticed that – he is loading the coal onto those vessels, and furthermore, there is no reason why Glencore cannot sent us a notice or a letter, or any other document they wish to in effect, notify us of the ships that he says would be, that the ships they would be entitled to the Glencore access price, rather than the negotiated access price with the shipping agents, and likewise, if your Honour sees subparagraph 2.1(b); this is the provision for when Glencore makes a representation to PNO of the kind referred to in section 48(4)(b), that is simply gaining effect to a provision that exists in the Ports & Maritime Administration Act.

There is no reason why Glencore could not make such a representation, whenever it choses to make such a representation, there is nothing stopping them from doing that. And therefore, again, all that would happened, when the tribunal finally dealt with this matter, would be to consider why a backdating or otherwise, that the financial consequence of those activities that have occurred in the meantime, so it is, we say, impossible, to identify any relevant prejudice to Glencore from any delay in the resolution of the tribunal hearing, so we are simply talking about the timing of monetary payments that would be made in due course, either failable to Glencore, or not failable to Glencore, depending upon the outcome of the remitter to the tribunal.

Now, when one weight against that, the nature of the hearing we say that the position becomes tolerably clear. If I might I just want to expand upon that. In relation to the topic of user contributions the tribunal decided this on three main bases. Each held by the Full Court to be erroneously, although that decision, of course, is the subject to an application for special leave. The first was that the parties having adopted a DORC approach, such an approach would produce an efficient forward looking amount which would emulate the cost of providing the service in a competitive market, leaving no role for historical cost analysis.

The second was that section 44X(1)(e) which is concerned with extensions made pursuant to the provisions of part IIIA rather than extensions at large, including historical contributions. The third was that in circumstances where the tribunal lacked full evidence of historical contributions, historical costs and the basis on which contributions were made, there was insufficient material to engage in the exercise proposed by Glencore, and the Full Court, in effect, has overturned each of those bases, and the consequence of these matters – sorry, the consequence of the - - -

HIS HONOUR: Is it right to say the Full Court overturned the third aspect? As I read their decision it was that – it considered that the tribunal's assessment of that matter was influenced by other decisions the tribunal had made as a matter of law, which the Full Court regard as wrong, and, therefore, the Full Court didn't foreclose that item C that you mention as I read it as an outcome, it's just that it needed to be reconsidered with an understanding of the law as laid down by the Full Court.

MR MOORE: Your Honour, we would embrace what your Honour says, and I should have put it more accurate, is the Full Court found it wasn't sufficient to simply say, "We don't have the evidence, therefore, we don't need to undertake the exercise."

HIS HONOUR: Yes.

MR MOORE: What the Full Court was saying, in effect, is, "You need to undertake the exercise. You need to do what you can, having regard to the various matters that one would need to have regard to." And your Honour is right to some considerable extent the tribunal on the last occasion observed that we don't need to do that because of the other matters which the Full Court has found were not - - -

HIS HONOUR: Yes.

MR MOORE: - - - correct, and I was immediately going on to say that the consequence of the tribunal's conclusion, and the way in which it proceeded on the last occasion was that the tribunal did not, in conducting its re-arbitration of the matter, and we emphasise that this is a re-arbitration, it is not some sort of review – or merits review of the ACCCs decision.

HIS HONOUR: Yes.

MR MOORE: The tribunal did not consider in detail the alleged contributions by ..... with port dredging, the historical costs associated with those projects, or the terms on which they were undertaken. And we emphasise that the topics of user contributions was one of the topics where the parties did not adopt the findings of the ACCC. Now, can I just explain what I mean by that? Although it was a re-arbitration the parties to save time and trouble, in effect, said in respect of matters that are non-contentious the tribunal does not need to reinvent the wheel, and the tribunal can adopt the approach that was taken by the ACCC. As the tribunal will appreciate user contributions was not one of those topics, and the consequence of that is that any findings by the ACCC or any analysis by the ACCC is not an analysis by the tribunal, was not accepted by the parties before the tribunal as governing the arbitration process and, therefore, the tribunal would need to, in effect, re-exercise that – the power of the tribunal to conduct an arbitration in relation to user contributions - - -

HIS HONOUR: Yes.

MR MOORE: - - - and, therefore, whatever factual matters might arise, including any factual disputes would be something that the tribunal would need to consider on that re-arbitration. And a considerable number of issues will likely arise. There is debate about the quantity of dredging undertaken by, or the subject of contribution by users. There are issues concerning whether dredging was a contribution or whether, for example, it was done for the benefit of the user, for example to obtain spoil for a user's other construction activities. There are issues as to whether the costs were borne by the user within the meaning of section 44X(1)(e) and an obvious example of that which we referred to in our submissions is in respect of the dredging activities which were actually conducted by the state and where there was a levy said to be associated with those activities.

We do say it would be necessary to consider what else the user was paying at the time in respect of what assets and at what cost. For example, if a – on a proper cost recovery basis, the user would be charged $10 per annum per ton for access to the port, but the user was only being charged $1 – in other words, if there was significant cost under-recovery going on and in effect, there was state-subsidised port facilities being provided at a very discounted price to users. And then if the state was to exercise – undertake a dredging exercise that cost a further $1 per ton per annum and was to charge the user an additional $1 per ton levy, then the true position, we would say, is that the user is paying $2 to get access to $11 worth of port – port infrastructure.

And one could not simply take the $1 levy and the $1 additional dredging in isolation divorced from the other matters. And one would have to have a more holistic assessment of what costs were actually being born by users and one would have to also have regard to other criteria pursuant to section 44X in that regard, including the value to the service provider, what are the efficient costs and matters of that sort, all of which would be a more complex enquiry. There are broader issues as to the level

of costs which are economically efficient. If the tribunal has the Full Court's decision handy.

HIS HONOUR: I do. I'm not sure whether my fellow tribunal members do, although what I will just very quickly do is try to transfer a copy in accordance with a mechanism that we have set up to deal with these new procedures. Just give me one moment.

MR MOORE: Participating in an experiment.

HIS HONOUR: Yes, this is actually a bit experimental. But I will see if that worked.

DR ABRAHAM: I have a copy already, so - - -

HIS HONOUR: Good. Thank you, Dr Abraham. Certainly, I will just mention to Professor Davis – hopefully, what will appear is a copy in the Australia Law Report version, which is in a folder that we're sharing for these purposes. Yes, please proceed, Mr Moore.

MR MOORE: Yes.

HIS HONOUR: Yes.

MR MOORE: And I may read out bits so it's clear. And I'm not - - -

HIS HONOUR: Yes, good.

MR MOORE: ..... paragraphs. But in paragraph 261 – 261 is on page 72 of the decision.

HIS HONOUR: Yes.

MR MOORE: Their Honours observed in connection with the third subparagraph of section 44ZZCA(a)(i) – so it's ZZCA(a)(i).

HIS HONOUR: Yes.

MR MOORE: And their Honours observed:

> *To a considerable degree, the question whether particular costs are economically efficient depends upon contestable matters of fact and economic opinion. It's not an error of law for the tribunal to form a judgment as to the level of costs, provided it does so by reference to a proper understanding of the meaning of the term efficient costs. In this case, with due respect it did not do so because it equated the statutory term as meaning in all circumstances the*

level of costs that might be recovered in a hypothetical competitive market, were efficient costs are not so equated in all circumstances.

And so what the Full Court is identifying there is there may still need to be an exercise in the forming of a judgment as to a level of costs – and it's to ..... efficient costs. And the error was assuming that was simply driven by the notion of what would be a, in effect, hypothetical replacement cost in a competitive market of providing an equivalent facility as a whole. So that erroneous approach, so says the Full Court, being removed, there is then a further exercise the tribunal needs to undertake. Likewise at paragraph 267, dealing with these second subparagraph 44ZZCA(a)(ii), which of course is the subparagraph that specifies that regulated access prices should include a return on investment commensurate with the regulatory and commercial risks involved.

The Full Court observed that that subsection did not pose the pricing principle to which there must be regard in terms of efficient costs that subparagraph (2) is not a subset of (a)(i) and the word "include" refers back to the prefatory words of (a). Rather, it was directed to ensuring that the return to the access provided was commensurate with the regulatory commercial risks involved. Expressed in those terms, the statutory language contemplated an allowance for a broad category of risks, including those associated with the regulatory process itself. What was required was the formulation of an appropriate conclusion as to the value of the extent of the investment to be used in the assessment in the extent of return. The tribunal did not undertake that task.

It failed to do so because of its view that a capital value determined in accordance with the agreed DORC methodology was the value that would conform to the statutory requirement. That was not necessarily so. And then in the next paragraph, the terms in which that subparagraph was expressed require an appropriate return to be determined after evaluating the relevant risks involving the particular cases. Now, that – one matter that can be brought into account in making that assessment was the concept of economic efficiency, which included consideration as to whether there had been user-funded contributions of that kind that meant that the cost of the part of the capacity of the facility was being borne by someone. However, it was not confined to such an assessment irrespective of whether an efficient measure of the value of ..... was to take account of user-funded contributions or not.

And so having regard to those paragraphs, it is clear that there is a broader enquiry that the tribunal needs to undertake in giving effect to the pricing principles than the tribunal did undertake. And that will necessarily require consideration of potentially a range of matters. And at 269 the full court observed that the tribunal – the tribunal's approach did not reflect what was required by the statutory provisions and therefore ..... to interpretation of the provision that informed the tribunal's reasons has been demonstrated. And then can I go forward to 289. This was where the Full Court made clear – their Honours made clear that:

We do not wish to be taken to accept the proposition advanced for Glencore that it was enough to show that there had been contributions in the past. There may be the aspects of the past that bear upon the conclusion at the relevant time as to whether the costs have been met in the past that is represented by the present value might properly be said to be costs that is borne. One matter that might be relevant to that enquiry may be the perpetual nature of the asset created by past user contributions. Another matter may be whether regard to those contributions, together with regard to the other factors of section 44X(1) requires balancing of competing considerations.

And then they make particular reference – their Honours make particular reference to section 44CA(a)(ii), which we have just been dealing with, which is the requirement to have a rate of return commensurate with the regulatory and commercial risks involved. The tribunal has not considered that aspect in expressing its final conclusion. And so when one then considers section 44X and what is potentially captured by the balancing of competing considerations, there are a number of considerations the tribunal may need to have regard to. One is 44XAA, the objects of the part. The other is 1(a), the legitimate business interests of the provider and the provider's investment in the facility. Another is the interested persons have rights to use the service. I have skipped over the public interest, but that may be relevant.

Also the direct costs of providing access to the service. And then in 1(e) itself, of course, the consideration there is to the value to the provider of extensions whose cost is borne by someone else. So it's not just that there are extensions whose cost is borne by someone else, but what is the value to the provider of those extensions which requires an evaluative consideration. And of course, in 1(g) the economically efficient operation of the facility and 1(h), the pricing principles specified in section 44ZZCA and of course, I have taken the tribunal to some observations of the Full Court about those.

So the exercise is not simply a matter of toting up the cost of the extensions and is not simply a matter of taking the percentage of the replacement cost or the efficient replacement cost which the extensions represent, which is the approached adopted by the ACCC. It is a broader and more nuanced enquiry that the tribunal will need to undertake. And there will no doubt be other issues, factual and conceptual, associated with user contributions and the exercise, we submit, is undoubtedly complex. And the Full Court has happily indicated that it's not for the Full Court to say what the result is, but it's for the tribunal to now undertake that more complex exercise, so user contributions we say is undoubtedly a matter that will be somewhat involved. There are then also some issues concerning scope. Here again the Full Court left the determination of the appropriate approach to the tribunal, however, can I just note in the decision at paragraph 151.

HIS HONOUR: Yes.

MR MOORE: Towards the bottom of the page, about four lines up from the bottom there's a sentence beginning:

That a party will seek to deal with PNO on the basis that the agreed terms will apply in such circumstances, and Glencore will thereby set the terms upon which the court will, in effect, issue a ticket.

Does your Honour see that?

HIS HONOUR: I do.

MR MOORE:

Issue a ticket for such ships to use the port, the cost of which will be borne by Glencore. The party in control of the ship may also wish to seek terms on which it is directly liable to PNO. The fact that each may seek to treat as to terms upon which the service may be provided does not pose any difficulty; PNO offers terms to each, and commercial decisions will be made on that basis.

And then at 162.

HIS HONOUR: Yes.

MR MOORE: There's reference about five lines into the paragraph of the notion of Glencore being – sorry:

The notion of a person who may have a right of access can, through Glencore, be given the ability or option of taking up Glencore's arbitrator right price.

So there's this notion that you're of an option or optionality - - -

HIS HONOUR: Yes.

MR MOORE: - - - for a user to be able to, in effect, choose. Now – considerations will arise in circumstances where, for example, a ship owner has through the contract with agents and negotiated a particular set of terms and conditions at a particular price, and then under this suggestion there might to be some mechanism for an option whereby they could take a different price if that was attractive to the person. It doesn't seem to be one that is – that what is in contemplation, is that Glencore would simply impose price or impose terms and conditions but rather that might be an option that would be for the ship owner and that would then confer – Glencore with the benefit of its arbitrated price if the ship owner takes up that option.

But these are matters that will require at least some thought and consideration as to how, in a mechanical sense they are to work, particularly if there is any particularly – and I emphasise this, if there is any inconsistency between the contractual agreed terms – non price terms - - -

HIS HONOUR: Yes.

MR MOORE: - - - and any terms which are the subject of the tribunal's determination and then the question that arose, well, how are those inconsistencies to be resolved. Is it to be resolved by some form of option or the like. So that there are matters that will require some – some sophisticated consideration in that regard.

HIS HONOUR: Yes.

MR MOORE: There is also – the question of the impact of the revocation of the declaration and we have in our submissions raised, at least two issues, that arise in that regard. One is the question of the term of the determination, and the other is any dispute resolution procedure which, currently, would seem to be the current procedure that, in the determination that has been set aside by the Full Court, would appear to be no longer efficacious, because it relies on a mechanism that is no longer available under the statutory regime. So, these are - - -

HIS HONOUR: Yes. Just on that last matter, and I might as well deal with it now just because you've raised it, but obviously there is a question, or in any remittal, there's a question as to what issues are remitted. Sometimes the view is formed the whole of the matter is remitted for redetermination, on other occasions it can be discerned from both the order of the appellate court and the reasons the appellate court that really the remittal is confined to specific issues. And uninformed by anything else, one might immediately assume, in this matter, that the remittal was confined to the two central issues on which the Full Court ruled.

The duration of the arbitration determination, I would regard as a new issue, in otherwise, it wasn't immediately the subject of the remittal and therefore could only be raised if the tribunal formed the view, well, notwithstanding two issues were dealt with by the Full Court, the nature of the Full Court's orders really were, in effect, that the whole arbitration needs to be redone, and that, in a sense, can open up any issues. I'm sure there's probably a mechanism under the Act for, in the context of changed circumstances to go back and revisit things, like the duration, obviously the removal of the declaration might be regarded as a changed circumstance, but you will need make an argument, I imagine, Mr Moore, in due course, if you wish to raise the duration of the arbitration determination as an issue in the remittal that you're really entitled to do that, that that is something that ought to be taken into account.

MR MOORE: Your Honour is undoubtedly right, with respect, and for present purposes, I simply note that that really needs to be added to the list of matters that will need to be the subject of consideration - - -

HIS HONOUR: Yes.

MR MOORE: - - - because this is a situation where it's not just us saying "Well, that is a supervening event that now requires a little extra consideration". We would say that, in fact, the determination has a failure in it, or it has a mechanism that is inutile, and that might - - -

HIS HONOUR: Yes.

MR MOORE: - - - the particular case so that – even if, for example, the tribunal regarded the remitter as somehow limited, the question would be whether in that circumstance there is nevertheless going to consider a broader issue.

HIS HONOUR: Yes.

MR MOORE: Of course, not in any way conceding the first issue, we would say that the remitter would require the tribunal to consider any matter that necessarily arises on the re-arbitration and we would say that these matters necessarily arise because of a important change of circumstances that has occurred since the previous determination, but those are matters, your Honour is right, that will be the subject of the debate.

HIS HONOUR: Yes.

MR MOORE: And for all of these reasons, and no doubt I have not captured all of the issues that will arise, that is probably impossible, but for all of these reasons, we do say that the suggestion that this is a one- to two-day hearing is not realistic, but we think this is actually a one-week hearing. I actually think the matters that I'm touching upon, I would need more than a day to address, and maybe up to

HIS HONOUR: Yes.

MR MOORE: Glencore would no doubt want a matching time to deal with them. The ACCC will no doubt, in its usual way, wish to say something about it, and the idea that that's somehow going to be dealt with in one to two days we say is just hopelessly optimistic.

HIS HONOUR: Yes.

MR MOORE: And that rather does emphasise the nature and scope of the task which would be, in our submission ..... if all that has to occur and then there's a possibility of the High Court to say "Well, that's – that's all wrong" - - -

HIS HONOUR: Yes.

MR MOORE: - - - That should be done – it should be done on some different basis, either – either setting aside the full court's decision or, as your Honour has observed, coming up with a yet further basis upon which the matter has to be determined - - -

HIS HONOUR: Yes.

MR MOORE: - - - which is entirely possible. And so, for those reasons, we do say this is a case where the tribunal should await news as to what is happening with the

application for special leave. And of course, obviously, if special leave is granted, that would be an even more compelling case for pausing - - -

HIS HONOUR: Yes.

MR MOORE: - - - ..... determined. I will just address the question your Honour has raised. If we're dealing with submissions, there's other – sorry, if we're dealing with timetabling issues, there would be other things I would want to say about those matters. But - - -

HIS HONOUR: No, although perhaps I might ask you, though, to address this: if the tribunal ultimately accepted your primary submission that there really is – the weighing of advantage and disadvantage tilts in favour of pausing for the appellate process to be completed, the further question, of course, that arises is does that mean nothing should happen and to the extent that anything could be done that might usefully be done, and what I really have in mind is to what extent should the port, insofar as its minded – it will be minded to put on new material, if not to be the subject of a formal order but to be urged by the tribunal not to sit on its hands because once the special leave application outcome is known and particularly if it – special leave is not granted the tribunal might want - - -

MR MOORE: Yes.

HIS HONOUR: - - - to move more quickly and not have further delay. But it is the overall question of what might, if anything, usefully be done in the meantime. It might – it might still be going too far to schedule hearings on the evidentiary question whether further will be adduced. There seems to me to be two aspects to the evidence. On the scope, the material that the port seems to me to want to bring forward dis in a sense largely new material in the sense that it wasn't material available at the time of the ACCC arbitration, or at least that's what I've gleaned from the materials. In respect of – in respect of user contribution, it raises the more difficult question that – and I don't – I use the language "second bite of the cherry" a little bit flippantly, you know, I don't mean it in too much of a pejorative way. But there is a question, of course, in these matters where the legislation shows a legislative intention that there not be a free-for-all at the tribunal level, a complete re-go.

Largely, parties are confined to what they produced before the commission subject to the tribunal exercising its discretion on the statutory criteria of reasonable and appropriate. Now, I can understand a submission "well, now in light of the full court decision, more things – the relevance of a wider range of matters is more apparent or has become apparent". I must say, there is a question in my mind, this was all an issue that was before the ACCC, lots of arguments could be made, lots of material could have been sought, decisions were made at that time as to how far the parties wanted to delve into the past, the parties made those decisions, a certain body of material was generated, there was no inhibition on anyone from delving further if they wished to. Should the port, which I understand is really the application that it is

making, now be allowed to open up evidentiary matters simply because a certain way of looking at things from a legal perspective has been shown not to be right?

MR MOORE: There are two things that I would say, your Honour. The first is that it is a little difficult to address that question in the absence of an identified thing that I'm asking - - -

HIS HONOUR: Yes.

MR MOORE: - - - the tribunal to – to look at.

HIS HONOUR: Yes.

MR MOORE: And of course, one possibility is that there will be nothing - - -

HIS HONOUR: Yes.

MR MOORE: - - - that I ask the tribunal to look at additionally to the material that was before the ACCC. Another possibility is that there is something that has been identified that is of particular significance, and we're able to address in a particular context that significance. To deal with that at large is a little difficult - - -

HIS HONOUR: Yes.

MR MOORE: - - - particularly having regard to the next point I would make, which is that the full court decision does raise matters and a frame of reference that it is fair to say the parties, neither before the ACCC or before the tribunal, were precisely addressing. Now, that may be, in effect, the fault of the parties collectively, in the sense that had we discerned what the full court would – would say in due course if that be the proper legal test. And perhaps we could have addressed it, but certainly that would be a relevant consideration as to whether the tribunal would simply say "well, that's too late", or whether the tribunal would say "this is an important facility, important question, it affects the terms of access in an important respect and we would prefer to have relevant material before us if that be critical and important". But again, in the absence of that – in the absence of an identified thing - - -

HIS HONOUR: Yes.

MR MOORE: - - - that I'm asking the tribunal to have regard to debate, it is a little difficult. But I understand what your Honour is putting to me - - -

HIS HONOUR: Yes.

MR MOORE: - - - and again, I understand we will need to address - - -

HIS HONOUR: Yes.

MR MOORE: - - - what exactly is the nature of the – of the material that we would want the tribunal to have regard to. And as your Honour would see from the affidavits, the nature of where the material is and the volume of it and the need to actually have a proper and focused inquiry and to bring forward only that which is of the category that we would say would make a difference to the tribunal's analysis has just meant that we haven't yet completed that exercise. In relation, though, to how that would procedurally have to arise, my learned friend, Mr De Young, has, in our submission, quite sensibly proposed that the material we have already identified could simply be dealt with at the hearing because it's at the confined sort, everyone knows what it is and the question just is whether the tribunal should have regard to it or not.

HIS HONOUR: Yes.

MR MOORE: But I rather suspect that if I was to bring forward some other material relating to user contributions, Glencore might want to have a debate about that at an earlier stage, including because it might be material that Glencore would wish to respond to - - -

HIS HONOUR: Yes.

MR MOORE: - - - or that's at least a possibility.

HIS HONOUR: Yes.

MR MOORE: And so, the question ..... that is coming in at all might well be a live issue that – that Glencore would want to have determined.

HIS HONOUR: Yes.

MR MOORE: And so there are probably steps that need to be taken before we know what is the material on which the further hearing would proceed and what would be taken into account.

HIS HONOUR: Yes, yes.

MR MOORE: And for all of these reasons, we would respectfully submit that the appropriate course is to see what is happening with the special leave application before trying to take a whole lot of further steps that might be entirely wasted, both as to the costs of the parties and as to the tribunal's time, even if they are, in effect, interlocutory steps rather than the hearing proper.

HIS HONOUR: I understand. Can I just ask about this one practical matter: It struck me from the affidavits that have been filed that certainly part of the material that the port is contemplating looking for or thinking about will be within the port's control - - -

MR MOORE: Correct.

HIS HONOUR: - - - there's other third parties that might have material. That might still be something that the port is able to pursue off its own bat. In other words, it requires no assistance from the tribunal or no – no exercise of compulsory power by the tribunal. I'm assuming the tribunal has some compulsory power in this area.

MR MOORE: It does.

HIS HONOUR: Yes. Is it in contemplation because – sorry, let me just pause there. There's obviously a great deal to be said for the pause that, of course, the port can continue – if the tribunal makes the decision to pause for reasons that have been discussed, the port can get on with any evidentiary exploration that it wishes to and it means – and hopefully complete that by the time the matter is reactivated by the tribunal and then any necessary interlocutory hearings, to the extent they're necessary, can then be held about whether the material will be admitted into evidence by the issuing of notices by the – by the tribunal and the extent to which Glencore needs to be given an opportunity to respond to that matter.

In one sense, that can all be dealt with quite practically and it's in the port's camp and the port can just get on with it without the tribunal ruling on it or making a determination about it at the moment. To the extent that the port really needs the tribunal to exercise a power to illicit material from other third parties in circumstances where the port – where they're not cooperative with the port and the port can't otherwise get the material, that, of course, is a very different set of circumstances because the port is going to have persuade the tribunal that it ought to exercise that power, it's going to open up all sorts of issues about whether that ought to be done and I can – I can just foresee a one-day hearing or two-day hearing on that alone - - -

MR MOORE: Yes.

HIS HONOUR: - - - which has, again, raised the question of whether that should happen, when it should happen, will it be wasteful, etcetera, etcetera. Does the port – is there an aspect of what the port is wishing to investigate, will it require that latter step t o be taken by the tribunal?

MR MOORE: The answer to that question is it may well but inquiries are still being undertaken that crystallises that point. So I can't - - -

HIS HONOUR: I see.

MR MOORE: - - - say to your Honour right now - - -

HIS HONOUR: Yes.

MR MOORE: - - - it will or that we - - -

HIS HONOUR: Yes.

MR MOORE: - - - be seeking that power to be exercised. All I can say is that it is on the cards that we will and, therefore, we are conscious that, as your Honour has observed, once we enter that territory, then there's a whole interlocutory process. There may be a third party, for example, who might wish to be heard as to whether it should be heard as to - - -

HIS HONOUR: Yes.

MR MOORE: - - - whether it should be required to produce material, matters of that sort, all which becomes - - -

HIS HONOUR: Yes.

MR MOORE: - - - much more complicated at that – at that point.

HIS HONOUR: Yes.

MR MOORE: And, for all of those reasons, we would respectfully suggest that it's something that should be looked at once we know what is happening with the special leave application, which we would expect we would know pretty early in the new year, having regard to the normal timing of these matters.

HIS HONOUR: Yes, I understand. I mean, it may – and I'm only expressing a very general and preliminary view. I mean, it may be that one course, of course, is to leave all of these matters in the port's camp to explore and pursue as it sees fit in the knowledge that, if the matter – and when it comes back to the tribunal and ready to proceed either because special leave is not granted or the appeal is finally determined, when the – when the tribunal comes to look at these matters and the exercise of powers under – I forget the section's number and letters but to issue the requisite notice, that what's reasonable and appropriate at that time will obviously – a number of factors will bear upon that, including the delay that has occurred, through no one's fault, but the delay that has occurred, what steps the port has taken in the meantime, what further delay might be involved in issuing a notice against a third party and all those sorts of matters may all loom large at that time which is all, of course, simply to say the port ought to do the best it can in the meantime and - - -

MR MOORE: Yes.

HIS HONOUR: - - - not expect too much, in a sense, tolerance – "tolerance" is probably the wrong word – but grace from the tribunal if and when it comes back.

MR MOORE: We – I understand, your Honour. And we – we have been undertaking – and an exercise we are continuing to undertake an exercise and - - -

HIS HONOUR: Yes.

MR MOORE: - - - and, in fact, we – before we came on, we were just discussing how we would process that. So - - -

HIS HONOUR: Yes.

MR MOORE: - - - we – your Honour can assume that we – we intend to continue that exercise to try and identify material, also bearing in mind that we will then have the burden of persuading the tribunal as to why it should request material, why it should have regard to material. And so that necessarily has a focussing – a focussing - - -

HIS HONOUR: Yes.

MR MOORE: - - - a focussing effect, if I can put it that way - - -

HIS HONOUR: Yes.

MR MOORE: - - - on the – on the exercise.

HIS HONOUR: Thank you. Mr Moore, I'm just going to inquire of, first, Dr Abraham and then, secondly, Professor Davis if they have any questions or matters they wish to raise with you.

DR ABRAHAM: None from me, your Honour.

HIS HONOUR: Thank you, Dr Abraham.

PROF DAVIS: None from me either.

HIS HONOUR: Thank you, Professor Davis. Good. I actually inferred that was a convenient point, Mr Moore, to – perhaps to allow Mr De Young to respond. Is there anything further that you wish to say at this stage?

MR MOORE: No other than if we are inter-programming issues then I – we would wish to say something - - -

HIS HONOUR: I - - -

MR MOORE: - - - timing and – and the like. Yes.

HIS HONOUR: I understand.

MR MOORE: Other than - - -

HIS HONOUR: Which – which we will return to. Yes.

MR MOORE: Yes, thank you.

HIS HONOUR: Yes, thank you. Good. Thank you. Mr De Young.

MR DE YOUNG: Yes, thank you. As the tribunal understands, we are opposed to the holding up of the matter - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - and the hearing pending the mere prospect of special leave being granted. And, if it assists, can indicate this at the outset: what we had in mind was a hearing in March or April of next year and timetabling leading up to that. Can I – the first matter we wish to raise in opposition to the court's proposed course is something that was addressed at the last case management hearing and I'm conscious that – that your Honour has indicated you've read the transcript but just let me emphasise the point briefly - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - and it's this: that, in our submission, there's a procedural irregularity which is occurring and – and that's because the port has made a forensic decision not to apply for a stay of the Full Court's remitter. And it should be able to use that forensic decision to now obtain a de facto stay before the tribunal. And that is a point of substance and that's because of – of this: that a relevant factor on – that any decision-maker would need to grapple with in deciding whether or not to grant a stay would necessarily need to be, "What are the prospects of obtaining special leave?" And that's a relevant consideration on the authorities which we identified on the last occasion and I accept your Honour's point that they're in a different context. But - - -

HIS HONOUR: Well, just while we're on that, it – I did go searching myself and it – it sort of surprises me that I wasn't able to put my hands on a case that is equivalent to this. I was hoping either Ms Dermody or – might find one or somebody else might find one. But it does strike me – it's slightly odd – well, I understand what you say about a stay and I do understand that one might think that perhaps seeking a stay in these circumstances at the Full Court level, effectively a stay of the remittal, might be a course that could be pursued. But, in circumstances where something is remitted to a lower tribunal court but, as I say, the appellate process is not complete, it would seem to be an unusual circumstance for the lower tribunal court to just redo the matter pending – while another appeal is pending but I haven't found a case that discusses it or anything else but – but it does seem odd for the very reason I've mentioned: I mean, the prospect of there being three decisions by the tribunal in this matter has to be a prospect that would seem rather odd to anybody, of course, wasteful of time and money for everybody. Now – so I don't – you know, I understand what you say about the stay. I've tried to find cases that deal precisely with this situation and oddly I haven't found one but - - -

MR DE YOUNG: In my submission, it's not odd, your Honour. It's because what's occurring is procedurally regular. All the cases are dealing with the circumstance

where the putative appellant seeks a stay before the Full Court. And that's the course that really ought to have been followed. And, if that course had been followed, it's abundantly clear that the prospects of special leave would have been a relevant consideration. And the reason why we have not been able to locate any cases on the point is because it's, in my submission, irregular, and putting that irregularity to one side, now that the tribunal is being called upon to, in effect, grant a de facto stay, the prospects of the special leave application ought to be a relevant consideration for the tribunal too, and that's, of course, putting the tribunal in an invidious position, and that's a reason why we submit that it really ought to be fatal for the port that they haven't applied for a stay in the Full Court. And, of course, related to that point is that Glencore is entitled to the full benefit of the correctness of the Full Court decision.

HIS HONOUR: Yes, I mean, those statements are made. I mean, there are many appeals where, of course, a ruling is made and effectively the appellate court makes final orders in substitution for the final orders of the lower body. And, of course, if you don't want that to take effect then, of course, you have to act immediately and you seek a stay. Remittals are somewhat different, of course, because there's no operative orders, and I do wonder whether it's just assumed in most cases that in a context of a remittal where the lower body has got to do it again, but there's the prospect of an appeal – there is an appeal or a prospect of an appeal from the appellate – intermediate appellate body that everyone knows it would be rather odd to go on and re-hear the matter when you're re-hearing it on a basis that is itself the subject of an appeal.

So I – I hear what you say, it's procedurally irregular. I mean, it's one way of putting it, but I sort of wonder whether in the context of this sort of stay some of the normal considerations on a stay wouldn't loom very large because it would just be seen to be wasteful and odd to allow the remittal to go on. In other words, force the lower body to conduct a whole new hearing on the matter while that intermediate appellate decision is itself the subject of appeal.

MR DE YOUNG: I understand what your Honour is putting to me and the only part that I cavil with is that there is an order of the Full Court and the order is that it be remitted back to the tribunal.

HIS HONOUR: Yes.

MR DE YOUNG: And that a tribunal has its responsibilities to hear the matter remitted and determine it, and we had a debate on the last occasion - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - about whether the 180 day timing is operative, but even if there was a guidance.

HIS HONOUR: Yes.

MR DE YOUNG: Yet what the port is urging upon the tribunal is to pause in its entirety the conduct of the remitter on the basis of nothing more than a prospect of the special leave being granted, and without advancing a submission to your Honour that they had good prospects or otherwise, and that – I'm not inviting that submission because it's – merely to say it illustrate how a submission of that kind made to this tribunal would be putting the tribunal, as I've indicated, in an invidious position, and that's – there's authority about that, and that's why the stays really ought to be granted by those superior courts.

HIS HONOUR: Yes.

MR DE YOUNG: And so that's a point that we've made, and I do want your Honour proceed and there may well be a compromise position that we can reach, if I can put it that way, but I will come to that on timetabling. Can I just deal with the next point in opposition to the court's proposed course which is the question of prejudice.

HIS HONOUR: Yes.

MR DE YOUNG: And there is, in our submission, real prejudice to Glencore because it's losing the benefit of the regulated price, and on the other hand the delay is providing for real benefit to the port. And the issue is, as your Honour indicated to my learned friend, really one of – the problem with the port's proposition that backdating protects prejudice, and the backdating won't protect Glencore until scope is determined, and in it, as your Honour has sensibly contemplated, and had occurred to us, of course, that Glencore was to keep a record of our Glencore nominated vessels. And even if we were to tell the court of every instance about a Glencore nominated vessel, in our respectful submission, the port will never agree to backdate those vessels under the regulated price.

It has never offered to agree. It has never undertaken to agree. It will dispute that limb. It will dispute the Glencore nominated vessels. It will dispute it in terms and idea, and absent any indication from the port that it would agree to backdate the Glencore nominated vessels we run the real risk of that – the idea of keeping a log of the Glencore nominated vessels not providing any real protection by way of backdating.

HIS HONOUR: Can I explore that a little bit with you though because obviously by your submissions on the remittal, Glencore will be saying it's within the power of the tribunal exercising the arbitration power under part IIIA to make a determination binding upon the port, effectively, that this is the price that is to apply and be charged by the port to these vessels, which are carrying Glencore coal. I mean Glencore's case is that that is within power under the statute, can be part of the arbitration determination, and by force of the statute, therefore, become binding on the port. Now, obviously Glencore have to succeed on that proposition before the tribunal, but that's the case that Glencore is bringing to the tribunal, and assuming it succeeds, then – I suppose then where the prejudice is, sorry, it's your case that that can be

imposed on the port, and won't it cure any prejudice at that time, once the tribunal rules on it? And, assuming it's in favour of Glencore, and backdates – which is obviously the usual way these things operate when there's been delay – why won't that work?

MR DE YOUNG: Well, it would, your Honour, if your Honour was – the tribunal was to accept our proposed scope, holus-bolus.

HIS HONOUR: Yes.

MR DE YOUNG: And particularly, it's this third limb - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - of the scope ..... the only controversy. And we say – and I might just take your Honour to a couple of passages from the Full Court reasons that our learned friends didn't, which, in our submission, make it abundantly clear that the Full Court has given a direction, in substance, or – that this form of access is wide open.

HIS HONOUR: Yes.

MR DE YOUNG: And the only real matter that the port raises in opposition to it is the idea that they have long-term contracts with shipping agents.

HIS HONOUR: Yes.

MR DE YOUNG: And that was a matter which the Full Court considered and rejected. But, pretty clearly, at paragraph 161 of the Full Court - - -

HIS HONOUR: Yes.

MR DE YOUNG: ..... 161 introduces the idea of – that there will be difficulty with this form of access determination, by reason of ship owners now becoming shipping agents: the same argument arises. And the Full Court, in the paragraph that followed, reject that as a problem. And, in particular, at paragraph 165, the Full Court says – and this is the burden of the port's submission on the point – there's no real feel of arbitrage, as between, on the one hand, the determinated – the determined price under this third limb of scope, and any existing agreements. And so, your Honour, we submit, we – that our third limb is compelling and overwhelming, and, if it is accepted, then we can avail the backdating. And the fear that we have is that any variation on the form of it that the port might persuade on the tribunal – as a matter of form, not substance – would arguably disentitle us to that – the benefit of that backdating. But I can't put it any more than that, for the moment.

HIS HONOUR: No. Because it means this also, doesn't it, Mr De Young, that the apprehension that you are expressing at the moment, of course, applies forward from

whenever – from now until whenever the tribunal makes a determination in this matter, on a remittal. But it already exists, in the sense that, from 2016 – from when the application was first filed of a dispute – the ACCC determination, I understand, under the statute, never came into effect, because of the application to the tribunal for review: and that's the statutory term. The tribunal then ruled on a certain basis, but that's been set aside. So from 2016 to date, in effect, there is no determination on the arbitration.

And the difficulty that you apprehend exists today – for that period, depending on the outcome – no doubt you would urge the tribunal not to let it go on for too much longer: it's only exacerbating the problem. But the problem is already there as to how the working out of what the Full Court believes, and has ruled is permissible and possible under the access regime – and any other considerations that might bear upon it, which is to do with the existing contractual arrangements between the port – and the agent ship owners bias, whatever it might be, has made some other arrangement – and just getting that to work under the mechanisms of part IIIA. But am I right the way I summarise it? I mean, the problem is there: you just don't want the problem to continue – Glencore doesn't want the problem to continue for too much longer.

MR DE YOUNG: Yes, that's right. And it's not just the problem – that's right. But it's not just the problem of not being able to – Glencore not being able to, with certainty, avail itself of the backdating provisions. It's also that Glencore, without the benefit of the regulated price, can't organise its commercial affairs, in accordance with these tribunal determination, both on scope and on price and that – Glencore doesn't wish for that state of affairs to go on either.

HIS HONOUR: Yes. Could I just understand what factually lies behind that submission because it is a question that was on my mind about how this all works. In the context of free onboard sales of coal which, of course, generally means you're selling the coal at the wharf and, of course, the buyer then has the costs of the freight and the shipping and the insurance, etcetera, from the port, achieving a lower price for the use of the port channels I assume just feeds into the commercial negotiations between Glencore and the buyers of its coal for the FOB price even though, in a sense, the FOB price doesn't directly include therefore the shipping costs, but to the extent that Glencore is able to achieve this lower access price for the shipping channels and in that sense make that available to its buyers in that way, then that has an effect on the price of FOB coal. Is that – am I right to understand that that's the commercial mechanism?

MR DE YOUNG: That – you are precisely right about it.

HIS HONOUR: Yes.

MR DE YOUNG: Glencore not legally liable under the FOB scenario, but economically liable and that's why there's a real commercial imperative to – for Glencore to be able to organise its affairs.

HIS HONOUR: Yes.

MR DE YOUNG: A commercial priority that's, of course, the tribunal would easily infer that's made all the more urgent in the current economic environment for coal exports.

HIS HONOUR: Yes.

MR DE YOUNG: I don't have any evidence about that, so I'm not putting that to your Honour as something that's - - -

HIS HONOUR: No.

MR DE YOUNG: That your – that the tribunal can have regard to today, but just to answer your Honour's question of why is this urgent for Glencore and what is it that Glencore has in mind - - -

HIS HONOUR: Yes. Yes, I understand. Can I put this to you – and, of course, don't feel compelled to answer it Mr De Young and I'm asking the question just so that I can properly get my mind around the asserted prejudice and the balancing of interests in this matter. Just to take what I put to you, you know, one step further, I can understand how that mechanism might operate knowing international market price properly for coal or various international market prices depending upon the end destination for the coal from which, of course, buyers then will subtract costs that the buyers have to incur, particularly if they're incurring shipping and insurance and the like, and you can work back to get to an FOB price which is negotiated.

I could well understand why a coal producer in Glencore's position to the extent that they can offer to a buyer through its shipping arrangements some lower costs associated with the use of the port and the shipping channels that there then might be a negotiation of a sharing of that reduction in cost. And I assume in one sense it probably would be a sharing of the reduction because it's something that Glencore as the seller of the coal can make available and can offer and I would have imagined that the cost therefore – the cost saving might be shared between the buyer and the seller. I say all of that just to lead to the question, can't and won't that still happen in respect of the back dating?

In other words, so if Glencore is successful before the tribunal and orders are made in the form that Glencore is seeking, the category C, therefore Glencore has the opportunity to make a lower shipping channel price, the navigation service charge, and the NSC in any event, price available to its vessels are just kept track of over time. There's some optionality associated with that, even on Glencore's approach and I imagine therefore would be a negotiation of discovering which vessels want to take advantage of that and no doubt some negotiation of sharing of the price reduction associated with that. And now, can I say, Mr De Young, that's all speculation on my part. I put it no higher than speculation. It's only trying to understand the mechanism by which Glencore obtains an advantage from the

extension of the arbitration determination so that I can understand is there prejudice and what is the nature of the prejudice from delay, so you will understand how and why I'm exploring these matters.

MR DE YOUNG: Yes, I fully understand, your Honour. On Glencore's case, and there was some evidence about this before the ACCC, Glencore was bearing the entirety of the economic cost of the port charge, so on Glencore's case it's not a matter of sharing between buyer and seller, it's the seller bearing the economic cost, and that's Glencore's case. I'm not suggesting that your Honour needs to - - -

HIS HONOUR: No. No.

MR DE YOUNG: - - - expect that for today. That's their case. And the difficulty with the backdating is that, as the tribunal may have picked up and Dr Abraham is well aware of, the circumstance in which Glencore is the charter as well and truly the exception to the rule or very few instances – I don't have the number to hand but there were few - - -

HIS HONOUR: I understand.

MR DE YOUNG: - - - and that's understandable given the nature of what Glencore's business is and FOB sales and the like. And, then, the second limb of the scope is the nomination under the local State Act, that in a sense the Glencore takes responsibility for the charge in the way in which the shipping agent does - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - and that hasn't occurred in the past. So that's – in terms of backdating, we haven't got much up to now, and so all the backdating needs to be done through the lens of the Glencore nominated vessel, or the vessels using the wharfs carrying Glencore coal, using the words of the Full Court. And we have endeavoured to draft our third limb in a forward looking away to address the port's concern about uncertainty with other ship runs, and that has been the focus of our drafting exercise to have a clear pathway moving forward as to how it would work when Glencore is not the charterer and doesn't do the State Act nomination.

Our fear is that the port will say, well, you've never done that in the past and so you are not going to get anything by way of backdating. And we can try and address that through the drafting or in submissions of the tribunal, but that's the fear that we have, and so that's why. And your Honour is right to say that fear and that problem already exists, we don't gainsay that it does, but we are anxious to have a determination on this question because we are fearful of a substantial dispute with the port about backdating, and none of - - -

HIS HONOUR: Yes, I see.

MR DE YOUNG: None of that is intended to criticise our learned friends for the port, we understand the point they're making and that's why we're keen to get on with it.

HIS HONOUR: Yes.

MR DE YOUNG: There is another possibility which we don't propound that can I mention because it came up at the last case management hearing, and that is the possibility of determining the scope question as an interim matter, and the president on the last occasion indicated he wasn't eager for the course, and I indicated that we would have a look at the Act and see if we could find any support for it, and we do see some support for the power - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - existing in section 44ZOA, subsection (2). Subsection (c):

> *Interim determination comes into effect until the earlier of the following and interim determination made by the tribunal whilst reviewing a final determination relating to the access dispute.*

That - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - read in conjunction with section 44ZE, subsection (4) which provides that the tribunal has the same powers of the commission, in our submission, provides support for the tribunal having the ability to reach an interim determination.

HIS HONOUR: Yes.

MR DE YOUNG: We can see that's not expressed - - -

HIS HONOUR: No.

MR DE YOUNG: - - - and not beyond doubt, and as I indicated a moment ago, we don't propound it, we propound a final determination on all issues, that is scope and user funding.

HIS HONOUR: Yes. No, I understand. I understand. And I can foresee immediately some questions both ways as matters of construction as to whether it can be done. I understand the point.

MR DE YOUNG: So we can we. I mention it really to tie up that loose end - - -

HIS HONOUR: Yes. Yes.

MR DE YOUNG: - - - but I'm repeating myself for a third time now, but we're not commending the tribunal to take that - - -

HIS HONOUR: No.

MR DE YOUNG: - - - at least not today - - -

HIS HONOUR: No.

MR DE YOUNG: - - - depending on where we get to.

HIS HONOUR: Just so, though, I do bottom out the points that I – it does seem to me on the materials I've seen so far that the user contribution issue does seem to involve more factual complexity compared to the scope issue, and that's putting it mildly.

MR DE YOUNG: I was going to downplay more, but – more complexity – but there's more in it, we accept that.

HIS HONOUR: Yes. And, of course, if it was the case the potential prejudice to Glencore of a practical kind that you've already mentioned to me could be solved through an interim determination on the scope issue, one can see that there are some, well, at least the weighing of the pros and cons of the tribunal taking any particular course is quite different. It's just that the cost involved in smaller, it probably can be done more quickly, and if it generates a practical benefit that – particularly top overcome a potential problem that might not be cured by backdating – might not be able to be cured by backdating – one can see some attractions on that. So I understand you're not urging it, but it's a point that, you know, it's not without some substance, I can see that.

MR DE YOUNG: Yes. And I said not urging it today - - -

HIS HONOUR: Yes. I understand.

MR DE YOUNG: - - - ..... other than we haven't given our learned friend's notice of any such application and - - -

HIS HONOUR: Yes, I understand.

MR DE YOUNG: - - - everyone would need to think that through. We certainly don't give up on it. Our primary submission today is we would like a determination on all issues - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - within that timeframe I've indicated, say March, say April. If that becomes not realistic, we certainly wouldn't want to rule out revisiting that question, but the optimism in me hopes we don't need to.

HIS HONOUR: Yes. I understand.

MR DE YOUNG: The other point that can I make in prejudice is that the importance of this matter is not limited to just Glencore, in our submission. Although it's a pricing an arbitration as between Glencore and the port, in our submission, the regulated price will also act as a price signal in the market for the dependant services, and so there's wider interest to have regard to in that effect.

HIS HONOUR: Yes.

MR DE YOUNG: Before I address some of the things that fell from our learned friends on the substance of the user funding and scope points which I will deal with briefly, can I next turn to two practical issues which is assess what we submit is the appropriate course in light of what has occurred already today, and then, secondly, the scope of the remitter. On the latter, I can deal with that probably easy, we do submit that it is and ought to be confined to the matters remitted by the Full Court conveniently described as scope and user funding and doesn't extend to other matters such as the timing of the determination which has never been controversial before the submission the port filed more recently.

HIS HONOUR: Yes.

MR DE YOUNG: And that's a matter which can be addressed in our submission at the final hearing, but I wanted to make our position clear about that.

HIS HONOUR: Yes. Just – you might remind me, I didn't have an opportunity to check, is there a mechanism under the statute to revisit determinations on the basis of a change in circumstance, or anything like that?

MR DE YOUNG: I don't think so. The uniqueness of our present circumstance is probably not contemplated by the draftsperson.

HIS HONOUR: Yes.

MR DE YOUNG: The tribunal's task is to redetermine the matter.

HIS HONOUR: Yes.

MR DE YOUNG: And there would have been open to the court to challenge whatever parts of the determination that wish to challenge - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - on the last occasion. And there was an – in addition to user funding and scope, there were a number of other disputes that are – the answers to which are recorded in the first tribunal's reasons.

HIS HONOUR: I suppose – is the answer to, in a sense, my question this – and I know – I can see 44ZU which deals with variation of final determinations once you have a final – let's assume this determination wasn't the subject of appeal and, in circumstances where the underlying declaration was revoked, it would have been open to the port, in a sense, to notify a new dispute, potentially, on the question of duration and have that then, potentially under 44S but – because – yes, 44ZU(1) says a determination can – effectively only be done by agreement. But the notes to that subjection says you can notify a new dispute. So I assume that's the mechanism by which, if someone wants something changed – of course, we don't – yes. We have the – we have the awkwardness that we don't have a determination at the moment so it's not actually varying anything. But – but – no. Sorry. Look, I shouldn't have distracted you, Mr De Young. I'm thinking out loud which is always unwise.

MR DE YOUNG: No, no. It's – I embrace what your Honour says about possibility.

HIS HONOUR: Yes.

MR DE YOUNG: There's – just while I'm dealing with the scope of the remitter, a related point is the proposition that the service has been revoked and that's a matter which the court now wishes to raise in respect of some dispute resolution provision of the - - -

HIS HONOUR: Yes, yes.

MR DE YOUNG: - - - determination. I can indicate this: that there has been another application to declare the service. And so if the port is successful in convincing the tribunal they ought to request information about revocation, we would urge one piece of rebuttal information, if I can describe it, that is – and that's there has been another application. As the tribunal probably appreciates, but I should say, to make my position clear, we say all of it is irrelevant.

HIS HONOUR: I understand. I understand. But it's probably not going to bear too much on the issues we need to decide now. I don't think there's any – and I didn't understand from Mr Moore there's any great pushback in the sense the course that Glencore is urging which is, "Well, the port, insofar as it's dealing with revocation, dealing with contracts, just prepare the affidavits, file them and a fight can be had at the hearing about whether they get on." And that – that fight is fairly narrow in scope and – I mean, we can either have it before the hearing or – or at the same time. But that – that's not the problematic area, I don't think.

MR DE YOUNG: It's not. And the reason why we're content for that course is because there's nothing further contextually we would ask the tribunal to request. So - - -

HIS HONOUR: I understand.

MR DE YOUNG: - - - if Mr Moore was successful, other than that – that small matter I mentioned, if Mr Moore is successful in persuading the tribunal this is relevant and necessary and appropriate, etcetera, then we – we're content to deal with that on the papers.

HIS HONOUR: Yes. I understand.

MR DE YOUNG: But – but it's very different situation with respect to this unidentified application for information about user funding which I will come back to.

HIS HONOUR: Yes.

MR DE YOUNG: Just – moving to the appropriate course, the tribunal will have seen the directions we put forward and we submit the matter should be progressed today. And can I make this point: that, even the present recognised on the last occasion that, as much pushback as I was getting, that, if we didn't have an answer to the special leave application by now and it was going to be delayed until next year, then – and I'm reading from the transcript at page 15, line 2:

> *So if it turns out that this special leave application is going to be delayed for some time, and by "some time" I mean next year, then I am inclined to get some things moving to – so as at least be prepared for a hearing as soon as possible.*

And we embrace that today and we do want to have the matter moving. And we've put forward some orders which I can explain briefly which are for the existing application for – the tribunal has seen ..... existing application for further material which is of that confined kind being pushed off until the hearing.

HIS HONOUR: Yes.

MR DE YOUNG: And for our learned friends to put forward their proposed affidavit that deals with those narrow matters. And so it's before the tribunal in the practical sense but not in the sense required - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - under the acts. And - - -

HIS HONOUR: I understand.

MR DE YOUNG: And that's a – that course we're proposing – it could be done by way of an interlocutory hearing but we just wanted to get on with it.

HIS HONOUR: Yes.

MR DE YOUNG: And then we've provided some further submissions. And the first set of submissions, in our proposed order 4, which is for the court to go to print on its position about scope and user funding following the Full Court. And just – can I just remind the tribunal that we have already put on our submissions on scope and – both the form of order sand the submissions. And, if it matters, there are two applications before the tribunal. We were, relevantly, the applicant on scope - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - and other things which are in the past. And then Mr Moore was the applicant on user funding.

HIS HONOUR: Yes.

MR MOORE: And so, for that reason, we've suggested that the port go first on user funding. It also makes sense for another reason which I will come to. And then there's some responsive submissions by Glencore and, in our submissions, we will deal with their application – the narrow application which has been made and the ACCC can go next on those questions.

HIS HONOUR: Yes.

MR MOORE: And, as I indicated on a couple of occasions, we are – we were looking for a hearing in, say, March or April subject to the convenience of the tribunal, of course.

HIS HONOUR: Yes.

MR MOORE: And if the tribunal is minded to follow that course then there's – and perhaps also list the matter for a case management hearing some early stage next year and we can populate that date then an optimist would – would hope that we have an answer from the High Court by, as Mr Moore has said, early next year.

HIS HONOUR: Yes.

MR MOORE: And - - -

HIS HONOUR: Yes.

MR MOORE: - - - of course i would accept that if – if special leave was granted then that would be a relevant consideration for the tribunal.

HIS HONOUR: Yes.

MR MOORE: We would have an appellate process on foot which we don't now. We have an application to appeal.

HIS HONOUR: Yes, yes.

MR MOORE: That's the – but equally so, and we submit this is – the much more likely scenario is that the special leave application will be dismissed by then and we can proceed to a hearing as soon as practical thereafter. And what – it really goes without saying, from what I've said, the we're really opposed to a complete downing of tools, a total delay pending the prospect of a special leave application being granted. And we're also opposed for – with – to the idea that tools are really downed so as to enable the port to – to work up its possible, as Mr Moore has quite properly conceded, application for further information about the topic of user funding. And - - -

HIS HONOUR: Yes.

MR MOORE: - - - I won't take too much time on this topic. We don't have any application. There was a direction made on the last occasion that that application – that application of this kind be made and it was made of the narrow kind, not of the kind that has been contemplated and for – essentially for the reasons that your Honour indicated, it's far too late to be doing it now. The issues that are covered off in the affidavit of our friends' instructors, the sort of things they're apparently thinking about, were well and truly issues before the ACCC. For example, there's – the volume of dredged materials was well and truly in issue and both sides put on their expert for courts, and that material is all in.

HIS HONOUR: Yes.

MR DE YOUNG: But in any event – I should say that it was contemplated at some point on the part of the court during the last tribunal phase that they might want to put on some further material about this topic, and they made a forensic decision, on that occasion, not to, but in any event, we don't have, as Mr Moore has quite properly conceded, any identified thing that they wish to seek. We don't have any more than a possibility and we also note this, that according to the affidavit that our learned friend's instructor has prepared, they've apparently done a lot of work and, we insert, found nothing yet. No thing has come forward, despite this matter being on foot for many, many years and the Full Court reasons being handed down since August, they have found nothing yet, and we submit that is telling in a sense that they – the court – sorry, withdraw that – the tribunal really ought not be contemplating a delay in the timetable to allow them to continue to fish around in this context. They ought to be – the court ought to be getting on with the matter substantiatively and if the court wishes to raise something at this time, then it really must raise it urgently and we're content, from our directions, as your Honour is saying, to leave that in the court's hands.

HIS HONOUR: Yes.

MR DE YOUNG: Can I just finally deal briefly with some matters of substance that fell from Mr Moore. These are matters that will need to be fully developed at the final hearing, but just for completeness, on the use of funding or pricing issues is – your Honour has correctly described it – we do not accept that it's a broader and more nuanced and complex enquiry of the kind urged by Mr Moore and Dr Roach. In our submission, it is very simple, and the full court recognise the simplicity of it, in this sense, that section 44X(1)(e) provides a very straightforward to the tribunal, that the proprietor does not get to charge a regulated price for assets which they didn't pay for, and that is because that cost is borne by someone else.

HIS HONOUR: Yes, but you would have to accept, wouldn't you, Mr De Young, even the language of 44X(1)(e), invites a number of questions about whether a cost was borne by someone else and under what circumstances. Issues of value and cost and the like and borne, are not simple questions – might invite an inquiry, as to the totality of the commercial arrangements that surrounded particular decisions.

MR DE YOUNG: Well as we would submit is, that analysis following the full court's decision, we submit this a clear - - - yes - - - and I'll come to references in a moment - - - yes - - - direction under 44X(1)(e) is clear in this respect, the cost of this regime work was not borne by the port and we submit that is clear, and therefore the instruction is that, at this point of the analysis, the port is not to charge for their return on that cost. Now, 44X(1)(e) is only one factor, accept it. And so, we understand and we would characterise what his friends are trying to do, is to raise offsetting, offsetting matters - - - yes - - - not within 44X(1)(e) but in other matters, they say are legitimate business interests etc. they are really trying to set up argument for an offsetting factor which, in our submission, will say ultimately, when the tribunal hears all of it, won't derogate from the substance of the direction provided by 44X(1)(e).

HIS HONOUR: Yes. I must admit, I thought it was brought in avalum and I must say, I read the full court reasons in a certain way, but I may be in error to do so, but a question of whether a cost of an extension, or expansion, is borne by someone – it would be a bit narrow to simply ask who wrote the cheque to the dredger, if in writing the cheque to the dredger, you also received a different form of financial benefit, or offset, that would take a very narrow and literal view of cost in a section such as 44X part 3(a) when all of these concepts are of course, trying to get to the economic and financial substance of matters, not narrow literal approach to it.

MR DE YOUNG: I get that your Honour, so if there was something – as a matter of concept – if there something that was in the – raised that was in the realm of the costs sharing, then conceptually, it could come - - - yes - - - for consideration under section 44X(1)(e) - - - yes - - - but here the so-called, nuance and complex matters of that court really wishes to raise and not of that – are not of that kind – and the material that they are relying on, is not of that kind, it's more in the realms of, well, this proposition, which we will seek at the tribunal, will ultimately reject easily, the

port wasn't a profit maximising enterprise, so it's completely unrelated to the costs of the dredging works that we are concerned of, and Mr Moore baulks at that because he tries to connect it all together, didn't charge other fees which he could have charged and therefore, there needs to be some sort of quid pro quo and I accept that we are characterising Mr Moore's argument in a certain way and he wants to characterise it in a different way, and they are ultimately matters that the tribunal will need to grapple with. But our submission is, and this we say is clear, that it isn't – it is simple – a simple proposition that on the evidence that the tribunal will be taken to, the cost of these extensions, being dredging works – and there's no question dredging works are extensions – was not borne by the port. And that's just – we say that's not - - -

HIS HONOUR: Yes .....

MR DE YOUNG: - - - ..... analysis, the instruction is clear - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - that ..... is not to be charged, subject to anything Mr Moore and the port wish to convince to the contrary.

HIS HONOUR: Yes, I – I do understand that. And, of course, we can't get drawn too much into the details in this. But I must say, having read the tribunal's original decision, having read the full court decision and being reasonably familiar with these sections of course, 44X(1)(e) is only a consideration. It doesn't determine a particular outcome which is determined by all of the considerations that are required by the Act. The only point I was going to make is that the conclusion on these sorts of matters experience tells me is not entirely straight forward and doesn't lend itself just to a simple arithmetic exercise. Matters of principle, economic principle and otherwise – and other competing factors, I suspect, inevitably will bear on these matters.

To that – I have to say, at the moment – and it's based largely on reading the underlying decision, reading the full court decision, to some extent influenced by the affidavits that have been filed, but probably even without those affidavits I would regard it as terribly optimistic, and I think I would have to say unrealistic to think that this matter would be heard in one to two days. I – all my experience suggests to me that it's much more likely to be the five days suggested by Mr Moore. Now, that doesn't go against anything you've said, Mr De Young, it's just my impression of the matter and trying to take a realistic view as to how long it's going to take indeed. Now, I hate to say this, but even with five days we're – everyone is going to need to move reasonably promptly and reasonably efficiently I think, just given what I perceive to be some complex and somewhat subtle issues that are going to have to be dealt with.

MR DE YOUNG: I can't say anything more about that at the moment but this: that once we have the port's submissions substantively - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - ..... don't have yet, we just have the affidavits and we will be much better placed to ascertain what the true nature of the beast is.

HIS HONOUR: Yes, yes.

MR DE YOUNG: That's really another reason why we submit that – that the tribunal should order that those matters be – be attended to, so that we are able to identify, as the president described it on the last occasion, what the beast is.

HIS HONOUR: Yes.

MR DE YOUNG: Because ..... we – we put our position, we hope, succinctly, both on scope and on user funding and – on user funding, I won't go to it now, but we did provide some submissions in advance of the last case management hearing setting out - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - what we say is the straightforward analysis that we propound on user funding and then we accept that Mr Moore and Dr Roche are going to create some colour and movement in their – in their areas, and that is going to take some more time. But once - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - once we have their – the port's submissions and ..... responsive submissions, we will be much better placed to identify what the duration of the hearing might be and - - -

HIS HONOUR: I understand. Could I ask you this question, and I will indicate the – the tribunal will reserve its judgment on the matters that we're discussing today to provide the tribunal members with an opportunity to confer, and then we will also – orders won't be made today, but can I ask you this: if the tribunal comes to the view that it is appropriate to give the port some more time to propound – prepare and then propound, that the tribunal ought to receive, issue a notice and the like, further evidence on the user contribution issue, I assume you would agree with an approach which requires that to be determined, really, as an interlocutory – as a preliminary matter. In other words, if – it shouldn't be dealt with at the hearing, I think for the very reason you've said before, Mr De Young, that if the tribunal was minded to allow the port to adduce further evidence, then Glencore would require an opportunity to consider it and respond to it.

And therefore, one possibility that must be in mind is that, for example, an order were made – direction made that the port put on and file any affidavits that it – that it wishes to adduce in any further hearing, say, by mid to late February, recognising the

Christmas period, together with an application – or notification of an application that – seeking the tribunal to issue a notice to allow that material go on. And then at a convenient time, probably a one day hearing in the weeks following that, there will actually be a hearing on whether that material should be allowed in, effectively, I know it's not a different mechanism under the Act, but a notice be issued by the tribunal.

I assume that Glencore, whilst wanting orders to set the matter down for hearing but would agree that that is a step that needs to be taken, unless – sorry, if the tribunal is minded to allow the port a little more time to prepare such material and propound that before the tribunal then it ought to be brought forward before the tribunal and determined as a preliminary matter. Would that be right?

MR DE YOUNG: Yes, probably, your Honour. It might depend on what's in it, though.

HIS HONOUR: Yes.

MR DE YOUNG: And there may be nothing on user funding.

HIS HONOUR: Yes. Yes, I understand. I understand.

MR DE YOUNG: What emerges on user funding might be confined to some straightforward thing that we can deal with - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - .....

HIS HONOUR: Yes.

MR DE YOUNG: So, it would only be if the port seeks to enlarge the factual inquiry in a controversial way. And if they were to do that, then we of course would want that determined - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - at a – at a preliminary hearing because it will substantively inform the parties' submissions and it may be we're asking that if the tribunal was to accept it, and we submit the tribunal wouldn't for all the reasons which your Honour has identified, lateness, availability, etcetera - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - if it was, there may be some further contextual material - - -

HIS HONOUR: Yes. - - -

MR DE YOUNG: - - - and offer that to the narrow, confined application which is currently before the tribunal.

HIS HONOUR: Yes.

MR DE YOUNG: And we would respectfully submit that if the tribunal was minded to allow that then it should be earlier than mid February. And can I just expand on that submission very briefly.

HIS HONOUR: We are close to Christmas.

MR DE YOUNG: Yes.

HIS HONOUR: So - - -

MR DE YOUNG: I understand, and maybe only a matter of weeks, but can I just make this – these short points. That - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - the – this matter has been around since 2016. And we realise there has been a change of solicitors and we do realise there's a number of relevant documents, I think the number is 500, but with the greatest respect, that's not a very large number in our – in our lives these days. And so, that's really not – doesn't provide for a cogent reason why this work hasn't been done already. And as I indicated, there was a – at a case management hearing on 20 November 2018 this idea was contemplated by the port and not pursued. So, that was two years ago. And so, the idea that they need now another, effectively, two months from today to review 50 – 500 documents, with respect, we submit is overreach. And if they are going to do this – and we do – if the tribunal is minded to allow further time, we want it to be enough time for our learned friends to properly think about it.

HIS HONOUR: Yes.

MR DE YOUNG: I mean, I could ask them to do it before Christmas, but your Honour wouldn't accept that and I would lose friends, and I'm not – I'm not submitting that.

HIS HONOUR: Yes.

MR DE YOUNG: But we would submit late January, or perhaps early February - - -

HIS HONOUR: Yes.

MR DE YOUNG: - - - for the reasons of urgency that I've already indicated.

HIS HONOUR: Yes.

MR DE YOUNG: Unless there was anything further I can do to assist the tribunal, they're the submissions we wanted to make on the ..... today, and I've made submissions on the directions.

HIS HONOUR: Yes. No, thank you, Mr De Young. Before we move to Ms Dermody, I might just again check with Dr Abraham first and then Professor Davis whether they have any questions for Mr De Young.

DR ABRAHAM: I do. Just – I'm trying to get my head around the – the complication you have with backdating. Is the problem that you would not be able to – Glencore would not be able to receive the benefit of lower prices passed on contracted carries in the event that the prices were lowered by the tribunal?

MR DE YOUNG: That is, Dr Abraham, is our fear - - -

DR ABRAHAM: Yes.

MR DE YOUNG: - - - not – not our position. We fear the port will say, "You're not entitled to that – to that backdating because you weren't the charterer. You didn't nominate and the – you didn't identify them as Glencore-nominated vessels." And we – we don't advance that position, Dr Abraham. We advance the position to the contrary. But our fear is the port will - - -

DR ABRAHAM: I understand. It's a question of uncertainty rather than distrust.

MR DE YOUNG: Yes. No, no. Our – I thought I had tried to make clear before, and perhaps clumsily, that we don't seek to suggest the port is doing anything wrong by adopting this position but just acting in their own - - -

DR ABRAHAM: No, no. I – no, it's clear. I mean, the point is there is no agreement as far as you're concerned and so it's not – it's not clear that the benefit would transfer, despite whatever good will might exist between the parties and whatever assurances you may have inferred from what the port has said. So is it a matter of gaining some clarity?

MR DE YOUNG: That would – that would certainly assist us, Dr Abraham, if we had the port's agreement that we could backdate in the way that we've discussed and that would change our attitude markedly. But, speaking colloquially, we're not holding our breath for that agreement.

DR ABRAHAM: Okay. That's the – the extent of it.

HIS HONOUR: No, thank you. Actually, could I ask just a follow-up question, Mr De Young, from Dr Abraham's question. Tell me if I have this right but I'm understanding that your apprehension is this: that seeking this scope determination as part of the arbitration is easier in a prospective sense but raises more arguments in a retrospective, backdating sense. In other words, your apprehension is about – it

may become a more difficult argument to advance before the tribunal. You're not saying it won't succeed but your apprehension is it does raise more complexities and, therefore, more difficult argument before the tribunal in respect of historical periods as opposed to prospective periods and that's – that's the fear. Therefore your position is getting worse because of that apprehension.

MR DE YOUNG: Yes, that's correct.

HIS HONOUR: I understand now. Thank you. Thank you. Good. Professor Davis.

PROF DAVIS: I've got one query: am I correct in thinking that the scope and the user contributions are two separable issues and, in that sense, it would be possible – I don't know whether it would make any sense at all, to actually hear them independently?

MR DE YOUNG: Yes. Yes, we would say they're entirely separable.

PROF DAVIS: And I don't know whether it would make any sense to – to hear them separately or not. That would be something that the legal minds here would – would know a lot – a lot better in terms of efficiency and so on.

MR DE YOUNG: Yes. And certainly that's right, Professor Davis: we do think they could be determined severally. There's a question of the tribunal's legal ability to do that and then there's, of course, a practical question of whether that's the most efficient course. And, at the moment, we're trying to endeavour to convince the tribunal to move to a speedy hearing on both issues to take away that. But if that becomes impossible then – then it may be something we need to revisit in our submissions.

PROF DAVIS: Thank you.

HIS HONOUR: Thank you, Mr De Young. Ms Dermody.

MS DERMODY: Thank you, your Honour. I just want to address four issues very briefly. The first is, in relation to the timetable, the tribunal is obviously alive to the various competing considerations. And the commission would obviously just made reference to the statutory indicators that these matters should move in a – in a timely fashion. But it's obvious that the tribunal is more than alive to the competing issues there. In respect of the current application that PNO has brought forward in relation to a direction to provide information, the Commissioner is content for that to be dealt with at the hearing of the matter. In respect of any future application that may be made in connection with the user funding, we see that as a – as a quite different issue.

It is an arid debate in the absence of an actual application having been made but, at this stage, it's certainly not obvious to the commission that that information isn't

information that could have been properly put before the commission at the time of the arbitration. And then a very minor matter, really, just in connection with the proposed orders and order 6 as drafted. Just to be clear that, perhaps, that order could be clearer in saying that the ACCC file and serve any submissions in response to the substantive submissions of the other parties because it – it could be read as being only in response to – and in respect of PNOs application with respect to the provision of information. So that's just a minor point.

HIS HONOUR: Yes. It may not be minor. You're right to raise it and I might ask Mr De Young whether he intended it to be as narrow as that. I hadn't actually focussed on it but – but it certainly is plainly written in a narrow way. And whilst I'm – I'm, of course, conscious of what the Full Court said about the commission's role before the Full Court but there are different considerations back before the tribunal and, of course, the statutory function of the commission before the tribunal has to be borne in mind. And I think a direction has already been given to the commission, I think, to the remittal, effectively to – to assist. So I might – I will return to you in just one moment, Ms Dermody, but can I just ask, Mr De Young, whether Glencore intended to confine the ACCCs submissions.

MR DE YOUNG: No. No, no. There was no endeavour to reign in the ACCC. There was – the drafting was just intended to – for convenience to identify to the tribunal the sort of things which would need to be addressed.

HIS HONOUR: Yes. Yes. No, I understand. I mean, obviously we can all debate precisely the role and function of the commission before the tribunal in these sorts of matters but it doesn't really require debate. But I assume in order – simply for the ACCC to file submissions and – and the tribunal would ordinarily assume that the commission would act appropriately within the normal parameters of the commission's role of assisting the tribunal in these sort of matters. No, thank you. Could I – I might then just return to Ms Dermody. Thank you. They were just the four matters you wished to raised, Ms Dermody?

MS DERMODY: Yes.

HIS HONOUR: And, again, I might just inquire of Dr Abraham first and then Professor Davis whether they had anything to raise.

DR ABRAHAM: Nothing – nothing from ..... thank you.

PROF DAVIS: Nothing from me either.

HIS HONOUR: No. Thank you. Good. Thank you, Ms Dermody. Mr Moore, is there anything that you wish to say in reply?

MR MOORE: Yes, just a few things, your Honour. First can I – I deal with the debate that my learned friend has raised in relation to the question of prejudice and also the seeking of a stay. Can I deal with the stay first?

HIS HONOUR: Yes.

MR MOORE: We say that our learned friend's position is a little misconceived and that is because of, in some respects, the slightly unusual circumstances of the present case, the Full Court has set aside the determination.

HIS HONOUR: Yes.

MR MOORE: The asset is currently unregulated. If one looks at the test for a stay, that addresses the question of whether a stay is necessary to preserve the subject matter of the litigation. Here there is no subject matter, in effect, to be preserved. The only threat or problem that could be – could arise is if, down the track, the tribunal was to seek to do something on the remittal that would somehow prejudice our position in a way that was not able to be recovered should be successful in obtaining special leave. And so, were we to even seek a stay, the first question that might be asked properly is, "Well, have you asked the tribunal whether they can delay the hearing of the matter pending the determination of special leave? Is there any imminent risk of a determination by the tribunal that will somehow adversely affect your interest?" The answer is there isn't one now but I am seeking to persuade the tribunal not to do that imminently. But, pending that actually occurring, there is really nothing to stay.

HIS HONOUR: Yes, yes.

MR MOORE: And so the suggestion that we should have gone and immediately sought a stay, the Full Court would say, "Well, what is the tribunal doing? Is there any risk of anything prejudicing your position?" So that's the first point. The second point is, in relation to the alleged prejudice, firstly, to the extent that there was suggested to be a, in effect, broader concern about pricing, we do draw attention to the fact that this declaration has been revoked. And, in the decision revoking that declaration, which is referred to by Mr ..... of - - -

HIS HONOUR: I'm sorry. We've just lost you, Mr Moore, only because I think your paper is hitting the microphone which makes it hard to here.

MR MOORE: I've covered the microphone with Mr Lloyd's affidavit which is not conducive to your Honour hearing me.

HIS HONOUR: Thank you.

MR MOORE: It's his affidavit of 5 October 2020.

HIS HONOUR: Yes. I've just – actually, I'm – I apologise, I don't have that readily to hand but perhaps you've just - - -

MR MOORE: No ..... it's a fairly short point. In paragraph 28 of that affidavit - - -

HIS HONOUR: Yes.

MR MOORE: - - - Mr Lloyd quotes from the NCCs revocation recommendation which observes that:

> *The navigation service charge of the port is likely to represent only a small proportion of the price of coal on international spot markets.*

The price of coal is very, very much greater than the navigation service charge. And, really – then, indeed, even the daily fluctuations of the price of coal is greater than the navigation service charge. And so this suggestion that the navigation service charge would somehow influence whether, for example, business occurs or does not occur is something that the NCC rejected. And the NCC observed that expert – coal miners are likely to be price takers, that it is highly unlikely that changes of the price and the service within the range of, and they gave a range of 41 cents to $1.36, but in fact the range we're talking about here is much narrower. The shippers are currently paying 81 cents under the contracts. Glencore obtained from the ACCC a price of 60 cents. Presumably that would be the price they would be seeking again if there was – what they would contend for a full deduction for user contributions. So it's only a 20 cent variation between what is currently being paid and what Glencore says should be paid.

And the NCC observed that in that much larger range it's highly unlikely that changes in the price of the services within that range in any given period are likely to alter export prices for coal, and then observed that declaration is unlikely to promote the material increase in competition in the markets for thermal coal tenements in the Newcastle catchment. So really this is just as a question of whether Glencore obtains, in effect, an additional amount, which would occur from any backdating should the tribunal ultimately determine the price should have been, whether it be 60 cents, 70 cents, 75 cents or whatever as opposed to the price currently being paid which is 81 cents.

HIS HONOUR: Yes, although the – sorry, if I could just interrupt you for a moment. I mean the issue that I felt that Mr de Young raised is this, that on their broadest proposition for scope of service the nominated vessels subparagraph, whilst Glencore will put the submission and – that that is an appropriate determination to be made by the tribunal, they foresee that there might be more arguments about that scope being made by the tribunal on a retrospective basis as opposed to a prospective basis, and the longer there is delay, they are bearing the risk of that issue that it's because there's a difference between trying to do what's there contemplated prospect as opposed to retrospectively. Is there anything that you want to say? I mean that's where I saw the prejudice primarily - - -

MR MOORE: Yes, your Honour. Firstly, dealing with the submission that somehow it affects Glencore's overall market position or it might somehow, you now, have some deleterious impact on their trading more generally - - -

HIS HONOUR: Yes.

MR MOORE: - - - we say that is just a false issue.

HIS HONOUR: Yes.

MR MOORE: So we're then dealing with a much narrower question, which is the potential inability somehow of Glencore to, in effect, obtain the financial benefit by a backdating issue. As I understand it, on the basis that my learned friend confidently says if you look at the Full Court's reasons it's all very simple. Scope is as we put it. And so his argument has to be, "Assume I'm wrong about that, and assume there's something more subtle that is required, and we haven't done that, and therefore there's a difficulty backdating." That's as I understand his argument, which is already somewhat tenuous an argument against himself.

But one has to put this in proper context. When the ACCC handed down its decision, its determination, it included in that determination the second limb that Glencore now seeks to determine. In other words that Glencore could nominate under the PMAA Act, under section 48(4)(b) to be responsible for charges, and that was at a time when the ACCC set the price at roughly 60 cents, and so Glencore could have taken the advantage of that nomination process. It did not put in a single nomination for those charges, and so the suggestion by Glencore that it really, really wants to avail itself of these opportunities has to be treated, we say, with some scepticism. but in any event if Glencore was now to indicate that it did want to have the advantage of the arbitrated rates in respect of coal vessels that were carrying its coal it can simply send us a notice telling us that, and it is a bit difficult to see how it would be beyond the capacity of this tribunal to fashion an appropriate remedy that would deal with that issue in due course if the tribunal felt that Glencore should have the benefit of the nominations of those vessels as vessels carrying Glencore coal.

It's very difficult to see how that's not some prejudice that is unable to be remedied. Now, we will wait to see whether Glencore, in fact, does make any such nominations pursuant – including to the form that it has proposed. But the suggestion that somehow, it will be irretrievably prejudiced is one that we say should be treated with some scepticism and should be able to be remedied. That is the critical issue on prejudice. In relation to the notion of, sort of, an earlier interim determination on the scope issue - - -

HIS HONOUR: Yes.

MR MOORE: - - - as the tribunal will appreciate, the scope issue has a fairly significant role in our application for special leave. And that immediately raises the question of, well, even if we've having a shorter hearing on scope, we still have to all prepare for that hearing, have that hearing and the tribunal has to sit and determine that matter. The tribunal may have to deal with arguments about interim determinations, the power to do so. The tribunal will have to deal with the evidentiary questions of the additional material that we say should come in. We have

just had a half-day hearing on a pure case management question. It's easy to see how that more simple case alone will chew up some time. And the idea that we would have that case and then we would all have to gear up for another case with another set of submissions, evidentiary questions, procedural questions, on user contributions – we suggest that's just not an efficient use of the tribunal's resources, or indeed the parties' resources.

HIS HONOUR: I mean, I understand what you say and there's – I mean, there's two ways that interim determinations can be done. And I think this has been done in the past and I mean by in the past, 10 or 15 years ago in regulatory matters where individual issues were the subject of rulings by the tribunal – and one can understand how one might split up this matter. Whilst generally it's inefficient, I mean, it does – I can see it has some benefit, which is it's easier to get everybody together on two days rather than five days as a general rule. And it does enable some focusing of attention on one issue and to be addressed and dealt with, if that could be done. I – you probably don't need to respond to those matters and – but it's – even if the interim determination was not an interim determination, I think, as contemplated by the statute, which would then come into force, but simply an earlier determination of one part of the dispute with the remainder to be determined later, whether that has any benefits might be something the tribunal needs to think about.

MR MOORE: I understand that, your Honour. There are two things I would say, though. Firstly, it does not avoid the problem that we are grappling with as to whether it would be undesirable to, in effect, have potentially three decisions of the tribunal.

HIS HONOUR: Yes, I accept that.

MR MOORE: Secondly, the – and I suggest this. The very hearing of the special leave application and the focusing on the arguments around this question – it's likely to be quite helpful and informative when we come to actually deal with this in due course in the tribunal, even if we were unsuccessful, because it's a relatively narrow legal question as to construction of the Act and how it would be applied - - -

HIS HONOUR: Yes.

MR MOORE: - - - in accordance with the - - -

HIS HONOUR: Yes.

MR MOORE: - - - reasons of the Full Court.

HIS HONOUR: Yes.

MR MOORE: And thirdly, and although I can't point to something significant – something in this category now, there is always that concern when one splits up issues that they could turn out to be some interrelationship between issues that only

emerges when matters that are the subject of careful focus – as I said, I'm just sitting here thinking in the three seconds I've had, I can't point to one. But that doesn't mean - - -

HIS HONOUR: No, I understand.

MR MOORE: - - - there's not a potential for some crossover between the two aspects of the case. And that is why there is generally a reluctance to engage in what is, in effect, a determination of separate questions or the - - -

HIS HONOUR: Yes.

MR MOORE: - - - severance of matters, because things do tend to surprise and do tend to show unrelated – related connections that are not originally anticipated. And so for all those reasons, we would suggest that's not an efficient course.

HIS HONOUR: Yes.

MR MOORE: Then in relation to the suggestion that – my learned friend charitably suggesting we should be working very hard in January to put on additional material, the reality is it's not the 500 documents that my learned friend referred to. The latest affidavit from my instructing solicitor has identified, in effect, large databases and areas that need to be reviewed. That process is being undertaken. It has commenced and it is being undertaken, but it is not a small exercise. And this year of all years people, you know, in my respectful submission actually need a break at Christmas. Many people haven't had a break all year, for various reasons. They need a break at Christmas. I include myself in that and I think in a practical and realistic way, we will need certainly until the end of February to complete that task to properly formulate the matters that we may need to rely on. And for the reasons that I have indicated, it's – to be properly focused and to make sure that these things are given proper thought takes longer rather than shorter. And in order to be most efficient, we need that additional time.

HIS HONOUR: Yes.

MR MOORE: So if the tribunal was minded to, in effect, order us to do something in the meantime, we would need, in my respectful submission, until the end of February, at least, to do that.

HIS HONOUR: Yes. Do you want to say anything against the proposition, though, Mr Moore, that it – rather than do nothing, one step – an appropriate step that might be taken is precisely that. I think this is effectively equivalent to the directions that were made by the tribunal on the last occasion. To some extent it's really the application that you had made, which is that there be an extension of the time in which any application were to be brought forward for the tribunal to issue a notice to, for example, if – just adopt that date, but the end of February. With the intention that subject to where special leave has got up to at that stage, and maybe not even subject

to that, the tribunal – and it's ..... to say my orders might contemplate a hearing on this preliminary issue, which is whether the port ought to be – whether the – it's probably framed as whether the tribunal ought to issue the notice.

But effectively, the substance of it is whether the port ought to be permitted to adduce further evidence on the user contribution issue of that kind. I mean, potentially, we could deal with both sides – scope as well as user contribution. But obviously, the user contribution is probably the more controversial of the two. But do you want to say anything against that sort of approach?

MR MOORE: Well, only this. The orders were made, in effect, by his Honour Middleton J at a time where the decision had recently been handed down. We were all reviewing the decision. His Honour was seeking to elicit what type of beast it is.

HIS HONOUR: Yes.

MR MOORE: Your Honour has correctly, with respect, identified the nature of the beast involves more complexity and nuance than Glencore has suggested. This was really – his Honour Middleton J's orders were in the face of a Glencore submission to say, "Well, look, this is all very simple. It's just using at user contributions. It's a one-day hearing. We should be able to do it very quickly and easily. And in our submission, having proper regard to the observations of the Full Court having regard to the provisions themselves is that it is a more complex and nuanced enquiry. And in those circumstances, it is one that properly, in our submission, awaits the determination of the special leave application – that appellate review process before the tribunal goes on, for example, to spend time dealing with questions which could themselves be complicated and lengthy as to whether material should be permitted to be referred to.

And one could easily imagine the hearing – a two-day hearing on that question alone, if there was a – if there turned out to be a body of material that we sought to rely upon and factual questions would come into the frame. And so all of that, we would submit, is more efficiently and properly dealt with later. I've indicated that we are continuing to undertake that task and we are reviewing the material, but we would, in the first instance, resist the suggestion that we should, in effect, timetable a hearing now as opposed to when that could be dealt with because then we are all locked into a whole lot of activity and cost and also tribunal consideration that may be wholly unnecessary.

HIS HONOUR: What is the earliest date now for special leave to be determined? Can it be determined on the papers, effectively, any time?

MR MOORE: It can be determined on the papers at any time - - -

HIS HONOUR: Yes.

MR MOORE: - - - as we understand it.

HIS HONOUR: Yes.

MR MOORE: But in terms of a hearing, we have listed tomorrow's list.

HIS HONOUR: Yes.

MR MOORE: Then, there is then a list on 12 February - - -

HIS HONOUR: Yes.

MR MOORE: - - - and then at 12 March, and then 16 April.

HIS HONOUR: Yes. Yes.

MR MOORE: Probability now is that it's more likely to be 12 March rather than 12 February, one would think.

HIS HONOUR: Yes.

MR MOORE: But that's not certain. That's not certain.

HIS HONOUR: Yes. No, I understand. I understand. It's just helpful. It helps me to think about the matter. Thank you.

MR MOORE: So if – sorry, I should say – if the tribunal was against the submission I've just made and said "No, we should have a hearing to look at this material", then in my submission, based on the timing we've been discussing, that would be a hearing in March. I also personally have some difficulties in February, but I can do a hearing in March. I understand from my learned friend that they can also do a hearing in March if there was to be a need for some hearing.

HIS HONOUR: No, good. .....

MR MOORE: I think, your Honour, everything else that my learned friend raised is really just questions of substantive issues that would be debated in due course, and I wasn't proposing to say anything more - - -

HIS HONOUR: No, no. I understand that. I understand that, thank you. I might just enquire whether there's anything arising from that that Dr Abraham wanted to ask, and then Professor Davis.

DR ABRAHAM: Just that, if there was a hearing in March, would we have some better idea of where the High Court is up to; for instance, whether there was a listing?

MR MOORE: I suspect we would. Based on the timing I have seen in other matters this year, one would expect to have a special leave hearing in either March or April, I would expect.

DR ABRAHAM: Would there - - -

MR MOORE: Our initial expectation was that it might be a bit earlier, so it would be surprising if we don't know by then what is likely to happen.

DR ABRAHAM: Would that include the possibility of rejection of special leave?

MR MOORE: So if the matter was listed, for example, in the March hearing – which was 12 March – of course, the High Court can also settle on another date – it could list a special fixture; I had that happen to me this week, in fact. But that – assuming that they stick to the currently scheduled dates, then it's a possibility that, after 12 March, it will be known whether special leave has been granted or not. But, again, these are just possibilities, because we don't know yet when it's going to be listed.

DR ABRAHAM: Okay. That's all.

HIS HONOUR: Good. Professor Davis?

PROF DAVIS: No, nothing from me.

HIS HONOUR: And I thank you. Well, can I thank the parties for their assistance this morning. The parties will - - -

MR DE YOUNG: ..... Can I just clarify two matters?

HIS HONOUR: Yes, Mr Young. Yes.

MR DE YOUNG: It might be clear enough, but just out of an abundance of caution – firstly, the price that Mr Moore was talking about for differential between the current price and the regulated price, is a price per tonne, and - - -

HIS HONOUR: I do understand that, yes.

MR DE YOUNG: - - - and, once multiplied, it comes to many millions of dollars, as Mr Lloyd's affidavit discloses.

HIS HONOUR: Yes, yes. No, I have those figures in mind.

MR DE YOUNG: And then the second point was the mid-February material. Just to note this point, that, even taking our learned friend's affidavit at its absolutely highest, and that the Full Court decision inspired a new workstream, it would be six

months between the Full Court judgment and that material coming forward. That's all I wanted to say.

HIS HONOUR: I thank you, Mr De Young. Can I thank the parties for their assistance this morning. I know it has been a fairly lengthy case management hearing, and the parties will appreciate none of these matters are really straightforward, in the circumstances that the tribunal finds itself in. It is for that reason, the tribunal will reserve its decision on orders to be made today, and that, of course, includes whether the matter is set down with a timetable for hearing, or some other interim steps are taken – or, indeed, no steps, just to canvass the whole range. The tribunal will reserve its decision on that. I'm hoping the tribunal will make a decision on that, really, just in the next day or so.

And it might promise a very short reasons associated with that, but just to explain the course that the tribunal will take. And the parties will be notified by that in the ordinary course. I don't contemplate there's a need for a hearing in order to make those directions, or provide those short reasons, that will be done by communication to the parties. Thank you. Please adjourn the tribunal.

MATTER ADJOURNED at 12.56 pm ACCORDINGLY