



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)

DETERMINATION

TRIBUNAL: Justice O'Bryan (Deputy President)
Dr D Abraham
Prof K Davis

DATE: 5 April 2022

WHERE MADE: Melbourne

THE TRIBUNAL DETERMINES THAT:

1. The Final Determination of the Australian Competition and Consumer Commission made under s 44V of the *Competition and Consumer Act 2010 (Cth)* dated 18 September 2018 be varied by making the amendments indicated (in mark-up) on the copy of the Determination annexed to these directions.



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REGISTRAR

Australian Competition Tribunal



ANNEXURE

Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd

Access dispute notified under section 44S of the *Competition and Consumer Act 2010* (Cth) on 4 November 2016.

Final Determination under section 44V

Background

On 4 November 2016, Glencore Coal Assets Australia Pty Ltd (**Glencore**) notified the Australian Competition and Consumer Commission (**ACCC**) under section 44S of the *Competition and Consumer Act 2010* (Cth) (**the Act**) of an access dispute in relation to the declared shipping channel service provided by Port of Newcastle Operations Pty Ltd (**PNO**). In particular, the Navigation Service Charge for coal vessels levied by PNO.

The declared shipping channel service (**the Service**) is defined as:

The provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.¹

The Commission constituted for the purposes of this arbitration (**the Commission**) provides this Final Determination on access by Glencore to the Service at the Port of Newcastle (**the Port**) under section 44V(1) of the Act. The Commission has also provided the parties with an accompanying Statement of Reasons.

Final Determination

Application of terms

1. Term

1.1 The Final Determination takes effect 21 days after the date it is made and expires on 7 July 2031 ([the Term](#)).

Backdating

1.2 The Navigation Service Charge and Wharfage Charge apply from the period starting 8 July 2016, as per clause 1.3.

1.3 The charges to apply during the period of backdating are to be determined through a deflation of the charges specified in 5.1 and 6.1 using the Sydney All Groups Consumer Price Index number published by the Australian Bureau of Statistics (**GPI Sydney**), calculated as the average of the latest four quarters over the average of the preceding four quarters.

Interest on backdated payment

1.4 Interest is payable on any amount overpaid [or underpaid](#) to PNO by Glencore within the relevant dates, being from 8 July 2016 until the date the Final Determination takes effect. The interest rate to be applied is 3.95 per cent, which is the June 2016 rate specified in the Large Business Weighted Average Rate on Credit Outstanding Variable Rate published by the Reserve Bank of Australia. Interest is to be compounded daily.

¹ Glencore Coal Pty Ltd, *Application for a declaration recommendation in relation to the Port of Newcastle*, May 2015, p. 15, <http://ncc.gov.au/images/uploads/DEPONAp-001.pdf>.



2. Scope

2.1 The scope of the determination includes the terms and conditions of access:

- (a) where Glencore, either directly or by agent, charters a vessel to enter the Port precinct and load Glencore coal, and
- (b) where Glencore makes a representation to PNO of the kind referred to in section 48(4)(b) of the *Ports and Maritime Administration Act 1995* (**the PMAA**) that it has the functions of the owner of a vessel, or accepts the obligation to exercise those functions, in order to enter the Port precinct and load Glencore coal.

2.2 For the avoidance of doubt, the determination does not apply to:

- (a) the terms and conditions of access to apply in respect of vessels carrying coal that have not been chartered by Glencore or in respect of which Glencore has not made a representation of the kind referred to in section 48(4)(b) of the PMAA
- (b) terms and conditions of access for vessels other than those calling at the coal terminals at the Port, and
- (c) any charges imposed by PNO other than the Navigation Service Charge and the Wharfage Charge.

3. Notification and information to be provided by Glencore

3.1 Glencore must provide 48 hours' prior written notice of its intention to use the Service under the terms of this determination. In the absence of notice the standard terms of access will apply. This term is waived for the period of backdating in clause 1.2.

3.2 For the purpose of the backdating under clause 1.2, and the true up under clause 9.2, within 30 days of the date of this determination, Glencore is to:

- (a) identify to PNO each vessel falling within the scope of clause 2.1 for the period 8 July 2016 to the date of this determination; and
- (b) for each such vessel, provide to PNO copies of:
 - (i) the relevant Vessel Berthing Application lodged via the cPorts portal hosted by the Port Authority of NSW; or
 - (ii) completed manifests required to be lodged under Regulation 17 of the *Ports and Maritime Administration Regulation 2012* or Regulation 12 of the *Ports and Maritime Administration Regulation 2021* (as the case may be) and clause 12.2 of the PNO's Vessel Standard Terms and Conditions; or
 - (iii) the information required by Regulation 11 of the *Ports and Maritime Administration Regulation 2012* or Regulation 6 of the *Ports and Maritime Administration Regulation 2021* (as the case may be).

Price terms

4. Building Block Model

The building block model is to be used to calculate the maximum allowable revenue that PNO may recover from the Wharfage Charge and Navigation Service Charge in each relevant period. The inputs to the building block model and the charges are reviewable as set out in clauses 5 to 9.



5. Wharfage Charge

- 5.1 The Wharfage Charge payable by Glencore to PNO in accordance with this determination will be \$0.0746 per revenue tonne as at 1 January 2018.
- 5.2 The Wharfage Charge will be indexed on 1 January of each subsequent year by CPI Sydney determined by reference to the CPI published for the September quarter of that year.

6. Navigation Service Charge

- 6.1 The Navigation Service Charge payable by Glencore to PNO in accordance with this determination will be ~~\$1.0058~~ ~~\$0.6075~~ as at 1 January 2018.
- 6.2 The Navigation Service Charge will be reviewed on an annual and five-yearly basis as set out in clauses 7 and 8.

7. Annual price setting

- 7.1 The Navigation Service Charge is to be reviewed annually as set out in clause 7.2.
- 7.2 The inputs to the building block model to calculate the Navigation Service Charge that are reviewable under the annual price setting mechanism are limited to:
- (a) forecast cargo volumes and gross tonnage coal vessels and non-coal vessels for the year, and
 - (b) in the event of a Material Change Event, forecast inputs relevant for determining the addition to the Navigation Service Charge as a result of the Material Change Event.
- 7.3 PNO will notify Glencore of the Navigation Service Charge at least 60 days prior to the start of the calendar year in which the charge is to apply. The notice will also outline and explain the assumptions on which the updated Navigation Service Charge has been determined.

8. Five-yearly review

- 8.1 A five-yearly review of the Navigation Service Charge will occur during the following years:
- (a) in 2024, with such reviewed price to take effect on and from 1 January 2022 and with the inputs to the building block model to be determined as at 2021, and
 - (b) in 2026, with such reviewed price to take effect on and from 1 January 2027.
- 8.2 The inputs to the building block model to calculate the Navigation Service Charge that are reviewable under the five-yearly review are limited to:
- (a) the regulated asset base being rolled forward, and the roll forward should:
 - (i) include, at the time of its commissioning, actual capital expenditure incurred in the current five-year period excluding any actual capital expenditure that is provided or funded by users and including an amount for interest incurred during construction of assets
 - (ii) include the forecast inflation used to set prices in the current period, and
 - (iii) be based on forecast depreciation used to set prices in the current period.
 - (b) the useful life of assets required to provide the Service and rates of depreciation (excluding perpetual assets)
 - (c) the weighted average cost of capital



- (d) forecast capital expenditure for the following five-year period excluding any capital expenditure that is forecast to be provided or funded by users
- (e) forecast operating expenditure for the following five-year period, and
- (f) such other inputs that are subject to a Material Change Event.²

9. True up

9.1 The Navigation Service Charge will be subject to an annual true up consisting of:

- (a) a pass through of the impact on revenue of actual volumes compared to forecast volumes through a revenue unders and overs mechanism, and
- (b) a pass through of costs from Force Majeure Events³ that have an incremental cost of in excess of \$1 million.

9.2 Within 60 days of the [date of this determination in respect of each calendar year from 2016 to 2021 and, for each remaining year of the Term from 31 December 2022, within 60 days of the end of each calendar year](#), PNO shall provide Glencore a true up reconciliation account setting out:

- (a) for the relevant year, forecast cargo volumes and gross tonnage of coal and non-coal vessels for the relevant year;
- (b) for the relevant year, the actual data for cargo volumes and gross tonnage of coal vessels and non-coal vessels for the year;
- (c) the variance of the actual data in 9.2.b against the forecast data identified in 9.2.a;
- (d) for the relevant year, calculation of the amount of the Navigation Service Charge determined by the building block model using the actual data in 9.2.b (**the Notional NSC**);
- (e) for the relevant year, details of the Navigation Service Charge paid by Glencore [for access within the scope of](#) ~~under~~ this determination including the total gross tonnage of vessels (**Glencore Paid NSC**);
- (f) for the relevant year, calculation of the amount of the Navigation Service Charge liability for Glencore using the Notional NSC (from 9.2.d) and the Glencore total gross tonnage of vessels (from 9.2.e) (**the Glencore NSC Liability**);
- (g) identification of the variance of the Glencore Paid NSC against the Glencore NSC Liability;
- (h) identification of either:
 - (i) an over-recovery by PNO of the Navigation Service Charge (where the Glencore Paid NSC is greater than the Glencore NSC Liability), or

² a Material Change Event means a change in law that is expected to cause an increase in costs that would cause a change in the charges of more than 2.5 per cent.

³ a Force Majeure Event means a case, event, or circumstance, or a combination of causes, events, or circumstances which is beyond the reasonable control of the affected party and by the exercise of reasonable due diligence the affected party was not reasonably able to prevent or is not reasonably able to overcome.



- (ii) an under-recovery by PNO of the Navigation Service Charge (where the Glencore Paid NSC is less than the Glencore NSC Liability).

- 9.3 Within 7 days of PNO delivering to Glencore the true-up reconciliation account under clause 9.2, Glencore must, in the event that the previous years' price setting regime resulted in an over-recovery by PNO of the Navigation Service Charge, issue PNO a valid tax invoice for any amounts to be adjusted, or
- 9.4 PNO must, in the event that the previous years' price setting regime resulted in an under-recovery by PNO of the Navigation Service Charge, issue Glencore a valid tax invoice for any amounts to be adjusted at the same time as delivering the true-up reconciliation account.

Non-price terms

10. Invoicing

- 10.1 PNO will issue a valid tax invoice in relation to any Wharfage Charge arising under the determination within 7 days of receipt from Glencore of the applicable cargo manifest prescribed by the PMAA.
- 10.2 PNO will issue a valid tax invoice to Glencore in relation to any Navigation Service Charge arising under this determination within 7 days of the vessel entering the Port.

11. Payment terms

All amounts due under this determination are payable within 7 days of delivery by email of a relevant tax invoice.

12. Interest on late payment

Interest on late payment of monies due and payable under this determination will accrue and be payable pursuant to section 70 of the PMAA.

13. Termination

- 13.1 The terms of the determination may be terminated in the following circumstances:
 - (a) by the parties mutual written agreement
 - (b) PNO may terminate the terms of the determination by written notice to Glencore where Glencore is in material breach of the terms, and that breach has not been remedied by Glencore within 28 days' notice of the breach by PNO
 - (c) PNO may terminate the terms of the determination where PNO's right to provide access to the Port is terminated or expires
 - (d) Glencore may terminate the terms of the determination by providing 28 days written notice to PNO.

14. Dispute resolution

- 14.1 If an issue, dispute or difference between Glencore and PNO arises out of, or in relation to the terms of the determination, either party may give written notice to the other party specifying:
 - (a) the nature of the dispute
 - (b) the alleged basis of the dispute
 - (c) the position which the party issuing the notice considers correct.



- 14.2 If Glencore and PNO do not agree within 7 days about the procedure and timetable for dispute resolution, each party must appoint a senior executive as its representative to meet or negotiate in good faith in an attempt to resolve the dispute.
- 14.3 If the dispute has not been resolved within 15 days after the date on which written notice was given, or within a period agreed in writing by the parties, the dispute must be submitted to a mediator in accordance and subject to the Resolution Institute Mediation Rules.
- 14.4 If the dispute has not been resolved within 45 days after the date on which written notice was given, or within a period agreed in writing by the parties, the dispute may be submitted to arbitration by the ACCC pursuant to section 44S.
- 14.5 The referral to, or undertaking of, a dispute resolution process does not (subject to any interlocutory order) suspend the parties' obligations under the terms of the [agreement-determination](#).

15. Assignment

Glencore cannot assign or otherwise transfer its rights under this [agreement-determination](#) without prior consent of PNO. Such consent must not be unreasonably withheld.

Date: