

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 8/10/2018 at 3:39pm AEDT and has been accepted for lodgment under the Practice Direction dated 23 September 2016. Filing details follow and important additional information about these are set out below.

Lodgment and Details

Document Lodged: Application to Tribunal for Review

File Number: ACT 2 of 2018

File Title: Re Application for review of the ACCC's Determination re the access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



A handwritten signature in blue ink, consisting of a stylized 'A' followed by a 'U'.

Dated: 8/10/2018 3:39pm AEDT

Registrar

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Tribunal. Under the Tribunal's Practice Direction the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4:30 pm local time at that Registry) or otherwise the next working day for that Registry.



FORM L

(subregulation 28C(1))

APPLICATION TO TRIBUNAL FOR REVIEW

*Application for review of the ACCC's Determination re the access dispute between
Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd*

Name of applicant: Port of Newcastle Operations Pty Ltd

Address of applicant: 6 Newcomen Street, Newcastle NSW 2300

1. Port of Newcastle Operations Pty Ltd (**PNO**) applies to the Australian Competition Tribunal (**Tribunal**) under subsection 44ZP(1) of the *Competition and Consumer Act 2010* (Cth) (the **CCA**) for a review of a determination of the Australian Competition and Consumer Commission (the **Commission**) on access to the service described below.
2. PNO is a provider of the service.
3. The service was declared by the Tribunal on 16 June 2016, pursuant to s 44K(8) of the CCA, commencing on 8 July 2016 and expiring on 7 July 2031. The declared service (the **Service**) is described 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 of Newcastle (**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.

4. **Facts and contentions on which PNO intends to rely:**
 - 4.1 On 4 November 2016, Glencore Coal Assets Australia Pty Ltd (**Glencore**) notified the Commission under s 44S of the CCA of an access dispute in relation to the Service.



- 4.2 The dispute related to the Navigation Service Charge and Wharfage Charge levied by PNO for coal vessels, pursuant to Part 5 of the *Ports and Maritime Administration Act 1995* (NSW) (the **PMAA**).
- 4.3 On 18 September 2018, the Commission provided its final determination of the access dispute under s 44V of the Act (the **Determination**), and its statement of reasons (**Reasons**).
- 4.4 The Commission determined the following charges are payable by Glencore:
- (a) the Navigation Service Charge will be \$0.6075 as at 1 January 2018. This compares with PNO's current (2018) charge of \$0.7553 (Determination [6.1], Reasons, p.7).
 - (b) the Wharfage Charge will be \$.0746 per revenue tonne as at 1 January 2018. This is the same as PNO's current (2018) charge (Determination [5.1], Reasons, p.7).
- 4.5 The Commission determined the terms and conditions of access apply in both of the following circumstances:
- (a) where Glencore, either directly or by agent, charters a vessel to enter the 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 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 (Determination, [2.1]).
- 4.6 Glencore must provide 48 hours' prior written notice of its intention to use the Service. In the absence of notice, PNO's standard terms of access will apply (Determination, [3.1]).
- 4.7 The Commission's Determination applies from 8 July 2016 until 7 July 2031. The Commission's determination provides for backdating of charges, including the payment of interest on any amount overpaid by Glencore. The Determination also



makes provision for regular reviews of the Navigation Service Charge and the indexation of the Wharfage Charge (Determination, [1], [7] and [8]).

- 4.8 The Determination does not apply to any other charges imposed by PNO, or the terms and conditions of access for vessels other than those calling at the coal terminals at the Port.
- 4.9 PNO makes the following contentions in relation to the Commission's Determination.
- 4.10 *First*, the Commission erred in its calculation of the depreciated optimised replacement cost (**DORC**) of the facility. From its initial ORC valuation of \$2.169 billion, the Commission deducted \$912 million for "user contributions" to the assets (in the form of contributions to historical dredging works at the Port). This results in an adjusted ORC estimate of \$1.26 billion (Reasons, p.136-7), and with depreciation of \$93.8 million, an adjusted DORC estimate of \$1.16 billion (Reasons, p.139).
- 4.11 The deduction of an amount for user contributions is inconsistent with the DORC methodology adopted by the Commission. The application of the DORC methodology involves an assessment of what it would cost to build a Port today, not an assessment of how much it did cost, or how those costs were incurred. As the Tribunal has previously observed, the DORC "arrives at a hypothetical value and looks forward": *Re East Australian Pipeline Ltd* [2004] ATPR ¶ 42-006 at 48,804 [18], cited with approval by the High Court in *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229, [27].
- 4.12 The Commission's approach also fails to have proper regard to the mandatory factors in s 44X(1), which include the objects of Part IIIA (see s 44AA) and the pricing principles specified in s 44ZCA. In particular, the Commission's Determination fails to have regard to the "legitimate business interests" of PNO which purchased the Port from the State of NSW in 2014: s 44X(1)(a). Contrary to the Commission's Reasons, the deduction of user contributions is not supported by s 44X(1)(e): cf Reasons, p.16. Further, to the extent that the Commission relied



upon the factor in s 44X(1)(b) (Reasons, pp. 15 and 23), there was no material before the Commission or any other basis to support the conclusion that altering the price for the Service would promote competition in dependent coal markets.

4.13 PNO’s primary contention is that the Commission should not have made any deduction to the DORC for “user contributions”. Alternatively, if the Commission wished to have regard to the financing of particular dredging projects, this should have been done as part of a comprehensive examination of historical matters, including the benefits provided by the State in return for any contributions, the history of under-recovery by the State, and the question of which users, if any, are entitled to the benefit of any contributions. The Commission’s Determination fails to have regard to any of these matters.

4.14 In this context, PNO notes that the State played no role in the arbitration, notwithstanding that it operated the Port during the period in which the “user-contributions” were made, and continues to own the Port. In relation to the latter, Commission rejected a submission by PNO that the State’s ownership made it a provider of the service, and hence a necessary party to the arbitration: see s 44U and the definition of provider in s 44B.

4.15 Further, in circumstances where the Tribunal has previously reached the view that it was not satisfied that increased access would promote a material increase in competition in the coal export market, or any other dependent market (see *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 [157]), and where the NCC had earlier reached a similar view, and where there was no material before the ACCC suggesting a different conclusion, there was no basis for the ACCC to reduce the Navigation Service Charge below its current level. There was, in particular, no basis to deduct \$912 million from the DORC for “user contributions”. Such a reduction, and such a deduction:

- (a) would not promote competition in any market;



- (b) would deprive PNO of its ability to make a proper return on the investment it had made in the Port (which included paying for the assets the subject of the deduction);
- (c) fails to have proper regard to the legitimate business interests of PNO and PNO's investment in the Port, contrary to the mandatory factor in s 44X(1)(a); and
- (d) would discourage future investment.

4.15 *Secondly*, PNO contends that the Commission erred in extending the scope to circumstances where Glencore makes a representation to PNO of the kind referred to in s 48(4)(b) of 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.

4.16 Section 44V limits the Commission's determination powers to matters relating to access by the third party, in this case, Glencore. Given this limitation, there is no basis to extend the Determination beyond those circumstances where Glencore charters a vessel to enter the precinct and load Glencore coal. The representation mechanism in s 48(4)(b) of the PMAA was not intended to determine usage for the purposes of Part IIIA of the CCA. The extension of the Determination to circumstances in which a representation is made extends the scope of the Determination beyond that permitted by s 44V, and gives rise to unnecessary and avoidable uncertainty about the circumstances in which the Determination applies.

4.17 PNO contends that the Tribunal should vary the Determination by confining it to circumstances where Glencore, either directly or by agent, charters a vessel to enter the precinct and load Glencore coal.



5. **Issues as PNO sees them:**

- 5.1 The first issue raised by PNO's application is whether the Commission has erred in deducting \$912 million from the DORC valuation for "user contributions".
- 5.2 The second issue raised by PNO's application is whether the scope should be confined to circumstances where Glencore charters a vessel to enter the precinct and load Glencore coal.

6. Address for service of documents:

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Dated: 8 October 2018

Signed on behalf of the applicant:

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Andrew John Christopher
Solicitor for the applicant