

NOTICE OF LODGMENT

AUSTRALIAN COMPETITION TRIBUNAL

This document was lodged electronically in the AUSTRALIAN COMPETITION TRIBUNAL on 9/10/2018 at 3:43pm 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 3 of 2018

File Title: Application 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 Pty Ltd and Port of Newcastle Operations Pty Ltd

Registry: VICTORIA – AUSTRALIAN COMPETITION TRIBUNAL



Dated: 9/10/2018 3:42pm 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 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 Pty Ltd and Port of Newcastle Operations Pty Ltd

Name of applicant: Glencore Coal Pty Ltd

Address of applicant: Level 44 Gateway, 1 Macquarie Place, Sydney, NSW, 2000

1. Glencore Coal Pty Ltd (**Glencore**) applies to the Australian Competition Tribunal (**Tribunal**) under subsection 44ZP(1) of the *Competition and Consumer Act 2010* (**CCA**) for a review of a determination of the Australian Competition and Consumer Commission (**ACCC**) on access to the service described below.
2. Glencore is the third party.
3. **Brief description of the service:**
 - 3.1. The following service was declared by the Tribunal on 16 June 2016 pursuant to section 44K(8) of the CCA for the period commencing 8 July 2016 and expiring on 7 July 2031 (**Service**):¹

*The provision of the right to access and use the shipping channels (including berths next to the wharves as part of the channels) at the Port of Newcastle (**Port**), by virtue of which vessels may enter the Port precinct and load and unload at*

¹ *Re Application for review of the decision by the Commonwealth Treasurer under subs 44K(2) of the Competition and Consumer Act 2010 (Cth) in relation to the application for declaration of a service provided by Port of Newcastle Operations Pty Ltd, ACT 1 of 2016.*



relevant terminals located within the Port precinct and then depart the Port precinct.

3.2. The Service is provided by Port of Newcastle Operations Pty Limited (**PNO**).

4. **Facts and contentions on which Glencore intends to rely:**

4.1. On 4 November 2016, Glencore notified the ACCC under section 44S(1) of the CCA of the existence of an access dispute in relation to the Service.

4.2. On 9 October 2017, PNO filed proceedings against the ACCC and others in the Federal Court of Australia seeking judicial review in relation to the conduct of the arbitration. On 9 November 2017, the Federal Court dismissed PNO's application.² The Court found that the arbitration had been validly commenced by the ACCC and that pre-conditions for notification had been satisfied.

4.3. On 18 September 2018, the ACCC issued its final determination of the access dispute pursuant to section 44V of the CCA (**Final Determination**) along with a Statement of Reasons and an Arbitration Report.

4.4. The ACCC determined that the scope of the Final Determination was limited to the terms and conditions of access only where:

(a) 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* (**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.³

² *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* (2017) 350 ALR 552.

³ Final Determination [2.1].



The ACCC determined that the scope of the Final 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.⁴

4.6. The ACCC determined that:

- (a) 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 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;⁵ and
- (b) the Navigation Service Charge payable by Glencore to PNO in accordance with this determination will be \$0.6075 per vessel gross tonne as at 1 January 2018, reviewed on an annual and five-yearly basis as set out in clauses 7 and 8.⁶

4.7. Glencore makes the following contentions in relation to the ACCC Determination.

4.8. The ACCC erred in determining that the Final Determination does not apply in respect of vessels carrying Glencore coal which are using the Service unless those vessels have 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.

⁴ Final Determination [2.2].

⁵ Final Determination [4.1].

⁶ Final Determination [6.1] and [6.2].



- 4.9. The ACCC's determination is inconsistent with the provisions of Pt IIIA of the CCA. The arbitration was commenced as Glencore and PNO could not agree on one or more aspects of access to the Service (CCA s.44S). In fact, Glencore and PNO had not been able to agree on various *in limine* aspects of access to the Service including whether the terms of access be made available to vessels carrying Glencore coal. The ACCC was empowered to "deal with any matter relating to access" to the Service in its final determination (CCA s.44V(2)).
- 4.10. The ACCC's determination is also internally inconsistent as the Wharfage Charge which the ACCC determined is within the scope of the Final Determination in fact applies to all vessels carrying Glencore coal regardless of whether they have 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.
- 4.11. Further, the ACCC made the following errors in the Final Determination:
- (a) the ACCC erred by accepting PNO's methodology and construction costs for the dredging of the channels and berth boxes and rejecting Glencore's contrary evidence without properly considering the merits of the material;⁷
 - (b) the ACCC erred by accepting an additional allowance in respect of the costs of the construction of reclamation bunding (including the costs of acquiring reclamation bunding materials when they are available from dredging of the channels and berth boxes);
 - (c) the ACCC erred by failing to include any deduction for user funding in respect of the costs of reclamation bunding;⁸

⁷ Statement of Reasons, p. 74 – 76.

⁸ Statement of Reasons, p. 136.



- (d) the ACCC erred by accepting PNO's 12-year construction period in determining the interest during construction period was based on constructions works not necessary for Glencore's use of the Service;⁹
- (e) the ACCC erred in accepting PNO's position that constraining PNO's revenue from coal services to the stand alone cost of providing those coal services is not required;¹⁰ and
- (f) the ACCC erred in accepting PNO's position that there will be no true up review for the rate of return on past forecast versus actual capex.¹¹

5. Issues as Glencore sees them:

- 5.1. Whether the scope of the determination should exclude vessels carrying Glencore coal which are using the Service unless those vessels have 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.
- 5.2. Whether the ACCC erred in the other respects in paragraph 4.11 above.

⁹ Statement of Reasons, p. 107.

¹⁰ Statement of Reasons, p. 172.

¹¹ Statement of Reasons, p. 181.



6. Address for service of documents:

Attention: Dave Poddar
Clifford Chance
Level 16, 1 O'Connell Street
Sydney, NSW, 2000

Dated: 9 October 2018

Signed by/on behalf of the applicant:

angela pearsall.....

Angela Pearsall, Partner, Clifford Chance,
on behalf of her Partner, Dave Poddar,
Clifford Chance
Solicitor for the applicant

History

Form L inserted by SR No 20 of 1996, reg 10.6, effective 31

January 1996; amended by SR No 280 of 2010, Sch 1, effective 1 January 2011 (as amended by SR No 337 of 2010).