

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



REGISTRAR

Dated: 9/12/2020 6:56 PM

Important information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Tribunal and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

COMMONWEALTH OF AUSTRALIA
Competition and Consumer Act 2010 (Cth)



IN THE AUSTRALIAN COMPETITION TRIBUNAL

File Nos: ACT 2 & 3 of 2018

Re: Applications under section 44ZP of the *Competition and Consumer Act 2010 (Cth)* for review of the arbitration determination by the Australian Competition and Consumer Commission in relation to an access dispute between Glencore Coal Ltd and Port of Newcastle Operations Pty Ltd.

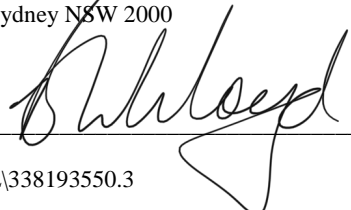
Applicants Port of Newcastle Operations Pty Limited (ACN 165 332 990)
and
Glencore Coal Assets Australia Pty Ltd (ACN 163 821 298)

AFFIDAVIT

I, Bruce Llewellyn Lloyd, of 1 Bligh Street, Sydney in the State of New South Wales, Partner, affirm as follows:

1. I am a partner at Clayton Utz, the solicitors for Port of Newcastle Operations Pty Limited (**PNO**) in these proceedings. I have carriage of this matter for PNO and am authorised to make this affidavit on PNO's behalf.
2. Except where otherwise indicated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.
3. I previously affirmed an affidavit in these proceedings on 16 November 2020 (**Second Lloyd Affidavit**), in which I deposed to PNO's efforts to date in identifying information in relation to historical capital dredging projects at the Port of Newcastle to which certain port users partially contributed, and which might properly be the subject of a notice under s 44ZZOAAA(5).

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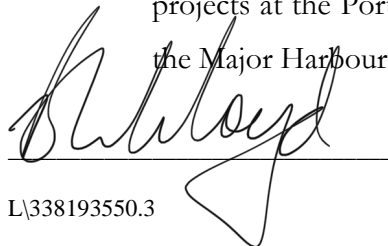
4. This affidavit provides an update in relation to the ongoing work that has been undertaken on behalf of PNO since the date of the Second Lloyd Affidavit.

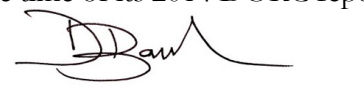
Dredging records

5. Since 16 November 2020, I and my team have continued to take steps to identify the kinds of primary records that may be available in the possession, power or control of PNO or third parties relevant to factual issues including:
- a. the amount and type of material dredged on the various historical expansion projects;
 - b. the actual cost paid for the dredging under arrangements that may have existed between State and non-State entities; and
 - c. associated issues such as the use of spoil (the **Dredging Issues**).
6. I describe these steps below.

Engagement with Dr Ward and Mr Hoogerwerf

7. Since 16 November 2020, I and my team met with Dr Ward (consultant at GHD Advisory, formerly of AECOM and the author of AECOM's expert engineering relied on by PNO in the ACCC arbitration proceedings) to ascertain whether any primary material relating to the Dredging Issues that was not previously before the ACCC or Tribunal might be available.
8. I am informed by Dr Ward that:
- a. periodic dredging reports would likely have been prepared by the dredging contractor and provided to the contracting party during the course of each capital dredging project, which may provide a conclusive evidentiary basis for the volume of material actually dredged, none of which were in evidence before the ACCC;
 - b. these periodic dredging records, and other relevant documents not before the ACCC or Tribunal such as dredging contracts, may be in the possession, power or control of Boskalis Australia Pty Ltd (**Boskalis**, the descendant entity of WestHam Dredging Company Pty Limited (**WestHam**) which undertook the Major Harbour Deepening and other dredging works at the Port), Port Waratah Coal Services (**PWCS**) or Newcastle Coal Infrastructure Group (**NCIG**);
 - c. while for the purposes of the ACCC's original determination, Dr Ward based his calculations of the volume of material dredged across all of the relevant expansion projects at the Port since 1986 on hydrographic surveys conducted in 1976 (prior to the Major Harbour Deepening project) and 2014 at the time of its 2014 DORC report

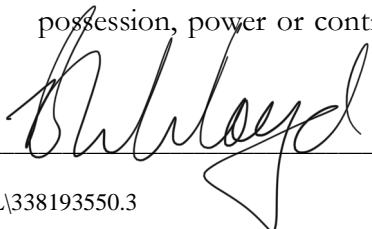




to PNO, he believes that interim surveys would likely have been arranged by the Maritime Services Board (**MSB**) or other dredging clients, including "in" and "out" surveys prior to and immediately following dredging campaigns, which were not before the ACCC but may be in the possession of PNO, PWCS or NCIG; and

- d. while AECOM relied on primary data from MDA Australia Pty Ltd's (**MDA**) 2013 valuation of the channel assets of the Port, there may be underlying data which was available to MDA, but which was not before the ACCC or Tribunal, which needs to be reviewed by PNO.
9. I am also informed by Dr Ward that Mr Hoogerwerf (independent dredging consultant, formerly General Manager and Executive Director of WestHam Dredging) may hold records relating to the Major Harbour Deepening Project, because he oversaw the Major Harbour Deepening project for WestHam, and was involved in the preparation of MDA's 2013 report.
10. After speaking with Mr Ward, I and members of my team conducted a videoconference with Mr Hoogerwerf, who informed me that:
- a. he managed the entire Major Harbour Deepening project for WestHam until its completion in 1983;
 - b. since 2003, he has been an independent dredging consultant, during which time he has been involved in other dredging projects at the Port of Newcastle (**Port**) including dredging for NCIG's coal terminal;
 - c. WestHam provided frequent dredging reports to the MSB during the course of the Major Harbour Deepening project;
 - d. Boskalis is likely to hold a number of relevant records;
 - e. he maintains personal electronic and physical storage facilities containing documents relating to various dredging projects during his employment at WestHam and as an independent consultant, including in relation to dredging projects at the Port;
 - f. additionally, a former colleague at WestHam who was employed as an Estimator and subsequently worked for Mr Hoogerwerf when he became an independent consultant, may also hold relevant documents relating to the volume of material dredged and charges for dredging works at the Port.

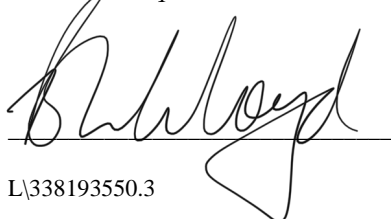
11. In light of PNO's investigations to date, I believe that there is likely to be material in the possession, power or control of third parties which was not previously before the Tribunal



which may be relevant to the Tribunal's examination of historical capital dredging projects at the Port, the volume and type of material dredged during the projects, and the actual cost paid for the dredging including contributions by non-State entities.

Examination of PNO's electronic and paper records

12. Since the date of the Second Lloyd Affidavit, PNO employees and Clayton Utz solicitors working under by supervision have separately been examining PNO's own records for any primary material relating to the Dredging Issues.
13. First, we have been working with PNO's Survey Manager, Mr Robert Kelly, to ascertain what historical survey data may be available which was not relied on for the purposes of AECOM's original reports.
14. I am informed by Mr Kelly that:
 - a. prior to 2000, surveys at the Port were recorded in hardcopy, and that PNO has access to these hardcopy surveys dating back a number of decades prior to privatisation;
 - b. after 2000, PNO has electronic records of surveys;
 - c. in his opinion, surveys conducted prior to and subsequent to capital dredging projects would be the most accurate way to ascertain the actual volume of material dredged as part of a dredging project; and
 - d. he believes that it may be possible to locate these surveys in PNO's records and to align them with the relevant capital dredging projects.
15. Mr Kelly has commenced the task of reviewing PNO's survey records. I am informed by Mr Kelly that this process is manual and time consuming, and will take considerable time to complete.
16. I am also informed by Dr Ward that, if Mr Kelly is able to locate the relevant surveys, he will require a significant period of time to digitise and analyse the surveys.
17. Separately, since the date of the Second Lloyd Affidavit, solicitors in my team have been working with PNO's IT Supervisor, Mr Martin McNab, to ascertain what relevant material may be stored within PNO's electronic document management system (**DMS**) that was not previously before the ACCC or the Tribunal in these proceedings.
18. I am informed by my partner Scott Grahame who is assisting me in this matter and believe from inquiries of Mr McNab that:





- a. since 2019, PNO has used a DMS called "Box.com" (**Box**), which is a cloud-native document management platform;
- b. prior to 2019, the State of NSW (and after privatisation, PNO) used a DMS called "Objective", which the State commenced using in approximately 2008 or 2009. Prior to that time, the State did not use a comprehensive DMS and instead used a mix of Fileshare and physical record keeping. At the commencement of using Objective, the State's hardcopy records were scanned into Objective, and its existing electronic records were migrated to Objective;
- c. in or around March 2020, PNO migrated its entire Objective archive to Box, with the effect that PNO now has an exact mirror of the contents of its Objective DMS including the original folder architecture (**PNO Objective Archive**);
- d. however, the PNO Objective Archive contains a subset of State-only documents, which were not made accessible to PNO upon privatisation and so are not available for review in the PNO Objective Archive; and
- e. the PNO Objective Archive contains around 731,833 files.

19. Solicitors in my team have been given access to the PNO Objective Archive, and at my direction, together with Mr McNab, have been conducting preliminary searches by keyword of the available material. I am informed that Box allows for basic Boolean search functionality.

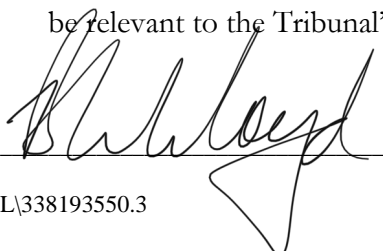
20. On the basis of these preliminary searches, I believe that PNO is likely to have within its possession, power or control documents relating to historical dredging projects, and in particular, the Dredging Issues, which were not previously before the ACCC or Tribunal, or available to PNO's experts.


21. I estimate that PNO and its external solicitors will need a further period of approximately six weeks to complete its review of the PNO Objective Archive in order to determine whether there is any material that PNO that would be relevant to the Tribunal's decision .

Historical Financial Records

22. In the arbitration before the ACCC, PNO relied on a report from Castalia dated 17 August 2018, which analysed historical charges at the Port from 1990 to 2014.

23. Since affirming the Second Lloyd Affidavit in this proceeding, I and my team have made further enquiries of Castalia to identify additional information which may be available and may be relevant to the Tribunal's remitter.





24. On 1 December 2020, Castalia, provided us with the primary material on which it relied in its report dated 17 August 2018. This material comprises approximately 70 documents (and includes, for example, annual reports of the MSB in the period FY1984 to FY1995, annual reports of the Newcastle Port Corporation (**NPC**) in the period FY1996 to FY2014, and various schedules of charges levied at the Port in the period 1976 to 2017).
25. Since 1 December 2020, at my direction, solicitors in my team have been reviewing these records, some of which appear to have been previously before the ACCC or the Tribunal.
26. This work is ongoing, and I estimate that PNO will require a period of approximately six weeks to conclude its analysis of this material.
27. Separately, since the date of the Second Lloyd Affidavit, PNO and its external solicitors have also conducted preliminary searches of PNO's own records, including the PNO Objective Archive, for any primary records relevant to the Port's historical charges.
28. Further, PNO's IT Supervisor, Mr Martin McNab and Survey Manager, Mr Robert Kelly are making enquiries of former PNO employees, including former IT and survey staff, to ascertain where such relevant documents might be stored, and the most efficient means to locate and recover these documents.
29. This work is ongoing, and I estimate that PNO will require at least six weeks to complete this examination of its own historical records.

AFFIRMED by the deponent
at Sydney in New South Wales
on 9 December 2020.

Before me:



Dylan Barber
NSW solicitor (081514)

Signature of deponent

