HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: PORT OF NEWCASTLE OPERATIONS PTY LIMITED ACN 165 332 990
Appellant

and

GLENCORE COAL ASSETS AUSTRALIA PTY LTD ACN 163 821 298
First Respondent

AUSTRALIAN COMPETITION TRIBUNAL
Second Respondent

AUSTRALIAN COMPETITION & CONSUMER COMMISSION
Third Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. The appellant, **PNO**, certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. The appeal arises out of an arbitration conducted by the Australian Competition and Consumer Commission (the **Commission**) pursuant to Division 3 of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) in respect of a declared service at the Port of Newcastle (**Port**).

3. The first substantive issue raised is who is a "third party" entitled to engage the statutory arbitral process in respect of declared services. The question raised by the Full Court's decision is whether the access referred to in the definition of "third party" and elsewhere in Part IIIA encompasses the Full Court's concept of "economic access" or an "economic interest".

4. The second substantive issue raised by the appeal concerns whether, in calculating the cost of infrastructure used by PNO in providing the declared service (which in turn was used to calculate the charge in dispute in the present case), deductions should be made for historical capital contributions by users of the facility, and if so, how.

Part III: Section 78B notices

5. PNO certifies that it has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903* (Cth) and has concluded that such notice is not required in this case.

Part IV: Reasons for judgment below

6. The reasons of the Australian Competition Tribunal (Middleton J, Mr R F Shogren and Dr D R Abraham) are *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 (**T**) (Core Appeal Book (**CAB**) 5).

7. The reasons of the Full Court of the Federal Court of Australia (Allsop CJ, Beach and Colvin JJ) are *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 382 ALR 331; [2020] FCAFC 145 (**FC**) (CAB 167).

Part V: Facts

8. The current proceedings relate to the following service at the Port declared pursuant to Part IIIA of the CCA (**Service**):

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

9. In May 2014, PNO took a long lease of the Port and took over its operations by commercial arrangements with the State of NSW as part of the privatisation of State assets: FC [12] (CAB 176). The Port is used for various activities, including the shipment of Hunter Valley coal: FC [13]. The first respondent (**Glencore**) is a coal producer.

10. The majority of Glencore's coal is exported through the Port on a 'free on board' (**FOB**) basis (FC [135]), such that the customer arranges shipping for collection of the coal from the wharf through one of the various forms of charter described by the Full Court at [114] – [128].

11. PNO levies charges pursuant to the *Ports and Maritime Administration Act 1995* (NSW) (**PMA Act**). Two charges are relevant to the present application. *First*, under s 50(1) of the PMA Act, a 'navigation service charge' (**NSC**) is payable in respect of the general use by a vessel of the Port and its infrastructure. This charge is payable on each entry by a vessel to the Port, is calculated by reference to the gross tonnage of the vessel (rather than the vessel's load), and is payable by the owner of the vessel as defined in s 48. This charge was the subject of the dispute between Glencore and PNO. *Secondly*, under s 61(1) of the PMA Act, a wharfage charge is payable in respect of availability of a site at which stevedoring operations may be carried out, is calculated by reference to the quantity of cargo loaded or unloaded at the site, and is payable by the person who, immediately before it is loaded, is the owner of the cargo. The quantum of this charge was not the subject of any dispute before the Commission or the Tribunal – it was included in the subject matter of the application brought by Glencore pursuant to s 44S of the CCA because it was relevant to the calculation of pricing for the NSC (under the model utilised by the parties).

12. Glencore notified the Commission of an access dispute between it and PNO pursuant to s 44S of Part IIIA, seeking the Commission to arbitrate the dispute concerning the quantum of the NSC. Glencore's was the only such application notified to the Commission before the declaration of the Service was revoked. (The revocation of the declaration did not operate to revoke Glencore's application for a determination, which

was made prior to the revocation: s 44I(4).)

13. Both the Commission and the Tribunal dealt with the issue of the scope of the determination on the basis that Glencore was entitled to a determination concerning the appropriate level of the NSC whenever Glencore relevantly used the declared service, that is whenever it chartered a vessel, and paid the NSC. This occurs for a small proportion of Glencore's coal: FC [135]. Glencore, however, sought to determine the NSC for *all* ships carrying coal from Glencore mines, notwithstanding that the large proportion of its coal is sold FOB, which means that Glencore has no involvement in the shipping, and does not pay the NSC the subject of the present dispute. In FOB sales, Glencore does not use, or pay, for navigation of the shipping channels.

14. The Commission and the Tribunal rejected Glencore's attempt to arbitrate the NSC payable when other users navigate the shipping channels at the Port. However, the Full Court determined that the Commission and Tribunal had erred, and that Glencore was entitled to arbitrate the terms of all ships carrying coal from Glencore mines, regardless of whether Glencore was responsible for, or involved in, shipping the coal.

Part VI: Argument

*Ground 1 – economic access (paragraph 2 of the Notice of Appeal (**NOA**) (CAB 309))*

15. The first issue concerns the meaning of "access", a term of central importance to Part IIIA and used throughout the Part, but not defined.

16. Part IIIA creates a statutory framework to access services. As this Court has previously observed,[1] Part IIIA provides a two stage process – a declaration process (contained in Division 2), and then, in respect of declared services, processes for the making of agreements or arbitrated determinations regulating the terms on which an access seeker may have access to a declared service (contained in Division 3). The Full Court's decision concerned the second stage.

17. Pursuant to s 44S, only a "third party", defined in s 44B as "a person who wants access to the service or wants to change some aspect of the person's existing access to the service", or the provider of the declared service, can notify the Commission and initiate

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1 *Pilbara Infrastructure Pty Ltd and anor v Australian Competition Tribunal* (2012) 246 CLR 379, 393.

a compulsory arbitration on the terms of access. (We will use capitalised "Third Party" in these submissions, to avoid any confusion with the ordinary meaning of that term). In this regard, Part IIIA provides for a bilateral arbitration between an access seeker (the Third Party) and an access provider (the "provider"). "Provider" is also defined in s 44B: a provider "in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service". "Service" is relevantly defined to mean "a service provided by means of a facility and includes: (a) the use of an infrastructure facility such as a road or railway line; (b) handling or transporting things such as goods or people; (c) a communications service or similar service…" (emphasis added).

18. "Access", in its ordinary meaning, relevantly refers to "admittance (to the presence or use of)" (*Shorter Oxford English Dictionary* (6th ed. 2007)). It is a physical concept, focusing, in the present context, on "use" of a service. The Full Court of the Federal Court has previously held in the context of Part IIIA that the term has its ordinary meaning of "a right or ability to use a service": see *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* (2017) 253 FCR 115, [137] (referring to the Full Court's earlier decision in *Sydney Airport Corporation Ltd v Australian Competition Tribunal and Ors* (2006) 155 FCR 124). The use of the word "access" rather than "use" no doubt reflects that the former term accurately encapsulates that there is some impediment that needs to be overcome, such as a proprietary right.

19. The parties to an arbitration are the provider, the Third Party and any other person accepted as having a sufficient interest (s 44U), but only a Third Party (or the provider) can initiate an arbitration (s 44S), and the Commission's determination is "on access by the third party to the service", not on the terms for anyone else's access: s 44V(1). The determination may deal with a wide range of matters, including matters not the basis for the notification, but subject to the requirement that they are matters "relating to access by the [T]hird [P]arty": s 44V(2). Therefore, the governing concept is "access" by the access seeker, and the arbitration determination can only deal with that matter.

20. The Full Court observed (at [46]) that the statutory authority to make a determination was not confined to allowing the Third Party to *use* the service, and stated that the language of "access to the service" "reflects the economic character of the legislation

which is concerned with facilitating arrangements that will advance economic efficiency rather than simply facilitating the physical use of the facility". The Court then stated (at [47]), "[t]herefore, a dispute as to commercial terms of access to the declared service sought by a particular third party for the purpose of securing the ability *for another party to physically use the facility* was within the scope of the statutory provision" (emphasis added).

21. At [48], the Full Court stated that the terms sought by the Third Party "might include provision by which the service might be used by a party other than the party seeking the arbitral determination relating to access to the service". In so stating, the Full Court appeared to overlook that s 44V(1) does not simply provide for a determination relating to access to the service, but rather provides that the determination is "on access by the third party to the service". The Full Court then observed that "whether access on those terms would be provided would be a matter for agreement or arbitral determination". It is quite unclear what this means: there is no provision in Part IIIA for a second arbitral determination about the application of the terms of the first one.

22. The Full Court relied on the statutory construction referred to in [20] above in its application of Part IIIA in the present case, and further introduced the notion of "economic" access or use. At [147]-[148], the Full Court noted the Tribunal's acceptance of PNO's submission that to use or access the Service means to navigate the shipping channels of the Port, and that only a person controlling the vessel is able to access the Service. At [149], the Full Court observed that this "pays little regard to the economic access or use of the channels as a necessary part of the export of coal". There was then a key passage at [155]: "Once one recognises that the access of use is not limited in the physical way identified by the Tribunal in its acceptance at [149] of PNO's submissions, then the notion of economic access or use will obtain equally whether by reason of Glencore selling on a CIF basis (where it has time or voyage chartered a ship) or by reason of selling on an FOB basis (which it has not chartered a ship). In each cases its access and use is economic in that it does not physically control the vessel using the channels."

23. At [159], the Full Court elucidated its notion of "economic use", stating that Glencore had "an economic interest" in being able to enter into an agreement with PNO as to the terms upon which ships carrying Glencore coal would be able to use the Service.

A potentially very wide class of persons may have an economic interest in the terms on which the person using the service might obtain its access.

24. There is nothing in the legislative scheme that supports the notion that a person with a mere economic interest in the use of a facility is a Third Party for the purposes of Part IIIA. There is nothing in that scheme to indicate that the term "access" should have a meaning different from its ordinary one. On the contrary, there are various textual indicators that support this ordinary definition. For example, the definition of service in s 44B refers to "the use of an infrastructure facility". Similarly, s 44ZO, which deals with the effective date of final determinations including backdating, provides in s 44ZO(4) that that the specified day "cannot be a day on which the third party did not have access to the service". That suggests physical access, given the conceptual difficulty of assessing the day on which a person obtains economic access or an "economic interest" in the terms on which another person might use a service.

25. Further, and more generally, the statutory scheme provides for binding arbitrations that determine the terms and conditions of access. It would be in tension with that scheme that potentially multiple parties with a mere economic interest could each determine the terms on which another person will use a declared service. For example, a user of the service could reach agreement with the provider, or obtain terms in a binding arbitration under Part IIIA, that gives it access on attractive terms (such as priority access) for which it is content to pay a higher price. A person with an economic interest might seek a different (and lower) price for that same use. Given that the determinations are each binding, how is any conflict to be resolved? The statutory scheme contains no provisions in the regard, for the simple reason that "access" is not economic access.

26. The Full Court's attempts to deal with this last issue involve a lack of clarity. At [48], it was suggested that whether access on the arbitrated terms would be provided to a third party would be a matter for separate agreement or separate arbitral determination, which finds no foothold in the statutory scheme. At [151], the Full Court stated that it was "conceivable that two parties are each potentially interested in securing economic terms covering the same physical use", and that this would be resolved by PNO, in effect, issuing a "ticket" for a ship to use the Port the cost of which would be borne by Glencore. This is another extra-statutory notion. The Full Court also noted that the

party in control of the ship may also wish to seek terms in which it is directly liable to PNO, and that this "does not pose any difficulty" because "PNO offers terms to each and commercial decisions will be made on that basis". Again, there is no support for this in the statute, which merely provides (s 44V) for a binding determination on access by the Third Party. At [162], the Full Court referred to "another person who may have a right of access to the shipping channels" (i.e. the ship operator) having the "option" to take up Glencore's arbitrated price. A determination pursuant to s 44V does not confer an option – it fixes the terms and conditions for both parties. Nor does the Full Court explain why the user would have the option to take one price or another, but PNO would not have a matching option. Further, to speak of an "option" to take a particular price overlooks that the determination pursuant to s 44V(1) may, and usually does, include detailed terms and conditions quite apart from price. For example, if a user had negotiated an agreement for preferential access in return for a higher NSC, would this user still be entitled to take the benefit of Glencore's "ticket" and retain the other benefits which it had negotiated? Likewise, at [167], the Full Court referred to the terms of access of Glencore including "a mechanism of delivering an equivalent price to another party whose access overlaps or coincides with Glencore's access", again focusing on price rather than terms and conditions, and otherwise not anchoring those observations in any provision of Part IIIA.

27. Relevant extrinsic materials considered by the Full Court refer to "access" and "use" interchangeably. Part IIIA was enacted to implement the reforms proposed by the 1993 Hilmer Report, as subsequently elaborated upon by the Commonwealth, States and Territories in the 1994 Competition Principles Agreement: FC [40], [43]. As quoted by the Full Court at [38], the Hilmer Report observed (at p 253) that "Policy judgments are involved as to where to strike the balance between the owner's interest in receiving a high price, including monopoly rents that might otherwise be obtained, and *the user's* interest in paying a low price" (emphasis added). Similarly, as observed by the Full Court (at [41]), in the Competition Principles Agreement it was agreed that the Commonwealth would put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure where various criteria were met, including that "the safe *use* of the facility by the person seeking access can be ensured at an economically feasible cost" (emphasis added). This recommendation found reflection in the original declaration criteria in the *Competition*

Policy Reform Act 1995 (Cth), which included "that access to the service can be provided without undue risk to human health or safety".[2]

28. To the extent that the Full Court's approach is said to be founded in a concern to promote economic efficiency (at [46]), that does not justify the approach. A concern with economic efficiency is not a reason for a notion of economic access: economic efficiency is promoted by permitting physical access to what may be monopoly infrastructure to materially enhance competition, and by permitting the regulation of pricing for physical access to prevent what may otherwise be monopoly pricing. The Tribunal declined to take such an expansive view of its jurisdiction, notwithstanding its economic expertise.

29. To the extent that the Full Court's approach is said to be one concerned with the interpretation of the particular declared service (at [158]), that does not justify an expansion of the identity of the Third Party for the purposes of Part IIIA. Nor is it consistent with the observations by the Full Court at [46]-[48]. Nor is it consistent with the definition of the declared service in any event, which refers to "the provision of the right to access *and use* the shipping channels …": [88] (emphasis added).

30. The Full Court gave particular emphasis to different forms of chartering arrangements: [114] – [135]. However, this was a distraction. Whatever might be the scope of particular charters, the present case did not raise any of these issues. The issue in the present case was whether Glencore should be able to arbitrate terms for access by vessels in the case of FOB sales, where it has no involvement in freight. The methods of chartering used by these vessels, and the arrangements in place between these vessels and the Port, were not the subject of evidence before the Full Court, because they were not the subject of any dispute. Even without evidence, however, this Court can safely infer from the absence of any other notified dispute, that whatever variety of chartering arrangements exist, they do not pose problems on a practical level for the operation of the Port or the collection of the NSC from vessels using the Port.

31. The correct approach was that adopted by the Tribunal, which was that Glencore is only using that part of the declared service for which the NSC is levied (being the use

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[2] Section 44G(2)(d) and s 44H(4)(d), both introduced by *Competition Policy Reform Act 1995* (Cth) and subsequently repealed in 2010 by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth).

of the shipping channels) where Glencore itself is using the shipping channels – for example, when it operates a ship to deliver coal to a customer located elsewhere – and it is only a Third Party in respect of access to the service for which the NSC is charged in those circumstances. It is not a Third Party in respect of the service for which the NSC is charged when it ships coal FOB, and the shipping channels are accessed by a ship owner and operated by someone else. Put another way, Glencore cannot arrogate to itself control over the terms on which ship operators access the declared service by navigating up the shipping channels to the berth, and subsequently depart by the same channels, being the service for which the NSC is charged. It cannot cut across the terms in place with the shipowners and charterers.

Ground 2 – Physical access to part of a service (NOA, [3] (CAB 309))

32. As discussed above in relation to ground 1, the Full Court's primary conclusion was that it was unnecessary for Glencore to have physical access to be a Third Party, and that an economic interest would suffice. But the Full Court also held that Glencore accessed part of the Service, namely that part of the Service for which the wharfage charge was levied. According to the Full Court, this made a Glencore an access seeker who could then seek to arbitrate the terms of which other people used the Service. This alternative basis for the Court's decision as to scope was also incorrect.

33. The wharfage charge received very little attention in the arbitration before the Commission because it is a modest charge that was not the subject of any dispute. The only disputed charge was the NSC. The only role of the wharfage charge in the arbitration was as a balancing item: the total amount charged by reference to the DORC valuation was divided between the NSC and the wharfage charge, so that the total of the undisputed wharfage charges had a role in the calculation of the disputed NSC. Under the PMA Act, the wharfage charge (which was payable by Glencore even when its coal is sold FOB) is a charge for the availability of the site at which the loading of coal vessels occurs: s 61. It is not entirely clear if the activity for which the wharfage charge was levied (the availability of the site) involved the use of the declared service, being the provision of the right to access and use the shipping channels (including berths next to the wharves), "by virtue of which vessels may enter the Port precinct and load and unload at relevant terminals… and then depart the Port precinct". Even if it did, it is clear that it was not a charge for use of that part of the Service involving

the navigation of the shipping channels and for which the NSC was levied.

34. The Full Court's alternative reasoning proceeded on the basis that a person accessing one part of a declared service could arbitrate the terms on which another person accessed another part of the declared service. For example, if there was a declaration of a service being the provision of a railway line and sidings, on the Full Court's approach a person accessing only the sidings to place goods onto the platform could arbitrate by compulsory arbitration the terms on which a railway company operating a rail freight operation obtained access to the railway line. The Full Court's approach would allow access seekers who are not in dispute in relation to their use of the service (in the present case, being confined to that aspect of the Service represented by the wharfage charge), and who do not wish to change any aspect of their use of the service, to engage the Commission's arbitral powers in respect of somebody else's use.

35. The Full Court purported to rely upon s 44V(2). However, as noted earlier, although that subsection is wide, it is restricted by its chapeau such that a determination "may deal with any matter relating to access by the third party". It does not extend to a matter relating to access by a different person. This legislative confinement is illustrated by the examples in sub-sections 2(a) to (e). With the exception of (d), each expressly refers to granting access to a third party ((a)), or altering the terms on which a third party is given access ((b), (c), (da), (e)). None suggest an operation which would allow a third party to determine the terms on which *another party* was granted access. Likewise, the definition of Third Party in s 44B includes someone who "wants to change some aspect of the person's existing access to the service", rather than someone who wants to change some aspect of another person's existing access to the service.

36. The Full Court's reasoning on this respect is a little unclear, partly because it is rolled up in the Full Court's approach to economic use. At [157], the Full Court concluded that in light of the activities covered by the wharfage charge, "that part of the Service is accessed or used by Glencore both physically and economically". At [160], the Full Court observed that in either case Glencore was the acquirer. At [162], the Full Court said that if Glencore "is accessing and using the Service and shipping channels", then "the determination through a bilateral arbitration can, under s 44V(2), set the terms of access as between Glencore and PNO such that another person who may have a right of access to the shipping channels to carry Glencore's coal and who may be subject to

the NSC, can, through Glencore be given the ability or option of taking up Glencore's arbitrated price". To the extent that the Full Court was relying upon Glencore's access the subject of the wharfage charge, that ignores the limitation in s 44V(2) itself that the determination must concern "any matter relating to access by the third party", not access to a different aspect of the service by someone else. To the extent that the Full Court was relying upon the "economic access" analysis, that is dealt with in the first ground above.

37. The consequence is that for FOB sales (i.e., the majority of Glencore's coal sales), there can be no proper dispute capable of arbitration by the Commission, as the only part of the declared service that Glencore is accessing is that which corresponds to the wharfage charge, about which there was and is no dispute.

Ground 3 – Representations under s 48(4)(b) of the PMA Act (NOA, [4] (CAB 309))

38. The third ground of appeal relates to the Full Court's decision to expand the scope of the determination to any circumstance where Glencore makes a representation pursuant to s 48(4)(b) of the PMA Act.

39. This aspect of the decision picks up the extended statutory definition of "owner" of vessel or cargo under the PMA Act. Section 50(4) of the PMA Act provides that the NSC "is payable by the owner of the vessel concerned". The definition of "owner" of a vessel or cargo appears in s 48 of the PMA Act. Sub-section (1) states that "'owner' of a vessel or cargo means (subject to this section) the person who owns the vessel or cargo". Sub-sections (2) to (4) provide that a reference in the PMA Act to the 'owner of a vessel' includes a reference to various other people (including a person who has chartered a vessel: s 48(3)). Sub-section (4) relevantly provides:

> A reference to the owner of a vessel or cargo includes a reference to any person who, whether on the person's own behalf or on behalf of another:
>
> (a) exercises any of the functions of the owner of the vessel or cargo, or
>
> (b) represents to the relevant port authority that the person has those functions or accepts the obligation to exercise those functions.

40. The effect of the Full Court's decision is that the NSC rate set by the determination will apply whenever Glencore makes a representation of the kind described in s 48(4)(b). This was not a term originally sought by Glencore; rather, it was proposed by the Commission in its draft determination. Moreover, it is common ground that

Glencore has never made such a representation.

41. The Tribunal rejected this extension, but the Full Court restored it: FC [163]. There is no basis for the extension. The provisions of a State statute cannot determine the question of who is a Third Party for the purposes of Part IIIA.

42. The Full Court restored this aspect of the Commission's decision on the same basis that it expanded the scope of the determination to any vessels carrying coal from a Glencore mine, namely, that access was not confined to physical access: see [167]. It follows that if this Court upholds Ground 1, it should also reject the Full Court's decision that the determination applies whenever Glencore makes a representation under s 48(4)(b) of the PMA Act.

Ground 4 – Statutory requirement to take user contributions into account (NOA, [5] (CAB 310))

43. Grounds 4 and 5 relate to an important aspect of the calculation of the NSC, namely the cost of infrastructure used by PNO in providing the Service. This cost was used to calculate the regulated asset base, which under the building block methodology used by the Commission, represents the value of capital on which a rate of return on, and of, capital was calculated as part of the calculation of the maximum allowable revenue: FC [21] (CAB 178).

44. Even if grounds 1 to 3 are resolved in PNO's favour, the Full Court's decision in relation to user contributions carries significance – both in respect of the Port (in respect of any CIF sales by Glencore, and in the event that the application to have the Port's services declared again succeeds), and for any other facility that may become the subject of declaration and arbitration pursuant to Part IIIA.

45. The Commission used the DORC valuation method, as propounded by both parties, which calculated the depreciated optimised replacement cost of the relevant Port assets used to provide the declared service. This method involves a hypothetical exercise of calculating how much a competitor would have to spend to duplicate the Port on an efficient, modern construction basis using the latest technology. DORC simulates pricing in a competitive market, and avoids pricing involving monopoly profits, as the Full Court recognised: FC [177], [194], [202]. Not only does the DORC method provide a means of approximating competitive pricing, it avoids the need for a historical inquiry into the actual costs incurred, which in the case of an infrastructure

facility such as the Port, which has been developed and improved progressively since the time of Governor Macquarie, would be an extremely difficult, expensive and time-consuming undertaking, and likely an impossible one.

46. Using the DORC method, the Commission calculated that the DORC was $2.169 billion. Although Glencore challenged various aspects of the Commission's calculation before the Tribunal, the Tribunal affirmed the Commission's calculation, and those aspects of the Tribunal's decision were not the subject of challenge by Glencore in the Full Court.

47. The subject of dispute before the Full Court was whether it was appropriate to make a deduction from this amount in recognition of what were described by Glencore as 'user contributions'. The 'user contributions' in the present case comprised various historical projects at the Port, specifically various dredging projects conducted between 1977 to 1983, and 1989 to 2010 (T [263] (CAB 71)), which the Commission determined had been fully or partially funded or undertaken by third parties: T [166] (CAB 50). The Commission made a deduction of $912 million from the total DORC value for these projects. Based on this deduction, the NSC was calculated at $0.6075 per gross tonne, rather than $1.0058 calculated on the full DORC of $2.169 billion: FC [24] (CAB 178).

48. Before the Tribunal, PNO contended that having opted for a DORC valuation method it was inappropriate to deduct amounts from the figure generated by this method for historical considerations. Such an approach involved an impermissible blending of valuation methods (DORC and historical cost), and was not required by the statutory criteria. PNO further submitted before the Tribunal that if any historical analysis was to be undertaken, one could not simply carry out a partial analysis (of identifying 'user contributions') but rather would need to undertake a much more thorough historical examination than had been undertaken by the Commission. The Tribunal accepted PNO's submissions, and decided that no allowance should be made for user contributions: T [608] – [609] (CAB 141).

49. The Full Court found that the Tribunal had erred, for two principal reasons: (i) the Court found that s 44X(1)(e) required the Commission (and the Tribunal, in conducting a re-arbitration) to take account of historical user contributions (FC [288]); and (ii) the concept of "efficient costs" referred to in the pricing principles for access

disputes (s 44ZZCA) were not necessarily met by reference to a measure of costs that would prevail in a competitive market, and also required consideration of whether there had been historical user funded contributions: FC [258], [268].[3] Both reasons involved error.

50. The first involves a misconstruction of the particular statutory criterion.

51. Section 44X(1)(e) is part of a self-contained statutory scheme that allows an access seeker to seek a determination which requires the access provider to extend the facility (including expanding the capacity or geographical reach) (s 44V(2)(d)), but with various safeguards, namely: the determination cannot result in the third party becoming an owner of any part of the facility (s 44W(1)(d)), or require the provider to bear some or all of the costs of extending the facility or maintaining the extensions (s 44W(1)(e) and (ea)); and the Commission must take into account the value to the provider of these extensions, the cost of which is borne by someone else (s 44X(1)(e)).

52. A similar scheme applies in relation to interconnections: a determination may require the provider to permit interconnection (s 44V(2)(da), but cannot require the provider to bear some or all of the costs of the interconnection (including its maintenance) (s 44W(1)(f)); and the Commission must take into account the value to the provider of the interconnections, the cost of which is borne by someone else (s 44X(1)(ea)).

53. It is apparent from the statutory context in which s 44X(1)(e) appears that it is referring to extensions undertaken as part of the determination of an access dispute. This was the conclusion reached by the Tribunal (at T [54] (CAB 24)). The Full Court held, however, that the provision referred to any expansion, regardless whether the expansion was ordered as part of a determination, or occurred at some point in the past.

54. In addition to the statutory context, the language of s 44X(1)(e) also points against such a conclusion. The provision refers to extensions (and interconnections), "whose cost *is* borne by someone else" (emphasis added). The use of the present tense is consistent with the construction favoured by the Tribunal that sub-section (1)(e) is to be read as part of a group of provisions dealing with contemporaneous extensions (and interconnections) ordered as part of a determination, not historical matters.

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[3] The two reasons were related, in the sense that the Full Court relied on efficiency considerations to support the Court's construction of s 44X(1)(e): FC [250] (CAB 242).

55. The Tribunal's construction of s 44X(1)(e) is also supported by the legislative history. One of the principles agreed in the 1994 Competition Principles Agreement was that the dispute resolution body established to deal with access disputes should take into account "the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake" (cl 6(4)(i), quoted by the Full Court at [42]). This suggests a concern with additional investments made as part of resolution of an access dispute, not a broader concern with how a facility had been constructed over time. As the Full Court observed (at [44]), in the second reading speech for the subsequent *Competition Policy Reform Act 1995* (Cth), the legislation was described, *inter alia*, as the enactment of reforms agreed to be undertaken by the Competition Principles Agreement. The provisions in ss 44V, 44W, and 44X contain the working out of the principle identified by the Competition Principles Agreement.

56. The Full Court justified its broader construction by fastening upon the difference in language between the Competition Principles Agreement, which as set out above, referred to the economic value to the owner of any additional investment that the person seeking access *has agreed to undertake*, and the final statutory provision, which referred to the value to the provider of extensions whose cost *is borne* by someone else. The Court held (at [51]) that this involved three changes. The first was to broaden the language to include instances where the cost is borne by someone other than the provider or the access seeker. That much might be accepted (including because a determination could require another person to pay for an extension), and is sufficient to explain the change in language. The second was that the change of language to "*is borne*" "appears to be intended to make clear that the focus of the provision is not confined to extensions agreed or determined as part of the bilateral access process itself" (see also [85]), and the third was that the use of "*is borne*" rather than "*is to be borne*" or "*is agreed to be borne*" captures costs already incurred. Respectfully, the second and third reasons provide a slender basis for concluding that Parliament intended a radical departure from the Competition Principles Agreement that the legislation was intended to enact. The more natural meaning of the present tense in s 44X(1)(e), and one which is consistent with the accompanying context, is that the provision is referring to extensions which the Commission has required the provider to provide. It is much less likely to refer to historical projects which may have been completed decades earlier, and the cost of which is also likely to have been borne some

time ago.

57. At [56]-[57], the Full Court relied on a paragraph from the Explanatory Memorandum, referring to a situation where a Third Party "has had to pay" for a facility extension or for the loss of a right, noting that this refers to payments that "have already been made". This involves a misunderstanding of the paragraph in question: it is referring to payments required to be made as part of a determination, not some historical payments. Rather than supporting the Full Court's construction, the paragraph supports the Tribunal's construction.

58. The Full Court returned to s 44X(1)(e) later in the reasons, and at [247]ff identified five reasons in favour of its construction. The first, second, fourth and fifth points overlook the significance of the statutory scheme discussed in [51]-[53] above, and the fact that a determination could require somebody other than the Third Party to meet the cost of an extension. The third reason also overlooks the statutory scheme and the reason why the provision exists. In circumstances where s 44W(1)(e) contains a specific prohibition on the provider being required to bear the cost of extending the facility as part of a determination (even though it might benefit from such an extension), an express requirement that the Commission take into account the value to the provider of extensions whose cost is borne by someone else is designed to prevent a windfall arising from that specific circumstance. That is very different from a requirement to undertake a historical cost analysis regardless of the methodology used.

59. Further, even if the Full Court correctly construed s 44X(1)(e) as referring to any extension, it did not follow that the Tribunal erred in failing to make a deduction from the DORC value for user contributions. In that regard, the Full Court at [254] appeared to conclude that the Tribunal was obliged to make an adjustment having regard to user contributions. All that s 44X required was that the Commission (or the Tribunal) "take into account" sub-section (1)(e), that is, take it into consideration, but not necessarily to give it any ultimate weight.[4] The way in which it did so, and the weight it gave to the matters enumerated in s 44X(1), was a matter for the Tribunal.

60. The Full Court also rested its conclusion on the pricing principles in s 44ZZCA, which is one of the matters which the Commission must take into account: s 44X(1)(h).

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4 *Rathbone v Abel* (1964) 38 ALJR 293 at 301 per Kitto J.

However, the construction given by the Full Court to s 44ZZCA is difficult to discern. At [260], the Full Court recognised that "efficient costs" referred to in s 44ZZCA(a)(i) were not the actual costs of the provider, but economically efficient costs. However, a "user contributions" analysis is fundamentally concerned with actual costs – it is a historical cost analysis. By contrast, the methodology adopted by the parties and relied upon by the Tribunal as satisfying the criteria (the DORC methodology) is not an analysis of actual costs, but rather is a forward-looking examination of hypothetical efficient costs in a competitive market. The Full Court did not explain how a partial analysis of historical actual (user contributions) was consistent with its construction in [260]. In any event, the Full Court concluded in relation to s 44ZZCA(a)(i) that any error "was of no consequence": [262]. However, in [267]-[268] the Full Court adopted a similar approach in relation to s 44ZZCA(a)(ii), which is concerned with a return on investment commensurate with the regulatory and commercial risks involved. Again, if the method adopted of calculating "the investment" is a hypothetical, forward-looking examination of efficient costs in a competitive market, rather than a historical cost approach which would usually be greater than efficient hypothetical costs, then there is no role for a partial and incomplete historical analysis under the guise of assessing an appropriate return on investment. In this regard, it is very difficult to understand what is required to comply with the approach in FC [268].

Ground 5 – How user contributions should be considered (NOA, [6] (CAB 310))

61. The fifth ground of appeal concerns the way in which the Full Court said the Tribunal should have taken the user contributions into account.

62. The Tribunal's primary conclusion was that, having adopted a DORC valuation method, it was not appropriate to have regard to historical costs. However, the Tribunal went on to observe at T [365] (CAB 88) that if regard was to be had to the financing of particular dredging projects, this would need to be done as part of a comprehensive examination of historical matters. The Tribunal correctly observed, however, that all the material needed to conduct such an examination was not before the Commission (understandably, given the Commission's decision to adopt a DORC valuation method), and hence that could not be undertaken by the Commission or the Tribunal.

63. The Full Court disagreed with the Tribunal's conclusion, holding at [288] (CAB 251) that s 44X(1)(e) "is not concerned with whether there were other aspects of the past

that might have provided some benefit to the provider. It is concerned only with whether the value of an extension that forms part of the facility used to provide the Service is value that 'is borne' by someone other than the provider."

64. The Full Court's approach is problematic. *First*, it is not appropriate to have regard to particular historical "user contributions" without an examination of their context. For example, an entity might enter into an arrangement with the State whereby the entity would have exclusive use of State land for a 30 year period rent-free, the entity would construct and have the exclusive use of a facility, and at the end of the period the facility would revert to State ownership. The entity might enter into the arrangement on the basis that the commercial return from exclusive access justified the cost of the facility. On the approach of the Full Court, it would be permissible – indeed required under s 44X(1)(e) – to single out the construction of the facility as a "user contribution", with the result that the State would have to make the facility available for free not only to the particular entity but to any other potential user, in perpetuity. That would not be a sensible result, or one that resulted in the efficient use of resources.

65. Likewise, if users were paying $1 per unit (e.g. tonne) p.a. to access a facility which cost the provider $10 to provide, and then the facility was expanded at a cost of $2, and the users paid an additional levy of $2, the overall result is that the users obtained for $3 a facility which cost $12 to provide. One could not sensibly isolate the $2 levy as a "user contribution" the value of which had to be excluded. This is not just a hypothetical possibility. One of the alleged "user contributions" in the present case was a channel deepening program carried out by the State of New South Wales said to be funded by a levy, but in circumstances where the Tribunal concluded on the evidence before it that there had been a very significant under-recovery by the State over many years of the cost of providing services, being the Port facilities, of at least $8 billion, which vastly exceeded the value of all of the alleged user contributions let alone the levy in question (T [329] – [336] (CAB 82 – 84)). On the Full Court's approach, the levy is required to be taken into account, but the under-recovery of costs can be ignored. That is nonsensical.

66. *Secondly*, the approach has no regard to the identity of the contributors. In the present case, Glencore did not make the so-called user contributions. The Full Court seemed to regard the identity of the contributor to the historical projects as irrelevant.

However, the Court's concerns about inefficiency were at least partly grounded in concerns about parties paying twice, or parties bearing a double burden (FC [63]). Those concerns do not arise where a party such as Glencore is seeking a discount in future prices on the basis of historical projects to which it did not contribute. Further as the Full Court itself acknowledged (at [64]), taking account of user contributions without regard to who made those contributions may itself produce inefficiencies, as free-riders may use more of the service than would be the case if the price signal to them properly reflected cost.

Part VII: Orders sought

67. Appeal allowed.

68. Order 1 of the orders of the Full Court of the Federal Court made on 24 August 2020, and order 1 of the Court's subsequent orders of 1 September 2020 in relation to costs, be set aside, and in their place order as follows:

    (a) Application dismissed.

    (b) The First Respondent pay the Appellant the costs of and incidental to the proceedings.

69. The First Respondent pay the Appellant's cost of the appeal in this court.

Part VIII: Estimate of time required

70. PNO will require some 2 hours for argument in chief and some 15 minutes in reply.

71. At the hearing of PNO's special leave application, the time estimate of one day was provided on the footing that the hearing time would be divided between PNO and Glencore. At that time, the Commission had filed a submitting appearance. It has since filed an appearance, and it is unclear what role it seeks to play before this Court.

Dated: 30 April 2021

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ANNEXURE

1. *Competition and Consumer Act 2010* (Cth) (current version as at 3 March 2021)
2. *Ports and Maritime Administration Act 1995* (NSW) (current version as at 22 January 2021)
3. *Competition Policy Reform Act 1995* (Cth) (as enacted)
4. *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (as enacted)