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 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

THIRD RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The third respondent, the Australian Competition and Consumer Commission (**ACCC**), certifies that these submissions are in a form suitable for publication on the internet.

Part II: Statement of issues

2. There are two primary issues raised in PNO's application.

a) First, whether the Full Court was correct in finding that access to and use of the shipping channels at the Port is not limited to circumstances where Glencore is the party in control of a ship carrying its coal—rather, that it extends to ships accessing and using the Port to load and transport Glencore coal. The ACCC submits that the Full Court was correct to find that the concept of "access" in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) is not limited to a physical conception of access but is more generally concerned with facilitating arrangements that will advance economic efficiency [FC46] CAB185. This is a broader notion of access to that adopted by the ACCC in its arbitration determination and in the review proceedings before the Australian Competition Tribunal (**Tribunal**). The ACCC agrees, with respect, with the Full Court's conclusion that Glencore accesses and uses

the declared service and shipping channels when ships carrying coal from its mine use the Port and can apply the terms determined through the arbitration process to all of those instances. The ACCC considers that this follows from a proper conception of "access" under Part IIIA, as elucidated by the Full Court.

b) Secondly, whether the Full Court was correct in finding that Part IIIA requires regard to be had to whether there were contributions made by users of the Port that were relevant to an assessment of what was required to promote the economically efficient operation of the Port in the provision of the service. The ACCC agrees, with respect, with the Full Court's conclusion that the provisions of Part IIIA require regard to be had to whether there had been user contributions that should be brought to account in determining the price and terms of access.

Part III: Section 78B notices

3. The ACCC considers that notice need not be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Statement of any material facts that are contested

4. PNO's submissions, at [13], inaccurately represent the content of the ACCC's determination. The ACCC's position (although expressed in slightly different terms at [T146] CAB44) was that the determination applied to circumstances: (i) where Glencore owned or chartered (directly or as agent) a vessel that entered the Port to load Glencore coal; and (ii) where Glencore fell within the extended definition of "owner of a vessel" in s 48(4) of the *Ports and Maritime Administration Act 1995* (**PMA Act**)[1] in respect of a vessel entering the Port to load Glencore coal. The Tribunal accepted only the first of these two limbs: at [T158] CAB48. PNO's submissions at [14] are consequently also inaccurate: for the ACCC's submissions on why application of the determination to circumstances described in the second limb described above would not result in Glencore precluding other shippers from undertaking their own negotiations, see [T142] and [T144] CAB42-43.

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[1] ACCC final determination under s 44V of the CCA: Access Dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd, 18 September 2018, p 2 (CAB144). Section 48(4)(b) of the PMA Act extends the meaning of the *owner* of a vessel or cargo to include a person who, whether on the person's behalf or on behalf of another, represents to the relevant port authority that the person has the functions of the owner of the vessel or cargo or accepts the obligation to exercise those functions. Section 50(1) of the PMA Act provides that a navigation service charge is payable in respect of the general use by a vessel of a designated port (defined to include the Port of Newcastle in s 47) and its infrastructure. Section 50(4) provides that a navigation service charge is payable by the *owner* of the vessel concerned.

Part V: Statement of argument in answer to the argument of the appellant

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

5. In substance, the first ground of appeal asserts that the Court erred at [FC155] CAB213 in concluding that access or use of a declared service under Part IIIA of the CCA is not limited to the physical concept identified by the Tribunal at [T149] CAB45. PNO argues for a narrow and physical meaning of "access" that does not extend to the notion of economic access. The principal justification for PNO's argument is the asserted need to ensure that for any act of access there is only one "third party" that can engage the processes under Part IIIA of the CCA.

6. Here, the declared service is as follows: 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.[2]

7. The Port forms part of the broader supply chain utilised by the Hunter Valley coal industry to export coal: [FC11] CAB176. The Port is the largest coal exporting port in the world. It is the only commercially viable means of exporting coal from the Hunter Valley: [FC13] CAB176.

8. The Hunter Valley coal supply chain is made up of coal producers (or miners), above rail haulage providers, the Australian Rail Track Corporation which provides rail (track) infrastructure, three export port terminals (being Carrington and Kooragang Island Terminals) operated by Port Waratah Coal Services and Newcastle Coal Infrastructure Group Terminal, port managers and the Hunter Valley Coal Chain Coordinator.[3] There are more than 30 operating coal mines in the Hunter Valley operated by 11 coal producers as well as other coal projects in various stages of exploration and development. There are three main rail haulage providers who transport coal from the mines to three terminals at the Port where coal is loaded onto vessels at one of the loading terminals.[4]

9. As identified by the Full Court, the shipping channels are a natural "bottleneck" monopoly and access to and use of the Port and its shipping channels are therefore essential for the export of coal from the Hunter Valley: [FC13] CAB176. In short, the Port and its

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2 *Application by Glencore Coal Pty Ltd (No 2)* [2016] ACompT 7, Order 2.
3 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [9].
4 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [9].

shipping channels are an essential feature of the relevant economic activity and markets associated with the mining and export of coal from the Hunter Valley: [FC14] CAB176.

10. Relevantly for the purposes of the submissions below, the service was declared by the Tribunal following the Tribunal's satisfaction of the (then) relevant declaration criteria.[5] The Tribunal made the following observations in applying criterion (a), which at the relevant time was: "that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service"[6]: *"the Service providing access to the shipping lanes is a natural monopoly and PNO exerts monopoly power; the Service is a necessary input for effective competition in the dependent coal export market as there is no practical and realistically commercial alternative; so access to the Service is essential to compete in the coal export market*".[7] The Tribunal was satisfied that, under the approach mandated by the Full Court to criterion (a) in *Sydney Airport Corporation v Australian Competition Tribunal* (2006) 155 FCR 124, access to the service would promote a material increase in competition in the market for the export of coal from the Hunter Valley.

11. In connection with the public interest criterion (criterion (f), as it then was), the Tribunal stated that it agreed with the Minister that any existing practical price constraints on PNO under the PMA Act and the Minister's power to seek a report with respect to PNO's pricing or other matters through the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), did not provide an effective substitute for access regulation. The Tribunal went on to observe that given the terms under which any arbitration by the ACCC would be applied, and the requirement in the pricing principles that regulated access prices be set to meet the efficient cost of providing access and include a return on investment commensurate with regulatory and commercial risk, the Tribunal was not satisfied that the declaration would cause any adverse effect on incentives or obligations to invest or discourage efficient investment and costs to PNO as the provider of the service.[8]

12. The approach of the ACCC to the scope issue in its determination, and before the Tribunal is summarised above at paragraph 4 (see also [FC136] CAB208). The ACCC did

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5 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6.

6 Following amendments made by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*, criterion (a) from 6 November 2017 provided: "that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia) other than the market for the service".

7 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [113].

8 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [167].

not consider that the phrase "any matter relating to access by the third party to the service" in s 44V(2) of the CCA was wide enough to permit the ACCC to deal with access by another party nominated by Glencore to the declared shipping channel service, as any such access would not be by Glencore but by that other party. In the arbitration, the ACCC fixed on the liability to pay the navigation service charge as being the relevant indicator of when Glencore could be said to be "accessing" the declared service.[9]

13. The ACCC has carefully considered the reasons of the Full Court relating to the issue of the scope of the determination. For the reasons that the Full Court found that the Tribunal's focus on physical access and use was wrong, the ACCC on reflection considers that the approach that it took in the arbitration, which focussed on physical access, was not consistent with the correct construction of "access".

14. The Full Court, with respect, correctly construed the term "access" by reference to "the broad context of the purpose of the declaration as directed to the relevant dependent market of the production, sale and export of coal": [FC158] CAB214. Such an approach is consistent with observations of this Court in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 (***BHP v NCC***), 161 [42], where it was said that the definition of "service" in s 44B of the then *Trade Practices Act 1974* (Cth) should be read "*in a way that would advance the attainment of the large national and economic objectives of Pt IIIA*" revealed in the statutory text and extrinsic material. The construction to be preferred is one that is "*more appropriate to advancing the overall objectives of Pt IIIA*" and is "*more consistent with the approach to construction of such legislation adopted by this Court many times over the past ten years*". This approach was embraced and restated in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; 246 CLR 379, 418 [97]. Of course, when two or more interpretations of a provision of an Act are open, the one that would best achieve the purpose or object of the Act is to be preferred: s 15AA of the *Acts Interpretation Act 1901* (Cth).

15. The important objectives promoted by Part IIIA, including the economically efficient investment in infrastructure by which services are provided in order to promote effective competition in upstream and downstream markets, and the threshold at which the declaration criteria are set, are indicators that the term "access" is not to be construed in a confined way. A service may only be declared where the declaration criteria are satisfied. These are very

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[9] ACCC Final Determination: Statement of Reasons, p 23 (Third Respondent's Book of Further Material (**RFM**) 28).

significant criteria, not only criteria (a) and (f) as discussed above, but also criterion (c), that the facility is of national significance having regard to its size, or its importance to constitutional trade or commerce, or to the national economy. Given the objectives sought to be achieved by Part IIIA, where the relevant decision maker is satisfied as to those matters, and an access provider is unable to agree on one or more aspects of access to a declared service, the notion of "access" should not be read down or narrowly constrained. As identified by the Tribunal in its determination declaring the service at the Port, the interests of the access provider are properly protected by the statutory regime.[10] Therefore, potential impacts on access providers arising from a broader conception of "access" do not provide any basis to narrowly construe that term when no such express limitation is found in the words of the statute.

16. It follows then that the Full Court was correct, with respect, in finding that the manner or mode by which an access seeker accesses a declared service is not limited to physical access. Significantly, access under Part IIIA is to a declared service, and not to the physical facility providing the service. The term "service" is defined in s 44B to mean a service provided by means of a facility and includes: the use of an infrastructure facility such as a road or railway line; handling or transporting things such as goods or people; and a communications service or similar service. The term "facility" is not defined for the purposes of Part IIIA of the CCA, but has been identified by the Tribunal as the physical asset or set of assets essential for service provision.[11]

17. A narrow conception of access in the present case would significantly curtail the achievement of the very objectives sought to be achieved by the declaration. This is particularly so in the present circumstances where, under PNO's conception of access, Glencore would not be "accessing" the service where it sells and ships a large proportion of its coal under Free on Board arrangements, as is common in the export of bulk commodities. Glencore is the party with the economic interest in the terms of access to the declared service, that is the shipping channel where its coal is being shipped, not the party with control of the vessel navigating the channel for this purpose. The latter party therefore has no incentive to exercise its rights under Part IIIA, with the result that the efficiency objectives of Part IIIA will not be realised if a narrow interpretation of 'access' is adopted, being one that precludes

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10 *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, [167].

11 *Re Review of Freight Handling Services at Sydney International Airport* (2000) ATPR 41-754 at 40,771.

Glencore negotiating and arbitrating terms of access which apply where vessels controlled by third parties navigate the shipping channel to ship Glencore coal.

18. PNO's submissions rely upon the word "use" (which appears in the dictionary definition of "access" set out by PNO at [18], as well as in the service description, see paragraph 6 above) in support of its contention that access is a physical concept. Again, by reference to the broad context of the declaration, there is no basis upon which to restrict the notion of "use" to a physical concept. Further, the word "use" in the area of land law has been given a broad meaning that is not limited to physical use.

a) Section 59(f) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) provides that loss attributable to disturbance of land includes: *any other financial costs reasonably incurred (or that might reasonably be incurred), relating to the actual use of the land, as a direct and natural consequence of the acquisition*. In *Council of the City of Newcastle v Royal Newcastle Hospital* (1957) 96 CLR 493 (on appeal [1959] AC 248), Williams J observed in respect of some 327 acres of land owned by a hospital on which it operated a hospital on a small portion of the land with the balance of the land being a buffer zone between the hospital and the surrounding land: *The word 'used' is, of course, a word of wide import and its meaning in any particular case will depend to a great extent upon the context in which it is employed. The uses to which property of any description may be put are manifold and what will constitute 'use' will depend to a great extent upon the purpose for which it has been acquired or created. Land, it may be said, is no exception and s 132 itself shows plainly enough that the 'use' of land will vary with the purpose for which it has been acquired and to which it has been devoted. It may be used for a public cemetery, for a common, for a public reserve, in connexion with a church or school and so on. Each of the forms of user referred to in the section relate to use by the owner and some of them, no doubt, contemplate a use which is synonymous with actual physical occupation and enjoyment. Others contemplate a use in a less direct form.*

b) The case of *The Council of the City of Parramatta v Brickworks Limited* (1972) 128 CLR 1 considered legislation that prevented the respondent from using certain land as a brickworks or quarry, subject to clause 32 of an ordinance which provided that "an existing use of land may be continued", where "existing use" was defined as meaning the use of land for the purpose for which it was used immediately before a certain

date. Gibbs J (as he then was) said at 21: *I would agree that the word 'use' in cl. 32 means a present use; it does not include a contemplated or intended use. It is not enough to bring cl. 32 into operation that land has been acquired with the intention of using it for a particular purpose in the future. On the other hand, it is not necessary, to constitute a present use of land, that there should be a physical use of all of it, or indeed of any of it*.

19. A potential consequence of a broader notion of access that extends to economic interest may be that there is more than one access seeker in respect of the same service. For example, when Glencore sells its coal Free on Board, the customer may be an access seeker as well as Glencore. PNO submits that such a situation would create some tension with the statutory scheme which provides for binding arbitrations that determine the terms and conditions of access: [25]–[26]. However, the prospect of difficulties arising from potentially inconsistent determinations is hypothetical, and appears unlikely given that any such binding determinations: would be made by a common arbitrator; would be guided by the same considerations in s 44X(1); could be the subject of a joint arbitration hearing in the event the ACCC was arbitrating two or more disputes relating to the service at a particular time (s 44ZNA); would be the subject of a written report published by the ACCC in connection with its final determination setting out matters including the principles and methodology it applied in making the determination, the reasons for the choice of asset valuation methodology, and any information provided by the parties to the arbitration relevant to those principles or methodology.

20. The ACCC respectfully agrees with the reasoning of the Full Court at [158] and [160] CAB214-215 that Glencore, as a party with an economic interest in acquiring the service for the benefit of the party in control of a ship carrying coal from its mine, was relevantly accessing or using the shipping channels when, by its sale arrangement, it causes a vessel to enter the Port.

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

21. Ground 2 concerns the Full Court's alternative basis for finding that Glencore was relevantly accessing the service when it loads ships at the berth with its coal. At [FC157] CAB214, the Full Court found that Glencore was physically accessing or using the berth by the use of the immediately adjacent wharf and water below adjacent to the revetments, in loading the ship at the berth.

22. PNO seeks to minimise Glencore's access to only that part of the service covered by the wharfage charge, on the basis that it was not the subject of dispute and was a "balancing item" in the arbitration process: PNO submissions, [33]. However, those points do not go to the issue of whether, as a matter of fact, Glencore was physically accessing part of the service. In this connection, PNO appears to invite consideration as to whether the activity for which the wharfage charge was levied involved the use of the declared service: PNO submissions, [33]. However, PNO does not raise as a ground for review whether the Full Court was in error in proceeding on the basis that, in loading ships at the berth, Glencore was accessing part of the service.

23. When Glencore physically accesses or uses the berth to load ships, Glencore is accessing part of the service. This then engages with the terms of s 44V(2) in Part IIIA, that a determination may deal with any matter relating to access by the third party to the service. There is no error in the Full Court's finding that part of the service is accessed or used by Glencore both physically and economically, whenever Glencore is selling and loading coal: [FC157] CAB214. The outcome of this ground, therefore, turns on this Court's view of "access". To the extent the Court finds no error in the Full Court's approach to the circumstances in which Glencore was physically and economically accessing and using the service, this Court should also find that ground 2 has not been made out.

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

24. Ground 3 concerns the Full Court's finding at [FC163] CAB216 that the Tribunal was in error in excluding the second limb of the scope of the determination found by the ACCC, being essentially when Glencore makes a representation under s 48(4)(b) of the PMA Act.

25. That finding was based upon the same reasons given by the Court as to why the Tribunal was incorrect to confine the terms of the determination to instances where Glencore was the party in control of the ship. As with ground 2, the outcome of this ground, therefore, turns on this Court's view of "access". To the extent this Court finds no error in the Full Court's approach to the circumstances in which Glencore was physically and economically accessing and using the service, this Court should also find that ground 3 has not been made out.

26. The issue is not, as PNO suggests at [41], whether the provisions of a State statute can determine the question of who is a third party for the purposes of Part IIIA. Rather, the issue

is whether the category of vessels potentially captured by the second limb (being vessels in respect of which Glencore may make a representation under s 48(4)(b) of the PMA Act) would come within the category of vessels covered by the Full Court's conception of physical and economic access. The former is a subset of the latter, as the former encompasses representations in connection with a vessel entering the Port precinct to load Glencore coal. In any case, although a State statute cannot change the meaning of a Commonwealth Act, there is no reason in principle why a State statute could not impact upon an underlying factual matrix which has some consequential impact on the circumstances or manner in which a Commonwealth Act may apply. Thus, a State law affecting the ambit of persons who may be liable to pay a charge to use an asset can affect who falls within the notion of an access seeker, without changing the meaning of the Commonwealth legislation.

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

27. Ground 4 of PNO's notice of appeal alleges that the Full Court erred in concluding that ss 44X(1)(e) or 44ZZCA of the CCA requires a determination to take into account any user contributions to a facility.

28. In considering ground 4, it is important to identify the precise nature of the Full Court's conclusions. In connection with s 44X(1)(e), the Full Court's conclusion was that the Tribunal committed an error of law in concluding that it was appropriate to use the depreciated optimised replacement cost (**DORC**) value to determine the access price to be paid by Glencore even if there were user contributions [FC254] CAB243. This is important because how the Tribunal had actually reasoned was that once the DORC methodology had been settled upon, excluding assets contributed by users could *not* generate efficient charges and would be inconsistent with Part IIIA [T278] CAB73. That is, that once a DORC methodology had been deployed there was no scope for adjusting the resulting asset value because to do otherwise would offend Part IIIA. It was this finding of the Tribunal that there could be no adjustment to the DORC determined asset value for user contributions that closed out the possible application of s 44X(1)(e) that the Full Court found to be in error [FC254] CAB243. Indeed, the Full Court considered that the Tribunal was obliged to take into account the present value to the access provider of extensions being borne by others by reason of past contributions [FC254].

29. Similarly with respect to s 44ZZCA(a)(i), the error identified by the Full Court in the Tribunal's determination was to treat the fact of user contributions as "conceptually irrelevant to the process for determining efficient costs" and that approach was "an error of law because, as a matter of law, the user contributions were not irrelevant" [FC259] CAB244 and [FC294] CAB252: cf PNO submissions [45].

30. In making its determination, the ACCC calculated the relevant asset value to be $1.16 billion (as at 1 January 2018) by reference to a DORC methodology.[12] This was based on an optimised replacement cost of $2,169.5 million less an amount of $912 million in respect of the optimised replacement cost of user contributions to give an adjusted optimised replacement cost value of $1,257.6 million. Depreciation was then applied to this value to give a DORC value of $1.16 billion.[13] As such, it is not accurate to say, as PNO does at [46], that the ACCC calculated that the DORC was $2.169 billion. The Full Court, at [176]-[178] CAB220-221, indicated that the better approach would have been to determine an asset value by reference to the costs that would be incurred by a hypothetical entrant in a competitive market, and to then go on to consider whether any adjustment was required to that value. That said, it acknowledged that mathematically (at least when the user contributions relate to perpetual assets) whether the adjustment was made in calculating the DORC or to the DORC, the outcome was "the same": [FC175] CAB220.

31. In its arbitration determination, the ACCC considered that user funded contributions should be recognised and deducted from the DORC value used to establish PNO's initial asset base and to calculate prices to ensure that PNO is able to reasonably recover its efficient costs. The ACCC considered that PNO's efficient costs for the provision of the service do not include capital costs that have been funded by users.[14] In this connection, the Full Court found that there is the prospect of economic inefficiency if the provider of an essential facility can appropriate (and charge a price for access to) the value of capacity the cost of which has been borne by others: [FC63] CAB190. The Full Court went on to say at [FC63] CAB190: "*The result will be that to the extent that the cost of the capacity is still being borne by others, they will make their economic decisions and price their products accordingly. Yet, in addition, the value of that capacity will have to be paid for and borne again by a third party who has to pay for access. By pricing twice the same value into the market, there is allocative inefficiency. The capacity is attributed with more value than it should be and*

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12 ACCC Final Determination: Statement of Reasons, p 140 (RFM145).
13 ACCC Final Determination: Statement of Reasons, pp 137-140 (RFM142-145).
14 ACCC Final Determination: Statement of Reasons, p 130 (RFM135).

market decisions are distorted in consequence. The cost of access to the capacity to the market as a whole is doubled, thereby distorting economic decisions leading to economic inefficiency. In addition, there will also be productive inefficiency if the double burden is imposed on parties who have already borne the cost of the extension and must now pay again for access to that capacity. However, there is inefficiency even if that is not the case."

32. The Full Court recognised, at [FC64] CAB190, that it was possible that there will be two categories of users of an essential facility; those who are bearing the cost of capacity and those who are not. In this situation, if there is no mechanism by which the cost-bearing users can charge the other users, then those other users will obtain the service at a lower cost. The Full Court made two observations relevant to that situation.

a) First, theoretically it is possible that those free-riding may then use more of the service than would be the case if the price signal to them properly reflected cost, which may lead to allocative inefficiency. However, it is also possible that the price advantage may be captured as additional margin which would not give rise to efficiency concerns.

b) Secondly, s 44X(1)(e) is directed to regulating the behaviour of the access provider, and in particular the need to bring to account the extent to which the cost of capacity is borne by others ([FC65] CAB191). In regulating the price and terms of access, it is ensuring that the access provider does not charge a price that is too high by reason of a charge for capacity the cost of which is borne by others.

33. PNO describes the ACCC's approach of deducting amounts from the figure generated by application of the DORC valuation method as an "impermissible blending of valuation methods (DORC and historical cost)": PNO submissions, [48]. That is not an accurate description of the approach adopted by the ACCC—the approach did not involve historic costs. Precisely because DORC involves modern engineering equivalent assets, the ACCC adjusted the asset value by reference to an estimate of the *proportion* of the DORC asset value attributed to user funding.[15] The approach of the ACCC was to determine, by reference to the percentage of the works undertaken that were funded by user contributions, a proportional adjustment to the optimised replacement cost of the asset so as to, in effect, remove the optimised replacement cost valuation of the user contributions. For example, the ACCC determined a replacement cost value for channel assets of $1.1 billion (2018) based on the

[15] ACCC Final Determination: Statement of Reasons, pp 135-136 (RFM140-141).

forward looking cost of the construction of those assets in the present day (essentially the dredging of the channels). By reference to the estimated volume of materials removed through dredging activities funded by users of the Port, the ACCC determined a 52.5% adjustment to the optimised replacement cost valuation of the channel assets.[16] This is because users had effectively contributed to the removal of just over half of the volume of the dredging undertaken to create, and thus the ACCC pro-rated the value of channel assets on this basis. This did not involve any consideration of historical cost.

34. Section 44X(1)(e) provides that, in making a final determination, the ACCC must take into account "the value to the provider of extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else". At [51], PNO submits that s 44X(1)(e) is "part of a self-contained statutory scheme" and, at [53], that 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". It may be accepted that the concept of "extensions" is referred to in a number of provisions in Part IIIA, but those references do not provide a basis to limit the application of s 44X(1)(e) to extensions undertaken as part of the determination of an access dispute. Further, if it truly was a self-contained regime as contended by PNO, it could be expected that the reference to "someone else" in s 44X(1)(e) would be to "the third party" as it is this term that is used in the other section in the alleged self-contained scheme referred to by PNO: ss 44W(1)(d).

35. In this connection, as identified by the Full Court at [245] CAB241, if it had been intended that the application of s 44X(1)(e) be limited to extensions undertaken as part of the determination of an access dispute, that could have been easily accommodated in the drafting of the provision. Further, the reference to "whose cost is borne by someone else" is a clear indicator that s 44X(1)(e) is concerned with extensions more generally, as opposed to those undertaken as part of a determination of an access dispute.

36. PNO alights on the use of the present tense "is" in the phrase "whose cost is borne by someone else" in support of its construction that s 44X(1)(e) is dealing with contemporaneous extensions ordered as part of a determination, and not historical matters: PNO submissions, [54]. However, as identified by the Full Court at [252] CAB242, the use of the present tense is explained by a focus upon the present value to the provider of the capacity created by an extension. Where that value exists and is being presently borne by another party, the value of the extensions *is* borne by someone else. The use of the present tense also ensures that, where

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16 ACCC Final Determination: Statement of Reasons, p 137 (RFM142).

that value does not exist (for example, because the extension has reached the end of its economic life), the extension is not taken into account. To the extent PNO submits that s 44X(1)(e) is concerned only with contemporaneous extensions ordered as part of the determination under consideration, and not any earlier in time determination between a particular access seeker and access provider, there is no reason from an economic perspective why the value to the provider of any extensions ordered as part of an earlier determination should no longer be taken into account.

37. PNO submits at [55]-[56] that the Full Court's reliance on the change in language from the Competition Principles Agreement, where the relevant principle was expressed as being that the dispute resolution body 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", to its present form, provides a slender basis for concluding that Parliament intended a radical departure from the Competition Principles Agreement. PNO accepts that the reference to "borne by someone else" is a broadening of the language, but says that this can be explained because a determination could require another person to pay for an extension. However, it is not at all clear that a determination could include a requirement of the kind PNO hypothesises. The determination concerns access by the third party to the service. The framework is such that a determination may require the provider to extend the facility (s 44V(2)(d)), and require the third party to accept, and pay for, access to the service (s 44V(2)(b)), but there is no suggestion in the regime that a determination could require another person to pay for an extension. Further, there is a prohibition on a determination having the effect of resulting in the third party becoming the owner (or one of the owners) of any extensions of the facility without the consent of the provider: s 44W(1)(d). This provision contemplates that a determination could only properly deal with the payment for extensions by the third party: see also s 44V(2)(b).

38. At [57], PNO says that the Full Court's reliance on a paragraph from the Explanatory Memorandum that refers to a situation where a third party has had to pay for a facility extension or for the loss of a right, is misplaced as the paragraph is referring to payments required to be made as part of a determination. However, it is not clear that this is so. The part of the Explanatory Memorandum relied upon by the Full Court at [55]-[56] CAB188-189 is dealing with s 44W and the restrictions on access determinations. The Explanatory Memorandum notes that the section specifies a number of constraints on the ACCC in making a determination that relate to the existing rights and ownership of the facility used to provide

the declared service.[17] The Explanatory Memorandum goes on to observe that the provisions guard against the provider being required to pay for extensions to the facility and also guard against a third party becoming an owner of a facility against the wishes of the provider.[18] The Explanatory Memorandum then provides: "*Where, for example, a third party seeking access to the declared service has had to pay the cost of an extension to the facility, or has had to pay fair compensation to another party for the loss of a right, this should be taken into account by the Commission in determining (under section 44V) the price of access by the third party to the declared service".*[19] With respect, the Full Court correctly understood that the Explanatory Memorandum was providing two examples of payments that may be made by a third party, and points to s 44V as governing whether regard would be had to those matters via s 44X(1) in determining the price for access, not s 44W. Contrary to PNO's submission, the example given in the Explanatory Memorandum does not provide support for a construction of s 44X(1)(e) that is limited, by reference to the s 44W restrictions on what an access determination may require, to payments required to be made as part of a determination and not historical payments. The fact that the Explanatory Memorandum refers to the two payments as examples, together with the past tense used in the Explanatory Memorandum, supports the conclusion reached by the Full Court.

39. PNO's submissions also do not grapple with the absurd or illogical outcomes that would arise if s 44X(1)(e) was construed as applying only to extensions undertaken as part of the determination of an access dispute. These outcomes include:

a) the value to the provider of the extensions whose cost was borne by a particular access seeker as a consequence of a determination would be a relevant matter to take into account in making that determination but not a relevant matter in any subsequent arbitration between the access provider and that access seeker; and

b) the value to the provider of the extensions whose cost was borne by a particular access seeker as a consequence of a determination would be a relevant matter to take into account in making that determination but not a relevant matter in any subsequent arbitration between the access provider and any other access seeker.

40. PNO does not advance any reason why the outcomes above would be consistent with the objects of Part IIIA. Section 44X(1)(e) recognises that making some adjustment in

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17 Explanatory Memorandum, Competition Policy Reform Bill 1995, p 32, [224]–[225].
18 Explanatory Memorandum, Competition Policy Reform Bill 1995, p 33, [227].
19 Explanatory Memorandum, Competition Policy Reform Bill 1995, p 33, [228].

recognition that the service provider has not funded an asset is consistent with a determination of efficient charges. PNO seems to embrace this at [58] in a manner that reveals the weakness of its own approach. It suggests that there is a purpose "to prevent a windfall arising" for the access provider from extensions funded under a determination. Preventing such a windfall would reduce the scope for economic inefficiency. Yet, PNO proffers no explanation for why Parliament's desire to prevent a windfall in such circumstances would not extend to circumstances when the user contributed asset (windfall) is provided in any other circumstance. That is, PNO does not proffer an explanation as to why an adjustment under s 44X(1)(e) would be consistent with a determination of efficient charges **only** where the extension was undertaken as part of the determination of an access dispute and not otherwise. There is no logical reason why this would be so. As observed by the Full Court at [250] CAB242, the economic inefficiency that may flow from the value generated from the costs of an extension being borne by particular parties (and therefore priced into the market) and that same value being priced into the access price apply irrespective of whether the extension was the result of the application of Part IIIA.

41. PNO submits at [59] that, even if the Full Court's construction of s 44X(1)(e) were correct, it did not follow that the Tribunal erred in failing to make a deduction from the DORC value for user contributions—it was obliged to take it into account but not necessarily give it any ultimate weight. However, as noted at paragraph 28 above, the Tribunal proceeded on the basis that, having settled upon a DORC methodology, there *could* be no adjustment to the asset value for user contributions because any such adjustment *could* not generate efficient charges. That is, this is not a case of the Tribunal having proper regard to user contributions as required by s 44X(1)(e) and, in balancing the various matters, assigning the matter of user contributions no weight. The Tribunal's determination preceded on the basis that it was, in the circumstances, precluded from taking into account user contributions because to do so would be inconsistent with the provisions of Part IIIA. This cannot be reconciled with the Full Court's construction of s 44X(1)(e) and was the error of law identified by the Court: [FC254] CAB243.

42. With respect to s 44ZZCA(a)(i), the Full Court found that the concept of efficient costs is not necessarily met if costs are set by reference to a measure of costs that would prevail in a competitive market: [FC258] CAB243-244. The Full Court recognised that there may be some circumstances, such as in the present case, where efficient costs may depart from the hypothetical ideal of the costs that would otherwise prevail in a competitive market.

By reference to the issue of user contributions, the Full Court identified that it may not be consistent with an economic understanding of efficiency for a provider to be able to charge the hypothetical price that would cover costs in a competitive market in a real world where those costs were being borne by others: [FC259] CAB244. The ACCC adopts the reasoning of the Full Court in this regard—in cases such as these where a completely hypothetical model that is abstracted from reality is being used, there is a need to consider whether, in the real world, the blind adoption of the outcome of such a model in fact results in a regulated access price that generates expected revenue that is at least sufficient to meet the efficient costs of providing access. Similar considerations apply with respect to s 44ZZCA(a)(ii).

43. At [60], PNO contends that taking into account user contributions "is fundamentally concerned with actual costs – it is a historical cost analysis". As noted at paragraphs 30 and 33 above, it is possible to make an adjustment using only a forward-looking approach to valuation: that is, without any regard to historical costs. That is what was done by the ACCC in this case. PNO fails to address what was done here, instead choosing to attack an approach that was not deployed.

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

44. Ground 5 alleges that the Full Court erred in concluding that deductions could be made from the asset base for user contributions without a comprehensive examination of the circumstances in which those contributions were made.

45. The ACCC agrees, with respect, with the Full Court's finding that s 44X(1)(e) simply requires regard to be had to the value to the provider of extensions whose cost is borne by someone else: [FC288] CAB251. That is, it is not concerned with whether there were other aspects of the past that might have provided some benefit to the provider. The Full Court was careful however to state that it did not wish to be taken to accept Glencore's position that it was enough to show that there had been contributions in the past and that there may be aspects of the past that bear upon a conclusion at the relevant time as to whether the cost that has been met in the past is properly a cost that "is borne": [FC289] CAB251.

46. PNO submits at [64] that the Full Court's approach is problematic because it is not appropriate to have regard to particular user contributions without an examination of their context. As noted above, the Full Court explicitly acknowledged that there may be aspects of the past that would be relevant to an assessment of whether a cost met in the past is properly characterised as a cost that is borne: [FC289]. Further, that there may be a need to balance

competing considerations in s 44X(1), in particular the pricing principle in s 44ZZCA(a)(ii) that requires the Tribunal to have regard to the principle that the prices should include a return on investment commensurate with the regulatory and commercial risks involved.

47. PNO's first example set out at [64] is wholly removed from the circumstances that pertain in the present case. To the extent such a situation existed, considerations of the type identified by the Full Court at [FC289] CAB251 would be relevant. The example given at [64] is internally flawed because it asks one to consider the situation where a State provides exclusive use of land for a 30 year "rent-free" period in return for the construction of a facility that will remain valuable at the end of that period. Understood from an economic perspective, the value of that facility can be understood as a delayed payment of rent in the form of the facility. That is, it is wrong to conceive of this as a rent-free period at all. In such a case, the State would be entitled under economic principles to charge in the future for both the value of the land and the value of the facility (which reflects its investment in the facility by foregoing rent). If, however, the State gave a truly rent-free period, it would mean that it never intended to recoup the value foregone by that policy. If at the end of such a rent-free period, the State obtained an asset on the land as a gift (in which it had made no investment, on this assumption), then it would follow that, in the future, the State wanted to have prices that reflected economic efficiency, the State would charge for the value of the investment in the land and for costs of maintenance of the facility but would not seek a return on the capital cost of the facility because it had made no investment in it (and thus faced no such capital cost).

48. In relation to PNO's second example set out at [65], a facility owner may, for a range of reasons, decide not to charge users the full economic cost of the service they provide. For example, a policy decision to promote an export industry or employment. That is an issue for the facility owner. What s 44X(1)(e) is concerned with is whether there is value to the provider of an extension whose cost is borne by someone else. That matter does not engage with a decision the facility owner may have made in connection with prices for the service it provides by means of the facility created by its own investment.

49. Finally, PNO submits at [66] that the approach of the Full Court is problematic because it has no regard to the identity of the contributors. The Full Court addresses that issue in its reasons as set out at paragraph 32 above. Most relevantly, s 44X(1)(e) is directed to ensuring that the access provider does not charge a price that is too high by reason that it is a charge for capacity the cost of which is being borne by others.

Part VI: Statement of respondent's argument notice of contention or cross-appeal

50. Not applicable.

Part VII: Time estimate required for presentation of ACCC's oral argument

51. The ACCC estimates that it will require 30 minutes to present its oral argument.

Dated: 28 May 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)