HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA S33/2021
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 OUTLINE OF ORAL SUBMISSIONS

Part I: Internet Publication

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II: Outline of Oral Propositions

User contributions

2. The error the Full Court identified with respect to the treatment of user contributions was that the Tribunal concluded that it was appropriate to use the depreciated optimised replacement cost (**DORC**) value to determine the access price even in the presence of user contributions (**ACCCS** [28]); [FC254] CAB243). The Tribunal reasoned that, once the DORC methodology had been adopted, excluding user contributed assets from the DORC "could not generate efficient charges and would be inconsistent with Part IIIA" (**ACCCS** [28], T[278] CAB73).

3. The Full Court found that the statutory scheme required the Tribunal to take into account the present value to the access provider of extensions being borne by others by reason of past contributions (**ACCCS** [28]; [FC254] CAB 243). The Full Court identified a related error with respect to s 44ZZCA(a)(i) (**ACCCS** [29]; [FC259] CAB244 and [FC294] CAB252).

4. The Full Court correctly construed s 44X(1)(e). The Full Court demonstrated a nuanced appreciation of the economic inefficiency involved in allowing a service provider to charge fees that provide a return on capital not actually invested by the provider (**ACCCS**, [31]; [FC63] CAB190).

5. Section 44X(1)(e) is a mandatory consideration. It considers the value to the provider of extensions whose cost is borne by someone else (**ACCCS** [34]). This at least includes user contributed assets (**ACCCS** [34]–[36]).

6. The Appellant contends that s 44X(1)(e) refers only to extensions undertaken as part of the determination of an access dispute—which is the conclusion the Tribunal reached (**AS** [53]; T[54] CAB24). In reply, PNO modifies its position, accepting that s 44X(1)(e) could apply to historical contributions made by the particular access seeker in a previous determination under Part IIIA (**AR** [14]). There is no response as to why, if an adjustment that takes into account the value to the provider of extensions serves economic efficiency in some contexts, it would be limited in others (**ACCCS** [30]).

7. Contrary to the Appellant's position, s 44X(1)(e) is not referrable only to extensions made within a self-contained scheme within Part IIIA (**ACCCS** [35]–[37]; *cf* AS [51], [53], AR [12]).

8. The Appellant contends that an adjustment for historical user contributions, at least where a DORC approach is being used, improperly involves a historical cost analysis (**AS** [48]; **AR** [13]). The Appellant misstates the approach that had been taken to user contributions in the present case (**ACCCS** [33], [43]).

9. There is no difficulty making deductions for user contributions absent a comprehensive examination of the circumstances in which they were made. Section 44X(1)(e) is concerned with the value to the *provider* of extensions whose cost is borne by someone else—not with whether past benefits may have arisen to the person having met that cost (**ACCCS** [45]; [FC288] CAB251; *cf* **AS** [62]).

Scope

10. The approach of the Tribunal to the issue of the potential scope of the access determination was to focus on physical access (**ACCCS** [5]; T[150]–[158] CAB 45–48; FC[141], [148] CAB 210–211).

11. The Full Court found that the Tribunal's focus on physical access was in error. The ACCC adopts the construction of the Full Court (**ACCCS** [13]).

12. The word "access" is properly to be construed 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" (**ACCCS** [14]; [FC158] CAB214).

13. The economic nature of the criteria for declaration supports an approach that access is not limited to physical access, but also encompasses access in an economic sense. This is consistent with the observations of this Court in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145, 161 [42] (JBA Part C, 392), as embraced in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379, 418 [97] (JBA Part C, 434).

14. Section 15AA of the *Acts Interpretation Act 1901* (Cth) is also relevant (**ACCCS** [14]). It provides that, in interpreting a provision of an Act, the interpretation that would best achieve the purpose or object of the Act is to be preferred. Here, that is the economic objects of Part IIIA (**ACCCS** [15]).

15. In the present case, it is Glencore, as the exporter of coal, rather than the owner or controller of a vessel, that has the economic interest in the terms of access to the service (**ACCCS** [17]). A narrow approach to "access" will significantly curtail the achievement of Part IIIA's economic objectives (**ACCCS** [17]).

Role of the ACCC in this appeal

16. The Appellant contends that certain of the ACCC's submissions should be disregarded as inconsistent with the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; 144 CLR 13 (**AR** [17]). The ACCC does not contend for the correctness of its determination in this proceeding and is entitled to make submissions as to the correct legal and economic principles.

Dated: 6 September 2021

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