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 REPLY

Part I: Certification

1. This reply is in a form suitable for publication on the internet.

Part II: Reply

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

2. The appellant (**PNO**) contends that "access" has its ordinary meaning. Neither the first respondent (**Glencore**) nor the third respondent (**ACCC**) offer any clear alternative construction. The ACCC submits (ACCCS [2](a)) that access "is not limited to a physical conception of access but is more generally concerned with facilitating arrangements that will advance economic efficiency". Glencore submits (GS [42]) that the term "must necessarily be broad and adaptable to the circumstances of the particular economic activity", suggests that a "mere" economic interest may not be sufficient (GS [39]), and states that the need to use a facility "will be considered 'access' for the purposes of Part IIIA where that use or access is required for a business to compete effectively in its relevant market" (GS [31]).

3. Such approaches do not provide a sufficiently stable content, or a practically workable operation, to a central term underpinning Part IIIA. Under the negotiate/arbitrate model in Division 3 of Part IIIA, access providers have to know, at a practical level, "With whom do I have to treat?". That cannot sensibly require the access provider to undertake, at the

outset of an access dispute, some assessment of effective competition, or consider what terms are necessary to foster a particular economic activity in another market. The approach of the respondents would widen Part IIIA beyond its intended scope and lead to endless disputes, including with persons who do not physically use the declared service and who may even be participants in non-dependent markets.

4. The respondents say that a construction that includes a notion of "economic access" is warranted because a failure to do so would not give effect to the economic objectives of the legislation. To say that Part IIIA has economic objectives is one thing. But it is another to say that they will not be met unless provisions are construed in a way that departs from the ordinary meaning of the term. The argument for the second step seems to be anchored in the particular circumstances of the present case: the gravamen of the respondents' contention is that "access" should be construed broadly or else the purpose of the Declaration will be frustrated. That is not a sound approach. *First*, it does not address the role of "access" in declared services more generally. For any declared service there are likely to be numerous upstream or downstream markets. It is not necessary, to promote the economically efficient operation of, use of and investment in infrastructure, for every person in those markets who has an economic interest in the existence, price or terms of access by a user of the facility to be able to negotiate or arbitrate those terms of access. Such an expansive intrusion of Part IIIA into commerce was not intended by Parliament and is likely to be expensive and wasteful, and to deter investment in infrastructure.

5. *Secondly*, the respondents' analysis of the circumstances of the present case is inaccurate in any event. The ACCC asserts ([ACCCS [17]) that the party with control of the vessel navigating the channel "has no incentive to exercise its rights under Part IIIA". The basis of this assertion is not elucidated. A purchaser of coal, who has arranged to collect the coal from the Port (under FOB terms), has an obvious incentive to reduce costs (the NSC) that are otherwise on top of the purchase price. Even if a purchaser seeks to pass on certain costs to a seller, the reduction of a transaction cost leads to additional benefit to be shared between the parties to the transaction. Glencore makes a similar argument (GS [10]), although the relevant footnote (footnote 7) is referenced to a paragraph of the Tribunal's decision that simply records a Glencore submission.

6. Further, a generalised assertion of the need for Glencore to be able to "access" the Port so as to export coal ignores the circumstance that there is no barrier to export. Ships have always had access to the Port to collect coal. Rather, the present matter concerns

Glencore's attempt to interfere with, and dictate, the quantum of the navigation service charge otherwise payable by the owner of the vessel. It is important to attend to the detail of what is sought in Glencore's application.

7. Likewise, little weight can be given to the respondents' invocation of the alleged importance of the declaration and the alleged need to ensure that Glencore obtains the benefit of it as a reason to give a broad operation to Part IIIA (e.g. ACCCS [15], [17]; GS [43]) in circumstances where the Port was only declared because of an anomalous operation of criterion (a) (applying the approach in the *Sydney Airports* case), since remedied by amendment.[1] In its decision declaring the service, the Tribunal concluded[2] that if it was permitted to consider the consequence of *declaration*, it would not have been satisfied that any increased access that would flow from declaration would promote a material increase in competition in any relevant market. Following the legislative amendment, the declaration was revoked.

8. Glencore also contends (GS [40]), based on *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 at [138], that "access" is broader than a physical concept. However, the Tribunal in *Re Virgin Blue* was not suggesting that physical access could be absent. The issue there was whether seeking different terms and conditions of access to a service could amount to "increased access".

9. Glencore makes two additional points. *First*, it contends (GS [38]) that *physical* control of a vessel carrying its coal is not necessary having regard to Part IIIA's object, and is unworkable, because not all forms of charter confer physical control. This submission is answered by paragraph [30] of PNO's submissions in chief. *Secondly*, it contends (GS [39]) that Glencore has more than a "mere" economic interest in access, because its "export arrangements" are what drive the need for Port access by seller and buyer, and Port access is required for effective competition in its relevant market. However, the fact that a FOB sale of Glencore coal causes a customer to charter a vessel to enter the Port does not mean that Glencore itself accesses the Service for navigating the Port, just as it does not mean that Glencore itself accesses the services of the shipping line.

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

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[1] *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth), Schedule 12 – Access to services, Part 1 – Declared services, items 2 and 10.
[2] *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [122]-[157].

10. The submissions of Glencore and the ACCC miss PNO's primary point, which was that even if the activity that attracts the agreed wharfage charge was access to part of the declared service (which is doubtful), it is not access to that part of the service which attracts the navigation service charge, which (as the name suggests) is a charge for distinct activities of the navigation of the shipping channels by a vessel (in the same way that access to a railway siding is not the same as access to the track). The wharfage charge was not the subject of any dispute. The dispute that was arbitrated concerned the navigation service charge, which is levied on the owner of the vessel as the person using the relevant service. The only access to that part of the service was by the vessel, whose operator pays PNO for that service.

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

11. As the ACCC recognises (ACCCS [25]), the Full Court's conclusions as to s 48(4)(b) rest on the same logic as its conclusions addressed by Ground 1.

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

12. In relation to s 44X(1)(e), the group of relevant provisions (s 44V(2)(d), (da) and (2A), s 44W(1)(d)-(f), and s 44X(1)(e) and (ea)), when read together, provide for a coherent scheme: the provider can be required to extend the facility or interconnect, but does not pay for it; the third party may bear the costs but does not become the owner of anything; therefore, the scheme would confer a benefit on the provider and s 44X(1)(e) and (ea) simply provide that this is a matter to be taken into account when making a determination. That does not have any connection with the historical user contributions in the present case. Contrary to ACCCS [37], the references in ss 44X(1)(e) and (ea) to "someone else" are simply in contradistinction to "the provider". Those provisions could equally have said "whose cost is not borne by the provider".

13. ACCCS [33] and [43], which assert that the ACCC's approach did not involve historic costs, miss the point. It is not about whether or not the historic user contributions were updated to a modern cost equivalent. The ACCC's adjustment was a deduction for the existence of historic user contributions, which is a partial historical cost analysis, because there was no matching analysis of whether there were historic benefits for users, or historic conditions under which the contributions were made. Further, it is impermissibly combining historic costs with a forward-looking DORC valuation which separately assesses prices in a putative competitive market which was the parties' agreed

methodology in this arbitration.

14. In response to ACCCS [39], if there was any such illogicality, then at most this would suggest that ss 44X(1)(e) and (ea) include extensions and interconnections ordered in a previous determination under Part IIIA, consistent with the scheme identified above.

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

15. Whilst the ACCC (ACCCS [46]), but not Glencore (GS [71]-[72]), accepts that historical aspects other than merely user contributions may need to be taken into account, this: (a) does not address the problem of mixing a historical analysis with an approach that calculates prices in a simulated competitive market based on DORC, (b) does not address the tensions and lack of clarity in the Full Court decision at [288]-[290] (CAB 251) as to what can be taken into account, and (c) ignores the Tribunal findings of very substantial under-recovery by the State over many years (at T [329]-[336] (CAB 82-84)), which were central to considering whether costs were actually borne by users. Glencore's submission at GS [74]-[75] about a lack of evidence also ignores the detailed evidence (including expert evidence) underlying point (c).

16. Glencore contends (GS [72]) there is no textual support in ss 44X(1)(e) and 44ZZCA(a) for considering other aspects of the past that may bear upon whether or not the costs of the extensions were in fact funded by users. This is incorrect, as the ACCC recognises. Section 44ZZCA(a) requires that regulated prices should be at least sufficient to meet efficient costs of providing access and include return on investment commensurate with the regulatory and commercial risks involved.

17. Certain ACCC submissions (ACCCS [4], [30]-[31], [33] and [43]) concern the correctness of the ACCC's own view in its arbitration. As the Full Court correctly identified at FC [312]-[314] (CAB 256-257), submissions of that type are inconsistent with the statutory scheme in Part IIIA and the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; 144 CLR 13, and should be disregarded.

Dated: 18 June 2021

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