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given.

R.H Kenna (L.S.)

Principal Registrar &
Chief Executive Officer

Form 105 (version 1)
UCPR 51.16, 51.18, 51.20



FILED

29 AUG 2025



NOTICE OF APPEAL

COURT DETAILS

Court Supreme Court of New South Wales, Court of Appeal
Registry Sydney
Case number 2025/332019

TITLE OF PROCEEDINGS

Appellant **Glencore Coal Assets Australia Pty Ltd**, ACN 163 821 298

Respondent **Port of Newcastle Operations Pty Ltd**, ACN 165 332 990

PROCEEDINGS IN THE COURT BELOW

Title below Glencore Coal Assets Australia Pty Ltd v Port of Newcastle Operations Pty Ltd
Court below Supreme Court of New South Wales
Case number below 2025/00048717
Date of hearing 7 March 2025
Material date 18 August 2025
Decision of Justice Peden

FILING DETAILS

Filed for **Glencore Coal Assets Australia Pty Ltd**, Appellant
Filed in relation to Whole decision below
Legal representative Dave Poddar, Quay Law Partners
Legal representative reference DP-2023-1064
Contact name and telephone Dave Poddar, +61 422 800 415
Contact email dave@quaylaw.com

HEARING DETAILS

This notice of appeal is listed for directions at

24/9/25

TYPE OF APPEAL

Commercial contractual disputes; other (Commercial List)

DETAILS OF APPEAL

- 1 This appeal is brought under s 101(1) of the *Supreme Court Act 1970* (NSW).
- 2 The appellant has not filed a notice of intention to appeal.
- 3 The appellant appeals from the whole of the decision below.

APPEAL GROUNDS

- 1 The primary judge erred in finding that, on a proper construction of the Determination made by the Australian Competition and Consumer Commission under s 44V of the *Competition and Consumer Act 2010* (Cth) and as varied by the Australian Competition Tribunal on 5 April 2022 (**Determination**), the appellant is only able to access the wharfage charge as set by the Determination if it meets the conditions of clause 2.1 of the Determination and is also liable to pay the navigation service charge (cf *Glencore Coal Assets Australia Pty Ltd v Port of Newcastle Operations Pty Ltd* [2025] NSWSC 769 (**J**) at [47], [59]-[66], [76], [78]-[80] and [84]).
- 2 The primary judge erred in finding that the scope of the dispute before the Australian Competition and Consumer Commission and which was resolved by the Determination concerned the terms of access when the appellant was accessing both the navigation service charge and wharfage charge (cf J[65]-[66]), whereas the dispute resolved by the Determination also included the terms of access to the wharfage charge in and of itself.
- 3 The primary judge ought to have found that, on its proper construction and in the context of the reasons of the:
 - a. Full Court of the Federal Court of Australia in *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194; [2020] FCAFC 145;
 - b. High Court of Australia in *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565, [2021] HCA 39; and
 - c. Australian Competition Tribunal on remittal from the High Court in *Application of Port of Newcastle Operations Pty Ltd (No 3)* [2022] ACompT 2,
 clause 2.1 of the Determination only specifies the circumstances in which the appellant may access the navigation service charge under the Determination and does not specify the circumstances in which the appellant may access the wharfage charge under the Determination.
- 4 The primary judge ought to have found that, on a proper construction of the Determination, the appellant may access the wharfage charge set by the Determination whenever it is the “owner” of cargo within the meaning of s 48 of the *Ports and Maritime Administration Act 1995* (NSW) and is liable to pay the wharfage charge, whether or not the appellant is also liable to pay the navigation service charge.

ORDERS SOUGHT

- 1 Appeal allowed
- 2 The orders made on 13 August 2025 and entered on 18 August 2025 be set aside, and in their place it be ordered that:
 - a. the defendant's cross-summons be dismissed;
 - b. it is declared that, for so long as the Glencore Notice and Determination are in force, wharfage charges from 1 January 2025 payable by the plaintiff to the defendant for loading cargo of a Relevant Glencore Company are fixed at the rate specified in clauses 5.1 and 5.2 of the Determination;
 - c. it is declared that the invoices issued by the defendant to the plaintiff since 1 January 2025, in respect of wharfage charges payable by the plaintiff to the defendant for loading cargo of a Relevant Glencore Company, are invalid to the extent such invoices are for an amount that exceeds the rate specified for wharfage charges in clauses 5.1 and 5.2 of the Determination;
 - d. the defendant to refund the plaintiff any amount that was for wharfage charges in respect of loading cargo of a Relevant Glencore Company and which was:
 - i. invoiced by the defendant and paid by the plaintiff during a time in which both the Glencore Notice and Determination were in force; and
 - ii. in excess of the rate specified for wharfage charges in clauses 5.1 and 5.2 of the Determination,
 together with interest on such amounts at the rate specified in UCPR 6.12(8);
 - e. for purposes of subparagraphs (b) to (d) above:
 - i. **Determination** means the *Final Determination Under Section 44V – Access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd*, issued by the Australian Competition and Consumer Commission on 18 September 2018 and as varied by the Australian Competition Tribunal on 5 April 2022 as set out in *Re Port of Newcastle Operations Pty Ltd (No 3) [2022] ACompT 2*;
 - ii. **Glencore Notice** means the notice issued by the plaintiff to the defendant on 16 December 2024 in which the plaintiff represented to the defendant that the plaintiff, from 1 January 2025, will exercise the functions of the owner of cargo and accepts the obligation to exercise those functions, for purposes of the *Ports and Maritime Administration*

Act 1995 (NSW), in respect of coal cargo being exported through the Port of Newcastle by a Relevant Glencore Company;

iii. **Relevant Glencore Company** means any one or more of:

- A. Bulga Coal Management Pty Ltd;
- B. Bulga Coal Sales Pty Ltd;
- C. Cumnock Management Pty Ltd;
- D. Glencore Coal Sales Pty Ltd;
- E. Glencore Coal (NSW) Pty Ltd;
- F. HV Coking Coal Pty Ltd;
- G. Mt Owen Pty Ltd;
- H. Mangoola Coal Operations Pty Ltd;
- I. Ulan Coal Mines Pty Ltd; and
- J. United Collieries Pty Ltd;

f. the defendant to pay the plaintiff's costs of the summons and cross-summons as agreed or assessed.

3 An order under UCPR 51.19 for restitution of the judgment sum paid by the appellant to the respondent, together with interest.

4 The respondent pay the appellant's costs.

UCPR 51.22 CERTIFICATE

I certify under UCPR 51.22(2) that the amount in issue in this appeal exceeds the specified amount under s 101(2)(r) of the *Supreme Court Act 1970 (NSW)*.

SIGNATURE OF LEGAL REPRESENTATIVE

This notice of appeal does not require a certificate under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014*.

I have advised the appellant that court fees will be payable during these proceedings. These fees may include a hearing allocation fee.

Signature

Capacity

Date of signature



Solicitor on record

29 August 2025

NOTICE TO RESPONDENT

If your solicitor, barrister or you do not attend the hearing, the court may give judgment or make orders against you in your absence. The judgment may be for the orders sought in the notice of appeal and for the appellant's costs of bringing these proceedings.

Before you can appear before the court, you must file at the court an appearance in the approved form.

HOW TO RESPOND

Please read this notice of appeal very carefully. If you have any trouble understanding it or require assistance on how to respond to the notice of appeal you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the notice of appeal from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales, Court of Appeal Law Courts Building Queen's Square Level 5, 184 Phillip Street Sydney NSW 2000
Postal address	GPO Box 3 Sydney NSW 2001
Telephone	1300 679 272

PARTY DETAILS

A list of parties must be filed and served with this notice of appeal.

FURTHER DETAILS ABOUT APPELLANT[S]**Appellant**

Name	Glencore Coal Assets Australia Pty Ltd, ACN 163 821 298
Address	Level 44, Gateway 1 Macquarie Place Sydney NSW 2000

Legal representative for appellant

Name	Dave Poddar
Practising certificate number	19609
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DETAILS ABOUT RESPONDENT**Respondent**

Name	Port of Newcastle Operations Pty Ltd, ACN 165 332 990
Address	Level 4 251 Wharf Road Newcastle NSW 2300