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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
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First Appellant	Glencore Coal Assets Australia Pty Ltd ACN 163821298
First Respondent	Port of Newcastle Operations Pty Ltd ACN 165332990

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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Glencore - Appeal submissions - for filing.pdf)

[attach.]

***Glencore Coal Assets Australia Pty Ltd v Port of Newcastle Operations Pty Ltd*, Supreme Court of New South Wales, Court of Appeal Proceedings 2025/332019**

<u>Appellant's Submissions</u>

A. INTRODUCTION, SUMMARY AND BACKGROUND

1. This is an appeal from orders entered on 18 August 2025 giving effect to Peden J's reasons in *Glencore Coal Assets Australia Pty Ltd v Port of Newcastle Operations Pty Ltd (No 2)* [2025] NSWSC 769 (**J**). It concerns the proper construction of an arbitration determination issued by the Australian Competition and Consumer Commission (**Commission**) under s 44V of the *Competition and Consumer Act 2010* (Cth) (**CCA**), as varied by the Australian Competition Tribunal (**Tribunal**) on 5 April 2022 (**Determination**): Blue 3:1048. The Determination followed a long history involving an access dispute between the appellant (**Glencore**) and the respondent (**PNO**), which included appeals to the Full Court of the Federal Court (*Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* (2020) 280 FCR 194 (***Glencore FC***)) and to the High Court (*Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 (***Glencore HCA***)). That history, which the parties accepted was relevant context to the construction of the Determination, was in the record before the primary judge.

2. Some of the relevant background is set out by the primary judge at J[4]-[41], but as addressed below, there are various omissions and errors in her Honour's summary of these important matters of context. In short, the access dispute concerned charges imposed by PNO under the *Ports and Maritime Administration Act 1995* (NSW) (**PMA Act**), and in particular a navigation service charge which, under s 50 of the PMA Act, is charged to an "owner" of a vessel for the vessel's use of the Port of Newcastle (including the shipping channels), and a wharfage charge which, under s 61 of the PMA Act, is charged to an "owner" of cargo for the availability of a site at which stevedoring operations may be carried out (such as berths adjacent to the shipping channel at which coal is loaded onto vessels). The "owner" of either a vessel or cargo is a statutorily defined concept and includes, under sub-s 48(4)(b), any person who makes a relevant representation to PNO.

3. In 2015, Glencore's parent company obtained a declaration of a service under s 44G of the CCA with respect to accessing parts of the Port of Newcastle. The service so declared (**Service**) was, relevantly, "*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": J[12]. Following the declaration of the Service, Glencore notified the Commission of an access dispute under s 44S of the CCA, which commenced an arbitral process through which the Commission was able to determine the terms and conditions of Glencore's access to the Service, including the navigation service charge and wharfage charge: J[13]-[15].

4. During the course of the arbitration, the parties agreed on the wharfage charge to be set: J[21]-[22]. There was a dispute, however, as to the "scope" of the determination, meaning the circumstances in which Glencore or other persons could take advantage of the charges set by the Commission under the determination: J[16]. The Commission resolved some of these matters in a "final determination" issued on 18 September 2018 (**2018 Determination**) with accompanying reasons (**Commission Reasons**): Blue 1:257. Clause 2 of its 2018 Determination, directed to some of these disputed matters, is set out at J[18]. As addressed below, cl 2 did not, however, expressly deal with whether the scope of the 2018 Determination extended to the wharfage charge whenever Glencore was liable to pay that charge, even if it was not also liable to pay the navigation service charge. So much was recognised by the Commission in its submissions to the Tribunal on review.

5. These issues remained in dispute between the parties on review to the Tribunal, which varied cl 2 of the 2018 Determination in [2019] ACompT 1 (**First Tribunal Reasons**). A judicial review application was then referred to the Full Court, which set aside the Tribunal's orders and remitted the matter back to the Tribunal. Some, but not all, of the Full Court's findings were then appealed to the High Court, and the High Court remitted some matters back to the Tribunal; specifically, the question of the scope of the navigation service charge: *Glencore HCA* (2021) 274 CLR 565 at [123]. The issue of the wharfage charge was not before the High Court: ibid at [56] and [75]. The Determination then made by the Tribunal in [2022] ACompT 2 (**Second Tribunal Reasons**) was the product of this process. The Determination following the remitter included, in cl 2, the same words that had originally been in cl 2 of the 2018 Determination, set out at J[18]: see J[41].

6. The Determination, in separate clauses, set the wharfage charge at a rate the parties and Commission agreed reflected the efficient costs of providing access to this aspect of the Service (J[67]) (with a mechanism for annual adjustment) and the navigation service charge at another rate with a different adjustment mechanism. Following the Determination, the wharfage charge fixed by PNO under s 62 of the PMA Act remained largely the same as that in the Determination, while the navigation service charge fixed

under s 51 of the PMA Act was below that fixed in the Determination. From about 2023, however, PNO began to significantly increase, by up to four times in magnitude, the rate of the wharfage charge fixed under the PMA Act, while still keeping the navigation service charge at a rate below that in the Determination: Blue 1:13 and 3:1085. That led Glencore, in December 2024, to issue a notice seeking to take the benefit of the wharfage charge under the Determination: J[43]; Blue 3:1072-75. In as little as four months, the difference between the total wharfage charges payable by Glencore at the rate fixed by PNO under the PMA Act versus the rate fixed in the Determination had risen to over $3 million: J[45].

7. At its core, the dispute before the primary judge was whether cl 2 of the Determination, on its proper construction, applied to confine the circumstances in which Glencore was entitled to the wharfage charge set by the Determination: J[46]. Clause 2 speaks to the circumstances in which Glencore is the "owner" of a *vessel* under s 48 of the PMA Act; circumstances relevant only to the liability to pay the navigation service charge. Glencore is instead liable to pay the wharfage charge whenever it is the "owner" of *cargo* under s 48. As the Full Court found, in reasons undisturbed on appeal, Glencore incurs the liability to pay the wharfage charge when it accesses that part of the Service concerned with the berths at which cargo is loaded. It would be an odd construction of the Determination to limit the scope of the wharfage charge to circumstances that have no relevance to that access or the liability to pay the wharfage charge: *Glencore FC* (2020) 280 FCR 194 at [153] and [157].

8. The primary judge, however, found in favour of a construction that tied the scope of the wharfage charge to circumstances relevant only to the navigation service charge. Her Honour did so by construing cl 2.1 of the Determination as also applying to the wharfage charge, such that Glencore could only benefit from the Determination's rate if Glencore was, at the same time, accessing the navigation service charge under the Determination: J[47]. This conclusion was the product of a process of reasoning that overlooked critical matters of context, leading to her Honour making four key errors.

9. *First,* her Honour found that the dispute which Glencore submitted to arbitration before the Commission had only ever included the wharfage charge when Glencore was also liable to pay the navigation service charge: J[13]-[14] and [65]-[66]. This overlooked, however, that Glencore had expanded the dispute before the Commission to include the wharfage charge whenever Glencore was liable to pay it, and Glencore had contended throughout the reviews and appeals that the wharfage charge fell within the scope of the Determination independently of the navigation service charge: Appeal Ground 2; see [16]-[22] below.

10. *Secondly*, her Honour recorded Glencore's submissions below as being that the effect of the Full Court's judgment was to find that Glencore could only access the wharfage charge under the Determination if it also accessed the navigation service charge: J[33]. Glencore, however, expressly made submissions to the *opposite* effect, with the consequence that the primary judge did not deal with the submissions Glencore actually made, and overlooked the fact that the Full Court, in reasons that were undisturbed on appeal, found that the scope of the Determination necessarily included the wharfage charge whenever Glencore was liable to pay it (and regardless of whether Glencore was liable to pay the navigation service charge): Appeal Ground 3(a); see [23]-[38] below.

11. *Thirdly*, her Honour overlooked that the High Court's reasons on the limited issues before it were also consistent only with a finding that, whatever else may be the scope of the Determination, it included the wharfage charge whenever Glencore was liable to pay it: cf J[36]-[39]; Appeal Ground 3(b); see [39]-[50] below.

12. *Fourthly*, her Honour overlooked the significance of the narrow remitter to the Tribunal which led to the inclusion of cl 2.1 of the Determination in its present form: cf J[37], [41] and [65]. Specifically, the High Court confined the remittal to the Tribunal to determine the scope of the navigation service charge only. In light of that limitation, the Tribunal explained, in the Second Tribunal Reasons, that its adoption of the words in cl 2.1 of the Determination was to determine the issue of when the navigation service charge as fixed by the Determination would apply. In these circumstances, it was not open to construe cl 2.1 of the Determination as being directed to any issue other than when the navigation service charge applied. That is, cl 2.1 had no bearing on the circumstance when the wharfage charge in the Determination applies, which under the Full Court's reasons (and consistent with the High Court's reasons) is whenever Glencore is liable to pay that charge: Appeal Ground 3(c); see [51]-[55] below.

13. In making these errors, the primary judge then erred in the construction of the Determination: Appeal Ground 1. Her Honour ought to have found that, on its proper construction, Glencore could access the wharfage charge fixed therein whenever Glencore was the "owner" of cargo within the meaning of s 48 of the PMA Act and liable to pay that charge: Appeal Ground 4; see [56]-[67] below.

B. THE CONTEXT RELEVANT TO CONSTRUCTION (GROUNDS 2 AND 3)

14. The relevant principles of construction of the Determination were not in dispute, and as found by the primary judge require construing the words used in light of their context,

including what had been submitted by the parties during the dispute leading to the Determination: J[51]-[53]. Here, the Determination was the product not only of the arbitral process before the Commission, but of a series of reviews and appeals that followed. The relevant "Determination" is that made by the Commission in 2018 as varied by the Tribunal in 2022 (CCA, s 44ZP(7)), and the relevant context in which to construe that Determination necessarily includes what occurred in each forum up to the making of the Determination.

15. While recognising that this context was relevant (J[54]), the primary judge ultimately had little regard to this context in construing the Determination. That was in error, because when cl 2.1 is considered in light of the context, it is apparent that the Tribunal never sought to confine, nor could it have lawfully confined, the scope of the wharfage charge by reference to the matters contained in that clause.

(1) The wharfage charge was separately before the Commission (ground 2)

16. A significant component of the primary judge's reasoning was her Honour's finding that Glencore never sought agreement from PNO as to the wharfage charge or to have this determined by the Commission separately from the navigation service charge: J[65]-[66]. That finding was unsupported by the evidence below.

17. Before the Commission, while Glencore had initially notified its dispute as concerning "*the reasonable level of navigation service charges*" (Blue 1:95), it subsequently expanded the dispute, as was permissible under s 44V(2) of the CCA, to concern "*all charges imposed by PNO in relation to the Service*", including the wharfage charge and a number of other charges: Blue 1:216-217. The fact that Glencore *did* seek to negotiate the wharfage charge with PNO and then have this determined by the Commission was recognised by the Tribunal on remitter from the High Court, when it described the "*dispute*" as concerning "*the rates of the navigation service charge and wharfage charge*", and noted "*though, the parties were agreed as to the rate of the wharfage charge"*: Second Tribunal Reasons [6] (Blue 3:1054-55). This description of the wharfage charge forming part of the dispute is consistent with the fact that it was only *during* the arbitration that the parties agreed on the wharfage charge, evidencing that it had been part of the arbitration: see J[22]. It was because of the agreement reached during the arbitral process that very little of the Commission's Reasons were then dedicated to the issue of the wharfage charge: cf J[23].

18. Glencore's submissions to the Commission also demonstrate that it had sought to arbitrate the wharfage charge whenever Glencore was liable to pay it, whether or not Glencore was also liable to pay the navigation service charge. Before the Commission, Glencore had

expressed its understanding that the 2018 Determination would include the wharfage charge whenever Glencore's coal was loaded onto vessels: see Blue 1:223 (at [9]). PNO disputed this, contending that what became cl 2.1 meant that the wharfage charge was only covered if coal was loaded onto vessels owned or chartered by Glencore: Blue 1:229-30.

19. The Commission did not expressly resolve *that* dispute between the parties when it issued the 2018 Determination. Instead, through cl 2.1 it resolved a separate dispute as to whether the 2018 Determination could extend to circumstances in which Glencore was not itself physically accessing the Service (such as by owning or chartering a vessel using the shipping channels), as well as whether the determination should extend to charges beyond the navigation service charge and wharfage charge: Commission Reasons, p 22 (Blue 1:285). Clause 2.1 did not purport to resolve the dispute as to whether the scope otherwise included in the wharfage charge, as was recognised by the Commission in its submissions to the Tribunal on review. In those submissions, the Commission pointed out that the issue of whether the wharfage charge in isolation fell within the Service (and consequently the 2018 Determination) was not a live issue before it as the parties had agreed on the wharfage charge: First Tribunal Reasons [145]-[146] (Blue 2:710-11). The Commission proposed rewording cl 2.1 to make it plain that it was confined to the navigation service charge: ibid.

20. Before the Tribunal on review, and contrary to J[65]-[66], Glencore continued to contend that the 2018 Determination's scope included or ought to have included the wharfage charge whenever Glencore coal was loaded onto vessels: Blue 2:475, 517, 581 and 625 and First Tribunal Reasons [136] (Blue 2:708). The Tribunal rejected this, finding that the scope of the determination was to be "*confined*" to the terms and conditions of access when Glencore used the shipping channels, by way of either itself owning or chartering a vessel: First Tribunal Reasons [151], [156] and [610] (Blue 2:713, 715 and 812). That was on the basis of a finding by the Tribunal that the Service as declared constituted only the shipping channels, such that Glencore could not be a person seeking access to the Service unless it was also the person controlling or in charge of the ship navigating the shipping channels: ibid [149]-[158] (Blue 2:712-15).

21. Glencore sought judicial review of this finding in the Full Court, including on the basis that the Tribunal had erred at law in limiting the scope of the 2018 Determination to not include the wharfage charge whenever Glencore accessed the berths at the Port for loading cargo: Blue 2:831-32 and 1269-70. The Full Court allowed the appeal on all grounds: *Glencore FC* (2020) 280 FCR 194 at [323]. As addressed further below, its reasons are

only consistent with a conclusion that the scope of the Determination was to include the wharfage charge whenever Glencore is liable to pay the same.

22. Following the Full Court's judgment and consistent with Glencore's position throughout, Glencore applied to the Tribunal to change cl 2.1 of the 2018 Determination in a way that would have put beyond doubt that the Determination's scope included the wharfage charge whenever Glencore was liable to pay that charge, whether or not Glencore was also liable to pay the navigation service charge: Blue 2:875-76 and 881-82. The Tribunal declined to make any decision at that time, as various issues were the subject of a special leave application to the High Court: *Re Application by Port of Newcastle*, Reasons for Directions dated 14 December 2020 at [6]. However, PNO did not seek special leave to appeal that part of the Full Court's reasons that contained findings on the wharfage charge.

(2) The significance of the Full Court's reasons (ground 3(a))

23. The primary judge considered that the Full Court had not expressly resolved whether Glencore could access the wharfage charge under the Determination only if it also accessed the navigation service charge: J[33]. However, her Honour understood Glencore as having submitted that this was the effect of the Full Court's findings: ibid. In fact, Glencore submitted the *opposite*.

24. Before the primary judge, Glencore submitted that it was the Tribunal which had determined that the wharfage charge could only be accessed if the navigation service charge applied (by reason of its revision to cl 2.1 of the 2018 Determination), and that this finding was then overturned by the Full Court: see Transcript, T18.16-T20.12 (Black 83-85) and Black 20-22 (at [69]-[77]). Glencore's submissions were that the effect of the Full Court's findings was that the Determination necessarily applied to the wharfage charge whenever Glencore was the "owner" of cargo, whether or not Glencore was also the person liable to the pay the navigation service charge. Perhaps due to a misunderstanding of these submissions, the primary judge did not expressly deal with any of this in construing the Determination. That led her Honour into error by construing the Determination without reference to key findings of the Full Court that were undisturbed on appeal.

25. On the question of scope, the Full Court began by observing that the Tribunal "*correctly*" focused upon the meaning of the "*Service*" and "*what it means to access or use the Service*": *Glencore FC* (2020) 280 FCR 194 at [147]. These matters are relevant to the scope of the Determination, because a determination under Part IIIA of the CCA is concerned with resolving a dispute as to the terms and conditions of access to the Service.

26. While the Tribunal had the correct focus in mind for resolving the issue of scope, the Full Court disagreed with the Tribunal's view on the meaning of the "*Service*" and access thereto. The Court observed that the Tribunal had accepted PNO's submissions that the Service encompassed the shipping channels only (and not separately the berths), with a person only using that Service if they controlled or were in charge of the vessel navigating the channels: [147]-[148]. That was the position PNO had adopted all the way to the Full Court, and was the reason why, on its argument, the scope of the 2018 Determination could only ever extend to when Glencore owned or chartered a vessel using the shipping channels (for which Glencore would then be liable to pay the navigation service charge).

27. The Full Court, however, rejected this view, finding that it "*is not without difficulty*": *Glencore FC* (2020) 280 FCR 194 at [149]. In particular, it found that:

> *On this construction, Glencore would be able to benefit from a declared Service relevant to the dependent market of producing and exporting coal only if it entered the market or business of shipowning, including demise chartering of ships. It is to be recalled that this would not only deprive Glencore of the determination as to the [navigation service charge], but also the [wharfage charge]. On the other hand, if the Tribunal intended by the word "charter" to include non-possessory charters such as time or voyage charters (a possibility inconsistent with the insistence on control of navigation), the confinement of the determination would be to limit its application to include CIF or similar sale, but to exclude FOB sale (though not, arguably, FOB with additional carriage service). In such circumstances, Glencore would be able to benefit from the declared service only if it entered the freight market, that is, the market for chartering vessels, especially by voyage charter. Once again, this applies to both the [navigation service charge] and the [wharfage charge].*

28. As was submitted below to the primary judge (T18.48-T19.8; Black 83-84), by observing that the Tribunal's construction of the Service deprived Glencore of the benefit of the wharfage charge in the 2018 Determination, the Full Court was pointing out the absurdity of tying the scope of the entire Determination to a circumstance that had no bearing on that part of the Service for which the wharfage charge was payable. This is clear from the Full Court's subsequent analysis, and rejection, of the Tribunal's reasons.

29. This subsequent analysis began with the Full Court's rejection of the Tribunal's narrow interpretation of the Service as being confined to the use of the shipping channels. The Full Court instead found (at [153], emphases added) that:

> *The Service is not confined to entry and exit from the Port.* ***It expressly includes the right to access and use "berths next to the wharves as part of the channels"*** *by virtue of which vessels may load and unload at relevant terminals*

> *and then depart. So,* ***both the Service as described and the matters which give rise to the liability to pay the [wharfage charge] encompass activities being undertaken at the berths****.*

30. In dealing with the Tribunal's rejection of Glencore's argument that, by loading cargo at the berths and incurring the wharfage charge, it was necessarily then accessing the Service, the Full Court (at [157], emphases added) said:

> *Glencore pays for and seeks access to the site. This is shown by the fact that* ***the [wharfage charge] is covered by the Tribunal's determination****. ... Glencore is 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.* ***The [wharfage charge]*** *is a product of the PMA Act, but it* ***is regulated by the determination*** *and that is so because it concerns the access and use of "berths next to wharves as part of the channels". In our respectful view,* ***that part of the Service is accessed or used by Glencore, both physically and economically, whenever Glencore is selling and loading coal. So, the Service is accessed or used****.*

31. In other words, the Full Court found that the Service included the berths at which coal was loaded and that Glencore was accessing the Service, regardless of any use of the shipping channels (for which a navigation service charge is imposed), whenever Glencore loaded coal at the berths (for which the wharfage charge is imposed). The Tribunal's formulation of the scope of the 2018 Determination, so the Full Court found, was wrong for excluding, at the very least, this aspect of Glencore's access. The finding of the primary judge, that the wharfage charge is only within the scope of the Determination when Glencore also "owns" the vessel within the meaning of s 48 of the PMA Act (J[47]), is the same type of reasoning used by the Tribunal that was expressly rejected by the Full Court.

32. Moreover, because the Full Court (at [159]) also found that Glencore was entitled to a determination dealing with "*any matter relating to access [to the Service] by it*", it follows that the consequence of the Full Court's reasons at [153] and [157] is that, whatever else may have been within the scope of the Determination, it must at a minimum include the terms on which Glencore accesses the Service by loading cargo at berths; i.e., the wharfage charge whenever Glencore is an "owner" of cargo.

33. With the Full Court having exposed the Tribunal's erroneous approach, the Court went on to then consider the question of whether Glencore's access to the Service also included any use of the shipping channels so as to entitle Glencore to a determination on the navigation service charge. On this issue the Full Court had two "*further and alternative*" ([159]) reasons as to why Glencore's access extended to the shipping channels: see also [160]. But

these reasons did not limit or qualify what the Full Court had already found, being that, at a minimum, Glencore accessed the Service by loading cargo at berths and was entitled to have the terms of that access (i.e., the wharfage charge) set by the Determination.

34. The first reason for the Full Court finding that Glencore's access also extended to the shipping channels was that access to the Service encompassed more than physical access, and included economic access: see at [158] and [160]. The second, albeit related, reason was that in accessing the Service through its physical use of berths, Glencore was then entitled to a determination that dealt with "*any matter relating to access by it*" ([159]). One matter that related to Glencore's physical use of the berths was the vessel's use of the shipping channels, which was necessarily required in order for the vessel to reach the berths. This, so the Full Court found (at [159]), gave Glencore an "*economic interest in being able to enter into an agreement with PNO as to the terms upon which ships carrying its coal would be able to use the Service*".

35. This second ground for finding that Glencore was accessing the entirety of the Service, and therefore entitled to a determination on all aspects of that access, was described in the High Court as a finding that the Service "*was indivisible*": *Glencore HCA* (2021) 274 CLR 565 at [75]. As addressed below, the High Court did not deal with whether or not this particular reasoning was correct, upholding the Full Court's findings on the first ground of reasoning.

36. The primary judge placed significance on the Service being "*indivisible*" to support the view that the scope of the Determination therefore extended only to circumstances when Glencore was accessing the whole of the Service, being when it was liable to pay the wharfage charge *and* the navigation service charge: J[64]-[65]. This, however, misapplied the Full Court's reasons. The Full Court did not find, on account of any indivisibility of the Service, that the scope of the 2018 Determination extended only to the circumstance where Glencore was accessing all aspects of the Service and liable to pay both the navigation service charge and wharfage charge. To the contrary, at [162] and [167], the Full Court actually envisaged that the Determination was able to set a navigation service charge that would not be paid by Glencore, but by the vessel owner or charterer who was carrying Glencore's coal.

37. The perceived indivisibility of the Service is also irrelevant to the question of whether Glencore has to pay both charges in order to benefit from the Determination. It was a basis on which Glencore could *also*, in the Full Court's view, seek a determination of the navigation service charge even if it was not itself physically using the shipping channels

(and, on the Full Court's reasons, even when Glencore was not even liable to pay the navigation service charge). The Full Court did not suggest that the indivisibility of the Service meant that Glencore then necessarily had to take the benefit of both the wharfage charge and the navigation service charge in order to rely upon the 2018 Determination. That would have been inconsistent with the Full Court's findings at [153] and [157], and with its view (at [159]) that Glencore could benefit from a determination concerning "*any matter*" relating to its access.

38. The Full Court's reasons for finding that Glencore could *also* seek in a determination the terms of access to the shipping channels led that Court to conclude that the 2018 Determination, insofar as it set the terms of the navigation service charge, could extend beyond circumstances in which Glencore was the owner or charterer of the vessel: see [162]-[163] and [167]. But it left for the Tribunal to determine the reformulation of the scope in light of its reasons: [169]. Whatever else the Tribunal may have done with the scope, it would have been required, at a minimum, to include the wharfage charge whenever Glencore loaded coal at a berth. To do otherwise would have been contrary to the Full Court's reasons at [153], [157] and [159] as addressed above.

(3) The High Court's reasons (ground 3(b))

<u>i. The High Court was concerned only with the navigation service charge</u>

39. PNO appealed aspects of the Full Court's judgment to the High Court, but it did not challenge its findings on the meaning of the "*Service*" or its findings at [153] and [157] that Glencore accessed the Service through loading cargo onto vessels (which gives rise to a liability to pay the wharfage charge).[1] Indeed, PNO's argument in the High Court presupposed the correctness of those findings. In the context of challenging the indivisibility point (referred to at [35] above), PNO accepted that the wharfage charge was not the subject of any dispute, but contended that the fact that Glencore accessed part of the Service when it paid the wharfage charge did not provide a basis for its arbitrating access to another part of the Service, namely, the shipping channels for which the navigation service charge was levied: Blue 3:886 and 900 (at [33]); *Glencore HCA* (2021) 274 CLR 565 at 569. The premise is that Glencore could access the wharfage charge without accessing the navigation service charge.

1 The failure to challenge these findings was a matter emphasised by the Commission in its submissions to the High Court (Blue 3:943 at [22]), responding to PNO's submissions (Blue 3:900 at [33]).

40. The High Court expressly observed that: "*There was no dispute that Glencore accessed that part of the Service which comprised use of the loading berths where Glencore sold FOB. There was also no dispute that, in respect of its access to that part of the Service, Glencore was liable to pay the Wharfage Charge*": *Glencore HCA* (2021) 274 CLR 565 at [75]. The Court also recognised that the wharfage charge "*was the subject of agreement between Glencore and PNO reached* ***in the course of the arbitration*** *and was not in dispute in the re-arbitration before the Tribunal*": at [55]-[56] (emphasis added).

41. Because PNO, in its appeal, narrowed the question of scope to only concern the navigation service charge, the High Court described the dispute before it as being only over "*the range of circumstances in which the Navigation Service Charge was to be payable by Glencore to PNO*" and the "*scope of the Navigation Service Charge*": *Glencore HCA* (2021) 274 CLR 565 at [57], [69]-[60] and [84]. In other words, the question of scope before the High Court was concerned with the circumstances in which the Determination may set the navigation service charge. What was not before the High Court was the scope of the 2018 Determination in respect of the wharfage charge. That question, as addressed above, had already been resolved by the Full Court and its reasons were undisturbed on appeal.

42. The primary judge considered that the High Court "*concluded that the Full Federal Court had erred in altering the Tribunal's determination of the [navigation service charge]*": J[37]. That is not, with respect, strictly correct. The High Court agreed with the Full Court that the question of the Determination's scope turned on the meaning of "*access*" to the Service as properly construed: *Glencore HCA* (2021) 274 CLR 565 at [84]. It agreed that "*access*" extended beyond physical "*use*" and extended to a person in a "*sufficiently connected upstream or downstream market*" who sought the "*right or opportunity to benefit from or use a system or service*": at [97]. The Court also agreed that the Service, properly construed, included the berths in addition to the shipping channels (at [104]) and that Glencore was a person seeking "*access*" to both aspects of the Service because it stood to enjoy the economic benefit from the ability of ships to load and then carry coal using the shipping channels and berths that formed part of the Service: [105].

43. Where the High Court disagreed was only with respect to the Full Court's finding that Glencore's access to the Service meant that it could also seek, in a determination, the setting of the terms of access of others, such as third-party owners or charterers of vessels: *Glencore FC* at [162] and [167]. The High Court considered that a person's "*access*" to a Service was limited by that person's right to negotiate access upon a service being declared

under s 44S of the CCA: *Glencore HC* (2021) 274 CLR 565 at [92], [96]-[97] and [99]-[100]. In circumstances where the wharfage charge and navigation service charge contributed to the landed cost of coal sold by Glencore, it had a right to negotiate both of those matters with PNO: at [100]. This was so even though it was possible other persons (such as the actual shipowners or charterers) might also have the right to negotiate these same charges: at [101]-[102].

44. However, Glencore's right to negotiate access, and therefore the scope of what could be arbitrated and determined by the Commission, was no less and no more than what "*could have been achieved without arbitration had PNO been willing to reach an agreement with Glencore about the amount of the navigation service charge payable by Glencore as permitted under the provisions of the PMA Act*": [106] and [108]. That is, the scope of the right of access, and therefore the scope of any arbitration and determination, was limited to "*what might be determined by agreement*" between the person seeking access and the service provider: [93]. Those limits were controlled by the PMA Act, and s 67 of that Act only permitted PNO to enter into an agreement concerning the charges with the person who was liable to pay those charges. Thus, Glencore could only negotiate with PNO, and the determination could only set, those charges that Glencore was liable to pay under the PMA Act: see at [110]. This meant that the scope of the Determination, insofar as it concerned the navigation service charge, could only extend to circumstances in which Glencore was the "owner" of the vessel within the meaning of s 48 of the PMA Act, as it is only that person who is liable to pay the charge: at [111].

45. These findings of the High Court were all couched in terms of the navigation service charge because, as addressed above, the question of scope before the High Court was confined to the navigation service charge. The Court also did not consider it necessary to consider the Full Court's alternative finding on the scope of the navigation service charge, based on the Service being one "*indivisible use of shipping channels and loading berths*": [112].

46. Because the issue before the High Court was so limited, the Court (at [111]) expressly confined the remitter to the Tribunal "*to determining the circumstances in which the Navigation Service Charge will be payable by Glencore to PNO*": see also at [123] and [125]. The primary judge considered that this confinement was because Glencore had only ever sought to have a determination of the wharfage charge when it was also paying the navigation service charge: J[65]. But as set out above, this overlooked what had occurred before the Commission, the Tribunal and the Full Court. The High Court had confined the

scope of the remitter because it had considered the issues concerning the wharfage charge to no longer be in dispute (see [55]-[56] and [75]) and only had before it the disputed issue of the scope of the navigation service charge.

ii. <u>The High Court's reasons are inconsistent with the primary judge's construction</u>

47. The primary judge's ultimate construction of the Determination, influenced by these errors, is in any event inconsistent with the reasons of the High Court. On the High Court's reasons, Glencore was entitled to a determination dealing with those terms that Glencore could have negotiated with PNO. The Service included, as the High Court accepted (at 104]), access to the berths at which coal is loaded. In respect of that access, Glencore is able to negotiate the wharfage charge with PNO whenever Glencore is liable to pay that charge; i.e., when it is the "owner" of cargo within the meaning of s 48 of the PMA Act: see PMA Act, s 61(3). Thus, for the same reasons that the High Court found the scope of the Determination could extend to the navigation service charge whenever Glencore was the "owner" of the vessel under s 48, the scope of the Determination could also extend to the wharfage charge whenever Glencore was the "owner" of cargo.

48. Indeed, the finding that the wharfage charge under the Determination applies only when the circumstances in cl 2.1 are engaged, artificially constrains and distorts the contractual choices available to Glencore, and the economically efficient operation and use of the Service, in a manner that is inconsistent with the purpose of Part IIIA of the CCA: cf *Glencore HCA* (2021) 274 CLR 565 at [99]-[100]. Glencore may seek to access the Service by loading coal of which it is the "*owner*" for which it is subject to the wharfage charge. Or it may seek to access the Service by also chartering a vessel or representing that it is the owner of the vessel under s 48(4)(b) of the PMA Act for which it would be subject to the navigation service charge. To limit the Determination to only the latter situation arbitrarily confines its scope to only one circumstance in which Glencore seeks "*access*" to the Service. There is no warrant for the Determination being so confined.

49. Such a confinement is also inconsistent with Jagot J's earlier judgment in *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* (2017) 350 ALR 552; [2017] FCA 1330. In that matter, and in response to an argument by PNO that there was no dispute as to "*access*" unless and until Glencore established that it owned or chartered a vessel seeking to use the shipping channels, Jagot J stated (at [50]) that this "*position fails to appreciate the capacity for a person in Glencore's position who wants to use the service to want to negotiate access to the service on terms which might apply to its*

use of the service in a number of different ways". Her Honour further found (at [66]) that PNO's attempts to confine the arbitration to cover circumstances in which Glencore was the owner of vessels was "*unduly restrictive having regard to: (1) the various capacities in which Glencore may become liable to make payments to PNO as the 'owner' of a vessel* ***(or of cargo)*** *under s 48*" (emphasis added) and "*(3) the possibility that the 'terms and conditions of the third party's access to the service' (s 44V(2)(c)) may extend to cover different kinds of capacities in which access is sought or proposed*".

50. Because Glencore had in fact sought to arbitrate the wharfage charge before the Commission, and by the time of the High Court appeal it was now accepted by all parties that the wharfage charge was within the scope of the Service, it follows that the scope of the Determination necessarily had to include the wharfage charge whenever Glencore was liable to pay it. Any other conclusion is inconsistent with the reasons of Jagot J, the Full Court and the High Court. The primary judge erred in not taking these reasons into account.

(4) The remittal to the Tribunal (ground 3(c))

51. It was in the remittal from the High Court that the Tribunal set the final terms of the Determination in a manner that included cl 2.1. The primary judge found that the Tribunal "*determined not to alter the Commission's original Determination concerning its scope*" (J[41]), but that does not accurately capture what had transpired.

52. The Tribunal was dealing with a situation in which the 2018 Determination as made by the Commission had already been varied by the Tribunal, including with a variation to cl 2.1, which variations were then set aside by the Full Court for reasons that were subsequently varied by the High Court: Second Tribunal Reasons [2] (Blue 3:1054). The Tribunal had to grapple with the complication that, in revisiting the 2018 Determination and making any variations thereto, it was confined by the High Court to re-determining the scope of the navigation service charge only; in the Tribunal's words: "*that is, the description of the vessels using the shipping channels* ***to which the navigation service charge is applicable***": ibid [12] (Blue 3:1057) (emphasis added). But the Tribunal recognised that its powers on remittal were also "*governed by the orders of the Full Court, as varied by the orders of the High Court*": ibid [16] (Blue 3:1059). It considered that the orders of the Full Court required it to revisit the issues in a manner that gives effect to the Full Court's conclusions on the specific legal issues disputed therein, and that the High Court's further order should be understood as remitting the matter to the Tribunal to be considered in light of the legal issues ultimately determined by the High Court: ibid [17] and [21] (Blue 3:1059-60).

53. When it came to considering the "*scope of the determination*", the Tribunal was nonetheless subject to the High Court's express confinement to "*redetermining the scope of the Navigation Service Charge*": ibid [19] (Blue 3:1060). That is why, on this issue, the Tribunal only discussed scope by reference to the navigation service charge. In this respect, the Tribunal said (at [25]-[26] (Blue 3:1061-62), emphases added):

> *In light of the High Court's conclusion concerning the scope of the determination, PNO proposed that the Tribunal make no change to the ACCC's arbitral determination on this issue [being cl 2.1 of the 2018 Determination]. It will be recalled that the ACCC determined* ***that the navigation service charge would apply*** *in respect of vessels using the shipping channel service in two circumstances:*
>
> *(a) where Glencore, either directly or by agent, charters a vessel to enter the Port precinct and load Glencore coal; and*
>
> *(b) where Glencore makes a representation to PNO of the kind referred to in s 48(4)(b) of the PMA Act that is has the functions of the owner of a vessel, or accepts the obligation to exercise those functions, in order to enter the Port precinct and load Glencore Coal.*
>
> *The Tribunal agrees that the ACCC's arbitral determination* ***on this issue*** *is consistent with the High Court's ruling.*

54. It is apparent from the emphasised words that the Tribunal was only considering the question of the scope of the navigation service charge. It was not considering the question of the scope of the wharfage charge, which was also set by the 2018 Determination and retained in the Determination. In light of the fact that the High Court had limited the Tribunal's remitter on scope to the navigation service charge only, the Tribunal's adoption of the same words used by the Commission in cl 2.1 can only be understood as being for purposes of setting the scope of the navigation service charge. In so doing, the Tribunal was also giving effect to the reasons of the Full Court that were not disturbed by the High Court, because cl 2.1 was not concerned with the scope of the wharfage charge.

55. The result is that the Determination does not contain any express provision setting out the scope of when the wharfage charge may be relied upon. But this omission, which was also present in the 2018 Determination (see [19] above), is not significant when the Determination is read in light of the judgments of the Full Court and High Court. That is because, those judgments make clear that the scope of the Determination extends to the circumstances in which Glencore is seeking access to the Service and able to negotiate the terms of that access with PNO. Since the Full Court's judgment, it has not been in dispute that Glencore accesses the Service through the circumstances giving rise to the wharfage

charge, and whenever Glencore is the "owner" of cargo under the PMA Act it is able to negotiate the terms of that access with PNO. It follows that the Determination, insofar as it is concerned with the wharfage charge, is applicable whenever Glencore is the "owner" of cargo under s 48 of the PMA Act.

C. THE DETERMINATION APPLIES (GROUNDS 1 AND 4)

56. The primary judge, accordingly, erred in construing cl 2.1 of the Determination as confining the scope of the entirety of the Determination: J[47] and [84]. This construction confines Glencore's access to the wharfage charge to circumstances that have no bearing on Glencore's access to that part of the Service or its ability to negotiate with PNO on the terms of that access. This is inconsistent with the reasons of both the Full Court and the High Court and was a finding infected by the four errors addressed in Part B above.

57. These errors also infected the other steps of her Honour's reasoning in construing the Determination in a manner that only allows Glencore to access it if it pays both the navigation service charge and wharfage charge.

(1) The text of the Determination construed in its proper context

58. In construing the Determination, the primary judge considered that the text of cl 2 supported the conclusion that it defined the limits of the Determination as a whole: J[60]-[63] and [79]-[80]. In particular, her Honour considered that the word "*includes*" in the chapeau to cl 2.1 was synonymous with "*consists of*", rather than having its ordinary meaning of seeking to define the scope in a manner that was inclusive rather than exhaustive: J[60]. When the word "*includes*" is construed in the context of the Full Court's and High Court's reasons and the fact that the Tribunal, in adopting these terms in cl 2.1, was doing so with respect to the scope of the navigation service charge only, it is apparent that the word bears its ordinary inclusive meaning, in recognition that cl 2.1 sets the scope of the navigation service charge only and not the wharfage charge. This same context deals with the primary judge's reliance on the word "*where*" in sub-cl 2.1(a) and (b) and the "*avoidance of doubt*" provision in cl 2.2: cf J[61].

59. It is also not to the point that the conditions in sub-cll 2.1(a) and (b) refer to vessels that both enter the Port "*and load Glencore coal*": cf J[79]-[80]. The relevance of that language is to confine the scope of the navigation service charge to only those vessels for which Glencore is both the "owner" and which are being used to load Glencore coal. That language was included because Glencore had initially sought for the scope of the

arbitration to cover charges imposed on a range of vessels, but subsequently accepted that it should be limited to vessels carrying coal: see Commission Reasons at 21-22 (Blue 1:284-85). These words say nothing as to whether the Determination only applies if Glencore seeks to rely on both the navigation service charge and wharfage charge.

60. Because the primary judge had overlooked the significance of the context in which the Determination was made, her Honour also then failed to attach sufficient significance to the other textual indications in the Determination that support the conclusion that the wharfage charge can be accessed independently of the navigation service charge. These other textual indications are that the Determination deals, in separate clauses, with the setting of the wharfage charge and the navigation service charge (see cll 5 and 6 (Blue 3:1050)) and that the respective charges are the subject of separate adjustment mechanisms: cll 7-9 (Blue 3:1050-51). The significance of this separation was not addressed by the primary judge.

61. The primary judge did, however, consider another textual indication supporting the differing treatment of the charges, being that the Determination required separate invoices for the wharfage charge and navigation service charge: J[78]; cl 10 (Blue 3:1052). While her Honour recognised that, had there been a provision requiring a single invoice, that would have indicated the Determination required both charges to be accessed together (J[78]), her Honour erred in not then accepting the significance of the converse position. The fact that the Determination expressly provides for separate invoicing reinforces that these are discrete and separate charges. Considered in context, cl 10 recognises that there may be circumstances in which one charge is payable by Glencore but not the other.

(2) The irrelevance of the methodology deployed to fix the navigation service charge

62. The other step of her Honour's reasoning concerned the fact that, in setting the navigation service charge, the Commission used a model that had as one of its inputs the revenue that would be received by PNO from the wharfage charge that had been agreed between the parties: J[67]-[76].

63. During the course of the arbitration, the parties had agreed on a wharfage charge, and this was accepted by the Commission as being an "*assessment of the efficient costs of providing access to this aspect of the Service*": J[22]. The parties also agreed that the amount of the navigation service charge could then be fixed by using a "*building block model*" (**BBM**) that involves calculating the "*maximum allowable revenue*" (**MAR**): Commission Reasons, p 32 (Blue 1:295). A BBM is a model that enables the calculation of prices that

can be charged so that the operator receives a return equivalent to what an efficient operator would be expected to receive in a hypothetical competitive market; i.e., a price that allowed for the recovery over of time of the costs of assets and efficient operations, with a reasonable rate of profit, but excluding monopoly profits.[2] The model does this through using various "*building blocks*", such as an indexation of the regulatory asset base, return on capital, depreciation, tax and other adjustments that may affect revenue, including risks.[3] The parties agreed with many of the inputs into the BBM, but some of the inputs remained in dispute and were then the subject of extensive reasons of the Commission, the Tribunal and the courts.

64. The wharfage charge was itself an input in the BBM, forming part of the recoverable MAR as one stream of revenue available to PNO. The other stream was the navigation service charge. Accordingly, in using the BBM to ascertain the MAR, the amount that could then efficiently be imposed for a navigation service charge took into account the amount that was likely to be received by PNO through the wharfage charge: see J[69]-[76].

65. The primary judge considered that this fact provided significant support to the conclusion that the Determination only contemplated applying to both the wharfage charge and navigation service charge when both charges were accessed together: J[76]. However, the use by the Commission of a BBM to calculate the MAR was simply a methodology it employed to determine the highest amount that PNO could justifiably impose for the navigation service charge, having regard to the matters in s 44X and to the pricing principles in s 44ZZCA of the CCA. The inclusion of the wharfage charge as an input into the BBM says nothing as to the intended scope of the Determination. It was simply an agreed input that formed a necessary part of calculating the MAR for purposes of setting the navigation service charge when using the adopted methodology.

66. The Determination does not require PNO to recover the full MAR; the MAR is instead an economic principle used by the Commission to set a cap on what PNO could charge for the use of that part of the Service that is associated with the navigation service charge. Indeed, the navigation service charge that PNO fixed under the PMA Act at the time of the 2018 Determination was well below the charge that came to be fixed for 2018 in the Determination, while the wharfage charge was the same: see Blue 1:270 and cf Blue 3:1050. This indicates that the charges PNO had itself fixed under the PMA Act were not

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[2] See generally Reasons pp 32-33 (Blue 1:295-96); First Tribunal Reasons at [161]-[164] (Blue 2:716-17); *Glencore HCA* (2021) 274 CLR 565 at [62]-[65].

[3] See, e.g., *National Electricity Rules* (Version 114, in force November 2018) at [6A.5.4].

recovering the full MAR that had been calculated using the BBM.

67. The consequence that PNO might recover less than the calculated MAR, if Glencore accessed only the wharfage charge under the Determination, is of no moment. Whether or not that occurs depends upon what amount PNO has charged the vessel owner for the navigation service charge, a matter within PNO's control. It was not the purpose of the Determination to ensure that PNO always recovered the MAR, only that it did not charge Glencore a navigation service charge, if the Determination applied, that would result in PNO recovering more than the MAR. The use of the wharfage charge as part of calculating that MAR is simply irrelevant to the question of the Determination's scope.

D. CONCLUSION AND ORDERS SOUGHT

68. Once the errors of the primary judge are corrected, it follows that, on a proper construction of the Determination, cl 2.1 is limited to the circumstances in which the navigation service charge may be used, whereas the separate wharfage charge may be used whenever Glencore accesses that part of the Service. Consistent with the Full Court's and High Court's judgments, that is whenever Glencore is the "owner" of cargo within the meaning of s 48 of the PMA Act and liable to pay the wharfage charge under s 61 of that Act. The primary judge erred in not construing the Determination in this matter.

69. It follows that the appeal should be allowed and the orders of the primary judge set aside in their entirety. In their place, the orders as sought at [2] of the Notice of Appeal should be made. This includes the order at [2](d), which requires PNO to refund Glencore any amount paid on invoices for wharfage charges in excess of the amount that ought to have been paid under the Determination. That order is appropriate in circumstances where, if the judgment below is set aside, there is necessarily a failure of basis that entitles Glencore to restitution (with interest) of the overpayment: see, e.g., *Redland City Council v Kozik* (2024) 98 ALJR 544 at [183]-[188] and [236]-[240] (Gordon, Edelman and Steward JJ).

70. It ought to be uncontroversial that Glencore is also entitled to restitution of the judgment sum paid, with interest: see generally *Heydon v NRMA* (2001) 53 NSWLR 600.

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