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Written Submissions

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00332019

TITLE OF PROCEEDINGS	
First Appellant	Glencore Coal Assets Australia Pty Ltd ACN 163821298
First Respondent	Port of Newcastle Operations Pty Ltd ACN 165332990

FILING DETAILS	
Filed for	Port of Newcastle Operations Pty Ltd,Respondent 1
Legal representative	Scott Grahame
Legal representative reference	
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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 (2025_332019 - Port of Newcastle Submissions dated 27 October 2025.pdf)

[attach.]

In the Supreme Court of New South Wales
Court of Appeal

No. 332019 of 2025

Glencore Coal Assets Australia Pty Ltd
Appellant

Port of Newcastle Operations Pty Ltd
Respondent

RESPONDENT'S SUBMISSIONS

A INTRODUCTION

1 The proceedings below concerned the construction of an arbitration determination dated 5 April 2022 (the **Determination**[1]) which provides the appellant (**Glencore**) with the ability to access particular wharfage charges and navigation service charges at the Port of Newcastle. The issue between the parties was whether Glencore was entitled to access the wharfage charge set under the Determination without also paying the navigation service charge. The primary judge (Peden J) determined that Glencore was not entitled to do so. This decision was based on the text of the Determination itself, in particular clause 2, which describes the scope of the Determination, together with contextual matters.

2 Glencore submits that the primary judge erred in reaching this conclusion. However, Glencore's appeal is not based on the text of the Determination. Notably, Glencore does not contend that the text of clause 2 of the Determination contains any indication that the Service can be divided and the charges accessed separately in the manner Glencore now seeks to do. Rather, Glencore submits that in construing the Determination, the primary judge "overlooked critical matters of context": AS [8]. Those matters of context concern aspects of the original arbitral process before the Australian Competition and Consumer Commission (the **Commission**), and subsequent reviews by the Australian Competition Tribunal (the **Tribunal**), the Full Federal Court, and the High Court. The

[1] The Determination appears at Blue 3:1048-1053.

necessary implication of Glencore's argument is that clause 2 of the Determination only partially addresses its scope, and mistakenly omits the circumstances in which the wharfage charge alone may be accessed by Glencore. There is no basis for this conclusion, or for finding that her Honour's decision was affected by error.

3 These submissions identify the principles of interpretation which the primary judge correctly applied (Section B), and the approach her Honour took to the construction of the Determination (Section C) before addressing Glencore's specific appeal grounds (Sections D-F).

B PRINCIPLES

4 The Determination is not a legislative instrument,[2] nor is it a contract. It is a document which is the result of an arbitration by the Commission (and then re-arbitration by the Tribunal). It is a type of arbitral award. In that context, the "scope of the issues that an arbitral tribunal resolved finally and conclusively is answered by primarily focusing on what the tribunal said and concluded in the award".[3]

5 The task of interpretation begins with the natural and ordinary meaning of the words used, which are to be read as a whole and in context, including in light of what matters were put before the decisionmaker.[4] While no "narrow or pedantic" approach should be taken,[5] the process cannot lead to "an attempt to construe the terms of an award according to the subjective intention of the parties or result in an unreasonable or unnatural construction being placed on the words of an award".[6] Rather, "[a]ttention must be fixed upon the ordinary meaning of the words used when read in context".[7]

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[2] *Competition and Consumer Act 2010* (Cth) (**CCA**), s 44V(6).

[3] *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* [2024] HCA 28; 98 ALJR 1096 at [25].

[4] *City of Wanneroo v Holmes* (1989) 30 IR 362 at 378 (French J).

[5] *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd* [2005] 2 Qd R 174; [2005] QSC 45 at [21] (Muir J); *Kucks v CSR Ltd* (1996) 66 IR 182 at 184 (Madgwick J).

[6] *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury* (2014) 87 NSWLR 41 at 80 (Walton P).

[7] *Public Service Association and Professional Officers' Association Amalgamated Union (NSW) v Secretary of the Treasury* (2014) 87 NSWLR 41 at 80 (Walton P).

C THE PRIMARY JUDGE'S CORRECT APPROACH

6 The primary judge correctly identified the issue in the proceedings as the "proper construction of the Determination, considered in the context of the legislative framework that governs the operation and use of the Port, and the long history of the parties' dispute" (J[2]).

7 The primary judge summarised the long background to the Determination and the dispute between the parties (J[4]-[45]) and correctly identified the appropriate principles (J[48]-[53]).

8 Pursuant to the *Ports and Maritime Administration Act 1995* (NSW) (**the PMA Act**), the respondent (**PNO**) is entitled to charge various charges for different services at the Port. The hearing before her Honour concerned two such charges: (i) a navigation service charge, payable in respect of the general use by a vessel of a designated port and its infrastructure (s 50); and (ii) a wharfage charge, payable in respect of availability of a site at which stevedoring operations may be carried out (s 61).

9 The key issue before her Honour was whether the Determination permitted Glencore to access the determined wharfage charge separately, without also paying the determined navigation service charge. The primary judge preferred PNO's construction of the Determination that Glencore was not permitted to pay only part of the price for access to the Service, for the following reasons.

10 *First*, the text of the Determination supported that construction. The Determination identifies its scope at the start of the document, in Clause 2, headed "scope of the determination" (J[60]). Each of sub-clauses 2.1(a) and (b) specify the situations in which the Determination operates for Glencore's benefit (J[61]) and clause 2.2 identifies when the Determination does not apply (J[61]). The clause does not indicate that either the navigation service charge or wharfage charge set out in the Determination can be accessed separately. Rather, the clause contemplates that by chartering a vessel to enter the Port precinct, and loading Glencore coal, Glencore will incur liability for both charges. Further, clause 3.1 requires Glencore to provide notice of its intention to use the declared "Service" which, as the background section of the Determination records, was defined to include both the use of the shipping channels and berths next to the wharves (J[62]).

11 *Secondly*, the Determination resolved a dispute between Glencore and PNO about the terms on which Glencore could access the declared Service as defined, the provision of which by PNO encompassed both the navigation service charge and the wharfage charge. Because the Commission determined both those charges in one arbitration about access to the Service, that provides a further indication that Glencore cannot access the charges separately (J[63]-[66]).

12 *Thirdly*, the framework for calculation of the charges set out in the Determination involved the Commission using a building block model to determine the maximum allowable revenue that PNO would be able to recover from the combination of the navigation service charge and wharfage charge (J[69]). As the primary judge recognised (J[76]):

> The specific reference to both WC [wharfage charge] and NSC [navigation service charge] being part of the "inputs" for BBM supports the conclusion that the determination contemplates the WC and NSC being paid in relation to one export of Glencore's coal; without the input of the WC, the calculation of the MAR could not have been determined for the provision of the service.

13 *Fourthly*, the use of the word "and" in clause 2.1 identified that to access the Determination, Glencore was required to both charter a vessel to enter the Port precinct (and therefore incur the navigation service charge) *and* to load Glencore coal (therefore also incurring the wharfage charge) (J[79], [80]). Her Honour considered that this was consistent with the other "constructional indicia" her Honour had analysed (J[80]).

14 The primary judge also addressed clause 10 of the Determination, relied upon by Glencore. That clause provided that the invoices for the navigation service charge and wharfage charge be invoiced separately. Her Honour correctly concluded that this was a neutral matter, including because the different statutory charges under the PMA Act were triggered in relation to different events and calculated in different ways under different provisions of the PMA Act (J[78]).

15 That reasoning of the primary judge, based principally on the text of the Determination itself, was orthodox and correct. Glencore's appeal focuses on what it says are neglected matters of "context"; its limited criticisms of her Honour's textual analysis are addressed in section F, below.

D GROUND 2: SCOPE OF DISPUTE BEFORE THE COMMISSION

16 The first matter of context which Glencore says that the primary judge overlooked was that Glencore had expanded the original 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": AS [9].

17 This argument is developed in AS [16] – [22], where Glencore contends that:

a) before the Commission, there was a dispute between the parties about whether the Determination would provide for a wharfage charge applicable "whenever Glencore's coal was loaded onto vessels" (AS [18]);

b) the Commission did not resolve that dispute (AS [19]);

c) before the Tribunal, Glencore continued to contend that the 2018 Determination ought to apply "whenever Glencore's coal was loaded onto vessels", but the Tribunal rejected that argument (AS [20]); and

d) Glencore sought judicial review of that point, succeeded before the Full Court and Glencore then sought to reflect that change in the Determination (AS [21]). The Tribunal declined to make any decision while PNO's special leave application to the High Court was outstanding (AS [22]).

18 Glencore's characterisation of the dispute before the Commission is inaccurate. Examination of the history of the proceedings reveals that the navigation service charge was always the focus of the dispute. Indeed, prior to the notification of the dispute, increases in the navigation service charge were identified as the basis for Glencore seeking to have the service declared in the first place: (see Section 7 of Glencore's application, which only refers to the navigation service charge: Blue 1:64-66). In the subsequent dispute before the Commission, Glencore's objective was two-fold: (i) to reduce the navigation service charge specified in the Determination; and (ii) to obtain the widest possible access to the navigation service charge specified in the Determination. To the extent that the wharfage charge featured in that dispute, it was

principally as a toehold for Glencore to obtain access to a determined navigation service charge (explained further below).

19 As Glencore itself has acknowledged, it was only after PNO increased the statutory wharfage charge fixed under the PMA Act, while keeping the navigation service charge at a rate below that in the Determination, that Glencore was prompted in December 2024 to issue a notice of its intention to "use the Service the subject of the wharfage charge", but not "the Service the subject of the Navigation Service Charge": (AS [6]; Blue 3: 1072-75). Glencore sought to retain the benefit of the deeds PNO has entered with vessel agents on behalf of all coal vessels entering the Port, which charge a lower navigation service charge than the determined rate (Blue 1: 37), but rely on the Determination to obtain a lower wharfage charge than otherwise applies to coal vessels loading coal at the Port.

20 But even if Glencore's characterisation of events was correct, and Glencore had submitted throughout the arbitration process that the wharfage charge fell within the Determination independently of the navigation service charge, this was never incorporated in the terms of the Determination, which, as her Honour observed, do not provide for the wharfage charge to be accessed separately. The Determination is the document which her Honour was being asked to construe.

21 At AS [18], Glencore says that 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". However, this was part of the dispute about the scope of the navigation service charge: Glencore's contention was that the navigation service charge should apply to all vessels, on which there was Glencore coal, whether or not it was a Glencore vessel.

22 For example, at AS [18] Glencore refers to [9] of its submission to the Commission (Blue 1:223). Paragraph 9 of that submission sought to point out an internal inconsistency in the Commission's Draft Determination, in support of Glencore's ultimate submission that the Determination should apply to a wider range of vessels. That is evident from paragraphs 4 and 11 of Glencore's submission at Blue 1: 222-223. Glencore's target, in those submissions (and in the various documents referred to at AS [19]) was the vessels to which the Determination would apply. Glencore did not suggest

that the Determination should be differently expressed so as to provide for access to the wharfage charge alone, without any reference to vessels.

23 This can be seen in the Tribunal's summary of Glencore's position (upon which Glencore relies – AS [20]). The Tribunal stated (Blue 2:708):

> Glencore also pointed to the fact that it was subject to and liable to pay the Wharfage Charge no matter whether Glencore or its customers were responsible for chartering the relevant vessel. It effectively inferred from this that Glencore was using, or PNO was providing access to, the Service. On this basis, Glencore contended that it should have the benefit of its arbitrated <u>prices</u> in both the circumstances outlined in the ACCC's determination scope, <u>as well as in respect of vessels carrying coal which have not been chartered by Glencore</u> or in respect of which Glencore has not made a representation of the kind referred to in s 48(4)(b) of the PMAA.
>
> (emphasis added)

24 Glencore wanted both the navigation service charge and wharfage charge under the Determination to apply to a wider range of **vessels** than the Commission had concluded. There was no suggestion that this should be done by way of the wharfage charge alone applying to cargo coming into the port. Glencore's focus was vessels and the charges applying to the vessels and cargo on those vessels.

25 In support of its submission that there was a dispute between the parties about the wharfage charge alone, which the Commission's 2018 Determination failed to resolve, Glencore refers to the Commission's proposed rewording of clause 2.1 before the Tribunal: AS [19]. But as the Tribunal's reasons make clear, this proposal was addressed to a different issue. At [146] of the Tribunal's reasons, the Tribunal recorded that the Commission proposed to alter the Determination "to clarify, but not substantively change" the meaning of clause 2.1 ([146], Blue 2:711). The Commission considered that this would "assist in making clear that whenever a person falls into the definition of 'owner' under the PMA Act, then the determination applies" ([147], Blue 2:711). The Commission's proposed change had nothing to do with clarifying that the scope clause only addressed the navigation service charge: cf AS [19]. The Tribunal's reasons support the primary judge's conclusion that "including" was synonymous with "consists of": J [60].

26 In the Full Court, Glencore sought to pursue, for the first time, the notion that clause 2.1 should refer to Glencore being able to access the Determination when it is the owner of **cargo**: AS [22]. That can be seen at paragraph 2 of its application to the Full Court (Blue 2:831). However, that does not assist Glencore. If anything, to the contrary. It was not picked up by the Full Court's reasons and such an amendment to the ACCC's Determination was never ultimately pursued by Glencore.

E GROUND 3: THE EFFECT OF THE REASONS OF THE FULL COURT, HIGH COURT AND TRIBUNAL ON REMITTER

27 Ground 3 alleges that her Honour overlooked: (i) the reasons of the Full Court (ground 3a, AS [10]); (ii) the High Court (ground 3b, AS [11]); (iii) and the Tribunal on remitter (ground 3c, AS [12]).

(1) The Full Court's Reasons

28 Glencore submits that the Full Court 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): AS [10]. Glencore also submits her Honour misunderstood and failed to deal with a submission to this effect.

29 Glencore's submission overstates the Full Court's analysis. The Full Court considered Glencore's liability to pay the wharfage charge as part of its analysis of whether Glencore made use of the "Service" (as defined in the Determination), and was therefore entitled to the determined navigation service (which it sought to have reduced). That was an important matter because the Tribunal had narrowed the scope of the Determination by reason of Glencore not accessing the "Service" unless it accessed the shipping channel itself (*Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 at [150]-[158]).

30 As the Full Court observed, Glencore propounded "a width of the determination based on the scope of the Service that covers access for it to the shipping channels for the export of all its coal, irrespective of the contractual arrangements that it may, or may not, make for the carriage of goods by any ship" (*Glencore Coal Assets Australia Pty*

Ltd v Australian Competition Tribunal and Others (2020) 280 FCR 194 (the **Full Court Decision**) at [20]). Glencore argued for a broader scope on two bases.

31 The first was that because Glencore paid the wharfage charge and asserted that it was the owner of coal prior to it being loaded onto a ship it necessarily, as a physical matter, used the Service, or at least that part of the Service, being the berths next to wharves which were part of the shipping channel (Full Court Decision at [154]-[157]). The second was that Glencore had a sufficient economic interest in the whole of the declared Service because it had 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 (Full Court Decision at [159]).

32 The Full Court accepted both of Glencore's arguments about its use of the "Service" as defined (Full Court Decision at [160]). However, Glencore did not submit, and the Full Court did not find that Glencore was therefore entitled to access the wharfage charge under the Determination alone. To the contrary, as the High Court described it, the Full Court saw the Service as "indivisible": "If Glencore accessed that part of the Service which comprised use of the loading berths, as the Full Court saw it, Glencore also necessarily accessed the other part of the Service, which comprised the shipping channels needed to get to and from the loading berths": *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 (**Glencore HC**), [75]. The Full Court specifically remitted the matter to the Tribunal to "fix the terms of the scope of the determination in the light of these reasons": Full Court Decision at [169]. Those reasons did not indicate that the terms of the Determination should provide for Glencore to obtain access to the determined wharfage charge by itself, without also paying the determined navigation service charge.

33 The second sentence of J[33] does appear to misstate Glencore's submission before the primary judge (AS [23]). That is of no material consequence. Her Honour clearly took into account, and reproduced, the key parts of the Full Court's reasons in considering the context in which the Determination was finalised (J[28]-[34], [37], [38]). Those reasons do not assist Glencore's construction.

34 Further, whatever the Full Court's reasons, the Court expressly required the Tribunal to take into account its findings about when Glencore accessed the relevant "Service", but

that it was otherwise a matter for the Tribunal to "fashion the scope of the terms" and to work out the "arrangements in the terms of access for Glencore to stipulate a mechanism by which the determined access price would apply to ships carrying coal from Glencore's mine" (*Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145; (2020) 280 FCR 194 at [169]). This is not consistent with Glencore's contention, in effect, that the Full Court reasons alone, in some unexplained fashion, have altered the written Determination in some way.

35 Glencore says that the Full Court reasons required the Tribunal "at a minimum" to include within the scope of the Determination the wharfage charge whenever Glencore loaded coal at a berth (AS [38]). But if it said that was required by the Full Court reasons, it was incumbent upon Glencore to raise that matter with the Tribunal upon remitter. It did not do so following the High Court's decision. Rather, on remitter, PNO proposed the Determination reverting to the Commission formulation and Glencore did not oppose that course (*Application by Port of Newcastle Operations Pty Ltd (No 3)* [2022] ACompT 2 at [3], [26]). And obviously, Glencore did not seek the statutory judicial review of the Tribunal's orders which was the only available means of asserting material error.

(2) The High Court's reasons

36 Glencore also asserts that the primary judge overlooked the High Court's findings (AS [11]). That contention should also be rejected.

37 The High Court accepted that Glencore had the economic interest in the declared Service identified by the Full Court (*Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* (2021) 274 CLR 565 (**Glencore HC**) at [105]) and that this was sufficient to expand the scope of the Determination to vessels where Glencore was the owner of the vessel under section 48 of the PMA Act (but no wider) (Glencore HC at [108], [111]). In light of that conclusion, the High Court did not need to consider the alternative basis on which the Full Court had expanded the scope of the Determination, namely whether the Full Court had erred in construing the Service as one "indivisible use of shipping channels and loading berths" (Glencore HC at [112]).

38 There is nothing in the reasoning of the High Court that supports Glencore's submission that it is entitled to access the wharfage charge under the Determination without also

accessing the determined navigation service charge. The High Court stated that on remitter, the Tribunal would be considering the question of "a particular ship carrying coal sold by Glencore" (Glencore HC at [111]).

39 The primary judge accurately summarised the effect of the High Court decision (J[36]-[39]) and took it into account.

(3) The Australian Competition Tribunal on remittal

40 Glencore places great store in the High Court's comment (Glencore HC at [111]) about the limitation of the remitter following from its decision (AS [12]).

41 The statement of the High Court followed from its finding about the extent of the arbitrated outcome that Glencore could obtain through the Determination. That outcome was limited to what could have been achieved by way of an agreement between PNO and Glencore (Glencore HC at [108], [110]). The High Court's comment at [111] was to ensure that the Tribunal did not go beyond those matters. It was not a straitjacket for the Tribunal such that the Tribunal did not have the duty and thus power to reframe the Determination in light of the decisions of the Full Federal Court and the High Court.

42 In any case, the Tribunal itself considered that it was bound to alter the Determination so as to reflect the findings of both the Full Court and the High Court. The Tribunal referred to its powers on remittal being governed by the "orders of the Full Court, as varied by the orders of the High Court" ([16] Blue 3:1059) and that the Tribunal's further determination was to be "made in a manner that gives effect to the Full Court's conclusions on the specific legal issues in dispute before the Full Court" ([17] Blue 3:1059). The Tribunal also noted the Full Court's confirmation that "it was for the Tribunal, on remittal, to define the scope of the determination" ([18] Blue 3:1059-1060). It was thus open, on the remitter, for Glencore to make any submissions it wished about how the Full Court's findings would be translated to an alteration to the terms defining the scope of the Determination.

43 Glencore did not make any such submission. It did not, for example, seek to make the scope of the Determination match that which it had sought in its application to the Full Federal Court (Blue 2:831 and paragraph 26 above). Nor did it contend, as it now does,

that the Commission Determination in 2018 was incomplete: AS [55]. Rather, Glencore was content for the relevant wording of the Determination to revert to the wording contained in the earlier Commission version (*Application by Port of Newcastle Operations Pty Ltd (No 3)* [2022] ACompT 2 at [3]). As a result, with Glencore's consent, clause 2.1 of the Determination was unchanged from the version initially formulated by the Commission, which the Tribunal considered was "consistent with the High Court's ruling" (*Application by Port of Newcastle Operations Pty Ltd (No 3)* [2022] ACompT 2 at [26]).

44 In submissions to the Tribunal during the earlier re-arbitration, Glencore's description of the scope of the Commission's Determination in 2018 was as follows (Blue 2:512):

> 2.20. The scope of the ACCC's Final Determination <u>is limited to</u> access to the Service:
>
> > 2.20.1. where Glencore, either directly or by agent, charters a vessel to enter the Port precinct and load Glencore coal; and
> >
> > 2.20.2. where Glencore makes a representation to PNO of the kind referred to in section 48(4)(b) of PMAA that it 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.
> >
> > (emphasis added)

45 Given that the ultimate effect of the Tribunal's decision on remittal was to leave the words unchanged, the primary judge was correct to conclude that the ultimate version of the Determination had the same effect.

(4) Ground 3 should be rejected

46 The ultimate effect of Glencore's argument in this Court is that the primary judge should have found that there were two ways in which Glencore could access the rates under the Determination:

a) First, where it chartered a vessel to carry its coal, in which case the Determination applied by reason of the written terms of clause 2.1; or

b) Secondly, where it did not charter a vessel, but was the owner of coal coming through the Port of Newcastle in which case the Determination applied, not because of its terms, but on the basis of reasons of the Full Court.

47 As has been set out above, nothing in the Full Court or High Court reasons provide any reason to move away from the text of clause 2.1. Had there been some need to adjust clause 2.1 in order to address any matter thought to require attention on a proper reading of the outcome and reasons respectively of the Full Court or High Court, the occasion for such an exercise was in the Tribunal after the matter was remitted. Glencore's failure to follow that course cannot in any principled way give rise to some kind of interpretive distortion of the promulgated text.

48 The primary judge was correct to analyse the Determination by reference to its text.

F GROUNDS 1 AND 4 – THE CONSTRUCTION OF THE DETERMINATION

49 In Section C of its written submissions, Glencore criticises the primary judge's textual analysis of the Determination, but based largely on the proposition that the primary judge overlooked the "context" in which the Determination was made. Once Appeal Grounds 2 and 3 are rejected, those criticisms also fall away.

(1) The Text of the Determination

50 As to AS [58], Glencore does not identify any error in her Honour's textual analysis of clause 2.1, including its placement at the start of the document, the heading "scope" and her Honour's analysis of the word "includes". The only criticism is that the relevant words of the Determination "should be construed in the context of the Full Court's and High Court's reasons". As set out above, those reasons do not provide any reason to construe the Determination differently from the primary judge.

51 At AS [59], Glencore submits that the reference in clause 2.1 to vessels loading Glencore coal was inserted to limit the scope of the determined navigation service charge, rather than indicate that the determined charges could only be accessed together. However, the inclusion of those words is further confirmation that clause 2.1 is a complete statement of the scope of the Determination. As her Honour correctly found (J[79] – [80]), the reference in clause 2.1 to a vessel entering the Port precinct, and loading coal, indicates that both activities had to occur for the Determination to apply.

52 Glencore also refers to the Determination containing separate mechanisms for the setting and adjustment of the two charges (AS [60]). That is hardly surprising, in

circumstances where: (i) the wharfage charge and the navigation service charge arise under different provisions of the PMA Act; and (ii) the two charges followed different tracks for their calculation during the course of the arbitration. The wharfage charge was agreed at an early stage of the arbitration, and it was determined that the wharfage charge be indexed annually by CPI (clause 5.2, Blue 3:1050). The navigation service charge was far more complex to determine and its adjustment was similarly difficult, including both an annual true up process, and a five-yearly review process (clauses 7-8, Blue 3:1050). The separate mechanisms do not indicate that one can be accessed by Glencore without the other.

53 There was also no error in the primary judge's analysis of clause 10 of the Determination (AS [61]). Wharfage charge and navigation service charges being dealt with in the same invoice would, as the primary judge recognised, be a strong indication that one could not be accessed without the other (J[78]). However, the converse does not follow. It is unsurprising that they are separately invoiced in circumstances where the calculation of those charges is based on different matters (weight of the cargo for the wharfage charge and tonnage of the vessel in respect of the navigation service charge). In any event, separate components of what might be called an entire supply will frequently be separately invoiced, such as in an ordinary contract for working materials used by a builder where it could not seriously be suggested that separate invoicing reflecting the makeup of the charges would entitle the customer to take the work carried out by the builder without taking the materials, or vice versa.

(2) The BBM Methodology

54 As identified in paragraph 12 above, a further factor taken into account by the primary judge in preferring PNO's construction of the Determination, was that the Determination expressly referred to the building block model (referred as the **BBM**) in clause 4. The BBM was the method used to calculate the maximum price PNO could charge for access to the Service.

55 The Commission described the BBM as follows (Blue 1: 404):

> [T]he parties agreed to use the BBM to calculate the MAR [Maximum allowable revenue] that PNO is able to recover from the Navigation Services Charge and the Wharfage Charge for the Service.

56 The modelling was carried out on the basis that <u>the combination</u> of the charges under the Determination was set so that PNO could not recover an amount from the combination of the charges which was greater than the MAR. As her Honour correctly noted, in using the BBM to ascertain the MAR, "the amount that could …efficiently be imposed for an NSC took into account the amount that was likely to be received by PNO through the WC" (J[70]). Her Honour accepted PNO's submission that for the purposes of the arbitration, the parties agreed to set the wharfage charge at its then current level, then maintain the charge in real terms, and recover the balance of the MAR through the navigation service charge (J[74]).

57 Her Honour correctly concluded that the BBM which had been used by the Commission was a further indicator that the "determination contemplates the WC and NSC being paid in relation to one export of Glencore's coal; without the input of the WC, the calculation of the MAR could not have been determined for the provision of the Service" (J[76]).

58 Glencore's answer to this is that if Glencore accesses the wharfage charge under the Determination alone such that PNO might recover less than the calculated MAR, that this is of "no moment" because whether PNO recovers less than the calculated MAR depends upon what amount PNO has charged the vessel owner for the navigation service charge, which can be addressed by PNO increasing its scheduled rate of navigation service charges (applicable to vessels generally) (AS[67]).

59 But the whole point of the arbitration was to set a price for Glencore's access to the declared Service – not part of the Service. In making its determination the Commission was required to take into account, among other considerations, the pricing principles specified in s 44ZZCA: see s 44X. Those principles include that the regulated access prices should be set as to generate expected revenue for a regulated service that is at least sufficient to meet the efficient costs of providing access to the regulated service, and include a return on investment commensurate with the regulatory and commercial risks involved: s 44ZZCA(a). The purpose of the BBM methodology proposed by the parties, and adopted by the Commission, was to arrive at a price of access, comprising the two charges, that would achieve that statutory pricing principle.

G CONCLUSION

60 Glencore's appeal should be dismissed with costs.

27 October 2025

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Certification of Suitability for Publication

I, Bruce Llewellyn Lloyd, solicitor for the Respondent, certify pursuant to paragraph 27 of Practice Note No. SC CA 1 - Court of Appeal that the Respondent's written submissions dated 27 October 2025 are suitable for publication.

Signature of legal representative

Date: 27 October 2025