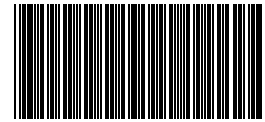




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Written Submissions

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

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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 - Reply submissions_31102025.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**

Appellant's Reply Submissions

A. INTRODUCTION

1. In its submissions of 27 October 2025 (RS), PNO contends that the primary judge's construction of the Determination,¹ which it embraces, was simply "*based on the text*", while Glencore's construction is not: RS[1]-[2]. This ignores AS[58]-[61], but it also ignores that the primary judge went beyond the text, by reading the word "*includes*" in cl 2.1 of the Determination as "*consists of*", giving that clause the same effect as if it had read: "*the scope of the determination [only] includes...*". On a literal reading of cl 2.1, it does not exhaustively define the scope of the Determination, because that is not the ordinary meaning of "*includes*". To make cl 2.1 exhaustive requires going beyond its text.
2. A focus on the text of the Determination alone is, at best, neutral for PNO. There are textual indications in favour of the conclusion that the Determination extends to the wharfage charge in isolation (AS[58]-[61]), which PNO seeks to diminish by reference to matters of context: see RS[52]-[53]. There are also textual indications that could suggest the navigation service charge and wharfage charge travel together (J[60]-[62]), but which take on a different meaning when considered in context: AS[58]-[61].
3. Simply, and as recognised by the authorities summarised at RS[4]-[5], the meaning of text cannot be divorced from its surrounding context.² Even PNO is ultimately caused to resort to three matters of context in seeking to justify the construction reached by the primary judge, each of which is addressed further below.
4. The one key matter of context that PNO avoids is the combination of ss 48, 50(4) and 61(4) of the PMA Act. These provisions make clear that the two charges are independent and do not travel together. They envisage that different persons will pay the charges: the "owner" of a vessel in the case of the navigation service charge, and the "owner" of cargo in the

¹ Defined terms in these submissions bear the same meaning as in Glencore's submissions of 29 September 2025 (AS).

² See, e.g., *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [83] (Edelman J, dissenting on other grounds); *Cherry v Steele-Park* (2017) 96 NSWLR 548 at [68]-[86] (Leeming JA, Gleeson and White JJA agreeing); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [78] (McHugh, Gummow, Kirby and Hayne JJ).

case of the wharfage charge. As the High Court found (*Glencore HCA* (2021) 274 CLR 565 at [108], [110] and [123]), the PMA Act is relevant to and delimits the scope of any dispute as to the terms of access to the Service. As addressed at AS[25], [44] and [47] and further below, this in turn informs the scope of the Determination. Given that the PMA Act treats the charges differently with different persons liable to pay, there is no logical reason why the Determination would then require both charges to travel together, by confining the scope of the wharfage charge to where Glencore is the “owner” of a vessel; a circumstance that bears no relevance to the liability under the PMA Act to pay the wharfage charge. This illogical outcome arises on the primary judge’s and PNO’s construction.

B. THE SCOPE OF THE DISPUTE BEFORE THE COMMISSION AND TRIBUNAL

5. The first matter of context PNO relies upon in aid of its (and the primary judge’s) construction is what was in dispute before the Commission and Tribunal: RS[11] and [16]-[26]. At RS[18], PNO submits that the dispute before the Commission was focussed upon the navigation service charge, with the wharfage charge merely “*a toehold*” for Glencore to access a determined navigation service charge. As with the primary judge’s finding to similar effect (J[65]-[66]), this is not supported by the record (see AS[17]), is inconsistent with the High Court’s understanding of the 2018 Determination (see below) and overlooks the key unchallenged findings of the Federal Court as to the scope of the Service and the circumstances in which Glencore was accessing, and could therefore arbitrate the terms of access to, the Service: see AS [25]-[32].
6. A critical matter of context, overlooked by PNO and the primary judge, is that the Commission (and Tribunal on remittal) was resolving an access dispute under s 44S of the CCA. An access dispute concerns where a person such as Glencore is “*unable to agree with the provider [of the Service] on one or more aspects of access to a declared service*”: s 44S(1) (emphasis added). Once an access dispute is before the Commission for resolution, the Commission can then “*deal with any matter relating to access by the third party to the service, including matters that were not the basis for the notification of the dispute*”: s 44V(2). Thus, and contrary to RS[59], a determination of an access dispute need not only deal with terms of access to the whole of a declared service, it can deal with “*any matter*” relating to access and any “*one or more aspects*” of the access.
7. In turn, and as PNO accepts (RS[29]-[31]), the Full Court made findings that the Service the subject of the Determination comprised the berths at which Glencore loads coal as well as the shipping channels: *Glencore FC* (2020) 280 FCR 194 at [153]. The Court also found

that Glencore accessed the Service whenever it loaded coal at a berth (and for which a wharfage charge arises), whether or not it also accessed the shipping channels (for which the navigation service charge arises): *ibid* at [157] and [159]; AS[30]-[32].

8. Thus, on the unchallenged findings of the Full Court, one of the “*aspects of access*” by Glencore to the Service, for which it could then notify an access dispute under s 44S of the CCA, was the wharfage charge. This was also a “*matter*” with which the Commission could deal in its Determination under s 44V, whether or not it had been raised by Glencore in its notification of an access dispute and independently from any other terms of access to the Service, including the navigation service charge. It is uncontroversial, in light of these findings, that the Commission could have determined a wharfage charge that was available to Glencore whenever it was liable to pay the wharfage charge, without Glencore also being liable to pay the navigation service charge. So much was recognised by the primary judge: J[66]. As addressed at AS[51]-[55] and further below, this is precisely what the Tribunal in fact did in setting the Determination on remittal.
9. Contrary to RS[32], the Full Court’s reasoning as to the Service being “*indivisible*” was not a finding that the Determination can only apply when Glencore is accessing the Service as a whole and liable to pay both charges. The point made by the Full Court was simply that, in accessing the Service by loading coal onto a vessel, Glencore was also accessing the shipping channels within the meaning of the Act because a vessel could not reach a berth to be loaded with coal without using the shipping channels: see AS[35]-[37]. This was a further basis on which the Court concluded that Glencore was then entitled to seek a determination as to the navigation service charge *in addition to* the wharfage charge. It was not a finding that sought to confine the scope of the Determination to circumstances when Glencore is liable to pay both charges only (and in any event, it was not a finding endorsed by the High Court: see AS[45]).
10. Once it is accepted that the Determination *could* have fixed the wharfage charge to be paid by Glencore even if it was not paying the navigation service charge, it is a logical step to conclude that the Determination in fact did so when the wharfage charge plainly formed part of the access dispute before the Commission and was fixed by the Commission as a result of that dispute. The text of the Determination is to be read in that context.
11. The primary judge (and PNO at RS[18]) overlooked this logical step on a misapprehension that the access dispute concerned the wharfage charge only when Glencore was also accessing the navigation service charge: see AS[16]-[22]. But that does not reconcile with

the record which shows that: Glencore specifically sought for the wharfage charge to be part of the access dispute to be determined, the Commission accepted that the wharfage charge formed part of the dispute and could be the subject of its determination, the parties reached an agreement on the wharfage charge during the course of the arbitration, the Commission then fixed the wharfage charge in the Determination, and the Tribunal on remittal had understood that the access dispute included the wharfage charge: AS[17]. In short, the wharfage charge was one of the “*matters*” relating to Glencore’s access to the Service in dispute which was to be resolved in the Determination.

12. The fact that the main focus of the parties before the Commission, Tribunal and courts was the navigation service charge (cf RS[18] and [29]) is a consequence of the wharfage charge having been agreed by the parties at an early stage of the process: J[21]-[22]. The little attention it received thereafter is not reflective of the dispute having been confined to access to the Service only when Glencore is liable to pay both the navigation service charge and wharfage charge: cf RS[21]-[24]. If Glencore accesses the Service whenever it is liable to pay the wharfage charge (as the Full Court found), it would be absurd for the determined terms of this aspect of its access to depend upon Glencore also being liable to pay for accessing other aspects of the Service, namely those associated with the navigation service charge. The Court would not lightly find that the Commission (and Tribunal on remittal) intended this absurd and unreasonable result: *Australian Broadcasting Corporation v Australian Performing Rights Associate Ltd* (1973) 129 CLR 99 at 109 (Gibbs J).
13. As to RS[21]-[22], Glencore’s submissions to the Commission focussed on the scope of the navigation service charge because it was operating on the assumption that the Commission had already accepted that the wharfage charge was within scope whenever Glencore’s coal was loaded onto vessels. That is clear from [9] of its submissions at Blue 1:223, in which Glencore stated: “*On the one hand, it is accepted [by the Commission] that the Wharfage Charge is within scope in respect of Glencore’s coal loaded onto vessels at the wharves*”. As addressed at AS[18], that was how Glencore read what became cl 2.1 of the Determination at that time, whereas PNO construed it differently.
14. Notably, the High Court also made this assumption. That is clear from its reasons at *Glencore HCA* (2021) 274 CLR 565 at [56]-[57], where the Court observed that the wharfage charge under the Determination “*was uncontroversial*” and “*remains uncontroversial*” and had been fixed “*in the course of the arbitration*”, while describing the controversy as instead concerning “*two respects*” of the navigation service charge only;

the first being the question of scope and the second being its amount. The Court again recognised (at [75]) that there was “*no dispute that, in respect of [Glencore’s] access to that part of the Service [concerned with the berths], Glencore was liable to pay the Wharfage Charge*”. It was on this assumption that the Court then analysed the issue of scope by reference to the navigation service charge only and Glencore’s “*right*” (but not obligation) to negotiate the navigation service charge whenever it was the “owner” of a vessel within the meaning of the PMA Act: see at [100]-[111].

15. Before the Tribunal in the first instance, Glencore did express the view that cl 2.1 of what was then the 2018 Determination could be construed (as PNO had done) as limiting the scope of the whole Determination (cf RS[44]), but that was the very basis of one of its complaints to the Tribunal. Contrary to RS[23]-[24], the premise of Glencore’s complaint to the Tribunal was that the wharfage charge was necessarily within the scope of the Determination regardless of Glencore’s relationship to any vessel. On that basis, it made no sense to then limit the scope of the Determination as a whole to where Glencore was an “owner” of the vessel (AS[20], Blue 2, 417 [4.10] and 625 [2.2]). Glencore even stated that the extent to which cl 2.1 limited the scope of the wharfage charge by reference to Glencore’s relationship to a vessel was “*presumably unintended*”: Blue 2, 517 [4.12].
16. At RS[26], PNO accepts that Glencore made clear before the Full Court that the Determination should include the wharfage charge whenever Glencore was the “owner” of cargo, but it wrongly states that this was a position made “*for the first time*”. As already observed, this was the position that Glencore assumed had been accepted before the Commission and about which it then complained to the Tribunal on an apprehension that cl 2.1 might be construed contrary to that assumption.
17. Contrary to RS[26], the Full Court did pick up this complaint by Glencore and found in Glencore’s favour on this very issue. Before the Full Court, Glencore submitted that the Service included the berths at which coal was loaded (contrary to what the Tribunal had found) and that, as a result, Glencore was “*accessing the Service*” and “*entitled to the determined wharfage and navigation charges ... whenever it is statutorily liable to pay those charges in accordance with s 48 and s 61 of the State Act*”: Blue 2, 873 [21]. It further submitted that “*[t]o the extent that the Tribunal purported to determine that the Wharfage Charge only applied if Glencore actually owned or chartered the vessel, its determination was misconceived and legally wrong*”: *ibid* [22].
18. It was these submissions which were picked up by the Full Court at [149], and where the

Court pointed out that the “*difficulty*” with the Tribunal’s approach to the scope of the 2018 Determination was that it then limited the Determination to “*circumstances where Glencore owns or demise charters vessels*”, which would then “*not only deprive Glencore of the determination*” as to the navigation service charge in other circumstances in which Glencore was still accessing that part of the Service, but “*also the [wharfage charge]*”.

19. The Full Court then (at [157]) dealt with the Tribunal’s rejection of Glencore’s complaint described at RS[23] and disagreed with the Tribunal’s finding. It found that the fact Glencore paid the wharfage charge for access to a berth meant that Glencore was accessing the Service (and therefore entitled to a determination on any of the terms of that access). The Full Court considered (at [157]) that this access “*is shown by the fact that the [wharfage charge] is covered by the Tribunal’s determination*” (emphasis added). The Court went on to state (at [157], emphases added):

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.

20. As addressed at AS[33] ff, the Court went on to then consider Glencore’s access to that part of the Service concerned with the shipping channels and the reasons why Glencore could benefit from a determined navigation service charge beyond circumstances where it was the actual owner or charterer of a vessel. But all of those Court’s findings were built upon the starting point, and assumption, that Glencore also accessed the Service merely by loading coal at a berth, for which it is liable to pay the wharfage charge, and as a result the wharfage charge is therefore regulated by the Determination. The statements of the Full Court quoted above indicate that it considered this was already the case on the text of the 2018 Determination (as the High Court also assumed, as set out above). There was no suggestion that the wharfage charge was tied to any relationship of Glencore’s with a vessel (and which is irrelevant to Glencore’s liability to pay the wharfage charge). To the contrary, the Full Court pointed out the “*difficulty*” with seeking to impose that connection.
21. It appears to be accepted by PNO that these findings were all undisturbed on appeal to the High Court (RS[37]). And contrary to RS[38], there is much in the High Court’s reasons and the positions of the parties before it that supports the conclusion that the scope of the Determination includes the wharfage charge when Glencore is liable to pay: AS[39]-[50].

C. THE REMITTAL TO THE TRIBUNAL

22. PNO is then left to resort to the second matter of context it relies upon, being that, even if the Full Court's reasons support the view that the Determination could set the wharfage charge when Glencore was not accessing the navigation service charge, this is not what the Determination said and Glencore ought to have requested the Tribunal to add other words to the Determination to make this clear: see RS[20], [26], [34]-[35] and [41]-[47]. This argument, however, ignores what occurred before the Tribunal on remittal and eschews a construction that has regard to the context of the Full and High Courts' reasons.
23. Contrary to RS[34], it is not Glencore's submission that the Full Court's reasons alone altered the written Determination. Rather, the Determination, the terms of which were made following the Full Court's reasons, are to be construed against the context of the Full Court's findings. This must be so because, as even PNO accepts (RS[42]), in issuing the Determination on remittal, the Tribunal intended to ensure that the Determination reflected both the findings of the Full Court that were undisturbed on appeal as well as the findings of the High Court. In that context, one would not readily construe the Determination in a manner that departed so fundamentally with core findings of the Full Court.
24. PNO also does not grapple with the significance of the limitation imposed on the Tribunal by the High Court's remittal: cf RS[41]. While the Tribunal did consider that it was bound to give effect to the reasons of both the Full Court and the High Court, when it came to reformulating cl 2 of the 2018 Determination, the Tribunal only dealt with the navigation service charge, consistent with the High Court's limited remittal and the High Court's assumption (at [57]) that the controversy over this clause was limited to the navigation service charge: Blue 3, 1061-62 [24]-[26]. In adopting the same text for cl 2 as in the 2018 Determination, the Tribunal on remittal described this clause as having "*determined that the navigation service charge would apply in respect of vessels using the shipping channel service in two circumstances ...*" (Blue 3, 1061 [25], emphases added).
25. Thus, the Tribunal plainly considered that the text of cl 2 was directed to the navigation service charge only. There is no suggestion in the Tribunal's reasons that it understood or intended for that clause to also govern the scope of the wharfage charge. That would have been inconsistent with the Tribunal's view that, in making the Determination on remittal, it had to also ensure that the Determination was consistent with the reasons of the Full Court, as varied by the High Court (if applicable): Blue 3, 1059 [17] and 1060 [21].
26. This also disposes of PNO's contention that Glencore could, but did not seek to, have the

terms of the Determination varied: cf RS[26], [35] and [43]. As addressed above, before the Commission, Glencore considered that the text of cl 2.1 of the 2018 Determination did not affect the wharfage charge. While it then had doubts before the Tribunal in the first instance (cf RS[44]), those doubts were removed in the reasons of the Full Court, High Court and the Tribunal on remittal making clear that it was only setting through cl 2 the circumstances in which the navigation service charge applied. In that context, Glencore was justifiably content with the same text being deployed, because read in context the word “includes” that was re-inserted into cl 2.1 by the Tribunal on remittal clearly indicated that the clause was concerned only with the scope of the navigation service charge.

D. THE BUILDING BLOCK MODEL

27. The final matter of context relied upon by PNO (and the primary judge) to construe the word “includes” as meaning “only includes” is the use of the wharfage charge as an input into the BBM: RS[12] and [54]-[59]; cf AS[62]-[67]. The error in RS[56] and the primary judge’s finding at J[70] is the suggestion that the navigation service charge was calculated by taking into account “*the amount that was likely to be received by PNO through the [wharfage charge]*” (emphasis added). The wharfage charge was inputted into the BBM not because it was “likely” to be received by PNO. Rather, it was because the price as fixed in the Determination reflected the efficient costs of that aspect of the Service with which the wharfage charge is concerned.
28. It must be recalled that what was being calculated through the BBM was a *maximum* price that PNO could justifiably charge for both aspects of the Service. What was a justifiable price, consistent with ss 44X and 44ZZCA(a) of the CCA, was one based on the “*efficient costs of providing access to the Service*”: Blue 1, 280. The Service, in turn, constituted two components: the berths at which coal was loaded and for which a wharfage charge was then imposed, and the shipping channels for which a navigation service charge was imposed. The methodology that the parties and Commission used to calculate what navigation service charge would allow for the recovery of the “*efficient costs*” of providing access to that part of the Service was, in simple terms, to take all of the relevant costs involved with providing the whole Service, calculated using the BBM, and to deduct therefrom the efficient costs of providing access to the berths as reflected in the fixed wharfage charge. This left only an amount that represented the efficient costs associated with providing access to the shipping channels: see Blue 1, 295.
29. This follows from the fact that the Commission considered the price agreed by the parties

for the wharfage charge “*reflects the parties’ assessment of the efficient costs of providing access to this aspect of the Service (sections 44X(1)(h) and 44ZZCA(a)(i))*”: Blue 1, 440. That being so, the balance of the costs that could justifiably be recovered through a navigation service charge would necessarily then constitute the efficient costs of providing access to the other aspect of the Service, being the shipping channels. This is the reason for the wharfage charge being an input into the BBM: cf RS[57]. It was a means of calculating a navigation service charge that separately reflected the “*efficient costs*” associated with the shipping channels only. Thus, there is no justification for construing the Determination as requiring both charges to always be paid by Glencore. If Glencore paid only the wharfage charge as fixed, that would be a payment of the efficient costs of access to that part of the Service (the berths). No pricing principle would be offended.

30. Moreover, and contrary to RS[59], the point of the arbitration was not to set “*a price*” for Glencore’s access to the *whole* of the Service, it was to resolve the terms of access to “*any aspect*” of the Service with the Commission able to deal with “*any matters*” relating to that access. As Jagot J observed, Glencore could access the Service “*in a number of different ways*”: *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* (2017) 350 ALR 552 at [50]. The point of the Determination was to resolve the terms of each and any of the ways in which Glencore accessed the Service.
31. The task for the Commission, it must be remembered, was to ultimately set a cap on what PNO could charge for the various aspects of the Service. That is, by definition, the MAR. It was not the task of the Commission to determine the price that PNO could and should charge. Whether or not PNO charged and then recovered the MAR depended upon what prices it fixed under the PMA Act, what other agreements it might reach under s 67 of that Act and whether or not Glencore would seek to rely on the Determination for any and all charges. What the Determination did ensure was that, whatever charges PNO may have fixed under the PMA Act, it could never charge Glencore an amount for the wharfage charge or the navigation service charge that exceeded what was justifiable for recovering the efficient costs of providing access to either or both aspects of the Service.

E. THE TEXT IN LIGHT OF THE CONTEXT

32. With the context of the Determination properly understood, PNO’s “textual” arguments fall away: cf RS[10], [13]-[14] and [50]-[53]. *First*, the text of cl 2 does not indicate that it prescribes the scope of the wharfage charge under the Determination. Contrary to RS[10], the heading of cl 2 is not “*scope of the determination*”, but only “*Scope*”. The

words “*scope of the determination*” appear in the body of cl 2.1 and are immediately followed by the word “*includes*”, not the words “*only includes*”. The matters listed in cl 2.1 are relevant only to circumstances giving rise to a liability to pay the navigation service charge. That is a further indication the clause speaks only to that charge.

33. *Secondly*, the further qualification in cl 2.1 that the scope extends to when Glencore is a relevant “owner” of a vessel “and” the vessel is to “load Glencore coal” limits the circumstances in which Glencore can access the navigation service charge, not the wharfage charge: cf RS[13] and [51]. That limitation arises because the relevant access by Glencore that entitled it to benefit from the declared Service and resolve an access dispute was that connected with its role in the downstream market of exporting coal: see *Glencore HCA* at [20] and [97]-[100]. This ensures that Glencore’s access to the navigation service charge is connected with the promotion of effective competition in upstream and downstream markets that use the infrastructure of the Port, and excludes Glencore’s ability to enter a new market (such as in chartering vessels) merely to benefit from the navigation service charge. That is all that these words are intended to achieve and do achieve. They have no bearing on whether cl 2.1 applies to limit the scope of the wharfage charge as well, because to be liable to pay the wharfage charge Glencore would necessarily be involved with the relevant downstream market for which it sought access to the Service.
34. *Thirdly*, the separate provisioning of the wharfage charge in the Determination and the separate invoicing requirements are not mere “neutral” factors: cf RS[14] and [52]-[53]. When cl 2.1 is construed in its proper context such that “*includes*” bears its ordinary inclusive meaning, cll 5 and 10.1 are the textual foundation for the Determination including within its scope the wharfage charge whenever Glencore is liable to pay the same. Glencore could not be invoiced for the wharfage charge under cl 10.1 at the price fixed in cl 5 unless it was the “owner” of cargo liable to pay those charges. The fact that the Determination separately fixes the wharfage charge and provides separately for its invoicing demonstrates that it is within the scope of the Determination, independently of whether or not Glencore is also liable to pay the navigation service charge.

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