AUSTRALIAN COMPETITION TRIBUNAL

Application by Port of Newcastle Operations Pty Ltd [2019] ACompT 1

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| Review from:  | The arbitration determination by the Australian Competition and Consumer Commission under section 44ZP of the *Competition and Consumer Act 2010* (Cth) in relation to an access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd |
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| File numbers: | ACT 2 of 2018ACT 3 of 2018 |
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| Tribunal: | **MIDDLETON J (PRESIDENT)****MR r F SHOGREN (MEMBER)****DR D R ABRAHAM (MEMBER)**  |
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| Date of Determination: | 30 October 2019 |
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| Catchwords: | **COMPETITION** – applications for review of the arbitration determination made by the Australian Competition and Consumer Commission in respect of access dispute between provider and user of a declared service – review to be conducted by way of ‘re-arbitration’ pursuant to s 44ZP of the Competition and Consumer Act 2010 (Cth) – where declared service is the right to access and use monopoly infrastructure assets at Port of Newcastle – where access dispute concerns quantum of charges levied for access and use of declared service and proper scope of application of such charges – how declared service to be interpreted and appropriate scope of application of arbitration determination – whether and how to account for contributions of service users in calculating regulated asset base – determination of projects that were the subject of contributions of service users – whether such projects would be undertaken by a hypothetical new entrant – determination of appropriate costs of such projects – determination of appropriate timeframe for such projects – consideration of impact of timeframe on interest – whether service provider able to recover costs of non-coal assets through arbitrated charges – whether to apply true-up for return on actual capital expenditure compared to return on forecast capital expenditure  |
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| Legislation: | *Competition and Consumer Act 2010* (Cth)*Competition Policy Reform Act* *1995* (Cth)*Ports and Maritime Administration Act 1995* (NSW)*Trade Practices Act 1976* (Cth)  |
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| Cases cited: | *BHP v National Competition Council* (2008) 236 CLR 145*East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229*Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* [2017] FCA 1330; (2017) 350 ALR 552*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124; (2017) 253 FCR 115  |
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IN THE AUSTRALIAN COMPETITION TRIBUNAL

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|  | ACT 2 of 2018 |
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| RE: | APPLICATION FOR REVIEW OF THE ARBITRATION DETERMINATION BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION UNDER SECTION 44ZP OF THE *COMPETITION AND CONSUMER ACT 2010* (CTH) IN RELATION TO AN ACCESS DISPUTE BETWEEN GLENCORE COAL ASSETS AUSTRALIA PTY LTD AND PORT OF NEWCASTLE OPERATIONS PTY LTD  |
| by: | PORT OF NEWCASTLE OPERATIONS PTY LTDApplicant |

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| tribunal: | MIDDLETON J (PRESIDENT)MR R F SHOGREN (MEMBER)DR D R ABRAHAM (MEMBER) |
| DATE OF DETERMINATION: | 30 October 2019 |

THE TRIBUNAL DETERMINES THAT:

The ACCC’s Final Determination made under s 44V of the *Competition and Consumer Act 2010* (Cth) dated 18 September 2018, be varied by deleting Clauses 2.1, 2.2 and 6.1 and replacing them as follows:

2.1 The scope of the determination is confined to the terms and conditions of access where Glencore owns or, either directly or by agent, charters a vessel that enters the Port precinct and loads Glencore coal.

2.2 For the avoidance of doubt, the determination does not apply to:

(a) the terms and conditions of access to apply in respect of vessels carrying coal that are not owned, or have not been chartered, by Glencore;

(b) the terms and conditions of access for vessels other than those calling at the coal terminals at the Port; and

(c) any charges imposed by PNO other than the Navigation Service Charge and the Wharfage Charge.

6.1 The Navigation Service Charge payable by Glencore to PNO in accordance with this determination will be $1.0058 as at 1 January 2018.

IN THE AUSTRALIAN COMPETITION TRIBUNAL

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|  | ACT 3 of 2018 |
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| RE: | APPLICATION FOR REVIEW OF THE ARBITRATION DETERMINATION BY THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION UNDER SECTION 44ZP OF THE *COMPETITION AND CONSUMER ACT 2010* (CTH) IN RELATION TO AN ACCESS DISPUTE BETWEEN GLENCORE COAL ASSETS AUSTRALIA PTY LTD AND PORT OF NEWCASTLE OPERATIONS PTY LTD  |
| BY: | GLENCORE COAL ASSETS AUSTRALIA PTY LTD Applicant |

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| TRIBUNAL: | MIDDLETON J (PRESIDENT)MR R F SHOGREN (MEMBER)DR D R ABRAHAM (MEMBER) |
| DATE OF DETERMINATION: | 30 october 2019 |

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# INTRODUCTION

1 The two applications before the Tribunal concern a dispute between Port of Newcastle Operations Pty Ltd (‘**PNO**’) and Glencore Coal Assets Australia Pty Ltd (‘**Glencore**’) regarding the terms and conditions of access to the Port of Newcastle (the ‘**Port**’).

2 PNO is the operator of the Port and Glencore is a user of the Port. PNO filed its application on 8 October 2018 (ACT 2 of 2018) and Glencore filed its application a day later on 9 October 2018 (ACT 3 of 2018).

3 The Port is subject to the access regime contained in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the ‘**CCA**’). Pursuant to that regime, and by Glencore’s notification dated 4 November 2016, the dispute between it and PNO was referred to the Australian Competition and Consumer Commission (the ‘**ACCC**’) for arbitration. As a result of that arbitration the ACCC determined the value of certain charges that PNO could levy on Glencore for access to the Port and the circumstances in which such arbitrated charges could be levied. The ACCC’s determination as to these matters was published in its Final Determination on 18 September 2018.

4 Each application calls on the Tribunal to review the Final Determination by conducting a ‘re-arbitration’ pursuant to s 44ZP. The Tribunal’s function in applications of this kind is not to identify error in the relevant arbitration determination but to re-arbitrate the dispute between access seeker and access provider based on the information, reports and things referred to in s 44ZZOAAA.

5 Whilst there was some disputation as to the material the Tribunal should consider in this re-arbitration, nothing turned upon this disputation in the Tribunal’s deliberations and its ultimate determination. Putting aside the report which Glencore asked the Tribunal to consider (to which we will return) there were a number of documents that were *not* taken into account by the ACCC, which are set out in an annexure to the ACCC’s submissions in each application, dated 5 April 2019. The Tribunal has not taken these documents into account, but as mentioned nothing turns on this for the purposes of the Tribunal’s deliberations and determination.

6 The Tribunal will be referring to the ACCC’s Draft and Final Determinations as a convenient way to address the issues raised in the re-arbitration. In doing so the Tribunal follows the approach of the parties, although the relevant materials and arguments were strictly set out in the Statements of Reasons provided with each Determination, not in the Determinations themselves. The Tribunal is still undertaking a re-arbitration and not a review or appeal of the ACCC’s Final Determination. However, just as the applications were presented to the Tribunal by the parties, the task of the Tribunal does not require it to ignore the reasoning of the ACCC. In fact a great deal of the reasoning and the Final Determination itself remained non-contentious.

7 For convenience’s sake, the ACCC’s Final Determination is annexed to these reasons as Annexure “A”. A document which identifies aspects of the Final Determination *not* in dispute, jointly prepared by the parties and the ACCC (at the request of the Tribunal), is annexed to these reasons in summary form as Annexure “B”.

# BACKGROUND

8 The Port is a major commercial shipping port and one of the largest coal export ports in the world. It is considered to be the only port from which it is commercially viable to export coal from the Hunter Valley coal fields in New South Wales (‘**NSW**’). The Hunter Valley coal industry and its associated supply chain is responsible for around 90% of NSW’s coal production and 40% of Australia’s total black coal production.

9 Glencore is the largest exporter by volume of coal from the Port. Approximately 85% of the coal mined by Glencore is exported to global markets including Japan, South Korea, Taiwan, China and Europe. Thermal coal exported from the Port to these destinations competes with coal exported from other countries such as Indonesia.

10 PNO has operated the Port since May 2014. Prior to this, the Port was operated by the State of NSW. In May 2014, the joint venture parents of PNO (Hastings Fund Management and China Merchants Group) acquired a 98 year lease from the NSW Government effectively privatising the Port’s assets. PNO is now jointly owned by The Infrastructure Fund (a wholesale investment fund under the trusteeship of Gardior Pty Ltd) and China Merchants Group. Under the terms of the lease, PNO has the power and authority to, amongst other things, fix and collect port charges pursuant to Pt 5 of the *Ports and Maritime Administration Act 1995* (NSW) (the ‘**PMAA**’). Two such charges are relevant to this access dispute: the Navigation Service Charge (the ‘**NSC**’) (which is payable in respect of general use by a vessel of the Port and its infrastructure) and the Wharfage Charge (which is payable in respect of the availability of a site at which stevedoring operations may be carried out). After it assumed the role of Port operator, PNO implemented a restructure of its charges with the effect that the price for coal ships using the Port increased by between 40% and 60% for some vessel types. The charges applied by PNO to Glencore (and other users of the Port) were as follows:

 Navigation Service Charge: $0.7286 per gross tonne in its 2015 port pricing schedule, and increased to $0.7553 per gross tonne in its 2018 port pricing schedule; and

 Wharfage Charge: $0.0746 per revenue tonne.

11 We observe that the NSC is applied by PNO at different rates to coal vessels, cruise vessels, and non-coal vessels (other than cruise vessels).

## Declaration of services at the Port

12 In the wake of PNO’s restructure of Port charges, Glencore made an application to the National Competition Council (‘**NCC**’) on 13 May 2015 for certain services at the Port to be ‘declared’ for the purposes of Part IIIA. The NCC issued its recommendation to the relevant Minister on 2 November 2015 which recommended the service not be declared on the grounds that it did not meet the requirement that declaration would promote a material increase in competition in at least one market other than the market for the service. The NCC was otherwise satisfied that all other criteria were met. On 8 January 2016, the Minister published his decision under s 44H(1) in which he decided not to declare the nominated service on the same basis as that recommended by the NCC.

13 On 29 January 2016, Glencore applied to the Tribunal under s 44K for review of the Minister’s decision. The Tribunal set aside the Minister’s decision in *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6, and on 16 June 2016 declared the following service:

*the provision of 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 (Port), by virtue of which vessels may enter the Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.*

(the ‘**Service**’)

14 The precise drafting of the description of the Service is important. It is a matter to which we will return later in these reasons.

## Notification and arbitration of the dispute

15 Following the declaration of the Service, Glencore made a series of attempts to negotiate with PNO in respect of the terms and conditions upon which Glencore could access the Port. No agreement was reached and on 4 November 2016, Glencore notified the ACCC under s 44S(1) of the existence of an access dispute in relation to the Service. In its notification to the ACCC, Glencore described the dispute as follows:

*Although PNO is currently providing access (and maintaining that it will always do so) the terms of access, in particular the navigation service charges for coal vessels, are unreasonable and Glencore is seeking to negotiate with PNO on reducing these charges to approximately their pre-privatisation levels (or pre-2015 levels as 2015 was the point at which PNO increased the charges, shortly after the Service was privatised and assets re-valued from $1.75 billion to $2.4 billion). Glencore submits that, at the very least, an economically efficient charge is likely to be significantly lower than the rates which are currently being applied by PNO.*

16 On 22 December 2016, the ACCC advised Glencore and PNO that:

(1) the pre-conditions for notification of an access dispute under s 44S had been met;

(2) an access dispute relating to the Service existed between Glencore and PNO; and

(3) the access dispute had been validly notified by Glencore.

17 The ACCC also established a ‘Commission’ for the purposes of the access dispute arbitration pursuant to ss 44U to 44ZNA of the CCA.

18 Between 22 December 2016 and 20 July 2018, the parties provided the ACCC with a considerable volume of information pertaining to the arbitration, and more specifically information to be used to determine appropriate regulated access prices for the Service.

## Judicial review of the notification of the dispute

19 On 9 October 2017, during the course of the arbitration, PNO filed proceedings against the ACCC and others in the Federal Court of Australia seeking judicial review in relation to the conduct of the ACCC’s arbitration. PNO and Glencore agreed to stay the arbitration while PNO’s challenge to the conduct of the arbitration was reviewed by the Court.

20 PNO claimed that the arbitration had not been validly commenced by the ACCC and that pre-conditions for notification of the access dispute had not been satisfied. On 9 November 2017, the Federal Court dismissed PNO’s application and found that the ACCC should be permitted to complete the arbitration process without interference from the Court: *Port of Newcastle Operations Pty Ltd v Australian Competition and Consumer Commission* [2017] FCA 1330; (2017) 350 ALR 552.

21 The arbitration resumed shortly after the Court’s judgment was handed down.

## The ACCC’s Draft Determination

22 On 20 July 2018, the ACCC published its draft determination (‘**Draft Determination**’) as required by s 44V(4), accompanied by a draft statement of reasons. PNO and Glencore were invited to make further submissions in light of the Draft Determination and did so. In its Draft Determination, the charges payable by Glencore as at 1 January 2018 on access to the Service within the scope of the determination were as follows:

 Navigation Service Charge: $0.4685 per gross tonne; and

 Wharfage Charge: $0.0746 per revenue tonne.

## The ACCC’s Final Determination

23 On 18 September 2018, the ACCC issued its Final Determination of the access dispute pursuant to s 44V(1)(b) along with a statement of reasons as required by s 44V(5), and an arbitration report. In its Final Determination, the charges payable by Glencore as at 1 January 2018 on access to the Service within the scope of the determination were as follows:

 Navigation Service Charge: $0.6075 per gross tonne (ie an increase of $0.1390 as compared to the Draft Determination); and

 Wharfage Charge: $0.0746 per revenue tonne (unchanged from the Draft Determination).

24 Relevantly, the scope of the Final Determination was limited to access to the Service:

(1) where Glencore, either directly or by agent, charters a vessel to enter the Port precinct and load Glencore coal; and

(2) where Glencore makes a representation to PNO of the kind referred to in s 48(4)(b) of the 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.

25 The ACCC determined that the Final Determination did not apply to:

(1) the terms and conditions of access in respect of vessels carrying coal which have not been chartered by Glencore or in respect of which Glencore has not made a representation of the kind referred to in s 48(4)(b) of the PMAA;

(2) the terms and conditions of access for vessels other than those calling at the coal terminals at the Port, and

(3) any charges imposed by PNO other than the NSC and the Wharfage Charge.

26 We will return to this defined scope and to the meaning of a representation of the kind referred to in s 48(4)(b) of the PMAA later in these reasons.

27 The Final Determination also provided for:

(1) ‘backdating’ provisions to the effect that the charges apply from the period starting 8 July 2016, being the date of declaration of the Service by the Tribunal as contemplated by s 44ZO(4)(b); and

(2) ‘five-year review’ provisions which contemplate a five-year review of the NSC involving a roll forward of the regulated asset base (the ‘**RAB**’) including actual capital expenditure which is incurred in the five-year period not funded by users (‘**Five-Year Review**’).

# LEGISLATIVE CONTEXT

## *Competition and Consumer Act 2010* (Cth)

28 Part IIIA of the CCA is concerned with third party access to certain ‘declared’ services such as the Port. In circumstances where the provider of a service and a user of a service cannot reach a commercial agreement on the terms and conditions upon which the user can access the service, either the user or the provider may notify the ACCC of an access dispute and request that the ACCC arbitrate. To this end, s 44S relevantly provides as follows:

*(1) If a third party is unable to agree with the provider on one or more aspects of access to a declared service, either the provider or the third party may notify the Commission in writing that an access dispute exists, but only to the extent that those aspects of access are not the subject of an access undertaking that is in operation in relation to the service.*

*(2) On receiving the notification, the Commission must give notice in writing of the access dispute to:*

*(a) the provider, if the third party notified the access dispute;*

*(b) the third party, if the provider notified the access dispute;*

*(c) any other person whom the Commission thinks might want to become a party to the arbitration.*

29 Section 44B contains the definition of ‘third party’ among other terms:

*“third party”, in relation to a service, means a person who wants access to the service or wants a change to some aspect of the person’s existing access to the service.*

30 Once a dispute has been notified to the ACCC, an arbitration is commenced. Relevantly, s 44U provides:

*The parties to the arbitration of an access dispute are:*

*(a) the provider;*

*(b) the third party;*

*(c) any other person who applies in writing to be made a party and is accepted by the Commission as having a sufficient interest.*

31 And further, s 44V relevantly provides:

*(1) Unless it terminates the arbitration under section 44Y, 44YA, 44ZZCB or 44ZZCBA, the Commission:*

*(a) must make a written final determination; …*

*on access by the third party to the service.*

*(2) A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:*

*(a) require the provider to provide access to the service by the third party;*

*(b) require the third party to accept, and pay for, access to the service;*

*(c) specify the terms and conditions of the third party’s access to the service;*

*(d) require the provider to extend the facility;*

*…*

*(2A) Without limiting paragraph (2)(d), a requirement referred to in that paragraph may do either or both of the following:*

*(a) require the provider to expand the capacity of the facility;*

*(b) require the provider to expand the geographical reach of the facility.*

*(3) A determination does not have to require the provider to provide access to the service by the third party.*

32 We should at this juncture comment on the operation of s 44V(2), which was relied upon by Glencore in support of its contention on the scope of the arbitration. In short, Glencore contended that the terms of s 44V(2) were such to permit a determination making Glencore’s terms of access available to persons who access facilities at a berth to load coal onto a vessel, regardless of whether that person is the owner or charterer of the vessel. The Tribunal does not accept the expansive operation of s 44V(2) as contended for by Glencore.

33 Access disputes within the context of Part IIIA are bilateral in nature. The consequence of the declaration of the Service was that a party (ie the person seeking access to the Service) had a right to negotiate with the provider of the Service. If they were unable to agree, then the party seeking access could notify the dispute to the ACCC. Access disputes are not intended to address rights of access by all users of a declared service. Further, the Final Determination under scrutiny in these applications does not deal with the *general* right of access by Glencore to the Port, but with the terms of access pertaining to that right of access already available. Glencore here is wanting a change to aspects of the existing access to the Service. The contest is thus as to the terms of the access already made available to Glencore, and relating to Glencore’s access as defined in the Service. Subsection 44V(2) allows the ACCC, in making a determination, some flexibility to deal with related matters to the access sought in Glencore’s notification. The inclusory matter mentioned in s 44V(2) suggests this by indicating matters, that were not the basis of notification of the dispute, which must nevertheless be related to the actual dispute between the parties as notified to the ACCC.

34 The provision in s 44V(2)(d), which deals with the provider extending the facility (including expanding its capacity), is within the scope of determining ‘access by a third party’. This is because it deals with the provider needing to act in connection with the circumstances relating to the particular third party, who notifies or who has been notified of the access dispute, which currently existed and which gave rise to the request for the ACCC to arbitrate.

35 In the present case, the Service consists of the provision of the right to access and use the shipping channel at the Port, by virtue of which vessels may enter the Port precinct, and load and unload at terminals within the Port precinct. The only circumstance in which Glencore could be said to be using the Service so defined is where it owns or, whether directly or by agent, charters a vessel to enter the Port precinct and load Glencore coal. We will return to this issue later in these reasons. However, it is important to appreciate that s 44V(2), whilst allowing for certain related matters to be dealt with by the ACCC that were not the basis for notification of the dispute, would not permit a change to the Service as defined and declared by the Tribunal on 16 June 2016.

36 As we have already observed, the applications before us call on the Tribunal to conduct a ‘re-arbitration’ of the access dispute. In this sense, the Tribunal is not required to identify any form of error in the Final Determination having regard to, for instance, the mandatory considerations the ACCC is required to take into account. That said, it is nevertheless helpful to outline the ACCC’s obligations when arbitrating disputes under Division 3 of Part IIIA, particularly as these are also relevant to our determination.

37 Section 44X sets out the matters that the ACCC must take into account in making final determinations in notified access disputes. At the time of the dispute being notified to the ACCC, it provided:

*(1) The Commission must take the following matters into account in making a final determination:*

*(aa) the objects of this Part;*

*(a) the legitimate business interests of the provider, and the provider’s investment in the facility;*

*(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);*

*(c) the interests of all persons who have rights to use the service;*

*(d) the direct costs of providing access to the service;*

*(e) the value to the provider of extensions whose cost is borne by someone else;*

*(ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;*

*(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;*

*(g) the economically efficient operation of the facility;*

*(h) the pricing principles specified in section 44ZZCA.*

*(2) The Commission may take into account any other matters that it thinks are relevant.*

38 We should observe that amendments have been made to the CCA since the time of notification to the ACCC, but the parties agreed that the amendments were of no significance to the dispute before the Tribunal.

39 Relevant to subsection (aa), the objects of Part IIIA are set out in s 44AA:

*(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and*

*(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

40 Relevant to subsection (h), s 44ZZCA sets out three pricing principles:

*The pricing principles relating to the price of access to a service are:*

*(a) that regulated access prices should:*

*(i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and*

*(ii) include a return on investment commensurate with the regulatory and commercial risks involved; and*

*(b) that the access price structures should:*

*(i) allow multi-part pricing and price discrimination when it aids efficiency; and*

*(ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and*

*(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.*

41 Also relevant to the ACCC’s role in arbitrations of access disputes are the statutory restrictions on final determinations. Section 44W provides that a determination of the ACCC has no effect if it would have any of the following effects:

*(a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user’s reasonably anticipated requirements, measured at the time when the dispute was notified;*

*(b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person’s actual requirements;*

*(c) depriving any person of a protected contractual right;*

*(d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility), without the consent of the provider;*

*(e) requiring the provider to bear some or all of the costs of extending the facility (including expanding the capacity of the facility and expanding the geographical reach of the facility);*

*(ea) requiring the provider to bear some or all of the costs of maintaining extensions of the facility (including expansions of the capacity of the facility and expansions of the geographical reach of the facility);*

*(f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.*

42 Separately, the Tribunal’s role in re-arbitrations of access disputes is set out in s 44ZP. Relevantly, that section provides:

*(3) A review by the Tribunal is a re-arbitration of the access dispute based on the information, reports and things referred to in section 44ZZOAA.*

*(4) For the purposes of the review, the Tribunal has the same powers as the Commission.*

*(5) The member of the Tribunal presiding at the review may require the Commission to give assistance for the purposes of the review.*

*…*

*(6) The Tribunal may either affirm or vary the Commission’s determination.*

43 Pursuant to s 44ZZOA, the Tribunal is required to make a decision within the ‘consideration period’. The consideration period is ordinarily a period of 180 days from the date of the application for review, but may be extended by written notice to the relevant Minister (see s 44ZZOA(7)), or extended in effect by agreement between the relevant parties (see s 44ZZOA(5)). The consideration period for the Tribunal’s determination of these applications is further addressed below.

44 Pursuant to s 44ZZOAA, the Tribunal must have regard to all of the information that the ACCC took into account in connection with the making of its Final Determination, as well as any information that the Tribunal has requested under the powers set out in s 44ZZOAAA(4) or anything done as mentioned in s 44ZP(5) or any information or report given to the Tribunal under s 44ZP(5A). We address s 44ZZOAAA(4) below in the context of an application made by Glencore for the Tribunal to request and consider additional information that was *not* taken into account by the ACCC in connection with the making of its Final Determination.

45 At the outset the Tribunal makes the following observations relating to these statutory provisions and their operation in these proceedings, particularly in relation to the important issue of ‘user contributions’ (to which we will return in more detail).

46 It is clear from the mandatory considerations that the Tribunal can and must have regard to a range of matters in a determination. The weight to be given to each matter is a question for the Tribunal depending on the circumstances before the Tribunal. To the extent mandatory considerations pull in different directions, again this is a matter the Tribunal needs to consider and undertake a balancing exercise. It is essentially an evaluative exercise.

47 Legitimate business interests of the provider are a factor to consider, and these need to be carefully considered and evaluated. This consideration is referred to expressly in s 44X(1)(a), the objects of Part IIIA (s 44AA) and the pricing principles (s 44ZZCA).

48 It is important (as one aspect to consider) that the price and terms of access should provide an incentive to a service provider to efficiently (and in a timely fashion) invest in maintaining and improving infrastructure necessary to provide facilities at the Port. Prices that are too low can lead to non-investment or delayed investment, or the non-provision of some infrastructure services.

49 The significance of this consideration is confirmed by the extrinsic materials to the *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth), which introduced the pricing principles. The Revised Explanatory Memorandum to that Bill notes (at [22.2]) that the pricing principles were introduced to address concerns that the potential for access regulation would deter investment in essential infrastructure, and that the pricing principles are intended to ensure that ‘the objects clause has more than just symbolic value, by providing effective market signals for the efficient use of existing resources and for future investment in infrastructure’. The Explanatory Memorandum goes on to explain (at [22.7]) that the pricing principle in s 44ZZCA(a)(ii) requires the ACCC to specifically factor in regulatory and commercial risks faced by service providers, to counter the perception that regulation favours service users:

*The reference to regulatory risk in Pricing Principle (a)(ii) is intended to refer to the perception that the exercise of regulatory discretion will be undertaken in a heavy-handed, arbitrary or uneven fashion. While such perceptions may deter investment in any dysfunctional market subject to regulation, regulatory risk takes on greater importance for infrastructure investors, due to the length of time and expense required for service providers to respond to changes in a market, perceptions that regulatory decisions tend to be biased in favour of service users rather than service providers/investors, the scale of investment in infrastructure and the sunk nature of the assets. Pricing Principle (a)(ii) requires regulators specifically to factor in regulatory and commercial risks in setting access prices. This may assist to address perceptions that regulatory bias favours service users.*

50 The other matter to recall is that regulation under Part IIIA is not an end in itself, but rather, the means of promoting effective competition in upstream and downstream markets. In *BHP v National Competition Council* (2008) 236 CLR 145, the High Court reviewed the background against which the *Competition Policy Reform Act* *1995* (Cth) (the ‘**1995 Act**’) introduced Part IIIA to the *Trade Practices Act 1976* (Cth) (the ‘**TPA**’). The Court quoted (at [13]) from the Second Reading Speech in the Senate on the Bill for the 1995 Act, where the Minister said:

*The bill inserts a new Part into the [TPA], to establish a legal regime to facilitate third parties obtaining access to the services of certain essential facilities of national significance. The notion underlying the regime is that access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets, such as electricity generation or gas production. Access to such facilities can be achieved if a person seeking access is successful in having the service ‘declared’ and then negotiates access with the service provider.*

51 Glencore already has access to the Port, and this Tribunal has previously reached the view that it was not satisfied that increased access would promote a material increase in competition in the coal export market, or any other dependent market (see *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [157]). These findings were made in the context of whether the service should be declared but are relevant to pricing and terms of access. For instance, there can be no competition-related justification to deduct $912.0 million from the optimised replacement cost (‘**ORC**’) for “user contributions” on the basis that the deduction will promote competition in related markets.

52 A number of other matters should be mentioned relating to the statutory provisions under consideration, particularly in respect of ‘user contributions’. As initial observations we make the following comments.

53 We do not see a deduction being made to the RAB for user contributions as consistent with allowing the Port to recover its efficient costs. Undoubtedly, the concepts of efficient costs and efficient operation appear in several provisions: ss 44X(1)(g), 44AA(a) and 44ZZCA(a)(i). However the efficient costs, pursuant to the methodology adopted by the ACCC, are those which a new entrant would incur, the depreciated ORC (‘**DORC**’) value. The concept of “efficiency” does not explain or justify any deduction of particular assets for historical reasons.

54 Subsection 44X(1)(e) provides that in making a determination the ACCC must take into account the value to the service provider of extensions whose cost is borne by someone else. The Tribunal takes the view this factor is directed at situations where the determination requires the provider to extend the facility (for example by extending a train line to a third party’s mine) and is not applicable here.

55 Then the question arises whether the deduction is justified as being in the interests of those who have a right to use the Service (s 44X(1)(c)) because it will ensure that users do not pay for the same assets twice: once through their initial investment and again through PNO’s charges. This presupposes, however, that the user has made an initial contribution with the expectation of receiving a future price benefit. In the present case, that assumption is not valid. However, we will return later to this issue in more detail.

## *Ports and Maritime Administration Act 1995* (NSW)

56 Part 5 of the PMAA governs the imposition of various port charges on either the owner of the vessel in which cargo is loaded or the owner of the cargo being loaded. Ordinarily, such charges are payable to the relevant port authority (see s 68), but by virtue of the 98 year lease arrangement, these charges are payable to PNO in the case of the Port.

57 As noted above, two charges are relevant to this access dispute: the NSC and the Wharfage Charge.

58 Section 50 of the PMAA relevantly provides for the imposition of the NSC in respect of the general use by a vessel of the Port and its infrastructure as follows:

*(1) A navigation service charge is payable in respect of the general use by a vessel of a designated port and its infrastructure…*

*(2) Unless the regulations otherwise provide, the charge:*

*(a) is payable on each entry by the vessel into any designated port, and*

*(b) is to be calculated by reference to the gross tonnage of the vessel*

*…*

*(4) A navigation service charge is payable by the owner of the vessel concerned.*

59 Section 61 of the PMAA also relevantly provides for the imposition of the Wharfage Charge in respect of the loading and unloading of cargo at the Port as follows:

*(1) A wharfage charge is payable in respect of the availability of a site at which stevedoring operations may be carried out.*

*…*

*(3) The charge is payable:*

*(a) in the case of cargo that is unloaded at the site—by the person who, immediately after it is unloaded, is the owner of the cargo, and*

*(b) in the case of cargo that is loaded at the site—by the person who, immediately before it is loaded, is the owner of the cargo.*

*(4) To the extent, however, that the charge is not paid by the person indicated in subsection (3) as liable for its payment, the charge is payable by the person who, at the time payment is demanded by the relevant port authority, is the owner of the cargo.*

60 Relevantly, s 67 of the PMAA provides as follows:

*(1) The relevant port authority may enter into an agreement with a person liable to pay any kind of charge under this Part.*

*(2) Such an agreement may make provision for or with respect to:*

*(a) fixing the amount of any charge payable by the person to the relevant port authority, and*

*(b) any other matter which the relevant port authority is permitted by or under this Part to determine in respect of the charge, and*

*(c) any right or privilege which by or under this Part accrues to the person liable to pay the charge, or which the relevant port authority may confer on the person.*

*(3) To the extent that provision is so made, the agreement displaces any determinations of the relevant port authority in relation to the charge or to the matter, right or privilege concerned.*

61 Importantly, the PMAA defines for the purposes of that Act the term ‘owner’ when used in the context of a vessel or cargo. In this respect, s 48 of the PMAA relevantly provides:

*(1) In this Act, owner of a vessel or cargo means (subject to this section) the person who owns the vessel or cargo.*

*(2) A reference in this Act to the owner of a vessel includes a reference to:*

*(a) a person registered as the vessel’s owner in the relevant authority under the marine legislation or the National law or other certificate of registry for the vessel, or*

*(b) a person who has chartered the vessel.*

*…*

*(4) A reference in this Act to the owner of a vessel or cargo includes a reference to any person who, whether on the person’s own behalf or on behalf of another:*

*(a) exercises any of the functions of the owner of the vessel or cargo, or*

*(b) represents to the relevant port authority that the person has those functions or accepts the obligation to exercise those functions.*

*…*

62 This section, and more specifically s 48(4)(b), formed part of the basis for the scope of the determination defined by the ACCC in its Final Determination, and is a topic of contention between PNO and Glencore in this access dispute.

63 Separately, Division 6A of the PMAA was introduced by amendments made on 26 November 2012. It allows the relevant port authority (PNO in the case of the Port) to levy on port users ‘infrastructure charges’ to fund investment in infrastructure projects such as the acquisition or development of land to be used as part of the port precinct, or the provision of services and facilities by the operator of the Port. As will be seen, this Division is relevant to one of the topics of contention raised in Glencore’s application regarding user contributions.

64 Finally, we mention cl 11 of the *Ports and Maritime Administration Regulation 2012* (NSW), which provides as follows relating to the responsibility of an ‘owner’ of a vessel to provide certain particulars to PNO relevant to the NSC:

*The owner of a vessel in respect of which a navigation service charge is payable must, at such time as the relevant port authority requires, furnish the relevant port authority with the following particulars:*

*(a) the owner’s name and address,*

*(b) the name, identifying particulars and relevant voyage number of the vessel,*

*(c) the gross tonnage of the vessel,*

*(d) the port in respect of which the navigation service charge is payable,*

*(e) the date on which, the time at which, and the purpose for which, the vessel entered the port,*

*(f) such other information with respect to payment of the navigation service charge as the relevant port authority reasonably requests.*

*Maximum penalty: 20 penalty units.*

# PRELIMINARY ISSUES

65 Before embarking on the parties’ submissions regarding the substantive aspects of the access dispute, it is appropriate to briefly address the two preliminary issues that arose as part of the case management of the applications before the Tribunal.

## Extension of the statutory timeframe for the Tribunal’s determination

66 As noted above, the Tribunal is statutorily required to make its determination on applications brought before it under Part IIIA within the ‘consideration period’, ordinarily a period of 180 days from the date of the applications save for the effect of any extensions of time or an agreement to disregard certain periods of time (see s 44ZZOA).

67 PNO’s application was made on 8 October 2018 and Glencore’s application was made a day later on 9 October 2018. In the absence of any extension of time or an agreement to disregard certain periods of time, the ordinary application of the consideration period would require the Tribunal to make its determination as early as 6 April 2019.

68 At the initial case management hearing of the applications, it became apparent that the hearing timetable agreed between the parties and the ACCC was such the applications would not – or rather could not, for a want of sufficient time for the parties and the ACCC to prepare – be heard by the Tribunal, much less decided by the Tribunal, prior to the date on which the Tribunal would be required to make and publish its determination. The parties and the ACCC subsequently gave further consideration to the most appropriate means by which to effectively extend the timeframe for the Tribunal’s determination on the applications to a date that afforded time for the applications to be heard and for the Tribunal to make its determination. Ultimately, it was considered that an agreement to ‘stop the clock’ pursuant to s 44ZZOA(5) was the most appropriate means.

69 On 2 April 2019, the Tribunal issued a direction to memorialise its agreement pursuant to that subsection with each of the parties and the ACCC. By that direction, it was agreed that the period between 2 April 2019 and 15 July 2019 would be disregarded for the purposes of calculating the consideration period. The effect of this agreement was that the Tribunal would be required to make its determination on the applications before it by as early as 20 July 2019.

70 Due to a number of factors, including the nature of the disputation between the parties and the complex issues that arose for determination, the Tribunal concluded that it would not be in a position to make its determination on the applications before it by that date. Accordingly, by notice dated 13 June 2019, the Tribunal advised the Treasurer, pursuant to s 44ZZOA(8) of the Act, that it would make its decision by 29 November 2019. In keeping with the requirements of that section, the Tribunal provided a copy of the notice to each of the parties and the ACCC and published a short form notice in *The Australian* newspaper. A copy of the notice to the Treasurer was also uploaded to the Tribunal’s website.

## Glencore’s application for the Tribunal to request further information

71 On 12 February 2019, Glencore made an application seeking that the Tribunal request additional information in the form of an expert report from Baggerman Associates, Marine Dredging Consultants, dated 12 February 2019 (the ‘**Baggerman Report**’).

72 Pursuant to s 44ZZOAAA(4) the Tribunal may request such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review under Part IIIA.

73 If so requested, that information must be considered by the Tribunal in addition to the information that the ACCC took into account (see s 44ZZOAA(a)(ii)), as noted above.

74 Glencore contended that the Baggerman Report should be requested (and included in the materials considered by the Tribunal) because it would assist the Tribunal to make a fully informed determination in relation to the costs of dredging. Specifically, it was claimed that the Baggerman Report would shed light on whether, as contended by Glencore, dredging of the entrance channel to the Port could be undertaken with modern dredging equipment alone, or whether, as contended by PNO, additional and expensive steps (specifically drilling and blasting pre-treatment) would need to be undertaken before dredging could occur.

75 On 27 February 2019, the Tribunal issued a memorandum to the parties and the ACCC which stated that it would refuse Glencore’s application, but that its reasons for doing so would be provided upon the publication of these reasons.

76 Before proceeding further on this topic, we should mention the way in which Glencore put its request, recalling this is a request for Glencore effectively to rely upon another expert report commissioned by it in respect of issues that were before the ACCC.

77 In support of its application, Glencore submitted:

*Access disputes under Part IIIA are difficult matters for access seekers as they face an asymmetry in obtaining data as to the relevant cost structures that the access provider enjoys. The Baggerman Report addresses a critical gap in the material before the ACCC. In Glencore’s submission, its consideration is essential to permit the Tribunal to make a fully informed determination of an important issue in this proceeding, namely whether, as contended by Glencore, dredging of the Entrance Channel to the Port could be undertaken with modern dredging equipment alone (as was done, for example, at Walker Shoal near Darwin) or, as argued by PNO, whether substantial additional costs for pre-treating hard rock with drilling and blasting should be included.*

78 At the outset, we do not accept that the Baggerman Report “addresses a critical gap” in the material before the ACCC. It supplements that material, but there is no critical gap. Further, the consideration of the Baggerman Report is not “essential” to permit the Tribunal to make the informed decision of the issue identified by Glencore. The Tribunal already has material on this topic on which it can make an informed decision.

79 In addition, the context in which it is sought to introduce the Baggerman Report is a factor to take into account.

80 In the lead up to the Draft Determination, Glencore, through its consultant engineers, Arup, contended that modern ‘Cutter Suction Dredgers’ (‘**CSDs**’) are capable of dredging of the entire Port, including the hardest rock located at the Entrance Channel (referred to as ‘dredging direct’). To support its opinion, Arup referred to the dredging of Walker Shoal in Darwin in 2014 where ‘rock with a greater strength to the Entrance of Newcastle was dredged direct by the CSD, Athena’.

81 PNO rejected this approach and, via its experts, AECOM, argued that the very hard rock at the Entrance Channel could not be dredged by CSDs and ‘would require the mobilisation of additional plant at significant cost’. AECOM also proffered the view that ‘[d]rilling and blasting then double handling with a TSHD [Trailer Suction Hopper Dredger] is also a much slower process than using a CSD’.

82 Glencore and PNO were also unable to agree on the volumes and types of material that were required to be dredged, particularly from the Entrance Channel.

83 In its Draft Determination, the ACCC accepted the position proposed by Arup:

*… [B]ased on the evidence before it, the Commission has concluded that Arup’s modelling provides a more robust approach to estimating the volume and type of material to be dredged. This extends to the UCS and RQD figures. The Commission also notes that Arup’s proposed methodology to dredging is based on what it submits has occurred in practice on at least one occasion such that it goes beyond a theoretical exercise. The Commission considers that these two factors suggest that the use of more advanced technology as proposed in Arup’s report is an appropriate assumption for the purposes of a DORC valuation for this arbitration. This also informs the Commission’s consideration of dredging costs below.*

84 In response to this finding, on 17 August 2018, PNO provided the ACCC with new expert material to explain why Arup’s proposed dredging methodology was impractical. This included material claiming that the sea conditions at the Port restricted the use of a CSD for much of the year and that the rock type and strengths at the Port were incomparable with those at Walker Shoal. The ACCC was critical of PNO, noting that it could have provided this information earlier in the arbitration as it was aware of Glencore’s position well before the Draft Determination. Nevertheless, the ACCC had regard to the further material.

85 Having received PNO’s additional material, on 17 August 2018, Glencore was required to provide any reply to the additional material from PNO within 10 days.

86 On 3 September 2018, Glencore provided the ACCC with a further report by Arup, responding to PNO’s additional material with as much information as it could obtain in the time available to it. That report included revised geological modelling for the Port but noted that the geotechnical data for Walker Shoal was the subject of confidentiality to a third party and thus could not be disclosed at that time. Arup also sought to address the claim that sea conditions at the Port were not suitable for the economic use of a CSD. Arup pointed out that smaller dredgers had been employed at the Port throughout its history and assessed the ‘operating envelope’ of newer, significantly larger CSDs.

87 In its Final Determination, the ACCC departed from the view it had expressed in its Draft Reasons and instead adopted the position argued by PNO: that pre-treatment of the rock with drilling and blasting was necessary. The ACCC took this view “specifically having had regard to the additional material submitted by the parties following the Draft Determination.”

88 In our determination of whether to receive and consider the Baggerman Report, a number of matters needed to be considered.

89 It is significant that the issues the Baggerman Report addressed were before the ACCC and well-known by the parties at least upon the delivery of the Draft Determination.

90 The Baggerman Report addressed the following questions:

(1) the extent to which the Entrance Channel at the Port could, as a practical matter and had it not already been dredged, be dredged today using a modern CSD, without a requirement for drilling and blasting pre-treatment; and

(2) to the extent that a significant portion of the Entrance Channel could be dredged by use of a CSD, the approximate total cost of dredging (including any necessary drilling and blasting pre-treatment).

91 In addressing these questions, Baggerman Associates:

(1) introduced background information regarding dredging technology, including CSDs and other methods such as drilling and blasting;

(2) considered the sea (wave) conditions in which modern CSDs can operate and considered independently collected data relating to the actual conditions experienced at the Entrance Channel over many years;

(3) considered the rock types and strengths that can be dredged by modern CSDs, analysed the geotechnical aspects of the rock at the Entrance Channel by reference to bore hole data, and compared them with rock conditions found at Walker Shoal – a project in which Baggerman Associates was intimately involved; and

(4) determined an economically appropriate work method for dredging the Entrance Channel and calculated the estimated costs of doing so. Reference was made to the volumes and geotechnical characteristics of the various materials to be removed, along with the specific production rates expected of modern dredging equipment operating at the Entrance Channel; and the real costs likely to be incurred in a commercial project.

92 It cannot be said that any of these questions or issues were only raised by the Draft Determination.

93 When on 17 August 2018, PNO lodged material in response to the Draft Determination, it included reports from Evers Consult on dredging and Akuna Dredging Solutions on dredging methodology and the assessment of hard rock at the Entrance Channel to the Port.

94 Then on 3 September 2018, when Glencore lodged its submissions in reply to PNO’s submission on 17 August 2018, that submission noted as follows:

*2. The PNO Submission repeats a number of arguments already addressed by Glencore in previous submissions made to the ACCC in this arbitration and, in particular, many of these arguments have been addressed in Glencore’s submission dated 17 August 2018. As such, Glencore does not seek to address each argument in the PNO Submission and instead maintains and refers to Glencore’s previous submissions in this matter, and in particular, its submissions to the ACCC dated 17 August 2018…*

*3. Enclosed with this submission is a report from Synergies Economic Consulting (Synergies Report) and a confidential report from Arup (Arup Report) which also respond to Direction 2 of the ACCC’s Direction.*

95 The Synergies report dated 3 September 2018 (referred to by Glencore) noted:

*After considering the suite of reports that PNO has submitted, they, while lengthy, introduce only limited new information. In many instances, PNO’s submission restates material from previous submissions, to which we have previously responded.*

96 We accept that it may have been difficult for Glencore to respond to the Draft Determination and material put forward by PNO on 17 August 2018. However, Glencore acted by 3 September 2018 in providing the ACCC with a further report from Arup on the material then obtained and available, and significantly did not request an extension of time to put further material before the ACCC. Presumably, Glencore considered it did not need to put further material before ACCC: after all, the Draft Determination on this issue was in its favour.

97 It was only upon its review of the Final Determination that Glencore wanted to rely on further material, as attested to in the affidavit of its solicitor (Mr Poddar) sworn 12 February 2019:

*15. Upon review of the Final Determination, I formed a view that the ACCC had relied on the Further PNO Material lodged on 17 August 2018 in response to the Draft Determination, and that Glencore had not had an adequate opportunity to address the matters which had impacted on the decisions reached by the ACCC in the Final Determination.*

*16. As such, the need for Glencore to seek to engage an expert to provide an expert report in response to the Evers Report and Akuna Report did not become apparent until after publication of the Final Determination on 15 September 2018.*

98 As Mr Poddar also attested, to address the PNO material (once the decision had been made to obtain more information after the Final Determination was published) would require time and resources to access information and obtain inputs from wave specialists.

99 Even accepting that Glencore could not reasonably have made available to the ACCC the Baggerman Report in the time limit it proposed, Glencore did not request an extension of time (presumably because it did not think it necessary) and, as we have indicated, the Baggerman Report covered issues well identified during the course of the arbitration before the Draft Determination was published.

100 Then it is important to recall the statutory context.

101 In a review of a final determination under s 44ZP, the Tribunal must only consider specified information. This primarily comprises the information the ACCC took into account in connection with the making of the determination to which the review relates, subject to the application of s 44ZZOAA.

102 There are a limited number of other categories of information or material that the Tribunal must have regard to that provide a potential avenue for “new” material (that is, material the ACCC did not take into account in making the Final Determination) to be considered as part of the review process. Each of these exceptions is only enlivened essentially by the request of the Tribunal.

103 In light of the above, the text and context make clear that s 44ZZOAA operates to limit the material that the Tribunal may consider in a review under s 44ZP. As such, to the extent “new” information is allowed into the review process it may only come via:

(1) a request from the presiding member of the Tribunal for the ACCC to give assistance to the Tribunal pursuant to s 44ZP(5);

(2) a request from the presiding member of the Tribunal by written notice requiring the ACCC to give information and to make reports for the purposes of the review pursuant to s 44ZP(5A);

(3) a request from the Tribunal for ‘such information that the Tribunal considers reasonable and appropriate for the purposes of making its decision on a review’ pursuant to s 44ZZOAAA(4).

104 In connection with s 44ZZOAAA(4), the Tribunal must positively form a view that any information it requests is ‘reasonable and appropriate’ for the purposes of making its decision.

105 As a starting proposition, where a party before the Tribunal urges it to request information that could reasonably have been made available to the ACCC before it made a final determination, it would not be reasonable for the Tribunal to request such information. This is because in order for the arbitration before the ACCC to have meaning, it is critical that the parties place before the ACCC all of the material that they consider to be relevant to the determination of the access dispute.

106 In considering making any request for information, the Tribunal should also keep firmly in mind that the CCA provides for the Tribunal to make a decision within 180 days from when the application for review is made: s 44ZZOA. Although this period can be lengthened, either by agreement of relevant persons or by the Tribunal extending the time in which it has to make a decision, it is an indication that the Tribunal should be able, and should endeavour, to make decisions within that period unless there are exceptional circumstances. In this way, the time period in which it is intended that a decision will be made (referred to as the ‘expected period’ or the ‘consideration period’) should inform whether any request for ‘new’ information is reasonable and appropriate.

107 Therefore, whether it is ‘reasonable and appropriate’ to request information will be necessarily informed by a consideration of the text and context of the ss 44ZZOAAA(4) and 44ZZOAA, including:

 that the primary material on which the review is to be based is that which was before the ACCC when it made the determination, which indicates that the review process before the ACCC is to be a meaningful one, and one in which the parties have every incentive to place the material that they consider to be relevant to the resolution of the dispute before the ACCC; and

 the limited timeframes in which the Tribunal has to make a decision, which indicates that it is not intended that there be any material broadening of the information that was before the ACCC when it made its final determination.

108 Finally, we observe that Glencore submitted that it is in the public interest for the Baggerman Report to be received and considered by the Tribunal because of its ‘broader relevance to future access issues’. Undoubtedly this may be so in that any determination by the Tribunal with the Baggerman Report before it will be made public and so will have some ‘precedent’ value in that regard; but this is but one consideration to be taken into account.

109 We accept that the Baggerman Report does contain information that is of general relevance to the declared services the subject of the arbitration.

110 At a high level, it goes to the optimised replacement cost of the assets required to provide the Service, which as will be seen, represents a significant battleground in this access dispute. However, relevance is not the only focus of the inquiry invited by s 44ZZOAAA(4). Indeed, we consider that requesting the Baggerman Report pursuant to that subsection, and at the behest of Glencore, would not be in keeping with the purpose of the statutory power, keeping in mind the Tribunal’s role as re-arbitrator in applications of this kind is constrained in the material it may consider in this role.

111 In respect of the specific subsection, the purpose of s 44ZZOAAA(4) is for the Tribunal to request information which it has identified as a means to fill a gap in its knowledge. It is not to be used to introduce new information – much less information which is the product of a commission of the party seeking to have it requested – that was not available at the time of the Final Determination. In this respect, the absence of any mechanism designed to be used by a party seeking to adduce new information for the Tribunal’s consideration is telling.

112 The ACCC recognised in its Final Determination that although the arbitration was between Glencore and PNO and conducted on the basis of the issues and materials put forward by the parties, the Final Determination and the supporting statement of reasons may be relevant to other users in their future negotiations with PNO. Similar observations could be made about this review process undertaken by the Tribunal. Nonetheless, the benefit of the Tribunal’s consideration of the information for any future negotiations or arbitrations needs to be balanced against the intent of the regime: that the parties to an arbitration put all relevant information before the ACCC as the original decision-maker.

113 Nevertheless, as we have already mentioned, this access dispute is bilateral in nature. It is open to the ACCC (and the Tribunal) to determine different terms and conditions of access to the Service for different users of the Service. We also mention that the Tribunal is not aware that any other user of the Service has notified any access dispute to the ACCC in relation to the Service.

114 Further, any pricing methodology adopted in one arbitration may change in a later arbitration, particularly if changes in future events suggest different assumptions may be appropriate to adopt in any pricing approach.

115 Therefore, whilst many considerations needed to be evaluated in determining whether it was reasonable and appropriate to request the Baggerman Report, in the end the proper approach was not to make any such request.

116 Finally, it bears noting that the Tribunal was aware of the contents of the Baggerman Report and its relevance to the issues between the parties in this re-arbitration at the time it made its decision on the issue. The Tribunal did not consider it was reasonable and appropriate to request the Baggerman Report in view of the ACCC process, the information already before the Tribunal and the statutory context of the Tribunal’s task. We also observe that assuming the Tribunal has the power to request the Baggerman Report now it has had a hearing and considered the submissions of the parties, the Tribunal would still not consider it reasonable and appropriate to request (on its own motion) the Baggerman Report for the same reasons. The Tribunal still considers that it does not require the Baggerman Report to assist it in the re-arbitration and does not consider that any request for such information is reasonable and appropriate for the purpose of making its determination in this re-arbitration.

# TOPICS OF CONTENTION

117 PNO and Glencore identified seven topics of contention for the Tribunal’s consideration. In support of their positions, each made a series of written submissions (received between 1 March 2019 and 15 April 2019), presented oral argument before the Tribunal over six days between 6 and 13 May 2019, and provided subsequent documentation to the Tribunal.

118 The ACCC also made submissions regarding each of the applications in accordance with the Tribunal’s directions dated 6 December 2018 and subsequent requests, which in effect required the ACCC to give assistance for the purposes of the Tribunal’s review pursuant to s 44ZP(5).

119 The seven topics of contention are summarised below:

(1) the scope of the Final Determination;

(2) the ACCC’s deduction of user contributions from the RAB;

(3) the costs of channel dredging;

(4) the inclusion in the RAB of $145 million for the importation of reclamation bunding material, and the associated issue of user-funded reclamation bunding works;

(5) the length of the construction period and the associated issue of the amount of interest during that construction period;

(6) whether prices should be permitted to be set at a higher level than what represents an appropriate return on coal-related assets; and

(7) the true-up in respect of forecasted capital expenditure, and any difference between forecast capex and actual capex within each five-year period.

# SCOPE OF THE FINAL DETERMINATION

120 As noted above, the ACCC concluded that the regulated prices set out in its Final Determination would only cover access to the Service:

(1) where Glencore, either directly or by agent, charters a vessel to enter the Port precinct and load Glencore coal; and

(2) where Glencore makes a representation to PNO of the kind referred to in s 48(4)(b) of the 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.

121 For ease of reference, we will refer to the above as the first and second *inclusive* limbs, as appropriate, of the determination scope adopted by the ACCC.

122 The ACCC also expressly excluded certain matters from the scope of its Final Determination. As noted above, these matters were:

(1) the terms and conditions of access in respect of vessels carrying coal which have not been chartered by Glencore or in respect of which Glencore has not made a representation of the kind referred to in s 48(4)(b) of the PMAA;

(2) the terms and conditions of access for vessels other than those calling at the coal terminals at the Port, and

(3) any charges imposed by PNO other than the NSC and the Wharfage Charge.

123 Again, for ease of reference, we will refer to the above as the first, second and third *exclusive* limbs, as appropriate, of the scope adopted by the ACCC.

124 PNO and Glencore both challenged this scope of the Final Determination. PNO contended it was too broad, while Glencore contended it was too narrow. Further, and as we will indicate later, the ACCC suggested a revised scope different from that in the Final Determination.

## PNO’s submissions

125 PNO’s primary contention was that, having regard to the provisions of Part IIIA, the ACCC had no statutory power to extend the scope of its Final Determination to the circumstances described in the second inclusive limb. In the alternative, PNO contended that even if it was within the ACCC’s statutory power (which PNO denied), the inclusion of the second inclusive limb would reveal a failure by the ACCC to have had proper regard to the mandatory considerations set out in Part IIIA.

126 PNO first turned to the description of the Service. It argued the focus of that description was access to and use of the Port’s shipping channels, including its berths. On PNO’s submission, that meant from both a practical perspective, and from the perspective of a proper construction of the description of the Service, that the only persons who could conceivably access or use the Service are persons that control a vessel (whether through direct ownership or a charter arrangement) for the purposes of loading or unloading at a terminal. This formed the foundation of PNO’s arguments against the ACCC’s adoption of the second inclusive limb in its determination scope.

127 PNO then referred to a number of provisions of Part IIIA including ss 44S, 44U, 44V, 44W, 44ZO(4), 44ZV, 44ZY and the definition of ‘third party’ in s 44B. PNO also referred the Tribunal to a decision of the Full Court of the Federal Court of Australia, which held that in the context of Part IIIA the word ‘access’ should be given its ordinary meaning, being ‘a right or ability to use a service’: *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124; (2017) 253 FCR 115. The net effect of the provisions and the authority referred to was said to be that the ACCC (and indeed the Tribunal) has statutory authority to make access dispute determinations *only* in respect of the ‘third party’ who sought to access the Service and who had notified the access dispute to the ACCC in accordance with the provisions of the CCA. In other words, the ACCC and the Tribunal only have the power to arbitrate a *bilateral* dispute between the relevant access provider and a (single) access seeker, not the power to arbitrate general terms of access between an access provider and all other persons.

128 PNO then referred to s 48 of the PMAA which among other things, deems for the purposes of that Act a person to be an ‘owner’ of a vessel, where that person makes a representation that it has the functions of the owner or accepts the obligations of the owner through its conduct. On PNO’s submission, the purpose of this deeming provision was to assist the relevant port authority in recovering charges for use of port infrastructure.

129 PNO submitted that the provisions of the PMAA (a State Act) were not intended to, and in any event could not for constitutional reasons, broaden the powers of the ACCC or the Tribunal to make access dispute determinations under the CCA (a Commonwealth Act). In other words, representations made pursuant to a section of the PMAA could not change who is in fact the owner of a vessel (when the word ‘owner’ is used in its ordinary sense) or alter the identity of the person who is in fact accessing or using the Service. It was on this basis that PNO contended that the second inclusive limb exceeded the ACCC’s power under Part IIIA to make a determination dealing only with the terms and conditions of access by the ‘third party’ that originally notified the dispute to the ACCC.

130 PNO also identified certain unintended and undesirable consequences of the second inclusive limb. First, by allowing Glencore to take advantage of the ACCC’s arbitrated prices whenever a s 48(4)(b) declaration was made, Glencore could engage in a form of arbitrage. For example, Glencore could represent to PNO that it had undertaken to pay another user’s fee for accessing the Service thereby permitting that user, who was not a party to the ACCC’s arbitration, to take advantage of the regulated prices PNO must provide to Glencore. Second, and relatedly, if the second inclusive limb of the ACCC’s determination scope were allowed to stand without intervention from the Tribunal, PNO would have no certainty as to whom it is required to provide Glencore’s arbitrated terms of access which, on PNO’s submissions, would, contrary to s 44X(1)(a) of Part IIIA, fail to take account of the service provider’s legitimate business interests. This consequence, as it was described by PNO, was also argued as illustrative that – in the alternative world where the ACCC had statutory power to extend the scope of its determination in the manner identified in the second inclusive limb (which PNO denies) – the ACCC had, in any case, made its determination beyond power because it had plainly not taken into account PNO’s legitimate business interests by extending the scope to the second inclusive limb.

## Glencore’s submissions

131 Glencore contended that the scope for the ACCC’s determination was unduly restrictive on account of the first exclusive limb which expressly excluded the arbitrated NSC from applying in respect of vessels carrying coal which have *not* been chartered by Glencore or in respect of which Glencore has *not* made a representation of the kind referred to in s 48(4)(b) of the PMAA. Glencore sought for the first exclusive limb to be excised from the scope.

132 Glencore advanced this contention from two fronts. On one front, Glencore argued that in order to fulfil the purpose of declared services regime in Part IIIA, the Tribunal needed to approach the matter from a practical and commercial point of view. This meant taking a ‘substance over form’ approach by ensuring that no matter the precise manner in which Glencore and its customers choose to contract with one another, the arbitrated terms and conditions of access to the Port should apply when Glencore is exporting its coal from the Port. On the other front, Glencore urged the Tribunal not to take an overly restrictive view of what the Service actually is. It argued that whenever Glencore uses the Port and its associated facilities and infrastructure to load coal onto a vessel for export, it was ‘using’ or ‘accessing’ part of the Service within the meaning of Part IIIA, and therefore should be able to enjoy its arbitrated prices.

133 Taking each of the fronts advanced by Glencore in turn, its primary submission in respect of the first was that because Glencore bears the ultimate economic cost of port charges in circumstances where vessels that are using the Service are chartered by Glencore’s customers and carrying Glencore’s coal, in order to effect the Final Determination, this practical and commercial reality should be recognised by excising the first exclusive limb, thereby extending the scope accordingly.

134 In support of this, Glencore submitted that its coal is sold to export customers under a number of different contract types, but that no matter the type, Glencore seeks to sell coal at the most competitive price on a delivered basis. In some cases, Glencore will arrange for the transporting vessel, and in other cases, the customer will make those arrangements. Glencore submitted that in either case, market structure and dynamics are such that Glencore bears the ultimate economic burden of the NSC imposed by PNO for use of the Service in the form of lower delivered coal prices. It claimed that for the Final Determination to only to apply to circumstances where Glencore arranges for the delivery of coal to its customers – and to ignore instances where Glencore’s customers make such arrangements – risks undermining the utility of the application of the Part IIIA regime to the Port.

135 On the second of Glencore’s two fronts, Glencore sought to emphasise that in circumstances where vessels using the Service are chartered by Glencore’s customers and carrying Glencore’s coal, Glencore is still a third party accessing or seeking access to the Service for the purposes of Part IIIA. It was said that by using or accessing the berthing boxes and the revetments associated with the berthing boxes for the purposes of loading coal into vessels, Glencore is accessing the Port’s infrastructure facilities which are a critical component of the Service as declared. Conversely, using the berthing boxes was not simply a matter of using an area of water otherwise unconnected with the Port infrastructure. In other words, once Glencore is using *part* of the Service (by loading coal onto vessels), the rest of the Service is incidental and likewise being used as a necessary incident of the loading of coal. Glencore willingly conceded that the relevant service is defined by the declaration of the Service, but pressed that it should be understood as including, consistent with the provisions of Part IIIA and in the context of the Tribunal’s determination in which it declared the Service, the facility and associated infrastructure by means of which the Service is provided.

136 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 prices in both the circumstances outlined in the ACCC’s determination scope, as well as in respect of vessels carrying coal which have not been chartered by Glencore or in respect of which Glencore has not made a representation of the kind referred to in s 48(4)(b) of the PMAA.

137 Glencore then proceeded to advance its first alternative submission, which we briefly canvassed above: that even if Glencore is not a user or access seeker of the Service when it loads its coal onto vessels at the terminal by virtue of s 44V(2), Glencore is still utilising the Service by using facilities which depend on the berthing box infrastructure. Glencore argued that the effect of this subsection was to open up any other matters relating to access such that, once it is accepted that Glencore is using certain facilities to load its coal onto vessels, and those facilities are supported by the berthing box facilities (which are, on Glencore’s submissions, expressly included within the Service), it follows that Glencore is a user of the Service whenever it is loading its coal onto vessels at the Port.

138 Glencore then proceeded to advance its second alternative submission. Glencore began by observing that under the ACCC’s scope, PNO must charge the NSC at the regulated price when Glencore is the owner or charterer of the vessel transporting Glencore’s coal but may charge a *higher* unregulated NSC when someone else is the owner or charterer of the vessel transporting Glencore’s coal. Glencore then referred to the pricing principle found in s 44ZZCA(b)(i), which must be taken into account by the ACCC by virtue of s 44X(1)(h):

*that the access price structures should … allow multi-part pricing and price discrimination when it aids efficiency …*

139 Glencore then submitted that the sort of price discrimination brought about by the ACCC’s scope, and more specifically the first exclusive limb of that scope, was not the sort that aided ‘efficiency’ as required under the pricing principle in s 44ZZCA(b)(i).

140 Finally, Glencore made a submission directly in respect of s 48(4) of the PMAA. It contended that s 48(4) of the PMAA served as a useful mechanism to determine in what circumstances a person is accessing the Service. It was submitted that both when a formal representation is made pursuant to that section, and even when no such representation is made but Glencore is loading its coal onto another person’s vessel (with the implicit authority to do so, lest the tort of trespass be committed by Glencore against the ship owner), it is apparent that Glencore is using or accessing (within the meaning of Part IIIA) the Service. On that basis, Glencore contended that the ACCC was right to include the second inclusive limb as part of its defined scope.

## ACCC’s submissions

141 In its written submissions, the ACCC responded to the PNO and Glencore challenges to the scope of the Final Determination.

142 In respect of PNO’s submissions, the ACCC contended that the imposition of legal liability to pay for a service is a strong indicator that the service is or will be supplied to that person, or is at least for their benefit. On this account, when Glencore makes a representation of the kind referred to in s 48(4)(b) – thereby making itself liable to pay the NSC – this suggests that Glencore is a user of the Service. The ACCC also dismissed PNO’s concerns about the implications of preserving the second inclusive limb of the determination scope. On the risk of creating an arbitrage opportunity, the ACCC submitted that the concern was overstated because it only applies where the representation is made in order for a vessel to enter the Port to load Glencore coal, meaning it only applies where Glencore coal is loaded. The ACCC considered it was unlikely that Glencore would deploy its potential arbitrage opportunity to grant its coal export competitors what would be, in essence, a reduction to those exporters’ cost base. On the spectre of there being uncertainty as to whom PNO would be required to offer Glencore’s arbitrated prices, the ACCC dismissed this on the basis that PNO would presumably be in a position to know when another person makes a representation of the kind referred to in s 48(4)(b) and therefore the circumstances in which Glencore will be considered to have made such a representation.

143 However, the ACCC did at the hearing endorse PNO’s characterisation of the Service. Counsel for the ACCC said that the Service did not itself directly involve the loading and unloading of coal – it involved the accessing of the shipping channels and berths, a purpose of which was the loading and unloading of coal. Counsel for the ACCC also expressed support for PNO’s view that the Service, being relevantly described as ‘the right to access and use the shipping channels (including berths next to the wharves as part of the channels)’ did not strictly include use of or access to the wharves.

144 In respect of Glencore’s submissions, the ACCC took issue with Glencore’s assessment that the determination scope would permit PNO to engage in price discrimination between economically identical transactions, that is, transactions for the sale of coal that are identical save for who of either the vendor or customer arranges for the transportation of the coal. The ACCC denied that the scope permitted such price discrimination and that such transactions are in any case economically identical. The ACCC contended that s 44ZZCA, which contains the pricing principle referred to by Glencore, only ever prevents price discrimination where a price falls within a determination. So to that extent, alleging price discrimination between a regulated price (which, as is apparent, falls within a determination) and an unregulated price (which falls outside of a determination) is circular.

145 The ACCC also dismissed Glencore’s reliance on its liability to pay the Wharfage Charge as demonstrative of it using the Service. Counsel for the ACCC clarified that the question of whether or not the Wharfage Charge (and thereby the use of ‘sites’ for which it is levied) falls within the Service was not a live issue before the ACCC. Rather, before the ACCC, the parties had provided an agreed model of charges and the Wharfage Charge was fixed (that is to say, agreed).

146 Separately, at the hearing before the Tribunal, the ACCC stated that, on further reflection, certain amendments should be made to clarify, but not substantively change, the meaning of the first inclusive limb of the determination scope. In response to this indication the Tribunal invited the ACCC to set out its proposed amendments to the scope, and it did so by a separate written document provided to the Tribunal following the hearing. That document explained that the ACCC considered the following amendments to clause 2 of its Final Determination were appropriate:

*2.1 The scope of the determination ~~includes~~is confined to the terms and conditions of access:*

*a. where Glencore owns or, either directly or by agent, charters a vessel ~~to~~that enters the Port precinct and loads Glencore coal, and / or*

*b. where Glencore falls within the extended definition of “owner of a vessel”~~makes a representation to PNO of the kind referred to~~ in section 48(4)~~(b)~~ of the* Ports and Maritime Administration Act 1995 *(****the PMAA****) ~~that is has the functions of the owner of a vessel, or accepts the obligation to exercise those functions, in order to~~in respect of a vessel entering and using the Port ~~precinct and~~in order to load Glencore Coal~~.~~, as a consequence of which Glencore:*

*(i) is liable to pay the navigation service charge under section 50(4) of the PMAA; and*

*(ii) as a person liable to pay that charge, has the authority under section 67 of the PMAA to negotiate with the relevant port authority with respect to: fixing the amount of any charge payable by the person to the relevant port authority, and any other matter which the relevant port authority is permitted by or under Part 5 of the PMAA to determine in respect of the charge, and any right or privilege which by or under Part 5 of the PMAA accrues to the person liable to pay the charge, or which the relevant port authority may confer on the person.*

*2.2 For the avoidance of doubt, the determination does not apply to:*

*~~a. the terms and conditions of access to apply in respect of vessels carrying coal that have not been chartered by Glencore or in respect of which Glencore has not made a representation of the kind referred to in section 48(4)(b) of the PMAA,~~*

*~~b~~a. terms and conditions of access for vessels other than those calling at the coal terminals at the Port, and*

*~~c~~b any charges imposed by PNO other than the Navigation Service Charge and the Wharfage Charge.*

147 Counsel for the ACCC claimed that redrafting the scope in this manner would assist in making clear that whenever a person falls into the definition of ‘owner’ under the PMAA, then the determination applies.

## Consideration

148 Each of PNO, Glencore and the ACCC were in agreement that in determining the appropriate scope for the application of the determination, the starting point is the description of the Service, as declared by the Tribunal on 16 June 2016. We agree. To repeat it, the Service declared by the Tribunal on that date was:

*the provision of 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 (Port), by virtue of which vessels may enter the Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.*

149 Put simply, the debate between the parties and the ACCC regarding the scope of the determination is resolved by answering the question what it means to access or use the Service. No one suggested the phrase ‘right to’ altered or impacted on the proper construction of the Service. PNO says that to use or access the Service means to navigate the shipping channels of the Port. Because of this, only a person controlling or in charge of a vessel is able to use or access the Service, which means that Glencore is only using or accessing the Service when it owns or charters a vessel to transport its coal. On the contrary, Glencore says that to use or access the Service means using *any* part of facilities or infrastructure of the Port, including loading of Glencore coal onto a ship. In reaching this view, Glencore relies on the language which follows ‘by virtue of which’ and say that the activity of loading and unloading at relevant terminals is so central to the economic exercise that is the subject of the Service declaration, that to construct the Service in any other way would be unduly narrow. On the back of this approach, Glencore says that it is accessing or using the Service whenever it loads its coal on vessels (regardless of who controls them) because it uses or accesses part of the Port infrastructure to do so.

150 Looking first to the terms of the Service, the primary focus of the declaration is on ‘the provision of the right to access and use the shipping channels’. The parenthetical language that follows is inclusive: ‘(including berths next to the wharves as part of the channels)’. It helps to clarify, almost in a ‘for the avoidance of doubt’ fashion, that the ‘right to access and use the shipping channels’ is not limited to the thoroughfares of those shipping channels which are used by vessels to navigate the Port. In other words, when reference is made to the shipping channels, it extends to the areas of those shipping channels that lie adjacent to the wharves.

151 However, the crux of debate between PNO and Glencore as to the scope of the Service lies in the meaning given to the connecting phrase ‘by virtue of which’. In the Tribunal’s view, this connecting phrase describes the *function of the shipping channels* (as was contended by PNO), not the *purpose of the Service* (as was contended by Glencore). When one, as an exercise in interpretive analysis, substitutes ‘by virtue of which’ with other synonymous connecting phrases in the context of the description of the Service, such as ‘as a result of which’ or ‘through which’ or ‘by reason of which’, the language that follows (‘vessels may enter the Port precinct and load and unload at relevant terminals…’) strikes the reader as secondary to the primary thrust of the description of the Service, being access and use of the shipping channels. On our view, it describes the function of such access and use of the shipping channels. Glencore’s construction requires a reading which substitutes ‘by virtue of which’ with ‘in order for’ and replaces the modal verb ‘may’ with the preposition ‘to’. The effect of Glencore’s construction is to qualify access and use of the shipping channels by reference to the apparent purpose of such access and use, being to load and unload at relevant terminals. In this sense, Glencore calls for a construction whereby the words which follow ‘by virtue of which’ work to expand the meaning of the words which precede it. We do not consider this to be the correct manner in which to interpret the Service from a textual perspective, and favour PNO’s construction as a result.

152 Looking second to the context of the declaration of the Service, PNO submitted in reply that notwithstanding the clear textual support for its interpretation in the definition of the Service, further support could be found in considering the original application made by Glencore for the Service to be declared. That document, dated 13 May 2015, made a series of references to the NSC (which, as already mentioned, is levied on the ‘owner’ within the meaning of the PMAA) and that otherwise placed the shipping channels as the physical infrastructure that is being used and accessed at the centre of Glencore’s application:

*The Council has previously found that Australian shipping channels are natural monopolies in the certification of the Victorian Access Regime for Commercial Shipping Channels…*

*…*

*Access to the shipping channels at the Port of Newcastle is a natural “bottleneck” monopoly that it is submitted should be subject to Pt IIIA.*

*…*

*The uncertainty of future pricing for accessing the shipping channels also affects the competitive dynamics in operations in shipping and cargo.*

*…*

*The facilities used to provide the Service are the shipping channels and vessel berth areas (as described above) identified in the plan attached…*

*…*

*A navigation service charge is payable by the owner of a vessel or cargo in respect of the Service…*

*…*

*The Applicant appreciates that the current increase in navigation service charges may appear marginal in terms of initial percentages given the significant costs involved in large scale coal exports…*

153 Whilst certainly not decisive, we agree with PNO’s submission that these passages illustrate that the focus of Glencore’s initial application was on the shipping channels and the need to access those shipping channels by vessels. If, on the contrary, the focus of Glencore’s application and the Service as declared was *not* on the shipping channels and their use by vessels, a peculiar situation could arise whereby both the loader of the coal and the person in control of the transporting vessel could each amount to a ‘third party’ under Part IIIA. If that were so, both could claim to be using or accessing the same Service, which could give rise to circumstances where there is confusion as to which arbitrated terms of access to apply. An example was given by PNO to illustrate the point: assume that one of Glencore’s customers, which has chartered its own vessel to pick up Glencore’s coal from the Port, and assume further that that customer wants to negotiate terms and conditions of access with PNO that permit the customer to obtain preferential berth treatment. In that scenario, Glencore would advise its customer that Glencore has already arbitrated terms of access with PNO, and the customer would have no independent right to negotiate (and arbitrate, if need be) with PNO directly. The effect of this would be that Glencore’s arbitrated terms of access would bind other potential users of the Port so long as Glencore’s coal was being shipped.

154 We should also indicate that for the reasons identified by PNO in its submissions and set out above, even if there was the power to determine the scope as defined by the ACCC or Glencore, the Tribunal considers it inappropriate and not consistent with the purpose of a declaration of a service under Part IIIA.

155 We should also mention that the revised scope put forward by the ACCC during the hearing before the Tribunal and referred to above does not address the submissions raised by PNO. It also introduces a further uncertainty as to how PNO would determine whether Glencore exercises any of the functions of the owner of the vessel within the meaning of s 48(4)(a) of the PMAA. Therefore, even if the ACCC could have so defined the scope as it did, the Tribunal would now vary the scope in line with the reasons advanced by PNO.

156 Finally, as to Glencore’s argument that its responsibility for paying various charges (including the Wharfage Charge) indicated that Glencore was an access seeker, no matter the precise circumstances of who chartered the vessel upon which coal was loaded, the Tribunal considers this to amount to ‘letting the tail wag the dog’. It is of little significance who is liable to pay, for instance, the Wharfage Charge. That is merely the product of the terms of the PMAA and the pricing schedule issued by PNO from time to time. The Wharfage Charge relates to different services and facilities, and reflects the level of facilities and services provided at a particular berth – such as berthing boxes, site offices, wharf sheets, pavements and worker amenities. On their own, the requirement to pay says nothing about whether or not the payee of a charge has access to and is the user of the Service. This must be determined in the context of the Part IIIA and the actual service declared thereunder. The only thing that matters in this respect is whether the use of certain infrastructure at the Port – whether it be the shipping channels, the berths, the wharves, or ‘sites’ within the meaning of the PMAA – equates to access and use of the Service.

157 With this is mind it becomes apparent that there is no significance at all to be drawn from the fact that the Wharfage Charge (for instance) is levied on Glencore when it occupies sites at the Port under the provisions of the PMAA.

158 In light of the above reasoning, we consider the scope of the application of the determination should be confined to where Glencore is the actual owner of the vessel, or either directly or by its agent charters a vessel that enters the Port precinct and loads Glencore coal. This is the access and use of the shipping channels that is properly the subject matter of the access dispute between PNO and Glencore, and the physical infrastructure that is being accessed and used.

# USER CONTRIBUTIONS

159 We have already touched upon this important area of the dispute before the Tribunal. Before setting out each of the parties’ submissions on the topic of user contributions, it is first necessary to explain the approach used by the ACCC in calculating the value of the assets required to provide the Service.

## Overview of the calculation of the DORC

160 Part IIIA does not mandate a particular pricing model to be applied when calculating charges that a service provider can charge users for accessing a declared service.

161 In the present case, the ACCC calculated the appropriate charges for the Service using a Building Block Model (‘**BBM**’) produced by the parties to the arbitration with contents substantially agreed between them. Specifically, the parties agreed to use a modified version of the Australian Energy Regulator’s publicly available Post-Tax Revenue Model (‘**PTRM**’). As described by the ACCC in its Final Determination, the BBM is a ‘widely-recognised and relatively standard regulatory pricing model’. It is used to assess the maximum allowed revenue (the ‘**MAR**’) of a provider of a declared service as being equal to the sum of underlying components (or building blocks) consisting of:

(1) the return on capital (based on the value of the regulated asset base (‘**RAB**’) and the weighted average cost of capital (‘**WACC**’));

(2) the return of capital (or depreciation);

(3) the operating expenditure; and

(4) tax and various other components.

162 In order to determine the RAB, the parties agreed for the ACCC to use the DORC methodology to value the assets required to provide the Service. A DORC valuation uses optimised replacement cost as its starting point. In essence, in assessing ORC one asks: *what would be the cost of replacing the asset using the latest technology and methods of construction, and a design which is optimised to construct the asset and provide the required service in the most efficient way possible?* To calculate the DORC, the ORC is adjusted to reflect the remaining useful life of the asset (in this case, the Port).

163 The rationale for using the DORC methodology is that it is thought to mimic the pricing of a competitive market for the purposes of promoting competition in a related market. In a competitive market, incumbent firms are constrained by the threat of new entry to charge no more than the minimum efficient cost of their production. If any incumbent firm charges excessive prices, a new efficient operator can enter the market and replace the higher priced incumbent. Although the provider of a declared service is unlikely to face actual entry, its costs should not exceed the costs that would be incurred by an efficient hypothetical entrant. It is assumed that the hypothetical new entrant would build a competing facility in the most cost-efficient and optimised manner possible (or else itself be replaced by a more efficient rival), and seek to recover its costs and return on investment on that basis.

164 In the case of the Port, and indeed in all cases, the application of the DORC methodology is a hypothetical exercise. A new entrant would not be able to build a competing facility to the Port, and in any case, the Port was not built with the latest technology and was not optimised in the manner conceived of by the DORC methodology. The methodology serves as a mere tool to calculate the RAB which is used as part of the BBM to arrive at the appropriate access charges for the Service.

165 Using the DORC methodology, the ACCC calculated the optimised cost of replacing the Port, as at 1 January 2018, to be $2,169.5 million.

166 Having calculated the optimised costs of replacing the Port, the ACCC then adjusted that figure downwards to take account of five instances in which improvements to the Port (specifically various dredging projects) had been funded or undertaken by third parties. The rationale for excluding the value of these projects from the asset base of the Port (or any other declared service) is that the relevant service provider should not be permitted to generate revenue from parts of an asset for which it was not responsible or did not pay. As a result of this exercise, the ACCC deducted $912.0 million from ORC. This reduced figure was used, together with an assessment of the remaining useful life of the port assets, to calculate the DORC. That, together with the other inputs, was then used to calculate the MAR, from which the access charges for the Service were derived. As a result of the deduction of the identified user contributions, PNO could not obtain any revenue in respect of approximately 42% of the value of assets of the Port.

167 Before canvassing the submissions put to the Tribunal, it is useful to go into greater detail as to what the ACCC decided in respect of the deduction of user contributions and the approach that it adopted.

## What the ACCC decided and its approach

168 As explained earlier in these reasons, the ACCC set the NSC so as to recover the maximum allowed revenue, and it set the MAR by using an agreed modified version of the Australian Energy Regulator’s PTRM. A key building block in the PTRM is the RAB, valued at DORC.

169 In its Final Determination, the ACCC wrote:

*The parties have agreed to the use of a DORC methodology for the initial valuation of assets required to provide the Service, with depreciation to be assessed on a straight line over the useful life of the asset.*

*The asset value is an important input to the BBM as it informs the calculation for return on capital and depreciation. As such, the asset value will directly affect the MAR and, ultimately, prices.*

*The DORC methodology involves valuing an asset at the cost of replacing it with a technologically modern equivalent asset (****MEA****) that is:*

* *optimised’ to provide the required service in the most efficient way possible*
* *adjusted to reflect the remaining useful life of the ass*et.

*Given the agreement between the parties, the Commission adopts the DORC methodology for the purposes of this arbitration. The Commission notes that there are several approaches that can be taken for the valuation of assets, and the DORC methodology is among the methods used by various regulators.*

*As discussed below, the DORC methodology values assets at the costs of a hypothetical efficient entrant to the market who will optimise the use of, operation of and investment in the asset. That is, it corresponds to the efficient costs of replacing the existing infrastructure with their modern equivalent to supply a given quantity and quality of output as would be expected in a perfectly contestable market.*

*The Commission therefore considers the use of the DORC methodology for valuing assets that then form the initial asset base contributes to ensuring that prices reflect efficient costs (sections 44X(1)(h) and 44ZZCA(a)(i)) while also ensuring that PNO is able to earn an appropriate return on its investment (sections 44X(1)(h) and 44ZZCA(a)(ii)). This is in the legitimate business interests of PNO (section 44X(1)(a)) and is also in the interests of those who have a right to use the Service (section 44X(1)(c)). This is also consistent with promoting the economically efficient operation of, use of and investment in in the facility (the objectives of Part IIIA and also having regard to section 44X(1)(g)).*

170 In the arbitration before the ACCC, PNO and Glencore each submitted estimates of DORC prepared by their respective consultants, AECOM and Arup.

171 Glencore argued that the value of user funded or user contributed assets should be deducted from the DORC value to establish PNO’s initial RAB. PNO opposed this deduction. The ACCC ultimately made the deductions sought by Glencore and that is the decision in dispute in this re-arbitration.

172 The amount that the ACCC deducted was $912.0 million, reducing the ORC by 42 per cent from $2,169.5 million to $1,257.6 million. Although other costs are recovered through the MAR, the relatively large share of capital costs meant that this had the effect of reducing arbitrated NSC by almost 40 per cent from the level that would otherwise have arisen.

173 Before the ACCC, the parties identified the projects undertaken by State and non-State entities at the Port. These were set out by the ACCC in Table 22 of its Final Determination:



174 In its Final Determination the ACCC stated relevantly:

 User funded capital contributions should be recognised and deducted from the DORC value that is used to establish PNO’s initial RAB and to calculate prices to ensure that PNO is able to reasonably recover its efficient costs.

 PNO’s efficient costs for the provision of the Service do not include capital costs that have been funded by users. Additionally, including user contributions in PNO’s initial RAB would result in users paying for the same assets twice: once through their initial investment and again through PNO’s charges: see Final Determination, page 130.

 In order for any adjustment for user funded contributions to be considered, there needs to be information showing a commercial agreement between the service provider and the contributor of funds.

 Alternatively, there needs to be sufficient information demonstrating the nature of user funded works undertaken, including any identifiable value of the user funded capital contributions. It was the latter that was predominantly presented to the ACCC as evidence of the nature of user funded contributions in the course of the arbitration: see Final Determination, page 130.

 In order for any adjustment to be considered, user funded contributions must be identified in the form of capital assets included in the asset base that are the subject of the DORC valuation (ie they are PNO’s owned and leased assets).

 The ACCC accepts Glencore’s submission that user funded or combined user and State funded contributions to assets have increased port capacity. The port assets Glencore claims are subject to user funded contributions (channels and berth boxes, riverwalls and revetments) continue to provide value to users in perpetuity.

 The ACCC disagrees with one of the principles identified by PNO that ‘bygones should be bygones’ in relation to the history of the construction of the assets. The ACCC is of the view that asset costs that have already been funded by users cannot reasonably be said to form part of the costs to PNO for providing the Service, and users should not bear those costs again for using the Service.

 Therefore, the ACCC considers that the DORC value used to establish PNO’s initial RAB should be adjusted to reflect user funded contributions to assets. This is in the interests of those who have a right to use the Service (s 44X(1)(c)) and also takes into account the value to PNO of extensions where the cost has been borne by users (s 44X(1)(e)). However, the size of the adjustment is also informed by consideration of the other issues raised by PNO and Glencore in relation to any mitigating factors and also estimation approaches.

175 We make an initial observation about the ACCC’s statements in the Final Determination. Nowhere in its reasoning with respect to user contributions did the ACCC use the term “monopoly profits”. The ACCC repeatedly stated that deducting user contributions is necessary to prevent users paying twice. The Final Determination only refers to monopoly profits once, when the ACCC discusses Section 44X(1)(a), which provides that in making a final determination the ACCC must take into account the legitimate business interests of the service provider. It commented that “[t]his includes allowing PNO ‘…to recover the costs of efficient investment in the facility, including having regard to its binding contractual obligations and relevant commercial risk’. This approach does not extend to PNO receiving compensation for loss of any ‘monopoly profits’.”

176 However, the ACCC did consider certain ‘mitigating factors’ raised by PNO.

177 First, PNO had argued that in the past the State made major contributions to each user funded project, such as environmental planning approvals. PNO also argued that numerous benefits accrued to users, such as not paying the State for the material dredged from the State’s landholdings that was subsequently used in their own works.

178 On this point, the ACCC agreed with Glencore that any costs incurred by the State in planning, facilitating and accommodating user funded capital would be captured in the ‘pre-adjusted’ DORC value. This is because both users and the service provider would incur the same overhead costs in the construction of assets they have funded, and such overhead costs are included in the DORC value. The ACCC did not accept that there is a direct connection between benefits accruing to users as a result of not having to pay the State for dredged material and the user funded amounts.

179 Second, PNO had argued that historical user funded contributions that are excluded from the DORC value should be balanced against the Port’s past economic losses, and when balanced against such losses no adjustment is required. PNO had also claimed that the value of the contributions had already been returned in the form of past low prices and no further adjustments are justified.

180 In response to this point, while the ACCC acknowledged that PNO had presented information showing that there had been historical losses, the ACCC did not accept that there was a direct connection between past losses of the Port operators and owners with the user funded amounts. In particular, the ACCC concluded that it had not been presented with evidence that the State intended to recover any past losses through future prices. The ACCC did not consider it appropriate to form a judgment in relation to the past decisions of the Port operators and owners, including about their pricing policy. The ACCC considered that governments have many competing objectives, which may mean that profit maximisation or cost recovery are not always the priority, and that, by contrast, there is a clear case that users would expect a future pricing benefit in instances where they have contributed to the cost of the asset, and would most certainly not expect to pay for the same assets twice.

181 Third, PNO argued before the ACCC that it is only Glencore’s contributions that are relevant for the consideration of any adjustment to the DORC to determine the prices charged to Glencore, and that Glencore had not made any such contributions.

182 In response to this point, the ACCC considered it to be an incorrect approach: the existence *per se* of user funded assets in the DORC valuation, not the source of the user funding, informs the adjustment. PNO’s initial RAB needed to reflect its efficient costs for providing the Service. This necessarily excluded any capital costs funded by users, regardless of the identity of the contributor and the amount of their contribution.

## Submissions to the Tribunal

### PNO

183 We give a brief overview of the approach taken by PNO before detailing some specific matters by reference to the Final Determination.

184 PNO contended that the ACCC miscarried its statutory task in making any deductions of the value of user contributions from the asset base of the Port.

185 Relying on the decision in *Re East Australian Pipeline Ltd* [2004] ATPR 42-006 at [18], cited with approval in *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229, [27], PNO described the DORC methodology as a forward-looking methodology in the sense that it considers the replacement cost of the asset using modern technology under modern conditions.

186 PNO then referred to the ACCC’s justification of its approach. In its Draft Determination (no equivalent section in the Final Determination was referred to, but this approach has been argued before the Tribunal), the ACCC stated that:

*an efficient entrant as assumed under the DORC framework would seek to avoid any capital cost it need not incur for the provision of the service, which would include any capital costs that were funded by users – regardless of the identity of the contributor and the amount of their contribution.*

187 PNO claimed that, in fact, there was no basis to conclude that a hypothetical entrant seeking to replace the Port (as is assumed under the DORC methodology) could reasonably avoid the costs the ACCC had excluded. The only basis on which the user contributions could be deducted from the asset base is by having regard to historical considerations which are irrelevant to the forward-looking quantification exercise required by the DORC valuation. Moreover, the ACCC also did not explain why user contributions are relevant to the DORC assessment but other historical matters, such as historical losses incurred by the Port, were not.

188 PNO submitted that to apply a DORC methodology, but to adjust it by reference to historical considerations such as actual user contributions in the past, would amount to applying a ‘blended’ approach of the sort denounced by the High Court in *East Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229. PNO went on to submit that there was no legislative support for the ‘blended’ approach adopted by the ACCC. Specifically, if the ACCC’s determination meant that PNO would not be permitted to generate revenue from 42% of the assets over which it acquired a 98 year lease, that determination would not have properly taken into account PNO’s legitimate business interests. PNO also rejected the ACCC’s stated bases for finding that the deduction of the value of user contributions from the DORC would enhance competition in upstream and downstream markets.

189 Consistent with the approach taken in other regulatory pricing decisions, PNO accepted that the value of user contributions should be deducted in circumstances where those users made capital contributions with the express intent of obtaining future price benefits. However, on its submission, none of the evidence supported a finding that users’ capital contributions were made with the promise or expectation that their contributions would be reflected in future prices, and that meant that the contributions ought not to be deducted from the RAB upon which PNO may generate revenues.

190 In the alternative, PNO submitted that even if the evidence was sufficient to establish an expectation that user contributions would be recognised in future prices, those contributions were not made by Glencore and so it has no legitimate expectation that the value of the contributions would be reflected in its access prices.

191 We now look to specific matters that require our attention.

192 PNO submitted that the ACCC calculated the DORC in an orthodox manner, but that having done so, it proceeded to adjust the DORC by reference to historical considerations which PNO regarded as improper. PNO couched some of its criticism of the ACCC’s decision, to adjust the DORC value, in terms of what costs a hypothetical new entrant would incur in building an optimised replacement port. It said that the ACCC had not explained why it made such an adjustment.

193 The ACCC’s Draft Determination had said that an efficient entrant, as assumed under the DORC framework, would seek to avoid any capital cost it need not incur in the provision of the Service, which would include any capital costs that were funded by others. On this, PNO argued that the whole purpose is to calculate what it would cost to replace a facility and that such an exercise would be defeated if it were assumed that a hypothetical new entrant could avoid certain costs.

194 As we have alluded to already, PNO submitted that both the ACCC and Glencore were incorrect to assert, as a general proposition, that in a competitive market a service provider could not charge a user for assets that the user (or any user) had funded, without the threat of being displaced by an efficient entrant. Instead, PNO submitted that, in actual fact, if a person were to provide a competitive service, that person would need to build the whole of the facility, equivalent to the facility used by PNO to provide the Service. In other words, in order to constrain PNO, the rival facility would have to be of the same quality as the PNO facility, and a rival could not constrain PNO by building just some parts of the facility (ie those parts which were not the subject of some user funding or contribution).

195 In its submissions, PNO pointed out that the present case was not one where the provider of the Service does not own or control the whole facility, or is not entitled (either pursuant to statute or contract) to charge for the use of some part of the facility. On the contrary, in this case PNO leases the whole facility, and is not subject to any constraint (other than the application of Part IIIA itself) in charging Glencore for access to the entire facility, and each part thereof. XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXX XXXXXXXXXXXXX XX XXX XXXXX XXXX.

196 PNO contended that the large deduction made by the ACCC for user contributions would deprive it of its ability to make a proper return on the investment it has made in the Port. That investment included paying for the long-term lease of the assets that were the subject of the ACCC’s deduction and were leased without adjustment for any obligation not to seek a return on these assets (because there is no such obligation). To make such a deduction would be, on PNO’s view, inconsistent with having regard to its legitimate business interests. It would mean that Glencore, which has no interest in the assets in question and made no contribution to them, would be free to obtain access to 42% of the assets free of charge (and well below the competitive price), whilst PNO which acquired these assets for value and with no notice of any prior entitlement to them, is forced to make them available without charge. That result, it was said, would not promote competition in any market: it would lead to fewer coal shipments and would have a chilling effect on investment and the incentive to acquire such assets. That, it was contended, was not an outcome that would be in keeping with the objects of Part IIIA.

197 In response to the ACCC’s justification (that the deduction is consistent with allowing the Port to recover its efficient costs), PNO contended that the efficient costs, pursuant to the methodology adopted by the ACCC, are those which a new entrant would incur; in other words, the DORC value.

198 To recap, PNO submitted that the approach of the ACCC and Glencore confuses historical costs and forward-looking costs. Unless it is a new asset, an asset such as a port would usually represent the work of different construction activities with different technologies over time, in a way that would not be replicated if the Port was constructed afresh. The DORC methodology, it was said, involves a hypothetical exercise rather than a modelling of steps in fact taken: steps funded by a user might not be taken at all, or in the same way, if the Port was reconstructed again as the DORC methodology assumes. PNO contended that the efficient replacement cost is likely to involve a hypothetical construction of the Port, as a whole, in a way that departs in significant respects from the way in which the Port was originally constructed. Though it is possible to undertake a historical analysis, or a forward-looking hypothetical analysis, it is not appropriate to mix the two PNO says.

199 The ACCC also sought to justify its approach by reference to s 44X(1)(e), which provides that in making a final determination the ACCC must take into account the value to the service provider of extensions whose cost is borne by someone else. However, PNO contended that the ACCC’s reliance on this factor was misplaced. This factor, it was said, was directed at situations where the determination requires the provider to extend the facility (for example by extending a train line to a third party’s mine): s 44V(2).

200 The ACCC also justified the deduction as being in the interests of those who have a right to use the Service (s 44X(1)(c)) because it will ensure that users do not pay for the same assets twice: once through their initial investment and again through PNO’s charges. PNO submitted, however, that this presupposes that the user has made an initial contribution with the expectation of receiving a future price benefit and in the present case, in respect of Glencore, that assumption is not made out.

201 In relation to this last point, PNO referred to decisions by the Queensland Competition Authority (‘**QCA**’). The gravamen of PNO’s argument is that the QCA set out principles for the treatment of user contributions, and that the ACCC should have followed the QCA’s approach but did not.

202 The QCA, responding to a direction by the Premier and Treasurer, assessed certain matters relating to gazetted prices for channel and river irrigators receiving water infrastructure services, provided by SunWater within the Burdekin River Irrigation Area. Part of that investigation involved user contributions. The QCA:

(1) noted that there is no legal requirement for the Queensland Government to recognise any payments as capital contributions;

(2) concluded that the Scheme should be viewed as an integrated development with payments from many sources contributing towards its overall capital cost;

(3) found that available evidence indicates that there was an understanding within the Queensland Government, and an expectation on behalf of irrigators, that irrigators’ payments for land, water and cane assignments were intended as an offset against the capital costs of the Scheme, and that this would be taken into account in future price setting;

(4) accordingly, considered that payments for the land, water and cane assignments should be recognised as capital contributions; and

(5) considered that prices should not include a return on these capital contributions, as this would represent an unwarranted impost on growers.

203 Summarising its conclusions, the QCA considered that a capital payment should be regarded as a capital contribution if it was the intention and expectation, of the relevant parties at the time, that the capital payment would be recognized for pricing purposes. Furthermore, a capital contribution should be recognized for pricing purposes unless past price reductions have fully compensated the contributor for the contribution, or the asset towards which the contribution was made has been consumed.

204 The QCA also recommended that, once recognised, users’ capital contributions should be included in the capital base for the purpose of determining prices, with rebates incorporated in the prices for relevant users, equivalent to the return on capital. This pricing methodology was preferred to the alternative of excluding the capital contribution from the regulated asset base of the entity, for the purposes of calculating prices.

205 In arguing that the ACCC had failed to apply these or any similar principles, PNO stated that the ACCC had instead proceeded on the erroneous basis that it is sufficient to show:

*a commercial agreement between the service provider and the contributor of the funds [or] [a]lternatively there needs to be sufficient information demonstrating that nature of user funded works undertaken, including any identifiable value of the user funded capital contributions.*

206 PNO then made the following propositions by reference to principles applied by the QCA.

207 First, that it was common ground that there is no record of any agreement that capital contributions would be recognised in future price reductions.

208 Second, consistent with the absence of any agreement, the historical records did not support a finding that any of the dredging works were undertaken in the expectation that the parties’ contributions would be recognised in future price setting.

209 Third, the parties who contributed to the dredging projects received benefits at the time. These benefits included the ability to use larger, more efficient vessels, access to clean dredging spoil used in land reclamation to construct terminals, connection between the shipping channel and the terminals, and assistance in the form of pre-construction activities and coordination (including the State obtaining the necessary development approvals). The ACCC considered that any costs incurred by the State in planning, facilitating and accommodating user funded capital would be captured in the ‘pre-adjusted’ DORC value. In response, PNO argued that the deduction made by the ACCC already included these costs and, more fundamentally, the ACCC had failed to grapple with the significance of these contributions – the fact that contributors received an immediate *quid* *pro quo* benefit is a reason not to infer that the works were completed with the expectation of a future pricing benefit.

210 Fourth, PNO contended that during the period in which the dredging works were undertaken, the Port did not earn normal commercial returns from access fees. To demonstrate this, PNO analysed the annual accounts for the Newcastle Port Corporation and the Maritime Services Board (‘**MSB**’) over the 25 year period from 1990 to 2015. This showed, PNO explained, that even if the value of the ‘South Arm’ and ‘Harbour Deepening’ dredging works are deducted from the DORC, the historical port charges imposed by the State of NSW did not recover the economic cost of providing the declared service.

211 The ACCC accepted that the material before it showed there had been historical losses, but then dismissed this material on the basis that PNO had not established that the Port intended to recover those losses.

212 However PNO argued that the question is not whether the State intended to recapture any past losses, through future prices, but whether it can be inferred that there was a contemporaneous agreement or clear expectation that the cost of dredging works would be recognised in future prices, notwithstanding that users were receiving the benefit of less than cost recovery otherwise. PNO then said that no such inference can be drawn, and such an inference would be entirely illogical.

213 PNO observed that the only evidence identified by Glencore in respect of expectations is an exchange of correspondence between Port Waratah Coal Services (‘**PWCS**’) and the MSB in relation to a dredging agreement in relation to Kooragong No 5 berth. PWCS’s letter of 18 November 1993 noted that the agreement of the same date “set out the terms on which MSB has consented to PWCS undertaking certain dredging operations”. The letter then sought the MSB’s acceptance of the “commercial basis on which PWCS [was] creating the New Channel”, including that the MSB and Hunter Port Authority (‘**HPA**’) would not levy any charge in relation to the use of the New Channel by PWCS, any coal exporter exporting coal through PWCS’s coal terminal, or any vessel transporting coal, except insofar as any such charge was directly related to activities or expenses incurred by the HPA.

214 MSB’s letter in response stated that the MSB was unable to accept the specific points in PWCS’s letter. This was because, relevantly, “there is no change to each party’s right to charge a fee for the use of the assets legally under the control of each party”. That, contended PNO, was destructive of any basis for a “user pays” adjustment. The letter further noted that:

*… MSB’s current policy is to exclude from its asset valuations any contribution or investment in port facilities by other parties. The effective result of this policy is that asset value based pricing will not give rise to any additional change [sic] for use of the extension of the port’s channel other than or [sic] cover actual services supplied (eg maintenance dredging, navigation aids, etc).*

PNO observed that no commitment was made in relation to future policy or charges.

215 In the absence of evidence to the contrary, it was contended by PNO that it was more likely that contributions made by users were made on terms that were commercially satisfactory, to that user, at that time. There was no evidence that those terms included any ongoing enforceable right, applicable in 2019, to obtain use of the contributed asset free of charge. The Port was leased to PNO on the basis that there were no such obligations.

216 It was then contended by PNO that nowhere in the submissions of either Glencore or the ACCC was there a satisfactory explanation of why the Tribunal should have regard to one type of historical fact – namely contributions by users – but disregard all others, including the basis on which the Port was operated prior to privatisation.

217 PNO further contended that the Final Determination did not seek to establish that Glencore had made any contribution, reasoning that the existence *per se* of user funded assets in the DORC valuation, not the source of the user funding, informs the adjustment.

218 PNO says that the correct analysis is not to seek to strip out assets from the DORC valuation, the value of which were quantified by a hypothetical exercise. Rather, the correct approach is to make any necessary adjustment at the point of dealing with the price payable by a particular user. It is at that point, it was said, that one can properly address the relevant questions: “did this user make a contribution on a basis whereby this user can obtain access to the service at a discounted price?” Or alternatively, “was a user contribution made of a type, and on terms, that would benefit all users, including in 2019?” That, PNO said, will require evidence of an agreement or some other proper basis for making an adjustment for the particular user.

219 Ultimately, PNO’s point on this topic was that in the absence of evidence of any extant obligation to continue to take into account some historical contribution by a user there is no basis for making any adjustment. PNO said that it operates under a statutory scheme, by which it has a right to recover certain charges, and where there is no evidence of any impediment to title or any contractual obligations relating to user contributions, it should be free to enjoy its right to charge for its assets in an unqualified manner.

220 PNO emphasised that the DORC is a forward-looking concept and involves a consideration of replacing the Port now, using modern technology. That would preclude excavating to one depth, and then later deepening the channel. The ACCC’s approach (following Glencore) of examining the historical records of projects that deepened the channels involves the very things that would not be done if the Port were to be replaced today.

### Glencore

221 In its written submissions, quoting from the Final Determination, Glencore submitted that the ACCC did not deduct the user funded capital contributions for the purposes of determining or calculating DORC. Rather, the ACCC deducted the user funded capital contributions from DORC in order to determine the initial RAB.

222 Glencore argued that the ACCC’s approach is consistent with previous regulatory decisions in which Australian regulators have taken account of past user funding of assets when setting regulated prices.

223 It also argued that the approach is no different in principle from the ACCC’s unchallenged decision to exclude from the asset base assets that are neither owned nor leased by PNO, but which play a part in the delivery of the service.

224 Specifically, Glencore argued in its submissions:

*In a competitive market, users of the Service … would not rationally agree to contribute or fund the development of assets and also pay (or see their customers pay or otherwise bear the cost of) prices that generate a return to the new entrant from access to those assets. Rather, in a competitive market, all such contributors would stay with (or switch to) a competing service. In other words, competitive tension would ensure that the service provider cannot seek to earn a return from users on assets in which, or to the extent to which, the provider has not invested in those assets.*

225 In oral submissions on behalf of Glencore, Mr Young QC adopted a somewhat different line of argument in respect of a new entrant. He pointed to ss 66A to 66C of the PMAA, which he said provided the hypothetical entrant with a statutory right to impose a requirement for user funding on all port users, in respect of any investment and any return on investment funding, the acquisition or development of land, or the provision of services and facilities.

226 Despite thus putting the argument in terms of the calculation of the DORC, Mr Young QC contended that, as a “post-DORC adjustment” it did not pollute the DORC methodology: see Transcript page 132.

227 Glencore then addressed PNO’s argument that, because it has a leasehold interest in the Port that is free from any obligations to third parties it is entitled to charge for access to the whole of the Port. Glencore’s response to that argument was that while the Tribunal (and the ACCC before it) is required to consider, amongst many other things, PNO’s business interests, those interests must be *legitimate*. Glencore submitted that an exercise of market power that seeks to charge a capital return on assets that were funded by other parties, and thereby extract monopoly rents, is not a legitimate interest.

228 Further, PNO’s proposed approach, which Glencore described as giving no recognition to substantial capital contributions by users in the past, is likely to discourage users from making similar investments in channel extensions in the future. Glencore argued that in the sale of any major asset it is reasonable to expect that all bidders will undertake an appropriate level of due diligence on the commercial and regulatory risks associated with that asset. In particular, in the case of the Port, it is reasonable to expect that bidders would have factored in the risk of the service being declared under Part IIIA and that price regulation of its charges would follow. In this regard, Glencore submitted that it would be reasonable to factor in to any bid the significant risk that the regulator or individual users would object to being required to pay for assets that users had already funded. It was said that under Part IIIA, PNO does not have an entitlement to recover the price it paid for the leasehold interest in the Port.

229 Glencore argued that, contrary to PNO’s submissions, there is nothing in the decision by the QCA that suggests that assets which the provider has not funded should be included in the regulated asset base, unless there is documentary evidence that a relevant user agreed, or otherwise expected, future price reductions. Indeed Glencore considered that the ACCC was correct in finding that, provided the nature of user contributed assets (including their value) is reasonably identifiable, those assets can and should be recognised in determining the regulated prices. In this case, Glencore considered that the contributed assets (and the value of those assets) were reasonably identifiable: it is on Glencore’s view enough that there has been a user contribution (regardless of the circumstances in which it was made).

230 Glencore submitted that the ACCC was correct to exclude all of the cost of the contributed asset from the regulated asset base and, as per the ACCC, considered that such an adjustment was in the interests of those who have a right to use the Service for the purposes of s 44X(1)(c). It was also something said to be consistent with the objects of Part IIIA, the pricing principles specified in s 44ZZCA and the public interest.

231 Further, Glencore submitted that the ACCC’s decision to deduct user contributions aligns with the way in which extensions are to be treated under s 44X(1)(e), namely that the value to the provider of extensions where the cost has been borne by users is to be taken into account. While PNO asserts that the provision is directed at situations where the determination under s 44V(2)(d), requires the provider to extend the facility (eg by extending a train line to a third party mine), this narrow construction is contrary to the natural and ordinary meaning of the words. The focus of the section, Glencore submitted, is to avoid the mischief of service providers charging users for a return on extensions to the facility providing the service, which have already been paid for by users. The dredging of the Port, paid for by user contributions, falls within this category.

232 Glencore further submitted that, in any event, even if s 44X(1)(e) is directed at future extensions, it is based on a principle that has relevance to past investments and that informs the proper application of other factors in s 44X in accordance with the objectives of Part IIIA.

233 Glencore stated that it is axiomatic that users have received a benefit from the deepening of the Port channels: that is why the projects were undertaken and how the Port was able to have users fund them. As the ACCC found, the Port has also benefitted considerably from these user contributed assets. The fact that the users who have paid for the asset have benefitted from them does not support PNO being able charge users for use of the asset in which, or to the extent to which, the investment was funded by others.

### ACCC

234 The ACCC began its written submissions by observing that in regulatory regimes with objectives similar to the objects of Part IIIA, the overall objective of regulation is to promote outcomes that would be consistent with those that would result from an effectively competitive market. There was no dispute between the parties that the regime under Part IIIA is, in the words of the High Court in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229, at [18], in the context of the access regime for gas pipelines, to operate as “a surrogate for the rewards and disciplines normally provided by competitive market”.

235 The ACCC continued by contending that excluding user funded assets from a regulated asset base was consistent with the outcomes that would be expected in an effectively competitive market. In such a market, a service provider would not charge a user for assets that the user had funded without the threat of being entirely displaced by an efficient entrant. Charging the user for assets it has funded would result in a price above the service provider’s efficient costs. A service provider could only charge the user a price that, in expectation, is just sufficient to recover the assets it has funded for the provision of the service, and it is this price that deters entry into the market.

236 The ACCC then observed that it was commonplace in regulatory regimes for user contributions to be excluded from valuations of the asset base. The ACCC gave examples from the National Gas Rules (‘**NGR**’) and the National Electricity Rules.

237 It said that in these regulatory regimes, user contributions are either excluded from the asset base or prices are adjusted in respect of such contributions. The principle, as expressed clearly in the NGR, is that a service provider is not to benefit through increased revenue from a user’s contribution.

238 The principle that a service provider is not to benefit through increased revenue from user contributions is consistent with the principle that underpins these types of regulatory regimes - that expected revenues over the remaining life of the assets ensure the net present value of the provider’s investment is zero (“NPV=0”). If a service provider receives a revenue stream from assets that it has not paid for, this will violate the NPV=0 principle, as the service provider will receive revenues that exceed its investment.

239 The ACCC contended that excluding user funded assets from the asset base is consistent with the statutory criteria. Specifically, excluding these assets ensures that:

(1) prices reflect efficient costs (ss 44X(1)(h) and 44ZZCA(a)(i));

(2) PNO is able to earn an appropriate return on its investment (ss 44X(1)(h) and 44ZZCA(a)(ii));

and is consistent with:

(3) PNO’s legitimate business interests (s 44X(1)(a));

(4) the interests of those who have a right to use the Service (s 44X(1)(c));

(5) the value to the provider of extensions whose cost is borne by someone else (s44X(1)(e)); and

(6) promoting the economically efficient operation of, use of and investment in the facility (the objectives of Part IIIA and also having regard to s 44X(1)(g)).

240 The ACCC considered that DORC was a methodology that could be used in order to determine an access price that would be consistent with the relevant statutory criteria. The DORC methodology is directed at measuring the economic cost of assets in service - that is, the net present value of expected revenues over the remaining life of the assets where monopoly profits are assumed to be zero.

241 The ACCC pointed out that DORC valuations are based on a competitive concept: a return on replacement cost is the maximum return that the monopoly firm could earn in a perfectly contestable market. The contestability standard assumes the market is “as if” the firm were operating in a perfectly contestable market. Regulatory regimes with objectives akin to those set out in Part IIIA seek to mimic the outcome of contestable markets as this is considered to promote efficiency.

242 The ACCC disagreed with PNO’s contention that, as the purpose of the DORC methodology is to derive the cost of replacement of the facility, there is no justification for the removal of the costs of assets that were user-funded in the past from the initial capital base.

243 The ACCC said that PNO was disregarding the premise underlying the DORC methodology, being to derive the net present value of expected revenues over the remaining life of the assets where monopoly profits are assumed to be constrained to zero by the threat of new entry.

244 The ACCC contended that the hypothetical exercise involved in the DORC methodology can be reconciled with this underlying premise by conceiving of that exercise as involving not only the replacement today of the existing asset but also the user funding, in the presence of the competitive constraints imposed by potential entry. These competitive constraints would operate to exclude the replacement cost of the future required productive capacity attributable to user funding from the replacement cost of the existing asset for the reasons it had explained.

245 The key element is that in an effectively competitive market, a service provider would not charge a user for assets that the user had funded without the threat of being entirely displaced by an efficient entrant.

246 It was contended by the ACCC that there was nothing improper about recognising past user contributions when determining the initial capital base using a DORC methodology. Indeed, in the decisions of the QCA referred to by PNO, the QCA recognises past user contributions when determining the initial capital base using a DORC methodology.

247 To the extent the ACCC’s reasons may be read as the ACCC adjusting ORC for user contributions as an interim step to calculating DORC, as there was no basis to assume that user and State funded assets should be assigned different depreciation rates, and the relevant assets had been assigned a perpetual life, no difference arises in making the adjustment at the ORC stage versus the DORC stage. The ACCC said it made an adjustment to the value of the asset base that resulted from the application of the ORC/DORC methodology. It did so in light of the matters it was required to take into account in s 44X.

248 The ACCC’s submissions asserted that the decisions of the QCA neither establish any economic or regulatory principle of general applicability, nor conclude that clear evidence is required for recognition of a user contribution when setting prices.

249 Nevertheless, the ACCC later stated that the QCA decisions set out a principle for the purpose of distinguishing between capital contributions which should be reflected in future pricing and payments made for some other purpose, being that capital payments should be recognised as capital contributions if it was the intention and expectation of the relevant parties at the time that the capital payment would be recognised for pricing purposes.

250 Notwithstanding this characterisation, the ACCC was at pains to downplay the general applicability of any conclusions reached by the QCA.

251 Summing up its reasoning, the ACCC said that in the present case, the capital payments for the ACCC’s consideration were user contributions. The parties had agreed that State contributions were not to be excluded for pricing purposes. The evidence before the ACCC did not establish one way or another whether there was an intention or expectation at the time of the user-funded dredging works that a capital contribution would be recognised when setting prices.

252 Consistent with the views expressed by the QCA, the ACCC exercised judgment on the basis of all available evidence. Having done so, the ACCC concluded that the statutory criteria were best served by not requiring users to pay a price that includes a return on capital for assets that they have already funded, and a service provider should not earn a stream of revenue from assets that it has not funded.

253 According to the ACCC, there was nothing in this approach which was inconsistent with the QCA decisions.

254 The ACCC then addressed PNO’s submission that past port charges did not recover the economic cost of providing the Service.

255 PNO had contended that no inference can be drawn as to an intention or expectation that user contributions would be recognised in future pricing having regard to the past losses sustained by the State. The ACCC said that the past losses evidenced by the material relied on by PNO were not specific to the Port; to the contrary, that material discloses that the Port did not itself sustain historical losses. In any event, any incurring of historical losses by the State is potentially (even likely) explicable by policy objectives unconnected to user contributions. In circumstances where there is neither evidence of historical losses at the Port nor any evidence that such losses were not informed by policy considerations unrelated to user contributions, it is not appropriate to offset the capital contributions by the benefit of past State pricing concessions as to do so would negate the intended benefit of those pricing concessions. Again, the ACCC’s views in this regard are consistent with the principles applied by the QCA in considering historically low prices in making its decisions.

256 PNO had contended that, as no contribution was made by Glencore and there is no evidence to establish an expectation that a contribution would be recognised in Glencore’s access prices, there is no basis for recognising user contributions in setting the charges Glencore should pay.

257 The ACCC said that its reasoning – the existence *per se* of user funded assets in the DORC valuation, not the source of the user funding, informs the adjustment – engages with the statutory criteria.

258 Mr Lloyd SC, on behalf of the ACCC, summed up its argument by saying that “[u]ser capital payments must be taken into account where this is required to avoid the provider earning monopoly rents and users paying twice for assets that they have funded.” This was in the context of, among other things, denying that the ACCC considered the surrounding factual context irrelevant, see Transcript page 306.

259 When asked in what sense Glencore could be considered to have paid twice, it not having made user contributions, Mr Lloyd SC said that “the point is, I suppose, in some sense, at a level of principle. If … Glencore had have been around for the entire time, we would certainly say then they would have paid twice” and further that “the paying twice is just a simple way of expressing the ideal. The ideal is that the provider, which doesn’t require you to look at the user at all, the provider not be able to have monopoly rents. They will have monopoly rents if they can get a return on capital that they didn’t - didn’t invest”, see Transcript page 308.

260 Mr Lloyd SC said that the ACCC did not change the DORC but took an amount off the DORC to adjust the RAB. However, he went on to say that while the ACCC certainly did not do it [the Glencore] way, “…that would be a way of conceptualising it. [Y]ou could say that the potential entrant is competing not just to reconstruct the Port but to do it with the same assistance. We, as I say, didn’t do it that way but the result is the same…”, see Transcript page 310. He explicitly did not adopt Mr Young QC’s reasoning with respect to recovery of user contributions under ss 66A to 66C of the PMAA.

261 Mr Lloyd SC responded to questions about the fact that PNO had not been the Port operator at the time of the user contributions: it had never built channels. He said that “what investment PNO actually made … is entirely a distraction and is the wrong question because the DORC value of the [Port], … with or without a user contribution deduction adjustment should be the same … whether the state still owned it, whether PNO owns it. The efficient value of the port doesn’t change according to who owns it”, see Transcript page 309.

262 Ultimately, Mr Lloyd SC summed up the ACCC’s reasoning in five propositions, see Transcript pages 335-336:

(1) Part IIIA is designed with the objective that regulated access prices specified in determinations following an arbitrated access dispute will generate revenues for access providers sufficient to meet the economically efficient costs of providing access to the declared service.

(2) The economically efficient costs of providing access to a declared service do not extend to giving an access provider a stream of revenue by way of a return of capital in respect of valuable assets that were contributed by access users.

(3) The exception to proposition 2 is where an access provider has subsequently repaid the capital value of the asset.

(4) In the circumstances of the present case, access users contributed capital to create perpetual capital assets held and legally owned or leased by an access provider.

(5) In the circumstances of the present case, neither of the access providers -that is the state or PNO - has repaid or paid for the capital value of those user created assets.

## The Tribunal’s analysis

263 As referred to earlier, there were two major tranches of channel upgrades involving user contributions:

(1) the Harbour Deepening dredging works from 1977 to 1983; and

(2) the South Arm and berth pocket dredging primarily from 1989 to 2010.

264 The ORC of the whole Port as estimated by the ACCC was $2,169.5 million.

265 The ACCC deducted a proportion of this amounting to $912.0 million, arriving at a pre-depreciation replacement cost of the Port of $1,257.6 million (the small discrepancy presumably due to rounding). The deductions were based on “the percentage of user funding” and concerned channel assets and riverwalls and revetments, which are two of the eleven categories of assets in the DORC. After depreciation, the final DORC value of the RAB on 1 January 2018 for the purposes of calculating the MAR was $1,163.8 million.

266 The size and method for making the deductions (by a proportion of the total DORC) were as proposed by Glencore.

267 The starting point for considering the appropriate value of the RAB is the DORC. Use of a DORC methodology was agreed between the parties. The ACCC decided that the DORC methodology would meet the requirements of s 44X.

268 The Tribunal does not disagree with the ACCC’s reasoning that use of the DORC methodology is appropriate. However, the Tribunal also notes that use of the DORC methodology is by no means mandatory. Other approaches could have been adopted, such as starting from the existing port charges and determining how they might need adjustment.

269 Furthermore, the Tribunal considers that use of the DORC methodology may lead to higher charges than other approaches. In accepting it as the starting point in this re-arbitration, the Tribunal is not only accepting the ACCC’s reasons for doing so, but acknowledging that any other approach is effectively precluded by the parties’ having agreed to use a DORC methodology.

270 In this re-arbitration there was some confusion as to whether the user contribution amounts were deducted from the estimated DORC to arrive at the RAB, or whether the adjustment was made within the DORC as part of its estimation.

271 The Final Determination is perfectly clear that, as stated above, the DORC was estimated on the basis of all the assets and that user contributions were then deducted. However, as set out above, the ACCC’s submissions adopted a different approach. The argument for the deduction was put in terms of what an efficient entrant would charge, and recovery of assets it has funded for provision of the service, this price deterring entry to the market. That is equivalent to treating the deduction as a step in calculating the DORC, not as adjusting it after it has been calculated. This manner of framing the argument hearkened back to a passage in the ACCC’s Draft Determination that was omitted from the Final Determination.

272 On oral Submissions for the ACCC Mr Lloyd SC stated accurately what the ACCC said it did in the Final Determination, but made his argument for the deduction at times in terms of an adjustment within the DORC and at times in terms of a deduction from the DORC. He said the two approaches were different ways of conceptualising the issue, the result being the same.

273 Similarly, Glencore noted what the ACCC had done in its Final Determination but couched its argument for the adjustment in terms of a hypothetical new entrant, ie as part of the estimation of the DORC.

274 PNO attacked the adjustment within the DORC as defeating the purpose of the DORC estimation.

275 It is accepted that, as the ACCC said, the two approaches lead to the same result, which is to generate the same lower RAB (and lower NSC) than if no deductions were made. However, the proper estimation of the DORC needs to be considered, and the thinking behind what is actually adjusted goes to the reasoning for making an adjustment.

276 The vital questions when using a DORC approach are: what assets are being considered, and what are the assets that are to be hypothetically replaced?

277 As the submissions show, all parties ostensibly agreed that the relevant facility is the whole port, meaning all the channels and berths. Both Glencore and the ACCC stated clearly at various points that this included user contributed assets. Deductions for user contributed assets were to be made after the DORC was calculated to arrive at the RAB. We say “ostensibly” because the Tribunal considers that the submissions just referred to - placing the adjustment within the context of calculating the DORC in the first place - are inconsistent with the facility comprising all of the assets, including those contributed by users.

278 Excluding them from the DORC is, in the Tribunal’s view, equivalent to deciding that not all the assets are required to provide the Service. Since the Tribunal is of the view that all the assets, including the user contributed assets, are required to provide the Service, the Tribunal considers that excluding them from the DORC could not generate efficient charges and would be inconsistent with Part IIIA, given that a DORC approach has been agreed and adopted.

279 The Tribunal will now explain that thinking in more detail. It will then go on to examine whether, nevertheless, there is a justification for adjusting the DORC, calculated for all assets including user contributed assets, by subsequently deducting the user contributed assets to arrive at the RAB.

280 A range of arguments were mounted for adjusting the DORC, or at least the argument was set out in a number of different ways. First, the ACCC said that in an effectively competitive market, a service provider would not charge a user for assets that the user had funded without the threat of being entirely displaced by an efficient entrant. A service provider could only charge the user a price that, in expectation, is just sufficient to recover the assets it has funded for the provision of the service, and it is this price that deters entry into the market.

281 Secondly, the principle (as expressed clearly in the NGR) is that a service provider is not to benefit through increased revenue from a user’s contribution. This principle is consistent with the “NPV=0” principle that underpins these types of regulatory regimes. If a service provider receives a revenue stream from assets that it has not paid for, this will violate the NPV=0 principle, as the service provider will receive revenues that exceed its investment.

282 Thirdly, the premise underlying the DORC methodology is to derive the net present value of expected revenues over the remaining life of the assets, where monopoly profits are assumed to be constrained to zero by the threat of new entry.

283 The hypothetical exercise involved in the DORC methodology can be reconciled with this underlying premise by conceiving of that exercise as involving the replacement today of not only the existing asset but also of the user funding, in the presence of the competitive constraints imposed by potential entry. These competitive constraints would operate to exclude the replacement cost of the future required productive capacity attributable to user funding from the replacement cost of the existing asset.

284 The Tribunal finds none of that reasoning convincing.

285 First, there is no explanation of how an efficient entrant could avoid paying the costs that had been incurred by users in contributing assets. The Tribunal does not consider that the scenario propounded by Mr Young QC for Glencore, but not part of the ACCC’s reasoning - the hypothetical new entrant using provisions of the PMAA to require users to provide funds equivalent to historical user funding - plausible.

286 Secondly, appeal to the NPV=0 criterion adds nothing to the argument. The unanswered question is how the hypothetical new entrant could provide the service by investing in an asset that excluded prior user contributions.

287 Thirdly, formulating the issue as a replacement of not only the existing asset but also of the user funding begs the question how this could be achieved. It is mere assertion that (hypothetical) competitive constraints would operate to separate and remove the replacement cost of capacity attributable to user funding from the total replacement cost of the facility. The Tribunal sees no mechanism for that to occur in the hypothetical situation envisaged by calculation of the DORC.

288 As PNO asked: How could the hypothetical new entrant avoid those costs? If those costs, why not other costs? At this point it might be asked: What if all the assets (assumed to be perpetual) had been contributed by users? The proposition is that the access provider would be able to charge only for operating expenses; it would receive no return on capital (because it would have invested no capital). What hypothetical new entrant would accept such a dubious privilege?

289 We agree with PNO that there is a conceptual difficulty in looking backward to adjust the DORC. The user contributions consist of channel-deepening projects. The assets created were the lower parts of the channels, giving the channels capacity to handle bigger ships. In the DORC hypothetical, the whole port would be constructed as a single, integrated project using modern technology. Channels would be excavated to the ultimate intended depth. The costs of deepening, taken from historical information concerning projects that were undertaken with old technologies and that would never be part of the DORC construction process, cannot be reconciled with estimation of the DORC.

290 This in-principle difficulty is exacerbated by the manner in which the deduction was made. In the DORC estimation, there were costs of specific assets - channels, reclaimed land, breakwaters, riverwalls and rivetments, etc, which the ACCC calls direct replacement costs - and common or indirect replacement costs, viz. pre-construction costs and interest during construction (which is capitalised). These common costs are clearly intrinsic to the notion of replacing the whole port in a single integrated project.

291 But having identified costs incurred years ago (eg dredging) associated with user contributions to specific assets - channels and riverwalls and rivetments - the ACCC then allocated a proportion of the DORC common costs to the direct user contributions. That is, the estimates of direct costs associated with specific historical projects were adjusted upwards to include a share of notional pre-construction costs and interest during construction associated with the creation of a replacement asset using modern technology and sequencing of construction. This inconsistency highlights the artificiality of the deduction of user contributed assets.

292 It is true that as presented in the Final Determination, the deduction - and sharing of common costs - takes place after the DORC has been calculated to arrive at the RAB. But it will be remembered that the argument is that making the adjustment within the DORC or after it has been calculated are simply two different ways of looking at the issue. The Tribunal considers that, if the deduction considered as part of the DORC calculation has fatal flaws, then the deduction cannot be accepted.

293 Nevertheless we turn now to the arguments for deducting user contributions that were not related to calculation of the DORC. The first is that the access provider would make monopoly profits if the deductions were not made.

294 At this point it is appropriate to deal with the question: how should the access provider be characterised? PNO, which is undeniably the access provider, said that it leases the whole facility and is not constrained, except by Part IIIA, in charging Glencore for access to the entire facility. Of course, exactly how Part IIIA constrains PNO is the issue at hand in the arbitration. We shall return to this issue later.

295 PNO said that making the deduction would deprive it of its ability to make a return on the lease in which it invested, which came with no obligation not to seek a return on user contributed assets. It acquired the user contributed assets along with the rest, but would be required to make them available free of charge.

296 The ACCC said that the DORC value of the Port is the same no matter who owns it. In particular, it would be no different if the State still owned and operated the Port. That is the nature of the DORC calculation exercise. PNO acquired a right to charge what the State would have been constrained by Part IIIA to charge, were it still the operator.

297 The Tribunal accepts the ACCC’s reasoning. Part IIIA cannot guarantee PNO a return on its investment. Indeed, it is useful for some purposes to abstract from the fact of privatisation. Part IIIA must be conceived of as leading to the same results for access prices with or without privatisation.

298 However, as discussed in what follows, the Tribunal considers it useful to examine the economic policy thinking that led to Part IIIA and to changes in how the services provided by government enterprises such as ports were charged for.

299 The ACCC argues that PNO would obtain monopoly profits over the remaining life of the assets if the user contributions were not deducted. Deduction would be consistent with Part IIIA on a number of grounds:

 It promotes the economically efficient operation of, use of and investment in the Service (ss 44X(1)(aa) and (g));

 It takes into account the value to PNO of extensions where the cost has already been borne by users (ss 44X(1)(e));

 It ensures that PNO is able to earn sufficient revenue to recover its efficient costs (ss 44X(1)(h) and 44ZZCA(a)(i));

 It is in the legitimate business interests of PNO and its investment in the facility (s 44X(1)(a)); and

 Furthermore, making the deductions would be in the interests of those who have a right to use the Service (s 44X(1)(c)) because it will ensure that users do not pay for the same assets twice: once through their initial investment and again through PNO’s charges.

300 We also observe s 44X(1)(e). The Tribunal considers that sub-clause (e) does not of itself require the deduction of user contributions; but at the very least, the circumstances of the contribution need to be examined.

301 The ACCC accepts that deciding whether user contributions could lead to the access provider making monopoly profits, and should therefore be deducted, falls to the factual circumstances of the contribution.

302 The ACCC saw two alternatives in order for any adjustment for user funded contributions to be considered:

 there needs to be information showing a commercial agreement between the service provider and the contributor of funds; or

 there needs to be sufficient information demonstrating the nature of user funded works undertaken, including any identifiable value of the user funded capital contributions. It was the latter that was predominantly presented to the ACCC as evidence of the nature of user funded contributions in the course of the arbitration.

303 It can be seen that the second alternative is different in nature from the first, to the degree where it is hardly a real alternative. That is, it sets a far lower hurdle and is vague as to what the “nature” of the capital contributions needs to be, and hence what information would be sufficient. Even in its written submissions, the ACCC’s statement of the criterion to be met became no more detailed than “[T]he Commission exercised judgment on the basis of all available evidence. Having done so, the Commission concluded that the statutory criteria were best served by not requiring users to pay a price that includes a return on capital for assets that they have already funded, and a service provider should not earn a stream of revenue from assets that it has not funded.”

304 It is hard to read this as more than a statement of the conclusion, as opposed to reasoning towards that conclusion.

305 Admittedly, in this part of its written submissions the ACCC was dealing with the QCA’s approach, which it rejected. But similar restatements in a broader context were also made, such as: “[u]ser capital payments must be taken into account where this is required to avoid the provider earning monopoly rents and users paying twice for assets that they have funded.”

306 In the hearing, the ACCC did set out reasons for considering that user contributions needed to be deducted to avoid monopoly profits:

 It can be inferred that the contributors would have expected a commensurate economic benefit.

 The assets funded by the user contribution are perpetual in nature. Users would have had an expectation at the time of making capital contributions that they would receive economic benefits from the user-funded assets in perpetuity.

 There is no cogent evidence before the Tribunal of pricing by the State below economic costs at any time prior to privatisation.

 Even if there were evidence before the Tribunal of pricing by the State below economic costs prior to privatisation, it would not follow that this was intended to offset the capital payments. There was no explicit or implicit agreement of the State to vary charges as compensation for user contributions.

307 It is not clear why, if those propositions are accepted, they lead to a conclusion that monopoly profits would be made, but it is worth considering them to throw light on the circumstances in which the contributions were made.

308 Several examples were proposed during the hearing to elucidate the monopoly profits question, but they did not lead to clear conclusions, perhaps because they could not capture the complexities involved in the user contributions with which the arbitration is concerned.

309 Consideration of other possibilities - gifting of assets to the owner of the facility; and provision of funding by the Commonwealth - likewise do not help to resolve the issues. On the one hand, some of these arguments introduced moral considerations. Is it right and fair that PNO should be able to charge for assets contributed by others? On the other hand, speculation about government policies was introduced. The Tribunal considered that, if anything, these other possible sources of assets only reinforced the conclusion that the asset provider is entitled under Part IIIA to base charges on all assets it owns, subject to considerations about understandings and expectations that we now explore.

310 It is common ground that the users would have expected a return on their investments in improving the channels. It appears that they would have expected that return through the ability to transport more goods than they otherwise could have done. There is no evidence that they received a reduction in charges at the time, dependent on their making the investment, nor that they had an expectation of reductions later.

311 The Tribunal considers that a user who made an investment in deepening a channel would have accepted that it would not have exclusive use of the deepened channel and, of course, by its nature could not have exclusive use of the greater depth, with other users being confined to the original depth.

312 It seems unlikely that the user making the investment would have had any detailed expectation about the course of future pricing for access over the longer term, but it may well have expected that there at least be no significant increase - or no increase based on the increased value of the channel it had deepened - in the period until it had recovered its investment (via greater throughput).

313 Letters that were adduced as evidence indicated that in the case of one user dredging project in 1993:

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314 These letters, which are the only relevant evidence available, confirm what the Tribunal considers would be likely to be the strongest degree of certainty regarding expectations about the treatment of charging in respect of user contributions.

315 There is little likelihood of a user seeking, much less expecting to obtain, assurances about pricing in perpetuity, or even beyond the relatively short term.

316 It seems far more likely that a user would only make a contribution of the type at issue here if it was confident that the impact of changes in charges was not a risk that caused it to doubt its prospective investment. If it assessed that there was some potential for its investment to lead to higher prices in the future, it would need to be confident that the investment would still make a sufficient return. It would have taken into account its experience of dealing with the Port operator and its knowledge of the history of port access pricing.

317 If the risk were considered material to the investment decision, the user would surely have sought to deal with it by contractual means. This is also an answer to Glencore’s submission that not excluding user contributions would deter any future such contributions.

318 In the general case, it seems likely also that a user making an investment that would provide benefits to other users, and in particular competitors (if any), would not object to higher charges being levied by the access provider on those other users.

319 Also in the general case, a user acknowledging that title for an investment that it made would belong to the Port operator might be likely to expect that the owner of the asset would at some stage charge for services provided by it. This would depend on the economic policy environment relating to government business enterprise charging at the time.

320 The QCA addressed the issue of expectations head-on. Differences between the circumstances that the QCA was inquiring into and those at the Port were not explored in submissions or the hearing. The QCA set out the circumstances relating to the Burdekin River Irrigation Area. However, the Tribunal does not know whether some features of the Port, such as inability to exclude other users from access to an asset contributed by a particular user, apply to the irrigation system.

321 One aspect is certainly different. The QCA found that there was an understanding within the Queensland Government and an expectation on behalf of irrigators that irrigators’ payments for land, water and cane assignments were intended as an offset against the capital costs of the Scheme and that this would be taken into account in future price setting. No such clear finding is available in this arbitration.

322 The QCA’s conclusions were:

 A capital payment should be regarded as a capital contribution if it was the intention and expectation of the relevant parties at the time that the capital payment would be recognized for pricing purposes.

 Furthermore, a capital contribution should be recognized for pricing purposes unless past price reductions have fully compensated the contributor for the contribution or the asset towards which the contribution was made has been consumed.

323 It is difficult to see why these criteria should not be relevant to the Port. Indeed, they seem to be intermediate between what the ACCC described as two alternatives that would enable it determine the matter:

(1) information showing a commercial agreement between the service provider and the contributor of funds, or alternatively;

(2) sufficient information demonstrating the nature of user funded works undertaken, including any identifiable value of the user funded capital contributions.

324 The Tribunal considers that evidence as to understandings and expectations could reasonably substitute for evidence as to a commercial agreement, but that information demonstrating the nature of user funded works could not.

325 The ACCC submitted that evidence did not establish one way or another whether there was an intention or expectation at the time of the user-funded dredging works that a capital contribution would be recognised when setting prices. The ACCC had accepted that such an inquiry was relevant. The Tribunal does not consider it acceptable to dismiss the relevance of - even the necessity for - such evidence simply because there was none.

326 The QCA’s second principle requires a check that the contributor of the assets has not been fully compensated by past price reductions. (The asset being fully consumed is not relevant in the case of channels in a port.) This involves an investigation of the pricing by the State prior to privatisation. Such an investigation was undertaken on behalf of PNO by Castalia in its report dated 17 August 2018.

327 According to that report (at page 4), for the period before 1990:

*While charges for Port services have been levied since the middle of the 19th century, it is unlikely that charges prior to 1990 had any commercial or economic basis. In 1990, the MSB, which was responsible for all ports in NSW at the time, including Newcastle, restructured prices.*

*At the time, the MSB described statutory port charges prior to 1990 as:*

…. nothing more than a tax on people who sent goods by sea. There were differing rates for different goods with no relationship as to the costs the Port incurred in handling them.

They were inefficient, inappropriate and extremely difficult to justify or explain.

*The different rates for each commodity for harbour dues and wharfage, presumably reflected the value of the product to the State so there was a “royalty” aspect to the charges. The rates were also uniform across all four major ports (Newcastle, Sydney, Port Botany and Port Kembla) and thus did not reflect costs at each port, even in total.*

328 The ACCC submitted that, since there was no separate information regarding charges at the Port before 1990, the report prepared by Castalia did not provide support for the proposition that the Port, considered in isolation, was not operating on a commercial basis. However, it did not challenge any of the material quoted above.

329 The important points as far as the Tribunal is concerned are that until 1990, charges were:

 levied on goods or commodities rather than vessels (while the current NSC, the subject of this arbitration, is levied on vessels); and

 not based on costs, at least not capital costs.

330 It follows that, contrary to the ACCC’s submissions, it is beyond belief that the charges could have delivered a normal rate of return for the Port over the period. But the real point is that the State Government and the Port operator were not thinking in terms of rates of return on investment in assets. These were the days before corporatisation, privatisation and opening government business enterprises to competition, or emulating competitive forces where competition was impossible, eg for natural monopolies.

331 In other words, it is no coincidence that the pricing practices of the period up to 1990 predate Part IIIA.

332 Dealing with the period since 1990, the Castalia report noted (at pages 4 to 5) that:

*In 1990 the MSB announced a major restructure of prices with the objective of shifting port charges from third parties, such as cargo owners, to the actual port users such as stevedores and ship owners and to achieve a measure of cost reflectivity. Under the new price structure, most prices now differed by port and port charges were related to the vessel and not the commodity being shipped.*

*While the restructured prices had some aspects of cost reflectivity, there was no attempt to revalue or recognise assets in any systematic way or to relate port charges overall to the costs of providing the service, including return on and return of capital. Total MSB revenue before and after the restructure was broadly similar so the restructure focussed largely on the distribution of charges and not the overall level. The MSB report showed that after the restructure, NSC revenue would only recover 51 percent of the cost of providing the service-based on the MSB’s understated asset values.*

*The low level of recognition and valuation of assets was highlighted by the Curran Report in 1987 which found the economic return on equity of the MSB was 1.0 percent compared to the return based on historical costs of 4.9 percent. Since inflation at that time was 8.5 percent and the Commonwealth Government ten-year bond rate was 13 percent, this shows that the MSB did not make commercial or economic returns even on its undervalued asset base and was providing services at below cost.*

*…*

*In the period after the 1990 restructure until 2014, NSC at Newcastle were largely unchanged with charges in 2014 only 7 percent higher than in 1990 in nominal terms. In the same period, the CPI rose by over 80 percent, so prices fell substantially in real terms …*

*…*

*Prices remained unchanged from 1990 until 1996. In June 1996 the Premier announced a 10 percent reduction over two years commencing 1 July 1996. This was to assist trade and improve competitiveness to support the coal industry and employment in the Hunter. There was no commercial or financial basis for this reduction.*

*After that date, charges remained essentially unchanged until 2012 when a series of small CPI-type annual increases of 3 percent to 4 percent were applied.*

*…*

*We conclude that prior to a price restructure in 1990, Port charges were little more than a tax on different commodities with no attempt to reflect the costs of the services provided and that financial accounts were non-commercial and asset values understated or simply not recorded.*

333 Castalia undertook an analysis of charges at the Port from 1990 to 2014. 1990 was chosen because it was then that the Port’s charges were restructured with the NSC being introduced, and from then that stand-alone data for the Port (separate from other NSW ports) are available. Castalia estimated the value of the asset base in 1990 by deflating a DORC estimate for 2014. For the purposes of the analysis it deducted the costs of user contributions although it did not consider that there was a case for doing so.

334 It found that economic costs over the period exceeded revenue by around $8 billion, “an order of magnitude greater than the … claimed ‘contribution’ for the Harbour Deepening dredging works and South Arm Dredging works …”. This analysis is said by PNO to show that the Port effectively paid for those projects.

335 ACCC mounted an attack on that analysis, the thrust of which was that the asset base estimate could not be trusted. There was some quibbling with terminology (economic depreciation) but the only substantive issue was the methodology of deflating the 2014 DORC to estimate the value of the asset base in 1990. Castalia had claimed that this was likely to overstate the value of assets as at 1990 because the DORC assumed newer, more efficient technology.

336 The Tribunal has considered the opposing arguments and decided that the Castalia analysis is if anything conservative and should not be discounted. Moreover, the ACCC did not challenge Castalia’s account of the history of the Port’s charging from 1990 to 2014.

337 The Tribunal does not go so far, however, as to agree with PNO that the user contributions were effectively paid back by the Port. To reach such a conclusion it would require information about understandings and expectations along the lines of the QCA principles. Rather, it sees the Castalia analysis as indicating that the Port operated in an environment where full cost recovery - ie charging for services on the basis of the economic costs of providing them - was still not being practised in the period after 1990.

338 There is nothing surprising about that, but it is useful to consider different economic perspectives. We have become used, in a regulatory context, to the notion that efficiency requires that prices be based on costs, and that this requirement implies that efficiency requires a normal return on assets (more accurately, an expectation at the time of an investment of receiving at least a normal return).

339 Those requirements are what one sees being met in competitive markets. But natural monopolies do not operate in competitive markets, where the usual case is that after some point marginal costs of production rise with increased volume. In such markets, competition between, and the long-run entry and exit of, similar firms leads to prices equal to both average and marginal costs. Prices are both efficient, in the sense of maximising the difference between the costs of production and consumers’ value of consumption, and sufficient to recover each firm’s costs, including a “normal” return on its invested capital.

340 Consequently, such prices have the happy property of representing the cost to the community of using resources to produce the firm’s output efficiently.

341 As soon as we step away from workable competition, things become more complicated. Prices based on a natural monopoly’s marginal costs of supply are not sufficient to recover its total costs. If the natural monopoly is to have a private financial incentive to invest in the first place, it must find a way - and be allowed - to charge at more than marginal cost. Alternatively, the firm must have some other ongoing means of financing its losses from marginal cost pricing. As the history of pricing at the Port prior to 1990 demonstrates, one solution to the problem is public ownership, where the losses on capital investments can be offset against economy-wide benefits from pricing below average cost. However, in practice, public ownership can cause other problems that outweigh any gains from more efficient pricing.

342 Where the assets producing the services provided by the natural monopoly are sunk - as they typically are - prices that recover the cost of those assets will be higher than the opportunity cost to the community of providing the services. Users will be paying more than the efficient price, and will correspondingly tend to use less of the service than would be optimal from the community’s point of view.

343 That is to say, the economic interests of the community and the private natural monopoly supplier are not in sympathy in the same way as those of the community and the supplier in a competitive market.

344 When most natural monopolies in Australia were State-owned, the State did not face the financial imperatives of a private supplier. It could choose not to price so as to recover fixed costs, or not to base prices on costs at all, or - as we have seen in the case of a port - to charge those supplying commodities through the Port rather than those directly imposing costs on the Port’s channels and berths, viz. owners of vessels.

345 Such pricing and operational behaviour of individual facilities was economically inefficient, especially in the structure of charges. But there was not necessarily much intrinsically wrong with the notion that the State could stand back and contemplate the whole supply chain, decide where it wished to levy charges and raise revenues, and make charging an instrument of various policy objectives. (Parties to the arbitration emphasised at times the range of government policies that may have been reflected in port charging.)

346 The basic point is that the State owner of a port did not see a virtue in emulating competitive conduct. In particular, even in recent times it did not occur to State owners of service providers that they ought to base charges on, among other things, the hypothetical replacement cost of their assets. The assets were sunk. Many assets - not channels in ports - were fully depreciated. Not providing a return on assets did not pose the problem of abjuring an incentive to invest in such assets. Government investment decisions were driven by considerations other than private financial returns.

347 Even if consideration turned to providing a return on new investment, there was no need for prices to generate a return on sunk investments.

348 This economic approach and policy framework were, and are, at odds with the economic thinking that led, along parallel lines, to Part IIIA and to the thrust for corporatisation and privatisation of government-owned enterprises. They were twin aspects of the search for greater economic efficiency, to the benefit of the wider community.

349 One consequence of this is that the focus on returns on assets compelled by Part IIIA applies to service providers regardless of their ownership. Even if the State still operated the Port, the effect of Part IIIA would be to require consideration of returns on assets, if Part IIIA applied to it. That would have required declaration of the service provided by the Port.

350 But while the State still owned and operated the Port, and the service was not declared, the principles required by Part IIIA remained in the background. The State was free to pursue whatever pricing practices it chose, and as we have seen, they did not, apparently, seek to emulate what would occur in a hypothetical competitive market.

351 The imperative to make a return on assets only arises in a manner not to be gainsaid when privatisation is contemplated. As we have attempted to explain, the pricing impact has pluses and minuses, whether the facility providing the service is State-owned or in private hands.

352 Even a private facility owner would still, if it were precluded from charging to obtain a return on sunk assets, have an inventive to continue to provide access, contrary to PNO’s claims. And it would not lose the inventive to invest in new assets and improvements to the facility, so long as the new assets were appropriately brought into the asset base on which charges provided a return.

353 What return it would make on its investment in the business would depend on what it paid for the business, which is not in evidence before the Tribunal and is not relevant to the determination of DORC-based pricing anyway.

354 But precluding a return on all the assets that are part of the facility (sunk or not) would send a signal to future investors in other natural monopoly assets that they risked having their investment, once made, treated as sunk, with future returns confiscated. That unfortunate investor would still have an incentive to operate its asset as long as the returns exceeded the scrap value, but the investment climate for such assets would be fatally damaged. In effect, price regulation would have created a new sovereign risk.

355 To sum up, Part IIIA - and the economic thinking about the discipline imposed by competition and the resulting efficiency benefits - leads to pricing of the services of a natural monopoly that attempts to prevent the achievement of the monopoly profits that would be available to an unconstrained private owner. But it also leads to pricing that provides a return on sunk capital as part of efficient costs. That means prices that, in the case of a natural monopoly, are higher than the opportunity cost to the community of using sunk assets. This is especially highlighted when a DORC methodology is applied, and the value of assets is based on the costs of a hypothetical new entrant.

356 This carries an inefficiency: users will, at the margin, use less of the service than they would if it were charged for at marginal cost, and that reduction in usage has an economic cost to the community. This economic cost might be very small if the cost of the accessing the service is nevertheless a small proportion of the economic surplus associated with the production process, in this case coal mining, that gives rise to demand for the service.

357 Now the situation in this arbitration is not the one contemplated in the excursion we have just taken through alternative ways of pricing the output of natural monopolies, viz. of providing no return at all on assets. The Tribunal refers to the change in policy approach to make the following point. The enactment of Part IIIA was a regulatory watershed. It effectively consigned to the past the old ways of thinking about pricing of essential services. It drew a line under questions about what returns had been made in the past, and focussed entirely on the future.

358 If a service provided by an essential facility was declared, then its pricing became subject to the requirements of Part IIIA, whether or not the facility was privately or publicly owned. One element of those requirements is that the legitimate business interests of the access provider be taken into account. That involves being able to achieve a reasonable return on its assets.

359 The Tribunal considers that Part IIIA shines the light of regulation onto what assets are required to provide a declared service. Prices should reflect the cost of those assets, whether through the DORC or some other approach. In this case, that means all the components of the DORC, regardless of their origins. A hypothetical entrant would need all the assets to provide the declared service, and would require a return on all the assets. Disputation over the treatment of user contributed assets cannot be resolved by examinations of past pricing. And nor can it be resolved by simplistic claims that users should not have to pay twice, or assertions that the access provider would be making monopoly profits, or that the NPV=0 criterion would be contravened.

360 Only clear indications of an understanding by the access provider and an expectation by the access user that future pricing would be adjusted in some way for the value of those assets could justify excluding them from the RAB. Even then, the better approach may be to maintain the full value of the RAB and make adjustment to the MAR for the effect of the understanding and expectation. We note the QCA’s approach in this regard.

361 Whether there would also be a need for some mechanism for the passing-on to the current access provider and access seeker of past understandings and expectations is not a question that needs to be addressed by the Tribunal. There is no evidence of any such understandings or expectations.

362 We finish by considering Mr Lloyd’s final proposal of five propositions which he said lead to the ACCC’s conclusion that user contributed assets must be deducted. They are set out above.

363 The problem is with the second proposition: “The economically efficient costs of providing access to a declared service do not extend to giving an access provider a stream of revenue by way of a return of capital in respect of valuable assets that were contributed by access users.” This proposition implicitly appeals to a notion of fairness, or perhaps common sense. It seems to demand acceptance as being self-evident. However, the ACCC has acknowledged that other considerations apply. By way of economic analysis of the facts, this proposition is not self-evident.

364 For the above reasons and analysis, the Tribunal considers that no deduction should be made to the RAB for user contributions. The RAB should be restored to its ORC value of $2,169.5 million, with the associated 1 January 2018 DORC value of $2,075.8 million.

365 We indicate that even if some regard was had to the financing of particular dredging projects (for instance), this would need to be done as part of a comprehensive examination of historical matters. This would include the benefits provided by the State in return for contributions, the history of under-recovery by the State, the question of which users would be entitled to the benefit of any contributions and the users’ expectations. Such matters should not be included in the calculation of a DORC value, but may influence the MAR and associated prices. None of these matters were considered properly by the ACCC nor could they be on the material before it. Similarly, the Tribunal could not undertake this task if we were of a different view to the one we have already reached, namely, no deduction at all should be made to the RAB for user contributions.

# USER FUNDING OF RECLAMATION BUNDING

366 This issue addresses Glencore’s concern that the DORC valuation includes estimated costs for reclamation bunding that have not been adjusted for the value of user contributions. As we have taken the view that no deduction should be made to the RAB for user contributions, it follows no deduction should be made for reclamation bunding.

367 Nevertheless, we make the following observations.

## Submissions to the Tribunal

### Glencore

368 In its submissions to the Tribunal, Glencore contended that, although the ACCC had adopted Glencore’s preferred approach to the value of user funded works for channels and berths in its Final Determination, the ACCC’s estimated costs for reclamation bunding inconsistently, and possibly inadvertently, excluded user contributions. Therefore it was contended that the Tribunal should apply the same user funding deduction to reclamation bunding as it did to channels and berth boxes, which would reduce the DORC value by $108.4 million (as at 1 January 2018); and the value of the NSC (as determined by the ACCC) by 7.7%.

369 It was contended that, contrary to an assertion by PNO that this matter was not raised in the arbitration Synergies had, in its 22 June 2018 report, highlighted that its estimate of user funded works was based on its approach of including bunding costs as part of the dredged channel value. This report also pointed out that it was insufficient to only recognise user contributions to the dredging cost component and that the related user contributions to the land reclamation cost category must also be recognised. Glencore further asserted that, contrary to PNO’s submissions, it was appropriate to apply the same percentage adjustment to reclamation bunding costs. While PNO had identified separate cost items for channel dredging and land reclamation, as identified by Synergies, these are simply separate cost items within a dredging project. Glencore’s estimation of the percentage adjustment to dredging costs for user funding was derived from information on users’ contribution to the Harbour Deepening dredging works and the South Arm channel and berth pocket projects. Both of these projects included dredging and land reclamation. Consistently, Glencore applied this percentage to the combined value of dredging and reclamation bunding. If these items are to be ascribed separate values, then Glencore contends that the same percentage reduction should be applied to both items.

370 While the ACCC pointed out that, in response to the Draft Determination, Glencore did not seek a proportional downward adjustment for user funding of reclamation costs, Glencore submitted in response that, given that in the Draft Determination the ACCC had adopted Glencore’s position (which incorporated bunding costs into its dredging cost estimates and applied the downward adjustment to the bundled cost) there was no need for Glencore to seek a proportional downward adjustment to reclamation costs.

371 Glencore also responded to the ACCC’s claims that there was no investigation in the arbitration process as to whether, or to what extent, the user funded dredging works contributed to the creation of bunding assets. Whether or not that is the case, Glencore considered that there was sufficient material before the Tribunal to support the conclusion that user funded dredging programs also involved funding of related reclamation programs. Glencore contended that this could be seen from:

 Synergies’ submissions that the dredging programs were not limited to channel dredging but also necessarily included the associated costs of disposing of the spoil, including the construction of any necessary bunding;

 the 1976 contract specification for the Harbour Deepening dredging works, which showed that the necessary bunding works were included in the dredging contract; and

 in relation to South Arm channel development works, in each case the terminals undertook both the dredging and land reclamation works, including any required bunding, as an integrated project.

372 Glencore submitted that, in light of this material, the Tribunal should conclude that dredging and land reclamation form part of a single project and, to the extent that users are found to have contributed to that project, that contribution should be applied to both the dredging costs and land reclamation costs.

### PNO

373 PNO’s primary position was that no user contributions deductions of any kind should be made.

374 PNO contended that even if the Tribunal affirmed the ACCC’s decision to reduce the ORC values to account for user contribution of assets, there was no basis for making a simple percentage adjustment to reclamation bunding in the same proportions. PNO claimed that land reclamation was a separate and distinct step to Harbour Deepening dredging works (even though it uses the dredge material from the Harbour Deepening dredging works). PNO alleged that there had been no examination, and Glencore adduced no evidence, identifying any particular reclamation bunding or the costs of such bunding which were allegedly paid for by users.

375 Counsel for PNO argued that in relation to the Harbour Deepening dredging works there was no user contribution to the costs of the reclaimed land, since the disposal of dredging spoils in reclamation bunds was an incidental part of the dredging. It was argued that the Port made areas available where the spoil could be placed, as an alternative to the contractual requirement to otherwise dump it at sea, and that there was no evidence that any user wanted the land.

376 More generally, PNO contended that there was no proper calculation or assessment of what reclaimed land was produced by which project, how such land relates to land which is reclaimed under the DORC calculation or whether it is properly or separately identified as a user contribution.

### ACCC

377 In its submissions, the ACCC contended that there was sufficient information demonstrating the nature of the user funded works undertaken. This included the identifiable value of the user funded capital contributions and identifiable capital assets included in the asset base. Because of this, the ACCC made a proportional downward adjustment of the ORC values to account for the user funded contributions to assets including channel and berth boxes. Counsel for the ACCC otherwise adopted the submissions of counsel for PNO at the Tribunal hearing, insofar as even if there was user funding, no adjustment was required.

378 Separately, and in response to Glencore’s submissions, the ACCC sought to explain how its position in this issue had changed between the Draft Determination and the Final Determination. In its Draft Determination, the ACCC had initially adopted Glencore’s position, which incorporated bunding costs into its dredging cost estimates. In its submissions in response to the ACCC’s Draft Determination, Glencore did not seek, and the ACCC did not apply, a proportional downward adjustment to reclamation costs on the basis that a proportion of the assets created by reclamation may have come from dredged material in the formation of channel and berth box assets to which users had contributed. In the absence of this, and having regard to PNO’s submission made in response to the Draft Determination, the ACCC ultimately accepted PNO’s position that the importation of reclamation bunding materials was required, and accepted the costs of reclamation bunding as set out in AECOM’s DORC valuation. The ACCC also endorsed PNO’s submission to the Tribunal that there was no investigation in the arbitration process as to whether, or to what extent, the user funded works undertaken contributed to the creation of capital assets in the form of reclamation bunding.

## The Tribunal’s analysis

379 The Tribunal’s decision that no adjustment should be made to the RAB for user funding (as earlier explained) determines the question of user funding of reclamation bunding. It is, we think, a subset of user funding and no adjustment should be made for it.

380 In any case, the Tribunal accepts PNO’s position that, even if it were accepted in principle that an adjustment should be made for user funding, in the case of user funding of reclamation bunding, insufficient evidence exists that users actually made a contribution, and there is no basis for applying the across-the-board percentage adjustment used by the ACCC in respect of other user contributions.

# COSTS OF CHANNEL DREDGING

381 The Tribunal is confronted by two different approaches to determining the appropriate costs of channel dredging. We will seek to describe and evaluate the material before us, without examining the expert material other that through the documentation provided. No party suggested we should do otherwise, nor did we consider it necessary to adopt any other course having regard to the constitution and function of the Tribunal.

382 On this issue we do not separately detail each submission of the parties, other than in the course of our own analysis.

383 In support of its claimed reduction to the DORC, Glencore primarily contended that a ‘jumbo’ CSD could be used at the Entrance Channel, which would avoid the need for drilling and blasting prior to dredging. Glencore submitted that the dredging estimate should be reduced by approximately $122 million (to approximately $847 million), or alternatively that the $970 million estimate should be substantially discounted to reflect the “very real probability” that the hard rock at the Entrance Channel could be removed using a CSD without drilling and blasting.

384 In response, PNO submitted that to accept Glencore’s submission would be to invite to error. The Tribunal agrees. On Glencore’s own submissions, there is at least a possibility that a CSD will not be able to remove the hard rock, in which case Glencore’s discounted DORC valuation would fail to capture the full replacement cost of the assets used to provide the declared service: any price calculated on this basis would contravene the pricing principle in s 44ZZCA(a)(i) by failing to generate expected revenue for a regulated service or services that are at least sufficient to meet the efficient costs of providing access to the regulated service.

385 The Tribunal has been faced with a choice between a proven construction technique that both parties agree will work (drilling and blasting), and an unproven one, about which there is no agreement and no clarity (the jumbo CSD). The Tribunal considers it most prudent and correct to base the DORC valuation on techniques that are proven. The Tribunal cannot be satisfied that the cost of drilling and blasting produces an inefficient price, and cannot (and should not) speculate as to what any discount would be, as suggested by Glencore.

386 We understand that Glencore submitted there would be no error if the Tribunal were to substantially discount PNO’s estimate of the dredging costs that the ACCC accepted (approximately $970 million) in comparison to Glencore’s estimate (approximately $847 million). It was contended that the recognition of such a discount would accord with common sense in circumstances where the competing figures rise no higher than hypothetical forward-looking estimates.

387 In this context, the Tribunal accepts that when making an administrative decision, neither party faces an onus or burden of proof. While the Tribunal’s acceptance of a party’s claims and the inferences to be drawn from them obviously requires a proper basis, so too should the rejection of any material. In these proceedings, the decision to be made relates to an estimate of a hypothetical current replacement cost. We accept the Tribunal is able to consider the two competing views, and if appropriate undertake a discounting task in determining costs.

388 The Tribunal is particularly aware that it is seeking to look into a hypothetical alternative to historical costs. There is an element of uncertainty in assessing what may occur. The Tribunal needs to take into account commercial realities, but still must look to probable outcomes rather than just speculative outcomes.

389 Even adapting this approach, having regard to the material before us, we are not satisfied that a jumbo CSD would be effective to dredge the hard rock at the Entrance Channel, nor are we persuaded of the other matters raised by Glencore stand as a proper informed basis for discounting cost estimates.

390 The reports prepared by Akuna and Evers Consult, each of which were commissioned by PNO, are based on commonly accepted or traditional views of the industry. While we appreciate the position of Glencore put by Arup – that the newer class of jumbo CSDs have demonstrated an operational capacity beyond that previously understood to be the case, we accept and adopt the approach taken by Akuna and Evers Consult.

391 To explain our conclusion, it is helpful to set out and address in turn the arguments put by Glencore in support of its preferred approach, which as noted, we have not accepted. We also set out PNO’s arguments in response.

392 Glencore drew the ACCC’s attention to the shortcomings of the Akuna and Evers Consult material in Synergies’ report dated 3 September 2018. Arup also pointed out how, in its view, Akuna and Evers Consult had erred in their interpretation of the data and Arup’s analysis.

393 Glencore argued that in the Final Determination, the ACCC accepted the views of PNO’s expert without properly grappling with the contrary evidence of Glencore. In particular:

(1) in finding that drilling and blasting was required, the ACCC cited Evers Consult’s opinion that a ‘Rock Quality Descriptor’ (‘**RQD**’) of less than 75% was required before any appreciable reduction in rock strength would be observed, and that Arup’s own analysis indicated the lowest RQD at the Entrance Channel was 86%. However, this ignored Arup’s contrary opinion that observed RQDs of between 79% and 97% would lower the effective strength of the rock to within the capabilities of a modern CSD and, importantly, that the hardest rock found in the vicinity “is unlikely to be observed consistently and for significant thicknesses within the maintained channel area.”

(2) the ACCC found that sea conditions at the Port would prevent the efficient use of very large CSDs (again on the basis of Evers Consult’s opinion) despite Arup pointing out that much smaller (and therefore more susceptible to wave conditions) floating dredging equipment had actually been used successfully at the Port throughout its history; and

(3) the ACCC considered there was “insufficient information” on the comparability between Walker Shoal and the Port to support the use of CSDs because the underlying data was unavailable. However, the ACCC failed to grapple with Arup’s evidence, which was based on actual involvement in the Walker Shoal project, and rather adopted without any apparent scrutiny the assertions of Evers Consult and Akuna that the two locations were in fact not comparable.

394 Glencore submitted that in doing so the ACCC disregarded Arup’s evidence about the extent of the hardest rock and the volumes and types of material in the channel more generally. It was submitted that the requirement for drilling and blasting of some of the channel says nothing about the extent of that work, or the work methods to be employed with material that does not require such pre-treatment in the channel generally.

395 It was further submitted that the Tribunal’s assessment of the material before it should include consideration of the probative value of the expert material adduced by each of the parties on the question of the estimated costs of dredging. Glencore contended that little weight should be attributed to the Akuna and Evers Consult reports and that Arup’s evidence in this regard should be preferred. As already noted, Arup were of the view the most appropriate and efficient method of dredging the channels and berth boxes (including the hard rock found at the entrance channel) would be the use of a jumbo CSD. Arup explained (in its 12 June 2018 report at page 10) that recent experience with this type of equipment established that it was capable of cutting through the hardest rock likely to have been situated in the operational areas of the Port:

*In their report Declared Assets DORC Report, AECOM note that very large Cutter Suction Dredgers can dredge rock up to UCS 50MPa. Arup’s assumption, based on prior experience from comparable projects in Australia, is that hard rock with a UCS 50-70MPa (depending on RQD) can be removed by CSD, without the need to revert to drilling and blasting. This approach has been proven across a number of projects over the past 5-10 years. Since the agreed approach to DORC valuations is to use Modern Engineering Approaches to value asset replacement cost, Arup believes it is appropriate to estimate the entrance channel replacement cost using CSD dredging techniques, and not drilling and blasting.*

396 Arup provided geotechnical modelling of the Port, based on the information available to it, to estimate the volume and strength of the material to be dredged. It estimated there to be approximately 1,260,038 m3 of high strength rock (that is, with a Uniaxial Compression Strength (‘**UCS**’) between 20 MPa and 60 MPa) and 51,378 m3 of very high strength rock (that is, with a UCS greater than 60 MPa). The considerable majority of this hard rock was said to be located at the Entrance Channel.

397 It was uncontroversial, however, that the UCS is only one factor by which the effective strength of rock (and therefore its dredgability) is to be determined and that specific fragmenting or fracturing of the rock needs also to be considered.

398 The extent of such fragmentation is described in terms of its RQD. In general terms, the lower the RQD, the weaker the effective strength of the rock. As stated in the Arup 12 June 2018 report at page 9:

*The assessment indicates that approximately 288,000 m3 of bedrock in the entrance channel has a UCS greater than 50MPa. However, analysing the RQD of the highest strength rock (>55MPa) indicates that it is likely to have some fracturing, having an RQD between 79 to 97%. The presence of fractures will lower the effective UCS of this material toward 50MPa.*

399 According to Arup, rock strengths of at least 60 MPa can be reliably fragmented with modern jumbo CSD. In response to the ACCC’s Draft Determination, Arup in the 3 September 2018 report at page 17 went onto to advise:

*Based on the results of UCS testing . . . the percentage of very high strength rock (<60MPa) encountered in the Maintained Entrance Channel is expected to be around 3.5%, with approximately 15% having a strength in excess of 50MPa. The average UCS value . . . is around 37MPa.*

400 Arup also cited (in its 12 June 2018 report at page 10) the recent example of the dredging of Walker Shoal in Darwin, where rock stronger than that at the Entrance Channel of the Port was successfully dredged by a jumbo CSD named ‘Athena’. This dredging at Walker Shoal took place without requiring drilling and blasting, despite provision having been made for such work:

*As further evidence that modern CSD dredging techniques can accommodate high strength rock, we highlight the dredging of rock at Walker Shoal, Darwin. In 2014, rock with a greater strength to the Entrance of Newcastle was successfully dredged direct by the CSD, Athena. Provision was also made for drilling and blasting but was not required. INPEX noted that the dredging was technically challenging, and involved the removal of a ‘very hard lump of rock’ that represented a safety risk to shipping. (Arup can provide specific confidential information relating to the CSD dredging undertaken at Walker Shoal under privilege should this be required. This includes details of the UCS and RQD of rock removed by CSD).*

401 Further to this, Arup stated (in its 3 September 2018 report at page 32):

*AECOM state that “the rock properties and wave climate at the Walker Shoal are significantly different to the conditions at Newcastle and that Arup’s suggestion that this is a comparable project is invalid”. They arrive at this conclusion having briefly reviewed information from an earlier ACER Vaughan geotechnical report dated August 1996.*

*Arup can confirm that the dredging associated with this report is on the edge of the Walker Shoal, and is not representative of the strength of the rock dredged by the Athena as part of the major works undertaken for INPEX in 2014. The reference used by AECOM to draw their conclusion is therefore invalid.*

*Baggerman has been involved in numerous rock fragmentation projects with material stronger than that at the Entrance to Newcastle Harbour, including the Walker Shoal project undertaken in 2014. The geotechnical data relating to the Walker Shoal project remains confidential at the time of writing. As noted in Section 2.2.1 of Arup’s 12th June report, rock at Walker Shoal was successfully dredged with the Athena, a modern Self Propelled JCSD. We therefore maintain the view that if the Entrance Channel was to be dredged today, the relatively weaker Newcastle Harbour material could be dredged with a modern Self Propelled JCSD.*

402 In its Draft Determination, the ACCC accepted (at page 51) Arup’s assessment of rock strengths and proposed work methodology:

*… [B]ased on the evidence before it, the Commission has concluded that Arup’s modelling provides a more robust approach to estimating the volume and type of material to be dredged. This extends to the UCS and RQD figures.*

*The Commission also notes that Arup’s proposed methodology to dredging is based on what it submits has occurred in practice on at least one occasion such that it does [sic, goes] beyond a theoretical exercise. The Commission considers that these two factors suggest that the use of more advanced technology as proposed in Arup’s report is an appropriate assumption for the purposes of a DORC valuation for this arbitration. This also informs the Commission’s consideration of dredging costs below.*

403 PNO responded to this part of the Draft Determination with reports from Akuna and Evers Consult explaining why Arup’s proposed dredging methodology was impractical. This included material referring to the sea conditions at the Port which restricted the use of a CSD for the majority of the year and that the rock type and strengths at the Port were incomparable with Walker Shoal.

404 As already indicated, Glencore’s response to this new material included Arup’s report dated 3 September 2018, which provided data and other material contradicting Evers Consult and Akuna.

405 The ACCC had regard to the further material and in its Final Determination adopted PNO’s dredging costs estimate.

406 In so deciding, the ACCC said that:

 the rock at the Entrance Channel was unlikely to be of a type that would allow the use of a CSD;

 sea conditions at the Port would limit the ability to use a CSD to dredge hard rock at the Entrance Channel; and

 there was “insufficient information” provided to establish with confidence the comparability between Walker Shoal and the Port to support the use of a CSD.

407 Glencore submitted that expert material submitted by PNO did not justify the ACCC’s decision to reverse its position from the Draft Determination so as to adopt PNO’s estimated dredging costs in preference to Glencore’s estimate without discount.

408 It was submitted that properly analysed, PNO’s expert material contained a number of unsubstantiated conclusions about important matters, and contained information that pointed to the very real probability that the hard rock at the Entrance Channel to the Port could be removed using a CSD without drilling and blasting.

409 The ACCC considered that PNO’s DORC valuation was more appropriate as it better reflected what would be required in practice to construct the channel and berth at the Port. However, the ACCC considered that PNO’s allowances for maintenance dredging and acid sulphate management were not appropriate and should not be included. In the case of maintenance dredging, the ACCC accepted the position put by Arup on Glencore’s behalf that maintenance dredging would ordinarily form part of the capital expenditure dredging project. In the case of acid sulphate management, the ACCC considered insufficient information had been provided by PNO (and its expert AECOM) to justify its inclusion. The ACCC therefore accepted PNO’s submitted total construction costs excluding the allowance for maintenance dredging and acid sulphate management. The result is total construction costs of $1,038.7 million (in 2014 dollars), which was then adjusted to reflect the valuation date adopted by the ACCC.

410 The Tribunal is in a difficult position with conflicting expert views, but nevertheless must make a determination based upon an assessment of the material before it. We have already indicated that the Baggerman Report sought to be relied upon by Glencore would not advance our consideration of the issue we need to determine, even if we were to allow it to be relied upon in this re-arbitration.

411 It is important to recall that the Port was not constructed using a jumbo CSD. However, the economic theory behind the DORC methodology is that users should not have to pay for the cost of access to the asset if, in a competitive market, an efficient competitor would be able to supply equivalent services more cheaply using the latest technology and an optimised (ie efficient) approach to construction. The decision must have proper regard to the legitimate business interests of the provider and the provider’s investment in the facility. The Tribunal is not looking for certainty. The Tribunal looks to see whether there is some degree of probability an event will occur. However, the Tribunal needs to reach a level of satisfaction that the construction method is as a matter of fact going to be feasible and appropriate.

412 Glencore referred to estimates by its expert, Arup, of the volume and strength of material to be dredged at the Port. In Arup’s 3 September 2018 report it estimated that there were 1.05 million m3 of total bedrock with a UCS of between 20 and 50 MPa and 209,000 m3 of total bedrock with strength of more than 50 MPa.

413 Arup advised that only around 3.5% of the rock at the Entrance Channel had a UCS greater than 60MPa. In Glencore’s submission, even if this very small proportion of rock cannot be reliably fragmented with a jumbo CSD, this should have no bearing on the method adopted for weaker rock at that location. The low average UCS value of rock in the Entrance Channel (around 37MPa), combined with the very low relative volume of very hard rock, provided a useful indicator it was submitted that extensive drilling and blasting was not required.

414 In the Tribunal’s view, the most reliable estimates of the hardness of rock at the Entrance Channel are those relied on by PNO’s expert AECOM, which are based on historical records showing the quantity of rock actually removed (through drilling and blasting) during the construction of the Entrance Channel, and core samples taken from that material, which show the strength and hardness of the rock material. Based on this material, AECOM’s assessment is that there are 953,731 m3 of total bedrock with UCS of between 20 and 50 MPa and a further 587,379 m3 of total bedrock that would require pre-treatment (by drilling and blasting) before it could be dredged.

415 Although the rock strength data from the core samples taken during the Harbour Deepening dredging works was relied upon by both AECOM and Arup, only AECOM has relied on the firm MDA which undertook the relevant Newcastle Harbour Navigation Channels Replacement Cost Valuation in 2014 to assess rock composition and strength. Whilst details of MDA’s methodology and workings have not been provided we see no reason not to accept AECOM’s assessment.

416 As previously stated, PNO obtained expert reports from AECOM, Akuna and Evers Consult, each of which expressed the opinion that CSDs were unsuitable for dredging very hard rock (ie rock with an UCS of more than 50 MPa). Glencore appears to accept that these opinions reflect the “commonly accepted” views within the dredging industry , but says:

(1) UCS is only one factor by which the effective strength of rock (and therefore its dredgability) can be measured, and that the fragmenting or fracturing of the rock also needs to be considered; and

(2) a newer class of jumbo CSDs have demonstrated an operational capacity beyond that previously understood to be the case.

417 The Tribunal is mindful of Glencore’s criticism of the approach we are taking in agreeing with the submissions of PNO.

418 As already stated, Glencore submitted that AECOM’s estimates of the rock hardness at the Entrance Channel were not reliable. PNO relied upon the fact that AECOM’s estimates are based on historical records showing the quantity of rock actually removed (through drilling and blasting) and core samples taken from that material. However, Glencore submitted such historical material is an unreliable source when assessing the need for and extent of any drilling and blasting using current technology. It was submitted that there has been a considerable evolution in the capacity and effectiveness of dredging technology since the various campaigns were undertaken at the Port. For example, the maximum rock strength capable of being directly dredged at the time of the Harbour Deepening dredging works was approximately 25MPa. AECOM seemed to agree that a modern jumbo CSD is now capable of dredging up to 70MPa in appropriate conditions.

419 It followed then, in Glencore’s submission, that the historical data on the volumes of rock that were unable to be directly dredged (and thus required drilling and blasting) in the Harbour Deepening dredging works would indicate much higher volumes than would be the case if the work was carried out today with modern equipment. It was submitted that it was inevitable that AECOM’s reliance on these historical records would produce an overestimation of the volume of rock requiring drilling and blasting today.

420 This claim appears to depend on Arup’s experience with a jumbo CSD at Walker Shoal in Darwin. However, the information which is available does not lead the Tribunal to any degree of satisfaction that the rock (and sea state) conditions at the Port and at Walker Shoal are comparable.

421 The data which was before the ACCC and now the Tribunal does not support the claim that the rock at Walker Shoal is of greater strength than at the Port. A geotechnical report by ACER Vaughan dated August 1996 showed that the RQD values for Walker Shoal were generally much lower than at the Entrance Channel to the Port. Further, sea conditions at Walker Shoal, unlike at the Entrance Channel at the Port, are calm and sheltered.

422 Evers Consult relevantly stated (in its August 2018 report at page 11) that:

*EC is of the opinion that observations and comparison in respect of the materials strengths between Walker Shoal and the Entrance to Newcastle are dissimilar and indicate differences in dredgeability of the two sites.*

*As demonstrated in Figure 3 (as provided by AECOM to EC and as included in AECOM’s report dated 17 August 2018), the RQD values for Walker Shoal are generally much lower than the RQD values for the PoN Entrance Channel, indicating that the Walker Shoal material is generally much more fractured and can consequently be expected to be much easier to dredge because of this material difference in the RQD values present at the two sites.*

*EC has worked on a few occasions in the general Darwin area and is familiar with the location and general seastate conditions at Walker Shoal. Walker Shoal is located in a completely sheltered part of Darwin Harbour and with the exception of a cyclone event the waters in that area are always very calm.*

*Overall with much more fractured rock and a very benign seastate environment, dredging at Walker Shoal with a jumbo CSD is entirely possible but can certainly not be quoted as similar to dredging at the Entrance of the Port of Newcastle.*

423 Similarly Akuna (in its 16 August 2018 report at page 6) stated the following:

*The fourth element to be reviewed was the statement whether the conditions present in the Walker Shoal project (which Arup seeks to rely on) are comparable to those at the Port of Newcastle with respect to dredging, or otherwise distinguish such conditions from the conditions present at the Port of Newcastle. As detailed in the rock strength assessments in this advice paper, the Conglomerate found at Walker Shoal is considerably weaker than the Conglomerate and Sandstone at the entrance channel of the Port of Newcastle. The Port of Newcastle entrance channel has a consistently hard rock stratum, while Walker Shoal has very weak rock in boreholes at 25 to 50 meter from the harder rock boreholes. Walker Shoal has an irregular rock stratum with distinctly to extremely weathered rock in a 200 by 200 meter area. The wave climate at Walker Shoal is at sheltered waters and favorable to dredge harder rock with a fairly stable very large modern self-propelled Cutter Suction Dredger and is not comparable to the wave climate at the entrance channel of the Port of Newcastle.*

424 Finally,AECOM (in its 16 August 2018 report at page 6) stated:

*Arup proposes the use of the CSD Athena to dredge the rock at Newcastle citing ‘comparable’ projects in Australia and specifically at Walker Shoal29, to demonstrate that rock up to 70MPa (depending on RQD) can be removed with a modern cutter suction dredger. AECOM’s view is that the rock properties and wave climate at the Walker Shoal are significantly different to the conditions at Newcastle and that Arup’s suggestion that this is a ‘comparable’ project is invalid.*

*This is clear from a comparison of the rock parameters for the Port of Newcastle Entrance Channel (sourced from the data provided under the 1976 Harbour Deepening Contract) with rock parameters at Walker Shoal (sourced from Acer Vaughan TR 29/96 East Arm Port Walker Shoal Geotechnical Drilling Investigation, August 1996).*

*… In our view the rock at Walker Shoal is not comparable to that at Newcastle and Arup’s attempted comparison of dredging methods at these two sites is therefore invalid.*

425 Glencore submitted that PNO’s insistence that a jumbo CSD could not effectively dredge the hard rock in the Entrance Channel is underpinned by AECOM’s premise that a window of at least 12 hours is needed to set up a jumbo CSD, conduct dredging operations and demobilise. This premise was said to be factually incorrect. As explained by Arup (in its September 2018 report), in arriving at such a conclusion, AECOM was said not to have given any consideration to the operational configuration of the jumbo CSD, the use of pre-installed quick-release anchors, and modern operational techniques to fragment the rock. Such factors allow for the rapid and efficient movement of dredging vessels from weather exposed areas to more protected areas when necessary. This was said to allow the jumbo CSD to work efficiently in weather-exposed areas on an intermittent basis as conditions allow.

426 As expressed by Arup (in its 3 September 2018 report at page 33):

*In their report dated 17th August, AECOM state that “12 hours is a realistic practical minimum period for a cutter suction dredger of this size to account for mobilisation time prior to operation”. In our opinion this is factually incorrect, and in arriving at such a conclusion, AECOM has not had any regard to the operational configuration of the JCSD, the use of preinstalled quick release anchors to support efficient movement, and the operational techniques to fragment the rock.*

427 In dealing with the operational assessment of JCSD, Arup went into considerable detail of the operational configuration, use of anchors, operational techniques, and the operational limitations of self-elevating platforms (‘**SEPs**’) in the Entrance Channel.

428 Glencore submitted that Arup’s 3 September 2018 report considered the issue in some detail and noted:

(1) The majority of the historic rock removal in the weather-exposed areas of Entrance Channel occurred as part of the Harbour Deepening dredging works and the equipment used during this campaign was largely floated, not elevated on spuds (due to construction delays with the SEPs).

(2) The historic drilling and blasting (which would have occurred in the harder rock areas that PNO says need to be pre-treated by drilling and blasting) was carried out by the ‘WH Gemini’ (a four-boom catamaran drilling and blasting barge) which operated mainly in the Entrance Channel for a period of 88 weeks during the Harbour Deepening dredging works.

(3) The drilling work undertaken by the Gemini was constrained by the vertical movement caused by the swell, typically limited by vertical movement of 0.3 to 0.5 metres. This movement is significantly less than the operating conditions of a jumbo CSD.

(4) During its working period of 88 weeks, the Gemini’s delays due to swell was less than 5%.

429 It was submitted by Glencore that contrary to the Final Determination and PNO’s submission, much smaller floating dredging equipment has been used successfully at the Port. Even accepting the wave data information relied on by PNO, Arup has demonstrated that a jumbo CSD could work within the expected operational windows in the most swell-exposed areas, moving to more protected areas as required with limited, if any, delays due to swell.

430 The ACCC found that the sea conditions at the Port would limit the ability of CSDs to dredge hard rock at the Entrance Channel. As AECOM explained, CSDs have tight limitations on the wave climate in which they can operate efficiently without damage to the cutter head, particularly when dredging in hard rock. As noted, AECOM expressed the opinion that at least 12 hours is needed to set up a CSD on site and undertake dredging and demobilise, and concluded based on sea condition data that there would be less than 4% of the year when there was a window of at least 12 hours with conditions suitable for dredging in >50 MPa rock and no opportunities to dredge in >70 MPa rock. Further, the figure of 4% was said to be based on historical reviews of sea conditions – in practice, dredging operators would be unlikely to be able to predict these windows with perfect accuracy, meaning the actual window is likely to be even smaller.

431 In our view, Glencore’s challenge to the ACCC’s findings, and the ACCC’s reliance on the opinions of PNO’s experts, are without substance for the following reasons:

(1) the opinions were based on the actual wave conditions at the Port. The analysis of the sea conditions is found in AECOM’s 16 August 2018 report (at pages 12-18 and at Appendix A, which contains a review of wave data recorded at the Port from 1989 to 2001 by Tremarfon Pty Ltd). Evers Consult refers to AECOM’s analysis of the sea conditions, including the ‘comprehensive wave analysis of data by Tremarfon’; and

(2) the dredging campaigns at the Port that used smaller, allegedly more susceptible floating equipment, involved dredging in less exposed areas, and even in those less exposed areas, the campaigns were constrained by wave activity. None, to any level of satisfaction, showed that it is viable to use a CSD to dredge the Entrance Channel in more exposed locations and for 12 hour periods.

432 It is to be also to be recalled that Akuna has been asked to provide its opinion as to whether:

 based on the interpretation by Arup of relevant conditions and data, the removal of rock by CSD, as proposed by Arup, is a feasible method for dredging at the entrance of the channel at the Port;

 based on the interpretation by AECOM of relevant conditions and data, the drilling and blasting method proposed by AECOM is a feasible and preferred approach to dredging at the entrance of the channel at the Port;

 the interpretation of the conditions and data at the Port by Arup is correct;

 the conditions present in the Walker Shoal project (which Arup seeks to rely on) are comparable to those at the Port with respect to dredging, or otherwise distinguish such conditions from the conditions present at the Port; and

 drilling and blasting remains a modern day equivalent method for dredging, and provide any recent/modern examples of where drilling and blasting remains relevant.

433 The 16 August 2018 Akuna report is, in part, expressly stated to be a review of the reports and submissions already prepared by AECOM (on behalf of PNO) and Arup (on behalf of Glencore) in relation to dredging methodology, with a view to providing a report on the most effective and efficient method for removal of rock at the Entrance Channel. Akuna provided its own opinion about the feasibility of direct dredging as opposed to drilling and blasting. This “CSD direct assessment” is said to be “dependent upon the holistic assessment of the local circumstances.”

434 That Akuna report accepted that there is no uniform division range, expressed in UCS, between direct dredging with a CSD and drilling and blasting. Many rock characteristic parameters play a role therein. However, the commonly accepted limits for very large modern CSDs is that they have an economic direct dredgability limit of between 40 and 50 MPa.

435 The Akuna report also noted that the data available to it relating to Walker Shoal was inadequate for it to assess the degree to which “the ductility of the [Walker Shoal] Conglomerate differs from the rock found at the entrance channel of the Port of Newcastle and the energy required to break the rock.” However, Akuna nevertheless proffered an opinion on the basis that “an informed assessment can still be made as to the similarity or otherwise of the conditions at the Port of Newcastle and Walker Shoal based on the data available.”

436 Nevertheless, Akuna (at page 5) came to some definite views:

*The first element to be reviewed was the statement whether, based on the interpretation by Arup of relevant conditions and data, the removal of rock by CSD as proposed by Arup is a feasible method for dredging at the entrance of the channel at the Port of Newcastle. Based on the reviewed and studied information, it can be clearly stated that the conglomerate and sandstone rock at the entrance channel of the Port of Newcastle is outside the operational and economic limits of a modern very large self-propelled Cutter Suction Dredger. Moreover, the wave conditions at the entrance channel will further limit the rock dredging capabilities of the CSD.*

Then at page 5 the Akuna report continued:

*The rock with a medium hardness at the entrance channel of the Port of Newcastle can partly been dredged by a modern very large self-propelled Cutter Suction Dredger of which the rock strength limit at the wave exposed outer part of the entrance channel will be lower than the rock strength which could be directly dredged at the moderately sheltered inner entrance channel area and the Horse Shoe area.*

*The remaining area, of which the footprint will be reduced to the harder rock, will require drilling & blasting after which the removal of the blasted rock would preferably be executed by a large modern Backhoe Dredger supported by self-propelled Split Hopper Barges.*

Then at page 6 of the Akuna report it was said:

*The interpretation by Arup of the working environment at the entrance channel does not take into consideration that the wave climate is very unfavorable to operate a Cutter Suction Dredger while dredging hard rock. The interpretation by Arup of the rock strength by combining the strength and the degree of weathering is unconventional and does not take into consideration the amount of energy and forces required to break the rock into hydraulically transportable sizes.*

*…*

*The fourth element to be reviewed was the statement whether the conditions present in the Walker Shoal project (which Arup seeks to rely on) are comparable to those at the Port of Newcastle with respect to dredging, or otherwise distinguish such conditions from the conditions present at the Port of Newcastle.*

*As detailed in the rock strength assessments in this advice paper, the Conglomerate found at Walker Shoal is considerably weaker than the Conglomerate and Sandstone at the entrance channel of the Port of Newcastle.*

*The Port of Newcastle entrance channel has a consistently hard rock stratum, while Walker Shoal has very weak rock in boreholes at 25 to 50 meter from the harder rock boreholes. Walker Shoal has an irregular rock stratum with distinctly to extremely weathered rock in a 200 by 200 meter area.*

*The wave climate at Walker Shoal is at sheltered waters and favorable to dredge harder rock with a fairly stable very large modern self-propelled Cutter Suction Dredger and is not comparable to the wave climate at the entrance channel of the Port of Newcastle.*

In the Akuna report, at page 6-7, it was stated:

*The statement by Arup that dredging rock with a very large Cutter Suction Dredger is a modern and more economic methodology to dredge the hard rock at the entrance channel of the Port of Newcastle shows little understanding of the rock dredging processes in general.*

*Rock, till certain strength, can be dredged direct by a CSD depending on the local circumstances and the detailed characteristics of the rock.*

*The harder the rock the lower the production the higher the operational costs, driven by the pick-point consumption, and hence the higher the unit rate for the removal of the rock.*

*At certain hardness the unit rate of the drilling & blasting operations will be more economical than the direct dredging by the CSD. At that stage, depending on the environmental permit conditions, drilling & blasting would and could be the dredging methodology to remove the rock.*

437 We make one further observation. We cannot be involved in speculation as to the future events that may unfold or as to the veracity of claims about the capacities of the most recently developed dredging equipment. Even accepting a modern jumbo CSD could operate at up to 70 MPa, we are not satisfied to the level required that the CSD will be able to operate in the manner contended for by Glencore. To the suggestion that if say the volume of hard rock was halved so that theoretically drilling and blasting could be supplemented with other dredging techniques, the Tribunal cannot base its decision on this degree of speculation. The Tribunal is satisfied that the correct view of the current and likely future state of the operational configurations and techniques for using the jumbo CSD in the construction of the Port is as put forward by PNO and the ACCC, and the analysis of Arup is sound.

438 For the foregoing reasons, the Final Determination was correct and is our own view.

# IMPORTATION OF RECLAMATION BUNDING MATERIAL

439 The Tribunal can conveniently deal with this issue in the same manner it dealt with the previous issue.

440 Glencore challenges the ACCC’s acceptance of PNO’s contention that an additional allowance of $145 million should be included in DORC valuation for imported reclamation bunding materials. We do not need to deal with the issue of user contributions as the Tribunal has already accepted PNO’s primary argument that user contributions are not to be taken into account.

441 It was submitted that such an additional allowance was not required as sufficient material was available from dredging without the need to import reclamation bunding materials.

442 Glencore relied upon the 12 June 2018 Arup report which (at page 4) stated:

*Properly analysed, no such additional allowance is required as sufficient material is available from dredging without the need to import reclamation bunding materials. Arup considers that our dredging and reclamation methodologies provide for the initial bunds to be developed as part of the dredging of the channel, and there is no need for imported material, or for bunds to be constructed in a 200mx200m grid.*

443 Further, in reliance on the earlier 28 May 2018 Arup report it was contended that the only cost allowance should be for the placement of dredged material:

*Costs for material placement and bunding are included in the dredging rates. Refer to the methodology assumed for material placement and bunding in Section 2.2.6.*

444 A significant factor in determining whether bunding materials were required to be imported is the suitability of the materials dredged from the Port. However, Glencore submitted that the ACCC failed to properly examine the issue and merely accepted PNO’s dredging costs without question in this regard, with the Final Determination stating (at page 81):

*The Commission notes the difficulties identified in relation to assessing the parties’ estimates of the volumes of materials to be dredged. However, the Commission has accepted PNO’s submitted position in relation to the type of material to be dredged (i.e. hardness of rock), dredging methodology and therefore costs on the basis that AECOM’s DORC valuation (upon which it relied) is likely to be more appropriate. Given this, the Commission considers that PNO’s submitted position that an additional allowance of $145 million ($2014) should be included in the DORC valuation for reclamation bunding materials.*

445 Glencore submitted that the answer to the question of dredging methodology says nothing about the suitability of dredged material for reclamation bunding. It was submitted that bunding is generally constructed from sand and cut conglomerate rock. The question, therefore, was whether dredging would produce sufficient quantities of this material.

446 Arup took the view that there would be sufficient material. In its 3 September 2018 report it stated (at page 52):

*The approach and Entrance Channel contains approximately 2 million cubic metres of fine, medium to gravelly clean sand which can be used in lieu of importing external materials for bund construction (sufficient to construct up to 60 kms of peripheral bunding - it is anticipated that a maximum of 10km of bunding from this source would be required).*

447 Assuming this was accepted by the Tribunal, Glencore argued that this should subsequently lead to the reduction of the DORC valuation used in the Final Determination by the amount included for imported reclamation bunding materials. This equated to approximately $145 million.

448 As we have said, the ACCC’s DORC valuation included $145 million for reclamation bunding materials. This involved the importation of materials to construct an initial bunded area below the river water level (formed with perimeter bunds or internal bunds) into which dredged material would be placed to form the reclaimed area. The ACCC’s estimate consisted of $65 million to source and place 700,000 m3 of material for the initial perimeter, and $80 million to form the bunds from material subsequently obtained from dredging.

449 Glencore submitted that no allowance for importing material was necessary, as sufficient material would be available from dredging at the Port to obviate the need to import reclamation bunding materials. However, the fine material which would be available from the early dredging at the Port would be unsuitable to form underwater perimeter bunds, which must be constructed from coarse or hard gravel or rock to be stable.

450 Glencore’s proposed methodology was explained in detail in Arup’s 3 September 2018 report. In summary, it required bunds (including perimeter bunds but only limited internal bunds) formed from washed sand won from dredging. Bunds would be formed to contain this work and the dispersion of sediment during reclamation. Following this, reclamation would proceed using a “pancake” method, by which layers of dredged material are laid, with preference given to coarser dredged material. This was detailed in Arup’s 3 September 2018 report (at pages 51-52):

*Arup is proposing that limited bunds are required and can be formed from clean ocean washed sand won from dredging. Bunds would be formed to contain the work and sediment dispersion during reclamation. Following this, reclamation would proceed using a pancake method, whereby layers of dredge material are laid, with preference given to coarser dredge material such as sand and cut conglomerate.*

*In Arup’s method, the washing and sorting of sediment can be effectively achieved using hopper barge compartments. Claimed material is washed through compartments in the hopper barge. It is then allowed to settle where the coarse material settles at the bottom of the barge and the fine fraction is left in suspension. The settled coarse sediment is then placed as reclamation material, allowing the remaining waters to be transferred offshore for disposal. Overtopping (i.e. whereby sediments are washed off the barge back into the water column) can be effectively controlled by employing suspended sediment monitoring, and restricting spill rates or halting works if exceedances of suspended sediment levels are detected.*

451 At page 54, Arup further stated:

*Arup is proposing to use coarser sediment, such as sand and cut conglomerate for reclamation purposes, while disposing of the finer sediment fraction (mud, clay, siltstone, claystone and shales) offshore due to its propensity to break down into finely dispersed materials. Initial perimeter bunds would be established prior to reclamation commencing.*

452 In the opinion of the Tribunal, Glencore’s method, which involved “pancaking” the sand material directly onto the areas to be reclaimed, without the need for perimeter or internal bunds, will suffer from two problems as identified by PNO.

453 First, without perimeter bunds to contain the dredged material, it is highly likely that soft marine sediment in the dredged material (such as mud, clay, siltstone, claystone and shales) would escape from the bunding, leaving residual deposits on the riverbed.

454 Citing the ‘AECOM Response to Section 5 of ACCC Draft Determination 20 July 2018 – Planning Opinion’, the Final Determination stated (at page 79):

*This would not comply with prevailing development consents in relation to the maintenance of water quality in the Hunter River.*

*Comparatively, the Bund Method would pose a lower potential risk of impact to water quality, ecology and biodiversity relative to the Pancake Method due to:*

* *The smaller area of excavated material exposed to the water column and connected to areas outside the port development footprint at any one time; and*
* *The shorter duration of excavated material placement activities exposed to the water column and connected to areas outside the port development footprint.*

*On this basis, and notwithstanding its additional expense, I believe that regulatory authorities would prefer the Bund Method over the Pancake Method, as the Bund Method would avoid or minimise potential impacts on water quality, ecology and biodiversity, consistent with the objects of the* Environmental Planning and Assessment Act 1979 (NSW) and Environment Protection and Biodiversity Conservation Act 1999 *(Cth). The regulatory authorities would likely seek to give effect to this preference through appropriate conditions of approval.*

*In my opinion, the Pancake Method is unlikely to be approved because it does not effectively avoid or minimise impacts on water quality, ecology and biodiversity and there is a feasible alternative (the Bund Method) which does.*

455 Whilst Glencore submitted that this risk could be avoided through the use of a trailer suction hopper dredge (which would remove the overlying soft material, which would then be disposed of offshore), we consider it is not possible in practice to remove all of this material and there are likely to be pockets of fine material remaining. By contrast, the use of perimeter and internal bunding, as provided for in the Final Determination, allows the containment and management of this material.

456 Secondly, Glencore’s pancake method assumes that there is no fine material in the remainder of the dredged material that would be placed in the reclamation. Inevitably, there would be pockets of fine material or localised variability in the material which is unsuitable for use in bunding and reclamation.

457 Citing the 28 May 2018 Arup report at page 16, the Final Determination stated (at pages 79-80):

*It is standard practice to construct internal bunding to create several reclamation cells which then allow the management of unsuitable material and discharge water. Glencore’s expert, Arup, refers to examples in Sydney and Brisbane where the pancake method has been used, but in neither of these cases was the dredged material pancaked into uncontained areas (i.e. areas without perimeter bunds) in the manner Glencore proposes.*

*the sand, cut conglomerate and the like are unlikely to break down into quantities significant quantities of sub 100 micron material requiring containment by bunds. As such Arup have adopted the pancake reclamation method previously used by PWCS in Newcastle, Sydney Ports in Botany Bay and at Brisbane Airport.*

458 There is also a timing problem with Glencore’s suggested approach. Relying only on material dredged from the Port would require alteration to the proposed construction program to ensure that suitable coarse dredged material is available when it is needed for bunding. Given the current program has been designed on a least cost basis, any significant alteration will necessarily lead to increased costs, which have not been factored into Glencore’s alternative approach. In addition, even if the bunds were constructed solely from onsite material, there would still be a significant cost associated with this task, which has not been considered.

459 For the foregoing reasons, the Final Determination was correct and is our own view.

# LENGTH OF CONSTRUCTION PERIOD AND INTEREST COSTS

460 The Tribunal proceeds to address these issues in a similar manner to the last two issues.

461 The Draft Determination proposed to adopt a 12 year whole-of-port construction program, as submitted by PNO. In its response to the Draft Determination, Glencore reiterated its previous submissions for adopting a shorter construction program for a sub-set of port assets, whilst also providing an alternative to PNO’s whole-of-port construction program. In contrast, PNO supported the Draft Determination and provided additional reasons for why Glencore’s alternative whole-of-port construction program should not be adopted.

462 PNO submitted that a 12 year construction program would be appropriate. This is based on AECOM’s DORC valuation, which assumes that the works would be completed by a selected contractor undertaking a single package of works for the Port as a whole. AECOM allows 5.5 years for planning and approvals, and 6.5 years for asset construction. This was detailed in the AECOM report dated 4 September 2017, at page ii:

*To evaluate the interest during construction costs, a detailed port construction schedule has been developed, built up typically from asset level. This indicates about 5.5 years of planning and approvals, followed by 6.5 years of construction.*

463 AECOM considered that, if the channel were to be constructed as a separate construction campaign, the remainder of the Port would also then need to proceed as a separate construction campaign. AECOM noted that, in this case, the benefit of using the dredged material for reclamation and surcharge would be lost, and AECOM estimated an additional $700 million in materials would be incurred (although dredging costs would be reduced by around $268 million). AECOM, as stated in their report dated 28 May 2018 at page 32, was of the view that the dredging cost savings are not sufficient to offset the additional material costs, such that the least cost method for developing the Port is as a single campaign:

*…if the channel were to be constructed as a separate construction campaign, with the dredged material disposed offshore, the remainder of the port development would also then proceed as a separate construction campaign. The benefit of using the dredged material for reclamation and surcharge would be lost and alternative land based sources would be identified.*

*Our assessment indicates that about 26. 5 million cubic metres of suitable fill material would be required to complete the reclamation of the port lands from their state at European First Settlement to their present levels of service. To be most efficient, it is assumed that this material would also be used as a rolling surcharge, before finally being incorporated into the works. Based on a 17m3 typical road truck capacity,· this volume of material would require 1.6 million truck movements into Newcastle.*

*If it’s assumed that the material was sourced from 35km away in the Hunter Valley, and each truck was able to complete three trips per day over a two year period, a fleet of about 1,000 trucks would be required to complete a total of 110 million truck kilometres.*

*We estimate the cost of sourcing 26.5million cubic metres of fill material onshore would be in excess of $700m. In addition, given the truck movements involved, it’s probable that a haul road would need to be constructed at significant additional cost, and there are likely to be further additional costs to rectify the damage caused to the existing road network.*

*We estimate that placing dredged material offshore, even though this may not be permitted, would offer dredging cost reductions in the order of $268m (including savings for bunding). This is not sufficient to off-set the additional costs of sourcing the material from land.*

464 This was also addressed by PNO in its submission to the ACCC in response to the Draft Determination:

*...the timeframe for construction of the channel is inextricably linked to the construction of the landside facilities. The channel and associated assets used to provide the declared service will not be operational and therefore able to generate revenue without the terminals and the terminals cannot be constructed prior to completion of the channel dredging without additional costs for obtaining suitable construction materials. Further, the dredged spoil cannot be dumped alongside the channel if the terminals are already under construction (or already constructed).*

465 PNO contended that Glencore’s construction program created a timing and cost issue in that the dredged spoil will need to be disposed of other than to be used in constructing the landslide facilities. PNO also stated that it had reviewed regulatory decisions cited by Glencore and submitted that it did not consider them to be relevant or apt to the circumstances in the case.

466 PNO argued that Glencore’s construction program was not practically feasible because it failed to take into account spoil disposal requirements in accordance with applicable environmental approvals and ignored the fact that landside facilities must be completed in order for the Port and the Service to be operationally functional at the end of the construction period.

467 As set out in the Final Determination at pages 101-102, in its response to the Draft Determination, PNO submitted that the ACCC should not accept Glencore’s revised whole-of-port construction program of 9.6 years for the following key reasons:

* *[t]he revised proposal by Arup does not conform with DORC methodology ... as it does not result in the least cost overall for the construction of the entire Port and does not replicate the current level of service*
* *their program will result in artificially and inefficiently shifting costs from the channel to the landside works and ‘increasing the total overall cost of the port development’*
* *[Certain] construction program matters raised by Arup ... contain material flaws*
* *[Regarding Arup’s] potential saving of 3 months on AECOM’s overall construction program ... Arup have adopted “techniques and durations ... without proper consideration of DORC principles which include that the project must not be unduly rushed (nor unduly delayed) and the development cost should be the most efficient and lower cost overall”*
* *Arup’s reclamation program has a critical timing flaw [which] ... does not align with the yield of its dredging strategy and shows the reclamation and all surcharging being in place mid-way through year six, but the dredging ... not being complet[ed] until the last quarter of year 8 ... Dredging of material needs to occur prior to the material being required for surcharging reclamation” ... AECOM estimate the construction program ... would need to be extended by 2.5 years*
* *AECOM submit that in contrast, its ‘mass balance assessment of the proposed dredging strategy ... allows for optimal and efficient use of the material as it becomes available from the dredging ... so, at any point during the surcharge task ... a shortfall of material that would require sour[c]ing alternative fill’ is avoided ‘and complies with DORC principles’*
* *Arup submit there is a saving to the volume of surcharge material [having] referenced the techniques and processes in the ... NCIG CET development ... However in relying on [this] ... as an indicator for more efficient techniques. Arup have not considered “that these techniques are significantly more costly than those used in AECOM’s DORC and the project specific drivers are non-existent in the context of our DORC assessment” ... further, Arup have incorrectly assumed certain land is vacant*
* *Specifically, ‘NCIG was constructed in a period of high coal demand and prices where there was a ... commercial imperative for early completion. The DORC methodology implicitly assumes long run conditions representative of the middle of the economic cycle’*
* *‘NCIG work took place in an area where previous land reclamation and stabilisation work had occurred ... [which was] not in a pre-European settlement state ... [t]hus the construction periods are not directly comparable’*
* *‘[r]eclamation and stabilisation of Mayfield 2, 3 and Dockyard areas has not been included’ by Glencore but PNO submit that they are not decommissioned assets, rather ‘the site has been remediated and a large area ... is currently used for cargo storage’*
* *However ‘even if the site was vacant’, because the ‘Mayfield site is not in its pre-European settlement state ... [a] proper DORC valuation would seek to replicate that service potential by including works to bring the area to its current load baring level’*
* *[Arup’s proposed] .. . alternative surcharging techniques .. . [do] not properly evaluate the impact of construction costs ... Without such assessment, Arup are unable to demonstrate that such techniques are more efficient or more appropriately conform to DORC principles.*
* *[T]here are ... critical engineering flaws in Arup’s proposed construction program ... [such that] the program does not represent a ... program that is capable of producing an asset able to deliver the Service in the time proposed including:*
* *‘Arup’ s... total period of 29 weeks to complete the tender process, award the contract and for the contractor to mobilise ... is an .. . inadequate duration for these activities’ and ‘correcting this would extend Arup’s program by at least 12 week’*
* *‘AECOM’s assessment is based on modern methods that provide the development at the least cost overall, not necessarily in the least time. The techniques proposed (but not evaluated or demonstrated to be more efficient)’ by Arup ‘may lead to an accelerated program but come at a significantly greater cost, or otherwise shift costs to other users (for example through increased terminal development costs) and ... would not be the most efficient overall.’*
* *Arup have proposed that shipment of coal is to occur before navaids are operational and also before the dredging of the Entrance Channel is complete. This is a critical operational issue as vessels will be unable to access or navigate the channel prior to these components being completed.*
* *‘Arup’s program does not adequately demonstrate the complex interface relationship between reclamation, wharf construction, revetment construction and berth box dredging’.*

468 PNO submitted that the ACCC should accept that the 12 year construction program complies with DORC principles and represents a more cost-efficient duration to construct the assets required to provide the Service.

469 Glencore put forth two alternative construction programs – one on a stand-alone basis (which Glencore stated was without delays associated with the construction of assets not required for the provision of the Service), and a whole-of-port construction program.

470 Glencore sought a further reduction to the DORC on the basis that it challenges the ACCC’s finding that the cost of interest during construction (‘**IDC**’) should be assessed on a construction period of 12 years. Glencore submitted that it would be possible to devise a shorter construction program to construct only those assets required for delivery of the Service. It contended that these assets could be constructed in 8.25 years which would reduce the IDC by approximately $322 million, which in turn would reduce the NSC by approximately 13%.

## Consideration

471 The Tribunal does not agree with Glencore’s approach. The DORC valuation is intended to reflect the hypothetical optimised replacement costs of the Port. This valuation is calculated using the most efficient construction program. The most efficient construction program is a single, integrated project. In theory, it may be possible to re-arrange the construction schedule to open the Port to business to some customers while it is still under construction. But this would not represent the most efficient method of construction, and would inevitably lead to the incurring of additional construction costs.

472 The Tribunal observes that Glencore has not sought to model the additional costs of a staged opening. For example, Glencore has not modelled the increase in construction costs for an earlier than scheduled construction of landside facilities or even the practical possibility of constructing such facilities. The 12 year whole-of-port construction period is optimised around the time required for the settling of soil under the terminals. Hence, there is strong possibility that even if the channel were completed after 8.25 years there would no terminals for the channel to serve. Glencore has also not sought to model the losses which would be incurred by the Port by operating on a partial basis with uncompleted terminals, which would need to be capitalised and added to the DORC. Instead, Glencore’s construction estimate assumes (unrealistically) that all other construction costs would be held constant.

473 Also Glencore’s calculations assume that if the Port was able to start operating while still under construction, all IDC would cease to be charged. But this would only be true in respect of those parts of the Port which have been completed. Glencore also assumes in its calculation of IDC that there is no further expenditure on assets necessary to provide the Service after the 8.25 year period. However, the fact is that the remaining port infrastructure, including the completion of land reclamation, and the construction of remaining wharves, revetments and land based infrastructure, including for other products, would then be completed during the Port’s operational phase. At least some of these works, such as revetments, would be necessary to provide the full Service. Further construction costs and interest would continue to be incurred in respect of those parts of the Service yet to be completed, while Glencore’s revised DORC fails to reflect this fact.

474 In reaching its Final Determination, the ACCC assessed the cost of IDC in accordance with a construction period of 12 years, as proposed by PNO. This was PNO’s estimate of the time required to construct the entire Port. Glencore challenged this finding.

475 It is necessary to consider Glencore’s position in more detail.

476 It was submitted by Glencore that the construction period should reflect the time required for efficient construction of only those assets required for delivery of the Service. Contrary to PNO’s “whole-of-port” argument (which was accepted by the ACCC), the time required to construct assets extrinsic to the Service (such as rail facilities, roads, and surcharging (ie improvement) of reclaimed land) ought not to be included for the purposes of the DORC valuation. Glencore’s evidence indicated a construction time of 8.25 years on this basis.

477 Synergies’ May 2019 report stated (at page 46):

*Recognising that, in practice, the port has been developed over a long period of time, largely through expansion of an operating-and therefore income generating-facility, Synergies considers that the construction period and cost profile should be assessed based on a pragmatic assessment of the time that would be required for the efficient construction of only those assets required to provide the declared service. Our view is supported by regulatory precedent, as outlined below.*

478 Glencore refers then to the position of PNO. PNO sought to justify its longer construction period on the basis that no revenue could be generated from the underlying assets of the Service unless and until reclaimed land was surcharged and all of the other assets were constructed; and that, therefore, interest should be capitalised until these other works (and, accordingly, the whole Port) are completed. This, it is said, is because efficient construction ought to be undertaken in a single campaign and the interrelationship of assets means that generation of revenue from declared Service-related assets (such as the channel) is dependent upon the completion of extrinsic of assets (such as reclaimed land). Glencore accepted that there are significant interrelationships between the construction of various assets required for the Port. However, Glencore says that it does not follow that this means the Port must be constructed in its entirety before substantial revenue can be generated from the assets that provide the Service. Glencore pointed out what PNO has publicly asserted to the NCC,in its application for revocation of the declaration of the Service, where PNO discusses the development of a container terminal at the Port.

479 Glencore pointed out that export of coal is responsible for over 90% of the Port’s revenue. Accordingly, it was submitted that the generation of revenue can be substantially commenced at the time that the coal terminals and related infrastructure are developed. This would include the reclamation and surcharging of the land required for those assets but would exclude certain assets contended for by PNO.

480 Arup, on behalf of Glencore, reported on how the sequencing of construction of the whole-of-port could be structured to allow completion of coal terminal infrastructure as a priority. Arup concluded that it would still require 8.25 years to construct the Service assets on a stand-alone basis, in which time construction of coal wharf and land-based infrastructure at Carrington and Kooragang Island could be sufficiently completed to commence revenue generating operations (albeit not necessarily at the full extent of current capacity). The remaining port infrastructure could then be completed whilst the Port is in operation.

481 It was then submitted that capitalising interest only to this point is consistent with standard regulatory practice that provides for IDC to be capitalised until assets are commissioned. Allowance for increasing volumes after this time may be addressed in pricing.

482 The Tribunal also notes that in response to the ACCC indicating in its Draft Determination its preference for the whole-of-port approach taken by PNO, Glencore proffered an alternative whole-of-port construction program that sees completion in 9.6 years.

483 If the Tribunal accepts Glencore’s principal position of an 8.25 year construction period, the IDC determined by the ACCC ought to be reduced by around $322 million, which will, in turn, reduce the NSC by around 13%. If the Tribunal accepted Glencore’s alternative construction period of 9.6 years, it will reduce the IDC by around $170 million, resulting in a reduction of the NSC by about 7%.

484 Glencore then said that PNO’s claim that the whole-of-port construction period of 9.6 years was unrealistic, and the ACCC’s acceptance of PNO’s claim, ignored the evidence provided by Glencore that there was no requirement for the “two stage” surcharging program. In the absence of a “two stage” surcharging program, AECOM’s own analysis shows that the whole-of-port construction can be completed within nine years. Glencore submitted that as identified by Arup:

 AECOM has substantially over-estimated the volume of required surcharge material, with the result that AECOM concluded that there was insufficient dredged material to undertake all required surcharging as a single stage. AECOM also concluded that this meant that either a two stage process was required (where surcharge material was moved to a second site once surcharging of the first site was complete) or additional material needed to be imported.

 This over-estimation was evident from the actual expected volume of surcharge material for the NCIG site (ie 4 million m3 as compared to AECOM’s estimated 10.6 million m3), and from the inclusion of surcharge material for vacant land (AECOM required 1.8 million m3 of surcharge material for vacant land at Mayfield).

 Correcting for this over-estimation of surcharge material requirements alone would allow surcharging to be completed in a single stage without the need to import surcharge material, enabling AECOM’s “accelerated” 9 year construction period to be achieved without any material increase in cost.

 Further, while Glencore’s “stand-alone” construction program did not seek to develop an integrated whole-of-port construction program aligning dredging with land reclamation for wharf development, its 9.6 year whole-of-port construction program did so.

485 Glencore then submitted that it followed that there is no reasonable basis for PNO to now claim that a 9.6 year construction period is unrealistic.

486 Glencore went on to explain its position further as follows. Within this 9.6 year whole-of-port construction period, it would be expected that an efficient infrastructure developer would prioritise the construction of the highest revenue generating assets – this means prioritising the development of the coal terminal infrastructure. As Arup explained, this approach does not mean staging of the Port construction in such a way as to add to the total cost and duration of construction, rather it means that the sequencing of construction activities would be prioritised to enable the coal sites to become operational in the most efficient way. It does not require material changes to the assumed construction methodology for components of the Port, and therefore would not add to the total cost and results in the most efficient construction of the Port, once account is taken of the opportunity cost of invested capital.

487 Finally, Glencore submitted that PNO has incorrectly claimed that the approach of capitalising interest costs, until revenue generation commences, does not give regard to the remaining works that will require completion. For construction works occurring beyond this period, there is no need to capitalise interest, as the Service assets will be generating revenue and are therefore able to cover their financing costs. This was addressed in Synergies’ 17 August 2018 report. As that report also points out, accepting assets into a RAB at their commissioning date, notwithstanding that there may be some further post commissioning expenditure, is also standard regulatory practice for infrastructure serving the mining sector.

488 In relation to a whole-of-port construction period, the ACCC noted that Arup’s arguments that all sites could be surcharged within 4 years were instructive in terms of where time efficiencies could be achieved. However, the ACCC claimed that Arup did not elaborate on the implications of surcharging for overall construction costs and that Glencore did not evaluate or demonstrate that Arup’s proposed approach would result in the lowest overall cost.

489 Glencore submitted that the following information allows the Tribunal to make this assessment:

(1) In AECOM’ s original analysis of the 4 year versus 7 year construction period, the only additional cost that AECOM attributed to the 4 year program was the cost of imported fill for surcharging (estimated to be $360 million) and this was compared to the additional interest costs associated with a 7 year reclamation program compared to a 4 year program (estimated additional IDC in DORC value of $211.4 million), leading to AECOM estimating a higher cost of the 4 year program of $148.6 million.

(2) However, Arup’s report shows that AECOM had substantially overestimated the amount of fill required for reclamation and surcharging, and showed that the 4 year reclamation program could occur without needing to import fill (and without needing to incur the additional $360 million cost).

(3) It followed that the 4 year reclamation program would then be cheaper than the 7 year program, as it would allow the avoidance of the additional $211.4 million interest costs resulting from the 7 year program.

(4) The ACCC’s submission that there was no total construction cost for Glencore’s whole-of-port construction program is incorrect. Arup’s estimated replacement cost is fully aligned with its proposed 9.6 year whole-of-port construction program.

490 At this stage, it is convenient to refer to the submissions of the ACCC.

491 In the ACCC’s view, separate construction campaigns as submitted by PNO would be necessary to accommodate the staged commissioning of assets. The ACCC considered that, on balance, PNO’s construction program therefore better reflected the considerations of an efficient entrant under the DORC framework. In particular, the ACCC considers that an efficient entrant would not undertake a staged commissioning of assets because the higher overall costs incurred would more than offset any cash flows earned from an earlier revenue stream.

492 The ACCC considered PNO’s proposed 12 year construction program as appropriate. The ACCC considered that this construction program provides for an IDC that contributes to ensuring PNO is able to earn a return on investment commensurate with the regulatory and commercial risks involved (ss 44X(l)(h) and 44ZZCA(a)(ii)) which is in the legitimate business interests of PNO (s 44X(l)(a)). This also ensures that prices reflect efficient costs, which is in the interests of those who have rights to use the Service (s 44X(l)(c)).

493 The IDC estimate adopted by the ACCC – which the ACCC has determined using a 12 year construction period and calculated as at the valuation date of 1 January 2018 – was $463.3 million. IDC together with the total construction cost estimate of $1616.1 million form the commissioning costs estimate of $2,169.5 million (at 1 January 2018).

494 The ACCC considered, and concluded in making the Final Determination, that the assumed construction program should allow for the construction of all assets required to provide the Service while minimising PNO’s overall construction costs. An efficient entrant, as assumed under the DORC framework, would need to consider a construction program that allowed for the construction of all assets necessary to provide the Service and would seek to minimise its total costs. This would include weighing the potentially higher construction costs that would be incurred in the earlier commissioning of assets against the receipt of earlier cash flows. Contrary to Glencore’s contention, however, an efficient entrant would adopt a construction program that provides for the generation of revenue as early as possible only to the extent that this minimises overall construction costs (net of cash flows).

495 In respect of Glencore’s 8.25 year stand-alone construction program, the ACCC considered, and concluded in making the Final Determination, that:

(1) the construction period should include all assets that are necessary to provide the Service to the point that revenue can be generated from the Service, which would necessarily include the time taken to construct assets that are neither owned nor leased by PNO. For example, whereas Arup’s stand-alone construction program excludes Macquarie Pier, the time taken to construct Macquarie Pier should be included in the construction program because it is necessary for the construction of the southern breakwater;

(2) Arup’s analysis does not consider the potentially higher overall construction costs that are likely to result from a staged commissioning of assets notwithstanding the importance of this given the strong complementarities in the construction sequence;

(3) while AECOM’s DORC valuation for PNO did not explicitly consider the cost impact of a staged commissioning, AECOM did estimate the costs of breaking the construction sequence in the form of separate construction campaigns;

(4) this demonstrated that separate campaigns for the channel dredging and landside facilities enable a shorter construction period but result in considerably greater total construction costs;

(5) separate construction campaigns would be necessary to accommodate the staged commissioning of assets proposed by Glencore; and

(6) the staged commissioning of assets proposed by Glencore would involve higher overall costs that more than offset any cash flows earned from an earlier revenue stream and, accordingly, would not be undertaken by an efficient entrant.

496 In respect of Glencore’s whole-of-port construction program of 9.6 years, the ACCC considered that Glencore had not fully considered the total cost of that program, and the ACCC could not be satisfied it would minimise total costs as an efficient entrant would under the DORC framework. More specifically, the ACCC considered that:

(1) Glencore’s construction period is shorter than that of PNO primarily because of differing views on the appropriate land surcharging program as assessed by Arup and AECOM respectively;

(2) Arup’s arguments to the effect that all sites could be surcharged within 4 years with no need to import fill material are instructive in relation to the issue of where time efficiencies and therefore financing cost efficiencies could be gained;

(3) however, while surcharging is the cheapest and most direct method of ground improvement, Arup did not elaborate on the implications of surcharging for overall construction costs and Glencore did not evaluate or demonstrate that Arup’s proposed approach would result in the lowest overall cost.

497 While Glencore correctly observed that AECOM (on behalf of PNO) did not consider the cost impact of a staged commissioning of assets, it does not follow that the imposition on Glencore of an evidential onus and a burden to establish its case to a standard that PNO does not face should lead to a rejection of Glencore’s whole-of-port construction program of 9.6 years. The Tribunal considers that PNO’s construction program better reflects the considerations of an efficient entrant under the DORC framework than Glencore’s because there was insufficient evidence of the total construction cost of Glencore’s program for use in the DORC valuation. In circumstances where Arup and Glencore failed to consider the implications of surcharging for total construction costs, there was no total construction cost for Glencore’s whole-of-port construction program that could be applied for the purposes of determining a DORC valuation.

498 We note that if a shorter period of construction were to be adopted, an allowance for capital expenditure and IDC for assets still to be constructed would be required.

499 The Tribunal considers that the submissions of the ACCC and PNO are in accordance with the practical and efficient realities of a construction program that is applicable in the determination of a DORC valuation.

# NON-COAL ASSETS

500 This issue addresses Glencore’s contention that the arbitrated charges applied to coal carrying vessels should not exceed the stand-alone costs of their provision. The proposition was initially raised by Glencore in its submissions to the ACCC’s arbitration.

501 The submissions of both parties to the ACCC in the original arbitration of this issue, summarised in Section 6.5 of the Final Determination, addressed the in-principle reasons a stand-alone pricing test should be applied; the nature of the assets associated with the provision of navigation and berthing services and the notional division of those assets between services to coal and non-coal vessels.

502 The submissions of the parties to the Tribunal on this issue covered the same arguments or materials that had previously been part of the original arbitration and included no new grounds. The ACCC’s submissions similarly reflected, without changes, its consideration of and responses to submissions in its Draft Determination and Final Determination.

## What the ACCC decided

503 The arbitrated charge applied to coal carrying vessels was an output of a spreadsheet pricing model based on the PTRM. This was jointly derived by the parties and their advisors.

504 The PTRM distributes an estimate of the total cost of the Service across two categories of Wharfage Charges and four categories of NSC, both of which charge types are explicitly divided between coal and non-coal vessels. The ACCC adopted the PTRM and varied inputs such as asset values to reflect its arbitration, but it did not alter the embedded process for setting the charges that distributed the final MAR

505 The ACCC rejected the need for the stand-alone test on the two grounds argued by PNO in its initial submissions in the arbitration:

 the Service does not distinguish between coal and non-coal users; and

 the assets Glencore seeks to exclude from the MAR provide value for both coal and non-coal users, and therefore should be included in the MAR.

506 It consequently determined the NSC for coal vessels using the method set out in the PTRM for distributing the MAR arising from the inputs decided in other parts of its Final Reasons.

## Submissions to the Tribunal

### Glencore

507 Glencore raised the issue of the treatment of non-coal assets in the context of the method used in the PTRM to distribute the calculated MAR between users of the Service. It’s acceptance of the model was contingent on application of a stand-alone revenue test.

508 Glencore submitted that coal users should not pay more than the stand-alone cost of providing the Service to them, as this test is consistent with the Part IIIA pricing principles (s 44ZZCA) and with earlier ACCC regulatory decisions in relation to the Hunter Valley coal network.

509 Glencore’s position was originally set out in detail in Section 8.2 of Synergies’ 28 May 2018 report to the ACCC, citing the decision of the Essential Services Commission of South Australia in the context of the South Australian rail access regime and the QCA’s consideration of this issue in the context of Queensland Rail’s Rail Access Undertaking. The consistency of the stand-alone test with the pricing principles relies on the logic summarised by the ACCC in their submission to the Tribunal:

*Pricing between stand-alone and incremental cost is considered to be efficient as it avoids cross-subsidies. Pricing above stand-alone cost is economically inefficient, and gives rise to the threat of an efficient entrant displacing the Port for the service.*

510 This argument was presented in more detail by the ACCC in its Draft Determination, although it did not appear in, and was not relied upon, in the Final Determination.

511 Glencore submitted that the stand-alone test is consistent with the economically efficient operation of the facilities required for the Service as prescribed by s 44X(1)(g). The pricing principles in s 44ZZCA (required to be considered by s 44X(1)(h)) specify that access price structures should allow multi-part pricing and price discrimination where it aids efficiency.

512 Synergies’ 17 August 2018 response to the Draft Determination argued that a requirement that coal users (including Glencore) pay charges for their particular use of the Service that exceed the stand-alone cost of providing the Service to those users (and therefore effectively cross-subsidise the use of non-coal assets by other parties), is inherently inefficient. That inefficiency arises because of the potential for entry by an alternative supplier of the services being charged above stand-alone cost, which would inefficiently raise the total costs of supply. Synergies also referred to what it described as “well established regulatory precedent” in concluding that a price above stand-alone cost implies inefficient cross-subsidy of other services.

513 As outlined by Synergies, the application of the stand-alone test to services to coal vessels would limit the revenue from coal vessel Wharfage Charge and NSC to the MAR assessed for the whole of the Service, minus only the capital costs associated with groups of assets identified by Arup as not required for channel and berthage services to coal vessels (termed the ‘non-coal assets’). In addition, Synergies claimed, without explanation, that it would be:

*... reasonable to assume that all of PNO’s operating costs will continue to be incurred in providing the declared service to coal vessels on a stand-alone basis.*

514 The groups of excluded assets and their relevant valuations were set out in Table 2 of Synergies’ response, reproduced below:



515 In submissions to the Tribunal following hearings Glencore subsequently described the non-coal assets to be excluded as:

*11.8% of dredging costs, $60.0m of revetments and seawalls and $54.0m of wharves and jetties in 2014$*

516 We note that no value was attributed to wharves and jetties assets in the Final Determination DORC calculations in the PTRM, although the category ‘revetments under wharves’ was valued at $54.0 million (in 2014 dollars). The Tribunal has proceeded on the basis these are the last item in the list of assets meant to be excluded (with nothing in this decision relying on the assumption).

517 Glencore also specified that the whole of user contributions to channel dredging should be applied only to coal-related assets. The final DORC calculations deducted a value for user contributions that was determined by applying a percentage of the original replacement cost to each of the channel assets and riverwalls and revetments asset categories.

518 The Tribunal has interpreted the effect of Glencore’s approach to mean that the original dollar value of user contributions (the user contribution percentage in the final PTRM, times the whole of the replacement cost of each asset class) would be deducted from the smaller, coal-only asset base (with, again, nothing in this decision relying on the assumption).

519 As demand forecasts and the Wharfage Charge are agreed by the parties, the application of the stand-alone test sets a specific limit on the coal vessel NSC. Glencore submitted that the effect of its adjustments, taking into account deductions for both user-contributed assets and non-coal assets, is to limit PNO’s initial NSC for coal vessels to $0.4938 per gross revenue tonne (‘**GRT**’) in 2018. This is $0.1137 per GRT below the ACCC’s determination of $0.6075 per GRT. Glencore concluded that because the NSC determined by the ACCC was more than Glencore’s calculated stand-alone NSC, the Final Determination was inefficient and inconsistent with the pricing principles in Part IIIA.

520 Based on media reports of a proposal by PNO to invest $1.8 billion in a container terminal at the Port, Glencore raised one new argument in submissions to the Tribunal that was not previously put to the ACCC. It submitted that the whole-of-port approach in the Final Determination would result in Glencore being forced to contribute to this capital expenditure through its NSC, notwithstanding the fact that the facility would not be used by coal vessels. Glencore did not argue that this was necessarily inefficient, only that it illustrated the “unfairness” of the Final Determination.

### PNO

521 PNO submissions to the Tribunal reflected the case previously made to the ACCC in arbitration, arguing that stand-alone pricing is not appropriate for several related reasons.

522 First, PNO submitted that the Port is a single integrated facility, offering one service. Consequently, unlike other instances where stand-alone pricing has sometimes been used to test the pricing of infrastructure, it is not possible to identify physically discrete and separate parts of the infrastructure related to the Service.

523 Second, PNO argued the Service does not distinguish between coal and non-coal users. This is the first of the two points accepted by the ACCC as the basis of its determination. PNO argued the Service includes the use of shipping channels at the Port for both coal and non-coal user access, reflecting the integrated nature of the facility. Prices should therefore be set at a level which would deter hypothetical entry by a competitor supplying the whole of the declared service (that is, services to both coal and non-coal users).

524 Third, PNO argued the evidence shows that the assets identified by Glencore, as not being used regularly by coal vessels, were in fact used to provide value to both coal and non-coal users. This is the second of the two points accepted by the ACCC as the basis of its Final Determination. PNO’s evidence on the use of Port assets was summarised in the Final Determination.

525 PNO submitted that there were more berths capable of accommodating coal vessels than claimed by Glencore. It also identified examples where coal vessels have in fact used the parts of the main channel or have been moved to berths within the Basin, which Glencore seeks to exclude. PNO provided evidence of the utilisation of notionally “non-coal” berths by coal vessels for necessary purposes other than coal loading, such as mooring during repairs and sheltering from adverse sea conditions.

526 PNO also argued that the Basin was used to provide a number of services associated with operation of the Port (such as tug and maintenance dredging and navigational aids) that are essential to the provision of the Service to coal vessels. PNO submitted that these examples, despite Glencore’s dismissal of some of them as “isolated”, mean the Port cannot be divided between coal and non-coal assets.

527 PNO further argued that the issue of the proposed container terminal at the Port raised by Glencore was a “red herring”. As a landside facility at the Port, the project would be excluded from the regulated asset base used to deliver the declared service, just as the coal terminals at the Port are also excluded from the asset base.

528 Contrary to Glencore’s claim that the project would disadvantage it, PNO argued that the container terminal would allow the costs of the Port to be shared across more users and would allow longer vessels to use the channel, both of which would potentially provide benefits to Glencore.

529 Further disagreeing with Glencore’s submissions, PNO argued that stand-alone pricing is not consistent with the relevant statutory criteria in s 44X(1), including the pricing principles in s 44ZZCA. Pursuant to s 44X(1)(d), the ACCC (and the Tribunal) must take into account the direct costs of providing access to the Service, which PNO submitted, in this case is a service provided to both coal and non-coal users. Stand-alone pricing was not consistent with s 44X(1)(g) which requires consideration of the “economically efficient operation of the facility”, because the facility here is the Port as a whole, not a stand-alone subset of users.

### ACCC

530 The ACCC’s submissions reaffirmed the approach taken in its Draft Determination and Final Determination. It accepted the two points made by PNO, that there are no separate coal and non-coal services and that all service-related costs are required to serve all users. Those points together effectively mean that the stand-alone test has no effect.

531 In submissions to the Tribunal, the ACCC argued Glencore was not correct to say that it had rejected Glencore’s proposed application of a stand-alone test. Rather, as outlined in its Final Determination, the ACCC concluded that there is no defined and estimated service increment of “coal access”, and the smallest defined and estimated service increment included both coal and non-coal access to the Service. On the facts before it, the ACCC therefore concluded that assets comprising the Basin and channels provided value to coal users and, on that basis, the entirety of the assets used to provide the Service were appropriately included in the asset base. Consequently, the stand-alone cost of providing access to coal vessels was not less than, but corresponded to, the stand-alone cost of providing the Service.

532 The ACCC submitted that it found that the non-coal assets, that Glencore sought to exclude, provide value for both coal and non-coal users and therefore should be included in the asset base for the purposes of calculating MAR. It also submitted that this conclusion was appropriate having regard to the statutory criteria.

533 The ACCC submitted that, contrary to Glencore’s claims, the frequency with which ‘non-coal berths’ have historically been used to accommodate coal vessels was not to the point. It argued access to the Service encompasses a right, or an option, to use those ‘non-coal berths’ for non-loading purposes. The ACCC considered this option to have economic value to coal users, whether or not they in fact ultimately use those non-coal berths, and it was therefore appropriate for the costs of those non-coal berths to be included in the MAR used in the stand-alone test.

534 The ACCC also agreed with PNO’s arguments, in response to Glencore’s characterisation of the Final Determination as ‘unfair’, on the basis of its claims about the impact of PNO’s proposed $1.8 billion expenditure for a container terminal at the Port. In addition, it observed that, because Glencore’s example relied on a newspaper article which post-dates the Final Determination, and was not information the ACCC took into account in connection with the making that Determination, it does not fall within s 44ZZOAAA(3)(c).

535 While the ACCC was not aware of a reference to the $1.8 billion figure within the materials the ACCC did take into account, it acknowledges that PNO’s long term plan for a staged container terminal development is referred to in general terms in those materials.

536 The ACCC submissions disagreed with PNO’s submissions that stand-alone pricing is inconsistent with the relevant statutory criteria in s 44X(1). It stated that pricing between stand-alone and incremental cost is considered to be efficient, as it avoids cross-subsidies. Pricing above stand-alone cost is economically inefficient, and gives rise to the threat of an efficient entrant displacing the Port for the Service. However, as the ACCC found that both coal and non-coal assets should be included in the asset base, the issue of whether stand-alone pricing is consistent with the statutory criteria did not arise.

## The Tribunal’s analysis

537 This ground of review concerns how the MAR is recovered from different classes of users of the Service. It is useful to review the approach agreed by the parties.

538 The MAR is calculated using a BBM and relates to the entirety of the Service. The MAR is based on, among other things, the RAB, which consists of all the assets required to provide the declared service, regardless of user. The PTRM, agreed to by the parties, provides for the MAR to be recovered from all Port users through two charges – the NSC and the Wharfage Charge – applying to three categories of users: coal vessels, non-coal vessels other than cruise ships, and cruise ships. This is despite the fact that the whole of the Wharfage Charge does not relate only to the declared Service (see section above on Scope of the Determination) and that the Determination applies only to coal users.

539 The parties have agreed that an initial portion ($0.0746 per Revenue Tonne) of the Wharfage Charge paid by vessels using the Port constitutes an efficient charge for the services associated with berths and berthing boxes.

540 The charges for non-coal vessels and cruise ships are an output of the model in exactly the same way that the charges for coal vessels are an output. But they do not appear in the Final Determination because the arbitration relates only to Glencore’s application for the determination of charges.

541 PNO is required by the Final Determination to levy the charges that were the output of the model for 2018, with annual reviews in light of forecast demand for services. PNO is not limited by the Final Determination as to what charges it levies on non-coal vessels or coal vessels other than those covered by the scope of the Final Determination.

542 In this way, the MAR is a notional figure. It is not actually the maximum revenue that PNO can earn, but is a regulatory parameter estimated as part of the derivation of charges for coal vessels. It notionally applies to all users because of the way that the model has been constructed, such as the fact that the RAB is estimated by reference to all the facilities that are required to provide the declared Service to all users. As mentioned, the construction of the model in this way was agreed to by the parties.

543 The means by which the MAR is shared between categories of users – and the resulting charges calculated – is set in the model. The model adopted the existing relativities between charges and simply applies them without change into the future. Thus:

 The Wharfage Charge is set at its agreed current level (prior to the taking effect of the arbitration) and maintained in real terms.

 Similarly, the levels of expected demand for Port access were provided by the parties’ expert advisors and were also agreed. These were set out in Table 30 of the Final Determination and comprise the number and average size of vessels in each of four categories, all assumed constant each year for the five years in the PTRM.

 The NSC for the categories of users are initially set at their current levels and then varied by the same proportion so as to achieve the recovery – along with the Wharfage Charge – of the MAR. In the Final Determination this meant that all the NSC were decreased by 19.57% from their pre-existing levels.

 The relativities between the NSCs for different categories of vessels consequently remained constant at their pre-existing levels, which happened to be that for non-coal vessels the charge for the first 50,000 GRT is 64.4% of the coal vessel rate, and the charge for any GRT above 50,000 is 145.4% of the coal vessel rate; and the charge for cruise vessels is 75% of the first 50,000 GRT coal vessel rate.

544 This charging structure was agreed between the parties, but with the important caveat that Glencore sought a checking mechanism: the stand-alone test. It argued that if the stand-alone charge for coal vessels was less than the charge resulting from unmodified use of the model, then that lower rate should apply to it. We shall explain this in more detail shortly.

545 It is accepted by all that, should the Tribunal vary the MAR associated with the Final Determination in light of other grounds of review, the same charging structure, ie the same relativities between charges, should apply, subject again to the caveat that Glencore seeks to apply a stand-alone test.

546 The stand-alone test sought by Glencore involves modifying the inputs to the model. So-called non-coal assets are removed from the asset base, reducing the MAR accordingly, and that lower MAR is recovered from coal vessels alone. When that modification is made in the manner proposed by Glencore, the model output for the NSC for coal vessels is less than the rate without the modification.

547 Glencore argues that, accordingly, the stand-alone test failed and it should pay the reduced charge. Effectively, Glencore argues that it should pay a lower share of the MAR than set out in the Final Determination. It says that PNO could forego the revenue involved or recover it from non-coal vessels.

548 The stand-alone test is well entrenched in economic theory. The ACCC addressed the test in its Draft Determination, noting:

*...while there is no stand-alone cost test in the pricing principles, the efficiency implications of levying charges above the stand-alone cost of a service are unambiguous. Charging above the stand-alone cost results in economic inefficiency and is counter to the objects of Part IIIA, which is to ‘promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided’ (section 44X(1)(aa)). In particular, if charges for coal access are above the stand-alone cost of the declared service, and charges for non-coal access are below the incremental cost, coal customers are a source of a cross-subsidy and non-coal customers are a recipient of a cross-subsidy, which results in allocative and productive inefficiency.*

549 In the Final Determination, the ACCC endorsed (as a matter of principle) use of the stand-alone test. However, it agreed with PNO that the smallest defined and estimated service increment includes both coal and non-coal vessels. The stand-alone cost of supplying access to coal vessels is therefore not less than, but corresponds to, the cost of providing the declared service to all vessels. It could be said that applying the test therefore has no effect.

550 We first sketch the thinking behind the test.

551 The relevance of the stand-alone test for the efficiency of prices arises from two propositions.

552 The first proposition relates to the efficiency of production. If prices for a group of services yield revenue in excess of stand-alone cost, there is potential for an entrant to produce only those services at lower prices, inefficiently causing the total costs of production of all services to rise. This follows because the original firm is assumed to have a natural monopoly cost structure that ensures joint production of multiple services always has the lowest cost, an assumption that is also usually part of the rationale for regulatory oversight.

553 The second proposition hinges on two statements that are logically identical in certain conditions:

 no group of services pays more than its stand-alone cost; and

 each group of services pays at least its incremental cost.

554 Incremental cost is the extra cost associated with producing the whole of a group of services, over the cost of producing the remainder of the firm’s total outputs. This is a concept distinct from the marginal costs of the last units of production that normally define efficient prices for a group of services.

555 The link between the statements means that if prices for a group of services does yield revenue in excess of stand-alone cost, there must be at least one other group that pays less than incremental cost. Pricing a group of services to yield revenue below their incremental cost (“cross-subsidising” those services) results in allocative and productive inefficiency.

556 Based on these propositions, pricing above stand-alone cost is not only “unfair”, but inefficient and therefore inconsistent with the pricing principles in Part IIIA.

557 The Tribunal agrees broadly with the ACCC and Glencore that efficiency considerations, the application of which is embedded in Part IIIA, suggest that the analysis said to justify a stand-alone test is relevant. However, efficient prices for natural monopoly cost firms (recalling that these need to include an element above marginal costs to recover common costs) will, in general, encompass elements of both cost and demand conditions, whilst the stand-alone test focuses solely on costs. Prices that pass a stand-alone test are therefore not necessarily efficient.

558 Moreover, the link between failure of the stand-alone test and inefficient pricing, which is usually cited as the basis for its use, relies on assumptions about demand and cost conditions that will rarely apply in practice.

559 Further, in checking whether a pricing structure for multiple products or services is inefficient, it would be necessary to perform the test on each product and set of products, and to examine the incremental costs of provision in a similar way.

560 The economic literature notes that, in practice, this is likely to be exceptionally difficult. For example, in a multi-product production process, the whole process may need to be re-engineered to produce a single product, if that could be done at all. Sometimes, a production process unavoidably produces by-products.

561 For these reasons, the Tribunal is unable to have confidence that a stand-alone test, as applied by Glencore, could definitively discriminate between efficient and inefficient prices. However, the results of the test, as submitted by Glencore, are stark: they purport to show that the arbitrated prices are far higher than could possibly be efficient. In the light of those model results, the Tribunal has considered the test further, as follows.

562 As noted above, the ACCC disagreed with PNO that the stand-alone test should not be applied, but concluded it was of no effect, because the stand-alone costs of supplying the declared service to coal vessels are no less than the stand-alone costs of supplying access to all-comers. It reached that conclusion on the basis that:

 the Service does not distinguish between coal and non-coal users; and

 the assets Glencore seeks to exclude from the MAR provide value for both coal and non-coal users, and therefore should be included in the MAR.

563 There is an immediate difficulty with this conclusion. It would follow that there would be no inefficiency in charging the full costs of providing the service to coal vessels while providing the service free of charge to other vessels. According the ACCC’s view of stand-alone costs, the fact that non-coal vessels are in fact charged is not required to achieve economic efficiency. This could only be true if the incremental cost of providing the service to non-coal vessels is zero. It is perhaps not immediately obvious that the incremental cost is not zero, but it seems likely.

564 The question can usefully be turned around. Presumably, on the thinking of the ACCC, the stand-alone costs of providing the service to non-coal vessels is, likewise, the same as the stand-alone cost of providing the service to all users. In that case it would not be inefficient to recover all the costs of providing the service from non-coal vessels and supply the service to coal vessels free of charge.

565 Moreover, the Tribunal does not agree with the ACCC that the Service not distinguishing between users is determinative. The fact that there are different users itself raises the question whether the pricing of the service to different users causes inefficiency.

566 Further, the Tribunal does not agree with the ACCC that – even if the assets sought to be excluded by Glencore in carrying out the stand-alone test provide value for both coal and non-coal users – that circumstance alone would rule out the exclusion of some part of the costs of those assets.

567 It is clear that some assets, though able to be used or sometimes used by coal vessels, would not be fully incorporated in a port providing stand-alone services to coal vessels. A stand-alone service for coal vessels would not require the use of all the assets in their existing configuration.

568 Put another way, the Tribunal believes the evidence shows that, while the assets Glencore has sought to exclude in applying the stand-alone test may provide value to coal vessels, they do not provide a value commensurate with their costs. It is not necessary to have all the non-coal berths available for occasional emergency use by a coal vessel. Some non-coal berths are not large enough to accommodate most coal vessels.

569 However, the exclusion of all the assets proposed by Glencore also raises problems at both a conceptual and a practical level. Even if it were the case that the assets Glencore seeks to exclude are entirely irrelevant to provision of the Service to coal vessels, self-evidently a new entrant seeking to provide services only to coal vessels would not build the whole Port, as it currently exists, and then exclude those assets. They could not be excluded from the Port and leave a working port. One cannot have gaps along a channel as if the berths not used by coal vessels were non-existent. It might be said that what is being excluded is not the assets, but the value of the assets. But that raises the question: which assets, and how are they valued? As the test is applied by Glencore, there is no relevant distinction to be made by the assets excluded and the values excluded.

570 The Tribunal is consequently of the view that no confidence can be had that the test, as applied in this instance, is sufficiently robust to be of use.

571 In addition, at the practical level, the Tribunal does not accept that the assets sought to be excluded by Glencore in fact provide no value to coal vessels at all; that is, that the Service could be provided to coal vessels if it were somehow possible to have those assets cease to exist, or contribute nothing to the provision of services in the Port.

572 Like the ACCC, the Tribunal accepts that there are non-coal berths that can potentially be used by some coal vessels for non-routine berthing, though some such berths could not be used by larger coal vessels. It also accepts that the Basin, sought to be excluded in full by Glencore, is used in the provision of a number of services that are essential to provision of the declared service to coal vessels.

573 Setting aside the conceptual difficulties mentioned above, excluding completely the Basin and parts of the main channel not used by coal vessels could not be justified. In fact, Glencore proposed an alternative test where the Basin assets were not excluded.

574 The Tribunal has found that if the test is run excluding only half of the dredging costs proposed by Glencore, and not excluding the Basin, the resulting NSC for coal vessels alone is not significantly different from that obtained from the model when no non-coal assets are excluded and the MAR is recovered from all vessels, coal and non-coal.

575 Given the large uncertainties involved, the Tribunal considers that there is insufficient evidence to conclude that the stand-alone test is failed. The Tribunal does not consider that the NSC should be reduced on the grounds that it is necessary to ensure that inefficiency is precluded.

576 That said, the Tribunal has reservations about the efficiency of the arbitrated price structure, and of the price structure as amended by the effect of our decision. We have felt impelled to accept the structure because it was agreed by the parties, subject only to Glencore’s ground of review relating to the stand-alone test, which we have considered and rejected.

# CAPEX TRUE-UP

## What the ACCC decided

577 The ACCC decided not to include a true-up for the return on actual capital expenditure compared to the return on forecast capex.

578 At the end of each five-year period, the RAB is rolled forward. Actual capital expenditure during the period is rolled into the RAB to form the starting RAB for the next period.

## Submissions by the parties to the ACCC

579 Glencore submitted to the ACCC in the arbitration that there should be a true-up. If actual capex during the period exceeded capex as forecast at the beginning of the period, an amount for the difference in the return (at the WACC) on the actual capex and the return on the forecast capex would be added to the RAB. If the actual capex was less than the forecast, a corresponding amount would be deducted from the RAB.

580 PNO submitted that there should not be a true-up, as it would not align with an incentive-based regulation scheme.

## The ACCC’s reasoning

581 The ACCC considered that a true-up of this nature would introduce unnecessary complexity to the five-yearly review process (s 44X(2)). Further, access pricing regimes should provide incentives to reduce costs or otherwise improve productivity (s 44X(1)(h)). In this regard, the ACCC considered the proposed true-up mechanism as inappropriate.

## Submissions by the parties to the Tribunal

### Glencore

582 Glencore submitted that any over (or under) recovery of the return on capital expenditure over the previous period should be rolled forward (at the WACC) and included as an adjustment to the asset values at the commencement of the next period. Omission of a capex true-up creates a significant incentive for PNO to overstate its capital expenditure forecasts to maximise its revenue. This is particularly the case in circumstances where, over the period of the Final Determination to 2031, PNO may incur significant expenditure in relation to non-coal-related matters such as the development of the proposed $1.8 billion container terminal.

583 It was then submitted that absent an appropriate true-up mechanism, Glencore will first have to detect any overestimated forecasts, once actual expenditure is known, and then have arbitration by the ACCC as its only recourse.

584 In oral submissions on behalf of Glencore, Mr Young QC denied that there is any complexity in having a true-up. He asked why ‘gaming of the system’ should be permitted to enable a projection that exceeds capex to earn a return. He submitted that the absence of a true-up provides no incentive to make a more efficient investment; it does the opposite. He further argued that the absence of a true-up allows PNO the opportunity to recover a return on a notional projection that they don’t live up to. It was argued that it was positively counter to concepts of efficiency.

### PNO

585 PNO submitted that this issue is of a much smaller magnitude than the other grounds of review raised by the parties. Forecast annual capital expenditure for the first five-year period (ie from 1 January 2018 to 2022) is approximately $800,000 to $900,000. The true-up mechanism would compare the return on the actual capital expenditure with the return on these forecast figures. Any discrepancy between the two is likely to be immaterial in the context of an asset base in excess of $1 billion.

586 PNO submitted that the ACCC’s approach conforms to standard regulatory practice. If PNO spends less than the forecast, it can keep the benefit until the end of the five-year period. At the end of the period the benefit is then passed on to consumers, as the RAB is updated on the basis of actual expenditure. Glencore’s true-up, it was said, would eliminate any incentive to deliver any capital savings.

587 Glencore’s reference to the possible new container terminal was described as a ‘red herring’: the terminal (or at least that portion which relates to the channel) is not included in the current forecast capital expenditure, as it is uncertain whether the project will proceed. Among other matters, PNO contended that the project would be contingent on the success of current Federal Court proceedings brought by the ACCC seeking removal of the existing restraint on competition for container trade between NSW ports. It was further suggested that if the project does ultimately proceed within the current five-year period, PNO’s forecast capital expenditure will have been significantly understated, and PNO will have failed to maximise its revenue – that is, the reverse of the risk that Glencore submits may arise without a true-up mechanism.

588 In oral submissions for PNO, Mr Moore SC gave two examples.

 If forecast capex for years 1 to 5 was $1 million but PNO spent only $600,000, it would get to keep the return on the $1 million. That would give it an incentive to make the saving on capex. $600,000 of capex would be rolled forward and customers would get the benefit in subsequent years of prices based on the capital base increased by only $600,000 instead of by $1 million. But under Glencore’s proposal, it would not receive any benefit from spending less than $1 million. It might as well spend the whole $1 million. That promotes gold-plating.

 On the other hand, without a true-up there is an incentive not to overspend, because if PNO ended up spending $1.5 million, it would not get any additional return: no return on the additional $500,000. With a true-up it would have no disincentive to spending the $1.5 million. The $1.5 million will then be rolled over and customers will have to pay prices based on that additional $1.5 million going forward instead of on an additional $1 million. So without the true-up PNO will get a return from years 6 to 15, but won’t get a return from years one to five.

589 In an oral response submission for PNO, Mr Moore SC said that it did not matter whether there was a true-up or not, but continued to maintain that it was good regulatory practice not to have one.

### ACCC

590 The ACCC submitted that cl 8 of the Final Determination provides for a five-yearly review of the NSC. Clause 8.1 provides that the NSC is to be reviewed in 2021, for the reviewed price to take effect on and from 1 January 2022, and in 2026, for the reviewed price to take effect on and from 1 January 2027.

591 In the Final Determination the ACCC concluded that a true-up would introduce unnecessary complexity to the five-yearly review process and did not provide incentives to reduce costs or otherwise improve productivity. The ACCC submitted that its conclusion was appropriate having regard to the statutory criteria and the Tribunal should form the same conclusion on review.

592 The ACCC observed that regulatory regimes typically provide incentives for service providers to incur efficient costs. In connection with capital expenditure, an incentive to incur efficient costs is provided where a service provider keeps the benefit (wears the cost) of under-spending (over-spending) against a capital expenditure forecast for the relevant pricing period. That is, the provider retains the return on capital and return of capital for a pricing period attributable to the amount of any under-spend of forecast capital expenditure for the period. This is reflected in regulated pricing for that period, and forgoes any return on capital and return of capital for the pricing period attributable to any over-spend of the capital expenditure forecast for that period. At the end of the period, actual expenditure is rolled into the asset base, and the service provider will then earn a return on, and return of, that actual expenditure amount.

593 The ACCC explained that there is a true-up for the difference between the return on and return of forecast capital expenditure and the return on and return of actual capital expenditure for the period, and where (as in the present case) there is an absence of any other capital expenditure incentive mechanisms, a service provider will not be subject to an incentive to incur only efficient costs – the incentive may in fact be to inefficiently overspend.

594 The ACCC also recognised that not providing for such a true-up may provide a service provider with an incentive to overstate capital expenditure forecasts. However, under a true-up mechanism a provider does not receive any benefit from out-performing (or incur any uncompensated cost for overspending) the capex forecast and is therefore not constrained to incur only efficient capex. In contrast, in circumstances where there is no true-up mechanism, the provider is encouraged to reduce capex to the efficient level because out-performing the capex forecast (or minimising any over-spend) delivers a financial benefit for the provider relative to incurring inefficient capex. As a consequence, where actual capex is rolled into the RAB at the end of the period, the increase in the RAB at the end of the period is constrained to efficient spend and is not inflated by inefficient spend. This operates to ensure that users only pay for efficient capex. That is, they only fund, through future depreciation allowances, efficient spend, and they only provide the provider with a return on efficient spend through future return on capital allowances.

595 The Final Determination does not provide for the ACCC to review forecast capital expenditure for the forthcoming five-year period (or perform any other function) in the five-yearly review. This reflects the ACCC’s view that the five-yearly review should be self-executing and capable of mechanistic implementation, and that the ACCC should not be conferred with any function in the review or by the Final Determination more generally. In the event there is a dispute between Glencore and PNO as to forecast capital expenditure, this would be dealt with pursuant to cl 14 of the Final Determination, which provides for:

(1) first, negotiation in good faith between senior executives of the parties in an attempt to resolve the dispute;

(2) secondly, if the dispute is not resolved within 15 days after notice was given of the dispute or within a period otherwise agreed by the parties, the dispute is submitted to a mediator;

(3) finally, if the dispute is not resolved within 45 days after notice was given of the dispute or within a period otherwise agreed by the parties, the dispute may be submitted to arbitration by the ACCC pursuant to s 44S.

596 In his oral submissions on behalf of the ACCC, Mr Lloyd SC pointed out that forecast capex for the initial period of the Final Determination is very small. If PNO were to spend a great deal more on capex in the period, then with no true-up they would not get a return on that additional capex during the period.

597 Putting that possibility aside, the only time the issue bites is in the second period. If PNO asked for an outrageously high level of capex, then Glencore would benefit from a true-up by PNO only receiving a return on its actual capex, if that were less than the forecast.

## The Tribunal’s analysis

598 The Tribunal notes that, in the end, PNO indicated that it did not care whether there was a true-up or not. Even if PNO embraced having a true-up – thus agreeing with Glencore’s position – the matter would require consideration against the relevant provisions of Part IIIA.

599 There was some confusion in the submissions as to what incentives are brought into play by having, or not having, a true-up mechanism. Is spending more on capex than is efficient the issue, ie more than is required to provide services efficiently into the future? Or is the issue making an overstated forecast of the efficient level of capex?

600 In the Tribunal’s view, the more important issue is the actual level of capex. Under this form of price regulation, the intention is that $1 million of capex will generate a return of $1 million over the life of the asset. That would accord with the NPV=0 principle. Of course, such an expected outcome – the actual outcome can never be assured – is subject to assumptions about the how the regulatory framework operates, eg that the WACC accurately reflects the firm’s cost of capital. It also depends on the regulatory framework – and indeed the specific pricing methodology – applying over the life of the asset, which may not be the case here.

601 Even with those qualifications there is a largely unavoidable incentive for “gold-plating”, ie spending more than the efficient level of capex, because once the capex is rolled into the asset base, a return is guaranteed. One method of dealing with that incentive is to subject the proposed capex to prior scrutiny. No such process was provided for during the course of the Final Determination, and there was apparently no call for one.

602 Whether there is a true-up or not has little bearing on this incentive to overspend on capex. The true-up – if there is one – comes into play only in relation to the difference between forecast and actual capex. It looks backward at the end of each five-year period to the return on capital during that period. Certainly, the absence of a true-up, as explained by the ACCC and PNO, does provide an incentive to underspend against the forecast. It seems to be assumed that any underspend is likely to be efficient. It might be achieved, for example, by postponing capex by extending the life of an asset and better maintenance. That would be a good thing. But it is hard to see why PNO would go out of its way to spend less than its forecast, given that this would reduce the return to it for the following period.

603 The incentive for efficiency said to be induced by not having a true-up mechanism depends, the Tribunal considers, on the capex forecast being accurate in the sense of being the best forecast, at the time it is made, of prudent, efficient capex. If the forecast is not the best possible, having no true-up still provides an incentive to underspend against the forecast.

604 On the other hand, with a true-up, PNO could more easily conceal intended overspending on capex by understating the intention in its forecast. It would pay no penalty for that understatement, as the true-up would provide it with a return, in the period in which it was made, of the full amount of capex.

605 In the light of these considerations, the Tribunal considers that the absence of a true-up mechanism better accords with the statutory provisions referred to by the ACCC in the Final Determination.

# CONCLUSION

606 The final view of the Tribunal is that the Final Determination is only to be varied as a result of the Tribunal’s disagreement with the result of the ACCC on the scope of the Final Determination and the NSC (and here only because of the contention relating to user contributions).

607 The Tribunal provided to the parties a draft of the Tribunal’s Determinations and the reasons for the sole purpose of checking confidentiality and the exact wording of the Determinations so as to properly reflect these reasons. In this regard, of particular focus was the scope of the Tribunal’s Determinations and the appropriate NSC.

608 The Tribunal has decided that no allowance should be made for user contributions in the calculation of the RAB. This was implemented in the agreed access pricing building block model by changing the percentage allowances for user contributions to zero. No other changes to the model are required to implement the Tribunal’s reasons.

609 The new NPV=0 pricing solution in the model requires an initial 2018 Coal Vessel NSC of $1.0058 per GRT. This replaces the previous value ($0.6075) in paragraph 6.1 of the Final Determination.

610 In each Application, the Tribunal varies the Final Determination made under s 44V of the *Competition and Consumer Act* *2010* (Cth) dated 18 September 2018, by deleting Clauses 2.1, 2.2 and 6.1 and replacing them as follows:

2.1 The scope of the determination is confined to the terms and conditions of access where Glencore owns or, either directly or by agent, charters a vessel that enters the Port precinct and loads Glencore coal.

2.2 For the avoidance of doubt, the determination does not apply to:

(a) the terms and conditions of access to apply in respect of vessels carrying coal that are not owned, or have not been chartered, by Glencore;

(b) the terms and conditions of access for vessels other than those calling at the coal terminals of the Port; and

(c) any charges imposed by PNO other than the Navigation Service Charge and the Wharfage Charge.

6.1 The Navigation Service Charge payable by Glencore to PNO in accordance with this determination will be $1.0058 as at 1 January 2018.

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| I certify that the preceding six hundred and ten (610) numbered paragraphs are a true copy of the Reasons for Determination herein of the Honourable Justice Middleton, Mr RF Shogren and Dr D Abraham. |

Associate:

Dated: 30 October 2019

# ANNEXURE ‘A’

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# ANNEXURE ‘B’

**TERMS OF FINAL DETERMINATION CONTESTED AND NOT CONTESTED FACTS**

The parties collated a document which identified the terms of the determination in dispute and not in dispute before the Tribunal.

***Non-contested facts***

Wholly stated, the non-contested terms are;

(1.1) Term: that the Final Determination should take effect 21 days after the date it is made and expires on 7 July 2031.

(1.2) Backdating: that the Navigation Service Charge (**NSC**) and Wharfage Charge apply from the period starting 8 July 2016, as per clause 1.3.

(1.3) Backdating: that the charges to apply during the period of backdating are to be determined through a deflation of the charges specified in 5.1 and 6.1 using the Sydney All Groups Consumer Price Index number published by the Australian Bureau of Statistics (**CPI Sydney**), calculated as the average of the latest four quarters over the average of the preceding four quarters.

(1.4) Interest on backdated payment: that the Interest is payable on any amount overpaid to PNO by Glencore within the relevant dates, being from 8 July 2016 until the date the Final Determination takes effect. The interest rate to be applied is 3.95%, which is the June 2016 rate specified in the Large Business Weighted Average Rate on Credit Outstanding Variable Rate published by the Reserve Bank of Australia. Interest is to be compounded daily.

(3.1) Notification by Glencore: Glencore must provide 48 hours’ prior written notice of its intention to use the Service under the terms of this determination. In the absence of notice the standard terms of access will apply. This term is waived for the period of backdating in clause 1.2.

(4.1) Building Block Model: The Building Block Model (**BBM**) is to be used to calculate the maximum allowable revenue that PNO may recover from the Wharfage Charge and NSC in each relevant period. The inputs to the BBM and the charges are reviewable as set out in clauses 5 to 9.

(5.1) Wharfage Charge: the Wharfage Charge payable by Glencore to PNO in accordance with this determination will be $0.0746 per revenue tonne as at 1 January 2018.

(5.2) Wharfage Charge: the Wharfage Charge will be indexed on 1 January of each subsequent year by CPI Sydney determined by reference to the CPI published for the September quarter of that year.

(6.2) Navigation Service Charge: the NSC will be reviewed on an annual and five-yearly basis as set out in clauses 7 and 8.

(7.1) Annual price setting: the NSC is to be reviewed annually as set out in clause 7.2.

(7.2) Annual price setting: the inputs to the BBM to calculate the NSC that are reviewable under the annual price setting mechanism are limited to:

(a) forecast cargo volumes and gross tonnage coal vessels and non-coal vessels for the year, and

(b) in the event of a Material Change Event, forecast inputs relevant for determining the addition to the NSC as a result of the Material Change Event.

(7.3) Annual price setting: PNO will notify Glencore of the NSC at least 60 days prior to the start of the calendar year in which the charge is to apply. The notice will also outline and explain the assumptions on which the updated NSC has been determined.

(8.1) Five-yearly review: A five-yearly review of the NSC will occur during the following years:

(a) in 2021, with such reviewed price to take effect on and from 1 January 2022, and

(b) in 2026, with such reviewed price to take effect on and from 1 January 2027.

(9.1) True up: The NSC will be subject to an annual true up consisting of:

(a) a pass through of the impact on revenue of actual volumes compared to forecast volumes through a revenue unders and overs mechanism, and

(b) a pass through of costs from Force Majeure Events that have an incremental cost of in excess of $1 million.

(9.2) True up: Within 60 days of the end of each calendar year PNO shall provide Glencore a true up reconciliation account setting out:

(a) for the relevant year, forecast cargo volumes and gross tonnage of coal and non-coal vessels for the relevant year

(b) for the relevant year, the actual data for cargo volumes and gross tonnage of coal vessels and non-coal vessels for the year

(c) the variance of the actual data in 9.2.b against the forecast data identified in 9.2.a

(d) for the relevant year, calculation of the amount of the NSC determined by the BBM using the actual data in 9.2.b (the Notional NSC)

(e) for the relevant year, details of the NSC paid by Glencore under this determination including the total gross tonnage of vessels (Glencore Paid NSC)

(f) for the relevant year, calculation of the amount of the NSC liability for Glencore using the Notional NSC (from 9.2.d) and the Glencore total gross tonnage of vessels (from 9.2.e) (the Glencore NSC Liability)

(g) identification of the variance of the Glencore Paid NSC against the Glencore NSC Liability

(h) identification of either:

(i) an over-recovery by PNO of the NSC (where the Glencore Paid NSC is greater than the Glencore NSC Liability), or

(ii) an under-recovery by PNO of the NSC (where the Glencore Paid NSC is less than the Glencore NSC Liability).

(9.3) True up: within 7 days of PNO delivering to Glencore the true-up reconciliation account under clause 9.2, Glencore must, in the event that the previous years’ price setting regime resulted in an over-recovery by PNO of the NSC, issue PNO a valid tax invoice for any amounts to be adjusted, or

(9.4) True up: PNO must, in the event that the previous years’ price setting regime resulted in an under-recovery by PNO of the NSC, issue Glencore a valid tax invoice for any amounts to be adjusted at the same time as delivering the true-up reconciliation account.

**Non-price terms**

(10.1) Invoicing: PNO will issue a valid tax invoice in relation to any Wharfage Charge arising under the determination within 7 days of receipt from Glencore of the applicable cargo manifest prescribed by the PMAA.

(10.2) Invoicing: PNO will issue a valid tax invoice to Glencore in relation to any NSC arising under this determination within 7 days of the vessel entering the Port.

(11.1) Payment terms: All amounts due under this determination are payable within 7 days of delivery by email of a relevant tax invoice.

(12.1) Interest on late payment: Interest on late payment of monies due and payable under this determination will accrue and be payable pursuant to section 70 of the PMAA.

(13.1) Termination: The terms of the determination may be terminated in the following circumstances:

(a) by the parties’ mutual written agreement

(b) PNO may terminate the terms of the determination by written notice to Glencore where Glencore is in material breach of the terms, and that breach has not been remedied by Glencore within 28 days’ notice of the breach by PNO

(c) PNO may terminate the terms of the determination where PNO’s right to provide access to the Port is terminated or expires

(d) Glencore may terminate the terms of the determination by providing 28 days written notice to PNO.

(14.1) Dispute resolution: if an issue, dispute or difference between Glencore and PNO arises out of, or in relation to the terms of the determination, either party may give written notice to the other party specifying:

(a) The nature of the dispute

(b) The alleged basis of the dispute

(c) The position which the party issuing the notice considers correct

(14.2) Dispute resolution: if Glencore and PNO do not agree within 7 days about the procedure and timetable for dispute resolution, each party must appoint a senior executive as its representative to meet or negotiate in good faith in an attempt to resolve the dispute.

(14.3) Dispute resolution: If the dispute has not been resolved within 15 days after the date on which written notice was given, or within a period agreed in writing by the parties, the dispute must be submitted to a mediator in accordance and subject to the Resolution Institute Mediation Rules.

(14.4) Dispute resolution: If the dispute has not been resolved within 45 days after the date on which written notice was given, or within a period agreed in writing by the parties, the dispute may be submitted to arbitration by the ACCC pursuant to section 44S.

(14.5) Dispute resolution: The referral to, or undertaking of, a dispute resolution process does not (subject to any interlocutory order) suspend the parties’ obligations under the terms of the agreement.

(15.1) Assignment: Glencore cannot assign or otherwise transfer its rights under this determination without prior consent of PNO. Such consent must not be unreasonably withheld.

**Contested Facts**

Wholly stated, the contested terms are;

(2.1) Scope: The scope of the determination includes the terms and conditions of access:

(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 *Ports and Maritime Administration Act 1995* (the 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.

(2.2) Scope: For the avoidance of doubt, the determination does not apply to:

(a) the terms and conditions of access to apply in respect of vessels carrying coal that have not been chartered by Glencore or in respect of which Glencore has not made a representation of the kind referred to in s 48(4)(b) of the PMAA

(b) terms and conditions of access for vessels other than those calling at the coal terminals at the Port, and

(c) any charges imposed by PNO other than the NSC and the Wharfage Charge.

(6.1) Navigation Service Charge: The NSC payable by Glencore to PNO in accordance with this determination will be $0.6075 as at 1 January 2018.

(8.2) Five-yearly review: The inputs to the BBM to calculate the NSC that are reviewable under the five-yearly review are limited to:

(a) the regulated asset base being rolled forward, and the roll forward should:

(i) include, at the time of its commissioning, actual capital expenditure incurred in the current five-year period excluding any actual capital expenditure that is provided or funded by users and including an amount for interest incurred during construction of assets

(ii) include the forecast inflation used to set prices in the current period, and

(iii) be based on forecast depreciation used to set prices in the current period.

(b) the useful life of assets required to provide the Service and rates of depreciation (excluding perpetual assets)

(c) the weighted average cost of capital

(d) forecast capital expenditure for the following five-year period excluding any capital expenditure that is forecast to be provided or funded by users

(e) forecast operating expenditure for the following five-year period, and

(f) such other inputs that are subject to a Material Change Event.

In agreeing to the document outlining the contested and non-contested terms, the ACCC’s reserved the right to qualify its position.

The ACCC subsequently did so via email, providing these additional comments regarding the NSC contained in clause 6.1 of the ACCC’s final determination:

The navigation service charge is a function of many elements:

 Valuation date: This was not contested by the parties before the Tribunal.

 Construction cost estimates: Glencore sought review of the ACCC’s determination in respect of dredging costs and reclamation bunding.

 Interest during construction: This is a function of the construction period/program and WACC. Glencore sought review of the ACCC’s determination in respect of the construction period/program.

 Asset lives: This was not contested by the parties before the Tribunal.

 WACC: The ACCC submits that the Tribunal should consider whether the WACC should be adjusted (primarily, decreasing the asset beta) if it includes a true up for the return on actual capital expenditure compared to the return on forecast capital expenditure in the RAB roll forward in the five-yearly review (see cl 8.2 of the ACCC’s determination) as contended for by Glencore (T383 lines 6 to 11). The ACCC notes that Glencore disputes this submission on the basis that a WACC is to be determined through the CAPM pricing model in which only systematic (or non-diversifiable) risk is compensated through the CAPM and the absence of a true up has no meaningful bearing on systematic risk (T474 line 40 to T475 line 3).

 User funding: PNO sought review of the adjustment to the DORC for user contributions. Glencore contended that (in addition to dredging and revetments) the estimated costs of reclamation bunding should take into account user funding of the assets.

 Standalone cost test for coal vessels: Glencore sought review of the treatment of non-coal assets in determining efficient allocations of the maximum allowable revenue between coal and non-coal users.

PNO responded to the ACCC above comments with the following:

 First, the material does not respond to the Tribunal’s request for a document identifying the clauses of the ACCC’s determination not in dispute before the Tribunal. PNO considers the Tribunal should not have regard to these comments in determining the navigation service charge.

 Second, and alternatively to 1, PNO does not agree that the ACCC’s description of the matters relevant to the determination of the navigation service charge is either exhaustive or correct. For example, the ACCC’s list does not include a number of inputs including (without limitation) demand forecasts, operating expenditure, and regulatory tax allowance, and includes elements that PNO says should not be taken into account in determining the navigation service charge. PNO relies on its previous submissions, including in relation to the interrelationship between the model inputs.

In relation to WACC, PNO agrees with Glencore that whether or not there is a true- up for the return on actual capital expenditure compared to the return on forecast capital expenditure in the RAB roll forward in the five-yearly review does not bear on the appropriate WACC for the reasons Glencore identifies. Accordingly, no adjustments to WACC are required.