FEDERAL COURT OF AUSTRALIA

Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal [2020] FCAFC 145

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| Review of: | *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 |
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| File numbers: | NSD 1986 of 2019VID 1285 of 2019 |
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| Judges: | **ALLSOP CJ, BEACH AND COLVIN JJ** |
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| Date of judgment: | 24 August 2020 |
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| Catchwords: | **COMPETITION** –applications for review of decision of the Australian Competition Tribunal (**Tribunal**) reviewing decision of the Australian Competition and Consumer Commission (**ACCC**) – where ACCC made an arbitration determination pursuant to s 44S of *Competition and Consumer Act 2010* (Cth) (**CCA**) – where Tribunal conducted a “re-arbitration” pursuant to s 44ZP of the CCA– 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 – whether Tribunal erred in determining how declared service is to be interpreted and appropriate scope of application of arbitration determination – whether scope can be justified by reference to the underlying State legislation being the *Ports and Maritime Administration Act 1995* (NSW) – where parties agreed to use building block model and depreciated optimised replacement cost methodology to calculate regulated asset base – whether Tribunal erred in deciding that contributions of service users should not be deducted when calculating regulated asset base – meaning of “extensions” in s 44X(1)(e) of the CCA – application of pricing principles in s 44ZZCA and criteria in s 44X(1) of the CCA – whether assessment is forward-looking – appropriate relief – whether matter should be remitted to Tribunal pursuant to s 44ZR(4) of the CCA**ADMINISTRATIVE LAW** – application for judicial review of decision of Australian Competition Tribunal (**Tribunal**) by Australian Competition and Consumer Commission (**ACCC**) – where ACCC made arbitration determination pursuant to s 44S of *Competition and Consumer Act 2010* (Cth) (**CCA**) – where Tribunal conducted a “re-arbitration” pursuant to s 44ZP of the CCA *–* where ACCC sought declaration that Tribunal erred – whether ACCC can seek review pursuant to s 163A(3) of the CCA |
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| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5*Competition and Consumer Act 2010* (Cth) ss 44AA, 44CA, 44F, 44G, 44H, 44K, 44PC, 44S, 44V, 44W, 44X, 44Y, 44Z, 44ZD, 44ZF, 44ZN, 44ZNB, 44ZO, 44ZP, 44ZQ, 44ZR, 44ZZCA, 87CA, 163A, Part IIIA*Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)*Competition Policy Reform Act 1995* (Cth)*Judiciary Act 1903* (Cth) s 39B*Ports and Maritime Administration Act 1995* (NSW) ss 3, 47, 48, 52, 58, 59, 60, 61, 66A, 66B, 66C, 67, Part 5, Divisions 2–6A*Trade Practices Amendment (National Access Regime) Act 2006* (Cth) |
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| Cases cited: | *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* [2009] HCA 41; 239 CLR 27*Application by Glencore Coal Pty Ltd* [2016] ACompT 6*ASP Ship Management Pty Limited v Administrative Appeals Tribunal* [2006] FCAFC 23; 149 FCR 261*Australasian United Steam Navigation Co Ltd v The Shipping Control Board* [1945] HCA 45; (1945) 71 CLR 508*Australian Energy Regulator v Australian Competition Tribunal (No 2)* [2017] FCAFC 79; 255 FCR 274*Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2011] FCAFC 114; 195 FCR 485*BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2007] FCAFC 157; 162 FCR 234*BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45; 236 CLR 145*Comandate Marine Corp v The Ship “Boomerang I”* [2006] FCAFC 106; 151 FCR 403*Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1978] AC 1*Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1*K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; 157 CLR 309*National Roads and Motorists’ Association Ltd v Parkin* [2004] NSWCA 153; 60 NSWLR 224*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; 246 CLR 379*Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124; 253 FCR 115*Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355*Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402*R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; 144 CLR 13*Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASCA 231; 25 WAR 511*Rio Tinto Limited v Australian Competition Tribunal* [2008] FCAFC 6; 246 ALR 1*Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146; 155 FCR 124*SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362*The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; 70 NSWLR 344*The Ships “Hako Endeavour”, “Hako Excel”, “Hako Esteem” and “Hako Fortress” v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21; 211 FCR 369*Tisand (Pty) Ltd v The Owners of the Ship MV “Cape Moreton” (ex “Freya”)* [2005] FCAFC 68; 143 FCR 43*Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45; 233 CLR 528 |
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| Date of hearing: | 1, 2 & 3 July 2020 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub–area: | Economic Regulator, Competition and Access |
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| Category: | Catchwords |
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ORDERS

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|  | NSD 1986 of 2019 |
|   |
| BETWEEN: | GLENCORE COAL ASSETS AUSTRALIA PTY LTD (ACN 163 821 298)Applicant |
| AND: | AUSTRALIAN COMPETITION TRIBUNALFirst RespondentPORT OF NEWCASTLE OPERATIONS PTY LTD (ACN 165 332 990)Second RespondentAUSTRALIAN COMPETITION AND CONSUMER COMMISSIONThird Respondent |

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| JUDGES: | ALLSOP CJ, BEACH AND COLVIN JJ |
| DATE OF ORDER: | 24 August 2020 |

THE COURT ORDERS THAT:

1. The determination of the Australian Competition Tribunal (**Tribunal**) made on 30 October 2019 be set aside and the matter be remitted to the Tribunal for determination according to law.

2. Within 7 days, each party file a minute of its proposed orders as to costs.

3. Within 14 days, each party file submissions of no more than 3 pages addressing its proposed orders as to costs, with the question to be dealt with on the papers unless the Court orders otherwise.

4. In order to prevent prejudice to the proper administration of justice, the reasons for judgment herein not be disclosed to anyone other than the parties and their legal representatives and the Tribunal in order that any party may make an application to redact or suppress any part of the reasons, any such application to be filed and served on or before 4pm Wednesday 26 August 2020. If no application be made by that time the Court will publish its reasons without qualification. If any application be made within that time, the Court will determine the question of publication with or without any qualification in the resolution of that application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

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|  | VID 1285 of 2019 |
|  |
| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSIONApplicant |
| AND: | AUSTRALIAN COMPETITION TRIBUNALFirst RespondentPORT OF NEWCASTLE OPERATIONS PTY LTD (ACN 165 332 990)Second RespondentGLENCORE COAL ASSETS AUSTRALIA PTY LTD (ACN 163 821 298)Third Respondent |

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| --- | --- |
| JUDGES: | ALLSOP CJ, BEACH AND COLVIN JJ |
| DATE OF ORDER: | 24 August 2020 |

THE COURT ORDERS THAT:

1. The application be dismissed.

2. Within 7 days, each party file a minute of its proposed orders as to costs.

3. Within 14 days, each party file submissions of no more than 3 pages addressing its proposed orders as to costs, with the question to be dealt with on the papers unless the Court orders otherwise.

4. In order to prevent prejudice to the proper administration of justice, the reasons for judgment herein not be disclosed to anyone other than the parties and their legal representatives and the Tribunal in order that any party may make an application to redact or suppress any part of the reasons, any such application to be filed and served on or before 4pm Wednesday 26 August 2020. If no application be made by that time, the Court will publish its reasons without qualification. If any application be made within that time, the Court will determine the question of publication with or without any qualification in the resolution of that application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1 Before the Court are two applications for review, one by **Glencore** Coal Assets Australia Pty Ltd and the other by the Australian Competition and Consumer Commission (**ACCC**). They concern a decision of the Australian Competition **Tribunal** in *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1, being a re-arbitration under s 44ZP of Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the **Act**) of a determination by the ACCC as arbitrator under s 44S of the Act of the disagreement between Glencore and Port of Newcastle Operations (**PNO**) over the terms of access to a declared service (**Service**)under Part IIIA of the Act at the **Port** of Newcastle.

2 Part IIIA enacts a process by which access to a service provided by means of essential infrastructure may be made a declared service. In this case, the declared service related to the use of the shipping channels at the Port.

3 If a party seeks access to a declared service, and the provider of the service and the access seeker are unable to agree on one or more aspects of access, then Part IIIA provides for a statutory arbitral process to resolve the dispute. The arbitral determination may deal with any matter relating to access to the declared service.

4 In that context, the applications for review raise two issues concerning the re-arbitration conducted by the Tribunal as to the price and terms of access to the Service by Glencore. The first concerns the scope of the declaration and the extent to which Glencore is a party seeking access to the Service. It raises a question of proper construction of the terms of the declaration of the Service. The second concerns whether the Tribunal adopted the correct legal approach in dealing with the value of contributions made in the past by Port users to the cost of infrastructure used by PNO in providing the Service.

5 In order to succeed on an application to review the Tribunal’s decision, an error of law must be demonstrated. This Court, on review, is concerned with whether the legal framework for decision-making was observed and whether the law was properly understood and applied by the Tribunal in making its decision. Matters of fact and contextual economic analysis are for the Tribunal. As has been observed previously in a number of decisions in which review has been sought of a Tribunal decision under Part IIIA, it is not this Court’s function to resolve the difficult and complex matters of judgment the Tribunal may be called upon to resolve (and thereby slide into impermissible merits review) but is rather to ensure the decision of the Tribunal accords with the law: *Australian Energy Regulator v Australian Competition Tribunal (No 2)* [2017] FCAFC 79; 255 FCR 274 at 293 [44], 309 [133].

6 Nevertheless, Part IIIA of the Act has embedded within it economic concepts. The proper interpretation and application of its provisions are questions of law. By giving legal effect to what are fundamentally economic objectives, the access regime enacted by Part IIIA poses questions of statutory construction that must be informed by the particular conceptions of competition and efficiency that Part IIIA was enacted to advance. This aspect of context poses some complexities for the task of considering whether there was a reviewable error of law in the present case as distinct from alleged unreviewable error in the economic analysis undertaken by the Tribunal.

7 The present matter is further complicated to some extent by the fact that before the Tribunal, much of the factual analysis and reasoning by the ACCC on the first arbitration was not in issue. Therefore, although the Tribunal conducted a re-arbitration, it did so on the basis of the correctness of much of what had been decided by the ACCC. In consequence, it is necessary to consider significant parts of that material as well as the reasons of the Tribunal.

8 The ACCC was in the unusual position of having three distinct roles in the course of the dispute as to access. It conducted the original arbitration (as separately constituted for that purpose). It was then directed by statute to be available to assist the Tribunal on the re-arbitration. Finally, in this Court, it was a separate applicant for review of the Tribunal’s decision. It will be necessary in due course to say something of the separate application of the ACCC.

9 In the above circumstances, four broad questions arise:

(1) Did the Tribunal err in law in concluding that the Service was, in effect, only provided to those parties in control of a ship and, on that basis, confining the scope of its determination to instances where Glencore was in control of a ship being used to load and export coal?

(2) Did the Tribunal err in law in the way it treated Glencore’s claim that there should be regard to the value of past contributions by users of the Port when determining the price to be paid by Glencore for the Service?

(3) Whether this Court should entertain the ACCC’s separate review application in respect of the decision by the Tribunal?

(4) If error of law has been demonstrated, what is the appropriate form of relief?

10 For the reasons that follow we would allow the application by Glencore as to both issues raised by its application, dismiss the application by the ACCC and remit the matter to the Tribunal for further determination as to the matters identified in these reasons.

## Background and an introductory explanation of the issues

11 The Hunter Valley coal industry, including its associated supply chain, is one of the largest coal export operations in the world. It includes coal miners as producers who export their coal, rail haulage and rail track providers, coal export terminals (including by Port Waratah Coal Services (**PWCS**)), and associated port facilities.

12 In May 2014, PNO took over the operation of the Port by commercial arrangements with the State of New South Wales as part of the privatisation of State assets.

13 The Port is not limited to the loading and movement of coal, but that is a significant part of the business of the Port. Newcastle is the largest coal exporting port in the world. The Port is the only commercially viable means of exporting coal from the Hunter Valley. The shipping channels are a natural “bottleneck” monopoly. Access to and use of the Port and its shipping channels are thus necessary for the export of coal from the Hunter Valley.

14 These matters are expressed at an appropriate degree of generality conformable with understanding the place of the Port and its shipping channels as an essential feature of the relevant economic activity and markets associated with the mining and export of coal. This is how a differently constituted Tribunal discussed the matter in *Application by Glencore Coal Pty Ltd* [2016] ACompT 6. That decision concerned the declaration of the Service under s 44K of the Act. It is the terms and conditions for access to this Service that were the subject of the disagreement between Glencore and PNO, and that were the subject of the arbitration by the ACCC and of the re-arbitration by the Tribunal (in respect of which re-arbitration determination the two present applications are brought).

15 In that earlier decision, the Tribunal set aside the decision of the Acting Federal Treasurer made on 8 January 2016 not to declare the Service. The Tribunal’s decision was affirmed by this Court in *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124; 253 FCR 115.

16 The expression of the Service in the decision of the Acting Federal Treasurer and by the earlier Tribunal in its determination was in the terms applied for by Glencore in its application, made on 13 May 2015 under s 44F of the Act, to the National Competition Council (**NCC**) for a recommendation by the NCC to the designated Minister. On 2 November 2015, the NCC had recommended that the Service not be declared, and on 8 January 2016 the Acting Federal Treasurer had made his decision not to declare the Service.

### The first issue: the scope of the determination

17 The terms of the expression of the Service loom large in these applications, especially in the application brought by Glencore. Looking at the matter at the level of generality with which the matter has been expressed above, the commercial and competitive considerations might appear to be tolerably straightforward in the following respects: coal miners and exporters need to have access to and use the Port and the Service (being the shipping channels) for the export of their coal. There may be competition between coal-loading facilities (there being three), but there are only the monopolistically controlled (by PNO) shipping channels (including berths next to wharves as part of the channels) available to be used to load and to carry coal out of the Port to foreign ports of discharge. Looking at the matter thus, the relevant access or use of the Service was of those who wished to export coal.

18 That, however, was not how the Tribunal construed the Service and how it confined the scope of the varied determination that it made. In its decision, the Tribunal accepted the approach urged upon it by PNO and confined the applicable determination to terms and conditions of access to the Service only when Glencore owns the ship that enters the Port precinct or when Glencore, whether directly or by agent, charters a ship that enters the Port precinct and, in each case, when the ship loads Glencore coal.

19 Both the ACCC and Glencore criticise that form of limitation of the scope of the determination, albeit in two differential respects. Both the ACCC and Glencore submit that a wider scope is justified by reference to the operation of the underlying New South Wales Act, the *Ports and Maritime Administration Act 1995* (NSW) (**PMA Act**). Glencore also seeks a wider and different scope for the determination, as covering all coal that it exports through the Port. The nature and justification for this approach can be seen in the expression of the matter thus far in its generality of expression of the economic and competition considerations.

20 The significance of the dispute about the scope of the determination is that Glencore propounds a width of the determination based on the scope of the Service that covers access for it to the shipping channels for the export of all its coal, irrespective of the contractual arrangements that it may, or may not, make for the carriage of goods by any ship. PNO propounds a more narrow width of the determination based on the scope of the Service that confines access to the shipping channels only where Glencore has a certain relationship with the ship (ownership or chartering of the ship), which confinement will limit the scope of the determination to only some of Glencore’s export sales. As will be seen, the better view of the Tribunal’s reasons is that in each such case the relevant ship must be controlled by Glencore.

### The second issue: the relevance of past contributions by users of the Port facilities to the development of the Port infrastructure in reaching the price terms within the determination

21 On this issue the ACCC and Glencore put effectively the same submission. Both supported the approach taken by the ACCC in its arbitral determination. The ACCC used a building block model and a depreciated optimised replacement cost (**DORC**) methodology, in order to calculate the regulated asset base (**RAB**) that represents the value of capital on which a rate of return on and of capital is estimated as part of the calculation of the maximum allowable revenue (**MAR**) in the setting of the price of access.

22 It will be necessary to consider in some detail the elements of this methodology and their and its relationship with the Act. For now, it is sufficient to identify the nature of the dispute.

23 In the years before the privatisation of the Port, the State had developed the infrastructure of the Port. Two examples of such development illuminate the issue. In the 1970s and 1980s the shipping channels were dredged to deepen the channels from 10–11m draft to 15m to accommodate large modern bulk carriers. In the 1980s and 1990s, a coal loader operated by PWCS was built by reclaiming land from dredging spoil and by associated construction work. The users of the shipping channels were said to have paid for the channel dredging by a special levy imposed on them and said to have been levied at their request. The coal loader was built and paid for by PWCS.

24 The ACCC in its determination valued all the various so-called user contributions and deducted that value ($912 million) from the relevant asset base upon which the MAR and so the relevant charge (the Navigation Service Charge (**NSC**)) were calculated, the latter at $0.6075 by reference to gross tonnage of a vessel. If, as contended by PNO and as found by the Tribunal, one did not deduct the $912 million of so-called user contributions from the relevant asset base the calculation of the NSC was $1.0058.

25 The essence of the dispute is the proper way to bring to account, if at all, the value of investment of assets necessary for the Service said to have been paid for by users of the Service rather than the provider of the Service in the assessment of the efficient costs of the provider. Why, it was said rhetorically by the ACCC in submission, should PNO obtain a return on investment that neither it nor the State paid for? PNO and the Tribunal, on the other hand, focused upon the methodology employed – the DORC model – to calculate the present day value of all assets in which a hypothetical new entrant would be required to invest to build and operate the Port. To look at the value of the past contributions by others would, on this view, be to distort the model used to derive efficient costs and where that model was used, price was to be determined in accordance with its conceptual structure. In the alternative, PNO questioned whether the character of the particular user contributions in the present instance was such that those contributions should be brought to account in determining an access price.

### The third issue: the proper role of the ACCC

26 As we have noted, the ACCC had three distinct roles in the course of events that led to the proceedings in this Court. The ACCC was not a party to the re-arbitration and therefore has no statutory right to seek review under s 44ZR of the Act, although it put submissions in the re-arbitration pursuant to ss 44ZP(5) and 44ZP(5A) of the Act. The issue is whether, in circumstances where Glencore has itself exercised its right of review and has raised the matters that the ACCC seeks to agitate by separate application, the Court can and should entertain a separate application by the ACCC.

### The fourth issue: relief

27 If error of law is found, then an issue arises as to the appropriate nature of the relief that should be granted. Two aspects must be considered. The first is whether the matter should simply be remitted to the Tribunal or whether, by reason of the manner in which issues were joined before the Tribunal, there should be an order limiting the extent of any further consideration by the Tribunal or even a form of order that would recognise that a particular result was inevitable.

28 The second aspect arises because the ACCC, but not Glencore, seeks declaratory relief. If it is appropriate to entertain the ACCC’s separate application then a question arises as to whether declaratory relief should be granted and, if so, in what terms.

## Structure of these reasons

29 Both of the first and second issues, being the scope of the determination and of the Service, and the relevance of user contributions in the past, require for their resolution an attendance to the provisions of the Act, to the terms and nature of the Service including its proper commercial and legal context including the PMA Act, and to the economic conceptions underpinning the operation of Part IIIA of the Act. Therefore, these reasons consider first the terms of Part IIIA in the context in which they were enacted. They then consider the terms in which the Service has been declared and, in that context, the relevant terms of the PMA Act.

30 Thereafter, each of the four issues is considered.

## Part IIIA of the Act – access to services

### The context of and background to Part IIIA as originally enacted

31 The background to the introduction of Part IIIA of the Act was set out by the Full Court in *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146; 155 FCR 124 at 125–132 [2]–[21].

32 As is there explained, Part IIIA was added to implement reforms proposed in 1993 by the National Competition Policy Review chaired by Professor Hilmer (**Hilmer Report**). The focus of the Hilmer Report was upon measures that would promote “effective competition”. It described efficiency as the fundamental objective of competition policy and identified three recognised aspects to efficiency (at page 4), being:

* **Technical or productive efficiency**, which is achieved where individual firms produce the goods and services that they offer to consumers at *least cost*. Competition can enhance technical efficiency by, for example, stimulating improvements in managerial performance, work practices, and the use of material inputs.
* **Allocative efficiency** is achieved where resources used to produce a set of goods or services are allocated to their highest valued uses (ie, those that provide the greatest benefit relative to costs). Competition tends to increase allocative efficiency, because firms that can use particular resources more productively can afford to bid those resources away from firms that cannot achieve the same level of returns.
* **Dynamic efficiency** reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities. Competition in markets for goods and services provides incentives to undertake research and development, effect innovation in product design, reform management structures and strategies and create new products and production processes.

33 As to the relationship between efficiency and competition, the Hilmer Report noted (at page 5):

However, there are some situations where unfettered competition is not consistent with economic efficiency. Examples of such “market failure” include situations where participants in a market have imperfect information about products, producers or suppliers, and the existence of so-called “natural monopolies” where a single firm can supply an entire market significantly more efficiently than two or more firms.

34 In addition to a regime for access to essential facilities, the Hilmer Report proposed separate reforms to deal with the problem of “monopoly pricing”, which was described as occurring in conditions where firms are not subject to effective competitive pressure and therefore will “be able to charge prices above the efficient level for periods beyond those justified by past investments and risks taken or beyond a time when a competitive response might reasonably be expected”: page 269. The regime for access to essential services was described as dealing with a different but related concern, namely the effect on competition in upstream and downstream markets where access could not be obtained to services provided by means of essential infrastructure. For present purposes, it is important to note that regulation to constrain the practice of monopoly pricing and regulation to promote efficiency by requiring access to essential facilities are related but distinct matters. Put another way, establishing an access regime is not directed at the problem of monopoly pricing *per se*, it is concerned with the wider efficiencies that might be delivered in other markets if there is access on price and terms that are established by an independent process guided by the public interest, principles of economic efficiency and the interests of the owner of the facility and other users.

35 The Hilmer Report proposed an access regime that would only be applied “to the limited category of cases where access to the facility was essential to permit effective competition”: page xxxii. It described instances (including ports) of natural monopolies, being facilities that cannot be duplicated economically. However, the specific focus of the Hilmer Report was upon those natural monopolies that “occupy strategic positions in an industry, and are thus ‘essential facilities’ in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets”: page 240. The Hilmer Report contemplated legislation that would confer a right of access to facilities of that character upon payment of an access fee.

36 Significantly, the Hilmer Report proposed a gateway to whether a facility was to be subject to a statutory right of access in the form of a declaration of a particular service. Three criteria were proposed to govern whether a facility would be declared to be an essential facility and thereby subject to provisions conferring a statutory right to access, namely (a) access should be essential rather than merely convenient; (b) the making of the declaration must be in the public interest, having regard to the significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness; and (c) the legitimate interests of the owner of the facility must be protected through the imposition of an access fee and other terms and conditions that are fair and reasonable.

37 Where an essential facility was subject to a statutory right of access, the Hilmer Report recommended that the access fee and terms of access be the subject of a process of negotiation with statutorily mandated private arbitration if the parties could not reach agreement.

38 The complexities that might be involved in establishing a fair and reasonable fee for providing access were acknowledged in the Hilmer Report in the following terms (at page 253):

Policy judgments are involved as to where to strike the balance between the owner’s interest in receiving a high price, including monopoly rents that might otherwise be obtainable, and the user’s interest in paying a low price, perhaps limited to the marginal costs associated with providing access. Appropriate access prices may depend on factors such as the extent the facility’s existing capacity is being used, firmly planned future utilisation and the extent to which the capital costs of producing the facility have already been recovered. Decisions in this area also need to take account of the impact of prices on the incentives to produce and maintain facilities and the important signalling effect of higher returns in encouraging technical innovation. For example, relatively low access prices might contribute to an efficient allocation of resources in the short term, but in the longer term the reduced profit incentives might impede technical innovation.

39 The Hilmer Report also acknowledged the difficulties in developing a one-size-fits-all approach to establishing the principles to be applied in determining the price for access. The Hilmer Report favoured an approach that would “require the relevant Minister to stipulate more specific pricing principles in the context of declaring a right of access to particular facilities”: page 255. The parties would then be free to negotiate access agreements according to those principles. If they could not agree then either party could insist on binding arbitration.

40 Following the Hilmer Report, the Commonwealth, States and Territories entered into an inter-governmental agreement at the meeting of the Council of Australian Governments in Hobart on 25 February 1994. The Competition Principles **Agreement** was made with the express intention of achieving and maintaining consistent and complementary competition laws and policies throughout Australia. It formed part of a wider consensus supporting the principles of competition policy articulated in the Hilmer Report and the implementation of the reforms it proposed. The Agreement elaborated upon matters addressed in the Hilmer Report in significant respects and, consistently with its character as an inter-governmental commitment, its terms governed the form in which legislation was subsequently enacted.

41 By cl 6(1) of the Agreement, it was agreed that the Commonwealth would put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure where:

(a) it would not be economically feasible to duplicate the facility;

(b) access to the service is necessary in order to permit effective competition in a downstream or upstream market;

(c) the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy; and

(d) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.

42 It can be seen that the scope of the proposed access regime reflected the nature of the recommendations in the Hilmer Report. The Agreement also provided that the regime would not apply where a State or Territory had in place an access regime which conformed to the principles set out in the Agreement: cl 6(2). The Agreement then specified principles that should be incorporated in any State or Territory access regime: cl 6(4). Those principles described a right to access with independent resolution if parties cannot agree on terms and conditions for access and included the following (at cl 6(4)(i)):

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner’s legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

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

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

Of particular relevance to the present case is para (iii) concerned with the economic value of any additional investment the access seeker or access provider had agreed to undertake.

43 The Commonwealth enacted an access regime as provided for in the Agreement. The regime comprised Part IIIA which was added by amendment to the then *Trade Practices Act 1974* (Cth). In the second reading speech introducing the Bill that became the *Competition Policy Reform Act 1995* (Cth), the legislation was described as a response to the Hilmer Report as well as the enactment of reforms agreed to be undertaken by the Competition Principles Agreement: *Senate, Parliamentary Debates (Hansard)*, 29 March 1995 at 2435.

44 The access regime as enacted provided for a process by which an application may be made for a particular service to be declared. A service that was the subject of a State or Territory access regime that conformed to the requirements of the Competition Principles Agreement could not be declared. The criteria to be applied in determining whether to declare a service reflected the recommendations of the Hilmer Report and the terms of the Competition Principles Agreement. In particular, it was necessary to adjudge whether the facility to be used to provide the service was of national significance. The focus was upon the nature of the facility and the consequences for competition if the service was declared.

45 For present purposes, it may also be noted that Part IIIA as originally enacted provided for arbitral determination in the event of a dispute relating to access to a declared service. It did so by provisions that follow the same structure as the current provisions, namely:

(1) It provided that if the access provider and the third party seeking access were unable to agree “on one or more aspects of access to a declared service” then either party may notify the ACCC of the existence of an access dispute: s 44S(l). Therefore, a dispute did not have to concern price or price-related terms. A dispute as to any aspect of access may be the subject of a notification.

(2) It required that there must be a final arbitral determination on access by the third party to the service: s 44V(l).

(3) It specified that the determination “may deal with any matter relating to access by the third party”: s 44V(2).

(4) As to those matters, “[b]y way of example”, it stated that 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;

(e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

The use of the drafting technique of specifying examples is significant. It was a mechanism by which to ensure that the particular illustrations did not confine the general statutory authority to determine any matter relating to access by the third party to the declared service.

(5) It specified in s 44X(l) the matters that must be taken into account in making the determination, which at that time were expressed in the following terms:

(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;

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

(g) the economically efficient operation of the facility.

(6) It provided restrictions on what a determination may require, including that a determination must not be made that would have the effect of “requiring the provider to bear some or all of the costs of extending the facility”: s 44W(l)(e).

46 It should be noted that the statutory authority to make a determination was not confined to the terms upon which the provider may be required to allow the third party to *use* the service. None of the statutory examples given in s 44V(2) refer to *use* of the service by the third party. Rather, the language of these and other provisions of Part IIIA is consistently to the effect that the statutory focus is upon “access to the service”. This language reflects the economic character of the legislation which is concerned with facilitating arrangements that will advance economic efficiency rather than simply facilitating the physical use of the facility.

47 Therefore, a dispute as to commercial terms of access to the declared service sought by a particular third party for the purpose of securing the ability *for another party to physically use the facility* was within the scope of the statutory provision. In such cases, the arbitral determination would consider the appropriateness of such terms having regard to relevant matters to be taken into account (as to which, see the reference below to s 44X). There is no indication that the fact that the service to which access was provided to a particular third party might result in the service being physically used by another party (though under terms secured by the third party) could be a reason, of itself, to determine that access to the service should be confined to instances where the service was physically used by the third party.

48 Further, it is evident from the scheme of Part IIIA that it was not for the access provider to confine the statutory jurisdiction to make a determination by itself imposing some form of restriction as to the way the service may be obtained or the type of arrangement by which access to the service might be secured (such as by confining the provision of access to the service to those who wished themselves to use the service). A determination could deal with “any matter relating to access”. A third party was not obliged to take access to the declared service that was of a particular kind proffered by the access provider. The party seeking access could seek a determination as to the manner in which the service was provided and any terms and conditions that might govern that access. Therefore, the terms sought might include provision by which the service might be used by a party other than the party seeking the arbitral determination relating to access to the service. Whether access on those terms would be provided would be a matter for agreement or arbitral determination.

49 It is also to be noted that, as originally enacted, Part IIIA did not specify particular pricing principles to be taken into account in an arbitral determination dealing with any matter relating to access (as to which, see below). Rather, it contemplated that a determination as to access that dealt with the matter of the price of access would be treated in the same way as any other matter and would be required to be made by taking into account each and all of the matters listed in s 44X(l)(a) to (g).

50 The terms of s 44X(l) can be seen to substantially reflect the matters that were recorded in the Competition Principles Agreement as matters that should be taken into account in resolving a dispute as to the terms and conditions of access. However, the legislation adopted a modified approach by specifying a number of restrictions as to particular effects that must not be the consequence of an access determination. In particular, in relation to extensions to the facility, s 44W(l)(d) and (e) provided that an access determination cannot make the access seeker the owner of the extension or require the access provider to bear some or all of the costs of extending the facility. In that respect, the Act clarified the terms of the Competition Principles Agreement which provided for costs incurred by the facility owner in extending the facility in order to provide access to be brought into account in determining terms of access, but did not deal with whether an obligation may be imposed upon an owner to incur that cost (an obligation which, by any measure, would be a very substantial imposition upon the owner of a facility).

51 Section 44X(1)(e) also adopted a different form of language to the Competition Principles Agreement in describing what is to be taken into account where value is provided by someone other than the access provider. Whereas cl 6(4)(i)(iii) required the economic value to the owner of any additional investment that the person seeking access had agreed to undertake to be brought to account, s 44X(l)(e) referred to the value to the provider of extensions whose cost is borne by someone else. There appear to be three material differences in the language. First, instead of just referring to contribution by the person seeking access, s 44X(l)(e) refers to “cost borne by someone else”. This appears to be intended to include instances where the cost is borne by someone other than the provider or the access seeker. Second, whereas the Competition Principles Agreement refers to costs that the access seeker *has agreed to undertake*, s 44X(1)(e) focuses upon the value of extensions whose cost *is borne* by anyone other than the access provider. This appears to be intended to make clear that the focus of the provision is not confined to extensions agreed or determined as part of the bilateral access process itself. Third, whereas the Competition Principles Agreement uses language that looks forward to cost not yet expended by referring the value of an extension that an access seeker had agreed to undertake, s 44X(l)(e) refers to value “whose cost *is borne* by someone else” – not *is to be borne* or *is agreed to be borne* – thereby capturing (but not being limited to) cost that has already been incurred in a manner that was not confined to costs yet to be borne.

52 In context, the statutory language appears to invite consideration of the value to the provider of any extension whenever undertaken “whose cost is borne by someone else”. If so, the use of the present tense “is borne”, may be to ensure that past cost (represented in the form of the present value of an extension) which is no longer being borne in any relevant economic sense by someone else (for example, because the extension has reached the end of its economic life) is not a matter to be taken into account. The focus is upon value that is currently being borne and in the future will be cost that is borne by someone other than the access provider.

53 In any event, the consistency between the Agreement and s 44X(l)(e) is that in determining appropriate terms and conditions for access, in every case, a category of value to the access provider that is created by cost not borne by the owner is to be taken into account (though the particular descriptions differ in language and scope).

54 As to the terms of s 44X, the only express guidance provided by the Explanatory Memorandum was as follows (at [233]–[234]):

The references here to the “legitimate” business interests of the provider and to the “direct” costs of providing access are intended to preclude arguments that the provider should be reimbursed by the third party seeking access for consequential costs which the provider may incur as a result of increased competition in an upstream or downstream market.

The section also provides that the Commission, in making a determination, may take into account any other matters that it thinks are relevant in addition to those it must take into account.

55 However, as to the operation of s 44W, the Explanatory Memorandum stated (at [224]–[228]):

This section specifies a number of constraints on the Commission in making a determination in relation to an access dispute. If a determination by the Commission breaches any of the constraints it is of no effect.

The constraints basically relate to existing rights and the ownership of the facility used to provide the declared service.

…

In summary these provisions give protection to:

(a) reasonably anticipated usage of a declared service as at the time the dispute was notified …

(b) future use of the service by the exercise of rights that existed at the time the dispute was notified in so far as the holder of those rights will actually use the service; and

(c) all contractual rights relating to access to a declared service, either of the provider or of the third party, that existed at the beginning of 30 March 1995.

In addition, these provisions guard against the provider being required, against his or her wishes, to pay for extensions to the facility …

Where, for example, a third party seeking access to the declared service has had to pay the cost of an extension to the facility, or has had to pay fair compensation to another party for the loss of a right, this should be taken into account by the Commission in determining (under section 44V) the price of access by the third party to the declared service.

56 Significantly, the last paragraph of the passage quoted above provides an example that deals in the same way with past payment for an extension and payment for loss of a contractual right. It is not an explanation that is confined to bearing the cost of an extension. Rather, it is an explanation that the price of access is to be determined under s 44V and should take account of payments relating to access that have been borne by the third party where those payments have already been made. It is simply pointing to s 44V as being the relevant provision when it comes to determining whether such matters should affect the access price (and hence to s 44X which specifies the matters to which there must be regard in making a determination under s 44V).

57 Therefore, the terms of the Explanatory Memorandum indicate that the restriction on what an access determination may require is not a means of specifying or confining the matters to which there must be regard in determining the price for access. Rather, those matters are stated in s 44X(l). If no extension is (or has been) sought as part of an arbitral determination, then the statutory obligation is still to take into account each of the matters specified in s 44X(l), including s 44X(l)(e) which concerns the value to the provider of any extension the cost of which has been borne by someone else.

58 In any event, given the context and subject matter, it is difficult to see why the fact that an extension was sought by the access seeker as part of an agreement or determination (or had been required by an earlier agreement or determination with that access seeker) would be of singular significance when it came to bringing to account the value to the provider of an extension whose cost had been borne by someone else. Take the case where an agreement had previously been reached between the provider and another party (a fourth party) as to the terms of access (without the need for an arbitral determination) and the agreement required that the fourth party bear the cost of an extension. Say that thereafter, access is sought by the third party and an arbitral determination of the price and terms of access is sought because agreement as to access cannot be reached. In such a case there would be no requirement to have regard to the contribution by the fourth party to the value of the capacity and the provider could seek a price on the basis that the facility included that capacity and therefore there should be regard to the cost of that capacity in determining an access price to be paid by the third party.

59 Take the further case where most of the capital cost of the capacity to which access is sought has been met by a public infrastructure subsidy to encourage a new industry and then there is an arbitral determination of the terms of access to a third party. Or the further case where the subsidy had been paid before Part IIIA was enacted.

60 It is difficult to see any reason why such cases should be treated differently to a case where the extension was sought by the particular party seeking access by the exercise of rights conferred by Part IIIA (especially where s 44X(l)(e), unlike cl 6(4)(i)(iii), is not confined to a contribution by the access seeker and includes any case where the contribution is borne by someone other than the provider).

61 If it is considered that the value to the provider of an extension whose cost is borne by someone else is a matter which must be taken into account where an extension is or has been sought in the exercise of rights under Part IIIA, then the same economic rationale must apply if the costs are borne by someone else for some other reason.

62 In the context of legislation concerned with promoting competition in the interests of economic efficiency, the use of the same terminology of “extend” or “extension” in s 44V(2), s 44W(l)(e) and s 44X(l)(e) may be explained by the economic significance of instances where the facility is made larger thereby adding value by creating part of the capacity to which access is being sought (on the one hand) compared to those instances where a capital contribution is made to existing infrastructure that does not add economic value (on the other hand). In terms of the concepts of economic efficiency described in the Hilmer Report, it is not the quantum of actual cost borne that is significant, but rather the *value to the provider of the extension* (that is, the economic value). This explains why the focus is upon the value to the provider, not the particular extent of the historical cost incurred by someone else in bringing the extension into existence.

63 Regard to the three aspects of economic efficiency described above reveals that there is the prospect of economic inefficiency if the provider of an essential facility can appropriate (and charge a price for access to) the value of capacity the cost of which has been borne by others. The result will be that to the extent that the cost of the capacity is still being borne by others, they will make their economic decisions and price their products accordingly. Yet, in addition, the value of that capacity will have to be paid for and borne again by a third party who has to pay for access. By pricing twice the same value into the market, there is allocative inefficiency. The capacity is attributed with more value than it should be and market decisions are distorted in consequence. The cost of access to the capacity to the market as a whole is doubled, thereby distorting economic decisions leading to economic inefficiency. In addition, there will also be productive inefficiency if the double burden is imposed on parties who have already borne the cost of the extension and must now pay again for access to that capacity. However, there is inefficiency even if that is not the case.

64 It is also possible (and the present case may be an example) that there will be two categories of users of the essential facility; those who are bearing the cost of capacity and those who are not. If there is no mechanism by which the cost-bearing users can charge the other users then those other users will, in effect, obtain the service at a lower cost. Theoretically, it is possible that those free-riding users may then use more of the service than would be the case if the price signal to them properly reflected cost. This may lead to allocative inefficiency. However, it is also possible that the price advantage may be captured as additional margin which would not give rise to efficiency concerns.

65 In that context, it is significant that s 44X(1)(e) is concerned with regulating the behaviour of the party in control of the essential facility, particularly the need to bring to account the extent to which the cost of capacity is being borne by others (whether they be users or not). It is specifically directed to ensuring that the price for the service to which access is being sought is not inefficiently high because it includes the value for an extension that is being borne by others. In regulating the price and terms of access, it is ensuring that the party in control of an essential facility does not charge a price that is too high by reason that it is a charge for capacity the cost of which is being borne by others.

66 The manner in which these and other matters of context bear upon the proper construction of the text of s 44X(l)(e) is considered below in the course of dealing with the second issue which is concerned with the proper approach to user funded contributions to the cost of the Port that contribute to the value of the assets used to provide the Service.

### Context of and background to Part IIIA as subsequently amended

67 Since their first enactment in the context and terms described above, presently relevant parts of Part IIIA have since been amended in certain respects.

68 The context for the amendments begins with the detailed review conducted by the Productivity Commission in its Review of the National Access Regime, Report No 17, 28 September 2001 which led to the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) (**Review**). The Review was an inquiry into the arrangements established by cl 6 of the Competition Principles Agreement and Part IIIA for regulation of access to significant infrastructure facilities. The Review proposed incremental changes to Part IIIA, particularly the introduction of an objects clause and pricing principles in Part IIIA.

69 As to the introduction of the objects clause, the Review described the difficulties in conveying the object of the legislation in a meaningful way. It observed (at page 128):

In the case of access regulation … the presumption is that unregulated markets will not promote efficiency – thus, regulatory intervention to induce competition is required to promote efficient outcomes. By definition, this requires judgements (and the scope for error) about what might constitute the appropriate degree of competition. Put simply, competition is a means to an end, rather than an end in itself.

70 Then (at page 129):

Given the emphasis on competition in the TPA, and the now substantial body of legal precedent revolving around competition as a proxy for efficiency, the task at hand is to marry competition more explicitly to efficiency. In the Commission’s view, such unification is best pursued at the regime’s operational level, notably within the declaration criteria (see chapter 7). This leaves scope to focus the objectives for the regime on improving efficiency – the fundamental reason for intervention in this area.

71 The Review proposed an objects clause that incorporated an explicit efficiency objective and recognised the role that Part IIIA plays in providing the framework for industry-specific regimes. The recommendation led to the introduction of s 44AA into Part IIIA as part of a number of amendments made in 2006 (see below). It provides:

The objects of this Part are to:

(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.

72 As to the need for pricing principles, the Review linked the need for their introduction to the explicit terms of the objects clause to ensure that it had “more than symbolic value”. It noted that efficiency of service use and efficient investment, being key elements of its recommended objects clause, “are determined to a large degree by the terms and conditions of access”: page 137. It noted a report from the ACCC to the effect that access pricing proposals should be designed to “prevent monopoly rent-taking by facility owners” and “provide efficient market signals for the use of existing facilities and for future investment”. The statement of these dual aspects echoes the recognition in the Hilmer Report of the two related but distinct concerns of monopoly pricing and efficient pricing (signalling and resulting in appropriate use of essential facilities in the interests of the wider economy).

73 In that context, the Review considered the criteria specified in s 44X as matters that must be taken into account in making an access determination: page 138. In recommending the inclusion of pricing principles, the Productivity Commission reasoned in the following way (at page 142):

Thus, a key role of pricing principles is not so much to prescribe what should happen in a particular situation, but to rule out approaches and methodologies which would be inappropriate. More generally, even pricing principles which signal that a particular outcome could fall within a wide band provide, at least tacitly, some discipline on regulators to justify the outcome of a particular determination.

74 As to the content of those principles, the Review noted the importance of ensuring that prices are set in a manner that preserves investment incentives to ensure ongoing efficient investment rather than simply strengthening the emphasis on reducing access prices so as to encourage efficient use and then concluded (at page 332):

In sum, the pricing principles must necessarily involve a balancing act between addressing monopoly pricing and allowing a degree of flexibility for revenue to be above costs. In pursuing this balance, the Commission considers that the principles should explicitly recognise the role of access regulation in curbing inefficient monopoly rents, but set a clear floor to ensure that incentives to invest are protected.

75 The terminology proposed by the Productivity Commission came to be incorporated in Part IIIA as s 44ZZCA in the following terms:

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.

76 It will be necessary to consider this language in more detail in dealing with the competing contentions of the parties, but considered in the context of the Review by the Productivity Commission and the introduction of the objects clause, the focus is upon achieving economic efficiency whilst protecting the incentive to invest. The Productivity Commission proposed pricing principles to which there must be regard in making an access determination. It did so on the express basis that they involved a “balancing act”. The drafting technique deployed in giving effect to the recommendation was to state the pricing principles in s 44ZZCA, but then include those pricing principles as an additional matter in the list of matters set out in s 44X(l), being matters that must be taken into account in making a determination. Informed by that context, s 44ZZCA may be taken to state principles that required balancing as between each other and with the other matters listed in s 44X(l).

77 As to the criteria to be applied in an access determination, the Productivity Commission considered possible changes (in addition to incorporating pricing principles into the criteria) “consistent with its views on the need to better focus Part IIIA on improving efficiency”: page 217. It examined in some detail whether the access determination should allow for an access provider to extend or expand its facility. It differentiated between a geographic extension, an interconnection and a capacity expansion. It observed that the status of s 44V was not absolutely clear on the issue of capacity expansion that did not involve geographic extension. The Productivity Commission then reasoned in the following way (at page 225):

The Commission notes that Clause 6(4)(j) of the Competition Principles Agreement refers to adjustments of access tariffs to reflect the costs and benefits of “extensions”.

In other words, the need for provisions covering mandated capacity expansions may depend on the detailed pricing requirements attached to the services in question. Importantly, these questions have never been addressed in a Part IIIA context.

In addition, there are complex issues relating to the treatment of the cost of a capacity expansion. There would be difficulties in having access seekers pay for capacity expansion because, unlike geographical extension, capacity expansion is not necessarily incremental and easily hypothecated to particular users. Capacity expansions can require discrete blocks of investment. As a result, in many circumstances, it may be difficult to attribute the costs to the individual users.

78 The Productivity Commission did not favour allowing a determination to require a facility owner to be directed to expand the capacity of a facility: page 226.

79 Subsequently, the Competition Policy Review was conducted by a Panel chaired by Professor Harper (**Harper Review**). It published its Final Report in March 2015. The Harper Review noted that “few infrastructure assets are currently regulated under Part IIIA. For the most part, the bottleneck infrastructure assets cited by the Hilmer Review as requiring access regulation have been regulated by industry-specific access regimes”: page 426. However, it observed that Part IIIA provides a legislative framework upon which industry-specific regimes are based and acts as both a model and a backstop for regulated access to services provided by essential infrastructure: page 429. It proposed revisions to the declaration criteria, but did not propose changes to the matters that must be taken into account in making a determination on access.

80 The Harper Review proposed only that the Tribunal be empowered to undertake a merits review of access decisions by the ACCC, a change that was made. It described the reason for doing so in the following terms (at page 439):

Decisions to declare a service under Part IIIA, or determine terms and conditions of access, are very significant economic decisions where the costs of making a wrong decision are likely to be high.

The Panel favours empowering the Tribunal to undertake a merits review of access decisions, including hearing directly from employees of the business concerned and relevant experts where that would assist, while maintaining suitable statutory time limits for the review process.

81 In the present context, those comments serve to emphasise that an access determination is fundamentally an economic decision the evaluation of the merits of which is a matter entrusted to the Tribunal.

82 In 2017, the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) made a number of amendments to Part IIIA to implement the recommendations of the Harper Review and the Review by the Productivity Commission concerning the national access regime. As part of those amendments, s 44X(l)(e) was amended to insert the words “(including expansions of capacity and expansions of geographical reach)” after the reference in that provision to extensions. The rationale for this amendment was expressed in the Explanatory Memorandum in the following terms (at [12.65]–[12.66]):

The Commission can make a determination in an access dispute that requires an infrastructure service provider to extend the facility or permit interconnection to the facility by a third party. This is separate to the declaration process, as the Commission may only arbitrate an access dispute after a service has been declared. There are also a number of safeguards that restrict how the Commission may use these powers.

Various references in sections 44V, 44W and 44X are amended. The intent of these amendments is to clarify that the Commission can require a service provider to expand the capacity of its facility (as well as being able to require a geographical extension) when making an access determination. The amendments also clarify that the safeguards in sections 44W and 44X apply to directed capacity expansions. It is intended that the Commission could require a provider to expand a facility’s capacity, whether or not it requires the provider to extend the facility’s geographical reach.

83 It can be seen that, despite the view of the Productivity Commission concerning expansions, the amendment was made in order to make clear that the reference to extensions in ss 44V, 44W and 44X applied to both expansions of capacity and expansions of geographical reach. The changes were not made to alter the meaning of the underlying concept of the value to the provider of extensions whose cost is borne by someone else. That value remained a matter that must be taken into account in making any determination. Importantly in the present context, it was not identified as a matter to be taken into account only when the determination itself proposed a requirement that the provider extend the facility (or such a requirement had been proposed by an earlier determination).

84 Further, it adopted that position despite the recognition by the Productivity Commission that there are complex issues when it comes to the treatment of the cost of a capacity expansion and despite the focus of the Productivity Commission on issues associated with imposing a requirement to expand capacity.

85 In the result, examination of the context shows that s 44X(l)(e) appears to have its origins in language adopted in the Competition Principles Agreement concerning matters to which there must be regard in any independent process for the determination of the terms and conditions of access. To the extent that a comparison between that language and the language as enacted assists, it appears to indicate that the reference to the value of extensions was not to be confined to extensions made in particular circumstances (whether by agreement between the access seeker and the access provider or by reason of the terms of an access determination). Further, the pricing principles in s 44ZZCA were introduced to ensure that there was a focus upon the matters stated in the objects clause added as s 44AA, namely economic efficiency and investment incentives, when determining the price on which access was to be provided.

### The text and structure of the Part IIIA provisions concerning declaration of a service

86 In *Sydney Airport* 155 FCR at 132–136 [23]–[32], the Full Court discussed the text and structure of important parts of Part IIIA in the form in which it stood in 2006. Importantly since then, the terms of s 44G and s 44H have been amended by the removal of the criteria for the decisions of the NCC and the designated Minister in s 44G(2) and s 44H(4), respectively and the introduction in 2017 (by Act number 114 of 2017 with effect from 6 November 2017) of s 44CA containing the “declaration criteria”. Relevant to the position of the parties here, though not relevant to these applications, was the placement into the declaration criterion in s 44CA(l)(a) of the words “on reasonable terms and conditions, as a result of a declaration of the service” being words that did not previously appear in s 44G(2)(a) or s 44H(4)(a). The introduction of those words was directed to the decision in *Sydney Airport* 155 FCR at 146–148 [76]–[89] that s 44H(4)(a) (and so necessarily s 44G(2)(a)) required a comparison of the future state of competition with the right or ability to access the service with that future state of competition without any such right or ability or with restricted right or ability. It did not require a comparison of the current factual position with a future position. Thus, whilst the effect of the declaration itself on competition (as it factually existed) might be relevant to consider, it was not mandated by the Act. As can be seen from s 44CA(l)(a) the effect of the declaration is now a mandatory consideration.

87 The importance of the operation of this change to the parties (but not to these applications) is that the declaration of the Service made by the Tribunal in 2016 was revoked in September 2018, by operation of s 44J(7) of the Act, after the Minister received a recommendation from the NCC that the declaration be revoked. The importance of the construction of the previous terms of s 44G(2)(a) and s 44H(4)(a) by the Full Court in *Sydney Airport* to the declaration of the Service by the Tribunal in 2016 can be seen in the Tribunal’s reasons: *Application by Glencore Coal Pty Ltd* [2016] ACompT 6 at [57]–[102].

## The terms and nature of the Service

88 The declared Service was described by the Tribunal in 2016 as being defined as:

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.

89 The Service is recorded in a public register. The Service was declared by the Tribunal in 2016.

90 A question arises whether that Tribunal decision can be used as an aid to construction of the terms of the Service, in circumstances where it is found in a public register. In *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45; 233 CLR 528 at 538–540 [35]–[44], the High Court (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ) discussed the limited role of extrinsic evidence in construing the Torrens Title register. That there should be a concentration on the public form of the words used to create (not merely evidence) proprietary rights in a register can be readily accepted. The private circumstances of the parties and their intentions, perhaps many years before, can be seen easily to be legally irrelevant. Similar considerations apply to the statutory contract between a company and its members: *National Roads and Motorists’ Association Ltd v Parkin* [2004] NSWCA 153; 60 NSWLR 224 at 236–238 [81]–[86] (Ipp JA); and Strata Title by-laws: *The Owners of Strata Plan No 3397 v Tate* [2007] NSWCA 207; 70 NSWLR 344 at 357–362 [53]–[71] (McColl JA). See generally Herzfeld P, Prince T, Tully S, *Interpretation and Use of Legal Sources: The Laws of Australia* (Thomson Reuters, 2013) at 555–556.

91 But here the public register is explained by an available public document: the decision of the Tribunal. Whilst recognising that it is principally the words of the Service that create the statutory rights involved, their proper meaning and reach is informed by their statutory, legal and public commercial context. In part, at least, that is provided by the earlier Tribunal decision.

92 In the earlier Tribunal decision, access to the Service was discussed by reference to the practical need for the Port as an essential step in the dependent market of producing and exporting coal from the Hunter Valley region. There was no discussion of the contractual methods of sale of coal and whether in some, but not all, of those contractual methods a coal producer would in some form of contractual mechanism take some control of a ship, but in others not do so either at all, or as relevant to the determination before the Tribunal. Such considerations are irrelevant to the relevant economic considerations of obtaining access to and using (both physically and economically) the Port to export coal, on ships. The shipping channels need to be the focus of the Service declared because that is the monopoly bottleneck. The declared Service is thus defined; but the point of its definition is its relationship (as a bottleneck monopoly) to the market of producing and exporting coal. Whilst vessels physically use the channel, it is the access to the channels by the producer and exporter of cargo that is of relevant economic significance. So much is manifest from the earlier decision of the Tribunal.

93 Further, the declaration of the Service should not be interpreted as if it were a statutory enactment. It is a purposive instrument which expresses a form of declaration to facilitate the exercise of the statutory right to access services provided by means of facilities, in order to advance the economic objects stated in s 44AA. It is concerned with promoting the economically efficient operation of, use of and investment in infrastructure by which the declared service is to be provided. It is not concerned with the regulation of the circumstances in which particular parties may themselves be allowed to use the infrastructure. It rests upon the constitutional heads of power described in s 44R which include the access for the purposes of constitutional trade or commerce.

94 For those reasons, as was stated in *Rio Tinto Limited v Australian Competition Tribunal* [2008] FCAFC 6; 246 ALR 1 at 13 [59], there should not be a literal or pedantic adherence to the description of the service in an application for the declaration of service when it comes to the form in which the service is declared. It is enough that the substance and essential nature of the service is not altered. Likewise, once the declaration has been made there should be no literal or pedantic approach to its interpretation, particularly an approach which would frustrate the evident economic purpose to be served by the instrument. As to these matters, see also *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2011] FCAFC 114; 195 FCR 485 at 499 [120].

## The PMA Act

95 It is necessary to have regard to the PMA Act, being legislation regulating charges of the kind the subject of the determination by the Tribunal: the Wharfage Charge (**WhC**) and the NSC. It is important, however, to recall that State legislation cannot control or confine the reach and scope of the proper operation of the Act. This consideration is particularly important when due regard is had to the potential reach of terms and conditions of access to the Service (when the terms of the Service are properly understood) as permitted by the flexibility within the chapeau of s 44V(2): “may deal with any matter relating to access by [Glencore]”.

96 The PMA Act was passed in 1995, amongst other purposes, to establish State-owned corporations to operate the State’s port facilities, to provide for port charges and pilotage, and for other marine matters.

97 Part 5 of the PMA Act deals with port charges. By the definition section for the Part (s 47) Newcastle is a “designated port”. A “relevant port authority” is defined relevantly in (a1) and (e1) in terms that included a party in PNO’s position, for the purposes of a navigated service charge, and site occupation and wharfage charges, respectively as follows:

(a1) in relation to a navigation service charge for Port Kembla or Port of Newcastle – each of the port operator of the port and the appropriate public agency for the port, or

…

(e1) in relation to site occupation and wharfage charges for sites at a private port ­ each of the port operator of the port and the appropriate public agency for the port, or

98 Newcastle (along with Port Kembla and Botany Bay) is defined (in s 3) as a “private port”.

99 Section 48 defines the “owner” of a vessel or cargo as follows:

(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.

(3) A reference in this Act to the owner of a vessel or cargo includes a reference to a joint owner of the vessel or cargo.

(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.

(5) For the purposes of this Act, a person does not cease to be an owner of a vessel because the vessel is mortgaged, chartered, leased or hired to another person.

100 The word “owner” within the section takes its ordinary meaning of proprietary ownership: cf *Tisand Pty Ltd v The Owners of the Ship MV “Cape Moreton” (ex “Freya”)* [2005] FCAFC 68; 143 FCR 43. The inclusive expression in subs (2) widens the meaning to capture the registered owner of the ship: cf *Tisand* 143 FCR at 74–76 [123]–[128], and the charterer of the ship. The word “chartered” (and so “charterer”) is not defined. As discussed in the next section of these reasons, that word could direct reference to one or more well-known types of charter: demise, time or voyage. We will deal with the meaning of “chartered” when we come to the proper scope of the Service and of the determination.

101 Divisions 2–6A of Part 5 deal with the various charges that can be levied at ports. For present purposes, only the NSC (dealt with in Div 2) and the WhC (dealt with in Div 5) are potentially relevant. Division 3 deals with pilotage charges that are not levied by PNO, but by the pilotage service provider; Div 4 deals with port cargo access charges that if levied in a port (and they are not in Newcastle) are levied by the Minister; and Div 5 deals with site occupation charges and wharfage charges.

102 By s 58, Div 5 applies to vessels and their cargo in Newcastle as a designated port in respect of sites leased to PNO as an operator of a private port.

103 The word “site” is defined in s 59 relevantly as follows:

(1) For the purposes of this Division, a ***site*** is:

(a) an area designated by the Minister under this Division and defined on a map kept at the office of the relevant port authority, or

(b) in the case of a site at a private port – an area designated under this Division by the relevant port authority and defined on a map kept at the office of the relevant port authority.

(2) An area cannot be designated as a site unless it is owned or operated by, or leased to, a relevant port authority and it consists of:

(a) an area of water surrounding or adjacent to a wharf, buoy or dolphin, and

(b) in the case of a wharf or a dolphin – the whole or part of the area of the wharf or dolphin.

The designated site includes any stratum of the air space above, or of the land or water below, an area so designated.

(3) In this section, ***wharf*** includes any land adjacent to it.

(4) For the purposes of this section, an area of water is deemed to be owned or operated by the relevant port authority if the bed of the water is owned or leased by the State or the Authority and:

(a) the area surrounds or is adjacent to a wharf, buoy or dolphin owned or operated by, or leased to, the relevant port authority, or

(b) the area is burdened by an easement that benefits an area of land owned or operated by, or leased to, the relevant port authority, or

(c) the area surrounds or is adjacent to an area referred to in paragraph (b), or

(d) the Minister approves of that area of water being included in a site operated by the relevant port authority.

104 Section 60 deals with the “site occupation charge” which is not relevant.

105 Section 61 deals with the WhC, as follows:

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

(2) Unless the regulations otherwise provide, the charge is to be calculated by reference to the quantity of cargo loaded or unloaded at the site.

(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.

106 Division 6 provides for berthing charges. These are not relevant, being charges for berthing at wharves, buoys or dolphins owned or operated by the Minister.

107 Division 6A deals with port infrastructure charges as follows in s 66A to s 66C:

**66A Application of Division**

(1) This Division applies to the following persons (referred to in this Division as ***port users***):

(a) the owners of cargo loaded or unloaded in the course of stevedoring operations at a designated port,

(b) the owners of vessels that berth at a wharf, buoy or dolphin at a designated port,

(c) persons liable to pay a site occupation charge at a designated port,

(d) persons who operate road or rail cargo transport services as part of the port-related supply chain.

(2) Unless the regulations otherwise provide, owners of the following vessels are not ***port users*** for the purposes of this Division:

(a) vessels owned or operated by the State or its agents,

(b) vessels owned or operated by the Commonwealth or its agents,

(c) police or emergency services vehicles,

(c) fishing vessels other than those used for commercial purposes,

(d) recreational or pleasure vessels including sailing craft and personal watercraft, other than those used for commercial purposes.

**66B Port infrastructure charges**

Port infrastructure charges are payable by port users to fund investment (and return on investment) in ***port infrastructure projects***, being the acquisition or development of land or the provision of services and facilities by the port operator, either:

(a) at the port in connection with the operation of the port, or

(b) outside the port in connection with the transport of cargo to or from the port or the storage, handling or distribution of cargo transported to or from the port.

**66C Fixing of port infrastructure charges**

(1) The relevant port authority may fix port infrastructure charges.

(2) Different charges may be fixed in respect of different port users, or according to such other factors as the relevant port authority thinks fit.

108 By Div 6A, PNO as a relevant port authority for Newcastle is empowered to fix infrastructure charges “to fund investment (and return on investment) in port infrastructure projects” as defined in s 66B, and levy them on owners of cargo such as Glencore under s 66A(l)(a) and owners of vessels (as defined in s 48) that berth at a wharf.

109 Division 7, being s 67, deals with agreements in respect of charges, 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.

110 Therefore, the PMA Act itself provides a mechanism (by s 67) whereby the relevant port authority (in this case PNO) may depart from the legislative charging structure and make an agreement with a person otherwise liable to pay any kind of charge under Part 5. It was not in dispute that Glencore may be subject to the WhC. Therefore, it was such a person.

111 It will be necessary to say more about the PMA Act. It suffices at this point to say that the structure of the charges broadly follows and is reflective of the real or physical activity that occurs at the Port: the NSC for the general use by a vessel of the Port and its infrastructure; pilotage charges; port cargo access charges; site occupation charges for various purposes including stevedoring; the WhC and berthing charges; and the infrastructure charges on persons set out in s 66A(l). That physicality of the relationship between the charge and the person liable does not, of course, determine how Part IIIA of the Act (as Commonwealth legislation) operates, informed as it is by broad notions of competition and efficiency. That said, it is necessary to recognise that Part IIIA is to be applied here in the context and framework of a working port and the State legislation governing its use and operation.

## Issue 1: the scope of the determination

### Relevant legal and commercial background to the sale and carriage of goods by sea

112 The commercial and competition considerations described earlier and by reference to which the Service was declared by the Tribunal in 2016 concerned the mining and selling of coal, and its transport by sea (as dry bulk cargo) to foreign markets.

113 A proper contextual background can be seen to involve the recognition of fundamental and well-known legal and commercial considerations touching the international sale, and sea carriage, of goods, such as coal. That such matters are relevant to be recognised is clear from the nature of the differences between the parties, which we have broadly summarised at [20] above. Neither the Tribunal nor the parties considered these issues in the detail expressed below. As will be seen the issue concerning the scope of the determination can be resolved without full consideration of this background. Nevertheless, these matters of background were raised in argument, and when considered reveal the limitations of the Tribunal’s approach and conclusions on this issue.

#### Chartering of ships – use of the ship and carriage of goods by sea

114 The contractual structures in the use and deployment of ships and in the carriage of goods by sea are many and various. There is, however, a broad grouping of types of contracts (called charterparties, from which the verb “to charter” is derived) that are utilised in (usually) standard forms that are able to be varied to suit the particular circumstances of the parties. The importance of standard form contracts and standard categorisation of types of contracts as basal to the operation of efficient markets such as in commodities, shipping, insurance and freight was lucidly explained by Lord Diplock in *Federal Commerce and Navigation Co Ltd v Tradax Export SA (The Maratha Envoy)* [1978] AC 1 at 7–8. The nature and character of these types of standard contract are well-known features of international trade, and can be found to be the subject of discussion in countless works of commercial and legal practice: for example, Branch AE, *Elements of Shipping* (7th ed, Routledge, 1996) at 332–362; Girvin S, *Carriage of Goods By Sea* (Oxford, 2007) at 15–19 [1.32]–[1.41]; Eder B, Bennett H, Berry S, Foxton D, Smith CF, *Scrutton on Charterparties and Bills of Lading* (22nd ed, Sweet & Maxwell / Thomson Reuters, 2011) ch 4; Wilson JF, *Carriage of Goods by Sea* (7th ed, Pearson, 2010) at 3–5 and 7–8; *Halsbury’s Laws of England* (3rd ed, LexisNexis, 1964) Vol 35 at 247–251; Davies M and Dickey A, *Shipping Law* (4th ed, Thomson Reuters, 2016) at 194–198, 368 and 467–468; White M, *Australian Maritime Law* (3rd ed, Federation Press, 2014) at 127–131, 136–137, 144–145 and 159–160; and Baatz Y, *Maritime Law* (2nd ed, Sweet & Maxwell, 2011) at 127–128 and 160ff.

115 Three types of charter or charterparty play a fundamental role in the arrangement of the deployment of ships: the demise charter, the time charter and the voyage charter.

116 The demise charter is a contract whereby the full possession and control of the ship is granted or demised to the charterer. Sometimes it may be a bareboat charter, that is, of the ship without any crew, sometimes with master and crew, who are transferred thereafter to the control of the charterer. The ship is chartered for a period of time in exchange for hire, and the charterer has all the incidents of possession and control that an owner would have, with the rights to, and consequential responsibilities for and liabilities from, controlling the master and crew. The demise charterer then is in the business of operating a ship for its commercial return by carriage of goods by sea, or by sub-chartering it to a sub-demise charterer, or to a time charterer. See generally, the references at [114] above; and the discussion by Latham CJ in *Australasian United Steam Navigation Co Ltd v The Shipping Control Board* [1945] HCA 45; (1945) 71 CLR 508 at 521–522, referred to in *Comandate Marine Corp v The Ship “Boomerang I”* [2006] FCAFC 106; 151 FCR 403 at 405 [4]–[5], 410 [29]–[30]; and see *The Ships “Hako Endeavour”, “Hako Excel”, “Hako Esteem” and “Hako Fortress” v Programmed Total Marine Services Pty Ltd* [2013] FCAFC 21; 211 FCR 369 at 372 [1], 386–388 [53]–[59], 404–405 [138]–[140].

117 The importance of the possession and control given by the demise charter and the existence of other types of charter (by time or voyage) may have different significances depending on the context. The demise charter, that is, a charter giving possession and thus operational control over the physical navigation and operation of the ship, is important in the present context if the Service and access to it are to be viewed by reference to the party controlling the ship in a physical sense of driving it and undertaking its navigation, as appears to have been the view of the Tribunal, to which we will come.

118 The time charter, like the demise charter, is for a period of time, but critically, possession and control of the ship remain in the hands of the owner or demise charterer. The nature of this type of charter was described by the Full Court of this Court in *ASP Ship Management Pty Limited v Administrative Appeals Tribunal* [2006] FCAFC 23; 149 FCR 261 at 287 [103]:

[A] time charterer of a working merchant ship is normally considered to have the ship at its commercial disposition (subject to the terms of the arrangement, including limits of trading). Indeed, such a charterer is often called the “disponent owner”. In a time charter, the person who stands as owner will agree to provide the services of the ship and crew and to place them at the commercial disposition of the time charterer: see *Hyundai Merchant Marine Co v Gesuri Chartering Co* [1991] 1 Lloyd’s Rep 100 at 107; *The Berge Tasta* [1975] 1 Lloyd’s Rep 422 at 424; *The Gregos* [1993] 2 Lloyd’s Rep 335 at 337 and *The Gregos* [1995] 1 Lloyd’s Rep 1; and *The Hill Harmony* [2001] 1 AC 638. One would not, however, ordinarily describe the time charterer as the operator of the ship, unless the context was such that the relevant designation was by reference only to the control of the commercial disposition of the ship: cf the definition of “disponent owner” in *Sullivan’s Marine Encyclopaedic Dictionary* (6th ed), p 135.

119 The definition of “disponent owner” in the standard maritime dictionary just referred to in the extract from *ASP Ship Management* was: “the time charterer of a ship. An operator through a charter arrangement to exploit the ship commercially”.

120 In a time charter, it is the *commercial* deployment or disposition of the ship which is controlled by the charterer: which ports to go to and what cargoes to lift and carry, within the scope of the authority in the contract. The ship is physically controlled and navigated by the master who is employed or controlled (in relation to the navigation and physical operation of the ship) by the owner or demise charterer. Thus, a time charter by a party will explain the commercial reason why the ship enters a port to lift a cargo, since the charterer controls its *commercial* disposition, but the vessel is controlled in a navigational sense by the party with its possession – the owner or demise charterer.

121 The notion of “hire” payments for a time charter may mislead: “hire” is paid not for the physical possession of the ship, but for the time during which the services of the ship are available to the charterer for its commercial use.

122 The time charter provides for the flexible utilisation and deployment of ships in potentially volatile world shipping and freight markets. That said, the time charter can also be used effectively as a contract for the carriage of goods if the charter is used to carry goods on a designated voyage or trip in what are called trip time charters – where the ship is hired for the time it takes to undertake a nominated voyage or trip.

123 As to time charters generally, see the references at [114] above.

124 The third type of charter is the voyage charter under which, in exchange for *freight*, the shipowner, or demise charterer, or indeed time charterer, agrees to make part, or all, of the ship available for the carriage of cargo from a port of loading to a port of discharge. The charter is not for time, such as in a time charter for 3, 6, or 12 months, or for the time a trip or voyage will take, but for the carriage of cargo from and to nominated ports in exchange for freight, generally calculated by tonnage of the cargo. The risks of delay and of the time taken to enter, berth at, load at and leave the loading port (here Newcastle) and to reach, enter, berth at and unload at the port of discharge are reflected in terms of the voyage charter dealing with laytime and demurrage, which terms are reflected in the price, being the freight rate.

125 The voyage charter can be for one or more voyages. It can also be employed in more general contracts. If a party wishes to arrange for the carriage of a large quantity of goods by ships over an extended period of time (as may be common in regular bulk trade), a volume contract or contract of affreightment will be entered into whereby vessels to be nominated will carry under individual successive voyage charters the volume of goods required by the charterer to be shipped and carried over the nominated period.

126 As to voyage charters: see, generally, the references at [114] above.

127 The demise charter and the time charter for a period of time can be seen as contracts for the use and deployment of the vessel, one by time and control of the possession, operation and navigation of the ship, the other by the right, during a period of time, to services from the ship by directing the commercial disposition of the ship.

128 The voyage charter and the trip time charter can be seen as contracts in one sense for the commercial use and deployment of the ship but also, just as much, for the carriage of goods by sea. This distinction of characterisation is not critical here, except to emphasise the distance between these types of charter and control of the operation of the ship and of its navigation.

#### International sale of goods

129 Those engaging in the international sale of goods employ different types of contracts in order to adjust the risks and rewards of the different markets involved in the transaction, including the relevant goods or commodities markets, carriage or freight markets, and insurance markets. Two well-known, indeed notorious, types of sales contracts or arrangements are CIF and FOB, being Cost, Insurance and Freight and Free on Board.

130 It is unnecessary to focus on the differences and similarities of these types of contract except in one respect. If one is selling CIF the seller will arrange both insurance and the shipping (freight) and the buyer pays a price accordingly. Thus it will be for the seller to arrange the carriage by some form of charter arrangement, such as a voyage charter. This responsibility of the seller to arrange carriage and insurance requires the seller to enter both the insurance and the freight markets. The arrangement may be C&F (Cost and Freight) where it will be for the seller to arrange carriage, but not insurance.

131 If one is selling FOB, the price represents only the goods which the seller has the responsibility to place on board the ship, with title passing as the goods pass the ship’s rail at loading. The seller often will not be responsible for the arranging of the carriage. In circumstances where the seller does arrange the carriage under an FOB contract (FOB terms with additional carriage services) it is arranged for and on behalf of the buyer. See the classic judgment of Devlin J in *Pyrene Co Ltd v Scindia Steam Navigation Co Ltd* [1954] 2 QB 402 at 424, where the relationship between law and practical day-to-day working of commerce in this respect is explained.

132 The important commercial considerations distinguishing the CIF and FOB sales are that in the former, the seller undertakes the risks and seeks the rewards in entering three fluctuating markets: commodity, insurance and freight; whereas in the latter, the seller only undertakes the risks and seeks the rewards in the relevant commodity market.

133 The terms of the International Chamber of Commerce Incoterms 2010 define and describe FOB and CIF contracts as follows:

FOB – Free on Board

“Free On Board” means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.

…

CIF – Cost, Insurance and Freight

“Cost, Insurance and Freight” means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

134 As to CIF and FOB sales (and variants and other types of sale arrangements), see generally Lorenzon F and Baatz Y, *Sassoon: C.I.F. and F.O.B. Contracts* (5th ed, Sweet & Maxwell / Thomson Reuters, 2012) at 3–5; d’Arcy L, Murray C, Cleave B, *Schmitthoff’s Export Trade: The Law and Practice of International Trade* (10th ed, Sweet and Maxwell, 2000) ch 2; Treitel G and Reynolds FMB, *Carver on Bills of Lading* (3rd ed, Sweet & Maxwell / Thomson Reuters, 2011) at 150–151 and 157–158; Goode R, *Commercial Law* (2nd ed, Penguin, 1995) ch 34.

135 Glencore, as is common in the export of bulk commodities, sells and ships a large proportion of its coal under FOB arrangements.

### Consideration of the approach of the Tribunal to the scope of the Service and of the determination

136 The Tribunal dealt with the question of the scope of the final determination at [120]–[158] of its reasons. The issue came to the Tribunal in circumstances where the ACCC had expressed the scope as follows:

(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 *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.

137 The ACCC had rejected Glencore’s submission that the scope should be broader to include all circumstances where it was exporting coal, including where its customer was the charterer of the vessel that was physically using the shipping channels. In other words, Glencore sought coverage by the determination when it sold FOB, as well as CIF, irrespective of whether it chartered the carrying vessel, or in what form it might charter it. The ACCC recorded Glencore’s submission at page 21 of its decision as follows:

Glencore is accessing the service in the very real economic sense in order to enable its coal to be delivered to its customers and Glencore is bearing the economic cost of the charges for the physical use of the service by the vessels chartered by its customers carrying Glencore’s coal.

138 The ACCC did not consider the Act to be wide enough to permit it to deal with FOB sales, saying at pages 23–24 of its decision:

However, in the Commission’s view, the phrase “any matter relating to access by the third party to the service” is not sufficiently broad to permit the Commission to deal with access by another party nominated by Glencore to the declared shipping channel service, as any such access would not be by Glencore but by that other party.

The Commission does not consider that this phrase and its components can properly extend to requiring PNO to provide access to the Service to another party nominated by Glencore (being a coal customer) merely because Glencore may indirectly bear some or all of the economic cost associated with the Service when used by that other party. The broad approach argued by Glencore is, in the Commission’s view, inconsistent with the natural and clear meaning of section 44V.

The Commission considers that PNO has a legitimate business interest being able to ascertain to a reasonable extent the scope and nature of its obligations to access seekers under the terms of a declaration (section 44X(l)(a)). This consideration is also relevant to the objective of achieving the efficient operation and use of the Service (section 44X(l)(aa)). If terms of access were extended to parties who are not a third party to the dispute, and who are to be nominated at the discretion of the access seeker, this would require PNO to assume an unreasonable level of uncertainty in its business dealings with other parties.

139 The submissions of PNO, which were accepted by the Tribunal, were set out by the Tribunal at [125]–[130] of its decision. PNO submitted that the provisions of Part IIIA meant that there was no statutory power to extend the scope of the determination to the second limb of the ACCC’s determination based on s 48 of the PMA Act, or that if it was within power the mandatory considerations within Part IIIA would prevent it.

140 The first limb of the above argument was reflected in [126] of the Tribunal’s decision:

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.

141 One can see in this argument the focus on the physical access to the channels by the person physically controlling the vessel. This underpinned PNO’s further submission that the Act did not permit anything other than a determination of a bilateral dispute between an access provider and a (single) access seeker (being the party owning and controlling the vessel entering the Port).

142 PNO further submitted that the PMA Act and in particular s 48, a State Act, could not change who, for the purposes of the Act, accessed the shipping channels.

143 Glencore’s submissions were set out at [131]–[140]. Glencore submitted that the Service should not be construed narrowly. Glencore stressed the practical and commercial context and that the form of the sale or carriage of the coal was irrelevant to the substance of the reality that Glencore bore the ultimate cost of Port charges whoever charters the vessel. If Glencore was exporting coal, it was accessing or using the shipping channels.

144 Also, Glencore submitted that when its customers might be seen to be accessing the shipping channels, so was it: the berthing boxes and revetments, for the purposes of loading the coal. Further, it was liable for the WhC and so was being charged for the Service. Thus, it was entitled to enjoy the arbitrated price of the Service, not limited to the WhC.

145 The ACCC’s submissions were summarised by the Tribunal at [141]–[147]. These supported the scope of the determination based on s 48 of the PMA Act, stressing Glencore’s legal liability to pay the NSC by a representation under s 48(4)(b) as a clear basis for concluding that it accessed or used the Service. It did not otherwise support Glencore’s position.

146 The Tribunal’s reasoning is found at [148]–[158] of its decision.

147 The Tribunal focused, correctly with respect, upon the meaning of the Service and “what it means to access or use the Service”. At [149] the submission of PNO was encapsulated as follows:

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.

148 It is plain from the balance of [150]–[158], in particular [153], that these submissions were accepted and that access to the Service was limited to the physical access to the channels, that is the navigation of the channels by ships, and that the person seeking such access is the person “controlling or in charge of a vessel”.

149 This construction is not without difficulty. First, it focuses upon the physical control of the ship in the shipping channel as the access to the Service. It pays little regard to the economic access or use of the channels as a necessary part of the export of coal. Second, it is limited to the control of the ship. Thus the determination would be limited to circumstances where Glencore owns or demise charters vessels such that it has the possession of the ship and through its own crew controls the navigation of the ship to enter and leave the Port to carry its own coal. On this construction, Glencore would be able to benefit from a declared Service relevant to the dependent market of producing and exporting coal only if it entered the market or business of shipowning, including demise chartering of ships. It is to be recalled that this would not only deprive Glencore of the determination as to the NSC, but also the WhC. On the other hand, if the Tribunal intended by the word “charter” to include non-possessory charters such as time or voyage charters (a possibility inconsistent with the insistence on control of navigation), the confinement of the determination would be to limit its application to include CIF or similar sale, but to exclude FOB sale (though not, arguably, FOB with additional carriage service). In such circumstances, Glencore would be able to benefit from the declared service only if it entered the freight market, that is, the market for chartering vessels, especially by voyage charter. Once again, this applies to both the NSC and the WhC.

150 This second, possibly wider, view of the scope of the Tribunal’s determination itself (by reference to what it meant by “charter”) raises the difficulty of more than one person “accessing” the Service referred to in [153] of the reasons. If Glencore voyage or time charters a vessel, it is still the owner or demise charterer (and not Glencore) who is physically using the channel in controlling the vessel. In these circumstances there would be (on this wider hypothesis of the Tribunal’s reasons) Glencore accessing the Service as (voyage) charterer and the shipowner or demise charterer accessing the Service as the party in control of the vessel. At [153], the Tribunal recited PNO’s submission and accepted the asserted problem if access was available to more than one party:

Whilst certainly not decisive, we agree with PNO’s submission that these passages [in Glencore’s original application] 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.

151 We will come, shortly, to the resolution of this difficulty by the application of the words “any matter relating to access by the third party” in s 44V(2). For now, it suffices to identify that the problem exists in any event unless one limits “charter” to demise charter, as the better reading of the Tribunal’s reasons does. We should add that this was the ultimate submission of PNO in this Court, after earlier it appeared to accept that “charter” included a charter such as a voyage charter as would suffice for CIF sale. It is also an approach that is informed by a physical conception of what is meant by access of a kind that requires the physical user of the Service to be identified and specific terms of access being confined to use by that user. In economic terms, there are no such limitations. It is conceivable that two parties are each potentially interested in securing economic terms covering the same physical use. A party such as Glencore may wish to seek terms of access that will apply to ships loading and carrying coal from its mines through the Port. It will seek to deal with PNO on the basis that the agreed terms will apply in such circumstances and Glencore will thereby set the terms upon which the Port will, in effect, issue a ticket, for such ships to use the Port the cost of which will be borne by Glencore. The party in control of the ship may also wish to seek terms on which it is directly liable to PNO. The fact that each may seek to treat as to terms upon which the Service may be provided does not pose any difficulty. PNO offers terms to each and commercial decisions will be made on that basis.

152 However, in the light of the view that the correct focus of the terms of the Service was the physical access to and use of the shipping channels, the Tribunal saw the words “by virtue of which” as central. At [151] of its reasons the Tribunal said:

[T]he 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.

153 With respect, we cannot agree. We do not see anything secondary about the words “may enter a Port precinct and load and unload”. The language used to describe the Service includes the berths or the shipping channels: the Service encompasses the availability of the site (being the area of water and the wharf and the strata of air and water set out in s 59(2) of the PMA Act that may be the subject of the WhC under that legislation). The Service is not confined to entry and exit from the Port. It expressly includes the right to access and use “berths next to the wharves as part of the channels” by virtue of which vessels may load and unload at relevant terminals and then depart. So, both the Service as described and the matters which give rise to the liability to pay the WhC encompass activities being undertaken at the berths.

154 Thus, we disagree with the proposition in [153] of the Tribunal’s reasons that the notion of access and use of the shipping channel is being somehow qualified by the apparent purpose of loading. Access to and use of the shipping channels is by not only the economic access and use of the channels and berths, but also the physical use of the berths (being part of the shipping channels) by use of adjacent wharves for which the WhC is paid, as part of the Service.

155 Once one recognises that the access or use is not limited in the physical way identified by the Tribunal in its acceptance at [149] of PNO’s submissions, then the notion of economic access or use will obtain equally whether by reason of Glencore selling on a CIF basis (where it has time or voyage chartered a ship) or by reason of selling on an FOB basis (where it has not chartered the ship). In each case its access and use is economic in that it does not physically control the vessel using the channels. This is, with respect, entirely in accordance with the purpose of the declaration of the Service, contrary to the Tribunal’s view in [154] of its reasons.

156 As to the WhC and access the Tribunal said the following at [156]–[157]:

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.

With this [in] 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.

157 For the reasons we have given, we respectfully do not consider that the argument of Glencore there identified is “the tail wagging the dog”. Glencore pays for and seeks access to the site. This is shown by the fact that the WhC is covered by the Tribunal’s determination. Part of the MAR is allocated to the WhC. Glencore is physically accessing or using the berth by the use of the immediately adjacent wharf and water below adjacent to the revetments, in loading the ship at the berth. The WhC is a product of the PMA Act, but it is regulated by the determination and that is so because it concerns the access and use of “berths next to wharves as part of the channels”. In our respectful view, that part of the Service is accessed or used by Glencore, both physically and economically, whenever Glencore is selling and loading coal. So, the Service is accessed or used.

158 Our fundamental disagreement with the Tribunal and the basis of our view that it misconstrued the Service, and thus asked itself the wrong question, is that access to and use of the shipping channels are not limited to, or indeed even governed by, the notion of physical access or use by the control and navigation of the vessel entering and leaving the Port to carry the coal. The broad context of the purpose of the declaration as directed to the relevant dependent market of the production, sale and export of coal makes that limitation or focus inappropriate. Access and use can be relevantly economic though connected closely and clearly, indeed immediately, to the physical activity involved. No particular general principle is at play here. Coal is exported in ships in respect of which any exporter may or may not have a particular or direct contractual arrangement. Whether or not an exporter makes any particular arrangement directly in controlling the physical or commercial deployment of the vessel does not affect a conclusion as a matter of meaning of the text of the Service that the exporter is accessing or using the shipping channels when, by its sale arrangement, it causes a vessel to enter the Port. It does so, that is it causes a vessel to enter the Port, when it sells CIF or FOB, irrespective of whether it owns, demise charters, time charters, or voyage charters the vessel, or not, as the case may be.

159 Glencore was entitled to a determination that dealt with any matter relating to access by it as a third party. It was plain that Glencore was seeking a determination of access on terms that would apply to ships carrying coal from its mines through the Port. If the Service that was declared was confined to access and use of the shipping channels (including berths next to the wharves as part of the channels) by a ship then even though Glencore was not the party in control of the ship, it could seek to agree terms with PNO on which it would acquire the Service on conditions that would allow ships nominated by Glencore to use the Service. Glencore had an economic interest in being able to enter into an agreement with PNO as to the terms upon which ships carrying its coal would be able to use the Service. One of the matters relating to access to be dealt with by the determination was the wording of a condition that would allow Glencore to acquire the Service and for ships carrying its coal to use the Service. Therefore, for that further and alternative reason, the Tribunal was in legal error in confining the terms of the determination to instances where Glencore was the party in control of the ship.

160 In either case, Glencore itself was the acquirer of the Service and could apply the terms as determined to all instances where ships carrying coal from its mine were using the Port. On the first approach, the Service was being used by Glencore at least to the extent of loading from the wharves. On the second approach, Glencore was a party with an economic interest in acquiring the Service for the benefit of the party in control of the ship. In either case, the terms in which the Service was described in the declaration were not a barrier to Glencore securing a determination of a kind that would require PNO to provide the Service to Glencore. The only issue concerned the precise terms upon which the Service might be declared. As that “matter relating to access” by Glencore was not addressed by the Tribunal the matter should be referred back to the Tribunal for further determination of that aspect.

161 This raises the issue of the place of other parties, such as the shipowner who may be subject to the NSC under the PMA Act and not have the benefit of the determination, a subject in respect of which the Tribunal made reference in [153] of its reasons (at [150] above).

162 If, as we consider to be the case, Glencore is accessing and using the Service and shipping channels, the determination through a bilateral arbitration can, under s 44V(2), set the terms of access as between Glencore and PNO such that another person who may have a right of access to the shipping channels to carry Glencore’s coal and who may be subject to the NSC, can, through Glencore be given the ability or option of taking up Glencore’s arbitrated price. The precise mechanism need not be set out here, save to say that it would need to be a product of the arbitrated bilateral rights and obligations between Glencore and PNO and conform practically to the workings of the Port and the PMA Act. This would ensure the benefit to Glencore of the arbitrated terms of access, and if for its own commercial reasons a shipowner or charterer wanted to pay more (for some preferential access, or its own commercial reasons otherwise) it would not be bound to take Glencore’s arbitrated price. That may or may not be a commercial issue for Glencore: to be solved either in its contractual arrangements with the buyer or the shipowner or by making a representation for the purposes of s 48(4)(b) of the PMA Act. Such an arrangement falls entirely within the clause “any matter relating to access by [Glencore]” in the chapeau to s 44V(2). The working out of such arrangements in the terms would be a matter for the Tribunal in the re-arbitration.

163 It also follows for the above reasons that we respectfully consider that the Tribunal was in error in excluding the second inclusive limb of the scope of the determination found by the ACCC: that is, when Glencore makes a representation under s 48(4)(b) of the PMA Act. The Tribunal (at [155] of its reasons) adopted the arguments of PNO, which had been recorded at [128]–[130] of the Tribunal’s reasons, as follows:

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.

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.

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(l)(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.

164 The submissions of PNO were necessarily founded on the narrow interpretation of the Service with which we disagree, being the physical access to the shipping channels by the party who controls the navigation of the ship.

165 There is no real basis for any fear of arbitrage; the determination would be confined to the ships carrying Glencore coal, however that might be defined.

166 Further we see no entrenchment on the legitimate business interests of PNO. The access regime determination was to access and usage in the sense we have described. The second limb of the ACCC’s scope of determination and the width to cover all coal exported by Glencore only conform to the purposes of the declaration of the Service, and go no further.

167 Nor would there be any exceeding of the reach of Part IIIA. The terms of access of Glencore are being fixed by determination which includes a mechanism of delivering an equivalent price to another party whose access overlaps or coincides with Glencore’s access, so as to provide terms of access *for Glencore*. To require PNO to give the relevant shipowner a mechanism to take a NSC of not more than $X as one of the terms and conditions of access by Glencore to the Service is only to ensure, or to make more likely, that Glencore will obtain the economic benefit of the declaration of the Service for its access to the Service.

168 The over-confinement of the scope of the determination to the ownership or demise chartering of vessels such that only the owner or charterer could be said to control the vessel and its navigation can be seen by taking the perspective of the carrier of the coal. PNO submitted that an extension of the scope of the determination as contended for by Glencore would affect its ability to negotiate higher or lower levels of the NSC with shipowners or “shipping lines”. Leaving aside the question of whether so-called “shipping lines” exist in dry bulk trade, if what is meant is negotiating with bulk fleet owners, or carrier interests who have volume contracts or contracts of affreightment to carry coal ex Newcastle, those fleet owners or carrier interests would, if they wished to seek to take advantage of Part IIIA, (like Glencore as a coal exporter) only be able to seek a determination by reference to ships that they owned or demise chartered and would not be able to do so in respect of time chartered vessels in their fleets or if they had voyage chartered vessels to carry out particular voyages under any contract of affreightment or volume contract with the cargo interest. Such helps to reveal that not only is the confinement foreign to the economic purpose of the declaration of the Service for the relevant dependent market of the mining and export of coal, it lacks coherence with the undertaking of shipping business.

### Conclusion as to issue 1

169 For the above reasons, we respectfully conclude that the Tribunal misconstrued the terms of the declared Service and so asked itself the wrong question. It is, however, for the Tribunal, not this Court, to fashion the scope of the terms. We would set aside the determination and remit the matter to the Tribunal to fix the terms of the scope of the determination in the light of these reasons. The working out of arrangements in the terms of access for Glencore to stipulate a mechanism by which the determined access price would apply to ships carrying coal from Glencore’s mine would also be a matter for the Tribunal in the re-arbitration

## Issue 2: the treatment of user contributions

### The DORC methodology

170 In its Review of the National Access Regime, the Productivity Commission observed that the debate concerning asset valuation methodologies to be used in determining asset values where access to infrastructure is regulated tends to focus on whether historical cost (known as depreciated actual cost (**DAC**)) or replacement cost measures should be used. The most common replacement cost methodology then in use was depreciated optimised replacement cost or DORC. The Productivity Commission described the two methodologies in the following way (at page 356–357):

Under the DAC method, assets are valued at their net book value and depreciated in line with accounting standards or a schedule specified by the regulator. Allowance for inflation is made either through indexation of the asset base, or by adjusting the allowed rate of return.

Under DORC, assets are valued at the cost of replacing their remaining service potential. The replacement cost is “optimised” in that replicating service potential does not necessarily involve replacing the same physical assets. Hence, if a new technology can deliver the service at a lower cost than the existing assets, those assets will be valued at the cost of the new technology. In this way, DORC is said to emulate what would happen to asset values in a competitive market.

It should be noted that when an investment is initially made, DORC and DAC valuations are equivalent. To be more precise, after an initial prudence review, DORC and Depreciated Optimised Actual Cost (DOAC) will be the same.

Over time, however, DORC and DOAC are likely to diverge. In theory, DORC values would normally be expected to trend lower than an inflation adjusted DAC value – the optimisation in DORC provides scope to lower asset values but rarely to increase them. In practice, however, DORC values can also be higher than an inflation adjusted DAC valuation. There are a range of reasons why DORC can be higher than DAC. One common reason is the somewhat arbitrary nature of depreciation schedules for assets with long lives. For example, an asset might have had a nominal expected life of 25 years when it was built, but with minor maintenance or modification may turn out to last 50 years. At, say, year 20 a DAC value will be low since the asset will be depreciated by 80 per cent. However, a DORC valuation conducted at this time would be based on an engineering assessment of the asset with a remaining life of 30 years.

171 Nevertheless, as the Productivity Commission recognised, there is a risk that over time and with technological advances, the DORC value may be much lower than the DAC value. Although the DORC value may result in an efficient measure of the cost associated with the amount to be allowed for depreciation, it may have other consequences that would distort the efficiencies of investment in infrastructure. Those would arise in the following way. If the holder of a regulated asset is required to provide access at a price determined by reference to a DORC value then, in effect, part of the initial investment will be stranded. The prospect of that outcome could have a chilling effect upon investment in key infrastructure that might be brought within the Part IIIA access regime. Efficient and desirable investment may be discouraged by the use of a DORC methodology to value assets for the purpose of determining the terms of regulated access.

172 However, to approach the matter in that way ignores the fact that risks of that kind can be factored into an appropriate rate of return on the capital invested. Assets which are at high risk of the advancement in available technologies reducing the optimal cost at which the asset might be replaced in the future can be afforded a greater rate of return as part of the process for determining an appropriate price. By that means there can be a rebalancing of the incentives for investment to encourage efficient outcomes. Hence the need to consider both efficient costs and investment incentives.

173 Finally, as was noted by both the ACCC and the Tribunal in the present case, DORC is not the only approach that may be adopted in order to determine the level of efficient costs. However, in the present case, other alternatives were not evaluated and were not raised on the review application as having any relevance.

174 The focus upon efficient costs and a return on investment commensurate with risk is now reflected in the pricing principles expressly stated in s 44ZZCA(a) of the Act. However, those two principles are just one of a number of matters to which there must be regard when making an access determination. The other matters listed in s 44X must also be taken into account in making the determination.

175 In the present case, the Tribunal approached the matter on the basis that the parties to the determination had agreed to use the DORC methodology to value the assets used to provide the Service: at [162]. That agreement masked a key issue because the parties did not agree whether “user funded” or “user contributed” assets should be deducted from the DORC value to establish the RAB: page 108 of the ACCC’s reasons. Before this Court, Glencore maintained that a deduction for user funded contributions to the value of assets used by PNO to deliver the Service should have been made as part of the DORC calculation or by way of subsequent adjustment to the DORC value. In either case, the mathematical consequence was the same.

176 However, there was a conceptual difficulty with the claim that there should have been adjustment as part of the DORC calculation. As noted above, a DORC approach is hypothetical. It is not concerned with actual cost or the source of funding to meet actual cost. Rather, it is concerned to identify the optimised replacement cost of the asset and then depreciate that cost to reflect its remaining useful life. The replacement cost determined by DORC is conceptual. Its assessment is divorced from the realities of how the cost might be funded and the extent to which users might contribute towards that cost. It is concerned with determining the cost of replacement of an existing asset in a way that might reflect the cost that would be incurred by a hypothetical entrant into a competitive market for the supply of the relevant service.

177 There is no demonstrated basis for conceptual validity in a measure that uses a DORC approach, but removes some of the cost to reflect the actual circumstances. A DORC value that was adjusted in that way would no longer indicate the costs that would be incurred by a hypothetical entrant in a competitive market. If there were said to be reasons why the DORC value, once determined, should be adjusted to reflect the actual circumstances or reasons why the determination of the price and terms of access required a balancing of the DORC value with other considerations then those were matters to be addressed outside the DORC calculation.

178 For those reasons, there has not been shown to be any error in that aspect of the Tribunal’s approach which involved a determination of the DORC value without regard to user contributions. Therefore, it is not necessary to consider whether any such error might have been properly characterised as an error of law for the purposes of the review applications. It is simply not an error in approach.

179 Otherwise, the major basis for Glencore’s attack on the Tribunal’s approach was that it was said to have elevated the DORC methodology to be the reason why there could be no deduction for user contributions at all. This was said to treat the DORC methodology, which was only a tool of analysis, as determinative of the statutory task and to disregard the statutory provisions. Those provisions were said to require the Tribunal to have regard to the fact that there had been user contributions. In effect, the error of law was said to be that the Tribunal used DORC (which had no statutory force) to reason why there should be no regard to user contributions (when the statute required such regard).

180 In order to evaluate the merits of that submission it is first necessary to understand the approach adopted by the ACCC in its arbitral determination.

### The determination by the ACCC concerning user funded contributions

181 The ACCC reasoned that the value of user contributions should be recognised and deducted from the DORC value to calculate the access price to ensure that PNO is able to reasonably recover its efficient costs: page 130. The ACCC found that there was sufficient historical information to identify the extent of dredging work at the Port that had been funded by users: page 131. There were two major tranches of user funded works: the Harbour Deepening Project (1977–1983) and the South Arm channel and berth pocket dredging (primarily 1989–2010): page 132. The ACCC found that both (a) user funding for expenses rather than capital; and (b) user funding for economic assets whose economic benefit has been exhausted, should not be considered: page 133. It found that there had been user funding that increased port capacity and the assets that were funded were perpetual assets that continued to provide value: page 133.

182 The ACCC then reasoned (at page 133):

The Commission 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 Commission 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 Commission 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 (section 44X(l)(c)) and also takes into account the value to PNO of extensions where the cost has been borne by users (section 44X(l)(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.

183 A claim by PNO that the user funded projects involved a mutual exchange of value and therefore were not contributions was not accepted: page 133. In particular, a claim that there were benefits accruing to users from using the dredged material was not accepted as a factor affecting the extent of the economic value for the assets that was contributed by the users: page 134. A claim that the user funded contributions should be balanced against historical losses from port operations which, it observed, may be the outcome of many competing objectives for government, was not accepted. It concluded that there was no direct connection between the operation of the Port at a loss and the undertaking of the dredging work: pages 134–135.

184 As to a claim by PNO that there should be no adjustment for the user contributions in a determination of terms of access for Glencore because it had not been a contributing user, the ACCC reasoned as follows (at page 135):

The Commission considers that this is 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 needs to reflect its efficient costs for providing the Service. For the reasons already discussed, this necessarily excludes any capital costs funded by users, regardless of the identity of the contributor and the amount of their contribution.

Further, as discussed in chapter 6.5, the smallest service increment at the Port includes both coal and non–coal access, meaning the entire declared service. Therefore, all user funded amounts should be excluded from the DORC value since they provide a future stream of economic benefits for the Service.

185 The ACCC then found that an adjustment should be made by reference to the DORC measured value of the asset based upon the proportion of the current navigation channels that had been funded by users. By adopting that approach, the ACCC was determining a current efficient value of the capacity that had been created by past user contributions. In that sense it could be described as a measure of value that was still being borne by those users. As the assets had a perpetual life, there was no difference between making the adjustment at the ORC stage (before allowing depreciation) or at the DORC stage (after allowing depreciation). That was because there was no depreciation of perpetual assets: pages 135–136.

186 On that basis, the ACCC allowed a deduction of 52.8% of the value of channel and berth boxes and 61.3% of riverwalls and revetments to the ORC values, being an amount of $912 million: page 136. Making the adjustment at the ORC stage might be criticised as a matter of conceptual nicety. In the interests of coherence in the logic of the analysis by the ACCC, it might be said that the DORC value should be determined without internal adjustment to maintain the integrity of the DORC measurement. Adjustments for matters unrelated to the DORC calculation could then be made. Put another way, it is not part of a DORC assessment to bring to account historical contributions or a present measure of the value still being borne by the users. DORC is concerned solely with the costs that might be incurred by a hypothetical entrant seeking to enter a competitive market for the supply of the Service. It is determining the optimum replacement cost for the asset that is then adjusted to match the life of the asset under consideration, in this case those parts of the Port leased by PNO that are used to provide the service. However, that point has no substantive significance in the present case because the assets in this case are perpetual and the different approaches lead to the same mathematical result.

187 The ACCC expressed the concluding view that the adjustment for user contributions gave effect to a number of the matters to which Part IIIA required it to have regard in making the determination, namely (at page 136):

The Commission considers that deducting user funded capital contributions from the DORC value used to establish PNO’s initial RAB is in the interests of those who have a right to use the Service (section 44X(l)(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 in turn promotes the economically efficient operation of, use of and investment in the Service (sections 44X(l)(aa) and (g)) and also takes into account the value to PNO of extensions where the cost has already been borne by users (section 44X(l)(e)). At the same time, the DORC value net of user contributions ensures that PNO is able to earn sufficient revenue to recover its efficient costs (sections 44X(l)(h) and 44ZZCA(a)(i)), which is in the legitimate business interests of PNO and its investment in the facility (section 44X(l)(a)).

188 The consequence for the access price of the deduction of the assessed value of user funded contributions was that the relevant assets were not the subject of allowance for a return on capital. In a different case there would also have been a consequence for depreciation (being a return of capital). However, as we have noted, the relevant assets were determined to be perpetual in nature. Therefore, no depreciation expense was allowed. However, as the ACCC observed, earning a return on an undepreciated value generates a higher return compared to depreciated assets: page 186.

189 These aspects of the calculation assume significance when it comes to the arguments to the effect that the Tribunal’s error of law was in failing to have regard to the terms of s 44X(1)(e) and in failing to give effect to the pricing principles expressed in s 44ZZCA(a).

### The reasoning of the Tribunal concerning user funded contributions

190 The Tribunal began its reasoning concerning user funded contributions at [174] by summarising the approach by the ACCC in its determination. It correctly attributed the following statements to the ACCC:

(1) User funded capital contributions should be recognised and deducted from the DORC value used to establish the RAB and calculate prices to enable PNO to reasonably recover efficient costs.

(2) PNO’s efficient costs for the provision of the Service do not include capital costs that have been funded by users.

(3) Additionally, including user contributions in the RAB would result in users paying for the same assets twice.

(4) In order for an adjustment for user funded contributions to be considered there needs to be (a) a commercial agreement; or (b) sufficient information to demonstrate the nature of the user funded works and their identifiable value.

(5) For an adjustment to be considered, the user funded contributions must be in respect of assets included in the DORC valuation (that is, they must be assets of the provider that are used to provide the Service).

(6) 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.

(7) Applying these considerations there should be an adjustment to the DORC value used to establish the RAB, the size of which should be informed by issues raised by PNO and Glencore in relation to any mitigating factors and estimation approaches.

191 The Tribunal then at [175] interposed a criticism of the above analysis by observing that the ACCC did not use the term “monopoly profits” in its reasoning. Impliedly, the Tribunal appears to suggest that it was necessary to undertake an analysis by reference to whether the absence of an adjustment for user funded contributions would lead to Glencore earning monopoly profits. This is not a valid criticism. Part IIIA does not use the terminology of monopoly profits in describing the matters to which there must be regard in an arbitral determination. For reasons that have been given, the provisions of Part IIIA and in particular the pricing principles are concerned with economic efficiency. The fact that a hypothetical monopolist who is charging prices determined using a DORC methodology plus a reasonable rate of return might be described (hypothetically) as not earning monopoly profits does not mean that it is efficient for an actual bottleneck monopolist to charge a price based on the capital cost of assets that have been paid for by users. Significantly, the argument for PNO before this Court did not seek to support the criticism inherent in the Tribunal’s observation.

192 Nevertheless, this initial criticism is revealing because it manifests a view by the Tribunal that confines the assessment to be made to an evaluation as to whether the price to be charged for a service provided by use of the particular assets is a monopoly price in the sense that it is more than would be charged in a competitive market. The DORC methodology produces a measure of cost that is based on the assumption that competitive entry is possible and a hypothetical new entrant would build a competing facility in the most cost-efficient way. Therefore, it may be seen as a measure that would ensure, in its hypothetical world, that there is no monopoly profit. In such a world, the point at which there is no monopoly profit equates with the point at which there is economic efficiency.

193 However, the question posed by the issue of user funded contributions required the consideration of a variable that is constrained by the assumptions on which the DORC model is based. It required the consideration of a different (and real) world in which it might be the case that a significant amount of the present capital value of the assets used to provide the service had been funded by users. The question for determination was whether, in such a world, it was inefficient for the service to be priced as if the asset had been funded by the service provider (even though part of the capacity may have been brought about by the funds of users) and also whether a lower price might be required having regard to the statutory criteria specified in s 44X, being criteria formulated to achieve the express object stated in s 44AA of “economically efficient operation of, use of and investment in the infrastructure by which services are provided”.

194 In a DORC world, the hypothetical entrant is the source of funds required to provide the facility, as are each of the competitive market incumbents. If that were not so and the incumbents had a subsidy or part of their capacity was funded by users, then the hypothetical entrant would not be able to compete by investing in assets at optimised replacement cost. Part IIIA did not require the Tribunal to determine a price that was at a level that avoided monopoly profit measured by reference to a hypothetical competitive market. Rather, it required a more sophisticated real world consideration of a price that advanced economic efficiency in the particular circumstances by having regard to the criteria specified in the statute. In that real world there was the possibility that the cost of part or all of the capacity was being borne by others by reason of their past contributions to the cost of that capacity.

195 After its initial criticism, the Tribunal then summarised the approach of the ACCC in dealing with the mitigating factors and estimation approaches concerning user funded contributions. It then dealt in considerable detail with the submissions advanced by Glencore, the ACCC and PNO.

196 The Tribunal then commenced its own analysis. It described DORC as the starting point for determining the RAB. It observed that the use of a DORC methodology had been agreed. Expressed in those unqualified terms it suggested (wrongly) that a DORC figure, unadjusted for user contributions, had been agreed as the way to calculate the RAB. The Tribunal then said at [267]: “The ACCC decided that the DORC methodology would meet the requirements of s 44X”. In doing so, the Tribunal was referring to the following passage from the ACCC’s determination (page 35):

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(l)(h) and 44ZZCA(a)(i)) while also ensuring that PNO is able to earn an appropriate return on its investment (sections 44X(l)(h) and 44ZZCA(a)(ii)). This is in the legitimate business interests of PNO (section 44X(l)(a)) and is also in the interests of those who have a right to use the Service (section 44X(l)(c)). This is also consistent with promoting the economically efficient operation of, use of and investment in in [sic] the facility (the objectives of Part IIIA and also having regard to section 44X(l)(g)).

197 Importantly, it can be seen that the ACCC did not decide, in unqualified terms, that the DORC methodology would meet the requirements of s 44X. Rather, the ACCC found that the use of DORC “contributes to ensuring” that the statutory criteria were met. When the ACCC came to consider the use of the DORC valuation it identified a number of issues on which the parties did not agree including “whether user funded capital contributions to construction of assets should be deducted”: page 37. It then dealt with each of those issues. As to user funding, the ACCC then formed the view “that 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”: page 130. Therefore, the ACCC’s determination was that a DORC methodology was an appropriate starting point not that the outcome of a DORC methodology in and of itself would meet the requirements of s 44X.

198 At the commencement of its detailed reasoning, the Tribunal stated its overall conclusion concerning user contributions in the following terms (at [278]–[279]):

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.

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.

199 As will emerge, the Tribunal then explained its reasoning as being (a) the parties agreed to use DORC; (b) DORC is a measure of efficient cost because it determines the costs that would apply in a hypothetical competitive market; (c) DORC requires all assets required to provide the Service to be brought to account; and (d) excluding user funded assets from DORC could not generate efficient charges and would not be consistent with Part IIIA.

200 There are two unstated assumptions in this reasoning pathway. First, the agreement by the parties to the use of DORC was an unqualified acceptance that DORC was an appropriate measure of efficient costs in the particular circumstances of the case. Second, DORC provides a measure of efficient cost that is applicable even if there have been user funded contributions because a party providing the Service would need to meet the cost of all the assets used to provide the Service.

201 Before this Court, the validity of both these assumptions is challenged by Glencore and the ACCC. However, it is the second assumption that assumes significance because it was the ultimate foundation for the Tribunal’s decision and it does not depend upon the validity of the first assumption. In the view of the Tribunal, if DORC is used (and no party contended that it should not be) then it provides a measure of efficient cost that is valid even if there have been user contributions. This is the view hinted at by the earlier criticism concerning monopoly profits. It is a view that is also evident in later reasoning at [301]–[307] that approaches the submissions advanced by the ACCC through the Tribunal’s lens of monopoly profits as being returns on all the assets that would have to be deployed by an efficient entrant to supply the Service.

202 In the view of the Tribunal, as DORC is a measure of the cost outcome that would pertain in a competitive market it cannot be the case that economic efficiency requires a different outcome.

203 In effect, the Tribunal has held that the criteria in s 44X (including the incorporated pricing principles expressed in s 44ZZCA(a)) may be satisfied if a DORC methodology is used without further adjustment for user funded contributions. If that involves an error of law then the application must succeed.

204 The Tribunal then set out its reasoning as to why the DORC methodology produced a measure of cost that was efficient and did not require adjustment even if there were further user contributions in the following terms (at [280]–[292]):

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.

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.

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.

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.

The Tribunal finds none of that reasoning convincing.

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.

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.

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.

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?

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 modem 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.

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.

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.

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.

205 It is the above reasoning which is the principal foundation on which the Tribunal’s decision rests. Thereafter, the Tribunal proceeded to address submissions raised by Glencore and the ACCC which it described at [293] as “arguments for deducting user contributions that were not related to the calculation of DORC”. In the course of doing so, the Tribunal observed at [308] that the various examples given of circumstances where costs had been contributed to by someone other than the provider could not capture the complexities involved in the user contributions in the arbitration. Then, returning to its earlier analysis, the Tribunal stated (at [309]):

[T]hese 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.

206 The Tribunal reasoned at [310]–[319] that the evidence did not support the conclusion that users had made contributions in circumstances where they sought or expected assurances about pricing in perpetuity or even beyond the relatively short term.

207 The Tribunal then dealt with a report undertaken on behalf of PNO described as the Castalia Report. The Tribunal concluded at [336] that the analysis undertaken in the Castalia Report was “if anything conservative”. It made particular reference to the following aspects of the report:

(1) Until 1990, charges at the Port were levied on goods or commodities rather than vessels and were not based on costs, at least not capital costs: at [329].

(2) It is beyond belief that the charges could have delivered a normal rate of return for the Port over the period: at [330].

(3) The analysis in the Report of charges at the Port from 1990 to 2014 found that economic costs exceeded revenue by around $8 billion: at [334].

208 The Tribunal then found at [337] that it “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 would require information about understandings and expectations along the lines of the QCA principles”. The reference to “QCA principles” is to conclusions reached by the Queensland Competition Authority (**QCA**) in considering the pricing of access to water in the Burdekin River Irrigation Area. The QCA reached its conclusions on the basis of an express finding that payments made by irrigators “were intended as an offset against the capital costs of the Scheme and that this would be taken into account in future price setting”: see [321] of the Tribunal’s reasons. The Tribunal observed that no such clear finding was available in the arbitration in this matter. It is convenient to note at this point that even on the assumption that s 44AA(b) is construed broadly and deals with access regulations beyond Part IIIA, discussion of the QCA’s analysis is unnecessary for present purposes.

209 The Tribunal then undertook what it described as an excursion into pricing practices for natural monopolies. After that, at [357], it characterised Part IIIA as drawing a line under questions about what returns had been made in the past and focused entirely on the future. This broad characterisation of the effect of the enactment of Part IIIA stands without any support by reference to the statutory provisions or their context.

210 After undertaking that analysis, the Tribunal returned to its main point and reasoned as follows (at [359]–[364]):

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.

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.

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.

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.

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.

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.

211 These reasons follow on from the conclusion by the Tribunal at the end of its excursion (at [354]–[355]):

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.

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.

212 Again, the focus in these paragraphs is upon the need for the service provider to use all the assets to provide the service and earn a return on the assets, and the proposition that the DORC methodology provides a measure of costs that would apply if a monopolist was constrained by competition. The reasoning of the Tribunal is to the effect that if the price reflects the level of costs that would pertain in a competitive market (being the kind of measure undertaken by DORC) then it is efficient irrespective of how the cost of those assets might have been met.

213 In the view of the Tribunal, it is only if the user contributions are associated with a clear understanding and an expectation that future pricing would be adjusted for the value of past user contributions that there would be a justification for excluding them from the RAB (or adjusting the MAR). However, an adjustment of that kind would be made “for the effect of the understanding and expectation”, not for reasons of efficient cost. In effect, in such a case, there would be an accrued right on the part of the users who had made the contribution that would need to be reflected in any determination of the terms of access for the person with that right.

214 The five propositions advanced by Mr Lloyd SC for the ACCC that were referred to by the Tribunal in the passage quoted above had been summarised by the Tribunal earlier in its reasons in the following terms (at [262]):

(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.

215 The answer provided by the Tribunal to proposition (2) was that it was advanced as being self-evident. However, with respect, that was not so. In summarising the submissions advanced to it by the ACCC, the Tribunal had noted earlier (at [251]–[252]):

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.

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.

(Emphasis added.)

216 The summary propositions advanced by Mr Lloyd SC reflected the approach that had been taken by the ACCC after considering all available evidence. In any event, irrespective of whether it was advanced as being self-evident, it was a submission concerning whether it was economically efficient to provide PNO with a stream of revenue by way of return on capital in respect of assets the value of which was contributed by access users. What is absent from the Tribunal’s reasoning is any precise articulation as to why in real world circumstances where there have been user contributions it is inconsistent with economic efficiency to make allowance for user contributions.

217 Ultimately, the Tribunal’s reasoning rests on the singular proposition that a measure of the costs that would have to be incurred by a hypothetical entrant into a competitive market for the provision of the Service was a measure of efficient costs that was relevant irrespective of whether there had been user contributions. DORC was a measure of such costs. Therefore, those statutory criteria that required economic efficiency to guide the determination of the access price were met by using the unadjusted DORC measure.

218 However, having reached that conclusion, the Tribunal then added (at [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.

219 This final paragraph is to the effect that it would not be enough to consider the extent of the user contributions. It would also be necessary to undertake a comprehensive analysis of other matters that might be described as some kind of return for or of the contributions. On that basis, the Tribunal’s view appears to have been that because that comprehensive analysis could not be undertaken, the same result would be reached even if it was appropriate to bring user contributions to account.

### The alleged error of law by the Tribunal concerning user contributions

220 In the above context, the alleged legal error by the Tribunal in relation to user funded contributions was articulated by Glencore and the ACCC in a number of different ways in the course of argument.

221 First, it was said that s 44X(l)(e) required the user funded contributions to be brought to account because they resulted in extensions and the value to PNO of those extensions was cost borne by someone else.

222 Second, it was said that “the efficient costs of providing access” referred to in the pricing principles in s 44ZZCA(a)(i) required the user funded contributions to be brought to account in determining the access price.

223 Third, it was said that in order for the regulated price for the Service to “include a return on investment commensurate with the regulatory and commercial risks involved” as described in s 44ZZCA(a)(ii), the price needed to be set by not allowing a return on assets used to provide the Service the value of which had been contributed by users.

224 Fourth, it was said that other matters listed in s 44X(l) that must be taken into account were not given effect by the Tribunal’s failure to have regard to user funded contributions. Particular reliance was placed on the objects stated in s 44AA (s 44X(l)(aa)), the “legitimate business interests” of PNO as the provider “and the provider’s investment in the facility” (s 44X(l)(a)), “the public interest, including the public interest in having competition in markets” (s 44X(l)(b)) and the interests of all persons who have a right to use the service (s 44X(l)(c)).

225 Fifth, it was said that the Tribunal erred in holding that the required analysis was forward-looking and the concept of efficient cost did not justify deduction of particular assets from the RAB for historical reasons.

226 Sixth, it was said that the Tribunal recognised that the DORC analysis should not include assets that were not owned or leased by PNO even though they might be said to be necessary for the provisions of the Service. It was claimed, in effect, that parity of reasoning meant that the same approach should have been applied to the value of assets used to provide the Service that had been contributed by users and not by the State.

227 Each of these six contentions is addressed below. However, it is first necessary to say something about two matters: (a) the significance of the fact that the State of New South Wales, not PNO, was the provider of the Service at the time the user contributions were made and PNO made a capital payment to the State for a long term lease of assets used to provide the Service; and (b) the relevance of economic concepts to the interpretation of provisions of Part IIIA.

### The State as predecessor to PNO

228 Part IIIA had been in place for many years by the time PNO entered into its lease of the Port. The terms of the 98 year lease between PNO and the State, entered into in May 2014, were not before the ACCC or the Tribunal. The lease includes a licence to operate the shipping channels at the Port. It appears that a capital sum was paid for the benefit of the lease, but the amount of that actual historical cost was not advanced by any party as a basis upon which the access price should be determined. In any event there would be a well-recognised problem of circularity if that were the case where public assets were sold or leased. The more that was paid for the lease the higher the access fee that could be justified under Part IIIA.

229 In consequence, there was no challenge to the proposition that PNO was in the same position as the State when it came to terms of access. That is to say, the manner in which Part IIIA applied to the Service and the required approach to the determination of terms of access was unaffected by the fact that there had been a change in ownership or possession or control of the Port. What might be termed the regulatory risk of a service being declared and the price and terms being regulated in accordance with the terms of Part IIIA was known at the time that PNO entered into the lease and therefore would be expected to be reflected in the terms agreed between PNO and the State. Indeed, there was evidence in the arbitration that PNO made an assessment of that risk as part of its process of due diligence before entering into the lease with the State: at [195] of the Tribunal’s reasons.

230 Therefore, even though the user funded contributions had been made at a time when the State was the operator of the Port, that fact did not affect the nature of the economic analysis to be undertaken.

### The relevance of economic concepts to the interpretation of Part IIIA

231 Where, as here, the legislation gives effect to economic policy, there are conceptually different ways in which economic meaning attributed to particular words may be reflected in the statutory provisions. In many instances, the purpose of the legislation is informed by economic principle, but the text is expressed using ordinary language. In those instances, the task of giving contextual meaning to the statutory language will be informed by that purpose, but the words will bear their ordinary grammatical meaning. However, in some instances, the statutory language may itself incorporate text with the intention that it be given the specialised meaning attributed to that language within the discipline of economics. In those instances, it is necessary to have regard to that specialised meaning rather than ordinary meaning in construing the language of Parliament. In doing so, the Court can draw upon economic evidence of that specialised meaning as well as recognised texts and previous decisions that have considered the specialised meaning. It can also have regard to extrinsic materials that express the specialised meaning.

232 Difficult issues may arise as to the precise circumstances in which expert evidence may be received from economists in order to establish the existence of a particular meaning recognised by economists or to assist in understanding relevant extrinsic materials: see *Re Michael; Ex parte Epic Energy (WA) Nominees Pty Ltd* [2002] WASCA 231; 25 WAR 511 at 541–543 [100]–[107] (Parker J, Malcolm CJ and Anderson J agreeing); and *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2007] FCAFC 157; 162 FCR 234 at 273­–274 [185] (Greenwood J, Sundberg J agreeing). However, those issues do not present here.

233 In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; 246 CLR 379, the High Court was concerned with the proper interpretation of the statutory criteria to be applied when an application was made for a service to be declared. As we have noted, those criteria are focused upon whether access would promote competition in other markets, whether the facility was of national significance and whether access on reasonable terms and conditions would promote the public interest. Significantly, they are not statutory criteria which themselves incorporate the concept of economic efficiency. In that context, the Court was presented with a very large body of extrinsic material associated with the introduction of Part IIIA and its amendment: 246 CLR at 408 [71]. It appears to have included the materials to which we have made reference in these reasons: 246 CLR at 408–410 [71]–[73]. In that particular context, the majority observed (when discussing the construction of s 44H(4)(b)) that (246 CLR at 410 [74]):

Subject to one possible qualification concerning the relevance of the assumptions that underpinned the 2006 amendments, little is to be gained by trawling through the extrinsic material with a fine gauge net. The resolution of the contested question of construction of criterion (b) is not to be found by noticing no more than that the Hilmer Report referred more than once to “essential facilities” and “natural monopoly”. Neither is a phrase that appears anywhere in the text of Pt IIIA. Nor can the contested question of construction be resolved by selecting particular quotations from the Hilmer Report and then attempting to construe the different and particular words of criterion (b) on the assumption that they give effect to those isolated passages. It is necessary to give meaning to the relevant statutory text and demonstrate why that meaning is to be adopted.

234 Even so, the majority found that the Tribunal in that case was right to emphasise that the statutory language “like all other provisions of Pt IIIA, is to be construed in the light of the objects of the Part as they have been stated, since 2006, by s 44A”: 246 CLR at 417–418 [97]. The majority went on to reason (246 CLR at 419 [98]):

The extrinsic material (especially the Hilmer Report) and the stated objects of Pt IIIA show that the Part is intended to operate in a way that will contribute to national economic efficiency. Duplication of a “natural monopoly” may be one form of economic inefficiency. That is, if the entire output of a relevant market can be supplied by a single firm at lower cost than by any combination of two or more firms, it would be inefficient to have more than one firm supplying the relevant market. And in such a case the incumbent firm, or the industry, can be described as a “natural monopoly”. But several further points must be made about these propositions.

235 Importantly, the majority then reasoned by reference to the economic concept of efficiency, not some ordinary meaning of the term.

236 In the present context the competing contentions of the parties concerned the application of the concept of economic efficiency. There was no claim that the term was to be given some meaning other than its economic meaning. Both the extrinsic materials to which we have referred and the decided cases recognise that within legislation that gives effect to the inter-governmental obligations recorded in the Competition Principles Agreement concerning access to essential infrastructure, the terms “economic efficiency” or “efficiency” are required to be given a meaning that conforms to their recognised meaning within the discipline of economics. It is an economist’s understanding of efficiency that is the focus of the Competition Principles Agreement (which itself gives effect to the Hilmer Report). Further, when Part IIIA was amended consequent upon the Review by the Productivity Commission, it was the economists’ terminology concerning efficiency that came to be incorporated expressly within the object of Part IIIA and added as one of the matters to which there must be regard in making a final determination of a matter relating to access to a declared service.

237 Economic efficiency has a well-established meaning amongst economists. It is a meaning that was considered in *Re Michael* 25 WAR at 545–547 [112]–[120], a case concerned with a State access regime that was enacted to give effect to the principles stated in the Competition Principles Agreement. In particular, as to economic efficiency, the Court there found (25 WAR at 545 [114]–[115]):

The expert evidence does establish, in my finding, that in that field of the discipline of economics that is concerned with competition policy, and in particular with the regulation of essential infrastructure in the public interest, though not confined to that field, there is a well established principle or theory typically referred to as “economic efficiency”. The evidence indicates that the theory owes much in its origins to the work of an Italian economist, Pareto, over half a century ago, but it has been greatly developed since then. The evidence establishes that there is a widespread awareness and understanding of this concept among economists familiar with the economic review of public policy, including competition policy. Not unnaturally, there are differences between economists in shades and depths of understanding of the concept, and ongoing research and development is constantly refining or reshaping its full dimensions. Nevertheless, its fundamental tenets appear to have general acceptance and understanding among economists in this field. Hence, in the particular context of the regulation of essential infrastructure in the public interest, as an aspect of competition policy, a reference to efficiency may well be a reference to economic efficiency.

The evidence establishes, notwithstanding some differences of detail, that according to the theory of economic efficiency, the concept of efficiency has at least three well recognised dimensions. These are, productive efficiency, allocative efficiency and dynamic efficiency, as to which all the experts seemed in the end to agree, although Professor Williams would add that there are other relevant dimensions of efficiency, in particular what he [describes] as the “to whom” question (how or to whom the benefits of efficiency are distributed within society). While the precise explanations of the three expert economists of the concepts of productive, allocative and dynamic efficiency differed in their expression, the underlying meanings appeared to be generally consistent. They were also generally consistent with the expression of these same three dimensions of efficiency in pp 3–4 of Ch 1 of the Hilmer Report, under the heading “Economic Efficiency”, as quoted earlier in these reasons.

238 The three dimensions of economic efficiency as explained in the Hilmer Report have been set out in these reasons at [32]. Those aspects were not in contention. Rather, the competing submissions concerned whether there had been error in giving effect to the relevant legislative provisions when informed by an economic understanding of the term “efficiency”.

239 Aside from the express incorporation of the economic terminology of efficiency, the task of construing the relevant statutory provisions in the present case is otherwise no different to that which is undertaken in any case where the meaning of legislative provisions is in issue. The task is to ascertain the contextual meaning of the words: *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 262 CLR 362 at 368 [14]. Statutory construction involves choosing from the range of possible meanings the meaning which Parliament should be taken to have intended: *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; 256 CLR 1 at 28 [57]. The range of meanings is itself to be informed by matters of context from the outset and not just when ambiguity is thought to arise: *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* [1985] HCA 48; 157 CLR 309 at 315 (Mason J). The statutory language cannot be given a meaning which the words used will not bear. For that reason, it is said that the starting point is the text whilst, at the same time, there is to be regard to context and purpose: *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at 381–382 [69]–[71]; and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* *(Northern Territory)* [2009] HCA 41; 239 CLR 27 at 46–47 [47].

240 By way of illustration of the importance of the context of Part IIIA in construing its provisions, it is to be noted that on appeal in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45; 236 CLR 145, the High Court supported its construction of the definition of “service” as used in Part IIIA on the basis that it was the only construction “that would advance the attainment of the large national and economic objectives of Part IIIA, as revealed in the legislative text enacted by the Parliament, the report that preceded its enactment, and the Minister’s Second Reading Speech”: 236 CLR at 161 [42].

### First, s 44X(1)(e): value of extensions borne by someone else

241 For ease of reference, we again set out the terms of s 44X(l)(e) (including the words of the chapeau):

The Commission [and the Tribunal on re-arbitration] must take the following matters into account in making a final determination:

…

(e) the value to the provider of extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else

242 We have already dealt with the context in which s 44X(l)(e) came to be enacted. As we have noted, the amendment to add the words in parenthesis was made to clarify and not to alter the fundamental meaning. Therefore, no significance attaches to whether it is the language before or after the amendment that is applicable in the present case (there otherwise being an issue as to whether the law should be applied as at the date of notification of the access dispute or the date of the re-determination by the Tribunal).

243 We have also explained the significance of the Competition Principles Agreement as a contextual matter for considering the terms in which s 44X(1)(e) came to be expressed. For reasons we have given, that context indicates a deliberate intention to (a) include instances where the cost has been borne by someone other than the provider or access seeker; (b) include instances where the extension was not the outcome of the exercise of rights conferred by Part IIIA itself; and (c) focus upon cost that “is borne”. The use of the present tense may be to ensure that the present value of an extension which is no longer being borne in any relevant economic sense (such as, because the extension has reached the end of its economic life) is not a matter to be taken into account. If so, the focus is upon value to the provider that is currently being borne and in the future will be cost that is borne by someone other than the access provider.

244 The subject matter of Part IIIA is access to a service provided by means of a facility of national significance. A facility provides the means for doing something, relevantly provision of the service that has been or is sought to be declared under Part IIIA. The word “extension” is to be understood in that context. It is concerned with an extension to the facility that is the means of providing the service. An extension is not effected by repairs or maintenance. As the context indicates, an extension adds to the facility in a manner that confers value on the access provider. It encompasses (and may be fully encompassed by) additions that increase the capacity of the facility to deliver the service. An extension allows the access provider to provide more services.

245 Part IIIA regulates the circumstances in which, as part of a determination of any matter relating to access, a provider may be required to extend the facility used to provide a declared service. It restricts the circumstances in which such a requirement may be imposed by providing that a determination must not be made that would require the provider to bear some or all of the costs of extending the facility. However, the existence of that limitation upon what a provider may be required to do by way of determination does not mean that s 44X(1)(e) is confined to instances where such a determination is made. If s 44X(l)(e) is to be confined to the value of extensions which the determination itself (or an earlier determination) requires be undertaken, there must be something in the language used in s 44X(l)(e), considered in context, that means that when price is being considered, its application is to be confined to extensions required by a determination. Significantly, the language in s 44X(l)(e) does not refer to extensions required by a determination of access. Its terms are not confined by terminology such as “extensions required by a determination under s 44V” and are not confined to instances where the cost of the value to the provider of the extension is borne by the third party seeking access.

246 Indeed, given the unqualified and general terms of s 44X(l) in describing the matters which must be taken into account if there is a determination of “any matter relating to access by the third party”, it would be expected that any factor that was only to be applied in the case of a particular kind of determination (namely, one where an extension was being sought or had been required by an earlier exercise of a right of access conferred by Part IIIA) would be specifically identified.

247 In the above circumstances, there are five reasons why such a limitation should be rejected.

248 First, the words used in s 44X(l)(e) are general and unqualified.

249 Second, s 44X(l)(e) must be taken into account in making any final determination, not just a determination where the extension is sought to be undertaken as part of the determination (or by some earlier exercise of Part IIIA rights).

250 Third, there is no reason consistent with the evident purpose of Part IIIA why the present value to the provider of an extension borne by someone else should be taken into account when it was required by Part IIIA, but not in any other case. The rationale for such a provision is to direct regard to whether the provider should be able to charge for that part of the present value of the facility which relates to capacity to provide the service that is being borne by somebody else. For reasons already explained, the economic inefficiency that may flow from the value generated from the costs of an extension to a facility being borne by particular parties (and therefore priced into the market) and that same value being priced into the access price for a service provided by means of the same facility apply irrespective of whether the extension was the result of the application of Part IIIA.

251 Fourth, it is also significant that the language used in s 44X(l)(e) does not refer to cost borne by the third party seeking access. Part IIIA consistently uses “third party” to refer to the particular access seeker in respect of whom a dispute relating to access has arisen. The fact that the provision is not confined to costs borne by the third party emphasises that it is concerned with any circumstance in which access terms are being set for a facility where part of the value of the capacity of the facility is borne by someone other than the access provider.

252 Fifth, the use of the present tense is explained not by a focus on what is effected by Part IIIA but by a focus upon the present value to the provider of the capacity created by an extension. Where that value presently exists and is being borne by another party (either because the cost is being carried by someone other than the provider or it is proposed that it will be met by someone other than the provider going forward) then the value of an extension is borne by someone else.

253 Finally, in the course of oral argument an issue arose as to whether there was significance in the fact that s 44X(1)(e) is confined to the value to the provider of extensions rather than the value to the provider of any part of the assets to which access is sought. The issue raised was whether the language of limitation supported a construction that confined operation of s 44X(1)(e) to an extension pursuant to terms of access in the exercise of the rights conferred by Part IIIA. However, the reference to extension is explained by an intention to ensure that the costs that were being borne by someone else related to the creation of an extension in the sense that it increased the available capacity. Where past cost contributions to capital did not extend the infrastructure then they may be characterised as funding existing infrastructure and therefore did not give rise to the same issues as where the cost of the capacity was being borne by a party other than the provider. It was that particular circumstance, and its potential for inefficiency, that explained why the provision applied to extensions.

254 It follows with respect that the Tribunal committed an error of law in concluding that it was appropriate to use the DORC value to determine the access price to be paid by Glencore even if there were user contributions. The Tribunal was obliged to take into account the present value to PNO of extensions being borne by others by reason of past user contributions. Glencore maintained the user contributions were of that character. In resolving a dispute as to any matter relating to access to the Service the Tribunal was required to determine whether the contributions were of the relevant character and, if so, to have regard to them in making the determination. By approaching the issue in the way that it did, the Tribunal closed out that possibility in a manner that was not consistent with the correct interpretation of s 44X(1)(e).

### Second, s 44ZZCA(a)(i): efficient costs of providing access

255 Again, for ease of reference, we set out the terms of s 44ZZCA(a) (including the words of the chapeau):

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

256 It is to be noted that the provision is not specifying a statutory requirement that must be met by the determination. It is part of a section that expresses pricing principles being one of a number of matters to be taken into account in making the determination. Provided the Tribunal had a properly informed understanding of what was required by the provision and it had regard to that matter in undertaking its determination then there is no error of law.

257 For reasons already given, the Tribunal rested its conclusion upon the view that the adoption of a DORC methodology to determine the RAB as part of a building block methodology would meet the statutory criteria because it would confine PNO to the recovery of costs determined by reference to a measure of costs that would pertain in a competitive market.

258 However, for reasons already given, the concept of efficient costs is not necessarily met if costs are set by reference to a measure of costs that would prevail in a competitive market. The promotion of competition is a means to an end, namely economic efficiency. Therefore, when s 44ZZCA refers to “efficient costs” it is not referring to the costs that would otherwise prevail in a competitive market. In some circumstances, such a measure will be a measure of efficient costs. However, in this case, there was claimed to be an unusual circumstance. It was a claim that the value of some of the capacity of the facility used to provide the Service had been funded not by the provider but by users and was being borne by them.

259 For reasons already given, it may not be consistent with an economic understanding of efficiency for a provider to be able to charge the hypothetical price that would cover costs in a competitive market in a real world where those costs were being borne by others. In such a case, the value of the cost of capacity may be included in both the measure of costs in a hypothetical competitive market as well as being borne by other parties. It may be factored into market behaviour twice thereby leading to inefficiencies. They would be the same kind of inefficiencies that would flow if the provider was able to charge more than the competitive measure of the costs of providing the capacity. The Tribunal’s approach was to treat that fact as conceptually irrelevant to the process for determining efficient costs. In adopting that approach, with respect, the Tribunal made an error of law because, as a matter of law, the user contributions were not irrelevant.

260 In reaching that conclusion we do not disregard the significance of the use of the definite article in s 44ZZCA(a)(i) when referring to “the efficient costs”. The concern of the provision, in context, is with the recovery of economically efficient costs, not the actual costs of the provider no matter how efficient they might be thought to be. Efficient costs are not dependent upon the identity of the provider. However, they are contextual. They depend upon the particular circumstances in which the declared service is provided. They are a level of costs which, in the realities of the marketplace, advance productive, allocative and dynamic efficiency.

261 To a considerable degree, the question whether particular costs are economically efficient depends upon contestable matters of fact and economic opinion. It is not an error of law for the Tribunal to form a judgment, as to the level of costs, provided it does so by reference to a proper understanding of the meaning of the term “efficient costs”. In this case, with due respect, it did not do so because it equated the statutory term as meaning, in all circumstances, the level of costs that might be recovered in a hypothetical competitive market when efficient costs are not so equated in all circumstances.

262 However, the error was of no consequence in the particular circumstances of the present case, assuming that s 44ZZCA(a)(i) only addressed a return of capital and not a return on capital. If the Tribunal had been satisfied that there were relevant user funded contributions and had regard to their extent in determining the MAR, then the extent of the contributions would have made no difference because of the perpetual nature of the assets. In such circumstances, there was no depreciation cost to be brought to account in calculating efficient cost and therefore the required expected revenue to be generated was unaffected by such matters.

### Third, s 44ZZCA(a)(ii): return on investment commensurate with risk

263 We have set out the terms of s 44ZZCA(a)(ii) immediately above at [255].

264 In order to determine the return on investment to be included in assessing the regulated access price that would give effect to the pricing principle expressed in s 44ZZCA(a)(ii) (being a matter that the Tribunal was required to take into account), the Tribunal had to determine both the extent of the investment and an appropriate rate of return. Before this Court, no issue is raised in relation to the manner in which the rate of return was determined.

265 As to the extent of the investment, both the ACCC in its determination and the Tribunal in its determination approached the matter on the basis that the DORC methodology was to be used to determine an appropriate value for the investment. The Tribunal determined that by reason of the nature of the DORC methodology it was not necessary to consider whether the capital value should be adjusted in any way.

266 The question raised by the contentions advanced for Glencore and the ACCC was whether, on a proper construction of s 44ZZCA(a)(ii), it was legally correct to approach the return on investment referred to in para (a)(ii) as a return on the DORC measured value of the assets leased by PNO (as was done by the Tribunal) or whether it required further consideration as to whether there were any user funded assets that should be excluded (an approach adopted by the ACCC in its determination but rejected by the Tribunal as being incorrect).

267 Significantly, s 44ZZCA(a)(ii) did not pose the pricing principle to which there must be regard in terms of efficient costs; (a)(ii) is not a subset of (a)(i) and the word “include” refers back to the prefatory words of (a). Rather, it was directed to ensuring that the return to the access provider was “commensurate with the regulatory and commercial risks involved”. Expressed in those terms, the statutory language contemplated an allowance for a broad category of risks including those associated with the regulatory process itself. What was required was the formulation of an appropriate conclusion as to the value of the extent of the investment to be used in the assessment of the extent of return. The Tribunal did not undertake that task. It failed to do so because of its view that a capital value determined in accordance with the agreed DORC methodology (without adjustment for any user funded contributions) was a value that would conform to the statutory requirement. That was not necessarily so.

268 The terms in which s 44ZZCA(a)(ii) is expressed require an appropriate return to be determined after evaluating the relevant risks involved in the particular case. No doubt one matter to be brought to account in making that assessment was the concept of economic efficiency which, for reasons we have given, included consideration as to whether there had been user funded contributions of a kind that meant the cost of part of the capacity of the facility was being borne by someone other than PNO as the provider. However, it was not confined to such an assessment (irrespective of whether an efficient measure of the value of capital deployed to provide the Service was to take account of user funded contributions or not).

269 With respect to the Tribunal, its approach to what was required by s 44ZZCA(a)(ii) did not reflect what was required by the statutory provisions and therefore an error of law as to the interpretation of that provision that informed the Tribunal’s reasoning has been demonstrated.

### Fourth, s 44X(1)(aa), (a), (b) and (c): the objects of Part IIIA, the legitimate business interests of the provider and the provider’s investment, the public interest and the interests of users

270 Once again, for ease of reference, we set out the relevant provisions (and the chapeau):

The Commission [and the Tribunal on re-arbitration] 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

271 Given the conclusions we have reached as to the application of the main provisions relied upon to support the review application, it follows that regard to the objects of Part IIIA as stated in s 44AA required the Tribunal to have regard to whether there were user contributions of a kind that were relevant to an assessment of what was required to promote the economically efficient operation of the Port in the provision of the Service. There was an error of law in failing to do so that might be couched as a failure to have regard to the objects.

272 As to s 44X(l)(a), in our view, the “legitimate business interests of the provider” are the interests that it has as the long term lessee of the Port and a party being required by legislation to provide a service on arbitrated terms that are not inherently antithetical to the objects of Part IIIA. Therefore, it is a provision that required the Tribunal to have regard to the private interests of PNO. The use of the term “legitimate” qualifies the interests of the provider to which there must be regard. The extent to which the statutory language might confine the interests of the provider to which there must be regard to interests of a kind that may be asserted in a competitive market need not be finally determined on this occasion and we prefer to leave that issue, which was not explored in any great deal in argument, to an instance where it is of critical importance.

273 The reference to “the provider’s investment in the facility” must mean the actual financial investment; investment here is not as generic as the reference in s 44ZZCA(a)(ii). As we have noted, in the present case no party suggested that there should be regard to the extent of the capital sum paid by PNO for its long term lease of the Port.

274 As to s 44X(1)(b), the extent of the interests that may fall within the term “public interest” is to be determined contextually. Its scope will be informed by the objects provisions in s 44AA. Given the express object of promoting economically efficient operation of the infrastructure by which services are provided, it must encompass the public interest in a determination that gives effect to that concept which, for reasons we have expressed, includes consideration of any user funded contributions that affect whether price and other access terms are economically efficient.

275 As to s 44X(1)(c), the interests of those who have rights to use the service is concerned with the accrued rights of other users. It is also a provision that requires rights inter se users to be considered. However, it is not a form of boot-strapping provision which is concerned with the statutory rights conferred by Part IIIA itself or the interest the third party might have as a user in a favourable outcome in the arbitration. The provision is directed to ensuring that there is regard to the interests of persons who already have rights to use the service who may be affected by the determination. The submissions by the ACCC to the effect that s 44X(1)(c) is concerned with the interest a third party seeking access may have in the disputed subject matter of the determination itself or that s 44X(1)(c) reflects some general requirement to have regard to the interests of the third party beyond giving effect to the statutory right to access on terms determined by having regard to the matters listed in s 44X(1)(c) should not be accepted.

### Fifth, the alleged legal error in requiring the assessment to be forward-looking

276 Before the Tribunal, PNO contended that DORC required a forward-looking approach in assessing the level of optimised replacement costs. That submission was accepted by the Tribunal. It found (at [289]–[292]):

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.

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.

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.

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.

277 Glencore and the ACCC characterised the Tribunal’s reasoning as being in error in requiring the assessment of the RAB to be based upon a forward-looking assessment.

278 There are two matters that must be kept distinct when it comes to the DORC based assessment of the RAB. The first matter is the integrity of the DORC approach as a tool for determining a level of costs that will be efficient in the simplified and hypothetical world in which it is determined, namely a market in which all participants must themselves bear the costs of capital. In such a world, the hypothetical entrant may be assumed to invest in a level of costs that would optimally replace the existing asset used to provide the relevant service. Therefore, it is inconsistent with a DORC methodology to look backwards to past costs.

279 However, the second matter is the use to which the DORC methodology may be put in making the determination in circumstances where it was not agreed that the RAB should simply equal the DORC value. The extent to which there should be adjustment, by reason of the matters to which s 44X required the Tribunal to have regard, was not a task that was resolved by the nature of the agreement to use DORC. For reasons we have given, aspects of that task required consideration as to whether there were user contributions of a kind that should result in an adjustment to the RAB. The Tribunal was in legal error in approaching its task as if no such requirement applied to the determination process.

### Sixth, assets used to provide the Service that were not leased by PNO

280 At a number of points in their submissions, Glencore and the ACCC sought to draw an analogy between certain assets that were used to provide the Service but were not leased by PNO and remained under the control of the State (**State Controlled Assets**) and the capacity created by the user contributions. The ACCC in its determination had excluded the State Controlled Assets from the assets included as part of the DORC valuation. There had been no issue taken with that approach before the Tribunal. It was said that consistency in logic required the same approach to be taken in respect of the capacity created by the user contributions.

281 We do not accept the logic of the submission. Part IIIA provides a right to access a declared service that is provided by means of the provider’s facility. The fact that PNO as the provider is able to deploy other assets, not part of the facility that it leases from the State, in providing the Service does not bring those assets within the statutory scheme. They do not form part of the facility of the provider. On the other hand, the whole of the Port assets that were leased, were part of the facility in the hands of the provider. The fact that funds to generate a significant part of that capacity may have been sourced from users did not make them a separate facility that was not part of that which was regulated. They were part of the facility which was under the control of PNO and were, for that reason, not directly analogous to the State Controlled Assets.

### The Tribunal’s final paragraph

282 As we noted when considering the Tribunal’s reasoning, in its final paragraph concerning user contributions (at [365]) it stated:

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.

283 The final words hint at a conclusion that, as a matter of fact and economic analysis, the material before the Tribunal was insufficient to provide the foundation for a conclusion that there had been user contributions that should be used to adjust the MAR and associated prices. In its form, it suggests a view that there was a failure to present sufficient material for the Tribunal to reach a conclusion on that issue in any event.

284 In the view of the Tribunal, if user contributions were to be brought to account there needed to be a comprehensive historical analysis of all of the past economics of the Port and where the benefits and burdens had fallen to see whether there was some offsetting benefit that was received for the contributions and whether the benefit of past contributions should be confined to those users who had made them.

285 On that basis PNO submitted that even if there was error in the principal analysis by the Tribunal, the applications for review must fail because of the view expressed in the final paragraph which summarised some earlier statements made by the Tribunal.

286 However, the difficulty with the Tribunal’s alternative basis for its conclusion is that it assumes a particular view of what is required as a matter of law if user contributions are to be brought to account. It assumes that the terms of s 44X(1) operate in a manner where there is to be no regard to past considerations unless they can be evaluated in a comprehensive way. In effect, if one aspect of the past is to be brought to account then all aspects must be included and if that cannot be done then there is no basis to consider past matter. It also assumes that there is a relevant inquiry to be made as to who made the user contributions.

287 However, there is no support in the terms of s 44X(1) for those views.

288 For reasons we have given, s 44X(1)(e) requires that there be regard to the value to the provider of extensions whose cost is borne by someone else. It is not concerned with whether there were other aspects of the past that might have provided some benefit to the provider. It is concerned only with whether the value of an extension that forms part of the facility used to provide the Service is value that “is borne” by someone other than the provider. It does not invite an accounting of all past benefit to that other person from having met the cost. It does not invite an allocation of that value to the particular person bearing the cost. Therefore, the alternative conclusion was not based upon a correct view of that provision.

289 We do not wish to be taken to accept the proposition advanced for Glencore that it was enough to show that there had been contributions in the past. There may be aspects of the past that bear upon a conclusion at the relevant time as to whether the cost that has been met in the past that is represented by the present value of an extension might properly be said to be cost that “is borne”. One matter that may be relevant to that inquiry may be the perpetual nature of the asset created by past user contributions. Another matter may be whether regard to those contributions together with regard to the other factors in s 44X(1) requires balancing of competing considerations. In particular, s 44ZZCA(a)(ii) requires the Tribunal to have regard to the principle that the provider be able to earn a rate of return commensurate with the regulatory and commercial risks involved. The Tribunal has not considered that aspect in expressing its final conclusion.

290 However, what was not suggested by PNO was that the extent of the user contributions could not be assessed in the manner undertaken by the ACCC. Rather, the principal complaints by PNO focused upon whether, having regard to other historical circumstances, the extent of the work funded by users should not be brought to account. Those arguments have not been addressed with a proper understanding of what was required by s 44X(1)(e).

291 Also, for reasons we have given, regard to the statutory object of promoting the economically efficient operation of, use and investment in the Port as the relevant infrastructure requires regard to whether part of the capacity has been provided by the contributions of users. The alternative conclusion by the Tribunal is not informed by that aspect of what the statute requires.

292 Whether regard to those matters leads to the same result as that reached by the ACCC or to some other result is not a matter to be adjudged by this Court. However, that view must be informed by a correct view of the statutory provisions. Those provisions do not require either a complete historical analysis of benefits or an assessment as to which user provided funds so that any price benefit would be confined to the contributing user.

293 In short, our conclusions about legal error extend to include the final alternative conclusion by the Tribunal at [365].

### Conclusion as to issue 2

294 With respect to the Tribunal, it has been demonstrated that there was an error of law by the Tribunal in failing to have regard to the user contributions on the basis that such contributions could not be relevant to the determination of an appropriate level of efficient costs. Various provisions in s 44X(l) required the Tribunal to consider whether there were user contributions of a character that should be brought to account in determining the price and terms of access.

## Issue 3: the application by the ACCC

295 As we have noted, Glencore and the ACCC each brought separate applications challenging the Tribunal’s decision. Glencore’s application relied upon the statutory right to appeal by way of review expressed in s 44ZR(1) of the Act. It raised both the scope and user contribution issues.

296 The application by the ACCC sought to invoke three separate aspects of the Court’s jurisdiction. First, the ACCC claimed to be a “person aggrieved” by the decision of the Tribunal for the purposes of s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Second, it also claimed to be a person with a “special interest” who had standing to allege jurisdictional error and invoke the jurisdiction conferred by s 39B of the *Judiciary Act 1903* (Cth). Third, it relied upon s 163A(3) of the Actwhich provides that the ACCC may institute a proceeding in the Court seeking the making of a declaration.

297 The ACCC submitted that there is a public interest in seeing an important aspect of Part IIIA properly interpreted. It said that it has a statutorily recognised public interest function in bringing proceedings to clarify the operation of the legislation. So much can be accepted. However, the proceedings that it commenced alleged that the contextual application of the legal principles for which it contends in the adjudication of the private dispute between Glencore and PNO should lead to a variation of the Tribunal’s determination in a manner that would reinstate the ACCC’s determination of the appropriate charge. In short, the primary relief it sought was an adjustment to the price that Glencore would pay. It also sought a declaration that the Tribunal erred by holding that the NSC should be based on the value of the assets used to provide the Service, without any adjustment for those assets not paid for by the service provider. Relief of that kind provided a direct and peculiar benefit to Glencore as the outcome of a statutory arbitral process; and in circumstances where Glencore was advancing that position for itself, in its own interests.

298 Division 3 of Part IIIA provides for the resolution of a dispute between the provider of a declared service and a third party who wants access to the service. The arbitration is to be conducted by the ACCC. It has powers to terminate the arbitration in certain circumstances, including where the dispute was vexatious or its subject matter was trivial, misconceived or lacked substance: s 44Y. The ACCC is to be constituted by two or more members for the purposes of conducting the arbitration: s 44Z. The arbitration must be conducted in private, unless the parties agree to a public hearing: s 44ZD. The parties may be charged by the ACCC for its costs of conducting the arbitration: s 44ZN.

299 It can be seen that the legislation provides for an independent adjudication by the ACCC (as constituted for the purposes of the arbitration) of a dispute between two parties. The ACCC has no role in bringing forth the issues for determination and the outcome is an adjudication of a dispute to which the ACCC is not a party. Plainly, the role of the ACCC in making a determination is to make a decision that will quell the dispute between the parties, not to perform some broader statutory function in the public interest. There are detailed provisions which govern the procedure to be applied by the ACCC in making the required arbitral determination which manifest its character as an independent decision making process: see, for example, s 44ZF.

300 The mechanism whereby a statutory right to access a declared service, provided by means of essential infrastructure at a price and on terms to be determined by independent arbitration in the event of dispute, is created in the wider interests of economic efficiency can be traced back to the recommendations of the Hilmer Report. It is a scheme by which the public interest is served by conferring the right of access and ensuring that individual disputes can be settled by arbitration.

301 Other access regimes establish a mechanism by which a regulator (in some cases the ACCC) sets a benchmark price or a schedule of prices and standard terms to apply in the marketplace as a whole. In such instances, the regulator exercises a statutory power to determine appropriate prices and terms of broad application in the public interest. The determination the subject of the present proceedings was not of that character.

302 The distinction between the private nature of the determination and its possible public consequences is addressed by a separate statutory requirement that the ACCC must publish a written report about the final determination it makes, which report may include the determination and reasons for determination: s 44ZNB. Amongst other things, the report must include “any implications the Commission considers the determination has for persons seeking access to the service or to similar services in the future”: s 44ZNB(3)(f). It is the report that provides wider guidance as to other determinations.

303 If there is an application to the Tribunal to review the arbitral decision by the ACCC then the determination has no effect until the Tribunal makes its determination on review: s 44ZO(2). A review by the Tribunal is a re-arbitration: s 44ZP(3). In conducting the review, the Tribunal has the same powers as the ACCC: s 44ZP(4). Significantly, the determination as affirmed or varied by the Tribunal is taken to be a determination of the ACCC for all purposes of Part IIIA: s 44ZP(7). Many of the procedural provisions that otherwise apply to the Tribunal do not apply to those instances where it conducts a re-arbitration under Part IIIA: s 44ZQ.

304 So, where there is a re-arbitration, the power to make the determination is not transferred to the Tribunal. It remains with the ACCC as the original decision-maker. The Tribunal’s power is to determine that the original decision was correct or to vary that determination. However, the determination takes effect as a decision of the ACCC.

305 It appears that the statutory obligation to prepare the report would also apply upon completion of the re-arbitration by the Tribunal because the re-arbitration takes effect as a final determination by the ACCC and the ACCC must prepare a report about a final determination.

306 In those particular circumstances, for the ACCC to seek to challenge the outcome of the re-arbitration by the Tribunal is for the ACCC to challenge its own arbitral determination, its own exercise of statutory power. Further, the position adopted by the ACCC in bringing its own application to challenge the decision by the Tribunal gives rise to the strange possibility that the ACCC may seek to challenge the re-arbitration in circumstances where none of the parties to the arbitration seeks to do so. The ACCC could contend for relief (and a consequent outcome) that no party to the dispute seeks. In such an instance if the ACCC was to succeed, who would have the carriage of any reconsideration of the matter by the Tribunal? It cannot be the position that the ACCC could run a case before the Tribunal that no party to the dispute wanted to run. All of these difficulties explain why s 44ZR(1) is couched as it is. Only a “party to an arbitration” may appeal to this Court, and s 44U makes clear that the ACCC is not such a party. Hence, the ACCC’s collateral challenge seeking to invoke other aspects of the Court’s jurisdiction. While s 44ZR may not limit the jurisdiction of the Court under the *Judiciary Act 1903* (Cth) or the *Administrative Decisions (Judicial Review) Act 1977* (Cth), the considerations discussed herein reveal why the proceedings in the form they took should not have been commenced or maintained.

307 The terms of Part IIIA in requiring the preparation of a report as to the consequences of the determination, reinforce the manifest intention that the process of arbitration is to deal only with the resolution of a private dispute. To the extent that there is a wider public interest to be served then those matters are to be addressed in the report.

308 Therefore, although the arbitral determination was mandated by statute, its character as an adjudication of a private dispute is evident and must be kept in mind in considering the extent to which there might be said to be a wider interest that might justify the approach adopted by the ACCC in bringing its own application to review the Tribunal’s decision. The fact that there may be consequences for the law that the ACCC must administer is not enough to justify the ACCC bringing the present application for review. Consequences of that kind arise whenever this Court adjudicates a dispute between private parties concerning a law administered by the ACCC, such as, for example, decisions concerned with unconscionable conduct of the kind proscribed by the Act.

309 In our view, even though no complaint was raised by PNO, it was not a proper step for the ACCC to take to bring an application challenging the decision of the Tribunal (and thereby, in effect, challenging its own exercise of statutory power). Although it was not the decision-maker on the review application to the Tribunal, the outcome of the re-arbitration was a determination by the ACCC. Further, the role of the ACCC when it made its decision was not as an administrative decision-maker exercising a statutory power with attendant discretions. Rather, it was independently adjudicating a dispute between two parties, the nature and extent of which was determined by those parties (save that the ACCC had power to determine matters that were not the basis for notification of the dispute: s 44V(2)).

310 Therefore, though not directly analogous to the circumstances in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* [1980] HCA 13; 144 CLR 13, the ACCC’s role in making the determination is akin to that of a statutory tribunal of the kind there addressed. The difference lies in the addition of the layer for re-determination by the Tribunal. It is not uncommon for legislation to provide for two layers of independent statutory review. For example, there have been independent review processes interposed between the making of an administrative decision and the exercise of a right to seek review in the Administrative Appeals Tribunal. In such circumstances, the independent decision-maker at the first layer should be guided by what are commonly known as the *Hardiman* principles as much as they should guide the independent decision-maker at the second layer. They do not countenance the commencement of proceedings by the independent Tribunal to challenge the validity of the decision making process.

311 Otherwise, in proceedings in which the ACCC’s independent decision (being its determination to take effect as varied by the decision of the Tribunal) is the subject of challenge, its active appearance in any proceedings should be regarded as exceptional and should, in general, be limited to submissions going to powers and procedures rather than the appropriate outcome. It ought not be alleging, for example, as the ACCC did in this case, that the decision of the Tribunal was so unreasonable that no reasonable Tribunal could have arrived at the decision (a position not pressed in oral submissions). All the more so, it should not be commencing its own proceedings in order to adopt a partisan position as to the outcome.

312 In the result, Glencore by its own application raised similar complaints and sought similar relief to the ACCC in relation to the issue of user contributions. But the appropriateness of the course taken by the ACCC is not to be adjudged by that further and separate step. The merits of the justification advanced by the ACCC must pertain even if Glencore and PNO had settled their differences after the Tribunal’s decision and even if PNO did not wish to dispute the Tribunal’s decision. It is inconsistent with the statutory scheme if the ACCC is seen to be arguing for the correctness of its own view in its own proceeding against the Tribunal.

313 Finally, whilst a case may be advanced as to why the ACCC had an interest, on behalf of the public, in seeking appropriate declaratory relief as to the meaning of relevant statutory provisions, those were not the terms in which the ACCC sought declaratory relief. It did not seek a declaration as to the proper construction of relevant provisions of the legislation in the circumstances and for the purposes of some ongoing aspect of administration of the Act. Possibly, such a course may have been appropriate to inform the content of the report to be prepared by the ACCC after the decision by the Tribunal if there was a concern as to the extent to which the Tribunal had proceeded upon a correct understanding of the law. Instead, the ACCC took the course of seeking a declaration that the decision by the Tribunal was wrong. For reasons we have given, it has not been shown why such an application should be entertained in the exercise of the Court’s discretion that attends any application under s 163A(3).

314 It follows, in our view, that the proceedings brought by the ACCC should not have been commenced. Therefore, it is appropriate for them to be dismissed. The proper role for the ACCC was to make submissions on Glencore’s application (to which the ACCC was named as a respondent) as to matters relating to the proper construction of the relevant legislative provisions and to provide such assistance as the Court may need in dealing with applicable economic principles. Further, if the ACCC had not been named as a respondent to Glencore’s application, the appropriate step would have been to seek leave to intervene under s 87CA rather than to institute or, in this case, continue separate proceedings. In the result, for the most part, the submissions advanced for the ACCC were related to grounds raised by Glencore that were similar in character to those expressed in the application by the ACCC. However, to the extent that the ACCC sought to advance separate review grounds, in our view it has not been demonstrated that there was a proper basis for the ACCC to do so and for that reason those grounds have not been separately addressed in these reasons.

## Issue 4: the appropriate form of relief

315 As to relief, the application by Glencore sought an order that the Tribunal’s determination be varied by substituting the NSC as determined by the ACCC, alternatively that the matter be remitted to the Tribunal for determination of the NSC according to law. In its written submissions, Glencore invited this Court to affirm the determination by the ACCC.

316 Section 44ZR(4) provides that the orders that the Court may make include (but are not limited to) an order affirming or setting aside the decision of the Tribunal and an order remitting the matter to be decided again by the Tribunal. Notably absent is any express power to make any decision that the Tribunal itself could have made.

317 As we have noted, the Tribunal’s decision is itself a re-arbitration. Once the re-arbitration process has been invoked and a determination made, it is difficult to see the basis on which this Court might return the parties to a position whereby the original ACCC determination takes effect without any re-arbitration. Therefore, by reason of the subject matter of the appeal by way of review conferred by s 44ZR, it is not open to this Court to reinstate the original determination of the ACCC, save perhaps in an instance where there was some defect in the application to the Tribunal such that the re-arbitration process was never validly invoked.

318 Possibly if this Court were convinced that as a matter of law a particular decision was inevitable, this Court could order that the determination of the Tribunal be varied in a manner that gives effect to that inevitable outcome. However, for the following reasons, this case is not of that character.

319 For reasons we have already given, the question of scope must be referred back to the Tribunal.

320 As to the issue of the user contributions, for Glencore it was contended that, no issue having been taken before the Tribunal as to the extent of the user contributions, if the Tribunal was in error in failing to have regard to those contributions then the consequence was that the accepted value of the contributions had to be brought to account in the manner determined by the ACCC in that determination. Even accepting the premise for that submission as being correct (a matter disputed by PNO), the statutory task to be undertaken by the Tribunal required it to have regard to the user contributions and not simply to bring them to account in the manner reasoned by the ACCC in its determination. It is not for this Court on review to undertake that task which involves regard to matters other than user contributions alone.

321 Therefore, the question of user contributions and any consequence for the access price arising from a determination of that issue is a matter for the Tribunal and that aspect must be referred back to the Tribunal.

322 As to the declaratory relief sought by the ACCC, in circumstances where the ACCC had appeared as a respondent to the application by Glencore it may be appropriate for declaratory relief to be granted in a form that affords certainty or protection for a respondent that a particular matter has been adjudicated by the Court. However, no such purpose would be served by granting declaratory relief in the terms sought by the ACCC. The Court’s finding of error will be given effect by orders setting aside the Tribunal’s decision and remitting the matter for determination according to law.

## Conclusion, orders and costs

323 For reasons we have given, the application by Glencore should be allowed. The application by the ACCC should be dismissed. The matter should be remitted to the Tribunal for further determination according to law. As to costs, there should be orders for short submissions as to the appropriate orders in light of these reasons. Each party should first file a minute of the orders as to costs that are sought, then there should be written submissions filed on the basis that, unless the Court otherwise orders, the question of costs will be dealt with on the papers. We will also restrict publication of the reasons for judgment for a short period in the light of the fact that there were confidential matters before the Tribunal addressed in argument.  In particular, there were matters in the redacted and confidential material which were related to what is found in the last sentence of [229].  There may be other matters of which we are unaware.  Thus, there will be orders allowing the parties a short time to make any application for any redaction or orders of suppression over any part of the reasons for judgment.

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| I certify that the preceding three hundred and twenty–three (323) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices Beach and Colvin. |

Associate:

Dated: 24 August 2020