



Arbitration Report

Access dispute between Glencore Coal
Assets Australia Pty Ltd and Port of
Newcastle Operations Pty Ltd

18 September 2018

Arbitration Report

Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**the Act**) establishes a regime to facilitate third party access to services provided through facilities with natural monopoly characteristics. Part IIIA provides a number of mechanisms by which the terms and conditions of access to services may be determined. One way is for the relevant Minister to declare a service or services provided by means of a facility. If declaration occurs, access seekers have a right to negotiate terms and conditions of access with the service provider and, failing agreement, either party may request the Australian Competition and Consumer Commission (**ACCC**) to arbitrate the dispute. The ACCC must then make an arbitration determination and publish an arbitration report.

On 18 September 2018, the ACCC made its Final Determination and issued its Statement of Reasons for an access dispute between Glencore Coal Assets Australia Pty Ltd (**Glencore**) and Port of Newcastle Operations Pty Ltd (**PNO**). These documents (redacted for any confidential information) are published along with and, where relevant, form part of this Arbitration Report in accordance with section 44ZNB of the Act.

The dispute concerned the level of access charges, and certain other access terms, set by PNO for users of the shipping channel service at the Port, which was declared under Part IIIA by the Australian Competition Tribunal in June 2016. The declared shipping channel service (**the Service**) is:

The provision of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port, by virtue of which vessels may enter a Port precinct and load and unload at relevant terminals located within the Port precinct and then depart the Port precinct.

Part IIIA provides flexibility in the methodology that can be used to calculate access prices, and the most appropriate methodology will depend on a range of factors. For the purposes of this arbitration, the parties were directed to jointly develop and submit to the ACCC a model and inputs to the model that both parties agreed to use for the formulation of access prices, together with a report detailing the aspects of the pricing model and other terms and conditions of access on which they were able to agree. The parties were also directed to provide separate submissions in relation to aspects of the access pricing model, inputs to the model and other terms and conditions of access on which the parties were unable to agree.

The parties agreed to use a building block model (**BBM**) as their access pricing model for the purposes of the arbitration. More specifically, a modified version of the Australian Energy Regulator's publicly available Post-Tax Revenue Model (**PTRM**). The BBM involves calculating the maximum allowable revenue (**MAR**) that the business may recover over a specified period, having regard to the efficient costs of providing the service (including a return on capital commensurate with the commercial and regulatory risks involved in providing the service). Charges or unit prices are then derived from the MAR using volume forecasts.

The parties also agreed to the use of a Depreciated Optimised Replacement Cost (**DORC**) methodology as their asset valuation methodology, with depreciation to be assessed on a straight line basis over the useful life of the asset. The asset valuation is an important input to the BBM as it informs the calculation for return on capital and depreciation. As such, the asset valuation will also directly affect the MAR and, ultimately, prices. The DORC methodology values assets at the cost to a hypothetical efficient entrant to the market who will optimise the use of, operation of and investment in the asset.

The ACCC's approach in this arbitration was to accept the parties' agreed pricing and asset valuation methodologies, and agreed inputs to, and implementation of, these methodologies. The ACCC then made determinations on those aspects where the parties were unable to agree. The arbitration process and the information that the ACCC took into account in making its determination, including that provided by the parties, is discussed in detail in the Statement of Reasons.

Section 44X(1) of the Act provides certain matters that the ACCC must take into account in making a determination in the arbitration of an access dispute. The Statement of Reasons outlines how the ACCC has taken these matters into account, which include the principles that the ACCC applied in making its determination.

Section 44X(2) of the Act provides that the ACCC may also take into account any other matters that it considers relevant. As set out in the Statement of Reasons, the ACCC took into account the complexity that would be involved in practically implementing the terms and conditions for access to the Service. The ACCC's preference was for the terms and conditions to be clear, certain, and simple for the parties to understand and apply.

It is noted that the arbitrated terms and conditions of access apply in the following instances:

- where Glencore, either directly or by agent, charters a vessel to enter the Port precinct and load Glencore coal, and
- where Glencore makes a representation of the kind referred to in section 48(4)(b) of the *Ports and Maritime Administration Act 1995* (NSW) 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.

Based on the information presented to the ACCC in the course of this arbitration, the ACCC considers that the level of the Navigation Service Charge and the Wharfage Charge as determined by the ACCC are appropriate for vessels carrying Glencore's coal in these circumstances.

Further, while any potential future dispute between an access seeker and PNO in relation to access to the Service would need to be decided on merits, the ACCC considers that the approach taken in the current dispute provides a useful framework and guiding principles in the parties' negotiations.