IN THE MATTER OF THE APPLICATION BY GLENCORE COAL PTY LTD FOR DECLARATION OF THE USE OF SHIPPING CHANNELS AT THE PORT OF NEWCASTLE

JOINT MEMORANDUM OF ADVICE

A. INTRODUCTION AND SUMMARY

1. We have been asked by the National Competition Council (the **Council**) to answer six questions relating to the expression "designated Minister" in Part IIIA of the *Competition and Consumer Act 2010* (the **Act**). The questions arise in the context of an application to the Council by Glencore Coal Pty Ltd (**Glencore**) regarding access to the Port of Newcastle, but are also directed more generally to how the designated Minister is to be determined where the operator and owner of a facility are not the same person.

2. Our answers to the six questions are set out in Part G below. In summary, and based on the facts that we have assumed and set out in Part B below, our advice is as follows:

   2.1. The Act envisages that there will be one, and only one, provider of any given service.

   2.2. Port of Newcastle Operations Pty Ltd (**PNO**) provides the service to which Gencore wants access, because, amongst other things, it is the entity that controls that access and the price to be paid for it.

   2.3. According to the definition in s 44B, the provider must be either the "the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service".

   2.4. PNO is the operator of the facility that is used to provide the service, and therefore satisfies that definition, whether or not it could also be categorised as the owner for the purposes of the Act.

   2.5. PNO is not a "State or Territory body".

   2.6. Therefore, according to s 44D, the designated Minister is the Commonwealth Minister.

2.7. A recommendation by the Council to the wrong Minister – or, put another way, a failure by the Council to fulfil its statutory duty to make a recommendation to the designated Minister – would be susceptible to judicial review.

B. FACTS

3. The Council is yet to receive all relevant documents (Observations at paragraph 18). However, for present purposes, we assume the following facts, based on the Observations and the Application:

3.1. The facility to which Glencore wants access is made up of the shipping channels (including vessel berth areas) at the Port of Newcastle (the **Port**).

3.2. The ultimate owner of the Port is the Crown in right of the State of New South Wales.

3.3. However, the Port has been leased to PNO for 98 years; and PNO runs the Port and receives the revenue from, amongst other things, charges fixed by PNO for access to the Port.

3.4. PNO, originally State-owned, was established by s 6 of the *Ports and Maritime Administration Act 1995* (NSW) (the **PMA Act**). On 30 May 2014, ownership of PNO was transferred into private hands. It is now jointly owned by a global funds manager and a global assets owner.

C. KEY LEGISLATIVE PROVISIONS

4. Under s 44F(1) of the Act, any person may make a written application to the Council asking the Council to recommend that a particular service be declared. According to s 44F(2) of the Act, after receiving the application, the Council:

> (a) must tell the provider of the service that the Council has received the application, unless the provider is the applicant; and
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> (b) must, after having regard to the objects of this Part, recommend to the designated Minister:
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> (i) that the service be declared, with the expiry date specified in the recommendation; or

(ii) that the service not be declared.

5. The "designated Minister" is the Commonwealth Minister unless, relevantly, the provider of the service is a "State or Territory body",[1] in which case the responsible Minister of the State or Territory is the designated Minister: s 44D(2) of the Act. "State body" is defined in s 44B of the Act to mean "a State" or "an authority of the State".

6. "Provider" is a defined term. Section 44B stipulates that:

> ***provider***, in relation to a service, means the entity that is the owner or operator of the facility that is used (or is to be used) to provide the service

7. Part IIIA frequently employs the expression "provider of the service".

D. DETERMINING THE PROVIDER OF THE SERVICE

General discussion

8. If the term "provider" appeared only in the definition of "designated Minister" in s 44D(2), it might be possible simply to "read the words of the definition into the substantive enactment",[2] with the result that, if either the owner or operator of the service were a State body, the designated Minister would be the State Minister. However, Part IIIA frequently employs the term "provider" and the expression "provider of the service", and in our view makes plain that there is only one provider of a given service. For example:

   8.1. The definition of "provider" refers to "<u>the</u> entity", and Part IIIA invariably refers to "<u>the</u> provider".

   8.2. The functioning of Part IIIA, including, for example, the many provisions requiring notice to be given to the provider, depends upon the identification of one provider.

   8.3. Section 44C deals with the case in which the provider of a service is a partnership or joint venture that consists of 2 or more corporations.

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1 The State or Territory concerned must also be a party to the Competition Principles Agreement.

2 *Kelly v The Queen* (2004) 218 CLR 216 at [103] (McHugh J).

9. Because the definition of "provider" in s 44B is open-ended, leaving open the possibility of the provider being either the owner or the operator of the facility, that definition cannot determine the identity of the provider of a given service where the operator and owner are distinct. Thus, the definition lays down a necessary condition of being a provider, but does not give a complete picture. To complete the picture, resort must be had to the defined term itself:[3] we must ask "Who provides the relevant service?" having regard to the plain meaning of those words, in the context of the Act.[4] That context includes the matters that might be addressed by the Commission, in any determination ultimately made under s 44V of the Act. Section 44V(2) provides:

> A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. By way of example, the determination may:
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> (a) require the provider to provide access to the service by the third party;
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> (b) require the third party to accept, and pay for, access to the service;
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> (c) specify the terms and conditions of the third party's access to the service;
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> (d) require the provider to extend the facility;
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> (da) require the provider to permit interconnection to the facility by the third party;
>
> (e) specify the extent to which the determination overrides an earlier determination relating to access to the service by the third party.

10. Thus, the provider is the entity which makes the relevant decisions in respect of the service/facility, including who will be allowed access to the facility and what, if anything, the entity allowed access will have to pay for that access. Other provisions relevant to understanding the concept of "provider" include s 44X(1) (which lists matters that the Commission must take into account in determining an access dispute) and s 44ZZCA (pricing principles for access disputes and access undertakings or codes).

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3 See *Macdonald (Inspector of Taxes) v Dextra Accessories Ltd* [2005] 4 ALL ER 107 at [18] (Lord Hoffman).

4 See, for example, *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [23]-[25] (French CJ and Hayne J).

11. Will the answer to the question "Who provides the relevant service" always be an entity fitting the description of "owner" or "operator" and, if so, does that render the definition of "provider" redundant?

    11.1. In *Rail Access Corporation v New South Wales Minerals Council Ltd*,[5] the Full Federal Court observed:[6]

> There may be a difficulty in Pt IIIA of the Act as a result of the terms of the definition of 'provider' in s 44B. Although the definition of "service" makes clear that the service may be provided by a means other than the mere use of an infrastructure facility, the definition of "provider" draws in the owner or operator of the facility that is used to provide the service. Thus, when the National Competition Council receives an application under s 44F(1) of the Act to recommend under s 44G that a particular service be declared, it is required by s 44F(2) to tell the provider of the service, that is to say the owner or operator of the facility that is used to provide the service, that it has received the application. However, that owner or operator may not necessarily be the person who in fact provides the relevant service.

    11.2. Having regard to the definition of service and Part IIIA more broadly, we have difficulty imagining a situation in which the provider of the relevant service could be someone other than the owner or operator of the facility used to provide the service. However, that issue may help to explain the purpose of the definition of "provider", which might otherwise appear redundant. That purpose may well be to make explicit the link between the service provider and the facility used to provide the service. That is, Part IIIA of the Act is fundamentally concerned with the efficient investment in – and use of – particular kinds of infrastructure (or "facilities"). The provider of a service, in Part IIIA, is necessarily the provider of a service by means of a facility and thus must be the owner or operator of the relevant facility.

Determining the provider of the service in the present case

12. While this question may require further analysis (including of the lease documentation, the operating licence and the PMA Act), the following matters, which we assume to be true, point to PNO being the "provider of the service":

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5 (1998) 87 FCR 517.

6 (1998) 87 FCR 517 at 524-525 (Black CJ, Wilcox and Goldberg JJ).

12.1. The Port is leased to PNO for 98 years: Application, p 16.

12.2. PNO operates the Port: Application, p 15; Observations, paragraph 13.

12.3. PNO fixes the charges payable by users of the Port: Application, pp 14 and 16-17.

13. An example of a consideration that may complicate this issue is that the "navigation service charge", which we understand to be the relevant charge in this case, is imposed directly by s 50 the PMA Act and not by PNO. Section 51(1) of the PMA Act provides that the "relevant port authority may fix navigation service charges". "Relevant port authority" is defined in s 47, in relation to a navigation service charge for the Port of Newcastle, as "each of the port operator of the port and the appropriate public agency for the port". "Appropriate public agency" for a port means the Minister or a port corporation designated by the Minister by order in writing as the appropriate public agency for the port. Thus, the charge is imposed directly by the Act, and the fixing of the charge appears to be a matter for the port operator and the "appropriate public agency".

E. IS THE PROVIDER OF THE SERVICE A STATE BODY?

14. While PNO and its functions are to some extent interconnected with State legislation and State agencies, and those functions may be subject to some kind of government oversight, we consider it unlikely that PNO would be characterised as a State body for the purposes of the Act.

15. Although much depends on the particular legislation in question, it is of assistance to refer to the discussion of the plurality in *Queanbeyan City Council v ACTEW Corporation Ltd*,[7] as to whether ACTEW Corporation Ltd was sufficiently distinct from government to be the subject of a tax. That discussion suggests that close attention ought be paid to the functions of the body in question and the degree of control exercisable over it by the executive government.[8] In *SGH Ltd*

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7 *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 at [23] – [30] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)

8 *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 at [26], [37] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

v Commissioner of Taxation,[9] Callinan J had identified the following matters as relevant to the issue of identity between a polity and an instrumentality:

15.1. the absence or otherwise of corporators;

15.2. an explicit obligation of the corporation to conduct its affairs to the greatest advantage of the relevant polity;

15.3. the participation of the executive government in the process of formulating policy and making decisions;

15.4. the right or otherwise of the government to appoint directors, and the source of, and responsibility for, their remuneration;

15.5. the destination of profits; and

15.6. the obligation or otherwise of the Auditor-General to audit the accounts of the corporation

16. Although we do not have instructions responsive to all of those matters, we believe that those kinds of considerations will point to PNO not being a State body. In particular, we understand that it is wholly owned by private investors for their own benefit. We also observe that, in the PMA Act, the Port of Newcastle is categorised as a "private port" (PMA Act, s 3).

F. DECISION UNDER AN ENACTMENT

17. Under s 44F of the Act, the Council must make a recommendation to the designated Minister. In our view, that recommendation would constitute a decision under an enactment for the purposes of the *Administrative Decisions (Judicial Review) Act 1977* (the ***ADJR Act***).

17.1. Section 3(3) of the ADJR Act provides that, "where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under

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9 (2002) 210 CLR 51 at [131], cited in the joint judgment in *Queanbeyan City Council v ACTEW Corporation Ltd* (2011) 244 CLR 530 at [30].

another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision".

17.2. The Council's recommendation under s 44F is expressly required by the Act and relevantly affects legal rights.[10]

17.3. A recommendation made to the wrong Minister would be reviewable on the ground that it involved an error of law: ADJR Act, s 5(1)(d); or that it was not authorised: ADJR Act, s 5(1)(f).

18. Conceiving of the matter somewhat differently, the Council has a duty to make a recommendation to the correct Minister, and the authority to make a recommendation only to the correct Minister. It is difficult to see why that duty, and the limit on power, would not be enforceable via judicial review.

19. For completeness, we also note that an applicant could invoke the Federal Court's jurisdiction under s 39B(1A)(c) of the *Judiciary Act 1903* (Cth).[11] Equally, an application for judicial review might be brought against the Minister to whom the NCC makes the recommendation, either before or after the Minister makes a decision.

G. ANSWERS TO THE SIX QUESTIONS

Q1 In counsel's opinion, who is the relevant Minister in respect of the Application?

A1 The Commonwealth Minister, based on assumed facts.

Q2 If the owner of the facility is a State body and the operator is not, how is the designated Minister determined?

A2 By considering which entity is, in fact, the "provider of the service".

Q3 Will the Council, in providing its recommendation to one of the Commonwealth Minister or the State Premier, have made a decision under an enactment?

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10 See *Griffith University v Tang* (2005) 221 CLR 99 at [89] (Gummow, Callinan and Heydon JJ).

11 See, for example, *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) 236 CLR 145 at [26].

A3 Yes.

Q4 Does the State as lessor remain the owner of the facility for the purposes of determining the designated Minister?

A4 Even if it did, if another entity meets the description of operator of the facility, it is necessary to consider which of the two is the provider of the service for the purpose of the Act.

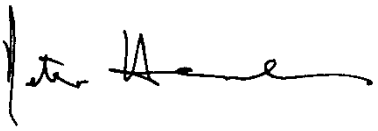
Q5 If the answer to question 4 is yes, are each of the lessee and lessor a "provider" of the service?

A5 No, there is only one provider under the Act.

Q6 If the answer to question 5 is yes, is a State body one of two "providers" of the service?

A6 No, there is only one provider under the Act.

Dated: 10 June 2015



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