HERBERT SMITH FREEHILLS

GLENCORE CHANNELS ACCESS EFFORTS INTO TRIBUNAL CHALLENGE

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Legal Briefings – By **Matthew Bull, Liza Carver**

Glencore Coal Pty Ltd is challenging the recent decision of the Acting Commonwealth Treasurer to not 'declare' services provided by the Port of Newcastle.

OVERVIEW

Glencore Coal Pty Ltd (**Glencore**) is challenging the recent decision of the Acting Commonwealth Treasurer to not 'declare' services provided by the Port of Newcastle (**Port**). Specifically, Glencore is asking the Australian Competition Tribunal (**Tribunal**) to review the Treasurer's decision on one of the key criteria (criterion (a)) that must be satisfied in order for infrastructure like the Port to be brought within the national access regime in Part IIIA of the Competition and Consumer Act (NAR).

This case is significant because access matters like this do not often come before the Tribunal. In addition to being a rare consideration of one of the key declaration criteria, it is the first time that the Tribunal will conduct such a review since the legislative provisions dealing its powers of review were reformed and its broad approach under the old law criticised by the High Court.[1]

The Tribunal's approach in this case will provide an indication as to how the Tribunal is adapting to its more limited role, including in relation to defining markets, assessing competition and considering which services are subject to the NAR.

BACKGROUND

The national access regime

The NAR enables parties to have services 'declared' under the NAR by applying to the National Competition Council (**NCC**), which makes a recommendation to the relevant Minister. The Minister cannot declare a service unless he or she is satisfied of all of the relevant criteria. One of the key criteria is criterion (a) which provides that, in order to be able to declare a service, the Minister must be satisfied that:

- 'access (or increased access) to the service would promote a material increase in competition in at least one dependent market (whether or not in Australia), other than the market for the service.'

If a service is 'declared', parties can refer disputes about access (including disputes about pricing) to the ACCC for binding arbitration.

NCC recommendation

On 13 May 2015, Glencore applied to the NCC for a declaration of the right to access and use the shipping channels (including berths next to wharves as part of the channels) at the Port which vessels use in order to enter the Port, load and unload at terminals and exit the Port (**Services**).

The NCC published the application and invited parties to comment. The NCC received submissions from 12 interested parties, including port users, the operator of the Port, industry bodies and Government Departments.

On 10 November 2015, the NCC recommended that the Services not be declared on the basis that the NCC was not satisfied in relation to criterion (a). Specifically, the NCC considered that:

- there was insufficient material before it to conclude that a separate market existed for the financing of coal mining projects in the Hunter Valley (the key market identified in Glencore's application), and
- in respect of the other dependent markets identified by Glencore, such as the coal export market, competition was unlikely to be materially promoted. In particular, the NCC noted that the charges for the Services represented a 'minor component' of the FOB cost of coal at the Port and, as such, were 'unlikely to have an effect on production and investment decisions such as to promote a material increase in competition in a market'.

Minister’s decision

On 11 January 2016, the Hon. Mathias Cormann MP, Acting Treasurer of the Commonwealth of Australia (**Treasurer**), published his decision not to declare the Services.

The Treasurer accepted the NCC’s recommendation and decided that he was not satisfied in relation to criterion (a), including because the navigation charges were a ‘small fraction’ of the overall coal price. He also found that there was no functionally distinct, dependent market for the financing of coal mining projects in the Hunter Valley

THE REVIEW

On 29 January 2016, Glencore filed an application with the Tribunal for a review of the Treasurer’s decision. Glencore’s application focusses on criterion (a) and whether there is a separate market for financing coal projects in the Hunter Valley

Criterion (a)

Criterion (a) is one of the key declaration criteria in the NAR. It is not often that criterion (a) is considered by the courts or the Tribunal. The most significant recent case involved Virgin Blue’s application to have airside services at Sydney Airport declared, which was considered by the Tribunal (2005), the Full Federal Court (2006) and briefly by the High Court when refusing Sydney Airport’s special leave application (2007). It was also considered by the Tribunal in relation to Fortescue’s declaration application in relation to railway lines in the Pilbara (2010).

The Hunter Valley financing market

Glencore is also seeking to review the decision that there is no functionally distinct market for the financing of coal projects in the Hunter Valley. This was the main market in which Glencore submitted there would be a material increase in competition if the Services were to be declared. Importantly, the Minister accepted the NCC’s assessment, which, in turn, was based on its conclusion that it did not have enough material to find that there was a separate market for financing coal projects in the Hunter Valley.

The Tribunal’s role

The approach the Tribunal takes to these 2 issues is likely to influence the extent to which applicants in the future seek to have services declared under the NAR.

Criterion (a) and market definition lie at the heart of the declaration regime in the NAR. They require a detailed consideration of economic and factual matters. It will be interesting to see how the Tribunal performs its task in light of the recent reform which limits its power to conduct the sort of extensive review which it has traditionally conducted under the NAR.

The NAR was reformed so that the Tribunal must start with the material that was before the original decision maker and genuinely conduct a 'reconsideration' of the decision (rather than starting wholly afresh, with new material). While the Tribunal can request a person to provide such information as the Tribunal considers 'reasonable and appropriate' and can ask the NCC to provide 'assistance', including giving it information and making reports, the High Court's comments about the proper role of the Tribunal are a potential constraining factor on its approach to using new evidence and material.

The type of services which are subject to the NAR

The Tribunal will also need to carefully consider the precise scope and nature of the Services. The Victorian Department of Treasury and Finance (**Department**) questioned whether the use of the shipping channels and berths is a service which is capable of being declared. The Department submitted that it is 'not apparent' that the operator of the Port is providing a service within the meaning of the NAR. That is, the shipping channels and berthing areas are essentially tracts of water through which ships navigate and over which the Port exercises a statutory power to levy charges but it does not enter into agreements for the provision of access.

While the Minister's published reasons did not focus on this issue, the NCC considered it in detail in its analysis of Glencore's application, including issuing a notice to the operator of the Port requesting it to provide information.

The Tribunal's approach to this issue could have significant implications for the scope of the NAR and, in particular, its application to ports and waterways.

Reform of the NAR

In addition to its implications for the NAR as currently drafted, this case could also have implications for potential reform of the NAR. The Government is currently considering important reforms to the NAR and, in its Response to the Harper Review.[2] Which largely adopted the recommendations of the 2013 Productivity Commission from the 2013 inquiry into the National Access Regime.[3] The outcome of this case could affect the nature of the proposed reforms.

Overall, this is a significant case which access seekers and infrastructure providers should follow very closely given its potentially wide-ranging implications.

This article was written by Matthew Bull, Partner, Brisbane and Liza Carver, Partner, Sydney and Ben Sheehan, Solicitor, Brisbane.

ENDNOTES

1. Pilbara rail access cases keep rolling.
2. Government responds to Harper Review.
3. The National Access Regime - Productivity Commission Final Report released.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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