HERBERT SMITH FREEHILLS

PLAIN SAILING FOR GLENCORE AS COURT UPHOLDS PORT OF NEWCASTLE DECLARATION

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Legal Briefings – By **Matthew Bull**, **Richard Robinson** and **Hannah Tulsi**

The Full Federal Court has confirmed the decision of the Australian Competition Tribunal to declare services provided by the Port of Newcastle under the National Access Regime (see our previous articles here and here). This paves the way for the ACCC to arbitrate the prices and other terms of access for using the channels and berths at the Port. The Court has again made it clear that the relevant test is the lower threshold for declaration from the Sydney Airport case, which ignores whether the access seeker currently has access and which does not require a detailed factual analysis.

However, it is not likely to be all plain sailing for access seekers. Amendments to the law are presently before Parliament which, if passed as expected, will reinstate the higher threshold and require the return to a more detailed factual analysis (which the Minister initially carried out when deciding not to declare the services provided by the Port).

BACKGROUND

On 13 May 2015, Glencore Coal Pty Ltd applied to the NCC for a declaration under the National Access Regime in Part IIIA of the Competition and Consumer Act (**NAR**) in respect of the Port of Newcastle to enable access and use of the shipping channels and berths (**Services**), which are used by vessels in order to enter the Port, load and unload at terminals, and exit the Port. The Port is one of the largest coal export ports in the world and is operated by the Port of Newcastle Operations Pty Ltd (**PNO**) under a 98 year lease.

Infrastructure services can only be declared under the NAR if five criteria are satisfied. The two criteria which were relevant to this dispute were the competition criterion (a) and the public interest criterion (f). These require that access (or increased access) would:

(a) promote a material increase in competition in a least one market (whether or not in Australia), other than the market for the service (in this case, for example, the coal export market), and

(f) not be contrary to the public interest.

On 11 January 2016, the Acting Treasurer, following the recommendation of the NCC, decided not to declare the Services. The Acting Treasurer decided that competition in the export coal market was unlikely to be materially increased by a declaration because the Port charges represented a 'minor component' of the cost of exporting coal.

MINISTER'S DECISION

Glencore applied to the Tribunal for a review of the Minister's decision. Glencore's challenge focused on the interpretation taken by the Minister (and the NCC) to the competition criterion. The Port additionally argued that the Minister's decision should be upheld because the public interest criterion was not satisfied. Adopting the approach to the competition criterion from the Sydney Airport case, the Tribunal found that, because access to the Service 'is essential to compete in the coal export market', providing access to the Service 'would promote a material increase in competition'. The Tribunal followed the approach from the Sydney Airport case and did not undertake a detailed factual analysis or consider the terms on which access was already being provided. The Tribunal set aside the Minister's decision and declared the Services until 7 July 2031.

FULL FEDERAL COURT'S DECISION

PNO appealed to the Full Federal Court seeking to set aside the Tribunal's decision and have the matter re-determined by the Tribunal. The Commonwealth of Australia and the ACCC were joined to the proceedings.

As one of the grounds of PNO's challenge was that the approach of the Full Court in the Sydney Airport case was wrong, a full bench of 5 judges heard PNO's application.

Ultimately, the Full Court unanimously dismissed PNO's application.

COMPETITION CRITERION - STILL THE STATUS QUO SET BY SYDNEY AIRPORT

The Full Court confirmed that the starting point when considering the meaning of 'access' is to consider the ordinary meaning of the word having regard to its context and legislative purpose. In that sense, 'access' simply means 'a right or ability to use the service'.

The Full Court considered that 'access' did not mean access under a declaration. It considered that to restrict 'access' to a legal right or entitlement would be to 'depart from its ordinary meaning'.

The Court also considered that there was an important distinction between access and declaration, which was made clear by the structure of the NAR – while a service may be declared, a party is not then automatically granted access to that service. Rather, they then have a right to arbitration which may or may not result in access being granted.

If 'access' meant access under a declared service, then (as the Court acknowledged) it 'readily leads to a conclusion that existing and likely future usage is to be taken into account'. PNO did not seek to revive this argument, but instead argued that the ordinary meaning of access included 'access as a matter of fact'. The Commonwealth strongly supported this argument.

However, the Full Court disagreed. It confirmed the position in Sydney Airport that the competition criterion does not direct attention to what the access provider does or will provide voluntarily, or the reasonable terms and conditions should 'access' to the service be provided (or not). It was of the view that a comparison between access and no access and increased access and restricted access was a 'more natural one' than that advanced by PNO and the Commonwealth, which invited a comparison of 'a future with a declaration and a future without a declaration'.

The Court accepted that its construction 'creates a lower hurdle' for an applicant than the construction advanced by PNO and the Commonwealth, but it ultimately considered its construction to be the 'correct one'.

PUBLIC INTEREST CRITERION - MINISTER'S DECISION SHOULD NOT BE DEPARTED FROM LIGHTLY

PNO submitted that, if its argument as to the proper construction of the competition criterion was incorrect, the existing and likely future usage of participants in the dependent markets was instead a material consideration under the public interest criterion.

The Full Court disagreed. Instead, it followed the Tribunal's endorsement of the comments made by the High Court in *Pilbara Infrastructure v Australian Competition Tribunal* (2012) 246 CLR 379. That is, when considering what is contrary to the public interest, a Tribunal 'would not lightly depart' from the decision of the Minister who is likely to have an 'informed and significant perspective'.

WHERE NEXT - THE TIDE IS TURNING

Despite some lingering debate as to whether the comments made by the Court in the Sydney Airport case in respect of the competition criterion were just in passing or were key to its decision, the Court has, for now, confirmed the relatively straightforward and low threshold for the competition criterion.

However, the Productivity Commission and the Harper Review committee have recommended that the competition criterion be amended to effectively align the test with the approach adopted by the NCC and the Minister.

This recommendation has been accepted by the Government and a Bill is presently before Parliament, which, if it passes as expected, will require the Minister to only declare a service if (amongst other things) satisfied that:

access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.

The amended competition criterion will restore the need to conduct a detailed factual analysis of the likely future with and without declaration. This will make it harder for access seekers to secure declaration in situations where access is already being provided voluntarily. The Full Court's 'lower hurdle' will be raised and the tide turned once more, leaving access seekers with rougher waters to navigate.

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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