TRIBUNAL TO RECONSIDER ITS PORT OF NEWCASTLE ACCESS PRICING DETERMINATION

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Legal Briefings – By **Paul A Burton**

It is back to the Tribunal for Glencore Coal Assets Australia Pty Ltd (**Glencore**) and Port of Newcastle Operations Pty Ltd (**PNO**) following the recent decision of the Federal Court.

This case is significant as it is the first time an appeal of a determination made by the Tribunal in respect of an access dispute arising under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) has been heard by the Federal Court.

On 24 August 2020, the Full Federal Court (comprised of Allsop CJ Beach and Colvin JJ) decided in Glencore's favour in its appeal against the Australian Competition Tribunal's (**Tribunal**) determination on 30 October 2019 to fix the Port of Newcastle's access charge payable by Glencore for use of the shipping channel Service.[1]

Glencore successfully argued the access charge determined by the Tribunal should not be limited to only those ships which Glencore was effectively "in charge" of, but to all ships accessing the Port which had been loaded with coal mined by Glencore. Glencore also persuaded the Court the past contributions made by the port users should be properly examined by the Tribunal in calculating the relevant access charge.

The Full Court also admonished the ACCC for having commenced its own separate judicial review proceedings in which it sought to challenge the decision of the Tribunal. Having succeeded in its appeal, Glencore (and PNO) will now return to the Tribunal to have a fresh determination made. Time will tell whether PNO will seek special leave to appeal from the High Court.

BACKGROUND

Following its privatisation in 2014, PNO as the new port operator, decided to increase the navigation Service charge (**NSC**) by between 40% and 60% from 1 January 2015. The NSC, charged on a gross tonne basis, is one of the charges the port is permitted to levy on port users under the *Ports and Maritime Administration Act 1995* (NSW) (**PAMA Act**) and is imposed on the owners of ships accessing the port.

In November 2016, Glencore referred an access dispute to the ACCC for arbitration, in accordance with Part IIIA of the CCA. On 8 October 2018, the ACCC published its access determination that PNO should reduce the NSC by approximately 20% to $0.61 per gross tonne.

PNO sought a review of the ACCC's determination in the Tribunal. On 30 October 2019, the Tribunal determined that the NSC set by the ACCC should be increased to $1.0058 per gross tonne (as at 1 January 2018).

The difference between the determinations is essentially attributed to economic arguments regarding whether PNO should be allowed to earn an economic return on the total value of its assets despite some of them having been historically funded by various users of the port, prior to the port's privatisation.

Although the Service is no longer declared under Part IIIA of the CCA (as of 24 September 2019), as the dispute was initiated by Glencore at a time when the Service was declared, the final determination made will apply to Glencore and PNO.

APPEAL TO FULL FEDERAL COURT

On appeal to the Full Court of the Federal Court, the following two principle issues were considered:

1. whether the Tribunal erred 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; and

2. whether the Tribunal erred 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.

SCOPE OF THE ACCESS DISPUTE

PNO submitted that to use or access the Service meant to navigate the shipping channels of the Port. Consequently, Glencore could only be said to be using or accessing the service when it owned or charted a vessel to transport its coal.

In contrast, Glencore submitted the service should not be construed narrowly. As Glencore bore the ultimate cost of port charges whoever chartered the vessel, if Glencore was exporting coal, it was Glencore that accessed or used the Port's shipping channels.

The Court agreed with Glencore and held that the Tribunal had misconstrued the nature of the declared Service and thus, asked itself the wrong question. The Court stated that access to and use of the shipping channels are not limited to, or governed by, the notion of physical access or use by the control and navigation of the vessel entering and leaving the port to carry coal. The Court explained:[2]

"*Whether or not an exporter [coal producer] 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*."

SHOULD THE VALUE OF PAST CONTRIBUTIONS BE DEDUCTED FROM THE ASSET VALUE?

This issue centred on whether an amount (equating to approximately $900 million) should be deducted from the value of the Port's assets delivering the declared Service to port users.

Prior to its privatisation, the State had developed the port's infrastructure including the dredging of the shipping channels to accommodate large modern bulk carriers. The access dispute claimed that the users of the shipping channels had paid for the channel dredging by a special levy imposed on them.

The Court concluded that by failing to have regard to the user contributions relevant to the determination of an appropriate level of efficient costs, the Tribunal fell into legal error. Section 44X(1) of the CCA 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.

COURT'S ADMONISHMENT OF THE ACCC

Following the Tribunal's decision on 30 October 2019, it was generally expected that Glencore would file an appeal to the Federal Court of the Tribunal's decision under section 44ZR(1) of the CCA.

However, the ACCC filed its own proceedings, seeking judicial review of the Tribunal's decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**). Remember, the ACCC was the original decision maker, having determined the access dispute between Glencore and PNO under Part IIIA of the CCA.

In the appeal, the ACCC submitted there was a public interest in seeking an important aspect of Part IIIA properly interpreted and that it had a statutorily recognised public interest function in bringing proceedings to clarify the operation of the law. The Court accepted this, but held it was not a proper step for the ACCC to take to bring an application challenging the Tribunal's decision.

While the actions of the ACCC in commencing its proceedings did not technically offend the well-accepted administrative law principle known as the *Hardiman* principle, the Court cautioned:[3]

"*in proceedings in which the ACCC's independent decision … 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. All the more so, it should not be commencing its own proceedings in order to adopt a partisan position as to the outcome*."

The Court dismissed the proceedings and it remains to be determined whether or not the ACCC will face an adverse costs order.

WHERE TO NOW?

The Court has remitted the case back to the Tribunal to re-make its determination. It is clear this will apply to all ships carrying coal mined by Glencore and the Tribunal will have regard to the historic user contributions made by port users.

However, what is unclear is the NSC that will ultimately be determined. It will likely be less than the $1 per GT determined by the Tribunal in October 2019. Whether or not it will revert to as low as $0.61 per GT is yet to be seen but somewhere in between is our best estimate.

At the same time, the National Competition Council (**NCC**) is considering a fresh application, submitted by the NSW Minerals Council, for the declaration of a shipping channel Service at the Port of Newcastle. In light of the Court's recent decision, the NCC has reopened until 7 September 2020 its public consultation on the declaration application. Further information can be found here.

ENDNOTES

1. *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145 (24 August 2020).

2. Ibid at [158].

3. Ibid at [311].

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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