



HIGH COURT OF AUSTRALIA

8 December 2021

PORT OF NEWCASTLE OPERATIONS PTY LIMITED v GLENCORE COAL ASSETS
AUSTRALIA PTY LTD
[2021] HCA 39

Today, the High Court dismissed an appeal from a decision of the Full Court of the Federal Court of Australia ("the Full Court") on an appeal from a determination of the Australian Competition Tribunal ("the Tribunal") concerning the terms of access to a declared service under Pt IIIA of the *Competition and Consumer Act 2010* (Cth) ("the Act") at the Port of Newcastle ("the Port"). The High Court held the Full Court was correct to set aside the Tribunal's determination and remit the matter to the Tribunal, but confined the scope of the Tribunal's task on remitter.

Since 2014, Port of Newcastle Operations Pty Limited ("PNO") has been the lessee from the State of New South Wales of the Port and has been the "operator" of the Port under the *Ports and Maritime Administration Act 1995* (NSW) ("the PMA Act"). PNO relevantly controls the use by others of the Port's loading berths and shipping channels and the PMA Act limits PNO to fixing and recovering a "navigation service charge" for the use of those facilities. Glencore Coal Assets Australia Pty Ltd ("Glencore") exports its coal through the Port. Glencore sells most of its coal to overseas buyers under "free on board" ("FOB") contracts whereby the seller delivers the goods onto a ship nominated by the buyer and typically, the buyer charters the coal transport ship contracting separately with the ship's owner or operator. In 2016, the Tribunal declared a service under Pt IIIA of the Act for the provision of the right to access and use the Port's shipping channels and loading berths ("the Service"). In 2018, the Australian Competition and Consumer Commission ("the ACCC") determined an access dispute about the Service between Glencore and PNO. Glencore applied to the Tribunal for review of the ACCC's determination. Before the Tribunal two aspects of the navigation service charge were controversial. First, the scope of the charge: did Glencore have the right to negotiate about the charge when it sold FOB and did not have a contract with the ship's owner or charterer? Second, the amount of the charge: should one of the components upon which the charge was calculated be adjusted down to account for historical works undertaken by the State in creating the shipping channels? In answering these questions, the Tribunal varied the navigation service charge determined by the ACCC. On appeal the Full Court found the Tribunal's reasoning as to both issues was affected by errors of law.

The High Court held that the Tribunal had erred in treating the permissible scope of its determination as confined to circumstances where Glencore exercised some measure of control over the physical activity of moving a vessel through a shipping channel. Glencore is a person who wants "access" to the Service and is thereby a "third party" under Pt IIIA and, by operation of the declaration of the Service, Glencore had a right to negotiate with PNO about the amount of the navigation service charge, including when it sells FOB. This conclusion accords with the ordinary meaning of "access" in Pt IIIA of the Act being the right or opportunity to benefit from or use a service. The High Court otherwise held that the Full Court was wrong in finding the Tribunal erred in determining the amount of the navigation service charge. The approach the Tribunal took on this issue was open to it.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*