



HIGH COURT OF AUSTRALIA

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Details of Filing

File Number: S33/2021
File Title: Port of Newcastle Operations Pty Limited v. Glencore Coal As
Registry: Sydney
Document filed: Form 27F - Outline of oral argument
Filing party: Appellant
Date filed: 07 Sep 2021

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: PORT OF NEWCASTLE OPERATIONS PTY LIMITED ACN 165 332 990
Appellant

and

10 GLENCORE COAL ASSETS AUSTRALIA PTY LTD ACN 163 821 298
First Respondent

AUSTRALIAN COMPETITION TRIBUNAL
Second Respondent

AUSTRALIAN COMPETITION & CONSUMER COMMISSION
Third Respondent

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

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Part I: Certification

1. This outline is in a form suitable for publication on the internet.

Part II: Outline of oral submissions

Ground 1 (NOA [2] CAB 309)

2. The ACCC's arbitral powers under Div 3, Pt IIIA can only be initiated by a "third party", being "a person who wants access or wants to change some aspect of the person's existing access": s 44B (JBA(6) 19).
3. The first respondent (**Glencore**) sought arbitration in relation to the navigation service charge (**NSC**) imposed by the appellant (**PNO**). However, a large proportion of
30 Glencore's coal is sold under FOB (free on board) arrangements (FC [132], [135] CAB 208), where it is not responsible for freight and does not pay the NSC (imposed under s 50(1), *Ports and Maritime Administration Act 1995* (Cth) (**PMA Act**)) (JBA(5) 217)).
4. The Full Court nevertheless concluded Glencore has "economic access or use" of the service because access to the Port is necessary to export coal (FC [17], [149] CAB 177, 211) (Appellant Submissions (**AS**) [22]).
5. The Full Court's interpretation of "access" does not conform to the statutory scheme. It is inconsistent with the ordinary meaning of "access" (AS [18]), the bilateral arbitral framework created by Div 3, Pt IIIA (AS [19]), and relevant legislative materials (AS

[27]).

6. The Full Court's interpretation would produce an uncertain operation to Division 3 of Part IIIA. The relevant "economic interest" is unidentified. The respondents do not propose a workable construction.
7. The Full Court's approach is not justified by an appeal to the economic character of the legislation (AS [28]), Reply Submissions (**RS**) [4]-[5]), or the need to ensure that Glencore has the benefit of the declaration (**RS** [7]).
8. The Full Court's approach creates the potential for multiple users, and conflicting terms of access, in respect of the same transaction (AS [26]).
- 10 9. The differing forms of charter arrangement were a distraction in circumstances where Glencore has no involvement in shipping (AS [30]).

Ground 2 (NOA [3] CAB 309)

10. The Full Court also held Glencore was entitled to seek arbitration of the NSC in respect of FOB sales, on the basis it accessed part of the declared service, namely the part for which it paid the wharfage charge (s 60(1) PMA Act (JBA(5) 221) (AS [32]).
11. The wharfage charge was not the subject of any dispute between Glencore and PNO. Glencore could have arbitrated a dispute about that charge, but cannot rely on use of the service for which that charge is levied as a basis for arbitrating someone else's access to the shipping channels for which the NSC is levied. That does not fall within s 44V(2) (AS [34], [35]). In other respects, the Full Court's reasoning is the same as Ground 1.

Ground 3 (NOA [4] CAB 309)

12. If the Court rejects the Full Court's expansion of access beyond physical access, it would also reject the expansion of the determination to any circumstance where Glencore makes a representation pursuant to s 48(4)(b) of the PMA Act (AS [42]).

Ground 4 (NOA [5] CAB 310)

13. For the purposes of calculating the NSC, the ACCC chose a DORC (depreciated optimised replaced cost) valuation method to calculate the regulated asset base, as propounded by PNO and Glencore (AS [43]). This method simulates competitive pricing and avoids the difficulties of calculating historical costs (AS [45] – [46]).
- 30 14. The Full Court's deduction from the DORC to reflect historical user contributions

impermissibly blends different valuation methods (AS [48]).

15. Contrary to the Full Court’s decision, such an approach is not required by the statutory considerations in s 44X:
 - (a) Section 44X(1)(e) is part of a self-contained statutory scheme that allows an access seeker to seek a determination which requires the access provider to extend the facility; it is not directed at historical extensions (AS [51] – [59]).
 - (b) None of the pricing principles in s 44ZZCA require a historical cost approach (AS [60]).

Ground 5 (NOA [6] CAB 310)

- 10 16. If historical user contributions are to be taken into account, this must be done in coherent, comprehensive manner (AS [62]).
17. The Full Court’s approach ignores the historical context in which the claimed user contributions were made, including significant under-recovery by the State (T [329] – [326] CAB 82 – 84) (AS [64] – [65]). Without this context, it is not even possible to characterise a payment by a user as a “user contribution”.

Dated: 7 September 2021



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