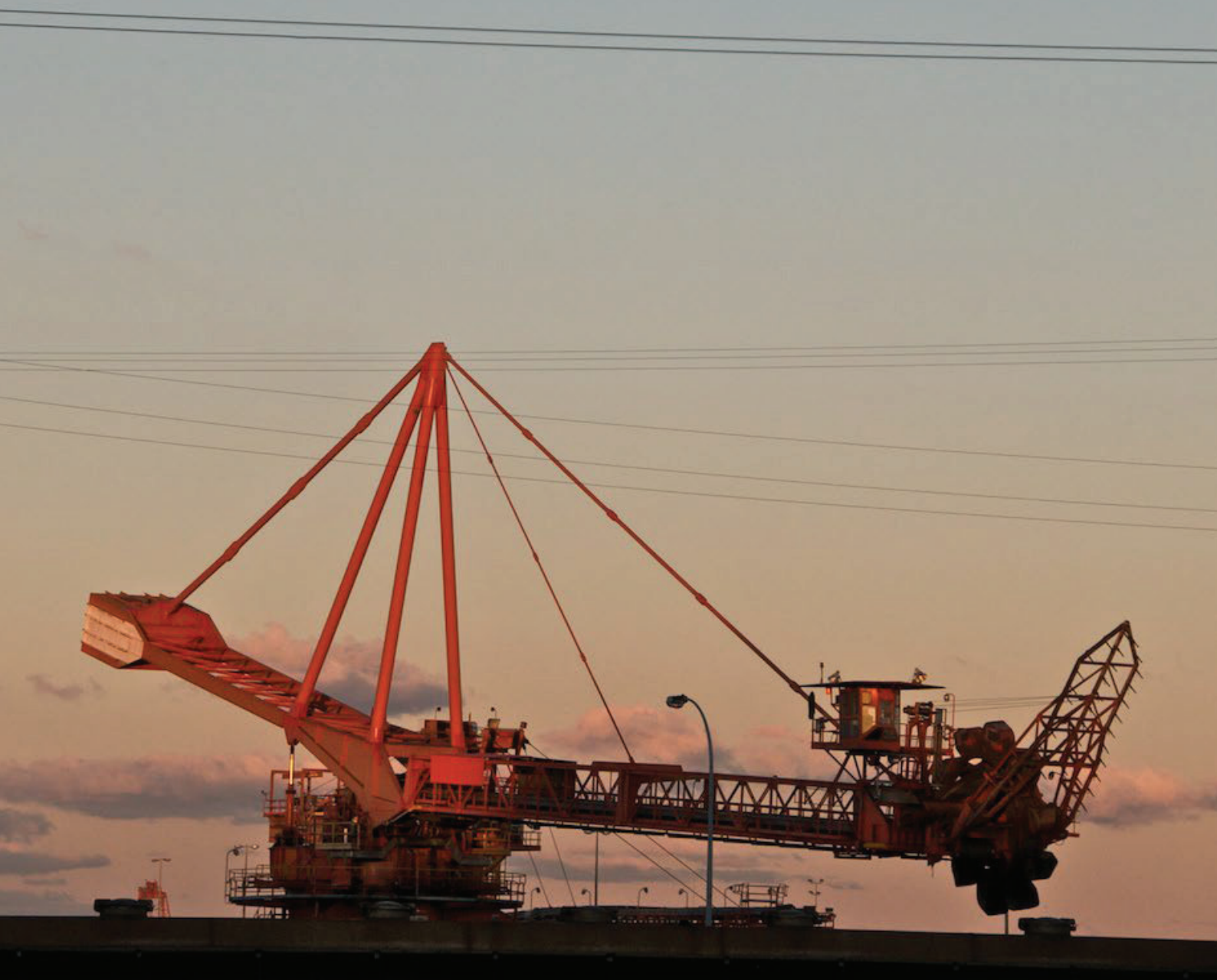
The meaning of 'access to services'

Elizabeth Lambert reports on *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39



Coal loader at Port Waratah in Newcastle

The High Court has made unanimous findings on the construction of Pt IIIA of the *Competition and Consumer Act 2010* (Cth) (the Act), most notably ss 44V, 44X(1) and 44ZZCA. The case considered the scope and who can negotiate the amount of a charge payable for use of a privately managed port's facilities, and whether such a charge for the use of privatised infrastructure should be calculated taking into account the historical works undertaken by the state in creating shipping channels.

Background

Since 2014, Port of Newcastle Operations Pty Ltd (PNO) has been the lessee and operator of the Port of Newcastle, under the *Ports and Maritime Administration Act 1995* (NSW) (PMA Act). The practical effect is that PNO controls the use of the port's loading berths and shipping channels.

By operation of the PMA Act, PNO can fix and recover a 'navigation service charge' (NSC) for the use of the port's facilities. It is imposed by reference to the gross tonnage of a vessel, on each entry of the vessel to the port: PMA Act s 50. It is payable by the vessel's 'owner', which includes on a person's own behalf or on behalf of another: PMA Act s 48.

Glencore Coal Assets Australia Pty Ltd uses the port to export its coal, generally using ships that are contracted or owned by the purchasers of the coal whereby the buyer bears all shipping and subsequent costs (known as 'free on board' or FOB).

In 2015, PNO increased the NSC by over 40 per cent, leading Glencore to notify the Australian Competition and Consumer Commission (ACCC) of a dispute, which was determined in 2018 by reducing the charge set.

PNO sought review of that determination by the Australian Competition Tribunal, who found in its favour.

There were two issues before the tribunal, which were in turn ultimately before the High Court:

1. Regarding the scope of the charge, did Glencore have the right to negotiate about the charge when it uses FOB and did not have a contract with the ship's owner or charterer?

2. The amount of the charge, including whether one of the components on which the charge should be calculated, be reduced to account for the historical works undertaken by the state in creating the shipping channels.

On appeal, the Full Court of the Federal Court found that the tribunal's reasoning on both issues was affected by errors of law.

The High Court unanimously found that the Full Court was wrong in finding an error by the tribunal in determining the amount of the NSC but agreed that there was an error by the tribunal in relation to its scope: at [83].

This decision appears to be of the rare variety where it is, on balance, a draw.

The scope of the charge

The tribunal found that the scope of its determination of the dispute was confined to circumstances where Glencore had an element of control over the shipping vessel using PNO's service, excluding circumstances where Glencore sold its coal free on board. The High Court held that this was in error, and upheld the judgment of the Full Court on this issue.

The resolution of this issue turned on the construction of multiple sections contained in Pt IIIA of the Act, particularly the meaning of 'access', which appears in the part's heading and is undefined.

The court referred to the definition of 'access' included in the COAG *Hilmer Report*, as meaning 'the ability of suppliers or buyers to purchase the use of essential facilities on fair and reasonable terms. An essential facility is a transportation or other system which exhibits a high degree of natural monopoly … [which] becomes an essential facility when it occupies a strategic position in an industry such that access to it is required for a business to compete effectively in a market upstream or downstream': at [19].

Section 44S of the Act confers a right to notify the ACCC of an access dispute, having the effect of commencing an arbitration before the ACCC. Pursuant to s 44V of the Act, the ACCC is required to make a written final determination 'on access by the third party to the service'.

Even when selling by free on board, the High Court found that Glencore wants 'access' to the service offered by PNO within the meaning of Pt IIIA of the Act, on the basis that it 'wants to ensure that it can continue to enjoy the economic benefit that it unquestionably gets from the ability of ships, loading and carrying the coal that it sells to overseas buyers and to use the shipping channels and berths at the port. It follows that Glencore is a 'third party' within the meaning of Part IIIA, and therefore had a right to negotiate the amount of the NSC with PNO. The court held that it was for the tribunal on remitter to determine when and how the NSC is payable by Glencore to PMO, including in circumstances where the coal is sold free on board: at [111].

The amount

This court noted that this issue was 'relatively narrow and highly technical': at [61]. The parties were agreed that the appropriate methodology to determining the NSC was a 'building block model' (BBM), which was to be based on a 'maximum allowed revenue' (MAR) consisting of a number of components, being the building blocks. The main building block of the MAR was a return on capital, to be calculated by applying a weighted average cost of capital to the value of the regulated asset base (RAB). The RAB is calculated using a methodology called 'depreciated optimised replacement cost' (DORC).

The dispute between the parties concerned whether the RAB, arrived at using the DORC methodology, should be adjusted downwards, thereby reducing the MAR. Glencore's proposition in support of this was that, in doing so, the NSC would be taking into account the historical circumstances whereby the NSW Government had previously made investment into creating the shipping channels and associated public works, which were now used by PNO to provide the service. It was argued that the service was therefore partly funded by 'user contributions' in the form of levies and charges imposed by the state on the port's users.

While the ACCC thought such an adjustment downward was appropriate, the tribunal declined to do the same, which was in turn overturned by the Full Court. The High Court held that, on this issue, the Full Court had erred in its construction of ss 44X(1) and 44ZZCA, when disapproving of the tribunal's approach. The court determined that the tribunal was not required to do more on this issue than what the tribunal in fact did: at [122].

Conclusion

The result is that the Full Court's orders remitting the matter to the tribunal stand, however, the redetermination is contained to the scope of the NSC only. This decision appears to be of the rare variety where it is, on balance, a draw. BN