COMPETITION & REGULATION UPDATE

OPEN SEASON ON ACCESS – IMPLICATIONS OF DECLARATION OF THE PORT OF NEWCASTLE

8 JUNE 2016

On 31 May 2016, the Australian Competition Tribunal granted Glencore's appeal and declared a service involving the use of the shipping channel at the Port of Newcastle. The Tribunal's reasons radically alter the application of access law in Australia, as compared with the NCC's approach, making it far easier for access seekers to have monopoly infrastructure declared. Declaration confers on access seekers the ability to obtain access to the infrastructure on terms set by the ACCC following an arbitration.

KEY IMPLICATIONS

The decision is of particular concern to the owners, and users, of monopoly infrastructure. The decision:

- sets the hurdle for declaration criterion (a) to the lowest possible level with the result that it will be easier for access seekers to obtain declaration of a service provided by monopoly infrastructure;
- effectively removes the ability for infrastructure owners to reduce the risk of declaration by providing access on reasonable terms; and
- increases the prospects of the terms of access for monopoly infrastructure being set by ACCC arbitration (which occurs where declaration is granted and access negotiations fail).

The decision may, however, be short-lived as it is subject to appeal and the Government has proposed changes to the relevant criterion.

OVERVIEW

On 31 May 2016, the Australian Competition Tribunal (**Tribunal**) declared a service involving the use of the shipping channel at the Port of Newcastle (**Service**).

This decision (**Decision**) has far reaching implications for access law in Australia. It makes it far easier for access seekers to obtain declaration of a service provided by monopoly infrastructure than had been the case under the NCC's approach. For infrastructure owners, it increases the threat of declaration.

In short, the Decision suggests criterion (a) will be satisfied in all cases where the service is a necessary input to compete in a dependent market.

Overview of criterion (a)

The Minister may declare a service if satisfied of five criteria set out in s44H(4) of the *Competition and Consumer Act* (Cth) (**CCA**). The first of those criteria (**criterion (a)**), has been the subject of ongoing uncertainty.

Criterion (a) is that:

> access (or increased access) to 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

Tribunal adopts Sydney Airport test

In this Decision, the Tribunal concluded that it was required to apply the approach described, arguably in *obiter dicta,* by the Full Federal Court in the 2006 Sydney Airport case. In that case, the Full Court, adopting a submission from Virgin, stated:

> All s 44H(4)(a) requires is a comparison of the future state of competition in the dependent market with a right or ability to use the service and the future state of competition in the dependent market without any right or ability or with a restricted right or ability to use the service.

Criterion (a) hurdle set to level zero

In consequence, this Decision sets the hurdle for criterion (a) at the lowest possible level.

In essence, for a service where there is no statutorily enforceable right to access, the Tribunal has reduced criterion (a) to a test of whether the service is a necessary input in order to compete in the dependent market. That test is likely to be met for services provided by a large number of facilities, including gas pipelines, ports, airports and railways.

By way of example, the Tribunal found, in this case, that criterion (a) was satisfied simply because, in order to compete in the market for export of coal from the Hunter Valley, it was necessary to have access to the service (ie use of the shipping channel).

Counterfactual analysis ignores the status quo

In its 2013 review of the national access regime, the Productivity Commission recommended the NCC approach of comparing the state of competition in the dependent market under the status quo against the state of competition where access is granted on reasonable terms and conditions. That approach arguably gives meaning to the words "(or increased access)" in the statute.

The effect of the Decision is to preclude comparison with the terms on which usage or access is already being provided voluntarily.

Thus, in this case, the Tribunal did not need to consider the terms upon which Port of Newcastle Operations Pty Ltd (**PNO**) was already providing the service to Glencore Coal Pty Ltd (**Glencore**).

Requirement for promotion of competition sidelined

The significance of the Tribunal's interpretation of the counterfactual analysis required by criterion (a) is underlined by the impact it has on the assessment of the "promotion of competition" element of criterion (a).

In this case, the Tribunal:

- accepted the Minister's conclusion that the dependent markets are workably competitive in the status quo; and
- concluded that the increased access sought by Glencore would not promote a material increase in competition in the coal export market (as compared to the status quo);
- but nevertheless declared the Service.

By way of contrast, the Tribunal concluded in the 2010 *Re Fortescue Metal Group* matter that Criterion (a) would not be satisfied if the dependent market was already effectively competitive. In that case, heard 4 years after the Sydney Airport case, the Tribunal said:

> The position we take is that if a dependent market is already effectively competitive, intervention is not called for. That is, we read criterion (a) as having no application to a market which is effectively competitive.

The phrase "promote a material increase in competition in at least one market" sits at the very heart of criterion (a).

Commentators have suggested that Part IIIA access under the *Competition and Consumer Act 2010* (Cth) (**CCA**) was only intended to address circumstances where the owner of a monopoly facility also competes in the relevant dependent market. ACCC chairman Rod Sims recently observed that the threat of regulation under Part IIIA, and the National Gas Law (**NGL**), is not acting as an effective deterrent to monopoly pricing in circumstances where the infrastructure owner is not vertically integrated for example, many gas pipeline owners are not vertically integrated.'

Implications of the Decision

The Decision:

- significantly increases the prospect that applications for declaration of certain monopoly infrastructure will be successful. As such, it creates opportunities for access seekers and increases the risk of declaration for the owners of monopoly infrastructure;
- effectively removes any ability for infrastructure owners to reduce the risk of declaration by providing access on reasonable terms. If the decision stands, it may impact access prices, and investment in essential infrastructure projects;
- increases the risk, for infrastructure owners, of an ACCC arbitration occurring – that is, the service provider losing control over the setting of terms and conditions for access to its infrastructure; and
- potentially removes any need for regulatory change in the gas industry. Criterion (a) in the CCA is similarly worded to criterion (a) in the NGL's coverage criteria. In April 2016, the ACCC recommended that the pipeline coverage criteria be replaced with a test that was more easily satisfied for a pipeline with substantial market power. That recommendation was based on a perceived restriction in the scope of the coverage criteria arising from criterion (a) which may no longer exist.

Possible appeal or legislative change

The Decision remains subject to appeal.

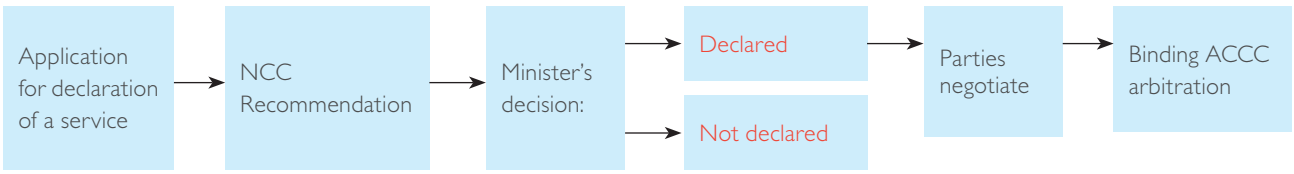
In addition, the Decision could be overtaken by legislative change. As the Decision is contrary to the Australian Government's most recent position, there remains a possibility that legislative change will overtake this decision. On 24 November 2015, the Australian Government undertook to develop exposure draft legislation to shift the focus of criterion (a) to a:

> comparison of access under the current situation versus access on reasonable terms and conditions through declaration

In doing so the Government supported the recommendation of the Productivity Commission in its 2013 review. However, the upcoming election means it is unclear whether an exposure draft will ever be completed, released or implemented.

Implications of declaration

The implications of declaration are significant. Once declared, any access seekers (not just the party that applied for declaration) have a right to negotiate access terms and conditions with the service provider. If those negotiations fail, access seekers have a right to a binding arbitration under which the ACCC will determine the terms upon which access is provided. We summarise this process in the flow chart below.



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