



Aurizon Network Pty Ltd v Glencore Coal Queensland Pty Ltd & Ors [2018] QSC 613

Judgment Notes
27 June 2019

Justice Jackson handed down his decision on Aurizon Network's proceedings against Glencore Coal Queensland Pty Ltd and five other defendants.

Background

The plaintiff in this matter, Aurizon Network Pty Ltd, is a subsidiary of Aurizon Holdings Limited, a listed company that is Australia's largest rail freight operator. Aurizon Network Pty Ltd is the lessee of the land for the rail corridor and operator of the network and associated rail infrastructure known as the Central Queensland Coal Network, which is Australia's largest export coal rail network. The plaintiff entered into a contract with each of the defendants styled as the "Wiggins Island Rail Project Deed (2011)" ("WIRP Deed"). The WIRP Deeds concerned the plaintiff funding and undertaking construction of works to upgrade the capacity of the plaintiff's infrastructure network. The purpose of the upgrade was to transport coal from the defendants' mines to a new coal ship terminal, called the Wiggins Island Coal Export Terminal.

The plaintiff sought to establish the liability of each defendant for amounts payable under the WIRP Deed, specifically the "WIRP Fee". The dispute arose due to the defendants giving notice to the plaintiff under a provision of the WIRP deed, which if held to be valid, would have the effect of reducing the defendants' liability to pay the WIRP Fee to nil.

The defendants' case relied on the fact that they notified the plaintiff prior to the First Milestone Target Date under a provision of the WIRP Deed. Notification allowed the defendants to cease being a 'Customer Segment', which transferred the burden of the WIRP Fee onto any remaining Segment Customers. As a consequence, the burden was thrown onto few Customers in what the Court regarded as a 'superficially bizarre game of musical chairs.'

The plaintiff submitted that the defendants were not entitled to give the notice. In support of this submission, Aurizon Network firstly contended that on the proper construction of the provision, a notice may not be given for a Customer Segment that is necessary to enable the plaintiff to provide "Aggregate Access Rights" for the relevant defendant or there is an implied term of the WIRP Deed to the same effect. Second, Aurizon Network contended that there is an implied term of the WIRP Deed that the Customer has a duty to act in good faith towards and deal fairly with the plaintiff in respect of giving notice under the provision. The third contention was that the First Milestone Target Date had already occurred, which in effect, ended any entitlement to give notice under the provision.

Judgment

Justice Jackson ordered that each of the notices given by the defendants under the provision of the WIRP Deed were invalid and of no operative contractual effect. In reaching this conclusion, his honour found that the plaintiff's case must succeed on the

second ground, because the defendants breached an implied term of the contracts to act in good faith towards and deal fairly with the plaintiffs in respect of giving notice under the provision of the WIRP Deed. In his honour's judgement, consideration was also given to Divisions 4 and 5 of Part 5 of the Queensland Competition Authority Act 1997 (Qld). These divisions impose obligations upon access providers to negotiate in good faith with an access seeker to provide appropriate access to the declared service. Moreover, the Court had regard to the admissibility of evidence of extrinsic facts in aid of the construction of the WIRP Deeds.

The judgment can be read [here](#).

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