HIGH COURT OF AUSTRALIA

Public Information Officer

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ASCIANO SERVICES PTY LTD v CHIEF COMMISSIONER OF STATE REVENUE

A rail freight operator was liable to pay duty on the lease of rail lines in New South Wales as the lease gave it the right to use the land occupied by railways, the High Court of Australia held today.

On 1 July 1996, a rail access agreement was entered into between National Rail Corporation Limited and Rail Access Corporation (RAC). National Rail was later called Pacific National (ACT) Limited. It began legal proceedings under that name but before the High Court heard its appeal its name changed to Asciano Services. The Court continued to refer to it as Pacific National. The agreement granted to Pacific National access rights to railway lines and associated infrastructure which formed part of the NSW rail network and which were owned by RAC. Land on which the lines and infrastructure stood was owned by the State Rail Authority (SRA). The RAC's powers were contained in Schedule 6A of the NSW *Transport Administration Act* (TAA). Clause 5(1) of the Schedule provided that a party to an access agreement was authorised to have access to the relevant rail infrastructure facilities and the land on or in which they were situated. Under section 164A(b) of the NSW *Duties Act*, a lease attracting duty included an agreement by which a right to use land was conferred on or acquired by the lessee. The Chief Commissioner of State Revenue assessed Pacific National as liable for duty of $567,283.85 plus interest, based on $162 million it paid under the lease between 1 July 2000 and 31 December 2003.

An objection to the assessment was disallowed and Pacific National sought a review in the NSW Supreme Court. Pacific National argued that no right to use land was granted by RAC through the access agreement and that the right was derived from the TAA. It submitted that all the RAC did under the agreement was to confer the right to use the physical items that comprise the NSW rail network, not the land itself. The Chief Commissioner argued that the rail track, cuttings, drainage works, earthworks, tunnels, bridges, track crossings, service roads and buildings were all land. Justice Ian Gzell revoked the assessment. He held that the rights in utilities affixed to or embedded in soil did not comprise land or amount to interest in land. Justice Gzell held that the vesting of the facilities in the RAC carried no interest in land and it therefore had no legal right to grant a right to use land. The Court of Appeal allowed an appeal. It held that the access agreement was one by which a right to use land was conferred or acquired so the duty was levied lawfully. Pacific National appealed to the High Court.

The High Court unanimously dismissed the appeal and held that the agreement was subject to duty. The TAA provided for access to and consequential use of land by others, including the RAC for purposes connected with the rail infrastructure facilities. Pacific National argued that the legal source of the right to use land, in association with the rail lines and infrastructure facilities, was Schedule 6A, clause 5(1) of the TAA. The Court held that Pacific National acquired a right to use the SRA's land because it was a party to an access agreement. The Court said that it was not correct to describe clause 5(1) of the TAA as the legal source of the right to use the land and diverted attention from the question which arose under section 164A(b) of the *Duties Act*, namely whether the agreement was one by which the right was acquired. The Court held the lease was such an agreement. Pacific National had no such right prior to its entry into the agreement. It was the making of the agreement and the grant of permission under it by which Pacific National acquired the right provided in clause 5(1).

- *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.*

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