AUSTRALIAN COMPETITION TRIBUNAL

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18 December 2009

Mr John Hawkins
Secretary
Senate Standing Committee on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

By email: economics.sen@aph.gov.au

Dear Mr Hawkins

Re: Inquiry into Trade Practices Amendment (Infrastructure Access) Bill 2009

Thank you for your invitation to make a submission on the Trade Practices Amendment (Infrastructure Access) Bill 2009. The attached submission has not been discussed with other members of the Tribunal. It only reflects my personal views.

I would be grateful if you could inquire of the Standing Committee whether it would be assisted in its task if I were to speak to the Committee at its hearing.

If you have any questions in relation the attached submission, I can be contacted in chambers on 03 8600 3643.

Yours sincerely

Ray Finkelstein

Submission to the Senate Standing Committee on Economics on the Trade Practices Amendment (Infrastructure Access) Bill 2009

Introduction

1. This submission relates to the Bill's proposed introduction of 'limited merits review' by the Australian Competition Tribunal (**Tribunal**). It does not consider other aspects of the Bill.

2. Subject to a few exceptions, the Bill essentially requires the Tribunal, in reviewing a decision, to only have regard to material that was before the original decision-maker (proposed section 44ZZOAA(7)[1]). The Tribunal powers to seek clarification of that material or additional information are limited.

3. It is suggested that the proposed limited merits review is too restrictive. It would be preferable to (i) provide a more flexible and practical mechanism for the Tribunal to seek information in addition to that which was before the original decision-maker and (ii) allow the Tribunal greater discretion to conduct proceedings in a more streamlined fashion. Specific recommendations are set out below.

Background

4. Before considering the proposed limited merits review for the Tribunal, it is necessary to outline some key features of the access regime under Part IIIA of the *Trade Practices Act 1974* (Cth) (**Act**).

5. Part IIIA is concerned with access to facilities which are of national significance. It has been traditionally understood to apply to certain key infrastructure industries that are often, but not always, former public monopoly enterprises. The main examples are electricity, water, gas and railways.

6. The process leading to access is sometimes described as a two-stage process.

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[1] Bill, Schedule 1, Part 1, Item 70.

a. Stage one involves 'declaring' a service provided by the relevant facility. A declaration may be only be made if certain criteria are satisfied. Broadly, these criteria require the facility to be of national significance, and for access to the facility to be safe, to promote competition in related markets, and to be in the public interest. The declaration process is initiated by a person requesting the NCC to make a recommendation about whether a service should be declared. Before making a recommendation, the NCC will ordinarily conduct a detailed investigation and may seek public submissions: section 44GB. Upon receiving the NCC's recommendation, the Minister decides whether or not to declare the service. The Tribunal has power to review the Minister's decision. The review is a reconsideration of the matter, not an appeal confined to identifying errors of fact or law: section 44K. At the review the parties are entitled to place before the Tribunal information that was before the Minister, as well as new information.

b. Stage two comes into operation after there has been a declaration. The declaration gives an access seeker an enforceable right to negotiate access to the service. If the access seeker and the owner of the facility are unable to agree on terms of access, the ACCC has power to arbitrate their dispute: section 44V. A party dissatisfied with the outcome of an arbitration may apply to the Tribunal to review the ACCC's decision: section 44ZP. Once again, the review requires the Tribunal to reconsider the matter afresh.

7. At both stage 1 and 2, a range of complex economic, technical, commercial and social issues will typically arise. To some extent, such complexity is unavoidable. The matters which the statute requires to be considered at each stage are rarely straightforward. As a result, in most cases the parties will, in addition to presenting the relevant facts, rely on the opinion of experts, especially economists. In one recent case before the Tribunal, expert evidence was required from economists, geologists, engineers and computer modellers, all of whom had differing views. The complexity of the issues dealt with by the witnesses should not be under-estimated.

8. When considering how the Part IIIA process can be improved, it is important to recognise that:
   - because of the national significance of the facilities involved, decisions about access usually have significant economic (and other) consequences;
   - the issues raised during the process are often complex and require expert evidence;

- even without undue delays, it may take a considerable time for the Part IIIA process to play out fully.

Proceedings before the Tribunal

9. The Tribunal is constituted by a Federal Court judge and two lay members selected from a pool of suitably qualified lay members: section 37. The lay members must have knowledge of, or experience in, industry, commerce, economics, law or public administration: section 31(2).

10. On a review the moving party is entitled to a hearing. The rules of procedural fairness permit the parties both to call evidence and test the evidence which is put against them. Subject to an overriding duty of fairness, the Tribunal exercises control over a party's ability to run its case as it sees fit. In particular, by section 103, the procedure of the Tribunal is, subject to the Act and the regulations, within the discretion of the Tribunal. The Tribunal is able, to some extent, to use this broad discretion to streamline proceeding. However, the precise ambit of the power is unclear, and there is always scope for a party to challenge its exercise.

Proposed change to proceedings

11. The Bill proposes to make a fundamental change to the way the Tribunal undertakes a review. As noted already, subject to two exceptions, the Tribunal will only be entitled to have regard to information that was before the original decision-maker. The two exceptions are as follows. First, the Tribunal may make a written request that a party provide it with particular information "for the purpose of clarifying information before the original decision-maker": proposed section 44ZZOAA(4)[2]. Second, the Tribunal may make a written request that the ACCC or the NCC (as relevant) provide it with specific information or make a specific report: see proposed section 44ZZOAA(7)(iii)-(iv)[3]. In each case the request must be in writing, served on all parties and published.

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[2] Bill, Schedule 1, Part 1, Item 70

[3] Bill, Schedule 1, Item 70. Section 44ZZOAA provides that the Tribunal may have regard to information received through requests to the ACCC or NCC; the power to make such requests is separately provided for under the Bill eg proposed section 44K(6).

12. The Explanatory Memorandum recognises (EM para 1.117) that despite the Tribunal's power to request information the review will largely be limited to the information before the original decision-maker.

13. The introduction of limited merits review is thought to confer significant benefits. The object is to overcome the inordinate time often taken for access disputes to be resolved. If the time taken is reduced so also will be the costs.

14. No doubt, it is essential for there to be efficient procedures for the timely resolution of access disputes. What is proposed by the Bill, however, will seriously detract from the Tribunal's ability to make correct decisions.

Problems with proposed changes

15. Past experience with limited merits review (eg under Part XIC which deals with access to telecommunications services) shows that the process suffers from several deficiencies. They include, but are not limited to, the following:

    a. Circumstances relevant to the making of a decision often change, and sometimes change dramatically. Unless adequate provision is made in the legislation, the Tribunal must (eg under Part XIC) assume the existence of facts that no longer exist and ignore facts that have come into existence since the decision under review was made.

    b. There will be occasions where the parties have not referred to all the material facts. That may be evident to the Tribunal, it being a body made up of experts. Again, absent an appropriate power, the Tribunal does not have the ability to gather additional material facts.

    c. In many, if not all, cases the Tribunal will have before it conflicting evidence regarding material facts, as well as conflicting theories from experts. The Tribunal is not able properly to test the facts and investigate the conflicts without being able to question the witnesses directly at a hearing.

16. The bottom line is that, in most cases, the Tribunal needs the ability to (i) receive additional evidence in a flexible and timely manner and (ii) ask questions of many witnesses.

17. While limited merits review does save time, if the limitations are too strict there is a real risk that it will result in erroneous decision-making.

18. The Bill attempts to address the inevitable shortcomings of limited merits review by (i) giving the Tribunal power to request clarifying information; and (ii) authorising the Tribunal to request the ACCC or NCC to provide it with information. These powers fall far short of overcoming the shortcomings of limited merits review for several reasons.

19. The first problem is that the nature of the additional material which the Tribunal can request under the proposal is too confined. The Tribunal can merely ask for 'clarification' (a nebulous concept) from a person who provided information to the original decision-maker. The Tribunal may also request the ACCC or NCC to provide additional information. This is inefficient – it forces the Tribunal to 'go through a middleman' when it would be quicker to directly seek the information from the relevant individual. In any event, the ACCC or NCC may be unable to obtain the requested information. At a minimum, the Tribunal should be able to request *any* additional information (and not just clarification) directly from the party who provided the information to the original decision-maker.

20. A second, related, problem is that under the proposal the Tribunal can only request information from either the person who provided information to the original decision-maker, the NCC or the ACCC. There will be occasions where the Tribunal needs to seek information from other individuals (for example, a particular independent expert). The persons from whom the Tribunal can seek further information should not be limited.

21. The third, and perhaps most significant, problem is that the proposed process for the Tribunal to seek further information is impractical. The process involves making a formal written request for further information, notifying various parties of this request and publishing a notice of the request. The proposal assumes that the Tribunal is able to identify precisely what additional information it requires so that it can be specified in its written notice. In reality the process of identifying the required additional information is the result of questions the Tribunal puts to the parties and their witnesses and the answers they give to those questions. Put another way, the

process is an iterative one. Often it will only become apparent during the course of a hearing that further information is required, once a party explains its case to the Tribunal and goes over the evidence which supports that case. It is quite unrealistic to expect the Tribunal to draft, circulate and publish questionnaires during the course of a hearing and have the information provided while the hearing is on-going. If the questionnaire process is to be applied at all it will inevitably cause significant delays in the hearing.

22. A related problem is that the proposal does not allow the Tribunal to receive oral evidence from witnesses at the hearing. In most instances it will be far simpler and more efficient for a Tribunal to question a witness in person rather than through written correspondence.

Addressing the problem of delays

23. Apart from the inevitable appeals to courts, a key cause of delay under the current Part IIIA regime is that when a decision is reviewed by the Tribunal there a few limits on the amount of new material parties can file, or the number of witnesses the parties can call. The Tribunal may impose limits to some extent - and is increasingly seeking to impose such limits - but much remains in the parties' control. The problem is not so much that the Tribunal considers new evidence, but rather that the parties are relatively unconstrained in putting forward that evidence.

24. Limited merits review removes the delay associated with parties adducing new evidence for the Tribunal hearing. It does not follow, however, that the Tribunal itself should be denied the ability to request and receive further evidence to supplement material which went before the original decision-maker. As mentioned, decisions made under Part IIIA have far-reaching consequences. The consequence of an erroneous decision has the potential to cause significant loss to both individuals and the community as a whole. It is important that the Tribunal gets its decisions right. In almost all cases, this will require the Tribunal being able to seek further information in a flexible and timely manner.

25. Enabling the Tribunal to seek supplementary information will not lead to great delays. If the matter is left in the hands of the Tribunal rather than the parties, any request for additional information will be targeted, confined to material important to the decision and will usually be produced at the hearing. Even in cases where the information is requested before the hearing, the normal practice will be to impose time limits.

Recommendation

26. It is suggested that the Bill should provide that:

a. In reviewing a decision, the Tribunal may have regard to information before the original decision-maker with a power to obtain any further information which the Tribunal considers is material to the review;

b. The Tribunal may exercise the power to obtain further information at such times and in such manner as the Tribunal determines;

27. In exercising a power to seek additional information, the Tribunal must have regard to section 103(1)(b) of the Act, which provides that:

> *103(1) In proceedings before the Tribunal:*
>
> ...
>
> *(b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and the proper consideration of the matters before the Tribunal permit*

Justice Ray Finkelstein, President
Australian Competition Tribunal

18 December 2009