# Chapter 5

## Role of regulators and the designated Minister

5.1 The bill proposes amendments relating to the role of the NCC, ACCC, Tribunal, and the designated Minister.

5.2 Witnesses at the hearing gave evidence relating to the current and proposed roles of the regulators. The various attitudes of witnesses reflects their approach to the issue of third party access, although most shared the opinion that further and broader reforms are necessary.

### Support for further power to be given to the Tribunal

5.3 The Minerals Council of Australia, Rio Tinto, Justice Finkelstein and Professor Baxt indicated through submissions and witness testimony that a transfer of power to the Tribunal would be of greater benefit to the decision-making process, for various reasons.

5.4 The Minerals Council of Australia, in its submission, characterised the Tribunal as 'an essential forum for testing facts and the regulatory process'.[1] It considers that the Tribunal is the only forum where:

> … assertions by interested parties can be tested through a primary evidentiary process and properly informed and considered findings of fact can be made and tested against the criteria I referred to earlier. Such a process cannot be undertaken by the National Competition Council.[2]

5.5 Under the amendments, the onus of testing primary evidence will fall on the ACCC at the point of their arbitration, which is much later in the process.[3] The Minerals Council is opposed to restrictions regarding the Tribunal's role in testing evidence.

5.6 The Minerals Council is concerned that a six month expected period is too short for Tribunal decisions, given the amendments and restrictions.[4]

5.7 As the Tribunal consists of one of four Federal Court judges appointed to the Tribunal and two lay members with experience in a relevant administrative section or

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1 Minerals Council of Australia, *Submission 8*, p. 4.

2 Mr Mitchell Hooke, *Proof Committee Hansard*, 5 February 2010, p. 4.

3 Mr Mitchell Hooke, *Proof Committee Hansard*, 5 February 2010, p. 13.

4 Mr Mitchell Hooke, *Proof Committee Hansard*, 5 February 2010, p. 4.

industry, the Tribunal has a stronger legal standing than the NCC and ACCC.[5] Rio Tinto stated at the hearing that the ability to give evidence:

> …under oath in a process that is akin to a court really places a discipline on all parties that is absent in other aspects of the process.[6]

5.8 Rio Tinto, in both its submission and evidence given at the hearing, strongly oppose restricting the role of the Tribunal. Rio considers the Tribunal to be the best forum for parties involved in access cases:

> The specialist Tribunal, constituted by a judge, an economist and an experienced business person, is able to make this assessment in a way that the Council and the Minister simply cannot. Recourse to the Tribunal is the one saving grace in Part IIIA…[7]

5.9 At the hearing, Rio warned of potential deterrence of future investment:

> The proposed limit on the tribunal, both in terms of time and material that it may consider, runs the very real risk of undermining the process and yielding a misconceived outcome. The result will be even less confidence in the process than currently exists, and investment in key facilities that could be subjected to part IIIA will therefore be further discouraged.[8]

5.10 Justice Finkelstein expressed concern over the lack of flexibility in receiving evidence, the restrictions on receiving additional evidence and material as well as the sources for the evidence.[9]

5.11 Professor Bob Baxt, in his personal submission, suggested that direct applications be made to the Tribunal in order to streamline the process, while the NCC acts as amicus tribunal.[10] At the hearing he stated his support for the role of the Tribunal:

> … I do not trust regulators to be the best judges of these issues. I think the Tribunal with the judge and the appropriate personnel there are the best people to judge these issues.[11]

### *Potential issues with transfer of power to the Tribunal*

5.12 The cost of the Tribunal stage of the decision-making process may present a prohibitive problem for potential access seekers. While large mining companies may

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5 Justice Finkelstein, *Submission 3*, p. 3.

6 Mr Mark O'Neill, *Proof Committee Hansard*, 5 February 2010, p. 64.

7 Rio Tinto, *Submission 6*, p. 3.

8 Mr Mark O'Neill, *Proof Committee Hansard*, 5 February 2010, p. 64.

9 Justice Finkelstein, *Submission 3*, p. 5.

10 Professor Bob Baxt, *Submission 1*, p. 1.

11 Professor Bob Baxt, *Proof Committee Hansard*, 5 February 2010, p. 103.

advocate the role of the Tribunal, smaller industry groups may be deterred from applying for access.

5.13 Fortescue Metals Group gave evidence at the hearing into the expenses involved in progressing through the Tribunal stage:

> In terms of going to the National Competition Council, the cost to Fortescue would be measured in tens or potentially hundreds of thousands of dollars. Most of the work was done in house. As soon as we go to the tribunal it starts being measured in millions of dollars, with massive expensive legal fees, which is simply not necessary.[12]

## The role of the NCC against the Tribunal

5.14 The role of the NCC in the initial stage of the process, for smaller groups, is essential to provide an assessment of whether the case is going to be economically viable to pursue successfully and efficiently. FMG expanded on its concern for smaller groups:

> Keep as much in the National Competition Council as you can so that small access seekers who do not have the sort of bankroll that Fortescue was able to put to this have a chance of getting access to infrastructure. Otherwise you are just switching it off for any small applicant who simply cannot afford the legal costs involved in trying to get access to infrastructure.[13]

5.15 This issue was also addressed by Treasury in 2007:

> Even if access is technically available, there may be an imbalance in bargaining power between the infrastructure owner and potential third party users, influencing the terms and cost of access and making entry potentially prohibitive for competitors.[14]

5.16 At the hearing the NCC described the use of QCs at the Tribunal as a 'lawyers' picnic'[15], and stated that as a general rule the NCC prefers to be involved with the parties and resolve disputes through its own process.[16]

5.17 The NCC stated at the hearing that the proposal of Professor Baxt, in which cases go directly to the Tribunal, would be problematic. In particular, it would remove the government from the declaration process, which would be a 'significant step'.[17]

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12 Mr Julian Tapp, *Proof Committee Hansard*, 5 February 2010, p. 89.

13 Mr Julian Tapp, *Proof Committee Hansard*, 5 February 2010, p. 89.

14 *Australian Government National Competition Policy Report, 2005-07*, 2007, Chapter 4.

15 Mr John Feil, *Proof Committee Hansard*, 5 February 2010, p. 18. Similarly Professor Bob Baxt described the current legislation as 'a lawyer's dream and a businessman's nightmare', *Proof Committee Hansard*, 5 February 2010, p. 100.

16 Mr John Feil, *Proof Committee Hansard*, 5 February 2010, p. 18.

17 Mr John Feil, *Proof Committee Hansard*, 5 February 2010, p. 18.

***Committee view***

5.18 Once the Tribunal completes its review any party may proceed to take the case to the High Court. It would be of concern to the committee if the Tribunal were to act as a barrier for smaller access seekers due to the significant costs associated with a Tribunal review. This ultimately harms competition in Australia as it denies the right to seek access. To paraphrase the Gladstone quotation at the start at this report, 'justice unaffordable is justice denied'. The committee believes the NCC play a crucial role in providing smaller access seekers with the opportunity to test the evidence of an access application in the affordable NCC setting before they proceed to the Tribunal and then possibly the High Court for a determination.

## Duplication of infrastructure

5.19 Declaration criterion (b) states that infrastructure must be uneconomically duplicable to be declared. The NCC supports the view that duplication of infrastructure relates to economic efficiency[18], rather than the physical possibility of duplication, as the Minerals Council does. The NCC gave evidence on the issue of duplication being economic:

> We think it is a straight economic issue that is determined by the interests of Australia as a whole… Our view is that what we are concerned about and what the act is concerned about is the national interests of Australia, and it is not in Australia's national interest to require parties, whether it is commercially viable or not, to waste billions of dollars that could be better used on other infrastructure or used elsewhere, or to put a billion-dollar barrier to entry before they can start competing in exporting iron ore.[19]

## Requests for information

5.20 Under both the current legislation and the proposed amendments, the NCC can request information under a written notice but cannot demand information be provided. Fortescue Metal Groups commented:

> I think probably the best solution to that [information asymmetry problem] is to actually give the NCC some powers to demand information from the incumbent.[20]

5.21 However the NCC themselves did not put forward a case for an expansion of their powers or further resources. They noted during the inquiry that they 'have never had difficulty in getting information we thought was relevant'.[21] Furthermore they felt that their inquiry process was sufficiently robust to enable them to make an accurate

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18 Mr John Feil, *Proof Committee Hansard*, 5 February 2010, pp. 20, 26.

19 Mr John Feil, *Proof Committee Hansard*, 5 February 2010, p. 26.

20 Mr Julian Tapp, FMG, *Proof Committee Hansard*, p. 89.

21 Mr John Feil, *Proof Committee Hansard*, 5 February 2010, p. 27.

decision. Should a matter proceed to the Tribunal this legislation still provides for them to be able to hear evidence under oath.

5.22 Treasury noted that:

> …under the new section 44ZZOAA, the Tribunal would have the capacity to seek additional information to clarify information provided to the original decision maker. The Tribunal would do so by giving a written notice to the person who provided the information, requesting the person give the Tribunal information of a kind specified in the notice. The clarifying information would be in whatever form the Tribunal considers appropriate, and may include oral submissions (see page 27 of the Explanatory Memorandum).
>
> The Bill is not intended to limit the capacity of the Tribunal to determine its own procedures. In particular, it is not intended to take away the Tribunal's ability to take evidence on oath or affirmation. Consequently, the Tribunal would not be prevented from taking evidence on oath under the amended provisions.[22]

### *Committee view*

5.23 Economic efficiency is an economic rather than a legal concept, and it can be judged effectively by the NCC, whose initial assessment of this could aid in saving the time and money of potential access seekers. To the extent that the bill means that more of the investigative work will or should be done by the NCC rather than by the Tribunal, some additional resources may need to be provided to the NCC.

5.24 The committee notes that at this stage the NCC do not believe they have any issues in getting information from various parties. Indeed this legislation should ensure that all evidence is presented to the NCC in the first stage of the process and prevent the introduction of 'new' evidence being introduced after a declaration has been made. Furthermore it should assist the Tribunal in carrying out its' function of reviewing the original decision rather than having to undertake an entirely new investigation.

## The role of ACCC arbitration

### *Excess capacity*

5.23 The ACCC has, under the present TPA, the right to order an infrastructure owner to extend a facility to allow third-party access. The issue of excess capacity was referenced by several witnesses at the hearing and regulators, including the NCC, whose view it is that the TPA allows for this order.[23] While it was the opinion of the Minerals Council of Australia that the onus of cost would be on the service provider,[24]

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22 Treasury, Answers to Questions on Notice, p. 78.

23 Mr John Feil, *Proof Committee Hansard*, 5 February 2010, p. 19.

24 Mr Mitchell Hooke, *Proof Committee Hansard*, 5 February 2010, p. 14.

the NCC made it clear that the cost is put to the seeker of access. In fact, the ACCC, according to Part IIIA section 44X(1)(a), must take into consideration the legitimate business interests of the service provider, as well as their interests.

5.24 This issue attracted a large amount of comment at the hearing, often implying that the owner of infrastructure would be prevented from using it by having to give third parties access.[25] The origin of the concern appears to stem from a flawed interpretation of the section. While several witnesses were concerned with the issue, a clearer understanding of the provision is needed.

5.25 Further amendments are not necessary at this time in regards to the issue of excess capacity.

### *Fixed principles in access undertakings*

5.26 Infrastructure service providers can submit to the ACCC for approval 'access undertakings', setting out the terms and conditions for access the provider is willing to offer. This provision, in Schedule 3, seeks to minimise regulatory risk.

5.27 The bill allows access undertakings to contain 'fixed principles' that will apply to subsequent undertakings and can only be varied with the ACCC's consent.

5.28 Witnesses at the hearing gave evidence regarding the importance of terms of access as a means of providing transparency and clarity throughout the process. The witness for FMG stated that the major concern for service providers was the terms of access.

> … what an infrastructure owner needs protection against is not declaration…What the infrastructure owner needs is protection against subsequent access terms being uncommercial. The protection must be against the terms of access and not against the right to negotiate to see if you can strike a deal to get access.[26]

5.29 There are similar provisions for gas pipelines in the *National Gas Law*.

### *ACCC 'amendment notices'*

5.30 The ACCC can currently only accept or reject an access undertaking. Under the bill, the ACCC could also issue an amendment notice, proposing amendments to the undertaking, rather than requiring a provider to submit a new access undertaking.

5.31 This amendment is purely administrative and is intended to streamline the decision-making process.

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25 For example, Mr Mitchell Hooke, *Proof Committee Hansard*, 5 February 2010, pp 9, 15.

26 Mr Julian Tapp, *Proof Committee Hansard*, 5 February 2010, p. 90.

**Recommendation 1**

**5.32 The committee recommends that the bill be passed.**

**Senator Annette Hurley**

Chair