Additional comments by Coalition senators

Introduction

While the Coalition broadly supports the Trade Practices Amendment (Infrastructure Access) Bill, it is particularly concerned about the introduction of the limited merits review. It is felt that amendments in this area could be made and encourages the Minister to consider changes in this specific area in order to maintain Australia's strong economic position when dealing with resources.

Merits review

Getting decisions wrong in the area of infrastructure of national importance will increase sovereign risk related to investment in private economic infrastructure and severely compromise operational efficiency with potential costs to the economy of billions of dollars in export income, royalties, employment, company profits and income tax. The proposal to limit the Australian Competition Tribunal's merits review power is flawed because the likelihood of a wrong decision will increase substantially if there is not an independent review with the right to test, through cross-examination, all assertions made or the right to call for and receive new evidence.

More generally, it is alarming that the scope of a judicial body be fettered on claims of supposed unwarranted delays based, not on a considered review of the law in action over time, but on conjectures about cases which radically enter new legal territory and have not yet reached their legal completion.

The Minerals Council of Australia argued in its submission and in evidence before the Committee that the stakes are high and that the changes dressed up as simply procedural are actually substantial:

> It comes down to two simple but profoundly important questions: under what circumstances should one business be required by law to make its private facilities available to another business where it is still a competitor; and what are the consequences—in terms of efficiency losses, regulatory costs and deterred investment in economic infrastructure and innovation—of getting the judgements wrong?[1]

For this reason, the evidence to the Senate Economics Legislation Committee by Justice Ray Finkelstein is significant and a cause for caution. It is unusual for a judge to make such an intervention.

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1 Mr Mitchell Hooke, Chief Executive Officer, Minerals Council of Australia, *Proof Committee Hansard*, 5 February 2010, p. 2.

> To be declared, a facility has to be of national significance. The stakes for the parties and the stakes for the nation are high. It goes without saying that it is imperative that at each level the correct decision is made insofar as that is humanly possible. I cannot but acknowledge that it does take time to resolve declaration applications. Sometimes the time seems inordinate. It no doubt seems inordinate to the business world, as much as it does to the executive arm of government, but it is necessary to understand precisely what is involved and the factors that contribute to the delay, because some of them are unavoidable. That is to say, like it or not it is a complex process.[2]
>
> … When I say 'big stakes', I am not trying to overplay what is going on. We are talking about major capital infrastructure. If things go wrong, what we are talking about is millions, if not hundreds of millions, if not worse than that in dollars being misspent or lost. It is serious stuff.[3]

Justice Finkelstein suggests the proposed limits review is too restrictive, in that the method being suggested may overcome the inherent delays with the risk of incorrect decision making:

> While limited merits review does save time, if the limitations are too strict there is a real risk that it will end in erroneous decision-making.[4]

Justice Finkelstein points towards several problems that may arise from the introduction of the Amendment Bill in its current form. In his submission, Justice Finkelstein discussed three major problems with the proposed changes to the *Trade Practices Act.*

He first discussed how the definition of what material could be clarified and provided was not properly defined and the method of obtaining additional material was inefficient:

> The first problem is that the nature of the additional material which the Tribunal is too confined.[5]
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> 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.[6]

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2 Ray Finkelstein, President Justice, Australian Competition Tribunal, appearing in a private capacity, *Proof Committee Hansard,* 5 February 2010, p. 31.

3 Ray Finkelstein, President Justice, Australian Competition Tribunal, appearing in a private capacity, *Proof Committee Hansard,* 5 February 2010, p. 36.

4 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3,* para. 17.

5 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3,* para. 19.

6 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3,* para. 19.

Justice Finkelstein continued on to examine information provided and how additional information from parties not involved in the dispute would, on occasion, be needed and under the proposed amendments this could not happen:

> 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.[7]

Finally, the discussion turned to the issue of the process involved in seeking further information. Given the complexity of the issues and the fact that the Tribunal may not know it needs specific information without a specific line of questioning meant that this could lead to incorrect decision making:

> The third, and perhaps most significant, problem is that the proposed process for the Tribunal to seek further information is impractical.[8]

Most importantly, Justice Finkelstein warns that the proposal will hamper the Tribunal's ability to make correct decisions:

> No doubt it is essential for there to be efficient procedures for the timely resolution of access disputes. What is proposed in the Bill, however, will seriously detract from the Tribunal's ability to make correct decisions.[9]

Justice Finkelstein gave weight to his submission at the Committee hearings:

> Putting it as simply as I can, the process chosen is a flawed process and the risk of getting a wrong result is too great. If it was my decision I would not take the risk.[10]

The Minerals Council of Australia questioned whether change to the merits review powers is warranted at all, arguing that the changes stand to diminish transparency, restrict accountability and undermine due and proper regulatory process, increasing the sovereign risk related to private investment in economic infrastructure:

> The Tribunal is an essential forum for testing facts and the regulatory process. The restriction will mean a genuine consideration of whether granting access will materially reduce the efficiency of the infrastructure owner will not take place. The National Competition Council does not have the powers or processes to allow it to undertake this role effectively.[11]

The consequence is increased sovereign risk, reduced investor confidence and compromised operational and economic efficiency. Given the recent problems in global financial markets, Australia needs to be in a position to provide investors with

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7 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3*, para. 20.

8 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3*, para. 21.

9 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3*, para. 14.

10 Ray Finklestein, President Justice, Australian Competition Tribunal, appearing in a private capacity, *Proof Committee Hansard*, 5 February 2010, p. 32.

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

the confidence to continue to invest in Australian firms and ensure high levels of operational and economic efficiency.

The Law Council of Australia was also concerned about limiting the amount of material before the Tribunal to the material that was before the original decision maker. While there was recognition of the extent of delays in decision-making, the Law Council of Australia was concerned that the limits could lead to an incorrect decision:

> The importance of merits review is well established as an essential aspect of good regulatory process and provides an appropriate check and balance. It is also likely that in many instances, limitations on merits review will in fact reduce procedural efficiency, as parties will choose to place more detailed and probative information before the original decision maker in an effort to ensure that this information will be available to the Tribunal, should the original decision proceed to review.[12]

Additional areas of concern

An additional area of concern to the mining industry is what happens if the Minister does not respond inside the 60 days set down in the legislation. While this proposal could be regarded as an efficiency or time saving measure, it is important that any procedural assumption applied in this situation should fall in the favour of the asset owner, rather than the asset seeker, and that a non-response to an NCC recommendation is to be deemed as accepting of the NCC's recommendation as a concern. More discussion with relevant stakeholders should be undertaken by the Government about the implications of this proposal.

Conclusion

Justice Finkelstein recommended some specific changes in his submission:

> It is suggested that the Bill should provide that:
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> 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;
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> b. The Tribunal may exercise the power to obtain further information at such times and in such manner as the Tribunal determines; [13]

12 Trade Practices Committee, Business Law Section, Law Council of Australia, *Submission 4*, para 2.

13 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3*, para. 26.

> In exercising a power to seek additional information, the Tribunal must have regard to section 103(1)(b) of the Act, which provides that:
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> > 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. [14]

Given the weight of concerns by stakeholders, there is merit in further addressing these concerns and the Coalition would welcome the opportunity to discuss these issues further with the Minister.

Senator Alan Eggleston **Senator David Bushby**

Deputy Chair

14 President Justice Ray Finkelstein, Australian Competition Tribunal, *Submission 3*, para. 27.