The Senate

Economics Legislation Committee

Trade Practices Amendment (Infrastructure Access) Bill 2009 [Provisions]

March 2010

ISBN 978-1-74229-222-9

Printed by the Senate Printing Unit, Parliament House, Canberra.

Senate Economics Legislation Committee

Members

Senator Annette Hurley, Chair	South Australia, ALP
Senator Alan Eggleston, Deputy Chair	Western Australia, LP
Senator David Bushby (from 2 February 2010)	Tasmania, LP
Senator Doug Cameron	New South Wales, ALP
Senator Barnaby Joyce (to 2 February 2010)	Queensland, NATS
Senator Louise Pratt	Western Australia, ALP
Senator Nick Xenophon	South Australia, IND

Secretariat

Mr John Hawkins, Secretary
Ms Aleshia Bailey, Researcher/ Executive Assistant
Mr Joshua See, Executive Assistant

PO Box 6100
Parliament House
Canberra ACT 2600
Ph: 02 6277 3540
Fax: 02 6277 5719
E-mail: economics.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate/committee/economics_ctte/index.htm

TABLE OF CONTENTS

Abbreviations

ACCC	Australian Competition and Consumer Commission
COAG	Council of Australian Governments
FMG	Fortescue Metals Group
MCA	Minerals Council of Australia
NCC	National Competition Council
SACL	Sydney Airport Corporation Limited
TPA	Trade Practices Act 1974

Chapter 1
Introduction

"Justice delayed is justice denied."

- attributed to William Gladstone (19th century British statesman)

1.1 There are provisions in trade practices legislation that promote competition by allowing access to significant infrastructure on fair terms. There are concerns, however, that the intent of the legislation is being frustrated by legal processes which are proving unduly protracted. This bill seeks to expedite proceedings.

Background

1.2 A 'national access regime' was inserted into the *Trade Practices Act* in 1995 to establish a legislative framework for third party access to nationally significant infrastructure (sometimes formerly provided by public enterprises, such as electricity, gas, water and railways) which it would not be economically feasible to duplicate. (The operation of the regime is described in Chapter 2.)

1.3 Treasury explain the importance of infrastructure access in the following terms:

> Fair and reasonable access for third parties to essential infrastructure facilities such as electricity grids, gas pipelines, rail tracks, airports and communications networks is important for effective competition.
>
> Many infrastructure facilities exhibit natural monopoly characteristics that inhibit competition in related industries. For example, restrictions on access to rail track may prevent competition between different companies seeking to provide rail freight services. Similarly, where a gas producer cannot make use of an existing gas distribution network to reach potential clients, it may be difficult to compete in or even enter the wholesale and retail gas supply markets.
>
> It is generally not economically feasible to duplicate such infrastructure, and given the historic likelihood of vertically integrated owners, it can be difficult for actual and potential competitors in downstream and upstream industries to gain access to these often vital infrastructure services. 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.
>
> The outputs of these industries are significant inputs to a wide range of economic activities. Where restricted, access arrangements result in higher

> prices or lower service quality, and whether through reduced competition and/or limited supply, the impact is felt by businesses and consumers alike.
>
> As a result, governments have given increasing attention to establishing a right of access to these facilities, under established terms and conditions, where privately negotiated access is not expected to be a viable option.[1]

1.4 The Productivity Commission, after a 2001 review of the National Access Regime, recommended that a number of changes be made to the legislation. That same year, the Council of Australian Governments (COAG) agreed to the Competition and Infrastructure Reform Agreement, which set out the proposal to have binding time limits. In April 2009 the then Assistant Treasurer, the Hon Chris Bowen MP, stated that:

> While the Regime appears to be operating effectively, there are concerns it is generating regulatory risks that are hindering investment in essential infrastructure.
>
> Some infrastructure owners and access seekers have argued that processes under the Regime are too lengthy and costly.[2]

Referral of the bill

1.5 On 29 October 2009, the Trade Practices Amendment (Infrastructure Access) Bill 2009 was introduced into the parliament.

1.6 On 19 November 2009 the Senate, by adopting a report from the Selection of Bills Committee, referred the provisions of the bill to the Economics Legislation Committee for inquiry and report by 9 March.

Purpose of the bill

1.7 The amendments to the *Trade Practices Act* (TPA) proposed in the bill relate to the National Access Regime. The bill seeks to streamline the administrative process involved with the regulation of third party access to nationally significant infrastructure.

1.8 The administrative process will be restructured to provide further clarity, transparency and certainty through technical amendments. The main amendment, proposed as Schedule 1, seeks to tighten binding time limits and introduce limited merits reviews. This amendment seeks to lessen delays in the decision-making process, which have proven to be costly and concerning for access seekers. The minister will have 60 days to make a decision after receiving a recommendation from the National Competition Council (NCC), or will otherwise be deemed to have accepted the NCC's recommendation.

---

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

2 C Bowen MP, *Reforms to Streamline the National Access Regime*, media release, 7 April 2009, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/GT8T6/upload_binary/gt8t60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/GT8T6%22.

1.9 Schedule 2 of the bill seeks to amend the TPA to allow a new infrastructure facility to be determined as ineligible to be declared under the Regime.

1.10 Schedule 3 will allow the Australian Competition and Consumer Commission (ACCC) to accept access undertakings with fixed principles.

1.11 Under Schedule 4 of the bill, the ACCC will be able to issue an amendment notice, which will lessen delays in the process.

1.12 Further minor administrative amendments are proposed in Schedule 5, which addresses the abilities of the regulators, namely the NCC, ACCC and the Tribunal.

1.13 The date of effect for the amendments is the day after Royal Assent, and matters begun under the National Access Regime before the commencement will only be subject to the amendments relating to the Australian Competition Tribunal process and no others.

Conduct of the inquiry

1.14 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website inviting written submissions by 18 December 2009. Stakeholders, industry groups and regulators were also invited to make a submission to the inquiry. Ten submissions were received, which are listed at Appendix 1.

1.15 A public hearing into the bill was held in Canberra on 5 February 2010. The witnesses who appeared are listed at Appendix 2.

1.16 The committee thanks all those who participated in the inquiry.

Structure of the report

1.17 Chapter 2 looks at Schedules 1 and 5 of the bill, particularly the aspects which deal with streamlining administrative processes. The impact of limited merits reviews on the administrative process is addressed in Chapter 3. Schedule 2 of the bill is addressed in Chapter 4. Chapter 5 examines the role of the regulators and the designated minister under the amendments.

Chapter 2

Expediting access:

Schedules 1 and 5 of the bill

Part IIIA of the *Trade Practices Act 1974*

2.1 Part IIIA of the TPA establishes the legislative framework for access to services, provides consistency for access regulation and encourages economic efficiency and promotes competition. The National Access Regime provides an avenue for access seekers when an attempt at a commercial negotiation has failed.[1] Section 44DA of Part IIIA 'requires decisions about access regimes to be consistent with the principles set out in the Competition Principles Agreement'.[2]

2.2 Access seekers currently have three means by which they can make their claim:

(a) Application through the National Competition Council (NCC) to have the service provided by the infrastructure *declared* by the designated minister and then access *negotiated* on a commercial basis;

(b) If agreement cannot be reached, the ACCC can make a legally binding *arbitration.*

(c) A minister's declaration or ACCC arbitration can be *reviewed* by the Australian Competition Tribunal.

2.3 The role and powers of the three regulators, the NCC, ACCC and Tribunal, under the amendments, will be explored in Chapter 5.

2.4 Seeking third party access is acknowledged to be a time-consuming process, and delays to the decision-making process are recognised as being a 'significant concern to infrastructure owners, access seekers and regulators alike'.[3] In the interest of fostering competition in the Australian infrastructure industry, the bill seeks to expedite decision making while maintaining the thoroughness of the process.

---

1 National Competition Council, *Submission 5*, p. 4.

2 Bills Digest, no. 66, 2009-10, 24 Nov 2009, p. 4.

3 Explanatory Memorandum, p. 5.

Declaration of services

2.5 Through the declaration of a service, access seekers are provided with the means by which they have a legal right to negotiate commercial terms and conditions of access with the provider of the service.

2.6 The NCC may only recommend, and the minister implement, declaration when the six criteria specified in the Act (Table 1) are all satisfied. In deciding whether to recommend a declaration to the minister, the NCC conducts a public consultation process, usually including a second round after release of a draft recommendation. In addition to the declaration criteria, the NCC considers the economic viability of development of a similar facility that could 'provide part of the service… and the duration of any declaration'.[4]

Table 1: The six declaration criteria

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service)

(b) that it would be uneconomical for anyone to develop another facility to provide the service)

(c) that the facility is of national significance, having regard to:

- (i) the size of the facility; or
- (ii) the importance of the facility to constitutional trade or commerce; or
- (iii) the importance of the facility to the national economy

(d) that access to the service can be provided without undue risk to human health or safety

(e) that access to the service is not already the subject of an effective access regime

(f) that access (or increased access) to the service would not be contrary to the public interest

Sections 44G(2) and 44H(4) of the TPA

Source: National Competition Council, *Submission 5*, p. 7.

4 NCC, *Submission 5*, p. 7.

2.7 Section 2.2 of the Explanatory Memorandum emphasises the meaning of 'declaration':

> A person may apply for a service to be declared. Declaration does not provide an automatic right for a third party to access that service. Rather, it provides access seekers with a right to binding arbitration if commercial negotiations cannot be successfully concluded.[5]

2.8 The NCC also makes clear in its submission to the inquiry that declaration does not directly mean that access will be granted, and that the function of Part IIIA is to consider the public interest in whether a service should be declared.[6] Declaration is also subject to commercial negotiations over the terms of access. If the negotiations fail, the ACCC may provide arbitration.[7]

2.9 The decision by the NCC must be made within four months. The amendments to time limits are discussed below.

2.10 The ACCC's arbitration is characterised by the NCC as 'light-handed' and the ACCC is 'specifically prohibited from making an access arbitration determination that would prevent an existing user having sufficient capacity to meet its reasonably anticipated requirements'. [8] This is to aid in opportunities for commercial resolution of access disputes, although the ACCC can make orders to resolve a dispute under the terms set out in section 44X of the TPA.

2.11 As part of the arbitration process, s 44X1a states that the Commission must take into account 'the legitimate business interests of the provider, and the provider's investment in the facility.'[9]

2.12 Specific access regimes have been established for particular facilities such as airports and natural gas pipelines. There may be certification of an access regime established by a state or territory.

Binding Time Limits, Schedule 1

2.13 Schedule 1 of the bill seeks to increase efficiency through the streamlining of administrative processes, the delay of which could hinder potential infrastructure investment or deter potential access seekers from making their claim.

---

5 Explanatory Memorandum, p. 35.

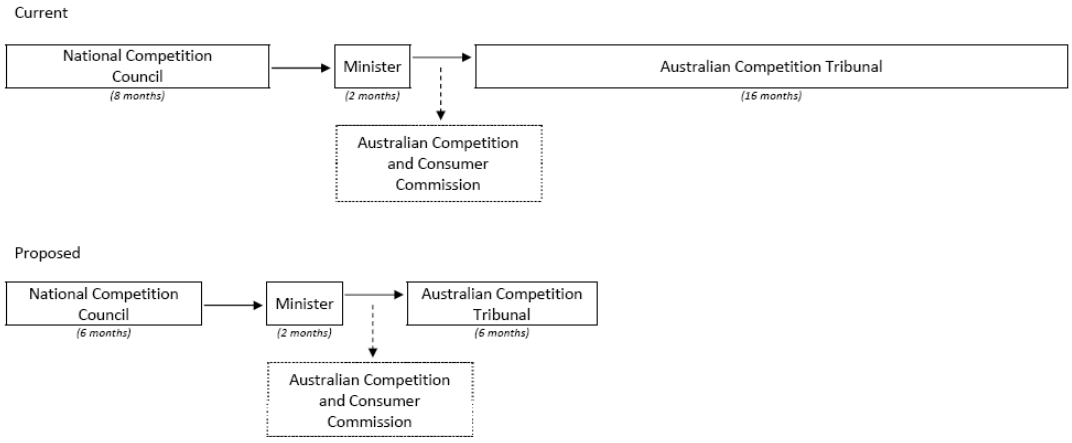
6 NCC, *Submission 5*, p. 8.

7 NCC, *Submission 5*, p. 8.

8 NCC, *Submission 5*, pp 9-10.

9 TPA s 44X1a.

2.14 As illustrated in the upper panel of the following chart, and detailed in Table 2, the experience with the processes has been that they can prove very time-consuming, particularly at the Tribunal stage. Even excluding the epic Fortescue case as an outlier, the NCC has taken between 2 and 13 months, the minister has taken two months and the Tribunal between 6 and 32 months to reach decisions. The average total period for completed applications is 26 months.



2.15 The bill will require the NCC, ACCC and Tribunal to take decisions within specified periods, generally 180 days. Under the amendments, the NCC and Tribunal may extend the period for making decisions, while the Minister can no longer extend the period.

2.16 The minister will have 60 days to make a decision after receiving a recommendation from the NCC, or will otherwise be deemed to have accepted the NCC's recommendation.

2.17 The specified periods may be extended by 'clock stoppers'. The main clock stoppers would occur when the regulator and the parties to the decision agree to stop the clock, or when the regulator requests information or invites public submissions.

2.18 Proposed section 44FA allows the NCC to request information within a specified time period. Information received in that specified period must be taken into account during the decision-making process.

Table 2: Time taken for decisions on declaration applications under Part IIIA

Application		NCC Recommendation		Ministerial decision		Tribunal Decision	
	Date	Date	months taken	Date	months taken	Date	months taken
Australian Union of Students	April 1996	June 1996	2	August 1996	2	July 1997	11
Australian Cargo Terminal Operators (Sydney)	Nov. 1996	May 1997	6	July 1997	2	Mar. 2000	32
Australian Cargo Terminal Operators (Melbourne)	Nov. 1996	May 1997	6	July 1997	2	not appealed	n.a.
Carpentaria Transport	Dec. 1996	June 1997	6	Aug. 1997	2	appeal withdrawn	n.a.
Specialized Container Transport	Feb. 1997	June 1997	4	Aug. 1997	deemed decision	appeal withdrawn	n.a.
NSW Minerals Council	April 1997	Sept. 1997	5	Nov. 1997	deemed decision	appeal withdrawn	n.a.
Specialized Container Transport	July 1997	Nov. 1997	4	Jan. 1998	2	appeal withdrawn	n.a.
Freight Australia	May 2001	Dec. 2001	7	Feb. 2002	2	appeal withdrawn	n.a.
Aulron Energy	Nov. 2001	July 2002	8	Sept. 2002	2	March 2003	6
Virgin Blue Airlines Pty Ltd	Oct. 2002	Nov. 2003	13	Jan. 2004	2	Dec. 2005	23
Services Sydney Pty Ltd	Mar. 2004	Dec. 2004	9	Feb. 2005	deemed decision	Dec. 2005	10
Fortescue Metals Group	June 2004	March 2006	21	May 2006	deemed decision	pending	44*[#]
Lakes R Us Pty Ltd	Oct. 2004	Nov. 2005	13	Jan. 2005	2	appeal withdrawn	n.a.
Tasmanian Department of Infrastructure, Energy and Resources Rail Unit	May 2007	Aug. 2007	3	Oct. 2007	7	not appealed	n.a.
Pilbara Infrastructure Pty Ltd	Nov. 2007	Aug. 2008	9	Oct. 2008	2	pending	15*
Pilbara Infrastructure Pty Ltd	Nov. 2007	Aug. 2008	9	Oct. 2008	2	pending	15*
Pilbara Infrastructure Pty Ltd	Jan. 2008	Aug. 2008	7	Oct. 2008	2	pending	15*
Average			***8***		***2***		***16****

*Where a Tribunal decision remains pending, the figure indicates the time taken as at February 2010. These figures are not included in the average. [#]The time taken for the Tribunal review of the decision relating to the FMG application also includes time taken for the Federal Court to consider an appeal on the NCC jurisdictional decision. Source: Treasury, Answer to Questions on Notice, 5 February 2010.

Binding time limits for the NCC

2.19 The expected period for the decision to be delivered is 180 days of consideration. As stated above in paragraph 2.17, clock stoppers generally occur when an agreement between the regulators and parties is reached on it. A full list of clock stoppers can be found at Appendix 3. The NCC clock stoppers apply to agreement between the regulator and parties, and requests for information.

2.20 Additionally, the NCC may apply for an extension for their decision, in which case it must, by notice in writing to the Minister, apply for the extension and justify its application.

Binding time limits for the ACCC and deemed decisions

2.21 The ACCC's expected period for access undertakings, industry codes and arbitrations of access disputes is 180 days. Competitive tender processes are subject to a 90 day binding time limit.

2.22 Clock stoppers apply in the following cases:

- An agreement is made between the ACCC and the relevant parties to the application or dispute;
- The ACCC requests information from a person via a written notice or direction under section 44ZG;
- The ACCC invites public submissions on an application;
- The ACCC defers an arbitration or an access dispute under subsection 44ZZCB(4); or
- The ACCC defers arbitrating a dispute while a declaration is under review by the Tribunal.[10]

2.23 If the ACCC does not make a decision on a competitive tender process within the expected period it is deemed to have approved it for a period of 20 years after a 21 day lapse. The lapse allows for an application for review to be made to the Tribunal.

2.24 In the instance of failure to make an arbitration determination, the decision is deemed to be in favour of maintaining the status quo.[11]

2.25 With regard to decisions on access undertaking, if the ACCC does not reach a decision it will be deemed not to have accepted the access undertaking.

---

10 Explanatory Memorandum, p. 18.

11 Explanatory Memorandum, p. 20.

Binding time limits for the Tribunal

2.26 The expected period for the Tribunal to make a decision is 180 days. Clock stoppers apply in the case of an agreement between regulators and parties, requests for information from a person or from a regulator.

2.27 To obtain an extension the Tribunal must write to the designated Minister and publish a notice in a national newspaper. It should be noted that under proposed section 44ZZOA(11) failure on the part of the Tribunal to reach a decision within the time limit or extend the consideration period 'does not affect the validity of a decision made by the Tribunal…'[12]

Attitudes towards Schedule 1

Views of larger miners

2.28 The Minerals Council of Australia (MCA) is opposed to the whole idea of an access regime, which they argue is a 'chill' or deterrent to firms investing in infrastructure.[13] They characterise the bill as 'tinkering' which will make matters worse.[14] In particular they oppose restricting the scope of the merit reviews.

2.29 At the 5 February hearing the Minerals Council expressed the view that the entirety of Part IIIA be reviewed, and in particular pointed to the 'uncertainty and confusion'[15] around it, which could be made worse by the reforms proposed in the bill.

> The climate of uncertainty and confusion around this section of the act will not be remedied by the administrative reforms proposed in the bill. Indeed, they stand to exacerbate the situation in proposing to expedite the access regime by imposing mandatory and arbitrary time limits on the Competition Council…[16]

2.30 One of the MCA's largest members, Rio Tinto, also strongly opposes Schedule 1 of the bill and shares the concern that time limits will have a negative effect on the decision.

> Speeding up decision making is not the answer if doing so increases the risk of a wrong decision and further investment in vital infrastructure is thereby discouraged.[17]

---

12 TP Act, 44ZZOA(11), p33, and Explanatory Memorandum p. 26.

13 Minerals Council of Australia, *Submission 8*, p. 3.

14 Minerals Council of Australia, *Submission 8*, pp 3-4.

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

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

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

2.31 In regards to the efficacy of streamlining the administrative system, Rio Tinto expressed the view that:

> … it must hurt if you are worried that it is going to increase the chances of a bad decision. That is the thrust of the submission, and that is we do not like part IIIA.[18]

2.32 Rio Tinto's submission to the inquiry summarised their opinion on Schedule 1, stating that they are opposed to it and believe:

> that it will further dampen enthusiasm to invest in facilities, beyond the disincentives provided by the current provisions of Part IIIA.[19]

2.33 At the hearing, Rio Tinto opined that the complexity of a case might be overlooked in order to make a quick decision.

> I think we would always prefer a process that is efficient… but we would also always prefer a process where material was properly considered and tested. We would think that would be more important, in a sense, than a strict time limit. In general, we would also suggest that the total time that this has taken seems an inordinate amount of time, but a huge amount of that time has actually been taken up with definitional debates in courts, rather than in the set processes that are set down.[20]

2.34 Fortescue Metals Group (FMG) applied for a declaration in June 2004 of services by BHP-Billiton's Mount Newman and Goldsworthy railway lines. The NCC decided that the Goldsworthy line was part of a production process and therefore could not be declared but that the Mount Newman line could be declared. BHP appealed to the Federal Court against the latter decision.

2.35 In December 2009 the case was reported as being with the Tribunal with a decision not expected until mid-2010, and then possibly appealed to the Federal Court and even the High Court, taking the case into 2011.[21]

2.36 Fortescue Metals highlighted a number of concerns with the existing access regime and the timescales in which it operates. At the hearing Mr. Tapp acknowledged that the Fortescue and BHP Billiton case was an exceptional case having taken six years to reach its final stages. Mr. Tapp referred to their Robe application which will have taken approximately two and a half years to complete which Fortescue felt better reflected an average case. However he noted that 'that is still too long' and that Fortescue 'welcomes anything that compresses the timescales'.[22]

---

18 Mr Philip Ward, Special Projects Adviser, *Proof Committee Hansard*, 5 February 2010, p. 67.

19 Rio Tinto, *Submission 6*, p. 5.

20 Mr Mark O'Neill, Chief Adviser on Government Relations, Rio Tinto, *Proof Committee Hansard*, 5 February 2010, p. 69.

21 'Miner may escalate access case', *Australian Financial Review*, 18 December 2009, p. 39.

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

2.37 Fortescue also raised the difficulties for an applicant in what they deemed to be 'double jeopardy'. This refers to the fact that under the current arrangements an applicant can proceed through the National Competition Council, receive a declaration by the Minister and then still have to re-argue the case in its entirety before the Tribunal. Mr Tapp explained:

> I just think it is wrong that you go through the entire National Competition Council process to arrive at a declaration and then the whole lot is just thrown away and you start again with the Tribunal. By the way, the Tribunal is a much more expensive process. 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. 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.[23]

Schedule 5 – Administrative Amendments

2.38 Schedule 5 of the bill proposes minor administrative amendments which seek to streamline the process from the point of the regulators, the NCC, ACCC and the Tribunal. Through these amendments the decision-making process will be accelerated through the improving of efficiency frameworks.

2.39 The NCC will be able to make decisions via the circulation of papers to the part-time councillors. The NCC will also be given the power to approve variations to an application for declaration rather than requiring the application be resubmitted. The repealing of criterion (d), seen in Table 1, and the need to consider non-certified state access regimes is also intended to aid in improving efficiency.[24]

2.40 The Tribunal will be given discretionary power over the staying of the operation of a declaration decision during the review process, and ordering costs in the review of declaration decisions.[25]

Committee view

2.41 In the consideration of access given to third parties, expediting decision-making would promote competition and encourage smaller industry groups to use the legislation as it was intended. The proposed amendments in Schedules 1

---

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

24 Explanatory Memorandum, p. 73.

25 Explanatory Memorandum, p. 71.

and 5 would aid in achieving this, although the complexity of the cases should continue to be acknowledged.

Chapter 3

Limited Merits Reviews

Schedule 1 – Limited Merits Reviews

3.1 The Australian Competition Tribunal is a review body. A merit review by the Tribunal is a re-hearing or a re-consideration of a declaration by the Minister (based on the original application to the NCC) or arbitration by the ACCC. The Tribunal may perform all the functions and exercise all the powers of the original decision maker for the purposes of review. It can affirm, set aside or vary the original decision. Although currently the Tribunal is only required to review the original decision it has the purview to seek entirely new information that may not have been presented previously.

3.2 The bill will require the Tribunal to base its merit review on the material before the original decision-maker (although it will be able to seek clarifying information from the access seeker, the ACCC or NCC).

3.3 The material sent to the Tribunal includes the recommendation of the regulator and submissions, but does not include any information disregarded by that regulator. This request for information must still be adhered to in the case of a failure to make a decision within the expected period by the original regulator.

3.4 As the decision-making process progresses information disregarded at each stage continues to be left out of further material provided to the next stage regulator. In this way, the amount of irrelevant information decreases until the final decision can be made based on the clearest and most relevant data.

Support for the amendment

3.5 The Department of Resources, Energy and Tourism supported the amendment:

> RET supports the different measures which will add to the efficiency of process under the National Access Regime, including time limits on decision making bodies and Ministers, and the limited merits review process.[1]

3.6 A representative for the ACCC referred to limited merits reviews at the hearing:

---

1 Department of Resources, Energy and Tourism, *Submission 7*, p. 1.

> One of the issues again about the limited merits review is that it is a balance... It really is a balance that in a lot of respects policy makers apart from us have to make. We have had experience with it… and the experience has been fine. Of course, there is more than one side to those. I would hate to disagree with Justice Finkelstein and some of his comments on it, but from an operational point of view we have not had any really great concerns.[2]

3.7 The National Competition Council also support the move to limited merit reviews:

> We think the proposal to focus the tribunal's consideration on material that was available to the council and the minister is a reasonable step. This mirrors provisions that are already in place in the National Gas Law and, in the limited time it has operated, it appears to be working reasonably well.[3]

3.8 The NCC also noted the issue of 'double jeopardy' in that applicants can go through the declaration process, achieve a Ministerial declaration, only to have to start the entire process from the beginning if it is brought before the Tribunal:

> What I have a problem with is us considering one set of evidence and one case and the Tribunal considering an entirely different or modified set of arguments and case. Although it is a de novo rehearing, it is a review of the decision of the minister. It is not a primary first shot.[4]

3.9 There were also concerns raised that this can often lead to a 'gaming' of the system – where evidence is deliberately withheld from the NCC process or to give misleading information in the original stage, to strategically delay the process until the tribunal stage when they are gradually required to give that information and to have its veracity tested. The view has been put that, as a result of the proposed restrictions at the Tribunal stage, it would then be in companies' interests to put as much information as they can up front to the NCC, and more accurate information.

3.10 Fortescue, among others, argued that restricting what the tribunal could consider would usefully encourage the provision of more information and more accurate information to the NCC at the beginning of the process because it would be in their interests to have it up front or miss out on using it at all:

> I think strategically if any incumbent knows that if they do not put that information in front of the council when it goes to the tribunal they cannot [use it] … it will encourage them to provide them.[5]

---

2 Mr Mark Pearson, *Proof Committee Hansard*, 5 February 2010, p. 45.

3 Mr Feil, National Competition Council, *Proof Committee Hansard*, 5 February 2010, p. 18.

4 Mr Feil, National Competition Council, *Proof Committee Hansard*, 5 February 2010, p. 23.

5 Mr Julian Tapp, FMG, *Proof Committee Hansard*, 5 February 2010, p. 91. A similar point was made by Mr Stamford, Department of Resources, Energy and Tourism, *Proof Committee Hansard*, 5 February 2010, p. 62 and by Mr Archer, Department of the Treasury, *Proof Committee Hansard*, 5 February 2010, p. 78.

3.11 At the hearing Treasury was asked to expand on the aspect of limited merits reviews and replied that while time limits are proposed, they can be extended and therefore the proposed limited merits reviews would work to reinforce the final decision-making objective.

> In combination we would like to think the measures will work well together, but we have some concerns about the time limit on its own, because we have had target and other time limits in the past.[6]

3.12 Treasury argued that the most efficient and effective way of assisting with decision making, streamlining the administrative process and encouraging the provision of the most accurate and relevant material at the earliest stage of the process will be achieved by limiting the scope of the merit review.

Opposition to the amendment

3.13 Justice Ray Finkelstein, President of the Tribunal, is opposed to the proposed introduction of limited merits review by the Tribunal. He suggested a less restrictive amendment:

> 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 original decision-maker and (ii) allow the Tribunal greater discretion to conduct proceedings in a more streamlined fashion.[7]

3.14 Justice Finkelstein, in his submission, outlined the problems he envisages with the introduction of limited merits reviews. He stated that the process 'suffers from several deficiencies'[8], including the inability to approach a review with flexibility, a need for the Tribunal to access additional material facts, and the restriction on testing conflicting evidence.

3.15 As discussed earlier, in Chapter 2, some interested parties express concern that the ultimate decision will not be the correct one. This was echoed by Justice Finkelstein:

> 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.[9]

3.16 Justice Finkelstein expanded on this view at the public hearing:

> 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

---

6 Mr Brad Archer, *Proof Committee Hansard*, 5 February 2010, p. 85.

7 Justice Ray Finkelstein, *Submission 3*, p. 1. Justice Finkelstein made his submission in a private capacity.

8 Justice Finkelstein, *Submission 3*, p. 4.

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

> 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.[10]

3.17 His perspective on the review process is that:

> The review is a reconsideration of the matter, not an appeal confined to identifying errors of fact or law: section 44. At the review the parties are entitled to place before the Tribunal information that was before the minister, as well as new information.[11]

3.18 A problem with restricting the Tribunal to only using material before the original decision-maker is that:

> 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…assume the existence of facts that no longer exist and ignore facts that have come into existence since the decision under review was made.[12]

3.19 Limited merits reviews are also opposed by Rio Tinto, who share Justice Finkelstein's concern. At the hearing Rio Tinto gave evidence in support of the role of the Tribunal as a means to test the veracity of information:

> 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.[13]

3.20 The National Competition Council did not share the view that circumstances relevant to the making of the decision were likely to change significantly between their determination and the review by the Tribunal:

> To be honest, this is large infrastructure. These are not markets that change overnight, and you are not dealing with such narrow points that there will be a lot of updating evidence, but if there is some by all means. If we had done this 10 years before we started looking at this, the market would have looked considerably different to 10 years later. I would rather that we were not having the council consider a matter and then the Tribunal consider the same matter 10 years later. That is a terrible thought. If there is a genuine modification to the circumstances, it seems to me that there is no reason

---

10 Justice Finkelstein, *Proof Committee Hansard*, 5 February 2010, p. 30.

11 Justice Finkelstein, *Submission 3*, p. 2.

12 Justice Finkelstein, *Submission 3*, p. 4.

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

why the Tribunal, in the current formulation, could not seek an updating report from the council.[14]

3.21 The role and powers of the Tribunal will be discussed in Chapter 5.

14 Mr Feil, National Competition Council, *Proof Committee Hansard*, 5 February 2010, p. 23.

Chapter 4

Services Ineligible to be Declared

Schedule 2

4.1 The bill proposes amendments to the TPA to allow new infrastructure facilities to be classed as ineligible to be declared for a period of at least twenty years.

4.2 The designated Minister would be able to provide a ruling, and would receive advice from the National Competition Council regarding the decision. The minister's decision is subject to merit review by the Tribunal and can be revisited if there is a material change in arrangements.

4.3 This proposal came from the 2001 review by the Productivity Commission, *Review of the National Access Regime*, which recommended that the designated Minister determine that a facility would not meet the criteria, and then be given exemption from declaration.

4.4 This would be similar to the 'no-coverage rulings' available for new gas pipelines under the *National Gas Law*. The NCC, in its submission, stated that the consistency between the existing 'no-coverage rulings' legislation and that proposed in the amendment would also work to promote regulatory certainty.[1]

Purpose

4.5 The amendment is intended to provide greater regulatory certainty, clarity and transparency by stating whether a new service could be declared or not, and so stimulate potential investment.[2]

4.6 The NCC agrees that the amendment regarding ineligibility:

> …will provide certainty to infrastructure investors that is not currently available… the Council considers that the introduction of these new provisions may increase certainty for investors and/or providers.[3]

4.7 The application for an ineligible service declaration may be made by 'any person with a material interest in a service to be provided by a proposed facility' and the Commonwealth, states or territories may apply for the decision for services they provide.[4] 'New facilities' subject to this amendment include extensions to existing facilities.

---

1 National Competition Council, *Submission 5*, p. 19.

2 Explanatory Memorandum, p. 35.

3 National Competition Council, *Submission 5*, p. 18.

4 Explanatory Memorandum, p. 37.

National Competition Council Recommendation

4.8 Any person with a material interest in a service being declared ineligible must apply in writing to the NCC for a recommendation to go to the designated Minister.

4.9 The service must be found by the NCC not to satisfy at least one of the criteria in section 44G of the TPA (listed in Table 1, paragraph 2.6 above).

4.10 The NCC may request information in order to make their recommendation. The NCC, in its submission, opposed the amendment relating to the request for information, although conceded information may sometimes not be provided in a timely fashion:

> The Council's view at this time is that a power to compel provision of information is unnecessary and would complicate the declaration process...In failing to provide information requested by the Council, a service provided can frustrate consideration of a declaration application. While the Council's experience to date has been that information requested is generally provided, sometimes the timeliness of the provision of information has been unsatisfactory.[5]

4.11 The expected period for the recommendation is 180 days, and is subject to clock-stoppers.

Decision by the designated Minister

4.12 The Minister must make a decision within 60 days of receiving the recommendation by the NCC. If the decision is not made, is it deemed to have been in accordance with the NCC recommendation.

Review by the Tribunal

4.13 The Tribunal may review any decision by the designated Minister if a person with a material interest in the case makes an application for this within 21 days of the published decision.

Committee view

4.14 Stronger time limits are needed for the decision-making process in relation to the NCC recommendation. Requests for further information should not slow down the process, nor should time limits impinge on the complexity of the case. A balance is required in order to make the correct decision in a timely manner after considering the relevant information.

---

5 National Competition Council, *Submission 5*, p. 14.

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

---

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

---

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]

---

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

---

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]

---

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.

---

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

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.

---

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]
>
> 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]

---

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

---

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:
>
> 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; [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:
>
> > 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.

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Mr Bob Baxt
2	Confidential
3	Justice Ray Finkelstein, Australian Competition Tribunal
4	Law Council of Australia
5	National Competition Council
6	Rio Tinto
7	Department of Resources, Energy and Tourism
8	Minerals Council of Australia
9	Mr Peter Brohier
10	Virgin Blue

APPENDIX 2

Public Hearing and Witnesses

CANBERRA, FRIDAY 5 FEBRUARY 2010

ARCHER, Mr Brad, Principal Adviser, Infrastructure, Infrastructure, Competition and Consumer Division, Department of the Treasury

BAXT, Professor Bob, Private Capacity

DEPTA, Ms Kirsten, Manager, Communications and Infrastructure Access, Infrastructure, Competition and Consumer Division, Department of the Treasury

FEIL, Mr John, Executive Director, National Competition Council

FINKELSTEIN, Justice Raymond Antony, Private capacity

HOOKE, Mr Mitchell Harry, Chief Executive Officer, Minerals Council of Australia

JARVIS, Mr Ben, Manager, Minerals Development Section, Minerals Branch, Resources Division, Department of Resources, Energy and Tourism

MANNING, Ms Hilary, Policy Officer, National Energy Market Branch, Energy and Environment Division, Department of Resources, Energy and Tourism

MARRIS, Mr Sidney Joseph, Assistant Director, Corporate Affairs, Minerals Council of Australia

NAYLOR, Ms Natalie, Legal Counsel, National Competition Council

O'NEILL, Mr Mark, Chief Adviser, Government Relations, Rio Tinto

PEARSON, Mr Mark, Executive General Manager, Regulatory Affairs, Australian Competition and Consumer Commission

STAMFORD, Mr Chris, General Manager, Minerals Branch, Resources Division, Department of Resources, Energy and Tourism

TAPP, Mr Julian Robin, Head of Government Relations, Fortescue Metals Group Ltd

WARD, Mr Philip John, Special Projects Adviser, Rio Tinto

WING, Mr Anthony, General Manager, Transport and General Prices Oversight, Australian Competition and Consumer Commission

APPENDIX 3

Clock Stoppers

Proposed section 44NC Time limit for Council recommendations

Stopping the clock			
Item	**Column 1** **Situation**	**Column 2** **Start day**	**Column 3** **End day**
1	An agreement is made in relation to the application under subsection (5)	The first day of the period specified in the agreement	The last day of the period specified in the agreement
2	A notice is given under subsection 44MA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information
3	A notice is given under subsection 44NAA(1) requesting information in relation to the application	The day on which the notice is given	The last day of the period specified in the notice for the giving of the information