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growth, innovation, productivity

Tribunal releases decisions on declaration of Pilbara railways

On 30 June 2010 the Australian Competition Tribunal (**Tribunal**) handed down its decisions relating to applications for access to four railway services operated by BHP Billiton Iron Ore Pty Ltd (**BHPB**) and Rio Tinto Ltd (**Rio Tinto**) in the Pilbara. These matters began with Fortescue Metals Group Ltd's (**FMG**) application to the Council in June 2004 for a declaration recommendation for BHPB's Mt Newman railway service. In 2007 and 2008 FMG also made declaration applications for BHPB's Goldsworthy railway service and for Rio Tinto's Hamersley and Robe River railway services.

In summary, the Tribunal:

- affirmed then Treasurer Costello's deemed decision not to declare BHPB's Mt Newman railway service
- affirmed Treasurer Swan's decision to declare BHPB's Goldsworthy railway service for 20 years (to 19 November 2028)
- varied Treasurer Swan's decision to declare Rio Tinto's Robe railway service such that it expires on 19 November 2018 rather than 19 November 2028, and
- set aside Treasurer Swan's decision to declare Rio Tinto's Hamersley railway service.

In this issue of *Accessible* we focus on the Tribunal's reasoning on legal issues which will be relevant for future declaration applications under Part IIIA of the *Trade Practices Act* (**TPA**), with less emphasis on the legal and factual findings specific to these four applications.

Criterion (b)—'uneconomical to develop another facility'

The Tribunal rejected BHPB's and Rio Tinto's submissions that criterion (b) requires a 'private investment test' under which the question is whether it would be profitable for any person to invest in another facility that provides the same service. The Tribunal concluded (at [835]) that such a test is 'inconsistent with the enacting history and does not meet the objectives of Part IIIA'.

The Tribunal held that criterion (b) is a 'natural monopoly test' which requires one 'first, to determine the reasonably foreseeable potential demand for the facility (strictly the service provided by the facility), and then compare the capital and operating costs of a shared facility to the sum of the capital and operating costs of an existing facility (or an expanded existing facility) and a new facility' [855]. In this costs comparison, the 'net social costs' of a shared facility and two separate facilities are excluded, however they are relevant to the public interest test under criterion (f).

This approach is consistent with the way the Council has previously applied criterion (b). The Council supports the Tribunal's decision to reject a private investment approach to criterion (b) as the Council considers that such an approach would be contrary to the objectives of Part IIIA.

With the exception of the Mt Newman railway, the Tribunal found that all the railway services were natural monopolies in satisfaction of criterion (b). The Tribunal considered that an alternative facility to the Mt Newman railway could be developed comparatively cheaply by extending FMG's Chichester line.

Criterion (a)—access would promote material increase in competition

FMG submitted that access would promote a material increase in competition in three markets: (1) the global market for iron ore, (2) the market for iron ore tenements in the Pilbara region and (3) the market for rail haulage services in the vicinity of the respective railways.

A copy of the Tribunal's statement of reasons is available on the Council's website at www.ncc.gov.au.

The period for parties to lodge a notice of appeal against the decision(s) expires on 13 August 2010.

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These were the same markets the Council had considered in its recommendations.

The first issue to be decided under criterion (a) was the market definition. Regarding the rail haulage market, BHPB and Rio Tinto contended that it was not separable from the below rail services sought to be declared ('below rail' services are the use of the railway to run trains, as distinct from 'above rail' services which are the use of the trains themselves). The Tribunal found that, whilst above and below rail services are often vertically integrated (and were so with these railways), the appropriate question is whether vertical integration is *inevitable*. Like the Council, the Tribunal concluded that vertical integration of above and below services was not inevitable.

The Tribunal also accepted the existence of a rail haulage market despite there not being any buyers or sellers of haulage services. Applying an accepted principle of market definition, the Tribunal held that it was sufficient that there were potential buyers and sellers, and that parties would likely conduct future transactions for haulage services if access was provided.

BHPB and Rio Tinto's submissions that the market for iron ore tenements was inseparable from the market for iron ore itself were rejected by the Tribunal, which noted that a number of firms engage in prospecting for iron ore without selling it.

The Tribunal found that access to all railways except Mt Newman would promote a material increase in competition in the market for rail haulage services. It found that the markets for iron ore and for iron ore tenements were already competitive, such that access would not promote an increase in competition in them.

Expansion power

The Tribunal confirmed that the Australian Competition and Consumer Commission (**ACCC**) has the power to order that a facility providing a declared service be expanded to provide further capacity. This had been disputed by BHPB and Rio Tinto, who argued that the ACCC's power to order an 'extension' to a facility did not include capacity expansions. The finding is consistent with the Council's interpretation of the ACCC's powers in this regard. However, the Tribunal doubted whether expansions of a declared service involving multiple parties would occur efficiently. It considered it likely that capacity expansions of shared facilities would be subject to costly delays. The Tribunal confined declaration to railways that had sufficient capacity to accommodate likely third party demand without multi-party expansions.

Criterion (f)—public interest, and discretion

It has long been recognised that satisfaction of the criteria in s44H(4) of the TPA does not *require* the Minister to declare the service, rather satisfaction of those criteria gives the Minister a *discretion* to declare. The same discretion applies to the Council's recommendation where the Council is satisfied that the declaration criteria in s44G(2) are met. The discretion may only be used against declaration – decision-makers have no discretion to declare in circumstances where one or more criteria are not met.

The Council and the Tribunal in previous matters have treated this discretion as a narrow one in light of the extensive preconditions that must be satisfied before the discretion arises. The Tribunal noted that this approach is not consistent with *Sydney Airport (No 2)*[1] in which the Full Federal Court observed that the discretion 'may be affected by a wide range of considerations of a commercial, economic or other character'. As such, the Tribunal held that 'the discretion is a very broad one' [1163].

Whilst the Council of course acknowledges the Full Federal Court's authority that the discretion under s44G(2) may potentially encompass a broad range of factors, it is concerned that a discretion as broad as the one described by the Tribunal has the potential to create uncertainty as to the matters that are relevant to declaration.

The Tribunal considered the implications of *Sydney Airport (No 2)* for criterion (f), namely that the question whether 'access' is contrary to the public interest cannot be read as 'access under Part IIIA,' but merely 'access' *simpliciter*. Did this mean, for example, that the regime governing access to declared services under Part IIIA cannot be taken into account when considering the effects of access? The Tribunal accepted that for the purposes of criterion (f) 'access' merely means access on reasonable terms and conditions, rather than 'access under Part IIIA'.

However, the Tribunal stated that if mere access was not contrary to the public interest, but declaration may be so when the likely character of access under Part IIIA is considered, this would likely be taken into account as a matter of discretion. The Council considers this to be an appropriate, pragmatic approach.

The Tribunal applied criterion (f) in a manner largely consistent with previous Council and

[1] *Sydney Airport Corporation Ltd v Australian Competition Tribunal* [2006] FCAFC 146, quoted at [39].

The *Trade Practices Amendment (Infrastructure Access) Act 2010* commenced on 14 July 2010.

This legislation makes a number of amendments to Part IIIA of the TPA which were outlined in the June 2009 and April 2010 issues of *Accessible*. The Council will be updating its Guides to reflect these changes and other developments.

On 29 June 2010 the Council released its final determination in favour of light regulation of the Kalgoorlie Kambalda Pipeline (KKP) in Western Australia.

The KKP has had an unusual regulatory history. Despite being a covered pipeline under the Gas Code and subsequent National Gas Law, no access arrangement has ever been submitted for the KKP.

Further information on the KKP is contained in the Council's determination and statement of reasons which is available under the 'past applications' tab on the Council's website at www.ncc.gov.au.

Tribunal decisions. It noted that where criteria (a) and (b) are satisfied, these conclusions should not be reopened under criterion (f) (though satisfaction of criteria (a) and (b) give rise to public interest benefits relevant to criterion (f)).

The Tribunal further stated that the factors which it will take into account when considering the 'public interest' will not be limited to strict cost-benefit issues. Rather, the Tribunal will have regard to broader issues regarding social welfare and equity, and consumer interests. The Tribunal noted that the impact of these factors will usually be difficult, if not impossible, to quantify. As such, the cost-benefit analysis will have significant qualitative, as well as quantitative, aspects.

The Tribunal concluded that criterion (f) does not require that the benefits of access be shown to outweigh the costs. Rather, it is a bar to declaration where the decision maker is satisfied that the costs of access would outweigh the benefits.

The Tribunal held that criterion (f) turned on two key benefits—capital savings from avoiding rail duplication, and the exploitation of otherwise stranded iron ore deposits, and two key costs—potential discouragement of investment in alternative railways, and delayed implementation of expansions and improved operating practices.

In relation to BHPB's Goldsworthy railway, the Tribunal found that criterion (f) was satisfied because the railway would not require expansion to meet third party demand and because there were unlikely to be alternative railways. Criterion (f) was also satisfied for Rio Tinto's Robe River railway until 2018, before which the line would have spare capacity.

The Hamersley and Mt Newman railways were found not to satisfy criterion (f) because they would need to be expanded to meet likely demand beyond the incumbents' existing plans, and the costs from the delays that would likely result from those expansions would be significantly higher than the savings from avoiding the need for alternative facilities.

On 15 June 2010 the Minister for Resources and Energy granted a 15 year no-coverage determination for the QCLNG pipeline.

The Minister's determination and statement of reasons are available on the Council's website at www.ncc.gov.au

Application for certification of Queensland Rail Access Regime

On 17 June 2010 the Premier of Queensland, the Hon Anna Bligh MP, applied under s44M of the TPA for the certification of the Queensland Rail Access Regime as an effective access regime. A copy of the application, together with details of the relevant legislation and other components of the Regime, is available on the Council's website.

The Queensland Rail Access Regime currently applies to rail transport infrastructure services where QR Limited is the railway manager, and to the coal handling services at Dalrymple Bay Coal Terminal. The Queensland Government is amending the relevant legislation so that these services continue to be covered by the Regime following the privatisation of QR Limited.

The certification process

The Commonwealth Minister is responsible for deciding whether or not to certify the Queensland Rail Access Regime as effective after receiving a recommendation from the Council as to whether or not the Regime meets the requirements for certification. The Council understands that the decision-making Commonwealth Minister for this matter will be the Treasurer, the Hon Wayne Swan MP. The TPA requires the Council to use its best endeavours to make its recommendation to the Commonwealth Minister within a period of six months, with provision for extension in exceptional circumstances.

In deciding whether or not to recommend that a regime be certified as effective, the Council must have regard to the principles set out in Clause 6 of the Competition Principles Agreement. The requirements for certification recognise that a range of regulatory approaches are capable of incorporating those principles. The Council must also have regard to the objects in s44AA of Part IIIA of the TPA.

Where a state or territory regime is certified as effective, that regime will exclusively govern the regulation of access to the services to which are subject to it. Those services cannot be declared under the generic access provisions in Part IIIA of the TPA or subject to a voluntary access undertaking by the service provider. Further information about the consequences of certification can be found in the Council's Guide to Certification (available on the website).

The Council's consideration of the certification application and declaration applications

As reported in the June 2010 issue of *Accessible,*

on 19 May 2010 Pacific National Pty Ltd lodged applications under s44F(1) of the TPA for declaration of four services provided by the coal railway network in Central Queensland owned by QR Limited (declaration applications). The decision-making Minister in relation to the declaration applications is the Premier of Queensland, the Hon Anna Bligh MP. The Council has announced its intention to consider the declaration applications together.

In the Council's view, many of the critical issues that arise in relation to the certification application mirror the issues that arise in relation to the declaration applications (in particular as they relate to declaration criterion (e)in s44G(2) of the TPA). The Council intends to undertake its consideration of the application for certification of the Queensland Rail Access Regime at the same time as its consideration of the declaration applications and, where appropriate, through a common process.

The Council's process

The period for written submissions on the applications closed on 19 July 2010 and the Council received a total of three submissions. Rather than seeking multiple submissions, the Council will treat submissions in relation to each application as submissions in relation to all these applications and will run its consideration of the certification application in parallel with its consideration of the declaration applications.

Given the complexity of the circumstances surrounding the applications, the Council is providing an opportunity for parties to make supplementary submissions addressing the consequences of any significant developments which have occurred since the first submission deadline. For example, differences between the Queensland Competition Authority's draft and final recommendations on QR Network's proposed access undertaking or changes to proposed legislation. Supplementary submissions must be made by **5pm on Monday 16 August 2010**.

Once the Council has received and considered the submissions, it will prepare a draft recommendation, provide a further opportunity for public comment on the draft recommendation, and provide its final recommendation on the certification application to the Commonwealth Minister. The Council anticipates that it will provide its final recommendation on the declaration applications to the Premier of Queensland at the same time. The TPA requires the decision-making Ministers to make their respective decisions within 60 days after receiving the Council's final recommendation. In the case of the certification application, this period may be extended. However, if the Premier does not make a decision on the declaration applications within the 60 day period, she will be deemed to have decided not to declare the services.

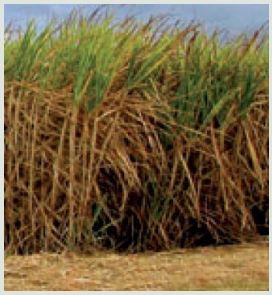
Final recommendation on Herbert River cane railway

On 16 July 2010 the Council provided its final recommendation to the designated Minister, the Hon Dr Craig Emerson MP, on the application by North Queensland Bio-Energy (**NQBE**) under Part IIIA of the TPA for declaration of the service provided by the narrow gauge cane railway owned by Sucrogen (Herbert) Pty Ltd (**Sucrogen**) in the Herbert River district of North Queensland.

NQBE had sought declaration of the service in order to operate its own trains and rolling stock to transport sugarcane to its proposed new cane processing factory near Ingham. The Council's 1 June 2010 draft recommendation was that the service not be declared. After considering the application and submissions made by Sucrogen and the Queensland Cane Growers Organisation, the Council in its draft recommendation reached a preliminary view that it was not satisfied that the Herbert River cane railway was of national significance and was not satisfied that access to the service would not be contrary to the public interest.

In preparing its final recommendation, the Council also took into account submissions in response to the draft recommendation received from NQBE and Sucrogen.

The designated Minister has 60 days from the day on which he receives the Council's recommendation to make his decision to declare or not declare the service and to publish his decision and his reasons. If he does not do so within 60 days, he will be deemed under the TPA to have decided not to declare the service. The 60 day period will expire on 20 September 2010. The Council will publish its final recommendation on its website on the day the designated Minister makes his decision (or deemed decision).



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