Accessible

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Full Federal Court decision on third party access to Pilbara railways

On 4 May 2011 the Full Federal Court (Keane CJ, Middleton and Mansfield JJ) handed down its judgment in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 (***Pilbara Rail Appeal***). This proceeding involved appeals from decisions of the Australian Competition Tribunal (**Tribunal**) relating to the declaration under Part IIIA of the *Competition and Consumer Act 2010* (**CCA**) of iron ore railways in the Pilbara operated by Rio Tinto Ltd (**Rio**).

Most notably, the Court allowed an appeal by Rio, with the effect that a declaration relating to Rio's Robe River iron ore railway was set aside. In its judgment, the Court construed the question of whether it is 'uneconomical for anyone to develop another facility to provide the service' (commonly referred to as 'criterion (b)') in a manner that departs significantly from precedent. This new construction has important implications for the future application of Part IIIA of the CCA and other access regimes such as the National Gas Law (**NGL**).

In *Re Sydney International Airport* [2000] ACompT 1 the Tribunal said the 'uneconomical to develop test should be construed in terms of the associated costs and benefits of development for society as a whole. Such an interpretation is consistent with the underlying intent of the legislation'. The Tribunal interpreted the (then) Gas Code in *Re Duke Eastern Gas Pipeline* [2001] ACompT 2 in the same manner. Since these cases this 'social test' has been adopted for criterion (b) by the Tribunal and the Council in every matter regarding third party access under the CCA, the NGL and its predecessor Code.

In the *Pilbara Rail Appeal*, the Full Federal Court overturned this view, holding that criterion (b) asks whether there is 'someone in the market place, whether by reason of circumstances specific to itself or otherwise, [who is] able to develop a similar facility' (at [50]). The Court said this involves 'identifying an individual who might profitably build the [alternative facility]' (at [86]) including individuals who may subsidise the development of duplicate facilities from the profits of related activities. This construction shifts the focus of criterion (b) from the costs and benefits to the Australian public, to private financial profitability.

In the Council's view, a key policy objective of Parliament in enacting Part IIIA was to avoid wasteful duplication of nationally significant facilities where that is contrary to the interests of Australian society as a whole. The Council considers this is evident from the enactment history of Part IIIA, particularly the Hilmer Report that recommended it, and the objects clause in s 44AA of the CCA. The Council acknowledges, however, that the Full Federal Court took a different view of Part IIIA's enactment history.

The Council's view is that (as stated by the Tribunal in *Re Sydney International Airport*) a social cost/benefit construction of criterion (b) is required to achieve Parliament's policy objective. The Council therefore respectfully disagrees with the Full Federal Court's reinterpretation of criterion (b). It considers that the private profitability construction of criterion (b) will inappropriately limit the availability of declaration under Part IIIA in almost all cases except where, for example, the facility in question serves only marginally profitable economic activity. This would, in the Council's view, frustrate the intent of Part IIIA.

Both Pilbara Infrastructure Pty Ltd and the Council have separately made applications for special leave to appeal the Full Court's decision to the High Court. The Council has also sought to intervene in the proceeding commenced by Pilbara Infrastructure. These applications have yet to be considered by the High Court.

Certification of SA Rail Access Regime

On 27 May 2011 the Council provided its final recommendation to the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP.

The Minister has 60 days to make his decision. Once this occurs, the Council will publish the decision together with the Council's final recommendation on the Council's website at www.ncc.gov.au

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SA Ports Access Regime certified

On 9 May 2011, the Commonwealth Minister, the Hon David Bradbury MP, released his decision to certify the South Australian Ports Access Regime as an effective access regime for a period of 10 years pursuant to s 44N of the CCA. The decision is consistent with the Council's final recommendation. Copies of the Minister's decision and statement of reasons, along with the Council's final recommendation, are available on the Council's website.

The South Australian Ports Access Regime, established under the *Maritime Services (Access) Act 2000* (SA) (**MSA Act**), covers essential maritime services and regulated services provided at proclaimed ports. Ports that are currently proclaimed are Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard. All of these ports are operated by Flinders Ports Pty Ltd.

In its final recommendation, the Council concluded that the South Australian Ports Access Regime satisfactorily addresses the principles governing certification in clause 6 of the Competition Principles Agreement and the requirement to have regard to the objects of Part IIIA in s 44AA of the CCA.

A consequence of the certification is that the regulation of access to essential maritime services and regulated services at any of the proclaimed ports is subject to the MSA Act and these services cannot be declared under Part IIIA of the CCA, nor be the subject of an access undertaking to the Australian Competition and Consumer Commission. Any request to Flinders Ports for access to these services must be managed by Flinders Ports in accordance with the MSA Act.

Access regulation overseas – USA

Over the next few issues of *Accessible*, the Council will look at how other countries regulate access to infrastructure. In the first of this series, we look at the US essential facilities doctrine which has informed the Australian response to the 'essential facilities problem', if only to a limited extent.

The 'essential facilities problem' arises where access to a facility exhibiting natural monopoly characteristics is necessary to enable businesses to compete in dependent markets. As the Hilmer Committee observed in 1993, 'the challenge from a competition policy perspective is to provide a mechanism that will support competitive market outcomes by protecting the interests of potential new entrants while ensuring the owner of the natural monopoly element is not unduly disadvantaged.' The Hilmer Committee was not convinced that the essential facilities doctrine had sufficiently developed to provide a suitable model for Australian law.

In the US as in Australia, some industries, such as telecommunications and electricity, are regulated. However, unlike Australia, the US does not have an access regime of general application. General access issues in the US are dealt with under antitrust law (*Sherman Act* 15 USC §§1-7), ostensibly through the application of the essential facilities doctrine. This is because the US Supreme Court has said that it does not recognise the doctrine (*Verizon Communications Inc v Law Offices of Curtis v Trinko LLP* 540 US 398 (2004) (***Verizon v Trinko***)).

The doctrine is a creature of the common law, developed by US courts in the context of 'refusal to deal' cases, generally regarded as dating back to 1912 (*United States v Terminal Railroad Association of St Louis* 224 US 783 (1912)) although not explicitly referred to by a US court until 1977 (*Hecht v Pro-Football, Inc.,* F.2d 982 (DC Cir 1977)). Its development has not been without controversy: in addition to the Supreme Court's comments in *Verizon v Trinko*, numerous critics have called for the doctrine to be severely limited or abandoned altogether. It has been observed that all essential facilities doctrine cases after *Verizon v Trinko* have been unsuccessful and that even where a court was satisfied that a facility was essential, liability turned on other considerations or was in many cases rejected on the merits.

The essential facilities doctrine is a limitation on the right of a firm to choose with whom it will deal. According to the US Court of Appeal (*MCI Communications Corp. v AT&T Co.* 708 F.2d 1081

Councillor Rod Sims nominated to be next chairman of ACCC

The Government has nominated NCC councillor Rod Sims to become the next chairman of the ACCC when the current chairman Graeme Samuel steps down on 31 July 2011. Assuming the nomination receives majority support from the States and Territories, Mr Sims will be appointed on 1 August 2011 for a five year term.

Certification of DBCT Access Regime

On 10 May 2011 the Council provided its final recommendation to the Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP.

The Minister has 60 days to make his decision. Once this occurs, the Council will publish the decision together with the Council's final recommendation on the Council's website at www.ncc.gov.au

(7th Cir. 1983), pp 1132–33), there are four elements to liability:

(1) control of the essential facility by a monopolist

(2) a competitor's inability practically or reasonably to duplicate the essential facility

(3) the denial of the use of the facility to a competitor, and

(4) the feasibility of providing the facility.

While this test bears some similarity to the declaration criteria in Part IIIA of the CCA, there are fundamental differences between the US and Australian approaches to access to essential facilities.

In the US the essential facilities doctrine is not a cause of action in itself and a plaintiff will not succeed unless a breach of the *Sherman Act* is established. On the other hand, in Australia the creation of access rights under Part IIIA does not require any contravention of the 'misuse of market power' provisions in s46 of the CCA, or that there be any anticompetitive intent on the part of the facility owner.

Further, remedies for a successful plaintiff in the US are personal. The plaintiff may be awarded damages for losses flowing from the refusal to deal and may obtain an injunction requiring the facility owner to provide the plaintiff with access to the facility on reasonable terms. In Australia, a party that has been denied access can seek access through declaration under Part IIIA, but the right to negotiate access arising from declaration is not limited to the applicant.

It is also significant that *Sherman Act* trials in the US are before a jury that determines a dispute between two parties without regard to the broader public interest. In Australia, the final decision maker is a State or Federal Minister who is expressly required to have regard to the public interest and the objects of Part IIIA in deciding whether or not to declare a service.

In summary, the essential facilities doctrine and Part IIIA are both directed to the 'essential facilities problem'. However, while the former is a judicial device for establishing liability within a dispute between private parties, the latter is a policy response directed toward the promotion of the public interest.

Who's who in regulation – OTTER

The Office of the Tasmanian Economic Regulator (OTTER) provides high level regulatory support to Tasmania's independent economic Regulator, which was established on 1 June 2010 by the *Economic Regulator Act 2009* (Tas).

The Regulator comprises a board of three people and replaces the previous statutory positions of Director of Gas, Electricity Regulator, Water and Sewerage Economic Regulator, and Government Prices Oversight Commission.

The Regulator is responsible for administering the *Electricity Supply Industry Act 1995* and the *Tasmanian Electricity Code,* with the objective of promoting efficiency, competition, and safety in the electricity industry. The functions of the Regulator include administering the licensing system for electricity entities, monitoring technical standards in the electricity industry, and enforcing the *Tasmanian Electricity Code*.

Similarly, the Regulator is responsible for administering the *Gas Act 2000*, the *Gas Pipelines Act 2000*, the *Gas Distribution Code* and the *Gas Retail Code*, which includes administering the licensing system for gas entities, granting pipeline licences, and establishing and monitoring codes for gas services. Unlike electricity, the price of natural gas in Tasmania is not regulated. As the supply of natural gas is relatively new, it is not considered an essential service and its pricing must be competitive with electricity so as to gain customers.

Under the *Water and Sewerage Industry Act 2008,* the Regulator's functions include administering the licensing system for the three water and sewerage corporations, regulating prices for water and sewerage services, and monitoring and reporting on the performance of regulated water and sewerage corporations.

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