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The Australian Competition Tribunal 'undeclares' third party access for rail lines company applying 'private profitability' test to 44H(4)(b) (The Pilbara Infrastructure Pty)

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Australian Competition Tribunal, 8 February 2013, Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd

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On 8 February 2013 the Australian Competition Tribunal (Tribunal) handed down its decision in *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd*. This brought to an end a long running legal dispute over third party access to *Rio Tinto*'s rail lines in the Pilbara region of Western Australia.

Background: Access to essential facilities in Australia

Under Australian law owners and operators of infrastructure can be required to allow third parties access to their facilities if their use is 'declared' by a designated minister (the Federal Treasurer). Infrastructure can only be declared for access if five criterion are met. Briefly, this requires that [1] (a) access would promote a material increase in competition in at least one dependent market; (b) it would be uneconomical for anyone to develop another facility to provide the service; (c) the facility is of national significance having regard to size, importance to trade or commerce or importance of the facility to the national economy; (e) it is not already subject to a certified access regime and (f) that access, or increased access, to the service would not be contrary to the public interest.

Third parties seeking access must first apply to the National Competition Council (NCC) which conducts public enquires and makes a recommendation to the designated minister, who then decides whether or not to declare the service. Parties unsatisfied with the Minister's decision can apply to the Tribunal for a review of the declaration and subsequently an appeal may be made to the Full Federal Court in points of law and ultimately the High Court (Australia's highest court).

The Pilbara Rail Case

At the end of 2007 Fortescue Metals Group Ltd (FMG), via its subsidiary, *The Pilbara Infrastructure* (TPI), applied to the NCC for an access declaration of *Rio Tinto Ltd*'s *Robe* and *Hamersley* railway lines [2]. These lines comprise more than 1,400km of rail and are used to carry iron ore from *Rio Tinto*'s mines in the Pilbara to the coast.

In August 2008 the NCC recommended declaration of these lines and this recommendation was followed by the federal Treasurer, who declared the services in October 2008.*Rio Tinto* made application for a merits review in the Tribunal the following month. More than 18 months later, in June 2010, the Tribunal made its determination, upholding (with modification) the declaration of the *Robe*line but overturning the decision in relation to the *Hamersley* line. Both *Fortescue* and *Rio Tinto* appealed this decision to the Full Federal Court which, in May 2011, determined that neither railway should have been declared. A final appeal was made by *Fortescue* to the High Court, which delivered its judgment in September 2012 [3], upholding the decision of the Federal Court and remitting the matter back to the Tribunal for consideration according to law.

Key points of law

In the High Court the key dispute centred around the meaning to be ascribed criterion (b), the requirement that it be 'uneconomical for anyone to develop another facility to provide the service'. The Court also considered criterion (f), that access or increased access would not be contrary to the public interest, and also ruled on the proper role of the Tribunal in the review process.

For more than a decade prior to the High Court's decision, the NCC, Minister and Tribunal had assessed criterion (b) by reference to a 'social benefit test', which considered 'whether for a likely range of reasonably foreseeable demand for the services provided by means of the [facility] it would be more efficient, *in terms of costs and benefits to the community as a whole*, for one [facility] to provide those services rather than more than one' (emphasis added) [4]. In the Tribunal's *Pilbara* decision it applied a similar, though not identical test, described as the 'natural monopoly test', asking 'whether the facility in question can provide society's reasonably foreseeable demand for the relevant service at a lower total cost than if it were to be met by providing two or more facilities' [5]. This test assesses only production costs, whereas the social benefits test also considers allocative and dynamic efficiency.

The High Court noted that both these constructions gave the word 'uneconomical' 'a meaning drawn from the study of economics' (para 79) which requires assessment against a hypothetical scenario without the need for any 'prediction of likely market behaviour' (para 82). Highlighting again its preference commercial based tests rather than tests grounded heavily in economic theory, the Court rejected both these constructions, instead concluding that the proper test was one of 'private profitability'. Pursuant to this test the question to be asked is whether anyone else could profitability develop another facility to provide the service (para 104). This requires 'close consideration of the market under examination' (para 104) and, while requiring the application of judgment, 'is a question that bankers and investors must ask and answer in relation to any investment' (para 106).

In considering the public benefit test in criterion (f) the High Court held that the range of public

interests that could be considered by the Minister was 'very wide indeed' (para 42) and the Tribunal should not lightly depart from a Minister's conclusions on public interest (para 112).

The High Court further held that the Tribunal, by conducting a full merits review of the Minister's declarations, including considering fresh evidence, had failed to perform its statutory task. The Tribunal's role is confined to a 're-consideration' of the Minister's decision and should focuson the material before the Minister, with assistance from the NCC if required (para 65).

The Tribunal's 'undeclaration' of the Pilbara rail lines

The High Court remitted the matter back to the Tribunal for determination according to law.Applying the private profitability test for criterion (b), the Tribunal concluded that there was insufficient evidence to support declaration of either line and therefore revoked the Minister's declarations. In the course of the review it refused Fortescue's request that the Tribunal seek further information necessary to address the private profitability test, holding that this would result in the type of review the High Court had concluded went beyond the powers of the Tribunal.

Future of access in Australia

Australia's third party access regime is currently being reviewed by the Productivity Commission, which will consider, among other things, 'whether the criteria for declaration strike an appropriate balance between promoting efficient investment in infrastructure and ensuring its efficient operation and use'. The High Court's timely interpretation of 'uneconomical' will be a key issue in this review. While facilities owners clearly prefer the High Court's 'public profitability' test, the NCC has expressed the view that the High Court's construction is unsatisfactory and should be amended to prevent 'wasteful duplication of societal resources' [6].

The other key issue arising from the Pilbara dispute was its protracted and clearly unacceptable timeline (during the course of which *Fortescue* constructed its own multi-billion dollar rail line) and the implications such delays have for business certainty. As the High Court acknowledged, delays in this case can largely be attributed to the incorrect assumptions the Tribunal made about its role in the review process. In addition to the High Court's ruling which restricted this role, amendments to the Act in 2010 (*Trade Practices Amendment (Infrastructure Access) Act* 2010 (Cth)), designed to expedite the access process, imposed strict timeframes for review and express limitations on the role of the Tribunal. Nevertheless, concern about the layers of review and the delays and uncertainty this can cause, will ensure this remains a core issue for consideration by the Commission.

More broadly, the current review will exam the merits of retaining a broad third party access regime in Australia. The protracted and controversial nature of these proceedings will no doubt weigh heavily on the Commission's assessment of the appropriateness and effectiveness of Australia's current access regime.

[1] Section 44H(4)*Competition and Consumer Act 2010*. Note that there is no subsection (d) in the Act.

[2] Access had also been sought to BHP's rail network in the Pilbara, but they did not form part of the appeal under consideration.

[3] T*he Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[2012] HCA 3

[4] R*eDuke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 at [137].

[5] T*he Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[2012] HCA 3 (para 79).

[6] NCC submission to Productivity Commission Inquiry into the National Access Regime (1 November 2012) (page 8) (http://www.pc.gov.au/__data/assets/...).

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