

**PRODUCTIVITY COMMISSION – THE ACCESS REGIME**  
**(THE ISSUES PAPER)**

**A ONE STEP ACCESS APPLICATION**

As noted in a separate part of this submission, I believe that there are too many layers included in the access regime in Part IIIA of the Competition and Consumer Act (**the Act**).

Recent applications for access have sometimes being progressed fairly speedily and access terms have been settled without a great deal of delay; on the other hand there have been some critical access applications in which the process is taken inordinate length of time before we even get to the stage of access terms being considered.

One vital change to the process which could be considered viable is to ‘concertina’ the application access process together with the access terms process. The existence of a review mechanism in relation to both aspects of the current regime in my view is an open invitation for persons who wish to protect their particular access facility from a successful application, to seek to review all stages of the process taking advantage of the rights vested in them. Such temptation would be reduced if in fact the whole access application process was one which the access application contains not only the grounds upon which access should be granted (satisfying the tests currently provided for in the legislation to justify an access being granted, coupled with the terms conditions, prices and related factors involved in granting the application). I argued for this in my paper presented to the University of Melbourne in February 2008 entitled – ‘National Economic Regulation – the cost of (inadequate ?) reform’ . An edited copy of this paper is also attached to this email.

When an application for access is being made, the parties seeking access must have a very good idea of the terms under which they would like to apply for access. The party from whom access is being sought must have some idea of the terms which they might be prepared to accept in agreeing to allow access to be given. At the same time the application for access is made, the parties should put forward the terms under which they are prepared to accept access (monetary and other terms). These matters should be considered together in the overall application for access. To divide the task up in the way in which the current regime has, leads to frustration and some would suggest confusion. Indeed the Tribunal, in dealing with the application for access to

Sydney Airport in a relatively recent decision<sup>1</sup> adopted a somewhat similar approach in dealing with the review of the application for access.

It may be argued that until a company knows that it has been granted access that it will not be able to effectively and efficiently estimate what the costs will be in relation to the project. I do not find that argument at all convincing. Businesses do not make decisions on whether they are to go into a major project and to bid for a project, setting out the costs that they believe they can construct the relevant project, without having to do the sums and appropriate calculations which are arguably no different to those that applied to the seeking of access. Some of the oral evidence provided by the National Competition Council suggests that some form of gaming may well occur in relation to applications which may not have been well enough thought through and assessed.

The Australian Competition Consumer Commission (**ACCC**) has the better experience in dealing with questions of access terms and the broader competition implications in this area (especially as a result of this fairly lengthy history in dealing with the telecommunications industry and may be an even better body to undertake these tasks.

Whatever regime is put in place there must always be some flexibility to enable access seekers to provide new information to ensure that the access regime that has been established as a result of the successful application can be tinkered with at the edges to ensure that appropriate accounts to be taken of unforeseen events that have occurred since the application as made and the relevant access regime is being pursued. The Act currently allows for amendments/variations to be made to the terms of authorisations granted where such 'tinkering' is warranted. There is no good reason why a similar process should not be introduced into this arena to ensure that having made the more difficult and time consuming decision to grant access and the terms on which access are to be granted of the decision maker should be equipped and ready to vary the arrangements where the appropriate arguments have been put to it for such variation.

It is clear that it would be very difficult to persuade the government to jettison the whole process currently in place and put in place a totally new process which of course maybe more ideal.

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<sup>1</sup> *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146.

## SHOULD THE RIGHT OF REVIEW FROM DECISIONS OF THE COUNCIL AND/OR THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION BE REMOVED?

One of the main reasons why the current access regime does results in very lengthy and costly “cases” in dealing with a relevant application, is because there is, and has always been a detailed and many would regard as a counter-productive review process in the legislation. Whilst the layers of review and appeal have been reduced from the first draft of the legislation, there still remain too many layers within the process.

If the government is to reduce the number of decision makers before a final decision on whether access is granted, and the terms of access, once the access application has been granted, it faces the very difficult decision of which of the relevant bodies should be removed from the current regime. We have seen what many agree has been a successful simplification of the review process in relation to the telecommunications access regime under Part XIC of the Act.

Does the Council have the necessary expertise and experience to warrant the removal of the Tribunal from the review process? Would we be confident to leave it to the Federal Court of Australia to decide or review issues including questions of law? (especially as the Federal Court of Australia (**the Court**) does not have sitting on it an economist as the High Court of New Zealand does). Alternatively should we eliminate the Council as a decision maker, but provide it with necessary resources to enable it to play the critical role of Amicus Tribunal/Court. This would in effect copy the approach taken by Parliament when it simplified the merger authorisation review process. Regrettably we have no examples of the direct application to the Tribunal for the authorisation of mergers since that legislation was amended. But the arguments in favour of such an approach still persuasive.

If the Council is provided with the relevant resources to ensure that all relevant information/arguments are provided/presented to the Tribunal, and all relevant arguments are also presented to the Tribunal in evaluating an application for access, with the Council also taking a neutral role as we believe the ACCC should/would take in any authorisation for a merger, we are likely to see a reduction in the number of applications made for access where there is a genuine doubt as to whether the access application will be successful or not, and the parties realise that the process stops at the Tribunal (other than on questions of law).

On reason why the Federal Court is probably not an appropriate body to make the decision on the merits, because these matters involve a large number of economic issues which have to be evaluated. In this context we note that the New Zealand regime provides for lay members to sit on

the High Court of New Zealand (these would usually be economists) providing one of greater confidence that the decision making process will be a balanced one.

I also repeat in essence the comments made on page 21 of my 2008 Melbourne University paper namely that we should have a regime under which the Tribunal should be the sole decision maker on the merits of any access application with the Council for providing appropriate assistance. As indicated earlier an edited version of my paper is attached

We then turn to the question of access terms and whether that should have the same structure as the application for access in that relevant regime would be one for the Tribunal to decide the actual terms with the ACCC playing the role of Amicus Tribunal in the same way as it is currently is required to play in relation to merger authorisation applications. However, the process could be even further simplified if, as argued in a separate part of the submission, the application for access should include not only the arguments in favour of granting access but also the terms under which access to be granted, the two matters being considered as part of a global application to the relevant decision maker – in our view the Tribunal. That particular question is discussed in a separate part of this submission.

## WHAT ROLE SHOULD THE RELEVANT MINISTER PLAY IN THE ACCESS DECISION PROCESS?

It is my view that the relevant Minister (either the Commonwealth Minister or the State or Territory Minister) should not retain the power currently enjoyed by the relevant Minister to in effect block or overturn decisions made by the relevant decision makers on questions of access.

I make this comment in the context of the ideological basis for an access regime, and to reflect the philosophy behind the current Competition and Consumer Act (**the Act**). When the predecessor to the Act was introduced, the relevant Commonwealth Minister did have power to give directions to the then Trade Practices Commission (**Commission**) to take into account certain matters, or to act in a particular way, in dealing with various matters considered by the Commission under that legislation. That power was removed in due course. Now, the relevant Minister, in line with other persons who may wish to influence decisions to be taken by the Australian Competition Consumer Commission (the ACCC), for example in authorisations or notifications etc, must make a submission in the same way as others do. These matters will be taken into account by the decision makers in any process – in this context, the National Competition Council (**the Council**) or the Australian Competition Tribunal (**the Tribunal**).

Whilst the Commonwealth Government still has the power to exclude the operation of the Act pursuant to section 51(1) in certain circumstances, and whilst the legislation still recognises the unique position of the overseas cargo shipping industry in Part X of the Act, there is no justification, in my view, for the Minister (or equivalent person) to have the influential role that he or she currently enjoys. If the relevant Minister (representing the views of the particular Commonwealth, State or Territory Government) believes that certain criteria or issues are so critical to the particular application for access being considered by the Council (or arguably the Tribunal) the Minister should be able to make submissions or provide information to the Council or Tribunal. The decision maker will no doubt take into account and give appropriate weight to any submission or information provided to it. This is the way the ACCC takes into account matters that are relevant in application for authorisation, notification, or some other similar decision making processes.

If there are particular areas of the Australian economy that are regarded as so important so as to exclude the operation of the relevant legislation (and I argue that there can be very few if any that should be given that special treatment) then it is more appropriate for the legislation to clearly indicate why that particular area should be excluded from the operation of legislation. In that context, the Government should be asked to provide compelling reasons as to why the legislation is necessary. In my view there should be no reason why the relevant State /Territory government should be given that power in relation to matters that come within the jurisdiction of the Commonwealth. A competition/public interest impact statement must be prepared.

In the event that this argument is not acceptable, the legislation should be amended to make it mandatory for the relevant Minister in wishing to override the relevant decision taken by the Council, the Tribunal (or whoever is relevant) to set out in detail why that decision has been taken. Regrettably the proposition that legislation when proposed should be supported by what is in effect a compelling cost benefit analyses and reasons for the legislation is given lip service to in Australia.

A similar approach in my view should be taken if the relevant Minister wishes to override any decision taken by the relevant body. Governments will always reserve to themselves the power to introduce legislation in extreme situations; it is unlikely that we should see such extreme situations arising in the context of the access regime. Furthermore, the failure to require proper reasons being given for the veto power being exercised makes mockery of the principles behind the philosophy underpinning the current legislation.