HERBERT SMITH FREEHILLS

Productivity Commission

National Access Regime

Submission from Bob Baxt AO, Emeritus Partner, Herbert Smith Freehills

Thank you for allowing me to provide a further submission to the Commission in relation to its draft report on the National Access Regime. These should be read as being in addition to my initial submissions provided to the Commission following release of its discussion paper.

There are basically 3 matters that I will make brief comments on but please also refer to the original shot submissions. Whilst these are matters that many will not see as being at the 'heart' of the issues set out in the terms of reference released by the Federal Government to the Commission , they are critical to the future continued successful operation of the access l regime.

It is fair to say that whilst the access regime is seen by many as contributing significant benefits to Australian economy and to business, it falls short of delivering the substantial further benefits that could be achieved if the regime were restructured in the manner suggested.

The matters I wish to address are:

1 Why do we need a double application regime in seeking not only access but the terms of access (I addressed this matter in my original submission under the heading of 'A one step access application').

2 The impact of the review mechanism on the current regime and suggested changes

3 The role of the Minister in determining whether access should be granted.

My original one stop access application submission did not deal directly with questions relating to merits review; it is perhaps appropriate for the two matters in which I made original submissions – the one stop access application and my further submission on the right of revi.

One stop access application and merits review

I do not believe that the Commission has adequately considered the suitability of a one stop access process in dealing with applications for access. Clearly, neither the Hilmer Report nor the Government regarded the possibility of a one stop access application as a relevan factorwhen the access regime was framed. But, experience has shown, in a number of matters that the National Competition Council (NCC), and the Australian Competition Tribunal ACT) have considered over the years, that the questions that have to be considered in relation to access are very heavily connected to the critical further questions that must be assessed, and if necessary " ruled on ' in relation to the access terms – price, length of time, etc.

As indicated in my original submissions, I do not understand why in access application the parties are not required to state with some degree of certainty what terms they are prepared to accept or negotiate in relation to if access were to be granted. To require the parties to go through a 2 stage process, with the potential for delays, reviews and various other hurdles that may be thrown up, if the process has to go through 2 stages is, to my way of thinking, rather mind boggling. I had considerable experience in the early years of the access regime in operation as I have briefly set out in my earlier submissions. I have seen how the existence of the various review mechanisms, and a 2 stage process, provide a rather ingeniously devised mechanism to ensure that delays may be extracted by parties who wish to make it difficult for access applicants. Whilst I do not have concrete "paper evidence" that can be considered as directly attributable to aims of delaying the process, I can assure the Commission, and I believe that there are many who would support this too, that the structure of the legislation, its drafting and matters relating to time and review process all can and do contribute in allowing delays to be effectively achieved. This is both very costly, and very frustrating as well as time delaying

The argument that parties will not be able to identify with clarity all of the terms and conditions for granting access must surely be regarded as commercial. Parties who go into transactions involving mergers and other major reconstructions and rearrangements, must be fairly aware of the terms and conditions that have to be negotiated and dealt with. The processes do allow for variations to occur in the context of the terms to be offered. The NCC, the ACT or the Australian Competition and Consumer Commission (the ACCC), in the context of arbitration or a similar role will be able to assist the parties to structure appropriate changes just as a court or the parties to a contract have the ability in ensuring that the relevant term, that are finally agreed upon, will reflect the ongoing continued consideration relevant to the parties, the subject to the negotiations.

When agreements are entered into between commercial parties, there are many drafts of the agreements that are prepared. Similarly, assuming that broad agreement is reached on the availability of access and the nature of the regime to be applied, all being considered in the one matter before the relevant adjudicating body, there is little doubt that quick negotiations can be pursued in order to finalise the terms of final access.

In my initial submission I suggested that a one stop application should be considered bythe ACT properly resourced and assisted by economists and others to deal with the matter and that this may be a more efficient way of ensuring that the particular access application will be more quickly considered and finalised. Whilst I acknowledge that the existence of a direct application to the ACT in relation to mergers, offered by the Dawson Committee in its review of the competition legislation in 2003, has not been taken up by relevant parties who still regard the informal clearance mechanism that is administered by the ACCC as a more acceptable alternative than going through the more formal structure of an authorisation the logic of this approach still holds fast. Access applications are formal and do require detailed consideration in the same way as the authorisation process requires consideration of matters before either the ACT or the ACCC, and the existence of a more speedy and effective application system would be regarded as very attractive by many members of the community.

Merits review

In the PC Draft Report, my submissions are characterised as in effect being opposed to the existence of a form of review. The summary by the PC does not accurately reflect my view or approach. My position is that there are too many opportunities for review and that the mechanism that the legislation should allow for, should reduce the use of the review mechanism by the parties. To me, the continued overuse of the review mechanism is just another example of the tactics used by parties who wish to extract delay as part of a negotiating process.

I am comfortable that the courts should be provided with the opportunity to be approached to evaluate the decisions of administrative agencies. Rules of natural justice, the application of a consistent rule of law approach in matters relating to these and other issues in the competition law environment are critical. We are moving far too often away from the clear recognition that the rule of law and the appropriate principles that are applied in evaluating the operation of the rule of law must be applied fairly and consistently. But, there is little doubt, that the current access regime in Part 111A of the legislation allows for too many different stages for review and is cumbersome, costly and time consuming. There must be a better and more efficient way dealing with these matters.

A streamlining of the merits review mechanism, together with a one stop application process described above will certainly provide greater certainty and efficiency in dealing with these matters.