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High Court decision on third party access under the Competition and Consumer Act 2010

The High Court decision in *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal; The National Competition Council v Hamersley Iron Pty Ltd; The National Competition Council v Robe River Mining Co Pty Ltd* [2012] HCA 36 (*Pilbara Railways*) clarifies the operation of 2 key criteria under the *Competition and Consumer Act 2010* (the Act) (the 'uneconomic' and 'public interest' criteria) for determining whether a third party will have an enforceable right to enter negotiations to gain access to a service provided by 'monopoly' infrastructure.

The decision also has relevance for decisions made in accordance with similar criteria under the National Gas Law in relation to access to pipeline services provided by means of a gas pipeline ([84]).

The High Court held:

- the expression 'uneconomical for anyone to develop another facility to provide the service' in s 44H(4)(b) of the Act required an inquiry as to whether there was anyone who could profitably develop another facility
- the expression 'would not be contrary to the public interest' in s 44H(4)(f) of the Act was to be applied in the context of the limited scope of review by the Australian Competition Tribunal (the Tribunal)
- there was no residual discretion to be exercised if a decision maker was satisfied as to the matters listed in s 44H(4) of the Act.

The Court also clarified the operation of s 44K of the Act before amendments were made in 2010 dealing with what material could be put before the Tribunal and the limited nature of the Tribunal's review task.

Background

The proceedings related to services provided by 4 railway lines in the Pilbara: Goldsworthy and Mount Newman lines operated by BHP Billiton Iron Ore Pty Ltd and BHP Billiton Minerals Pty Ltd (together BHPB) and Hamersley and Robe lines operated by Rio Tinto Ltd and its associated entities (Rio Tinto).

Fortescue Metals Group Ltd (FMG) or its wholly owned subsidiary, The Pilbara Infrastructure Pty Ltd (TPI), applied to have the services declared under Pt IIIA of the Act – that is, for a right to negotiate access to the relevant railway services. On recommendations from the

National Competition Council (the NCC) that all 4 railway services be declared, the Minister (the Commonwealth Treasurer) declared the services relating to Hamersley, Goldsworthy and Robe for a period of 20 years; and, in failing to declare Mount Newman within the statutorily required timeframe, was taken to have decided not to declare that service.

On appeal by FMG, BHPB and Rio Tinto, the Tribunal set aside the decision to declare the Hamersley line and reduced the period of declaration for the Robe line to 10 years.

On judicial review application by FMG and Rio Tinto, the Full Court of the Federal Court dismissed FMG's application and allowed Rio Tinto's applications, overturning the declaration of the Robe line. FMG and TPI appealed to the High Court. The High Court by majority quashed the Tribunal's determinations and remitted the matters to the Tribunal for determination according to law.

The High Court decision

After dealing with the way the Tribunal carried out its review task ([65]), the High Court was concerned with 3 aspects of the test on which the National Competition Council and the Minister (and Tribunal on appeal) were required to be satisfied in order to declare a particular service.

Issue 1 – section 44H(4)(b) – 'Uneconomical' means 'unprofitable'

French CJ and Gummow, Hayne, Crennan, Kiefel and Bell JJ (Heydon J dissenting) held, over 2 possible alternatives, that the better view of 'uneconomical' in s 44H(4)(b) of the Act is 'unprofitable':

- the focus is on 'whether it is shown to be likely that anyone could profitably, and therefore would be likely to, develop another facility to provide the service' ([83], [81])
- the language of s 44H(4)(b) supports this conclusion ([95–96]); it points away from an evaluation of efficiency from the perspective of society as a whole and towards an evaluation of what would be feasible or practical for an actual or potential participant in the marketplace ([97])
- the attainment of the large national and economic objectives of Pt IIIA supported this view of criterion (b) ([97])
- the extrinsic material did not support the conclusion of one interpretation over another ([74], [95]).

In dissent, Heydon J held that 'uneconomical' meant 'wasteful of society's resources' ([157], [159]). Society's resources would be wasted by duplicating an existing facility if the existing facility could meet reasonably foreseeable demand for the service it provided at a lower total cost than if the service was provided by 2 or more facilities.

'Uneconomical' is not concerned with 'net social benefit' or 'natural monopoly'

The majority's decision is significant for its rejection of the 2 alternative meanings of 'uneconomical' on which the Tribunal had been acting for more than a decade.

Under the first alternative, the 'net social benefit' approach, preferred by the NCC and by the Tribunal in *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 and *Duke Eastern Pipeline Pty Ltd* (2001) 162 FLR 1:

- the decision as to what is uneconomical is made taking account not only of productive costs and benefits but also considerations of allocative and dynamic efficiency
  - allocative efficiency is where resources are used to produce a set of goods or services allocated to their highest-value uses. Dynamic efficiency involves preserving incentives for innovation and investment ([80], [164]).

Under the 'natural monopoly approach' ([79]), preferred by the Tribunal in *Pilbara Railways*, the subject of the High Court's decision:

- the decision as to what is uneconomical is made taking account of 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 2 or more facilities.

Issue 2 – section 44H(4)(f) – Not contrary to the 'public interest'

The majority held the range of matters to which the Minister may have regard in considering whether access (or increased access) to the service would not be contrary to the public interest is 'very wide indeed' ([42]). Conferral on the Minister of a discretionary value judgment such as this is a recognition of the 'great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest' ([42]). It is to be expected that the Tribunal would not lightly depart from a ministerial conclusion about whether access would be in the public interest ([112]).

In dissent, Heydon J considered that criterion (f) involved a narrow inquiry; it was directed only to whether there could be concrete harm to an identified aspect of the public interest which was not otherwise caught by criteria (a) to (e) ([187], [189–191]).

Issue 3 – section 44H(4) – No residual discretion

The entire Court held that, if the decision maker was satisfied as to the 6 criteria in s 44H(4), there was no residual discretion. Section 44H(4) was an exhaustive list of considerations that may bear upon the decision to declare a service ([116], [193]).

Implications for Commonwealth agencies

The decision clarifies the operation of 2 key criteria under the Act (the 'uneconomic' and 'public interest' criteria) for determining whether a third party is entitled to enter negotiations to gain access to a service provided by 'monopoly' infrastructure. The decision also has relevance for determinations that must be made in accordance with similar criteria under the National Gas Law in relation to access to pipeline services provided by means of a gas pipeline ([84]). It may also be relevant to other legislative schemes under which similar criteria apply.

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