FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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The Australian Version of the Essential Facilities Doctrine - A Low Threshold Chosen by Our Major Regulatory Body

When the national competition policy was reviewed by the Hilmer Committee in 1993, it recommended that the question of access to essential facilities had to be dealt with differently in Australia from the way it had been dealt with in the United States. Only one case had discussed the essential facilities doctrine in Australia - the Federal Court of Australia announced in the *Queensland Wire* case in 1988 that the essential facilities doctrine did not apply in Australia. The Hilmer Committee was concerned that natural monopolies, and the owners of very important facilities such as railway lines, electricity grids, bridges, ports etc., should in appropriate cases be made to provide access to these facilities so that this would lead to greater competition. To rely on the antitrust laws as currently (and still) drafted would be futile. Accordingly, the Federal Government enacted Part IIIA of the *Trade Practices Act* (the "Act"). This provides (basically) an administrative regime to deal with third party access questions. The National Competition Council (the "Council") was established to adjudicate on these matters and detailed legislation was enacted to govern the relevant rules.

The Council has now published its first decision on access which has immediately created problems in the way in which this area is to be addressed. The application in this case was by Australian Cargo Terminal Operation ("ACTO") for access to certain services provided by facilities owned by the Federal Airports Corporation ("FAC") at Sydney and Melbourne International Airports. The FAC owned the airports at that time. The actual applications related to the declaration of "the service provided through the use of freight aprons and hard stands to load and unload international aircraft" at the two airports. Additional services were sought in the applications. Similar applications were also brought against Qantas Airways Limited and Ansett Airlines Limited, which are the major Australian air carriers which also owned freight aprons and hard stands at the two airports. As it turned out, there were other organizations which owned similar facilities at the two airports. The Council decided to deal with the application against the FAC only, and to return to the other applications later. Those other applications have now been abandoned.

The first major decision issued by the Council on access applications has now been released in relation to this matter and the result is not one that antitrust lawyers are reading with any degree of confidence.

Before a facility can be declared under the Australian regime, a number of criteria have to be satisfied pursuant to section 44G(2) of the Act. The applicant has to establish the following:

(a) that access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:

  (i) the size of the facility; or
  (ii) the importance of the facility to constitutional trade or commerce; or
  (iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest.

While the legislation does not refer to natural monopolies, or to similar terms, the Council itself indicated in its own draft guidelines that the question of access should normally be linked to natural monopolies or similar situations. Clearly, each case would be dealt with on its own merits but because the criteria that have to be satisfied are so onerous, this indicates that access would only be granted in rather unusual circumstances.

Despite these factors, the Council has come down with a remarkable decision. It has declared the relevant facilities (that is the hard stands and aprons) owned by FAC as essential facilities in effect.

However, in dealing with the first three criteria in section 44G(2) the Council seems to have misconstrued the aim of the legislation.

The Council felt that the words in section 44G(2)(a) "promote competition" needed to be read literally and narrowly. Prohibitions in the Act are linked generally to establish that there has been a "substantial lessening of competition". This concept in turn has been carefully evaluated to ensure that competition, rather than the position of a competitor, is evaluated. The Council, however, seemed to read the expression promoting competition as equally promoting a competitor. The addition of one competitor in a thin market that was already highly competitive with the existence of a number of operators and owners of various facilities, was hardly discussed. As a result the relevant clause in section 44G(2) has been given a far wider reading than what was anticipated.

Similarly, the Council seemed to ignore the fact that Qantas, Ansett and a number of other operators already operated aprons and stands at the two airports. Their existence indicated that it would not be uneconomical to duplicate that particular facility and the associated service. The Council seemed to be confusing an application for those particular facilities with an application for access to the airport!! The logical result of the Council's decision was that

the Qantas and Ansett facilities would also have been declared so that one would have had a series of "essential facilities" in this context.

Furthermore, the Council did not consider that it was difficult to establish that these facilities were of national significance bearing in mind the criteria set out in section 44G(2). But again, and with respect, it seems that the Council was misconstruing the actual application and the terms of the Act. The airports were clearly of national significance in such a large country, as sparsely populated as it is. The hard stands and aprons would truly not have come within that description.

The Council was also satisfied that the other criteria in the section had been established.

Under the legislation, the Treasurer is required to review any decision taken by the Council within 60 days and to make an independent decision in relation to the matter. Whilst the Council delivered a 70 page report, the Treasurer's four page announcement appeared to "rubber stamp" the decision of the Council. One assumes that the Treasurer would have to make an independent evaluation and the Act is specific on this. From the information released from the Treasurer it is difficult to see how an independent evaluation of these matters had been undertaken by the Treasurer's office. Although that may well have occurred, the evidence was certainly not there to suggest it.

There is an appeal mechanism in this area the decision of the Council and the Minister may be appealed to the Australian Competition Tribunal (the "Tribunal"). The Tribunal generally consists of a judge who sits as chairperson, an economist and another lay person. One would have hoped that this decision could have gone to the Tribunal so that the important economic criteria that are set out in section 44G(2) could be evaluated in the context of other decisions made by the Tribunal over the years.

Editors' Note: At the time this issue went to print, the Council's decision had been appealed.