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COMPETITION & REGULATION UPDATE

HARPER REVIEW - KEY RECOMMENDATIONS FOR PORT AND RAIL INFRASTRUCTURE OPERATORS/USERS

The long-awaited Harper Panel's Final Report on Australian competition law and policy has been released. In this update, we highlight the key recommendations of the panel relevant to port and rail infrastructure operators and users, being recommendations with respect to the National Access Regime in Part IIIA of the *Competition and Consumer Act* (CCA) and the prohibition on the misuse of market power prohibition in section 46 of that Act. In summary, we consider that if implemented, the Panel's recommendations for Part IIIA will make it more difficult for access seekers to achieve declaration of infrastructure under Part IIIA. However, the recommended changes to section 46, which expand its reach and make it easier to prove a contravention, could provide access seekers with another avenue to use as leverage in negotiations with access providers.

NATIONAL ACCESS REGIME - PART IIIA

The Panel concludes that the National Access Regime in Part IIIA of the CCA still has a role to play today. It still has an indirect role in supporting industry specific access regimes and may also be required for future access regulation of ports and airports. The Panel agrees with the conclusion of the Productivity Commission (PC) in its 2013 review of the National Access Regime that Part IIIA is likely to generate net benefits to the community, however, its scope should be confined to ensure that it is only used in exceptional circumstances. If implemented, the Panel's recommendations will make it more difficult for access seekers to achieve declaration of infrastructure under Part IIIA.

The Panel recommends that the declaration criteria in Part IIIA should be amended as follows:

- Criterion (a) should require that access on reasonable terms and conditions through declaration promote a substantial increase in competition in a dependent market that is *nationally significant*. By requiring the promotion of a substantial increase in competition in a market that is nationally significant, the Panel recommends that the threshold for declaration in criterion (a) be increased from that recommended by the PC. This is to overcome an outcome of the Pilbara rail access case (*Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 246 CLR 379) in which many infrastructure owners were concerned that Fortescue only managed to satisfy this criterion in the above rail haulage market in the Pilbara.
- Criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service. This is contrary to the PC's preferred approach to criterion (b) which was that criterion (b) should be satisfied where total foreseeable market demand for the infrastructure service over the declaration period could be met at least cost by the facility. However, it is consistent with the PC's fall-back position that if criterion (b) continues to be applied as a private profitability test as per the High Court's decision in the Pilbara rail access case, the term "anyone" should not include the incumbent service provider.
- Criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest. This is consistent with the PC's recommendation and places the burden on access seekers to establish that access is in the public interest.

The Panel also recommends that the powers of the Australian Competition Tribunal on review of declaration decisions should be expanded to enable the Tribunal to undertake a merits review of access decisions (including hearing directly from employees of the business concerned and relevant experts), while maintaining suitable statutory time limits for the review process. In the Pilbara rail access case, the High Court ruled that the Tribunal's current ability to reconsider the Minister's decision to declare or not declare a service involved reviewing what the relevant Minister decided by reference to the material that was placed before the Minister.

In addition, the Panel recommends that the current roles of the National Competition Council (to review an application for declaration of an infrastructure service and determine whether to recommend declaration of that service to the relevant Minister) and the Australian Competition and Consumer Commission (ACCC) (to arbitrate the terms and conditions of access if negotiations between the access seeker and infrastructure provider fail) should be combined and be undertaken by a new national Access and Pricing Regulator.

MISUSE OF MARKET POWER - SECTION 46

The Panel recommends bringing the misuse of market power prohibition into line with the other provisions in Part IV of the CCA. If implemented, these amendments would expand the reach of section 46 and make it easier to prove a contravention, primarily because of the removal of the "take advantage" limb and the addition of an "effects" test. Accordingly, this could provide access seekers with another avenue to use as leverage in negotiations with access providers.

The three key changes recommended by the Panel are:

1 Expanding section 46 to encompass the standard Part IV effects test (in addition to the existing purpose test). If implemented, this would make it easier to prove contraventions of section 46. The ACCC has long advocated for this change on the basis that it is difficult for the ACCC to prove the subjective purpose of an accused.

2 Removing the "take advantage" limb. If implemented, this would make it more difficult for a firm with market power to defend its actions. The taking advantage limb has traditionally provided comfort to firms engaging in conduct that would be a rational business strategy even for a firm without substantial market power. The Panel initially proposed including an express defence to this effect. The removal of this limb in favour of exclusive reliance on the standard Part IV

substantial lessening of competition test would expand the reach of the prohibition and place significant importance on the interpretation of that test.

3 Introducing the standard Part IV substantial lessening of competition test in place of the existing proscribed anti-competitive purposes. A key issue will be whether there is sufficient certainty associated with the application of this test in the context of misuse of market power. The Panel recommends requiring courts to have regard to specific factors that increase or lessen competition including efficiency, innovation, product quality or price competitiveness. In our view, the inclusion of those factors would not alter the nature of the test. Existing jurisprudence establishes that the test requires a comparison of the state of competition in the relevant market with and without the conduct, including pro-competitive and anti-competitive factors.

The Panel also recommends allowing the ACCC to authorise conduct which satisfies a public benefit test (which requires that public benefits outweigh public detriments, including any lessening of competition). This change would standardise section 46 with other provisions in Part IV. However, the time and cost associated with an authorisation application means that significant forward planning and investment would be required by firms with substantial market power seeking to rely on authorisation as a basis to engage in conduct that could lessen competition.

MORE INFORMATION

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