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National Economic Regulation: the cost of (inadequate?) reform

Bob Baxt AO, Partner Freehills
Professorial Fellow, University of Melbourne

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bob.baxt@freehills.com

Freehills

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This paper, which was presented at a special forum organised by the Melbourne Business School on 27 February 2008, highlighted the need for Australia to move forward in overcoming the constitutional and other difficulties that have led to a significant cost being imposed on business by virtue of the splitting of powers. The Business Council of Australia (BCA) study referred to in this paper has recently been updated by a further paper ('Towards a Seamless Economy – Modernising the Regulation of Australian Business', 17 March 2008) indicating that the costs for this continued scenario is far greater than that noted in the paper (\$16 billion as against the \$9 billion estimated in its previous study). It is pleasing to note that the initiatives being taken by the Federal Government in relation to the Council of Australian Governance (CoAG) described in this paper have been accelerated in the last few weeks and there is an optimism that we will be able to overcome some of the difficulties which are highlighted in the content of this paper.

1 Introduction*

The invitation from Jerome Fahrer in August 2007 to deliver the first in this series of Law and Economics lectures came at a time when there were increasing frustrations facing Australian companies in a number of different areas of operations, not the least of which being the application of the provisions in Part IIIA of the *Trade Practices Act 1974 (TPA)* dealing with access and terms of access to what are often referred to as essential facilities. However, to me, the problems went far beyond that area of frustration.

For many years I had been concerned with the duplication and overlapping of legislation in different areas that affected business which have resulted in significant costs to Australian business. The burden of regulation was a major catalyst to the establishment of a special committee in 2005 under Gary Banks, the Chairman of the Regulation Taskforce. The Committee produced the report *Reducing the Regulatory Burden on Business* (the **Banks Report**).¹ A number of initiatives have been taken as a result of that report.² There have also been significant benefits generated by the continual, if at times stuttering, operation of CoAG. These have been well documented.

The election of a Federal Labour Government in November 2007 was an important catalyst in ensuring that some of the previous momentum, that had been stalling, was

* I wish to acknowledge the considerable support I have received from my firm Freehills in relation to this paper. However, the contents of this paper, the views I have expressed, the arguments that I have raised are not necessarily shared by my firm and should not be attributed to my firm.

I would also like to acknowledge the wonderful assistance that I have received from a team of very able young paralegals and lawyers working at Freehills with me. In particular, I wish to thank Gillian McKenzie, Sarah Benbow, Emily McConnell, Maé Comber and Sarah Moore.

¹ Regulation Taskforce 2006, 'Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business', Report to the Prime Minister and the Treasurer, Canberra, January.

² These include: the development of an online Business Consultation Portal to improve government consultation with business; the development of a New to Business checklist to assist new businesses to understand the regulatory requirements relating to them; the strengthening of the Office of Best Practice Regulation whose role includes working with governments to prevent the generation of unnecessary regulation; the development of a 'Business Cost Calculator' to allow government and business to quantify the cost of compliance with proposed regulations; the introduction of corporate law reform via the *Corporations Legislation Amendment (Simpler Regulatory System) Act 2007* (Cth); and the government's direction to the Productivity Commission to undertake annual targeted reviews of regulatory burdens on businesses over a five year cycle, the first of which was its report on the Primary Sector released in November 2007.

given a new lease of life. Within weeks of the election of the Labour Government, major new initiatives were announced by CoAG as a result of Prime Minister Rudd's enthusiastic vision. There is a promise of much here – hopefully much of that promise will be achieved.

In this paper, whilst I will be touching on many of the well understood issues surrounding the fragility of our constitutional framework in enabling the Commonwealth Government working either alone or in conjunction with the States (and Territories) to regulate in this area, I will not attempt to analyse the way in which constitutional reforms might be achieved. Rather, I will be reviewing a number of areas of our 'economy' in which a more pragmatic approach might produce more significant results.

Before turning to some of these matters, it is worth repeating some background on the burdens and cost of the current Federal system. In doing so I have relied heavily on research undertaken (and very well undertaken) by others. There are 2 papers in particular on which I have relied – the BCA's 2006 paper *Reshaping Australia's Federation: A New Contract for Federal State Regulations*. This highlighted the extraordinarily difficult and some would suggest insurmountable problems that Australia faces in overcoming legal hurdles in ensuring that we continue to regulate our national economic activities (where they must be regulated) in a sensible and constructive way.

The second extremely valuable source is Justice Robert French's paper *Horizontal Agreements – Competition Law and Corporate Federalism* delivered at the Competition Law conference held in Sydney on 5 March 2007. It deals in an encyclopaedic fashion, with the way in which the Commonwealth Government has ensured various areas of Commonwealth law can and have been coordinated to create a cohesive national and 'operation' mechanism.

2 Competition Law reform

This area of regulation has thrown up even more drama concerning the reach of the constitutional power of the Commonwealth.

My initial experience in the competition law area arose when I was asked to write a commentary on the now largely forgotten case of *Concrete Pipes*³. That case concerned the first modern attempt by Australia to introduce competition law after the *Australian Industries Preservation Act 1906* (which was one of the very earliest statutes prohibiting anti-competitive conduct and practices) foundered on constitutional grounds in two famous cases *Huddart Parker & Co Pty Ltd & Appleton v Moorehead* (1909) 8 CLR 330, and the *Attorney-General (Cth) v Adelaide Steamship Co Ltd* (1913) 18 CLR 30.

Sir Garfield Barwick framed the Australian *Trade Practices Act* of 1965 on that of the UK *Restrictive Trade Practices Act* of 1956, which in my view was a not a well thought through proposal, and one which nevertheless failed on constitutional grounds. As a result of the hints given in the *Concrete Pipes* case to the Australian government, a new Bill was passed – the *Restrictive Trade Practices Act* of 1971 introduced into parliament the Restrictive Trade Practices Bill (No 2) and the Monopolies Commission Bill 1972. However, political events intervened, Labor was elected to power in 1972 and it quickly moved to the introduction of the current legislation.

Before turning to a discussion of reform of the access regime, it is interesting to reflect on the history of the establishment of CoAG. Much of the credit for this initiative is given to former Prime Minister Paul Keating. He was instrumental in CoAG being formally established. However, it would be churlish to ignore the initiatives taken by the then

³ *Strickland v Rocla Concrete Pipes Limited* (1971) 124 CLR 468

Prime Minister Bob Hawke and the Labour government in 1991 which were an important precursor to the establishment of CoAG.

In a joint paper under the names of Prime Minister Hawke, Treasurer Keating and Senator John Button, the Industry Minister, entitled *Building a Competitive Australia* (featured in the speech presented to the Commonwealth Parliament on 12 March 1991 by Mr Hawke) the government promised to dismantle barriers to competitiveness and efficiency within Australia by reforming the processes of government through the Special Premiers' Conference, and establishing a sub-committee of Cabinet's Structural Adjustment Committee to systematically examine the whole economy for opportunities to promote the process of positive structural change. This internal focus followed major decisions to float the Australia dollar, which led to the deregulation of financial markets and the airline industry, and the introduction of competition in telecommunications. The other major initiative was to systematically reduce trade barriers such as tariffs and assistance grants and to push Australia's participation and competitiveness as a nation in the global marketplace.

A particularly interesting passage in the reform paper referred to above, foreshadowed what was to become a more ambitious and greater task undertaken by the Hilmer Committee.⁴ The paper (or rather the speech) noted:

“But there are many areas of the Australian economy today that are immune from that Act: some Commonwealth enterprises, State public sector businesses, and significant areas of the private sector, including the professions.

This patchwork coverage reflects historical and constitutional factors, not economic efficiencies; it is another important instance of the way we operate as six economies, rather than one.

The benefits for the consumer of expanding the scope of the Trade Practices Act could be immense: potentially lower professional fees, cheaper road and rail fares, cheaper electricity.

This has to be done – and I have initiated the process, by today writing to the Premiers urging a positive examination of all we can do, at the May Special Premiers' Conference, to widen the ambit of the Trade Practices Act to bring such excluded areas within the scope of a national framework of competition policy and law (emphasis in original)."

Once he became Prime Minister, Mr Keating pursued some of the initiatives enunciated in that approach. After consulting with the State and Territory Premiers and governments, Prime Minister Keating established an Independent Committee of Inquiry chaired by Professor Frederick G Hilmer in October 1992.

The resulting Hilmer Report⁵ proposed wide ranging and significant reforms impacting the provision of services by government entities and the basis on which these services are subject to competitive forces.

A further report commissioned by CoAG in August 1994 supported the economic benefits of the Hilmer reforms⁶ and led to the adoption of a National Competition Policy in April 1995 by all the governments of Australia. The framework for the implementation of this

⁴ Hon Bob Hawke, 'Building a Competitive Australia' (speech delivered at the Commonwealth Parliament, Canberra, 12 March 1991) 1.13.

⁵ Independent Committee of Inquiry, 'National Competition Policy', August 1993.

⁶ Industry Commission, 'The Growth and Revenue Implications of Hilmer and Related Reforms', March 1995. This report estimated that the implementation of the reforms proposed in the National Competition Policy, and related reforms in electricity, gas, water and road transport previously agreed upon by the various governments would result in an increase in the real GDP of \$23 billion or 5.5 per cent per annum, the creation of 30,000 jobs, individual savings of \$1500 per annum for consumers, and increases in State and Federal revenues in real terms of \$5.9 billion and \$3 billion respectively.

Policy was encompassed in three main agreements⁷ which together provided a mechanism for implementing the six key elements of the Hilmer reform proposal:

- 1 the extension of the reach of the TPA to unincorporated businesses and State and Territory government businesses;
- 2 the restructuring of public sector monopoly businesses;
- 3 the development of a national regime to ensure third party access on fair and reasonable terms to nationally significant infrastructure;
- 4 the extension of price surveillance to State and Territory government businesses where such businesses cannot feasibly be restructured or opened up to third party access;
- 5 the adoption of competitive neutrality principles to ensure that government businesses do not enjoy a competitive advantage over private sector competitors as a result of their public sector ownership; and
- 6 the systematic review of all legislation that restricts competition and the repeal of such legislation where the restriction is unjustified or exceeds any restriction required to serve the public interest.

The Industry Commission's report indicated that while Commonwealth government stood to receive a larger share of the net revenue benefits of the proposed reforms, it would incur only a small proportion of the expenditure required to implement them. To overcome this imbalance a system of national competition payments was implemented whereby the Commonwealth agreed to provide financial assistance to the States and Territories conditional upon the satisfactory progress of the reforms in accordance with the timetable set out in the agreement.⁸

Between the 1997-98 and 2005-06 financial years the Commonwealth paid on average \$592 million per annum in national competition payments. In 2005-06 alone \$834.1 million in national competition payments was paid to the State and Territory governments. This is in addition to the system of specific purpose payments paid by the Commonwealth government to the States to fund various government services and implement policy objectives.

The most interesting and important part of the Hilmer initiatives, for my purposes, was of course the recommendation which led to the introduction of Part IIIA of the TPA.

Whilst it is probably unnecessary to remind readers of the structure of Part IIIA of the TPA, I must do so to emphasise what are perceived to be the major problems in its operation. These are mainly due to the duplication in the process which is mandated by the legislation, which in turn may lead to protracted litigation.

As it stands, the application of Part IIIA of the TPA has become mired in complexity and lengthy delay. This is as a direct result of the numerous layers of consideration and appeal that are available to participants relying on the access regime. Under the first step of a multi-tiered access regime in the TPA, applicants can apply to the National Competition Council (**NCC**) for an assessment of whether a particular service be declared. In effect this is a declaration that it is an essential facility. The parties must satisfy the criteria set out in the statute.⁹ The NCC then makes a recommendation to the relevant Minister (usually the Federal Treasurer but it can be a State Minister) on whether a declaration should be made. Once a decision has been made by the relevant Minister, whether following the recommendation of the NCC or rejecting its recommendation, the parties have a right to appeal to the Australian Competition Tribunal (**the Tribunal**). The

⁷ Competition Principles Agreement 1995; Conduct Code Agreement 1995; Agreement to Implement the National Competition Policy and Related Reforms 1995.

⁸ Agreement to Implement the National Competition Policy and Related Reforms 1995.

⁹ These criteria are set out in section 44G(2) of the *Trade Practices Act 1974* (Cth).

Tribunal in effect reviews the relevant Minister's decision. This appeal can be brought by the original applicant (in the event that the application is unsuccessful), or by interested parties that have made submissions to the NCC who are not happy with the recommendation. This process is a very lengthy one and although time limits have been set down by the NCC and new regulations, the recent example of the application for access to BHP Billiton's railway lines in Western Australia by the Fortescue organisation has shown that those time limits cannot be maintained. I do not wish to attribute any cause to those delays – it is the natural process of a law in operation.

Assuming that the service is declared (and the Tribunal has been generally granting applications) then negotiations as to access terms are commenced. If the parties cannot agree to the particular terms, the ACCC can be engaged in what is in effect an official arbitration on access terms. Any determination made by the ACCC can again be reviewed by the Tribunal.

There are no appeals from the decisions of the Tribunal, either in the context of the access application or the arbitration, except on questions of law. As we have seen in recent examples concerning the access regime, and as I will point out in more detail in relation to one application, the appeal process can be very time consuming and no doubt very expensive.

For various reasons, I cannot go into a number of the examples of access applications that have been made under Part IIIA. Suffice to say that as a partner in another law firm, I was instrumental in arguing the quite famous (some would say infamous) production process exemption argument in relation to the Western Australian railway lines currently the centre of dispute in the new litigation involving Fortescue. The question of whether a railway line in the context of the Western Australian mining industry can be a production process is likely to be heard by the High Court in the near future. In this context, the High Court has made some interesting, and I believe appropriate, comments on the fact that the Part IIIA regime is slow and difficult.

In *NT Power Generation Pty Ltd v Power and Water Authority (PAWA case)*,¹⁰ the joint judgment of all of the judges sitting on that case, other than Justice Kirby, is relevant to illustrate my concern:

“[t]here is no contradiction in legislation which contains Part IIIA and also contains ss 2B and 46. It is possible to imagine circumstances similar to those of the present case in which PAWA [the power and water authority] would not be vulnerable to a s 46 challenge, but would eventually have to provide access, either under an effective access regime devised by the Northern Territory or under a regime developed pursuant to Part IIIA. **Further, in cases where there is a contravention of s 46, it is possible that curial relief, sought speedily, might be obtained before completion of the somewhat elaborate arbitral, review and appellate procedures provided for in Part IIIA** (emphasis added).”¹¹

Perhaps a more important example, especially in the context of the future, is in relation to applications for access to services in the water industry.

Sydney Water: a case study

In March 2004, Services Sydney Pty Ltd (**Services Sydney**) applied under s 44F of the TPA to the NCC for a recommendation that certain services relating to Sydney Water's sewerage system be 'declared services'. Services Sydney sought access to transportation and interconnection services from the sewers to convey sewage from customers, purify the water and either offer it for sale as recycled water or discharge it into the Hawkesbury-Nepean River as environmental flows. The NCC made the

¹⁰ (2004) 210 ALR 312.

¹¹ Ibid 334-335.

requested recommendation to the Premier of NSW but when no decision was made on the recommendation within the 60 day period allowed, the Premier was deemed under the Act to have decided not to declare the services. Services Sydney sought a review of this determination from the Tribunal. On 21 December 2005, the Tribunal set aside the decision and declared six services for a period of 50 years.¹²

As a result of the Tribunal's decision the New South Wales government passed the *Water Industry Competition Act 2006* (NSW) which, along with the *Water Industry Competition (Access to Infrastructure) Regulation 2007* (NSW), create a licensing framework for private sector provision of water, sewerage and stormwater services in the areas regulated by Sydney Water and Hunter Water, but potentially across the State. Although the New South Wales Act received assent on 27 November 2006, the commencement date for the Act has not yet been specified. (Some further comments on this legislation and the dispute are set out in Appendix 1.)

On 6 November 2006, the ACCC was notified of an access dispute between Services Sydney and Sydney Water regarding the access price of three declared sewerage transportation services involving the North Head, Bondi and Malabar sewerage reticulation networks. In its first decision relating to access pricing for the water and sewerage industry in Australia, the ACCC determined that the appropriate methodology for access pricing is the regulated retail price for affected customers minus the avoidable costs (those costs that Sydney Water could avoid if it no longer supplied sewerage services to those customers) plus facilitation costs (those costs prudently incurred by Sydney Water in providing access to the declared services).¹³

The issue concerning access to water assets and services, and matters associated with the regulation of the water industry is a critical matter going forward in my view. As an appendix to this paper I set out material which is particularly relevant in the context of one of our most precious assets. We desperately need to deal with this matter more effectively, efficiently and speedily than has been the case to date.

3 A new review process for access matters

I have indicated on many occasions that the drafting of Part IIIA of the TPA was less than ideal to start with. Despite various reviews, it fundamentally remains a very flawed regime for dealing with access applications. I take no issue with the propositions put forward in the Hilmer Report that access to essential facilities was a critical area in moving forward.

I remind those of you who are familiar with the interpretation of Part IIIA, and put forward for those of you who are not aware of it, that the High Court of Australia in its most direct evaluation of Part IIIA of the TPA in contrast to the operation of s 46 of the TPA in the *PAWA case*¹⁴ suggests that relying on Part IIIA may be less advantageous than relying on s 46.

The views that I am putting forward in these conclusions are mine. They are probably not shared by many of the partners in my firm. But our clients may be sympathetic to some of the views, depending on which side of the access 'dispute' they might find themselves. Applying for access creates enormous difficulties for companies in Australia; defending an application for access may provide very good reasons for supporting the continued operation of Part IIIA. With apologies to all concerned, and with a view to creating a climate for debate, I put forward these proposals in the hope that they may be considered attractive.

¹² *Re Application by Services Sydney Pty Ltd* (2005) 227 ALR 140.

¹³ Australian Competition and Consumer Commission, 'ACCC determination – Sydney Water Access Dispute' (Press Release No. MR 185/07, 19 July 2007).

¹⁴ Above n 32.

It is interesting to note that the current Part IIIA is quite different to the original plan which contained an even further layer of potential legal 'procrastination'. It is also interesting to note that the mechanism whereby appeals can be brought from decisions both of the NCC/Minister and the ACCC (the first in relation to whether access should be granted and the second in relation to any arbitration determination), had originally been replicated in general approach in Part XIC of the TPA (with respect to telecommunications access) but have since been modified. In Part XIC there is now no appeal from the arbitration decision of the ACCC to the Australian Competition Tribunal. Again, whilst this may not suit some organisations it will certainly be regarded as valuable to others.

When I was chairman of the TPC, I was faced with one of the most difficult applications for authorisation in a merger that faced the TPC (brought by North Limited (the company was later acquired by its co-applicant) and CRA Limited (now part of Rio Tinto Ltd). The two companies had originally sought the TPC's view as to whether the proposed joint venture which was to create an international company to compete overseas (the company was Pasminco Ltd) would satisfy the then merger test. At that time (in 1988) the relevant test was one which measured mergers by a dominance test. It was clear to me and my colleagues at the TPC that there was no chance that the TPC would 'informally clear' the merger. But at the same time it appeared to us at the TPC that there were very good reasons why the merger might be supported in the context of an authorisation application – that is, notwithstanding the potential anti-competitive results of the merger, there were good public interest/public benefit grounds why it should be supported. This new Australian company would be able to compete more effectively in the international market.

When advised of this suggestion, the two parties argued that any determination made by the TPC would be 'appealed' under the then regime which allowed a review of the TPC's determination by the then Trade Practices Tribunal (now the Australian Competition Tribunal). I understood their concern. Nevertheless, I persuaded the companies to seek authorisation which, after an interesting process, was granted by the TPC. No 'appeal' was lodged. Shortly after that matter was completed, I approached the then Attorney-General, Lionel Bowen, with a proposition that in cases of mergers, especially in mergers of the size and importance of this particular merger, the parties should be given the choice of applying to the TPC or the Trade Practices Tribunal for authorisation. That view was debated for a number of years. For obvious reasons, it was not supported by the TPC. If parties were to apply directly to the Trade Practices Tribunal (and in my view the TPC would then be amicus tribunal, and assist in ensuring that all issues were canvassed by the Trade Practices Tribunal) the TPC would lose its power to make a determination in such matters. Of course, no one wants to give power up too easily.

The Dawson Committee, which was appointed to review the operation of the *Trade Practices Act* in 2002 in its Report recommended (amongst other things) that authorisation applications in relation to mergers should go direct to the Australian Competition Tribunal with the ACCC being in effect 'amicus tribunal'.

I suggested to the Dawson Committee that it should provide the parties with a choice of taking small merger authorisation applications, which would not require very difficult questions to be considered, to the ACCC in the hope that no 'appeal' would be sought. However, in difficult matters, where it was clear that someone would likely appeal the decision, parties should have a right to go directly to Tribunal. Whilst the Dawson Committee decided not to include the option (they felt this would result in forum shopping), their recommendations regarding merger authorisations were enacted (with some modification and improvement for the role of the ACCC) into the TPA. These amendments came into force in the beginning of 2007. However, the number of formal merger authorisation applications will always be small, and none have yet been brought.

It is my view that a similar approach – ie, avoiding the 'middle person' as it were – could operate very successfully in relation to both levels of the decision making process for Part IIIA applications. I see no good reason, in principle, why the Tribunal should not be the body to decide the initial application for access with the NCC acting as amicus tribunal (in a similar way that the ACCC will now act as amicus tribunal in merger authorisation

applications). Similarly, parties should be given the choice of going direct to the Tribunal in relation to the arbitration of access terms. They would choose to do so, in my view, if they felt that the determination that might be made by the ACCC would not be accepted by relevant parties. This would considerably shorten the timeframe in which these matters are to be considered, make the system more effective and certainly less costly.

I would add a further suggestion in this context. When an application for access is being made, the parties seeking access must have some 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 under which they might be prepared to allow access to be given, assuming they were forced to do so. It makes a great deal of sense to me that at the same time the application for access is made, the parties also 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 the recent decision¹⁵ adopted a somewhat similar approach in dealing with the review of the application for access. I do not intend to go into the details of that case (our firm was involved in it) but it is interesting to note that the High Court of Australia did not grant leave to appeal the decision of the Full Federal Court, which in effect upheld the way in which the Tribunal evaluated the matter in that case.¹⁶

In short, this is the outline of the alternative solution that I believe should be considered. I see no reason why properly funded bodies such as the ACCC (and it is properly funded) and a body like the NCC (provided it is given appropriate funding) should not be able to act as amicus tribunal in ensuring that any decisions in relation to access/access terms can be dealt with adequately and more speedily in the first instance by the Tribunal. This would, of course, involve the removal of the further additional review undertaken by the Minister. Timeliness could become more important, the opportunities for various appeals and other potential frustrations would be eliminated. We are now fast-tracking many matters in our courts. I see no good reason why we cannot also fast-track issues in relation to access applications.

There is a further alternative to my suggestion that there be a direct application to the Tribunal which Graeme Samuel, Chairman of the ACCC, has suggested. Under his proposal the appeal to the Tribunal from the recommendation/determination of the NCC, or the ACCC in the context of an arbitration decision, would in effect be an appeal 'on the papers' to the Tribunal. This would be the case whether the Ministers' role was retained or not.

A review on the papers would be similar to the recent provisions inserted in the TPA in relation to the formal process for merger clearance. This change was made to the TPA on 1 January 2007, but has yet to be used. Most merger clearances are obtained through an informal process which, although speedy and efficient, has no legal effect. The formal merger clearance process was introduced following the recommendations of the Dawson Committee to ensure that parties could obtain a definitive and legally binding clearance of a difficult merger. Any decision by the ACCC to effectively reject a formal merger clearance could be appealed by the relevant parties to the Tribunal on the papers. A similar arrangement would apply to either an access declaration or a determination of the terms of access. This would also represent a considerable saving in time.

Whichever of the alternative processes are eventually chosen, it is essential that we retain the right which currently exists in the TPA for any decision of the Tribunal to be reviewed on the law by relying on administrative law principles.

There is, of course, a more drastic alternative, which I do not support. It is, nevertheless, necessary to put it forward for discussion. This would involve removing the role of the

¹⁵ *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146.

¹⁶ *Sydney Airport Corporation Limited v Australian Competition Tribunal & Ors* [2007] HCA Trans 98 (2 March 2007).

Tribunal and allowing the NCC and the ACCC to be the final decision maker in each case – that is, why not remove the right of appeal to the Tribunal? Why not remove the political implications in the Minister having to make a decision?

I do not want to delve into questions concerning the definition and application of 'production process'. The issue of whether access should be available to anything other than natural monopoly facilities (ports, railway lines built by the Government etc) is for another occasion. My aims are not that ambitious. I am more concerned in ensuring that the system that we have (which I believe is very sound in essence in this context) would have a process that is more meaningful and acceptable in economic and legal terms.

I note that the Minister for Resources, Martin Ferguson, has foreshadowed a review of Part IIIA, citing delays and frustration in the operation of claims.¹⁷

¹⁷ Rachel Pannett, 'Ferguson to foil Fortescue on rail', *The Australian*, (Australia), 8 February 2008.