

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY  
BETWEEN:

No M155 of 2011

The Pilbara Infrastructure Pty Ltd  
(ACN 103 096 340) & Another  
Appellants  
and  
Australian Competition Tribunal  
& Others  
Respondents

10

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY  
BETWEEN:

No M156 of 2011

The Pilbara Infrastructure Pty Ltd  
(ACN 103 096 340) & Another  
Appellants  
and  
Australian Competition Tribunal  
& Others  
Respondents

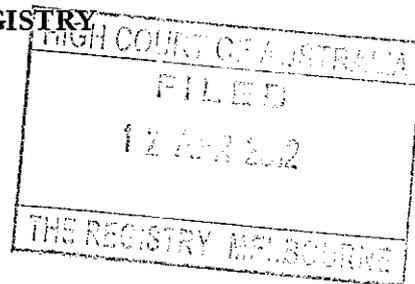
20

IN THE HIGH COURT OF AUSTRALIA  
MELBOURNE REGISTRY  
BETWEEN:

No M157 of 2011

The Pilbara Infrastructure Pty Ltd  
(ACN 103 096 340) & Another  
Appellants  
and  
Australian Competition Tribunal  
& Others  
Respondents

30



**SUPPLEMENTARY SUBMISSIONS OF THE INTERVENER**

---

Filed on behalf of the Intervener  
Clayton Utz  
Lawyers  
Level 18  
333 Collins Street  
Melbourne VIC 3000

Date: 12 April 2012  
DX 38451 333 Collins VIC  
Tel: +61 3 9286 6000  
Fax: +61 3 9629 8488  
Ref: 206/80110706

**PART I: CERTIFICATION**

1. These submissions are in a form suitable for publication on the Internet.

**Part II: Basis & Status of Intervention**

2. The Intervener (**Council**) was, on 6 March 2012, granted leave to be heard in these appeals generally in support of the appellants (**Fortescue**) on the issue of the proper construction of s 44H(4)(b) of the *Competition and Consumer Act 2010* (Cth) (**the Act**).<sup>1</sup>
3. On 8 March 2012, the Council sought and was granted leave<sup>2</sup> to intervene in respect of the amendments to the notices of appeal proposed by the appellants; and the substantive grounds to be raised by the amendments.

10 **Part III: Reasons Why Leave to Amend Should Not Be Granted**

4. The proposed amendments to the notices of appeal should be assessed according to the criteria for special leave set out in s 35A of the *Judiciary Act 1903* (Cth), namely:
  - (a) whether they involve a question of law: that is of public importance, whether because of its general application or otherwise; or in respect of which a decision of the Court is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
  - (b) whether the interests of the administration of justice, either generally or in the particular case, require that they be considered by the Court.
- 20 5. The proposed new grounds of appeal do not raise matters of public importance, of general application or otherwise. The Act was amended with effect from 13 July 2010 by the *Trade Practices Amendment (Infrastructure Access) Act 2010*, Act No 102 of 2010 (**the 2010 Act**). The effect of the 2010 Act was to limit the Tribunal's review of declaration decisions under s 44K to the "information, reports and things referred to in section 44ZZOAA",<sup>3</sup> being:
  - (a) in respect of declaration decisions made by the Minister, all of the information that the Minister took into account in connection with the making of that decision: ss 44ZZOAA(a)(i) and 44ZZOAAA(3)(c);
  - (b) in respect of deemed declaration decisions, all of the information that the Council took into account in connection with the making of the declaration recommendation: ss 44ZZOAA(a)(i) and 44ZZOAAA(3)(a);

---

<sup>1</sup> Ts 2-4.

<sup>2</sup> Ts 6870-6875; Ts 6884.

<sup>3</sup> s 44K(4).

(c) any information provided in response to a request by the Tribunal for information it considers reasonable and appropriate: ss 44ZZOAA(a)(ii) and 44ZZOAAA(4)-(7); and

(d) any assistance, information or reports that the Tribunal requires the Council to give: ss 44ZZ)AA(a)(iii)-(iv), 44K(6) and (6A).

6. The provisions contained in the 2010 Act apply to any applications for review made to the Tribunal under s 44K after 14 July 2010.<sup>4</sup>

10 7. Other than these appeals, there are no applications for review made on or before 14 July 2010 that are currently before the Tribunal or in which the Tribunal's decision is currently the subject of an application for judicial review.<sup>5</sup> Accordingly, the issues raised by the proposed new grounds of appeal will not affect any proceedings other than these appeals.

8. There is no difference of opinion between any courts or tribunals as to the state of the law on the issues the subject of the proposed new grounds of appeal. The ability of the Tribunal to receive new evidence on a review under s 44K has never before been questioned.

20 9. The interests of the administration of justice do not require the resolution of the new issue raised in the proposed new grounds of appeal. Prior to the issue being raised by the Court on 7 March 2012, no party had questioned the ability of the Tribunal to receive new evidence in the conduct of its review. All parties before the Tribunal and the Full Court of the Federal Court in the proceedings below accepted the Tribunal's ability to do so.

10. It is not necessary for the Court to resolve the new issue in order properly to dispose of the current appeals. If leave were not granted, the issue of remitter would only arise if Fortescue succeeded in its appeal in M155 of 2011 and Rio Tinto's notice of contention failed. Even then, the issue could be left for the parties to agitate before the Tribunal on remitter if they so desire.

11. For the reasons set out in Part IV below, there is little prospect of the appeal succeeding on the proposed new grounds of appeal if leave is granted.

30 12. Further, the matters sought to be raised by the proposed new grounds of appeal were not raised specifically either before the Tribunal or before the Full Court of the Federal Court.<sup>6</sup> The power to grant special leave where a point is raised for the first time in this Court should only be exercised in "exceptional circumstances".<sup>7</sup> There are no such "exceptional circumstances" in the present case.

<sup>4</sup> 2010 Act, s 2(1) and Schedule 1, cl 11 and 72(4).

<sup>5</sup> Affidavit of Robert John Feil sworn 12 April 2012.

<sup>6</sup> Fortescue's Supplementary Submissions, [73].

<sup>7</sup> *Crompton v R* (2000) 206 CLR 161 (*Crompton*), [10], [14]-[20] (Gleeson CJ), [122] (Kirby J).

**Part IV: Submissions as to the Merits of the Subject Matter of the Amendments**

13. In considering the substantive grounds to be raised by the proposed amendment, three provisions of the Act as it stood at the time of the Tribunal's decision (that is, prior to the 2010 Act) are of central relevance: s 44K(4); s 44K(5); and s 44K(6). Except where otherwise noted, the following submissions reflect the Act as it stood prior to the significant amendments made by the 2010 Act.
14. Section 44K(4) provided that "[t]he review by the Tribunal is a re-consideration of the matter." The "matter" referred to in s 44K(4) was the subject-matter of the Minister's decision, of which review was sought under s 44K(1) or (2): namely, the decision under s 44H(1) to declare or not to declare the service that was the subject of a recommendation by the Council under s 44F. The Tribunal's task was not to review, or re-consider, the Council's recommendation.
15. The Minister's responsibility under s 44H was to decide whether to declare the service or not to declare the service: the Council's recommendation was a pre-condition to the Minister making that decision, but the Council's recommendation was not the subject of the Minister's consideration and decision. The Minister was not confined to the information that was available to the Council when the Council made the recommendation. The observations of Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*<sup>8</sup> can be applied to the Minister's function under s 44H:

20 It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the [declaration], and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject-matter, scope and purpose of nearly every statute conferring power to make an administrative decision an implication that the decision is to be made on the basis of the most current material available to the decision-maker. This conclusion is all the more compelling when the decision in question is one which may adversely affect a party's interests or legitimate expectations by exposing him to new hazard or new jeopardy.

30

16. Because the review under s 44K was a "re-consideration", the Tribunal was bound to address the same questions as those posed for the Minister by s 44H(4). That is, the Tribunal was to consider again (re-consider) whether the service that was the subject of the Council's recommendation should be declared. No doubt s 44K(4) used a different term to describe the review ("a re-consideration") from the term used to describe a review in s 44ZP(3) ("a re-arbitration") or s 101(2) ("a re-hearing"); but the review under s 44K was no narrower than a review under s 101: to re-consider a decision connoted a full
- 40

---

<sup>8</sup> (1986) 162 CLR 24 at 45.

consideration, in which the Tribunal reached its own conclusion on the application to the facts of the relevant statutory criteria, on the basis of the Tribunal's assessment of the material which was before the Tribunal. That understanding of the s 44H review was clearly expressed by the Tribunal in *Re Services Sydney Pty Ltd*.<sup>9</sup>

The Tribunal's review is a re-consideration of the matter (s 44K(4) of the Act). In other words, it is not an appeal and the Tribunal can consider new information and evidence that was not available to the NCC or the Minister. For the purposes of the review, the Tribunal has the same powers as the designated Minister (s 44K(5) of the Act) and may affirm or set aside the Minister's decision (s 44K(8) of the Act).

10

17. It was established in 1975, and has never since been doubted, that it is open to the parties to a review under s 101 to "put material before the tribunal which was not before the commission – even material which may not have been in existence at the time of the commission's determination".<sup>10</sup>
18. Section 44K(5) conferred on the Tribunal, for the purposes of the review, "the same powers as the designated Minister". That provision imported into the Tribunal's review the constraints on the Minister's power to declare a service: see s 44H(2) and (4). Those constraints were an aspect of the Minister's explicit powers. It also imported the Minister's implicit power to seek and receive information relevant to the decision whether to declare a service. Of course, the Minister would have the Council's recommendation, which might have been supported by detailed material; but noting that the Act did not require the Minister to exclude from consideration other, perhaps more current, information that was supplied to the Minister or which the Minister sought out. It cannot be supposed that Parliament intended the Minister to refrain from receiving or seeking relevant and up-to-date information when considering whether to declare a service. Just as the Minister, on receiving a declaration recommendation, must have been authorised (and therefore had the power) to request and receive information relevant to the making of the decision to declare or not to declare the relevant service, so the Tribunal had that power.
19. The Tribunal's powers pursuant to ss 44K(5), 44K(7), 44K(8) and 44K(9) were sufficiently analogous to the powers of the Administrative Appeals Tribunal (the AAT) pursuant to ss 43(1) and 43(6) of the Administrative Appeals Tribunal Act 1975 (the AAT Act) to allow the question for determination by the Tribunal under s 44K to be described in the following terms:<sup>11</sup> The question for the determination of the Tribunal is not whether the decision which the [Minister] made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

20

30

---

<sup>9</sup> [2005] ACompT 7 at [9].

<sup>10</sup> *Re Queensland Timber Board* (1975) 24 FLR 205 at 208.

<sup>11</sup> *Drake v Minister for Immigration* (1979) 24 ALR 577 at 589.

20. In considering the effect of the AAT's powers under s 43(1), the High Court has confirmed<sup>12</sup> that, absent a statutory limitation constraining the AAT to a review at a particular time in the past, the Tribunal was entitled to have regard to the evidence of conduct subsequent to the original decision-maker's decision. In so finding, Kirby J stated:

10

When making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration. When, therefore, the [Administrative Appeals] Tribunal elects to make "a decision in substitution for the decision so set aside", as the Act permits, it would be surprising in the extreme if the substituted decision did not have to conform to such a standard.<sup>13</sup>

20

21. Accordingly, in the absence of any contrary provision, and in circumstances where the Tribunal "has the same powers as the designated Minister", the Tribunal was not limited to a consideration of the evidence before the Minister at the time of the Minister's decision. That conclusion was fortified by the presence in the Act of various procedural mechanisms that allowed the Tribunal to obtain further evidence for the purpose of its review under s 44K.
22. Paragraph 31 of Fortescue's supplementary submissions suggests that certain statements in *Eastern Australian Pipeline Pty Ltd v ACCC* (2007) 233 CLR 229 at [77] support Fortescue's contention that the review to be conducted under s 44K is limited to the record before the Minister. However, that is not so. The quoted passage on which Fortescue relies has been taken out of context. Properly considered, the review procedure under s 44K was more analogous to the "full 'merits' review", which the Court suggested applied under s 38 of Schedule 2 of the *Gas Pipelines Access (South Australia) Act 1997* (which applied to coverage decisions akin to declaration decisions) rather than the more limited "review on the record" prescribed by s 39 of that Act.
23. Section 44K(6) specifically provided a mechanism by which the Tribunal itself could seek and obtain additional information from the Council. Section 44ZZP(1)(e) authorised the making of regulations, in relation to the Tribunal's functions under Part IIIA, about "procedure and evidence, including the appointment of persons to assist the Tribunal by giving evidence ...". Regulation 22B(1), which applied to a review of a Minister's declaration under s 44K, authorised the participation in the review of the person who applied for the declaration recommendation and the provider of the service.
24. Further, as the Tribunal decided in *Re Lakes R Us Pty Ltd*,<sup>14</sup> "the general procedural provisions in Part IX apply to the review of declaration decisions under s 44K". That point was also made in *Asia Pacific Transport Pty Ltd*,<sup>15</sup> where the Tribunal said, in the

30

<sup>12</sup> *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286.

<sup>13</sup> *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286 at [41] (Kirby J).

<sup>14</sup> (2006) 200 FLR 233 at [26]-[27].

<sup>15</sup> (2003) ATPR 41-920 at [7].

context of a s 44K review: “The Tribunal has a general discretion to conduct and regulate its own proceedings in accordance with s 103(1) of the TPA”;<sup>16</sup> and in *Re Freight Victoria Ltd*,<sup>17</sup> where the Tribunal said: “[T]he Tribunal is satisfied that the provisions in Div 2 [specifically including s 103(1)] which relate to procedure and evidence apply to all hearings and proceedings of the Tribunal and not only to a review of Australian Competition and Consumer Commission determinations.” That construction was reinforced by s 44ZQ, which excluded the application of s 103 to reviews by the Tribunal of arbitration decisions by the Australian Competition and Consumer Commission (**Commission**) – leaving s 44K reviews subject to the operation of s 103. Amongst the powers conferred by s 103(1) was the power for the Tribunal to set its own procedure. Amongst the regulations made under s 104 was reg 22(1)(b), which authorised the Tribunal to give directions with respect to evidence in proceedings before the Tribunal. That regulation was supported by both s 44ZZP(1)(e) and s 104. Section 105 authorised the Tribunal to take evidence on oath or affirmation and to summon persons to appear before the Tribunal to give evidence and to produce documents. See also ss 107-108.

10

25. Those textual considerations support the following conclusions about s 44K before its amendment in 2010:

20

- (a) When an application was made to the Tribunal for review of the designated Minister’s declaration of a service, the Tribunal was required to consider afresh (that is, to re-consider) whether a declaration should be made;
- (b) the Tribunal was authorised to determine its own procedures; the review by the Tribunal was on an inter partes basis, and the parties to the review were the applicant for a declaration recommendation and the provider; and
- (c) in re-considering the question whether a declaration should be made, the Tribunal was authorised to receive new information (that is, new evidence).

30

26. The width of the Tribunal’s former powers to receive new information from the parties in the course of its reviews under s 44K was confirmed by both the amendments made by the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) (**the 2006 Act**) and the amendments made by the 2010 Act. The 2006 Act introduced s 44ZZBF, which provided that a person affected by an access undertaking decision made by the Commission could apply to the Tribunal for “review”. As with the review of declaration decisions under s 44K, the review under s 44ZZBF was a “reconsideration of the matter”, for the purpose of which the Tribunal “[had] the same powers as the Commission”.

27. The Explanatory Memorandum to the Bill for the 2006 Act stated that the 2006 Act was intended “to implement the Government’s response to the Productivity Commission’s

<sup>16</sup> Those matters were decided before the enactment of s 102A, which is discussed in more detail in paragraph 33 below.

<sup>17</sup> (2002) ATPR 41-884 at [17].

Inquiry Report No 17, Review of the National Access Regime”.<sup>18</sup> The Productivity Commission’s Inquiry Report (**the PC Report**) gave detailed consideration to the “appeal rights” then contained in Part IIIA, noting that: “for the purposes of the appeal [from a declaration decision], the Tribunal has the same powers as the designated Minister and is required to reconsider the matter entirely. Matters of law raised in Tribunal judgements [sic] are, in turn, subject to judicial review”; [emphasis added] and “declaration, certification and arbitration decisions [were already] subject to merit review” [emphasis added].<sup>19</sup> The Productivity Commission recommended that the same rights should be extended to review of the Commission's decisions on access undertakings:

10

Part IIIA should include provision for merit review by the Australian Competition Tribunal of decisions by the Australian Competition and Consumer Commission on proposed undertaking. [emphasis added]<sup>20</sup>

28. While the Productivity Commission’s initial position paper canvassed removing appeal rights in relation to declaration decisions, that position was viewed with “great concern” by service providers and “support from access seekers and user interests was largely absent”. The Productivity Commission acknowledged the concern, raised by the Council, that “the abolition of provision for merits review of accepted declaration decisions could increase the prospect of challenges to the jurisdiction of Part IIIA ... such a shift in the basis of appeals may not be conducive to timely or efficient outcomes”. The ultimate finding was that “the current rights of appeal attaching to Part IIIA declaration decisions should be retained”.<sup>21</sup> The Government's response to the PC Report was to agree with the recommendation regarding the provision of merit review by the Tribunal of Commission decisions on access undertakings, stating that “provision of this additional appeal right is consistent with other access routes (ie certification, declaration and arbitration determinations)”.<sup>22</sup>

20

29. Further, it is clear that the purpose of the amendments to the review process under s 44K made by the 2010 Act was to limit the range of material that the Tribunal could take into account as part of that enquiry. That purpose supports a broader interpretation of the Tribunal’s previous powers.<sup>23</sup>

30

30. The *Trade Practices Amendment (Infrastructure Access) Bill 2009 (2009 Bill)* was introduced to give effect to the Competition and Infrastructure Reform Agreement reached by the Council of Australian Governments on 10 February 2006. It resulted in, amongst other

<sup>18</sup> Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005, 2 June 2005 at [1.1].

<sup>19</sup> PC Report, pp 18, 389 and 391.

<sup>20</sup> PC Report, pp 391.

<sup>21</sup> PC Report, pp 393-397.

<sup>22</sup> Government Response to Productivity Commission Report of the National Access Regime, p 17. The Government's response only addressed the recommendations contained in the PC Report, not findings of the type referred to in footnote 21 above.

<sup>23</sup> *Grain Elevators Board (Vic) v Dunmunkle Corporation* (1946) 73 CLR 70 at 85-86 (Dixon J); *Deputy Federal Commissioner of Taxes (SA) v Elder's Trustee and Executor Co Ltd* (1936) 57 CLR 610 at 625-626; *Commissioner of Taxation v Anstis* (2010) 241 CLR 443 at [24].

things, the insertion of clause 5(c) of the Competition Principles Agreement limiting merits review under State and Commonwealth access regimes to certain categories of information.<sup>24</sup> In the Second Reading Speech for the 2009 Bill,<sup>25</sup> the Minister said:

Concerns have been raised about the ability of parties in a [Part IIIA] review to provide additional information that had not been provided to the original decision-maker in their deliberations ... The bill provides that where merits review of decisions under the regime is available, the Australian Competition Tribunal may only have regard to the information taken into account by the original decision-maker.

- 10 31. The Explanatory Memorandum compared the then current, and proposed new, breadth of the Tribunal's powers to receive new information as follows:<sup>26</sup>

New Law	Current Law
Under limited merits review, when reviewing decisions under Part IIIA the Tribunal can only have regard to the information submitted to the original decision-maker. The Tribunal may only seek additional information to clarify the information before the original decision-maker, or from the ACCC or NCC in their role of assisting the Tribunal.	Reviews of Part IIIA decisions are a complete rehearing of the matter.  New information may be submitted to the Tribunal.

- 20 32. While the Bill was subsequently amended so as to allow the Tribunal to request other information it considers reasonable and appropriate for the purposes of making its decision on the review (s 44ZZOAAA(5)), including information that could not have reasonably been available to the decision maker at the time of the original decision (s 44ZZOAAA(7)), the Supplementary Explanatory Memorandum to the Bill continued to note that the purpose of the Bill was to "introduce limited merits review", in which the Tribunal would be "limited primarily to the information that was before the original decision maker".<sup>27</sup>
33. No guidance as to the powers of the Tribunal to receive further evidence on s 44K reviews prior to the 2010 Act can be derived from the omission of any reference to Part IIIA reviews in the definition of "proceedings" in s 102A, as inserted by the 2006 Act. The definition of "proceedings" is non-exclusive. The only two matters included in the

<sup>24</sup> Explanatory Memorandum to the Trade Practices Amendments (Infrastructure Access) Bill 2009 29 October 2009 at [1.3] and [1.4].

<sup>25</sup> House of Representatives, *Debates*, 29 October 2009, p 11469 (Craig Emerson, Minister for Competition Policy and Consumer Affairs).

<sup>26</sup> Explanatory Memorandum to the Trade Practices Amendments (Infrastructure Access) Bill 2009, 29 October 2009, p 10.

<sup>27</sup> Supplementary Explanatory Memorandum to the Trade Practices Amendments (Infrastructure Access) Bill 2009, 24 June 2010, at [1.2].

definition are both based on provisions added by the 2006 Act. In those circumstances, the insertion of the definition cannot have the effect of excluding, from the scope of Division 2 of Part IX of the Act, Part IIIA review proceedings that were already provided for in the Act. At the time when the 2006 Act was introduced, neither the Tribunal nor Parliament doubted that the Tribunal's review of the Minister's decisions under Part IIIA was governed by the procedures in Part IX of the Act, or that the Tribunal's review was a full merits review. The relevant extrinsic materials establish that Parliament considered that, prior to the amendments made by the 2006 Act to which reference has been made (and the 2010 Act), the Tribunal's review of access declarations under Part IIIA was a full merits review, and that the Tribunal had the power to consider new information and conduct hearings. The Tribunal had itself concluded (and no court had expressed a contrary opinion) that its reviews of Part IIIA declaration decisions were subject to Part IX of the Act,<sup>28</sup> or had, without specifically determining the application of that Part, nonetheless proceeded on the basis that the Tribunal had the power to conduct hearings and receive evidence.<sup>29</sup> It followed that there was no need for s 102A to include specific reference to such reviews, which were considered already to fall within the scope of Part IX of the Act.

- 10
34. Nor is there any constitutional problem caused by the Tribunal having been authorised to conduct a full merits review under s 44K and receive new evidence for that purpose. In conducting a review under s 44K, the Tribunal was not exercising the judicial power of the Commonwealth. While it is uncontroversial that “the ability of Parliament to confer non-judicial power on a Judge of a Chapter III court ... has the potential, if it is not kept within precise limits, to undermine the doctrine in the *Boilermakers' Case*”,<sup>30</sup> such limits are observed if the non-judicial function: is carried out in public save to the extent that general considerations of justice otherwise require; is manifestly free of outside influence; and results in a report or other outcome which can be assessed according to its own terms.<sup>31</sup>
- 20
35. The function of the Tribunal in carrying out a review pursuant to s 44K was conducted in such a manner. As a consequence there was no incompatibility between the performance of a Judge's judicial functions or the proper discharge by the judiciary of its responsibilities and the Judge's role as a presidential member of the Tribunal conducting a s 44K review. To the extent that the functions performed by the Tribunal, which included a Judge of the Federal Court of Australia, were non-judicial functions, the Tribunal operated safely within the precise limits referred to by this Court in *Hilton v Wells*.<sup>32</sup> In those circumstances, no
- 30

---

<sup>28</sup> *Re Lakes R Us Pty Ltd* (2006) 200 FLR 233 at [26]-[27]; *Asia Pacific Transport Pty Limited* (2003) ATPR ¶41-920 at [7]; *Freight Victoria Limited* (2002) ATPR ¶41-884 at [17]; *Re Virgin Blue Airlines Pty Ltd* (2005) 195 FLR 242 at [113].

<sup>29</sup> See, for example, *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 at [22]; *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at [6]; *Re Application by Services Sydney Pty Ltd* (2005) 227 ALR 140 at [9].

<sup>30</sup> *Wainohu v New South Wales* (2011) 243 CLR 181 (*Wainohu*) at 221, [78] (Gummow, Hayne, Crennan and Bell JJ), quoting Mason and Deane JJ in *Hilton v Wells* (1985) 157 CLR 57 at 81-82.

<sup>31</sup> *Wainohu* at 226, [94] (Gummow, Hayne, Crennan and Bell JJ), quoting Gaudron J in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 25-26.

<sup>32</sup> (1985) 157 CLR 57.

potential incompatibility arose where the Tribunal was required, as it did here, have regard to considerations that may affect the public interest.

36. In any event, the consideration of matters of public interest is not the sole domain of the legislature or the executive. Courts can, and do, consider matters of public interest in a variety of contexts.<sup>33</sup> It is not a concept of unascertainable meaning or unlimited scope. Its meaning in the context of s 44H(4)(f) is to be determined from the subject matter, scope and purpose of the statutory enactment. That is a legal exercise. Application of political consideration to the assessment of such interest would not fall within its ambit either for the Minister or the Tribunal.

10

**Part IV: Applicable Provisions**

37. See Annexure A hereto.

Dated: 12 April 2012



**STEPHEN GAGELER SC**  
 T: (02) 6141 4145  
 F: (02) 6141 4099  
 E: stephen.gageler@ag.gov.au

**PETER HANKS QC**  
 T: (03) 9225 8815  
 F: (03) 9225 7293  
 E: peter.hanks@jr6.com.au

**JEREMY SLATTERY**  
 T: (03) 9225 8397  
 F: (03) 9670 7086  
 E: jeremyslattery@vicbar.com.au

---

<sup>33</sup> For example, under the common law relating to covenants in restraint of trade, all such covenants are prima facie unenforceable unless held to be reasonable with respect to the interests of the parties concerned and the public.

## Annexure A

### Part IX of the *Trade Practices Act 1974* (Cth) as at 5 April 2006 (prior to the enactment of *Trade Practices Amendment (National Access Regime) Act 2006* (Cth))

#### Part IX—Review by Tribunal of Determinations of Commission

##### Division 1—Applications for Review

##### 101 Applications for review

(1) A person dissatisfied with a determination by the Commission:

- (a) in relation to an application for an authorization or a minor variation of an authorization; or
- (b) in relation to the revocation of an authorization, or the revocation of an authorization and the substitution of another authorization;

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

(1AA) If:

- (a) the person applying under subsection (1) for review of a determination was the applicant for an authorization, or for the minor variation of an authorization, for the revocation of an authorization or for the revocation of an authorization and the substitution of another authorization; or
- (b) the Tribunal is satisfied that the person has a sufficient interest;

the Tribunal must review the determination.

(1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(6), (7), (8) or (9).

(1B) A presidential member may, on the application of a person concerned:

- (a) in an application for an authorization under subsection 88(9); or
- (b) in an application for a minor variation or a revocation of such an authorization; or
- (c) in an application for the revocation of such an authorization and the substitution of another authorization;

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the

application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

- (2) A review by the Tribunal is a re-hearing of the matter and subsections 90(6), (7), (8) and (9), 91A(4), 91A(5), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

#### **101A Application for review of notice under subsection 93(3) or (3A)**

A person dissatisfied with the giving of a notice by the Commission under subsection 93(3) or (3A) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice and, if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal shall review the giving of the notice.

#### **102 Functions and powers of Tribunal**

- (1) On a review of a determination of the Commission in relation to:
- (a) an application for an authorization; or
  - (b) an application for a minor variation of an authorization; or
  - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or
  - (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

- (1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:
- (a) the grant of an authorisation under subsection 88(9); or
  - (b) the minor variation, or the revocation, of an authorization granted under that subsection; or
  - (c) the revocation of an authorization granted under that subsection and the substitution of another authorization;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

- (1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.
- (1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.

- (2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission in relation to:
- (a) an application for an authorization; or
  - (b) an application for a minor variation of an authorization; or
  - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or
  - (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

- (4) Upon a review of the giving of a notice by the Commission under subsection 93(3):
- (a) if the person who applied for the review satisfies the Tribunal that in all the circumstances:
    - (i) the conduct or proposed conduct to which the notice relates has resulted or is likely to result, or would result or be likely to result, as the case may be, in a benefit to the public; and
    - (ii) that benefit would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result from the conduct or would result or be likely to result from the proposed conduct;

the Tribunal shall make a determination setting aside the notice; or
  - (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal shall make a determination affirming the notice.
- (5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.
- (5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.
- (5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).
- (5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:
- (a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of paragraph

93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and

- (b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.
- (6) For the purposes of a review by the Tribunal, the member of the Tribunal presiding at the review may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies.
- (7) For the purposes of a review, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.

## **Division 2—Procedure and Evidence**

### **103 Procedure generally**

- (1) In proceedings before the Tribunal:
  - (a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;
  - (b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and
  - (c) the Tribunal is not bound by the rules of evidence.
- (2) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by the Tribunal constituted by a presidential member.

### **104 Regulations as to certain matters**

The regulations may make provision:

- (a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and
- (aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and
- (b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

### **105 Power to take evidence on oath**

- (1) The Tribunal may take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath or affirmation.
- (2) A member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons.

**106 Hearings to be in public except in special circumstances**

- (1) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.
- (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may:
  - (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; or
  - (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.
- (3) The powers of the Tribunal under this section may be exercised by the Tribunal as constituted for the purposes of the hearing or by the Tribunal constituted by a presidential member.

**107 Evidence in form of written statement**

The Tribunal may permit a person appearing as a witness before the Tribunal to give evidence by tendering, and, if the Tribunal thinks fit, verifying by oath or affirmation, a written statement, which shall be filed with the Registrar.

**108 Taking of evidence by single member**

The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorize a presidential member to take evidence for the purposes of the proceedings on its behalf, with such limitations (if any) as the Tribunal so constituted directs, and, where such an authority is given:

- (a) that member may take evidence accordingly; and
- (b) for the purposes of this Act, that member shall, in relation to the taking of evidence in accordance with the authority, be deemed to constitute the Tribunal.

**109 Participants in proceedings before Tribunal**

- (1) A person to whom an authorization was granted is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that authorization.
- (1A) A person to whom a notice was given by the Commission under subsection 93(3) or (3A) is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that notice.
- (2) The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal.

**110 Representation**

In proceedings before the Tribunal:

- (a) a natural person may appear in person;
- (aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;
- (b) a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal;
- (c) an unincorporated association of persons or a member of an unincorporated association of persons may be represented by a member or officer of the association approved by the Tribunal; and
- (d) any person may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory or of the High Court.

## Part IX of the *Trade Practices Act 1974* (Cth) as at 30 June 2010

### Part IX—Review by Tribunal of Determinations of Commission

#### Division 1—Applications for review (other than for merger clearances)

##### 101 Applications for review

- (1) A person dissatisfied with a determination by the Commission under Division 1 of Part VII:
  - (a) in relation to an application for an authorization or a minor variation of an authorization; or
  - (b) in relation to the revocation of an authorization, or the revocation of an authorization and the substitution of another authorization;

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

(1AAA) Subsection (1) does not apply to a determination under subsection 89(1A).

(1AA) If:

- (a) the person applying under subsection (1) for review of a determination was the applicant for an authorization, or for the minor variation of an authorization, for the revocation of an authorization or for the revocation of an authorization and the substitution of another authorization; or
- (b) the Tribunal is satisfied that the person has a sufficient interest;

the Tribunal must review the determination.

- (1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the

applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(5A), (5B), (6), (7), (8), (8A), (8B) or (9).

- (1B) A presidential member may, on the application of a person concerned:
- (a) in an application for an authorization under subsection 88(9); or
  - (b) in an application for a minor variation or a revocation of such an authorization; or
  - (c) in an application for the revocation of such an authorization and the substitution of another authorization;

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

- (2) A review by the Tribunal is a re-hearing of the matter and subsections 90(5A), (5B), (6), (7), (8), (8A), (8B) and (9), 91A(4), 91A(5), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

#### **101A Application for review of notice under subsection 93(3) or (3A) or 93AC(1) or (2)**

A person dissatisfied with the giving of a notice by the Commission under subsection 93(3) or (3A) or 93AC(1) or (2) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice and, if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal shall review the giving of the notice.

#### **102 Functions and powers of Tribunal**

- (1) On a review of a determination of the Commission under Division 1 of Part VII in relation to:
- (a) an application for an authorization; or
  - (b) an application for a minor variation of an authorization; or
  - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or
  - (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

- (1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:
- (a) the grant of an authorisation under subsection 88(9); or

- (b) the minor variation, or the revocation, of an authorization granted under that subsection; or
- (c) the revocation of an authorization granted under that subsection and the substitution of another authorization;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

- (1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.
- (1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.
- (2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission under Division 1 of Part VII in relation to:
  - (a) an application for an authorization; or
  - (b) an application for a minor variation of an authorization; or
  - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or
  - (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

- (4) Upon a review of the giving of a notice by the Commission under subsection 93(3):
  - (a) if the person who applied for the review satisfies the Tribunal that:
    - (i) the conduct or proposed conduct does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 47); or
    - (ii) in all the circumstances:
      - (A) the conduct or proposed conduct has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and
      - (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the conduct or proposed conduct;

the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.

(5AA) Upon a review of the giving of a notice by the Commission under subsection 93AC(1):

(a) if the person who applied for the review satisfies the Tribunal that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision outweighs or would outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision—the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AB) Upon a review of the giving of a notice by the Commission under subsection 93AC(2):

(a) if the person who applied for the review satisfies the Tribunal that:

(i) the provision does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 45); or

(ii) in all the circumstances:

(A) the provision has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and

(B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;

the Tribunal must make a determination setting aside the notice; or

(b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AC) If the Tribunal sets aside a notice (the *objection notice*) given by the Commission under subsection 93AC(1) or (2), then:

(a) if the Commission gave the objection notice as part of a process starting when the Commission gave a notice under subsection 93A(2) (conference notice) during the period described in paragraph 93AD(1)(a)—the Commission is taken for the purposes of paragraph 93AD(1)(b) to have decided not to give the objection notice at the time the Tribunal set it aside; and

(b) for the purposes of subsections 93AD(2) and (3), the objection notice is taken not to have been given.

- (5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.
- (5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).
- (5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:
- (a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of paragraph 93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and
  - (b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.
- (6) For the purposes of a review by the Tribunal under this Division, the member of the Tribunal presiding at the review may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies.
- (7) For the purposes of a review under this Division, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.

## **Division 2—Procedure and Evidence**

### **102A Definition**

In this Part:

*proceedings* includes:

- (a) applications made to the Tribunal under Subdivision C of Division 3 of Part VII; and
- (b) applications made to the Tribunal under section 111 (about review of Commission's decisions on merger clearances).

### **103 Procedure generally**

- (1) In proceedings before the Tribunal:
  - (a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;
  - (b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and

- (c) the Tribunal is not bound by the rules of evidence.
- (2) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by a presidential member.
- (3) The powers mentioned in subsection (2) may be exercised by a presidential member:
  - (a) whether or not the Tribunal has been constituted under section 37 in relation to the proceedings; and
  - (b) once the Tribunal is so constituted—whether or not that member is part of the Division of the Tribunal so constituted.

#### **104 Regulations as to certain matters**

The regulations may make provision:

- (a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and
- (aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and
- (b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

#### **105 Power to take evidence on oath**

- (1) The Tribunal may take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath or affirmation.
- (2) A member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons.

#### **106 Hearings to be in public except in special circumstances**

- (1) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.
- (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may:
  - (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; or
  - (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.
- (3) The powers of the Tribunal under this section may be exercised by the Tribunal as constituted for the purposes of the hearing or by the Tribunal constituted by a presidential member.

### **107 Evidence in form of written statement**

The Tribunal may permit a person appearing as a witness before the Tribunal to give evidence by tendering, and, if the Tribunal thinks fit, verifying by oath or affirmation, a written statement, which shall be filed with the Registrar.

### **108 Taking of evidence by single member**

The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorize a presidential member to take evidence for the purposes of the proceedings on its behalf, with such limitations (if any) as the Tribunal so constituted directs, and, where such an authority is given:

- (a) that member may take evidence accordingly; and
- (b) for the purposes of this Act, that member shall, in relation to the taking of evidence in accordance with the authority, be deemed to constitute the Tribunal.

### **109 Participants in proceedings before Tribunal**

- (1) A person to whom an authorization under Division 1 of Part VII was granted is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that authorization.
- (1A) A person to whom a notice was given by the Commission under subsection 93(3) or (3A) or 93AC(1) or (2) is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that notice.
- (2) The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal.

### **110 Representation**

In proceedings before the Tribunal:

- (a) a natural person may appear in person;
- (aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;
- (b) a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal;
- (c) an unincorporated association of persons or a member of an unincorporated association of persons may be represented by a member or officer of the association approved by the Tribunal; and
- (d) any person may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory or of the High Court.

### **Division 3—Review of Commission’s determinations on merger clearances**

#### **111 Applications for review**

(1) A person who applied under Subdivision B of Division 3 of Part VII for:

- (a) a clearance; or
- (b) a minor variation of a clearance; or
- (c) a revocation of a clearance; or
- (d) a revocation of a clearance and a substitution of another clearance;

and who is dissatisfied with the determination by the Commission in relation to the application may, as prescribed and within the time allowed by or under the regulations or under subsection (5), apply to the Tribunal for a review of the determination.

(2) A person who was granted a clearance under Subdivision B of Division 3 of Part VII that was:

- (a) revoked by a determination of the Commission under section 95AS; or
- (b) revoked and substituted with another clearance by a determination of the Commission under section 95AS;

may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the determination.

(2A) The regulations may make it a requirement that an applicant under subsection (1) or (2) give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.

(3) The Tribunal must review the determination after receiving the application and the prescribed fee.

Note: Division 2 contains provisions about procedure and evidence that relate to proceedings before the Tribunal.

(4) If a person has made an application under subsection (1) or (2) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant and the Commission, whether or not the Tribunal is satisfied of the matters referred to in section 95AN.

(5) A presidential member may, on the application by the applicant, shorten the time allowed by or under the regulations within which an application under subsection (1) may be made if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

#### **112 Tribunal to notify Commission**

The Tribunal must notify the Commission of the application for review.

### **113 Commission to give material to Tribunal**

- (1) After being notified of the application for review, the Commission must, within 2 business days, give to the Tribunal all the information that the Commission took into account in connection with the making of the determination to which the review relates.
- (1A) The Commission must identify which of that information (if any) the Commission excluded from the merger clearance register under subsection 95AI(3), (4) or (7).
- (2) In this section:

*business day* means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

*merger clearance register* means the register kept under section 95AH.

### **114 Tribunal may consult etc. to clarify information**

- (1) The Tribunal may seek such relevant information, and consult with such persons, as it considers reasonable and appropriate for the purposes of clarifying the information given to it under section 113.
- (2) The Tribunal may disclose information identified under subsection 113(1A) to such persons and on such terms as it considers reasonable and appropriate for the purposes of clarifying the information.

### **115 Commission to assist Tribunal**

For the purposes of the review, the member of the Tribunal presiding at the review may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal as the member specifies.

### **116 Tribunal only to consider material before the Commission**

For the purposes of the review, the Tribunal may have regard only to:

- (a) the information given to the Commission in connection with the making of the determination to which the review relates and that was given to the Tribunal under section 113; and
- (b) any other information that was referred to in the Commission's reasons for making the determination to which the review relates; and
- (c) any information given to the Tribunal under section 114; and
- (d) any information or report given to the Tribunal under section 115.

### **117 Tribunal to make decision on review**

On the review of the Commission's determination, the Tribunal must make a determination affirming, setting aside or varying the Commission's determination.

### 118 Time limits for making review decision

- (1) The Tribunal must make its decision on the review within 30 business days after receiving the application for review.
- (2) However, if before the end of that period the Tribunal decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, the period is extended by a further 60 business days.
- (3) If the Tribunal makes a decision under subsection (2), the Tribunal must notify the applicant of it before the end of the 30 business day period.
- (3A) If the Tribunal has not made its decision on the review within the period applicable under subsection (1) or (2), the Tribunal is taken to have made a determination affirming the Commission's determination.
- (4) In this section:

*business day* means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

### 119 Tribunal's decision taken to be Commission's

The Tribunal's decision affirming, setting aside or varying the Commission's determination is, for the purposes of this Act other than this Part, taken to be the Commission's determination.

## Part IX of the *Competition and Consumer Act 2010* (Cth) as at 12 April 2012

### Part IX—Review by Tribunal of Determinations of Commission

#### Division 1—Applications for review (other than for merger clearances)

#### 101 Applications for review

- (1) A person dissatisfied with a determination by the Commission under Division 1 of Part VII:
  - (a) in relation to an application for an authorization or a minor variation of an authorization; or
  - (b) in relation to the revocation of an authorization, or the revocation of an authorization and the substitution of another authorization;

may, as prescribed and within the time allowed by or under the regulations or under subsection (1B), as the case may be, apply to the Tribunal for a review of the determination.

(1AAA) Subsection (1) does not apply to a determination under subsection 89(1A).

(1AA) If:

- (a) the person applying under subsection (1) for review of a determination was the applicant for an authorization, or for the minor variation of an authorization, for the revocation of an authorization or for the revocation of an authorization and the substitution of another authorization; or
- (b) the Tribunal is satisfied that the person has a sufficient interest;

the Tribunal must review the determination.

- (1A) Where a person has, whether before or after the commencement of this subsection, made an application under subsection (1) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant, the Commission, and all persons who have been permitted under subsection 109(2) to intervene in the proceedings for review, whether or not the Tribunal is satisfied of the matters referred to in subsection 90(5A), (5B), (6), (7), (8), (8A), (8B) or (9).
- (1B) A presidential member may, on the application of a person concerned:
  - (a) in an application for an authorization under subsection 88(9); or
  - (b) in an application for a minor variation or a revocation of such an authorization; or
  - (c) in an application for the revocation of such an authorization and the substitution of another authorization;

shorten the time allowed by or under the regulations within which an application under subsection (1) may be made for a review of the determination by the Commission of the application referred to in paragraph (a), (b) or (c) if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

- (2) A review by the Tribunal is a re-hearing of the matter and subsections 90(5A), (5B), (6), (7), (8), (8A), (8B) and (9), 91A(4), 91A(5), 91B(5) and 91C(7) apply in relation to the Tribunal in like manner as they apply in relation to the Commission.

#### **101A Application for review of notice under subsection 93(3) or (3A) or 93AC(1) or (2)**

A person dissatisfied with the giving of a notice by the Commission under subsection 93(3) or (3A) or 93AC(1) or (2) may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the giving of the notice and, if the person was the person to whom the notice was given or the Tribunal is satisfied that the person has a sufficient interest, the Tribunal shall review the giving of the notice.

#### **102 Functions and powers of Tribunal**

- (1) On a review of a determination of the Commission under Division 1 of Part VII in relation to:
  - (a) an application for an authorization; or
  - (b) an application for a minor variation of an authorization; or
  - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or

- (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

the Tribunal may make a determination affirming, setting aside or varying the determination of the Commission and, for the purposes of the review, may perform all the functions and exercise all the powers of the Commission.

- (1A) If a person applies to the Tribunal for review of a determination of the Commission relating to:
  - (a) the grant of an authorisation under subsection 88(9); or
  - (b) the minor variation, or the revocation, of an authorization granted under that subsection; or
  - (c) the revocation of an authorization granted under that subsection and the substitution of another authorization;

the Tribunal must make its determination on the review within 60 days after receiving the application for review.

- (1B) The 60 day time limit in subsection (1A) does not apply if the Tribunal considers that the matter cannot be dealt with properly within that period of 60 days, either because of its complexity or because of other special circumstances.
- (1C) If subsection (1B) applies, the Tribunal must notify the applicant before the end of the 60 day period that the matter cannot be dealt with properly within that period.
- (2) A determination by the Tribunal affirming, setting aside or varying a determination of the Commission under Division 1 of Part VII in relation to:
  - (a) an application for an authorization; or
  - (b) an application for a minor variation of an authorization; or
  - (c) an application for, or the Commission's proposal for, the revocation of an authorization; or
  - (d) an application for, or the Commission's proposal for, the revocation of an authorization and the substitution of another authorization;

is, for the purposes of this Act other than this Part, to be taken to be a determination of the Commission.

- (4) Upon a review of the giving of a notice by the Commission under subsection 93(3):
  - (a) if the person who applied for the review satisfies the Tribunal that:
    - (i) the conduct or proposed conduct does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 47); or
    - (ii) in all the circumstances:

- (A) the conduct or proposed conduct has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and
- (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the conduct or proposed conduct;

the Tribunal must make a determination setting aside the notice; or

- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.
- (5) Where the Tribunal makes a determination setting aside a notice given by the Commission under subsection 93(3), then, after the setting aside of the notice, subsection 93(7) has effect in relation to the conduct referred to in the notice as if the Commission had not given the notice.

(5AA) Upon a review of the giving of a notice by the Commission under subsection 93AC(1):

- (a) if the person who applied for the review satisfies the Tribunal that any benefit to the public that has resulted or is likely to result or would result or be likely to result from the provision outweighs or would outweigh the detriment to the public that has resulted or is likely to result or would result or be likely to result from the provision—the Tribunal must make a determination setting aside the notice; or
- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AB) Upon a review of the giving of a notice by the Commission under subsection 93AC(2):

- (a) if the person who applied for the review satisfies the Tribunal that:
  - (i) the provision does not and would not have the purpose, and does not and is not likely to have or would not have and would not be likely to have the effect, of substantially lessening competition (within the meaning of section 45); or
  - (ii) in all the circumstances:
    - (A) the provision has resulted or is likely to result, or would result or be likely to result, in a benefit to the public; and
    - (B) that benefit outweighs or would outweigh the detriment to the public constituted by any lessening of competition that has resulted or is likely to result, or would result or be likely to result, from the provision;

the Tribunal must make a determination setting aside the notice; or

- (b) if the person who applied for the review does not so satisfy the Tribunal—the Tribunal must make a determination affirming the notice.

(5AC) If the Tribunal sets aside a notice (the *objection notice*) given by the Commission under subsection 93AC(1) or (2), then:

- (a) if the Commission gave the objection notice as part of a process starting when the Commission gave a notice under subsection 93A(2) (conference notice) during the period described in paragraph 93AD(1)(a)—the Commission is taken for the purposes of paragraph 93AD(1)(b) to have decided not to give the objection notice at the time the Tribunal set it aside; and
  - (b) for the purposes of subsections 93AD(2) and (3), the objection notice is taken not to have been given.
- (5A) The Tribunal must set aside a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice satisfies the Tribunal that the likely benefit to the public from the conduct or proposed conduct to which the notice relates will outweigh the likely detriment to the public from the conduct or proposed conduct.
- (5B) The Tribunal must affirm the giving of a notice under subsection 93(3A) if the person who applied for a review of the giving of the notice does not satisfy the Tribunal as described in subsection (5A).
- (5C) If the Tribunal sets aside a notice given by the Commission under subsection 93(3A), then:
- (a) if the Commission gave the notice as part of a process starting when the Commission gave a notice under subsection 93A(2) during the period described in paragraph 93(7A)(a)—the Commission is taken for the purposes of paragraph 93(7A)(b) to have decided not to give the notice under subsection 93(3A) at the time the Tribunal set aside the notice given under subsection 93(3A); and
  - (b) for the purposes of subsections 93(7B) and (7C) the notice is taken not to have been given.
- (6) For the purposes of a review by the Tribunal under this Division, the member of the Tribunal presiding at the review may require the Commission to furnish such information, make such reports and provide such other assistance to the Tribunal as the member specifies.
- (7) For the purposes of a review under this Division, the Tribunal may have regard to any information furnished, documents produced or evidence given to the Commission in connexion with the making of the determination, or the giving of the notice, to which the review relates.

## **Division 2—Procedure and Evidence**

### **102A Definition**

In this Part:

*proceedings* includes:

- (a) applications made to the Tribunal under Subdivision C of Division 3 of Part VII; and
- (b) applications made to the Tribunal under section 111 (about review of Commission's decisions on merger clearances).

### 103 Procedure generally

- (1) In proceedings before the Tribunal:
  - (a) the procedure of the Tribunal is, subject to this Act and the regulations, within the discretion of the Tribunal;
  - (b) the proceedings shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Tribunal permit; and
  - (c) the Tribunal is not bound by the rules of evidence.
- (2) The powers of the Tribunal with respect to matters of procedure in particular proceedings may be exercised by a presidential member.
- (3) The powers mentioned in subsection (2) may be exercised by a presidential member:
  - (a) whether or not the Tribunal has been constituted under section 37 in relation to the proceedings; and
  - (b) once the Tribunal is so constituted—whether or not that member is part of the Division of the Tribunal so constituted.

### 104 Regulations as to certain matters

The regulations may make provision:

- (a) for securing, by means of preliminary statements of facts and contentions, and by the production of documents, that all material facts and considerations are brought before the Tribunal by all persons participating in any proceedings before the Tribunal; and
- (aa) with respect to evidence in proceedings before the Tribunal, including the appointment of persons to assist the Tribunal by giving evidence (whether personally or by means of a written report); and
- (b) with respect to the representation in any such proceedings of persons having a common interest in the proceedings.

### 105 Power to take evidence on oath

- (1) The Tribunal may take evidence on oath or affirmation and for that purpose a member of the Tribunal may administer an oath or affirmation.
- (2) A member of the Tribunal may summon a person to appear before the Tribunal to give evidence and to produce such documents (if any) as are referred to in the summons.

### 106 Hearings to be in public except in special circumstances

- (1) Subject to this section, the hearing of proceedings before the Tribunal shall be in public.
- (2) Where the Tribunal is satisfied that it is desirable to do so by reason of the confidential nature of any evidence or matter or for any other reason, the Tribunal may:

- (a) direct that a hearing or part of a hearing shall take place in private and give directions as to the persons who may be present; or
  - (b) give directions prohibiting or restricting the publication of evidence given before the Tribunal, whether in public or in private, or of matters contained in documents filed or lodged with the Registrar, received in evidence by the Tribunal or placed in the records of the Tribunal.
- (3) The powers of the Tribunal under this section may be exercised by the Tribunal as constituted for the purposes of the hearing or by the Tribunal constituted by a presidential member.

#### **107 Evidence in form of written statement**

The Tribunal may permit a person appearing as a witness before the Tribunal to give evidence by tendering, and, if the Tribunal thinks fit, verifying by oath or affirmation, a written statement, which shall be filed with the Registrar.

#### **108 Taking of evidence by single member**

The Tribunal as constituted for the purposes of any proceedings in which evidence may be taken may authorize a presidential member to take evidence for the purposes of the proceedings on its behalf, with such limitations (if any) as the Tribunal so constituted directs, and, where such an authority is given:

- (a) that member may take evidence accordingly; and
- (b) for the purposes of this Act, that member shall, in relation to the taking of evidence in accordance with the authority, be deemed to constitute the Tribunal.

#### **109 Participants in proceedings before Tribunal**

- (1) A person to whom an authorization under Division 1 of Part VII was granted is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that authorization.
- (1A) A person to whom a notice was given by the Commission under subsection 93(3) or (3A) or 93AC(1) or (2) is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to that notice.
- (2) The Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal.

#### **110 Representation**

In proceedings before the Tribunal:

- (a) a natural person may appear in person;
- (aa) a person other than a body corporate may be represented by an employee of the person approved by the Tribunal;
- (b) a body corporate may be represented by an employee, or a director or other officer, of the body corporate approved by the Tribunal;

- (c) an unincorporated association of persons or a member of an unincorporated association of persons may be represented by a member or officer of the association approved by the Tribunal; and
- (d) any person may be represented by a barrister or a solicitor of the Supreme Court of a State or Territory or of the High Court.

### **Division 3—Review of Commission’s determinations on merger clearances**

#### **111 Applications for review**

- (1) A person who applied under Subdivision B of Division 3 of Part VII for:
  - (a) a clearance; or
  - (b) a minor variation of a clearance; or
  - (c) a revocation of a clearance; or
  - (d) a revocation of a clearance and a substitution of another clearance;
 and who is dissatisfied with the determination by the Commission in relation to the application may, as prescribed and within the time allowed by or under the regulations or under subsection (5), apply to the Tribunal for a review of the determination.
- (2) A person who was granted a clearance under Subdivision B of Division 3 of Part VII that was:
  - (a) revoked by a determination of the Commission under section 95AS; or
  - (b) revoked and substituted with another clearance by a determination of the Commission under section 95AS;
 may, as prescribed and within the time allowed by or under the regulations, apply to the Tribunal for a review of the determination.
- (2A) The regulations may make it a requirement that an applicant under subsection (1) or (2) give an undertaking under section 87B that the applicant will not make the acquisition while the application is being considered by the Tribunal.
- (3) The Tribunal must review the determination after receiving the application and the prescribed fee.

Note: Division 2 contains provisions about procedure and evidence that relate to proceedings before the Tribunal.

- (4) If a person has made an application under subsection (1) or (2) for a review of a determination, the Tribunal may, if the Tribunal determines it to be appropriate, make a determination by consent of the applicant and the Commission, whether or not the Tribunal is satisfied of the matters referred to in section 95AN.
- (5) A presidential member may, on the application by the applicant, shorten the time allowed by or under the regulations within which an application under subsection (1) may be made

if the member is satisfied that special circumstances exist and that, in all the circumstances, it would not be unfair to do so.

#### **112 Tribunal to notify Commission**

The Tribunal must notify the Commission of the application for review.

#### **113 Commission to give material to Tribunal**

- (1) After being notified of the application for review, the Commission must, within 2 business days, give to the Tribunal all the information that the Commission took into account in connection with the making of the determination to which the review relates.
- (1A) The Commission must identify which of that information (if any) the Commission excluded from the merger clearance register under subsection 95AI(3), (4) or (7).
- (2) In this section:

*business day* means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

*merger clearance register* means the register kept under section 95AH.

#### **114 Tribunal may consult etc. to clarify information**

- (1) The Tribunal may seek such relevant information, and consult with such persons, as it considers reasonable and appropriate for the purposes of clarifying the information given to it under section 113.
- (2) The Tribunal may disclose information identified under subsection 113(1A) to such persons and on such terms as it considers reasonable and appropriate for the purposes of clarifying the information.

#### **115 Commission to assist Tribunal**

For the purposes of the review, the member of the Tribunal presiding at the review may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal as the member specifies.

#### **116 Tribunal only to consider material before the Commission**

For the purposes of the review, the Tribunal may have regard only to:

- (a) the information given to the Commission in connection with the making of the determination to which the review relates and that was given to the Tribunal under section 113; and
- (b) any other information that was referred to in the Commission's reasons for making the determination to which the review relates; and
- (c) any information given to the Tribunal under section 114; and
- (d) any information or report given to the Tribunal under section 115.

### 117 Tribunal to make decision on review

On the review of the Commission's determination, the Tribunal must make a determination affirming, setting aside or varying the Commission's determination.

### 118 Time limits for making review decision

- (1) The Tribunal must make its decision on the review within 30 business days after receiving the application for review.
- (2) However, if before the end of that period the Tribunal decides that the matter cannot be dealt with properly within that period, either because of its complexity or because of other special circumstances, the period is extended by a further 60 business days.
- (3) If the Tribunal makes a decision under subsection (2), the Tribunal must notify the applicant of it before the end of the 30 business day period.
- (3A) If the Tribunal has not made its decision on the review within the period applicable under subsection (1) or (2), the Tribunal is taken to have made a determination affirming the Commission's determination.
- (4) In this section:

*business day* means a day that is not a Saturday, a Sunday, or a public holiday in the Australian Capital Territory.

### 119 Tribunal's decision taken to be Commission's

The Tribunal's decision affirming, setting aside or varying the Commission's determination is, for the purposes of this Act other than this Part, taken to be the Commission's determination.