

## **PRODUCTIVITY COMMISSION INQUIRY**

### **LEGISLATION REVIEW OF CLAUSE 6 OF THE COMPETITION PRINCIPLES AGREEMENT AND PART IIIA OF THE TRADE PRACTICES ACT 1974**

#### **AUSTRALIAN RAIL TRACK CORPORATION SUPPLEMENTARY SUBMISSION**

The Issues Paper prepared by the Productivity Commission in relation to its inquiry into a legislation review of Clause 6 of the Competition Principles Agreement (CPA) and Part IIIA of the Trade Practices Act (TPA) 1974 was issued in October 2000. The inquiry gives effect to a commitment made, as part of the NCP, by the Commonwealth and States and Territories to review the national access arrangements after five years of operation. The paper covers such issues as current access arrangements, including the Part IIIA national access regime and industry specific regimes, the use of and rationale for the national regime, means of improving the regime, access, and the implication for any changes on Clause 6, industry specific regimes and other regulation. The Commission has sought comment on these issues.

The Australian Rail Track Corporation (ARTC) has expressed some initial views in a submission provided to the Commission on 15 January 2001. In addition to this, ARTC would like to make some further statements in this supplementary submission as detailed below.

***1. ARTC is of the view that there should be a single adjudicator with respect to regimes for access in Australia.***

ARTC believes that having two separate national regulatory bodies adjudicating on access regimes, namely the Australian Consumer and Competition Council (ACCC) and the National Competition Council (NCC), is both inefficient and contrary to the principle of having an even playing field in like industry sectors or groups.

The assessment of all access regimes involving industries whose operation has national implications should be solely a matter for the ACCC. The NCC should not be involved in assessing access regimes. This would enable a consistent set of principles to be applied in such assessments and a consistent process to be followed.

The activities of specialist bodies involved in the assessment of access regimes for particular industries should be incorporated into the role of the ACCC. The principles and strategies proposed within industry sectors should be able to be assessed by an entity that has, as its sole purpose, the role of assessing the competition and market effects of a regime. Such specialist bodies tend to become captive to a particular industry sector and so get diverted from the parameters of access and competition into other matters less

relevant, or are inclined to seek a trade-off between competition and access issues for other outcomes in the particular sector.

The NCC was initially intended to have a role of providing a transitional vehicle for state based government entities to move into the same market framework as private sector participants. This transitional role is now becoming entrenched in the competition reform process and is now tending to be played off by participants to assist private sector owners or operators of monopoly assets to circumvent ACCC jurisdiction. This activity is having the effect of slowing down the progress of competitive reform in the states.

Having a single adjudicator of access regimes (the ACCC) would significantly enhance the achievement of the aims of National Competition Policy by enabling:

- a. The application of a consistent set of competitive principles across all regimes, including the identification and allocation of cost, treatment of capital and identification of market risk based rates of return.
- b. The provision of a more coherent framework for the identification of markets.
- c. The provision of a more coherent and consistent framework for the application of access principles within like industry sectors regardless of the ownership of the provider of access.

Further, all parties seeking declaration of a service provided by a facility should seek such declaration from the ACCC. In assessing the criteria for declaration, the ACCC would make a judgement on the national significance of the service and, where nationally significant, any recommendation should be made to the relevant Commonwealth Minister.

The NCC should retain its role of over-viewing progress by governments on the implementation of National Competition Policy and advise governments on future policy development.

***2. ARTC is of the view that the differentiation of access regimes should be on the access providers' market and industry position.***

The access regime framework should facilitate differentiation based on the commercial drivers of different access providers. Such drivers are often governed by the structure of the particular industry.

An access provider which is an entity controlled by, or related to, entities with downstream market significance (a vertically integrated access provider) in an industry sector should be subject to a prescriptive framework for the provision of access to third parties on a fair and reasonable basis. This type of regime could be described as a **'Third Party Access Regime'** and would prescriptively provide for a range of issues including:

- Access Application and Negotiation
- Access Pricing
- Dispute Resolution
- Service Performance
- Anti-competitive Conduct (including less conspicuous activity)
- Information Flows and Ringfencing

On the other hand, an access provider with no such downstream market interests is likely to have access revenue as its only source of income and has a commercial incentive to promote competition in the use of the asset to grow the market. Such an entity is more likely to develop, without regulatory influence, an access regime which demonstrates an 'open' approach to access provision on fair and reasonable terms. Such a regime could be described as an **'Open Access Regime'** where the only concern of a regulator may be where the asset displays significant monopoly characteristics (ie there is a lack of alternative or strong competition to use of the asset). In such cases, some regulatory prescription with respect to access pricing may be required.

Where an alternative exists and there is strong competition to use of the asset, the access provider is likely to price access fairly and, further, will seek some process to ensure access is priced to its value in the market. Such an environment requires little regulation as it exhibits close to normal free market characteristics. A similar circumstance may arise where an asset is new to the market and has little or no initial revenue base.

The differentiation between these two types of regime would allow each to be more effective in the circumstances of a specific access provider and market. The distinction between "Third Party Access Regimes" and "Open Access Regimes" should be made in the framework of National Competition Policy.

3. ***ARTC is of the view that Industry Codes should be able to be departed from by access providers as long as it can be demonstrated to the ACCC that the proposed regime satisfies the requirements of an access undertaking.***

Industry Codes should not become an inhibitor to innovation or a tool used to force an industry sector down to the lowest common denominator.