BUNBURY PORT AUTHORITY
RESPONSE TO THE NATIONAL ACCESS REGIME ENQUIRY ATTACHMENT

While many of the objectives of the Access Regime are supported, there are in our view a number of deficiencies. In particular, the concern is of the potential conflict between Part 3A and other sections of the Trade Practices Legislation.

The Bunbury Port Authority has recently been involved in a Federal Court decision which Adsteam/Stirling Harbour Services alleged that if the Authority issued an exclusive licence for the provision of towage services that it would breach Sections 45, 46 and 47 of the Trade Practices Act. The Court found in favour of the Authority at the initial trial and unanimously on Appeal. Division 2 provides for declared services which could include a port area and undo the work and effort of the Court process.

It is interesting to note that in the case of the Bunbury Port Authority, the Federal Court found that the issuing of an exclusive licence was pro competitive rather than anti competitive. It is necessary that the proposed access regime considers outcomes, rather than processes, in a normal commercial environment.

The statement is supported that access should promote competition and economic efficiency, however this can be achieved in many ways and while access is a possibility, it is by no means the sole method of increasing competition and economic efficiency. The access regime fails to address these important considerations.

Industry Specific Access Regimes
Access to channels as proposed in a port is by itself irrelevant as access to berths and loading facilities, is also necessary. A ship may obtain access to a channel, but if it cannot get access to a berth the channel component becomes irrelevant, as there is no facility available for the exchange of cargo.

Channels and berths become critical, where they are owned by one single party and another party wishes to obtain access. It is necessary to consider the whole of the port operation, rather than just one component as this in itself is of no value.

Item 4 Rational for a National Access Regime
As a facility owner there are a number of issues that need to be considered before access will be provided.

First and foremost is the impact that access will have on the facility owners business in particular;

- In the market place;
- The impact on their future use of the facility;
- Risk of downtime due to the misuse/damage of the facility by another party;
- Risk of capital, if modifications are required;
- The free ride to the organization seeking access ie. there is very little of their capital at risk and as such the facility owner is required to bear the total risk element.

Organisations seeking access to a facility should be required to pay an access fee determined on their expected usage, which recognises all costs including fixed, variable and a component for risk. These are costs that they would have to incur if they provided a new facility. There will be significant financial benefits to the new user as there is no significant upfront capital for the provision of the facility and as such there is a direct benefit and competitive advantage.

The term monopoly pricing of access is in my view an inappropriate term, rather it should be referred to as a "fair price for access". A transfer of income occurs whenever a new party seeks to enter and compete in a static market. However in a growth market cheaper prices and/or additional consumption may be generated by a new player. From a policy perspective, I believe that this distinction is important.

The Authority is of the view that access to infrastructure can be accommodated within existing Legislation and an access regime is in our view unnecessary. The existing requirements of the Trade Practices Act (excluding Part 3A) are sufficient to ensure that access to necessary infrastructure complies with legislation.

As an example in the Bunbury Port a berth and ship loader have been provided by Alcoa but have been made available for use by a competitor, Worsley. This arrangement has been in place since mid 1980. A similar arrangement exists with the loading of woodchips, where the facilities provided are used by a number of parties.

These arrangements have been in place, well before Part 3A of the Trade Practices Act was introduced.

These arrangements are driven by commercial imperatives with involvement by the Port Authority where required. It is our view that the general competitive provisions relating to essential services in the Trade Practices Act are effective.

<u>Improving the Current National Access Regime</u>
The suggestion that Part 3A should focus on the exercise of monopoly power by owners of essential facilities is worthy of consideration. However the critical factors that needs to be considered are the rights of the facility owner and the risk inherent in providing such facilities.

If there is a requirement that facility owners make their facilities available to third parties, in most instances competitors, there is the real risk that there will be a reluctance to construct and provide facilities. This is an issue which needs to be considered when reviewing the access regime.

It is our view that new facility owners will be hesitant to invest and risk capital on a venture if competitors will be given access to their infrastructure at what may be seen as less than a fair price.

The long term impact on infrastructure investment needs to be considered as part of the Access Regime. It is our view that the optimum approach is to allow organizations to enter into their own commercial arrangements.

The Legislative provisions of the TPA could then be used if the facility owner charged unfair prices or provided unrealistic access.

In such an instance, the approach would be to assess what is fair access, but again recognising the requirements of the facility owner and the risk as it is imperative that these outcomes are not compromised. To do otherwise, would in our view have disastrous long-term consequences.

The issue of exclusive licences or rights is something which has been tested in the Courts and rather than adopt a generic policy, it is necessary to consider the particular aspects of the industry. As alluded to previously offering an exclusive licence in the Bunbury Port for the provision of towage services was found by the Courts to be pro competitive rather than anti competitive with the action initiated to protect a strategic commercial position.

Importantly the litigation initiated by Adsteam/Stirling Harbour Services was not against a competitor, but against a facility owner which sought to optimise the benefits to port users and the regional economy of the south west.

Negotiate/Arbitrate Issues

It is not in our view appropriate that in negotiations a facility owner disclose certain information as this may erode their competitive position. It is more appropriate that consideration is given to the cost estimate of replicating that infrastructure which is then used as a base to determine the fair value of access.

The benefits provided by a facility being in place for a number of years should not in our view flow though to a new access seeker as the risk and capital invested was made by the facility owner when no other industry was prepared to take the risk.

The question is not so much that access would lead to a large increase in competition as this may only result in a shifting of revenue but that there is a significant public benefit in the access; ie. end users. If it is not possible to answer or address this question objectively prior to the event, then all other issues are questionable.

The national significance statement is arguably subjective and lacks definition. A more important distinction would be as follows;

- What other community/end user benefits or implications of duplicating the facility;
- If there are not any, then a competitor should not have cheap access to another facility;
- If the asset can be duplicated then an access seeker should not have a free ride at no or little risk.

In today's environment there is no such thing as a level playing field, which is evident in the telecommunications industry where competitors to Telstra have few constraints. Conversely Telstra is required to not only operate in a commercial environment, but also to meet certain community service obligations and extensive public scrutiny.

Health and Safety Issues are difficult aspects to consider in the access regime, as again they could in most instances be subjective. As an example to construct a road specifically to handle heavy haulage has many benefits including safety, but other implications need to be considered.

Generally health and safety matters can be addressed under the public interest test and no further Legislation is required.

It is important that proof in the public interest test is with the party seeking the change. Further, natural justice requires that the facility owner is given the chance to present other arguments against declaration, regardless of the circumstances.

Appeal Processes

It is important to note that many aspects of access have been handled through the Courts thus negating the need and value of Part 3A of the Trade Practices Legislation.

Also of importance is the necessity to consider that some parties may collude to break the influence of another party. While I appreciate that existing Trade Practices Legislation covers this, the parties could be seen to be acting as individuals, rather than in concert and is an element that while not evident at the moment needs to be considered in the long term.

It is our view that there is no need to have both the MCC and the ACCC in the administration of Part 3A. The appropriate body if Part3A is to continue is through the ACCC.

Pricing Issues

If part 3A is to remain there should be some general parameters for pricing principles/rules as part of obtaining access. We would consider these to be;

- Risk;
- Cost of Managing the Facility;
- Maintenance;
- Capital Investment ie. Cost of Capital.

Pricing principles should be broad rather than explicit as circumstances change and different industries have different requirements.

It is our view that speculating on future developments creates an aura of uncertainty. The only future matters that should be considered are the development plans of the facility owner to ensure that their operations are not compromised.

Asset Valuation

The only certainty in relation to asset valuation is the known historic costs. All others are subjectively determined. However a possibility is deprival value based on future income streams as this determines the financial impact if the facility was not available.

As argued previously, it is our view that the best approach is the cost of replicating the asset at today's values as an access seeker should not have the benefit of investments made by a competitor, years prior.

Auctioning access is not in our view appropriate in a commercial environment. Conversely if the facility is owned by Government then Government has the option to obtain from that facility the best possible outcome. However Government should not in our view auction off access to facilities which it does not own or if that industry is subject to competitive commercial pressures.