Submission to the Productivity Commission on the National Access Regime

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1. I submit this paper as a person with lengthy experience in business, and with further relevant experience as a Member of the Australian Competition Tribunal from November 1985 to November 2000. I consider that I am able to offer an informed submission, relying in particular on knowledge and experience gained while participating in Tribunal matters. I am somewhat constrained — having sat as a Member of the Tribunal on two matters relating to access under Part IIIA of the Act that have come before the Tribunal for decision (*Australian Union of Students* [1997], and *Sydney International Airport* [2000]), I cannot properly offer any explicit gloss on either of these decisions. However my general comment is founded in part in my experience hearing these matters. Further, because my educational qualifications relate directly neither to economics nor to law, I do not offer any submission that relies on a professional knowledge of either discipline.

2. As a lay participant in Tribunal proceedings and decisions over some 15 years, I observed at close quarters the practical workings of the Trade Practices Act. From this privileged perspective, I came to admire the logic of the drafting of the Act, which allows its effective and realistic application in a diverse and changing commercial environment. The Act is not comprised of detailed and exhaustive provisions that attempt to foresee and determine every conceivable commercial eventuality to which the Act might apply. Rather the Act provides for generally stated prohibitions, founded in economic principle, to be interpreted in the circumstances of particular business conduct. The accumulating body of precedent arising from interpretation of the relevant provisions in the courts and in the Tribunal is a basis for understanding among practitioners as to how the Act constrains commercial conduct in particular instances, within the tumultuous and constantly shifting arena of competitive business.

3. It is widely accepted that — taken broadly — the Act works, and works well, despite the generality of its terms. It is useful in the context of a review and projected improvement of the National Access Regime to ask why this is so, and then to consider whether the access provisions enacted in 1995 fit well into the larger and more proven framework of the Act.

4. Under Part VII of the Act, specific forms of business conduct — including unforeseen complexities and novel business practices arising in changing circumstances — can be evaluated and exempted from sanction for breach of Part IV provisions, through the device of "authorisation". The form of the Act thus admits that no legal drafting, however detailed and ingenious, can comprehend the diversity of practices that might be adopted in pursuit of commercial advantage. It follows that provision must be made for doubtful practices to be evaluated instance by instance without a presumption of improper commercial behaviour being attached.

5. Crucially, the test for exemption of a specific business practice as "authorised" conduct relies on the existence of identifiable public benefits arising from the conduct at issue, that are determined by the ACCC (or on review by the Tribunal) to outweigh the associated anti-competitive detriment. The scope of relevant "public benefit" is not limited in the Act; the term is unqualified by explicit considerations of economic principle — unlike "anti-competitive" detriment. In short, the test to be applied by the determining body relates to the balance of public interest. Moreover this test is now accepted, by the Tribunal and in certain Federal Court decisions, as being properly applied prospectively, by comparison of the likely future with the conduct at issue allowed, against the likely future with that conduct proscribed. An alternative view that the balance of public interest might be validly assessed by comparing past circumstances with prospective future circumstances (i.e. by a 'before and after' test) is seen to be inappropriate and potentially misleading.

6. This tenet of the Act — that the public interest, as judged rigorously by the weighing of public benefits against anti-competitive detriments, shall prevail

in the evaluation of questionable business conduct — is central in practice to the administration of the Act. It is, in my view, one crucial factor that has made the Act effective over more than 25 years of its application and refinement, has distinguished the Australian Act from comparable legislation in other countries, and has allowed it to be well-accepted in the Australian community and much admired elsewhere.

7. It is to be noted well that the test for authorisation is not solely a test against economic principle Nor is it primarily directed to the pursuit of economic efficiency, as some economist commentators have asserted. Of course these are powerful considerations, but reasons attached to Tribunal determinations and to court decisions have affirmed on several occasions that effects on competition and economic efficiency are not the only dimensions to the public interest. Legal requirements matter of course, and the fostering of competition and economic efficiency matter, but other considerations that bear on the public interest can matter also. The statutory structure of the Australian Competition Tribunal, and its diverse membership, reflect this multi-disciplinary approach to the administration of the Act. Further, it is to be noted that determinations of the Tribunal can be appealed only in respect of a matter of law, and that (as I understand it) such an appeal has never been mounted.

8. My submissions in regard to the present Part IIIA of the Act, and in respect of an improved National Access Regime, are founded in the above remarks. I submit, in sum, that — as in the administration of other parts of the Act — the net public interest (which includes a due regard to legal and economic considerations) should be the guiding consideration in the grant of third-party access to the use of nationally significant infra-structure facilities.

9. While the intent of Part IIIA of the Act as presently drafted is broadly apparent from other documents, its detailed provisions are confusing. Argument before the Tribunal in *Sydney International Airport* [2000], amply demonstrated the problems associated with the wording — in what is stated and in what is absent, in what is defined and what is not defined. The same

difficulties are also evident in the Tribunal's reasons for decision, which necessarily devoted much of its content to issues of meaning and definition. I believe that a more lucidly drafted Part IIIA would have seen the hearing and decision in *Sydney International Airport* [2000] proceed far more expeditiously. (I do not, in the immediately preceding remarks, imply that the present Part IIIA is wrong in attempting to distinguish two stages in procedures for achieving defined access to the use of a relevant facility. To the contrary. I revert to this issue later in this submission.)

10. Indeed the present provisions of Part IIIA might be said to stipulate both too much and too little. They add elements to the tests for declaration that serve to preclude the ready use of established and proven procedures for the identification and weighing of public benefit and of effects on competition, yet they put nothing especially useful in their place.

11. Further, I suspect that much of the confusion in the wording of Part IIIA arises from the related words "service" and "facility". "Service" is not defined, but has its meaning indicated by example and by some explicit exclusions. "Facility" is not defined at all. It may be that I am missing something, but it seems to me that the implicit distinction between "service" and "facility" would be no less sharp, and would be more comprehensible to everyone, if the word "service" were to be completely dropped from the wording, and replaced by the phrase "defined use of a(the) facility". In long consideration and discussion of the administration of Part IIIA, I have not identified an instance, however hypothetical, where this change could affect the intended application of the access provisions. A declaration would then explicitly allow in principle a defined use of a specified facility by a third party (as is in effect the case now) and the definitional problems that so dogged the proceedings in *Sydney International Airport* [2000] would be transformed accordingly, to focus on the more straight-forward and more immediately relevant task of determining whether a specific facility is one to which third-party access might sensibly be sought and perhaps allowed.

12. I suggest that an issue of possible declaration of a defined use of a specific facility by a third party should be addressed by the designated advisory or administrative body or person (the NCC or the designated Minister or the Tribunal or whoever) in accordance with revised Part IIIA provisions that would have the following import:
    i. The economic principle that underlies and justifies third-party access to the use of some facilities under Part IIIA should in some way be made explicit as an aid to the administration, interpretation and wider understanding of this part of the Act. (Not being an economist, I offer no proposal as to how this indication of the purpose and intention of Part IIIA might be worded, but plainly enough it will relate to the pursuit of economic efficiency and limitations to the misuse of market power, including monopoly power.)
    ii. Exclusions and other statements should be listed that will serve to clarify and substantially narrow the range of facilities for which defined use might be declared. Such a list will incidentally serve to illustrate the intended scope of Part IIIA.
    iii. It should be explicit that a declaration recommendation or decision is to be taken on grounds of the balance of public interest, adopting the same forms of words — "public benefit", "anti-competitive detriment", "misuse of market power", etc — that are adopted elsewhere in the Act, so that established and accepted precedents and interpretations are immediately applicable (where relevant) to the administration of a National Access Regime.

13. In discussions of the problems of Part IIIA that I have attended or am aware of, the stipulation of a two-stage procedure has been widely criticised, overtly on two grounds: first, that consideration of pricing and other practical issues is delayed until after costly declaration proceedings (and possible appeal) have been completed, and second, that the procedures are too burdensome and time-consuming to be commercially practicable. I submit that the two-stage design is inevitable and essential for rational and consistent administration of a National Access Regime, notably because the decision criteria differ so radically between the two stages.

14. In the first stage—the declaration stage — the issue being addressed is (or should be) whether third-party access to a defined use of the relevant facility is, on balance, in the public interest, and hence whether such access should be allowed at all. As I have asserted above, the proper test to determine a declaration issue will involve weighing discernible public benefit against anti-competitive detriment. Here, I am certainly not arguing for a regime where declaration should the usual outcome of an access application, nor for a regime where substantial private investment in major infra-structure facilities in the small Australian economy could be expected to lead in the normal course to counter-productive access obligations. Nevertheless, it is surely proper that the use of nationally significant infra-structure facilities should be subject to examination so that the community is assured that the public interest is being served.

15. Competition effects could be seen to arise in the use of infra-structure facilities from the misuse or prospective misuse of market power where a provider is the sole owner or operator of a bottleneck facility, or from impacts on the workings of upstream or downstream markets. I see no reason why, other evidence (including economic evidence) should not be introduced at the first stage by a provider arguing against declaration. The NCC, the ACCC and the Tribunal all have established procedures for maintaining the confidentiality of commercially sensitive material. For example, adverse pricing effects might be argued by the provider as constituting public benefit, or the better encouragement of capital investment, or the prudence of respecting practical limits to facility capacity, or the retention of the commercial advantage that a "first mover" will expect to gain from entrepreneurial behaviour. I do not see that the two-stage procedure, properly integrated into the Trade Practices Act, can justifiably be argued as delaying an outcome, or as inhibiting just and comprehensive analysis. Granted, it may not suit a monopoly provider to have his commercial situation and intentions evaluated (even in confidence) by a public agency or bench, but that is not an argument against it happening, pursuant to the law.

16. I offer no submission as to the workings of the second stage of access procedure — the resolution of the terms and conditions for the now-obligatory defined access — where the decision criteria relate entirely to the commercial interests of the parties. The Act envisages that the terms and conditions of access will be negotiated between the third party and the provider, with provision for independent arbitration in the event of no agreement being reached. This is the usual commercial methodolgy for determining price and contract terms, and I see no sensible alternative. Nor can I see how the explicit inclusion of some such procedure in provisions of the Act can be considered detrimental to the conduct of business, nor as delaying an agreed outcome.