Submission to the Productivity Commission on the National Access Regime

1. I make this submission as an economist who has had extensive experience in the adjudication process in competition law. I was for 23 years a lay member of the Australian Competition Tribunal and for 10 years a lay member of the New Zealand High Court (for competition cases). Thus this submission is based upon considerations both of economics and law.
2. The access law is embedded in the Trade Practices Act. The policy objectives that have primacy in the restrictive practices provisions are the promotion of competition and of economic efficiency. The Act has been given strength and efficacy by the enactment of strong law couched in general terms and with appropriately placed presumptions and burdens of proof. Thus in Part IV of the Act there is an onus upon the applicant to prove to the court that the respondent's conduct is anti-competitive etc. In Part VII of the Act there is placed upon the applicant an onus to satisfy the Commission (and on a rehearing, the Tribunal) that the disputed conduct will likely result in a benefit to the public that outweighs any anti-competitive detriment.
3. The access provisions are very different, written in cumbersome and uncertain language, in a structural design of Byzantine complexity. Much could be achieved by the Commission if it were to pursue a clear agreement on objectives, a simplification of language and, in the declaration phase of the law, an appropriate reliance upon presumptions and burdens of proof. There needs to be a recognition that the access provisions are part of a more general scheme, the restrictive practices provisions of the Trade Practices Act, with an integration or Part IIIA with Parts IV and VII of the Act.
4. The Commission's task is daunting, in both scope and detail. This submission focuses on but one element or the Commission's task, namely its review of Declaration. But the treatment of Declaration is really the foundation for the total access scheme.

5. Divisions 1 and 2 or Part IIIA have been subject to much criticism, largely on two grounds: (1) the uncertainty, complexity and sheer quantity of language employed and (2) the proliferation of authorities charged with the determination of declaration – the NCC, the Minister and the Tribunal, with the possibility of triple-handling of parties' submissions. I agree with these criticisms.

6. The complex verbal structure of Divisions 1 and 2 seem a long way from the essential policy concern, as expressed by the Tribunal in Austudy (Re Australian Union of Students (1997) ATPR 41-573 at 43,956) :

> "Part IIIA is based on the notion that competition, efficiency and public interest are increased by overriding the exclusive rights of the owners of 'monopoly' facilities to determine the terms and conditions on which they will supply their services."

7. The story of the first substantial case under the Declaration Divisions is instructive: Sydney International Airport (2000) ATPR 41-754. The application for declaration of certain airport cargo handling services was first made to the NCC on 6 November 1996. Upon the NCC developing its recommendation for a partial declaration, it moved to the relevant Minister on 8 May 1997. On 30 June 1997 the Minister made a similar decision. On 21 July 1997 the Federal Airports Corporation applied to the Tribunal for a review of the Minister's decision. Finally on March 2000 the Tribunal released its determination, upholding the Minister's declaration subject to some small variation in terms. Almost three years of argument and consideration!

8. Nor was the text of the Tribunal's determination reassuring. That determination proved to be in large part a definitional exercise, an exploration of the meaning of the terms of Ss 44H(2) and 44H(4) and by implication Ss 44F(4) and 44G(2). This is not to criticise the approach of the Tribunal. Its role was determined by the terms and structure or the statute. Indeed its findings were warmly welcomed by practitioners as of great assistance to future litigation. Nevertheless it is sobering to reflect that after a process lasting over a year in the Tribunal, consuming considerable resources, the main point of principle that emerged was as follows (at 40,775):

> "107....The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service.

> The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial."

This conclusion was reached "having had regard, in particular, to the two stage process of the Pt IIIA access regime."

9. The two underlying problems expressed in para 5 above are related. The legislators and their advisors have been unwilling to make the achievement of declaration easy, being worried by the potential interference with property rights and the impact upon business incentives.

10. To my mind the legislators are right to be worried. Economic efficiency (not to mention fairness) requires a clear specification of property rights (coupled with the promotion of competition). Business firms must have incentives for investment and innovation. They must be permitted to take advantage of economies of vertical integration where they are available. They must be protected from rulings that would call for the inefficient duplication of productive facilities.

11. However these concerns, which all centre upon property rights, can be addressed in a much simpler and more effective way by enacting a straightforward presumption in this body of law that there is no general duty for any corporation to deal with specific customers or suppliers. Specifically, and to fix ideas, let me propose a drastic simplification to Divisions 1 and 2 of Part IIIA of the Act. We suppose that the entire turgid language of the Divisions be abandoned and there be substituted a scheme with the following core elements:

    1) This Division applies to the conduct of corporations with activities of national significance possessing substantial market power in one or more markets.
    2) The presumption is that such a corporation has no duty to deal with a particular customer or supplier (or class of customers or suppliers?).

3) Such a presumption may be rebutted by a potential customer or supplier on the grounds of

- likely substantial increase in economic efficiency, or
- likely substantial increase in competition in any market, or
- likely benefit to the public.

12. It would be sensible for applications to be made to the ACCC in the first instance (given that the Commission has the major oversight of terms and conditions of access if declaration is granted) with availability of a rehearing in the Tribunal. It would not be inappropriate for such an enactment to be used to vet certification.
13. In addition to the core elements
    - declaration should give protection from s. 46
    - there should be time limits specified.
14. With such a narrow and specific focus in the access test, there would be a strong case for extending the coverage of the declaration procedure to:
    - bottleneck "monopolies" generally and not just those associated with the supply of infrastructure or utilities;
    - transactions in goods as well as services;
    - access of suppliers as well as customers, i.e. both purchase and sales conduct;
    - both integrated and non-integrated "monopolies".

    The wide coverage of the Declaration Division would be apt also to achieve economic efficiency in the structure of intervention. One would wish similar rules to apply to "monopolies" of whatever character.
15. It would probably be prudent to include an exemption for the "use of intellectual property".
16. Such an access test would appropriately complement s. 46 on monopolization and Part VII on authorization in the other restrictive practices provisions in the Act. Indeed the complementarity between the declaration provisions and s. 46 would be enhanced if there were enacted an amendment to the statute making authorization available for conduct challenged under 8.46. In this way efficiency and competition concerns could be addressed directly rather than in the existing backhand fashion under s. 46 litigation.

17. Turning to the structure of the existing access regime as a whole, there are two features of the existing regime that I believe should be retained. The first is what might be termed the two-track approach, namely the creation of the industry-specific regimes (telecoms, gas, electricity, rail, airports etc) alongside the residual areas of application addressed directly by Part IIIA. Each of these industries has its own technical features requiring specialized expertise and technically expressed rules. Further, the industry-specific regimes exist!

18. The second feature lies in the fundamental two-stage structure of Part IIIA, namely the division between the initial declaration process and the arrangements for determination of the terms and conditions that will govern access to a declared service. Within the latter are included the undertakings and registration mechanisms as well as the negotiate/arbitrate technique. For where firms seek to gain approval for their undertakings and contracts, there may be no formal declaration, but the very existence of the declaration process, as the Productivity Commission has said (Issues Paper, p.9), acts as a "driver" of these applications by business firms.

    At first blush, the separation of declaration from the specification of terms and conditions appears nonsensical: How can a declaration be determined to be, broadly, in the public interest, if the terms and conditions are unknown? Yet I have come to believe that separation can and should be justified on grounds of adjudicatory and regulatory process. To determine the terms and conditions of access, and conceivably in an on-going way, is regulatory in the strict sense. But a determination on declaration is quasi-judicial (adjudicatory) with the outcome essentially a positive or negative order (akin to an injunction). That is why the declaration test can be simplified as suggested above to a rebuttable presumption.

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