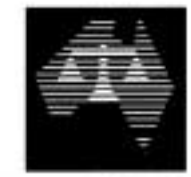

Review of the National Access Regime
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Sirs

Part IIIA Position Paper

This submission is made by the Trade Practices Committee of the Business Law Section of the Law Council of Australia ('the Committee') in response to the Productivity Commission's Position Paper. The Committee welcomes the Position Paper and supports the recommendations in it. However, there are some matters which the Committee wishes to draw to the Commission's attention. This submission draws on the private submission lodged with the Committee by A I Tonking, Barrister, with his concurrence.

1. Proposal 5.2: As the Commission is aware, the Committee was divided on whether Part IIIA should be confined to vertically integrated facilities. The Committee respects the Commission's recommendation that Part IIIA should cover both vertically integrated and non-integrated facilities. However the Committee does not agree that Part IIIA should be amended to provide for explicit recognition of the application of Part IIIA to non-vertically integrated facilities. This is not necessary given that the two Tribunal decisions to date (*Sydney Airport*[1] and *Duke*) both dealt with situations where the service provider was not vertically integrated, and did so without any apparent controversy.

THE NATIONAL COUNCIL OF LAWYERS
19 TORRENS STREET BRADDON ACT 2612 GPO BOX 1989 CANBERRA ACT 2601

TELEPHONE: (02) 6247 3788 INTERNAT: +612 6247 3788 FACSIMILE: (02) 6248 0639 DX5719 CANBERRA
EMAIL: mail@lawcouncil.asn.au WEB SITE: http://www.lawcouncil.asn.au

[1] (2000) ATPR 41-754.

2. Proposal 6.1: The second limb of this proposal deals with criterion (b) and proposes that the language be changed from "another facility" to "a second facility". Again, both Tribunal decisions referred to above reached a conclusion that, notwithstanding the use of the word "develop", account should be taken of existing facilities. It is difficult to see that the minor wording change proposed by the Commission advances matters, particularly given the commentary at page 142 of the Paper which emphasises the need for the new wording not to be interpreted narrowly to mean a second facility based on the same technology. As the Tribunal (as well as the NCC) has already come to a view about the existing wording, any change will likely lead to an inquiry as to what was intended and the inference that something different was intended and this may introduce new uncertainties.

3. Proposal 6.2: is apparently designed to address the difficulty by making express reference to existing facilities. However the principal areas of debate to date have related to the meaning of the word "service" in criterion (b) and this does not appear to be addressed by the proposal in 6.2. The Commission will recall that the Tribunal in the Sydney Airports decision referred to difficulties experienced by some witnesses, and indeed parties, in comprehending the level of service described in criterion (b). Likewise, it was an issue of the definition of service which gave rise to the Robe River litigation[2]. In the recent *Duke* decision the Tribunal decided[3] that, for the purposes of criterion (b), "*no market analysis is necessary or appropriate in the description of the services provided by the pipeline"*. As a consequence the Tribunal held that the fact that there was another pipeline in the same market as the Eastern Gas Pipeline was irrelevant to the consideration of whether there was another facility providing the same service as the EGP. Although there are wording differences between the criteria and the way they operate under the Gas Pipeline Access Law and under Part IIIA, the principle seems to be the same. Accordingly, if a new approach is to be adopted in relation to defining this criterion, considerable care needs to be devoted to the drafting. This is reinforced by the proposal that Part IIIA should operate as a model for other access regimes. This proposal is strongly supported by the Committee.

   The Tier 2 proposal removes all references to *"facility"* and refers only to the *"provider of the service"*. Clearly this proposal would have wider drafting implications for Part IIIA as service is currently defined in Section 44B by reference to a facility.

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2 *Hamersley Iron Pty Ltd v. NCC & Ors* (1999) ATPR 41-705.

3 At para 69.

4. Proposal 6.2 (Tier 2)

In the course of the public hearings conducted by the Productivity Commission as part of its review of the National Access Regime, questions have arisen as to the appropriateness of explicitly including efficiency considerations in the declaration criteria. The Committee's views have been sought on the legal hazards or benefits which may arise from explicit reference to economic efficiency and specifically the proposed criterion (d) in proposal 6.2 of the Productivity Commission's Position Paper.

Generally, the Trade Practices Act has not resorted to explicit considerations of efficiency but has used competition as a proxy for efficiency on the basis that competition will usually promote efficient outcomes.

The Committee supports the Commission's proposed inclusion of an explicit objects clause to Part IIIA which recognises that the objective of the Part is to enhance overall economic efficiency.

The Committee supports the view that efficiency considerations should be more explicitly dealt with in the declaration criteria. There seem to be several alternate approaches:

(a) first, an efficiency criterion of the type proposed by the Commission could be inserted in substitution for the existing requirement that there be a promotion of competition;

(b) an additional requirement could be inserted so that declaration would only occur where there was both a promotion of competition and either a positive enhancement to efficiency or no negative impact on efficiency;

(c) in the context of the public interest criterion express reference could be made to economic efficiency.

The first alternative involves perhaps not a significant change in the outcomes which may result from the criteria but it would have a significant impact on the nature of evidence which is likely to be required to determine whether or not access would improve economic efficiency. The measurement of efficiency enhancements is likely to be a more complex task than the assessment of a promotion of competition. It would also need to be clear in what sense efficiency is to be considered. It would no doubt take into account dynamic, productive and allocative efficiency and presumably those would need to be assessed from a societal point of view rather than from the point of view of an individual participant.

The second alternative would require proof either that access promoted competition and was efficiency enhancing or that it promoted competition and was not detrimental to efficiency. This approach still requires at least assessment and perhaps also measurement of efficiency but does so as amplification of a competition assessment. Its focus would be to ensure that declaration did not occur in circumstances where, whilst there was a promotion of competition, there was a negative efficiency outcome.

The third alternative would involve amending the current public interest criterion so that it read something like:

> "*That access (or increased access) to the service would not be contrary to the public interest having regard to the impact the denial of access, or the terms and conditions of access, on economic efficiency.*"

This amounts, in combination with existing criterion (a), to a requirement of the promotion of competition but then a refusal to declare in circumstances where that refusal would not be efficiency enhancing.

Adopting an approach which does not require affirmative proof of economic efficiency but rather requires it to be clear that declaration would not adversely impact efficiency would seem to ameliorate the evidentiary difficulties which may be encountered in proving an enhancement in economic efficiency.

Overall, the Committee considers there is merit in maintaining consistency between various parts of the Trade Practices Act focusing on competition but the Committee would support adding to this that declaration not have any adverse impact on efficiency as an express part of the public interest criterion.

5. Proposal 9.2: The Committee believes as a matter of policy that the functions of declaration and arbitration should be fulfilled by separate bodies in order to maintain the independence of the arbitrator. Accordingly the Committee is opposed to the Commission's recommendation for a single regulator.

6. Proposal 9.5: It is proposed that appeals against decisions to declare services under Part IIIA should be abolished as part of the Tier 2 approach. This proposal appears to be based on a desire to align Part IIIA with Part XIC, the regime for telecommunications. This overlooks the fact that there are special reasons why the telecommunications regime is drafted in the way it is eg, the speed of deregulation required by the Government in telecommunications markets and the fact that many of the services under Part XIC were deemed as declared services by the ACCC pursuant to transitional legislation without the need for an inquiry as to the long-term interests of end-users. The absence of

the appeal right in Part XIC is germane to those reasons which do not have application generally. It is inappropriate that the drafting of Part IIIA should be driven by a specific industry regime which the Commission is recommending should be brought more into line with Part IIIA. The Committee is opposed to this recommendation and suggests that it should be abandoned on the basis that it conflicts with the broad principles adopted by the Position Paper in relation to interference with property rights and the preservation of rights of appeal.

7. Proposal 10.1 (Tier 1)

Proposal 10.1 of the Position paper provides for the removal of overlaps with other parts of the Trade Practices Act in the following terms:

> The terms and conditions of the following Part IIIA access arrangements should be exempt from exposure to Parts IV and VII of the Trade Practices Act:
>
> . arbitrated determinations for declared services;
>
> . agreements reached under certified regimes with the involvement of the relevant regulator;
>
> . private agreements for declared services covered by registered private contracts.

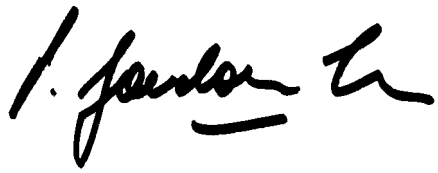
As the Committee indicated in its earlier submission, Parts IV and VII should not apply in the three circumstances outlined. However we do not consider that the removal of the overlap between these provisions is best addressed by "exempting" Part IIIA arrangements from Parts IV and VII. To "exempt" suggests that no regard need be had to whether the determination or agreement impacts on competition. It also suggests that a determination or an agreement may be reached that offends Part IV, or that would offend Part IV if not for the exemption.

It is reasonable that owners and access seekers be given the certainty that protection from Part IV provides. However the protection should only extend to the making of the agreement and its implementation as contemplated by the determination, undertaking or Agreement. We prefer an approach which provides that in each of the three circumstances, the entry into and compliance with the arrangements within their terms is deemed compliance with Part IV. The Council suggests the Commission recommends language similar to Section 51(3) namely:

> A contravention of a provision of Parts IV or VII shall not be taken to have been committed by reason of:
>
> (a) the ACCC making a determination in respect of declared services;
>
> (b) the NCC certifying a regime; or
>
> (c) the registration of private contracts in respect of declared services.

The approach recognises the continued relevance of Part IV in relation to access arrangements. It also provides some encouragement to the parties to consider the breadth and on-going competitive impact of their arrangements.

Yours faithfully,



P G Levy
Secretary-General

18 July 2001