SUBMISSION TO PRODUCTIVITY COMMISSION

re PART IIIA, TRADE PRACTICES ACT

The Hilmer Committee recommended the adoption of legislative provisions designed to open up access to natural monopoly infrastructure the owners of which, because it was vertically integrated, had an incentive to limit access to potential competitors of its upstream or downstream affiliates. However the Committee stipulated that access should be mandated only where it was "essential" in order to bring about effective competition in the public interest.

This recommendation was reflected in the terms of clause 6 of the CoAG Competition Principles Agreement, the only change in wording being that access should be "necessary" for effective competition.

By contrast Part IIIA is not limited to vertically integrated facilities; it requires only that "competition" be "promoted" by access, as long as this is not contrary to the public interest. When Part IIIA was introduced as part of the *Competition Policy Reform Act* 1995 the philosophical underpinnings of these and other changes were not stated, let alone explained or justified.

I attach a short article which I wrote for the Australian Trade Practices Reporter, which makes these points in more detail. The article refers to the decision of the Competition Tribunal in the Sydney Airport case which applied Part IIIA and which has been relied on by the NCC in subsequent decisions, not just under Part IIIA. In Sydney Airport the Tribunal adopted a very low threshold for satisfaction of the criterion of promoting competition in another market. On this test it would be difficult to find an example of a facility access (or increased access) to which could not be said to promote competition. Further, now that the public interest test has been reversed from what was recommended by Hilmer, that criterion is effectively neutered for the same reason.

Part IIIA occupies a central position in the expanding field of access regimes and its interpretation is already having an effect on those other regimes. It is important that Part IIIA should operate in a way which addresses serious bottlenecks in the economy without at the

same time tying up scarce resources in pointless disputes which may interfere with the productive use of infrastructure without being conducive to any appreciable improvement in efficiency.

I note that the Trade Practices Committee of the Business Law Section of the Law Council of Australia has prepared a more detailed submission which I have seen in draft. I agree with the general thrust of that submission.

4 December 2000 A.I.Tonking

ACCESS TO FACILITIES - REVIEWING PART IIIA

The Competition Principles Agreement of 11 April 1995 ("CPA") between the various Australian jurisdictions repays re-reading from time to time.

Clause 6 required the Commonwealth to put forward legislation to establish a regime for third party access to infrastructure facilities where, among other things, *"access to the service is necessary in order to permit effective competition in a downstream or upstream market."* This reflected the recommendation of the Trade Practices Review (Hilmer) Committee that a right of access to a facility should be created only if the relevant Minister was satisfied that *"access to the facility in question [was] essential to permit effective competition in a downstream or upstream activity"* (para 11.4). Thus, while the CPA had departed from the Hilmer model in at least two significant respects (the terms and conditions of access to be part of the declaration, and the access regime to exclude other remedies such as section 46) it appeared that the Commonwealth had agreed that its legislation would mandate access only where it was a prerequisite for effective competition.

Somewhat surprisingly Part IIIA of the *Trade Practices Act* ("TPA"), the Commonwealth's performance of its CPA commitment, departed significantly from both statements of principle. Its formulation of the principle was that access should be declared where the Minister was satisfied that:

> *"access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service"* (section 44G).

This was clearly a markedly lower standard than that prescribed in the CPA in at least four respects:

- increased access could be the subject of a declaration;
- a declaration need only promote competition, not be essential or necessary for it;

- the competition to be promoted did not have to be "effective" competition;

- the market in which competition was to be promoted did not have to be upstream or downstream, suggesting that the access provider need not be vertically integrated.

Strictly speaking the CPA did not limit access to the case of a vertically integrated monopolist's facility, but it did replicate the wording of the Hilmer Report more closely than Part IIIA. Hilmer's reasoning in relation to this was that owners of essential facilities who were not competing in upstream or downstream markets usually had little incentive to deny access, and where they were in a position to derive monopoly profits this was best addressed by price controls. In Queensland Wire, BHP was vertically integrated through its subsidiary with which the applicant sought to compete. The same was the case in Pont Data.

The reference to "effective competition" in Hilmer was intentional. Yet it was omitted also from the national interest criterion in section 44G(2)(f). Hilmer had recommended that a declaration should not be made unless it was in the national interest having regard to the significance of the industry to the national economy and *"the expected impact of effective competition in that industry on national competitiveness"*. Instead the requirement of national significance was attached to the facility itself (para 44G(2)(c)) while para 44G(2)(f) only required that *"access (or increased access) … not be contrary to the public interest"*. Clearly Hilmer was using *"effective competition"* (and sometimes *"workable competition"*) deliberately (e.g. Report pp. 215, 269). The Committee well knew the difference between effective competition and perfect competition; they could hardly be taken to be advocating the latter as a standard.

The extrinsic materials, comprising the explanatory memorandum and the second reading speeches, for the *Competition Policy Reform Act 1995*, which introduced Part IIIA, do not explain there significant departures from what was recommended.

In a number of cases their significance has now manifested itself, as will be noted below.

Further reference to the CPA discloses that the parties agreed to review how it was working within 5 years. The review of Part IIIA is to be undertaken by the Productivity Commission. A forum to be attended by interested parties to discuss that review process, how Part IIIA has worked and what is should look like in the future, is taking place in Melbourne in late July 2000.

In the period of its operation the National Competition Council (NCC) has dealt with fewer than a dozen applications for declaration. It has also dealt with applications for certification of State access regimes and various ancillary matters. The Australian Competition Tribunal has dealt with two matters, resulting in one declaration, and the Federal Court has decided two cases concerning Part IIIA while two other cases have touched on access issues generally.

If any trend can be detected it is that, although developments have not been rapid, there has been a tendency on the part of the NCC, the Tribunal and the Courts to interpret the declaration power widely, in favour of the access seeker. There has been a tendency for the Commonwealth Minister to follow the NCC's recommendation to declare, without advancing substantive additional reasons, but for State Ministers not to declare, despite a recommendation.

This suggested trend appears to be at odds with the conservative expectations of the Industry Commission when it reviewed Part IIIA in November 1995, and even of the NCC itself in its Draft Guide of August 1996. There the Council expressed its view that:

> *"… declaration should be confined to circumstances in which the normal dynamics of innovation and investment, or the other regulatory means available, will not be sufficient to counteract the monopolistic position held by an infrastructure operator. This is principally because, where effective competition is likely, granting access will do little to promote competition and thus have little effect on prices and quality. But it will impose potentially large regulatory costs on governments and the infrastructure operator. Hence, it would be difficult to establish that granting access in such cases would not be contrary to the public interest."*

The NCC thought that the public interest test would filter out many applications on this basis, namely that they would not be judged as contributing to effective competition. It is suggested that the public interest criterion has not been applied in this way.

The Airports case provides the starkest example of how Part IIIA has been applied in a way which departs from the type of expectations which can be gleaned from reading the Hilmer Report, the CPA and the NCC Draft Guide. It is currently the most authoritative decision on Part IIIA since it is a decision of the Tribunal: Re Review of Declaration of the Freight Handling Services at Sydney International Airport (2000) ATPR 41-754.

Space does not permit of a summary of the factual background or the various arguments advanced by the parties in the Airports case, which related to the services provided by Sydney Airports Corporation's ("SACL") facilities comprising freight aprons and other areas at the airport used by third parties for the loading and unloading of aircraft. SACL was not a provider of the services for which the facilities were sought to be used; it was not vertically integrated, whereas the major Australian airlines were. SACL sought review of the Minister's decision to adopt the NCC's recommendation that the services be declared. The Tribunal found that competition in at least one market, the market for ramp handling services, would be promoted by the declaration.

The features of the case which make it interesting, and significant in terms of the development of Part IIIA, are that:

(a) the Tribunal defined the relevant markets quite differently from the NCC;

(b) as mentioned earlier, SACL was not vertically integrated and had no interest as a competitor of potential users of the services;

(c) the provision of the services which were declared was the subject of price regulation under the *Prices Surveillance Act*;

(d) there were already four providers of ramp handling services on the airport and the Tribunal appears to have accepted the evidence that it was unlikely that the market would support more than four suppliers of ramp handling services;

(e) the Tribunal considered that, while SACL had a legitimate role in requiring strict adherence to safety, health and operational standards, these were matters which could be addressed at the stage of negotiated or arbitrated access.

The Tribunal, noting that the Hilmer model had not been adopted in Part IIIA, at least insofar as would require the terms of access to be decided at the declaration stage, was content to leave other matters to the second stage, including whether the applicant for declaration was a viable entrant. In that respect the Tribunal's decision has been favourably referred to by the Federal Court in a case involving access under Part XIC of the TP Act: Foxtel Management Pty Ltd v ACCC [2000] FCA 589 (Wilcox J, unreported; an appeal is pending).

A key concern raised by this two-staged approach is whether it is efficient to expose the facility owner (and indeed the potential new entrant) to the costly exercise of pursuing declaration and negotiating or seeking arbitrated access terms when the latter may be such that, for commercial reasons, entry will ultimately not eventuate. While it may prolong the initial stages of the process it would seem to be more efficient to revert to what the Hilmer Report recommended and amend Part IIIA so these matters are determined at the outset.

It is apparent that the Tribunal saw the issue in Airports as *"whether SACL should be granting wider access to the services which are provided by means of its facilities"* and concluded it did not have the right to do so *"if, by so doing, there will be constraints on competition in the markets in which those services are provided"*. Again the reference to *"increased access"* (sec 44G(2)(a)) was not part of the Hilmer Report's proposal. The Tribunal refers on a number of occasions to *"the underlying policy of Part IIIA"*. Having stated that any submissions as to the underlying policy based on the Hilmer Report should be considered with caution, the Tribunal does not appear to indicate, other than by reference to the statutory language and, on one occasion, the Competition Principles Agreement and the second reading speech, where it has located that underlying policy, nor does it provide any encapsulation of the policy in identifiable form. One can however glean that the underlying policy (referred to in paragraphs 10-12, 54, 149, 200, 201, 204, 205 and 230) that the Tribunal discerned was that nothing should be allowed to stand in the way of the market determining how many providers there should be in the provision of relevant goods or services. Promotion of competition meant the removal of entry barriers which, in this case,

were represented by SACL's ability to decide who should provide the services. This stemmed from the Tribunal's conclusion that promoting competition meant providing a better environment for competition and did not involve any certainty that competition would in fact increase. In turn this approach was derived from the two stage process in which declaration unlocked a bottleneck or removed barriers.

Thus it is apparent that the whole thrust of the Tribunal's approach to declaration was informed by considerations which were not present in the Hilmer recommendation and a number of which were warned against in its Report.

Other rulings by the Tribunal in the Airports case contributed to this approach. Thus the Tribunal held that, in determining whether it would be economical for anyone to develop another facility to provide the service, "anyone" excluded SACL, the facility owner. To decide otherwise would "*subvert the underlying policy of Part IIIA*".

The question of effective competition does not seem to have been considered in terms by the Tribunal, nor does it appear to have been advanced in submissions by SACL. Certainly it was not considered as part of the public interest test: the Tribunal found that it was in the public interest that competition be promoted for the reasons it had already stated.

The Tribunal applied the "*future with and without test*" which has been accepted by the Tribunal as appropriate in authorisation cases and, significantly, by the Court in "*substantial lessening of competition*" cases. There may logically be no alternative to that test when considering whether competition will be promoted by declaration. Here the Tribunal was constrained by the words of the statutory criterion - would competition be promoted by access, not was access essential to effective competition. If access is equated to the removal of an entry barrier, as it is likely to be in virtually any access case, it is difficult to envisage how the conclusion could ever be other than that competition (that is, in the Tribunal's terms, more competitors) would be promoted by declaring a facility open for access. In other words the wording of the test predetermines the outcome, all other things (such as the national significance of the facility) being equal.

An approach to Part IIIA and its analogues which favours access over private rights was also evident in the decision in Seven Cable Television Pty Ltd v Telstra Corporation Ltd (2000)

ATPR (Digest) ¶46-202 where it was held that a strict (narrow) construction should be given to the expression *"protected contractual rights"* in Part XIC so as not to frustrate the purpose of the legislation which was to promote competition.

Having said that it should not go unrecorded that the decision in Hamersley Iron Pty Ltd v National Competition Council & Ors (1999) ATPR 41-705 favoured the facility owner in giving a broad interpretation to the production process.

In light of these developments the review of Part IIIA is timely, and will provide all interested parties with an opportunity to consider whether the experiment has achieved its objective, and whether that objective is one which should be maintained.