NORTHERN TERRITORY GOVERNMENT
SUBMISSION TO

PRODUCTIVITY COMMISSION INQUIRY
INTO

NATIONAL ACCESS REGIME:

RESPONSE TO POSITION PAPER

July 2001

Northern Territory Government

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EXECUTIVE SUMMARY

This submission responds to the Commission's Position Paper on the Review of the National Access Regime. In particular, it provides information on the Northern Territory Government's experience in developing and implementing access regimes for rail (section 2), electricity (section 3) and gas (section 4). Several significant issues have arisen.

Greenfield developments

The Territory Government's experience with the AustralAsia Railway Project and the National Third Party Access Code for Natural Gas Pipeline Systems has highlighted a range of difficulties for greenfield infrastructure projects under the present access arrangements.

In the case of the railway project, as a result of the access provisions in Part IIIA of the *Trade Practices Act*, the Northern Territory and South Australian Governments had to develop a complex access regime in order to protect the legitimate business interests of the investors.

As acknowledged by the Commission, there is a strong case for providing major infrastructure projects, or at the very least certain services provided by major infrastructure projects, that may be only marginally profitable with an "access holiday". The case is strongest for large scale projects that have a long payback period. Without this additional certainty for investors, the community may be denied the opportunity to benefit from new infrastructure services.

Existing infrastructure

The present access arrangements also give rise to concerns in relation to pre-existing marginal infrastructure developments. In particular, there are circumstances in which the arrangements do not sufficiently protect the legitimate investment returns that were necessary to ensure development of an infrastructure project in the first place.

The Amadeus to Darwin gas pipeline was built in the mid 1980s to provide fuel for public electricity supply in the Territory's major centres. The pipeline is unlikely to have been built without the Territory Government's direct investment and financing guarantees which, in effect, created the market for natural gas for electricity generation in the Territory.

In theory, the National Gas Code and associated competition reforms "grandfathered" pre-existing gas contracts. In the Territory's context, it was understood that no third party would be able to obtain access to the pipeline at a unit price lower than PAWA's, unless PAWA agreed. In practice, the status of these grandfathering arrangements is unclear.

A recent draft determination by the Australian Competition and Consumer Commission (ACCC) is of major concern. Under the ACCC's approach, a third party competitor to the pipeline's foundation customer, PAWA, may be able to have gas hauled to its electricity generators for significantly less than the amount PAWA has to pay. While costs could be lowered for electricity consumers, this would be at the expense of taxpayers. Therefore, it would seem appropriate that Part IIIA of the *Trade Practices Act* be amended to unambiguously preserve the rights of owners of existing infrastructure. Similarly, the rights of foundation customers using such infrastructure should be preserved to the effect that foundation customers cannot be disadvantaged by competitors being able to access infrastructure at a regulated price that is less than the foundation customers are contractually obligated to pay. The Territory may provide further information to the Productivity Commission on this issue later in the inquiry.

National significance and costs of compliance

It is difficult to know in advance whether a particular infrastructure service would meet the criteria for declaration. It is therefore difficult to assess whether the Territory Government needed to seek certification of, for example, its electricity access regime. The concern is that the Territory may have unnecessarily incurred significant costs in seeking certification when PAWA's networks may not ultimately have been subject to declaration.

Clearer specification of the criteria for declaration, and the services to which it can be applied, might have enabled these costs to be avoided. Alternatively, a mechanism for easily and quickly establishing whether a particular piece of infrastructure was subject to declaration could assist in removing regulatory uncertainty. The Commission's proposed changes to the declaration criteria do not appear to address this issue.

A similar concern arises in relation to smaller scale distribution networks under the National Gas Code. Given the significant costs of compliance, a different less costly access regime should be considered for such networks.

Factors considered in the certification process

In assessing the effectiveness of a State or Territory access regime, it is unclear whether the National Competition Council (NCC) is required to focus solely on the access regime for the service (such as the right to access PAWA's networks) or is also entitled to take into account the degree of competition in upstream or downstream markets (such as the Territory's electricity retail market and contestability timetable).

Clarifying the range of matters that may be considered during the certification process would provide greater certainty and reduce the costs of developing compliant access regimes. The Commission's proposed changes do not appear to address this issue.

Duration of the process

The Commission's position paper notes that concerns have been raised about the cumbersome and uncertain nature of the national access regime, in particular the time taken to achieve outcomes. The certification process for the Territory's electricity access regime has taken around eighteen months and is still to be completed. However, the time taken largely reflects the extensive changes that have been identified as necessary to meet the NCC's interpretation of the requirements for certification.

While time limits would assist in ensuring there are not unnecessary delays, the Commission should be mindful not to recommend unrealistic or inflexible deadlines. This is particularly the case where there is a clear commitment by the applicant to achieving certification. Non-certification, followed by a requirement to lodge a second application, would be likely to take longer and be more costly.

Other issues

The Territory's experience with both the railway and electricity access regimes lends support to several of the Commission's proposals in its Position Paper, including:

- clarifying that the declaration process is limited to monopoly situations;
- aligning more closely the criteria applying across the different access routes; and
- allowing access undertakings to be lodged by parties other than the owner or operator of the infrastructure.

In addition, in section 5, the Territory briefly comments on some of the other specific proposals raised in the Commission's Position Paper. In particular:

- Modification of the declaration criteria to ensure that provision of access must deliver a substantial increase in competition would avoid the costs in providing access where only a limited increase in competition (and, by implication, only limited benefits) would result.
- Ministers play an important role in the declaration and certification processes. The declaration and certification criteria are open to a considerable degree of interpretation, which could potentially affect the economy significantly depending on the nature of the interpretation. Ministers, as elected representatives, are best placed to assess these impacts. Therefore, the final decision should be made by governments rather than by unelected bodies.
- Making a single regulator responsible for administering Part IIIA of the *Trade Practices Act* would unduly concentrate regulatory power. In particular, it would not seem appropriate that a body decides on which assets it should regulate. This was one of the underlying reasons for the creation of the NCC.

1 INTRODUCTION

This submission responds to the Productivity Commission's Position Paper on the Review of the National Access Regime released in late March 2001.

The submission provides information on the Northern Territory Government's experience in developing and implementing access regimes for rail, electricity and gas. In particular, the submission responds to the Commission's request for information on:

- the costs of administering access regimes under Part IIIA of the *Trade Practices Act* and the various industry access regimes;
- examples of specific impacts of access regulation on investment in essential infrastructure;
- the benefits which are likely to accrue from restructuring the criteria for "declaration" of an infrastructure service;
- the scope and mechanisms for parties other than the owner or operator of a facility to lodge an access "undertaking" application;
- ways in which the practical difficulties of targeting those projects/services that should be granted an "access holiday" within Part IIIA might be overcome;
- the NCC's suggested target time limits for declaration and certification processes; and
- which body or bodies should handle the revised Part IIIA arrangements.

2 RAIL

2.1 Introduction

Several issues arise from the South Australian and Northern Territory Governments' recent experience with access regulation in the context of the AustralAsia Railway Project. It is likely that some of the issues raised would also apply to other similar infrastructure projects, apart from railways.

The AustralAsia Railway Project is a 50-year build, own, operate and transfer (BOOT) project. The project integrates the development of a new railway line from Alice Springs to Darwin with the existing railway from Tarcoola to Alice Springs and new port facilities in Darwin. It is a greenfield infrastructure project with large up-front capital requirements (both from governments and the private sector) and substantial demand risk. Private financing for the project is supported by the cash flows to be generated by the development.

2.2 Competition and risk

The Northern Territory Government's view was that the public interest, in terms of economic and regional development and the promotion of competition in freight transport markets, would be best served by having the railway constructed. Competition within the rail mode was of only second order importance and entirely academic if access uncertainty prevented the construction of the railway.

Minimising the risks associated with the future cash flows that support the financing of the project was a critical issue for the project financiers and the sponsoring Governments. Third party access represents a risk that could undermine the cash flows of the incumbent developer and is therefore a significant concern.

2.3 Declaration risk

For the AustralAsia Railway Project, there are arguments that, without an access regime, the risk of declaration could be minimal. This is because of the likelihood that the railway would not meet the criterion, in section 44G(2)(a) of the *Trade Practices Act*, that access would promote competition in at least one market other than the market for the service. Road competition in the relevant transport corridor is particularly strong, with vehicle productivity amongst the most efficient in the world. For the foreseeable future, all of the potential freight business of the railway is likely to be subject to intense road competition.

Nevertheless, if an application were made, there is a possibility that the NCC may adopt a narrow definition of the market for the service (eg the market for rail freight services) and recommend declaration. This is a risk that financiers are unable to accept without applying a substantial discount to project revenues.

It appears anomalous that the competition test applied in considering an application for declaration (ie that access would promote competition in at least one market other than the market for the service) is a lower threshold than would be applied in consideration of an undertaking or State/Territory regime (ie that access is necessary to permit effective competition in at least one market).

For a marginal project such as the AustralAsia Railway, the Governments were faced with the anomaly that a third party seeking declaration would face a lower competition test than the Governments or the facility owner would need to demonstrate in order to have the State/Territory access regime or undertaking accepted. This could have led to an unfortunate situation where a service could be declared but could not be subject to an effective State or Territory access regime or an undertaking. Therefore, the Territory welcomes the Commission's proposal to align more closely the criteria applying across the different access routes.

2.4 AustralAsia Railway Access Regime

In order to provide some certainty to investors on what access arrangements would apply to the railway, an access regime was required.

An undertaking was problematical, as the owner of the infrastructure was not known until the competitive tendering process was completed and access arrangements had to be accepted and in place by the time of financial close. The undertaking route therefore risked substantial delay in commencement of the project.

In this instance, it would have been useful to have a mechanism to enable an undertaking to be lodged before the completion of the tendering process. Therefore, the Commission's suggestion to allow undertakings to be lodged by parties other than the owner or operator of the infrastructure is welcomed by the Territory.

An access regime by its nature is designed to facilitate third-party access and access had the potential to dilute the cash flows that supported the financing for the project. It was therefore imperative that the pricing principles in the access regime protected the cash flows that underpinned the original investment.

The AustralAsia Railway access regime was designed to achieve this objective. Where a new entrant can create economic value, by either being more efficient than the incumbent or creating a revenue opportunity unavailable to the incumbent, access is encouraged. However, the regime does not facilitate access where the effect is just to transfer economic value from the incumbent (and risk-taking investors) to third parties (unlike other rail regimes that seek to promote fair and equitable access for all operators). Under the AustralAsia Railway access regime, the original investor has a privileged position. Unless a third party brings something to the table, there is no financial incentive for them to access the railway.

The access regime is, as a consequence, quite complex and the complexity alone had a negative effect on the perceptions of the project financiers and contributed to significant delays in the finance approval process

The preferable approach would have been to allow an "access holiday" (ie for the project to fall outside of the risk of declaration) for a period sufficient to satisfy the debt requirements of the project. The risk to efficiency would be minimal and an unambiguous "access holiday" would provide much greater comfort to financiers. As noted in the position paper, this is consistent with the practice for major infrastructure projects overseas, such as the channel tunnel, where legislative exemption from prevailing access rules has been granted.

A national access regime which forces access arrangements to be developed for greenfields infrastructure projects, in circumstances where access is unlikely to create any economic value and indeed may destroy value by creating complexity, added delay and risk, is inappropriate. In such cases, the access regime is likely to discourage risk-taking and frustrate investment. The need for access holidays is strongest for those marginal projects of a significant scale with a long-term payback period.

2.5 Monopoly rent test

The NCC has interpreted the requirements for an effective access regime to include constraints on pricing that ensure prices are free from “monopoly rents”. The test that is generally applied is that the facility owner can earn no more than a “normal” commercial return on the value of assets employed.

This created a number of difficulties for the AustralAsia Railway Project.

Firstly, the regime caters for natural monopoly facilities but does not adequately cater for circumstances where the natural monopoly facility (in this case, a railway line) is used for the purpose of providing services for which there is a strong competitive market (ie the transport of freight in the Adelaide to Darwin corridor). The ability of the railway owner to extract monopoly rents in the general freight market is negligible, yet an “effective” access regime requires revenues earned in this competitive market to be regulated. For a greenfields project of this type with uncertain demand, such regulation potentially caps legitimate “blue sky” revenues and, as a consequence, could lower the expected value of future revenues for the investor. This reduces the ability of the project to attract private sector investment. While Part IIIA of the *Trade Practices Act* might be intended to apply to facilities with “monopoly” characteristics, access should be mandated only for services provided in an otherwise monopoly market. The Commission’s proposed revision of the declaration criteria appears to partially address this issue.

A second difficulty is establishing a “normal” risk-adjusted return for projects such as the AustralAsia Railway. Reference to existing rail businesses with established markets substantially underestimates the required risk premium for a greenfields project. Having no certainty as to how government capital contributions might be treated in the regulated asset base further complicates the issue. The NCC’s preference was to ensure the access regime had sufficient flexibility for some future arbitrator to make an appropriate determination. However, this desire for flexibility is completely at odds with investors’ desire for certainty.

The *Trade Practices Act* requires the legitimate business interests of both the facility owner and potential new entrants to be considered. However, this has led to the presumption that access must be provided in an equitable way to all comers, notwithstanding that the different parties have faced different risks and costs. There seems to be insufficient weight given to the legitimate business interests of the incumbent risk-taking investor relative to a third-party entrant when considering capacity allocation and other operating issues. This puts at risk the cash flows that underpin the original investment. Ideally, the regime should allow a privileged position where it is required to protect legitimate investment returns that were necessary to ensure development of the project in the first place.

3 ELECTRICITY

3.1 Introduction

PAWA's monopoly on the supply of electricity in the Northern Territory ceased on 1 April 2000. This followed a comprehensive review of options for reforming the Territory's electricity market and improving PAWA's performance, announced by the Government in 1998.

Under the arrangements, other suppliers are able to use PAWA's networks to deliver electricity to customers. Choice of supplier commenced for large volume customers using at least 4 gigawatt hours a year. The threshold has since been progressively lowered to customers using over 2 gigawatt hours a year from 1 April 2001. Under the original timetable, the threshold will be further lowered to 750 megawatt hours a year on 1 April 2002. By then, in terms of energy sales, around 45% of the market will be open to competition.

The use of PAWA's networks is governed by a formal Electricity Networks (Third Party Access) Code. An independent Territory regulator, the Utilities Commission, was established to license suppliers, administer the Code and regulate network prices and service standards.

On 30 November 1999, the Government applied to the NCC for a recommendation on the effectiveness of its Access Code in terms of Part IIIA of the *Trade Practices Act*. Subsequently, following extensive discussions with the NCC, the Government proposed a range of changes to the Code.

However, a number of issues were still to be resolved at the time the NCC released its draft recommendation in September 2000. At that stage, the NCC was unable to recommend certification, including because the Territory's contestability timetable did not phase in all customers over a three to five year period.

Following further discussions with the NCC, the Government recently approved the implementation of full contestability through an extension of choice of supplier to smaller businesses and domestic customers by April 2005. However, this will be subject to a detailed independent review and public benefit test in 2002. In addition, the Government approved further, mainly technical, changes to the Access Code to address other concerns raised by the NCC.

In its update on the certification process in late March 2001, the NCC stated its preliminary view that the amendments proposed by the Government would meet the requirements for certification. However, the NCC has made clear that any changes to the contestability timetable resulting from the proposed review would negate certification and require a recertification process.

In relation to timing, the NCC has indicated that it would require all amendments to the Code and related legislation to be in effect before it would finalise its recommendation on certification. A final recommendation is therefore unlikely before late July or August 2001.

3.2 Benefits of access

The new electricity supply industry arrangements are aimed at reducing the cost of electricity while, at the same time, taking into account the Territory's unique physical and social circumstances.

The regime for access to PAWA's natural monopoly electricity networks was an essential element of the reforms. The commencement of the access regime enabled a private sector supplier (NT Power Generation Pty Limited) to enter the market in competition with PAWA in April 2000.

The more competitive market has resulted in significant reductions in electricity costs for larger consumers, estimated at around 15 per cent. The proposed review of the extension of contestability will enable a detailed assessment of whether there is a net public benefit from contestability for smaller businesses and domestic customers.

3.3 Rationale for seeking certification

The Territory Government chose to apply to the NCC for a recommendation on the effectiveness of its Access Code in order to provide greater certainty for new suppliers and for PAWA. Certification would establish the Access Regime as the sole legal regime for third party access to electricity networks in the Territory. In particular, it would provide immunity against possible recourse to the declaration of the relevant services under the *Trade Practices Act*.

Although declaration would not automatically follow, non-certification would give rise to uncertainty within the Territory's electricity supply industry in relation to future terms and conditions of access. It is the threat of declaration that creates this uncertainty.

It is difficult to know in advance whether PAWA's electricity networks would meet the criteria for declaration. In particular, there would be doubt as to whether PAWA's networks would be considered to be "of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy".

Therefore, it is difficult to assess whether the Territory needed to seek certification of its electricity access regime in the first place. The concern is that the Territory may have unnecessarily incurred significant costs in seeking certification when PAWA's electricity networks may not ultimately have been subject to declaration. Clearer specification of the criteria for declaration, and the facilities to which it can be applied, might have enabled these costs to be avoided. The Commission's proposed changes to the declaration criteria do not appear to address this issue.

3.4 Criteria for certification

In considering the effectiveness of a State or Territory access regime, the NCC is required to apply the criteria contained in Clause 6 of the Competition Principles Agreement and must not consider other matters. These criteria require considerable interpretation. Therefore, there is uncertainty as to the range of matters that the NCC can legitimately take into account during the certification process.

In particular, it is unclear whether the NCC is required to focus solely on the access regime for the service (such as the right to access PAWA's networks) or is also entitled to take into account the degree of competition in upstream or downstream markets (such as the Territory's electricity retail market and contestability timetable).

Clarification of the range of matters that can be taken into account during the certification process would provide greater certainty for State and Territory Governments in developing compliant access regimes. The Commission's proposed changes to the declaration criteria would not appear to address this issue.

3.5 Duration of the process

The Commission's position paper notes that concerns have been raised about the cumbersome and uncertain nature of the national access regime, in particular the time taken to achieve outcomes.

The certification process for the Territory's electricity access regime has taken around eighteen months and is still to be completed.

In large part, the time taken reflects the extensive changes that have been identified as necessary for the regime to meet the NCC's interpretation of the requirements for certification. It has taken time to work through a number of difficult issues, to agree with the NCC on appropriate changes to the access regime, and to obtain Ministerial and Government approval of the changes. In addition, as the NCC requires all amendments to be in effect before it finalises its recommendation, further time has been required to permit passage of some legislative amendments.

Where there is a clear commitment to achieving certification, it seems sensible to take slightly longer to resolve outstanding issues rather than cut the process short simply to meet a predetermined, and arbitrary, deadline. Non-certification, followed by a requirement to lodge a second application, would be likely to take longer and be more costly.

The time taken with the certification process has not been to the disadvantage of the Territory's electricity suppliers or consumers. In the meantime, the Territory's access regime has continued to operate, enabling the new private sector supplier to continue to deliver electricity to its customers and larger electricity customers to continue to benefit from lower prices.

While time limits would assist in ensuring there are not unnecessary delays, the Commission should be mindful not to recommend an unrealistic or inflexible deadline for completion of the certification process.

4 GAS

4.1 Introduction

The National Third Party Access Code for Natural Gas Pipeline Systems has been progressively introduced over the past two years. Experience is therefore based on only a short time span. Nevertheless, certain weaknesses and difficulties have begun to emerge and there has been much anecdotal criticism during the start-up period.

On 16 October 2000, the Commonwealth Treasurer and Minister for Industry, Science and Resources gave in-principle support for an independent review of the operation of the National Gas Code. This is to be conducted following the outcome of the current Inquiry. The Territory's concerns will be raised in detail during the forthcoming review. This section therefore provides only a limited snapshot of the Territory's experience with third party access for gas infrastructure.

4.2 Treatment of existing pipelines

The Amadeus to Darwin gas pipeline was built in the mid 1980s to provide fuel for public electricity supply in the Territory's major centres, and particularly the Darwin–Katherine area. The Territory Government guaranteed the lease financing of the pipeline and the foundation gas purchase contracts with the Amadeus Basin gas producers. The Government also agreed with AGL (now the Australian Pipeline Trust) to develop the pipeline and to provide various services as lessee and operator of the pipeline. These undertakings represented a major commitment of the Territory Government, and the remaining obligations under these contract arrangements remain a major Territory Government exposure.

The outcome of these Government initiatives is that, other than for remote communities and mines, virtually all electricity generation in the Territory is fuelled by natural gas. Most of this gas is supplied through the pipeline. As well, almost all natural gas sold in the Territory is used for electricity generation.

In short, the Government through direct investment and financing guarantees has created the market for natural gas for electricity generation in the Territory.

In theory, the National Gas Code and associated competition reforms "grandfathered" pre-existing gas contracts. In the Territory's context, it was understood that PAWA would not be disadvantaged by the new regime. In particular, it was understood that no third party would be able to obtain access to the Amadeus to Darwin gas pipeline at a unit price lower than PAWA's, unless PAWA agreed.

In practice, the status of these grandfathering arrangements is unclear. The ACCC released its draft determination on an access application by the pipeline operator and lessee, NT Gas, for the Amadeus to Darwin pipeline in May 2001. Under the draft determination, pipeline tariffs would be 45% lower than the tariffs proposed by NT Gas.

It is of major concern that, through the access arrangements, a third party competitor to the pipeline's foundation customer, PAWA, may be able to have gas hauled to its electricity generators for significantly less than the amount PAWA has to pay. While costs could be lowered for electricity consumers, this would be at the expense of taxpayers.

At this stage, more detailed analysis of the ACCC's draft determination is required before further comment can be provided. However, it would seem appropriate that Part IIIA of the *Trade Practices Act* be amended to unambiguously preserve the rights of owners of existing infrastructure. Similarly, the rights of foundation customers using such infrastructure should be preserved to the effect that foundation customers cannot be disadvantaged by competitors being able to access infrastructure at a regulated price that is less than the foundation customers are contractually obligated to pay. The Territory may provide further information to the Productivity Commission on this issue later in the inquiry.

4.3 Regulatory discretion versus prescription

Originally, it was intended that the gas access framework would represent "light-handed" regulation rather than prescriptive legislation. In dealing with monopoly situations, it was intended to regulate for a competitive market rather than regulate competition in the market. While the initial emphasis was on discretion in administration, there appears to have been "regulatory creep". The regulatory authorities and elements of the industry seem to require greater prescription on the basis of needing to achieve greater regulatory certainty.

This appears to be an expedient response by the regulators which has seen the flexibility of discretion sacrificed to avoid challenges in Court over the intentions and interpretation of the Code. Industry often appears uncomfortable without the legal safety of traditional "black letter" law.

Since its inception, the Natural Gas Pipelines Advisory Committee (NGPAC) has dealt with a constant flow of demands for Code changes generally emanating from the regulators (with some sympathy from elements of the industry, but by no means consistent support). These changes have involved greater prescription and reduced discretion.

4.4 Coverage – transmission versus distribution pipelines

The move to an access regime was originally prompted by the need to deal with monopoly transmission pipelines. At some point in the finalisation of the Natural Gas Pipelines Access Agreement, distribution networks were included in the Code. The inclusion of distribution networks within the Code, without allowing for differences between distribution and transmission services, was inappropriate.

Consideration should be given to having distribution networks covered by an alternative access regime that better suits the peculiarities of this form of investment. Experience indicates that the cost of compliance for distribution networks with the current Code is often out of proportion to the possible public benefit. This is especially true for networks servicing small regional centres, where there is little possibility of growth in the market and the introduction of competitors is unlikely in the foreseeable future.

In July 2000, Code coverage of the Alice Springs distribution network was removed on the recommendation of the NCC. This followed a public inquiry held at the request of the network owner. It was estimated that compliance with the Code would cost in the vicinity of $250 000 (not including costs to the regulator or the Territory Government). This figure was based on the costs of compliance for similar sized networks interstate servicing similar sized populations. Based on these figures, compliance would have cost $400 per customer. The customer base comprises around 625 residential, commercial and light industrial customers, with little prospect of substantial growth in customer numbers for many years.

The issue of whether or not it is appropriate to apply the same access regime to transmission and distribution networks needs to be addressed. On the basis of the significant costs of compliance and the lack of any substantive evidence as to the public benefit, it would appear that a different and less costly access regime should apply to smaller scale distribution networks.

4.5 "Greenfields" pipelines

The Code was developed with a view to gaining access to existing monopoly pipelines. However, it is apparent that the Code does not provide the necessary level of regulatory certainty required by investors in new networks. In particular, it is uncertain as to whether the ACCC or other regulators could consider a proposed access arrangement on a "paper" pipeline.

Regulators require the pipeline to be built or the proposal substantially concluded before an application can be seriously considered. However, a conflict arises because investors need to know the implications of any access arrangement long before settling on a deal.

The alternative is to give an access undertaking for a new pipeline. While this may represent an attractive alternative (and inadvertently defeat the policy intentions of the Code), it still raises the possibility that once the pipeline is built an individual may seek declaration under the Code. This potential scenario opens pipeline proposals to regulatory uncertainty.

There is a need for the Code to be assessed regarding its suitability for handling new investments. Where the above criticisms are substantiated, the Code should be amended to reduce the level of regulatory uncertainty.

4.6 Other issues

The process for obtaining changes to the National Gas Code is unduly slow. Proposed changes are circulated to all nine participating Ministers, who each place different priorities on providing a response. One option would be for the procedure to be altered so that a recommendation to Ministers for a change to the Code to be circulated on the basis of implied support, unless the Minister(s) respond(s) with advice to the contrary. A failure to respond within a specified period (say 21-28 days) could be taken to indicate Ministerial endorsement of the recommendation.

5 SPECIFIC RESPONSES TO PROPOSALS IN THE POSITION PAPER

The Commission's Position Paper proposes a wide range of changes to current arrangements. The following comments are limited to those proposals of most significance to the Territory that have not been addressed in the previous sections.

Modification of the declaration criteria to ensure that the provision of access must deliver a substantial increase in competition and to remove the possibility that services provided under conditions of duopoly or oligopoly could be declared (proposal 6.1)

Overhaul of the declaration criteria, focussing more directly on efficiency rather than simply promoting competition, and requiring that declaration would be likely to improve efficiency significantly (proposal 6.2)

The declaration criterion in relation to increasing competition should, at a minimum, match the competition criterion for certification. This would ensure that an incongruous situation where a service could be declared but could not be subject to an effective State or Territory access regime would be avoided. The proposals would only partially address the disparity between these tests.

That said, the proposals would increase the likelihood that services would only be subject to declaration when a significant increase in competition would result. This would avoid the costs inherent in providing access in cases where only a limited increase in competition (and, by implication, only limited benefits) would result.

Adopting the proposed declaration criteria may have reduced the necessity to obtain certification of an access regime for the AustralAsia Railway.

Ending the role for Ministers in declaring and certifying services (proposal 9.1)

Ministers play an important role in the declaration and certification processes. The criteria for declaration and certification involve the exercise of a considerable degree of judgment. Accordingly, the criteria are open to considerable interpretation, and decisions can have considerable impacts on the economy. Ministers, as elected representatives, would appear best placed to assess these impacts. Therefore, such decisions should be made by governments rather than by unelected bodies.

However, to improve transparency and accountability, there is merit in the Commission's related proposal (proposal 9.8) for Ministers to publish reasons for their decisions. This would be particularly the case where the decision is to reject a recommendation of the relevant regulator.

Making a single body responsible for administering Part IIIA – most probably the ACCC (proposal 9.2)

Making a single regulator responsible for administering Part IIIA would unduly concentrate regulatory power. This outcome would be compounded by the Commission's separate proposal to end the current role of Ministers in declaring and certifying services.

Both the NCC and the ACCC have built up a considerable degree of institutional knowledge in this area. Part of this knowledge may be lost if all regulatory functions are vested in the one body. Aligning the criteria for the different routes of access, in itself, should help to ensure greater consistency in access decisions.

It should be noted that the need to decentralise decision making on access was one of the major reasons why the NCC was established. If the ACCC were given sole power, it would have absolute discretion over what is declared. Accordingly, it would not seem appropriate that a body make decisions about which assets it regulates.