(QMC file copy)

21 December 2000

John Cosgrove
Productivity Commission
PO Box 80
Belconnen ACT, 2616

Dear Mr Cosgrove

Inquiry into the national access regime

Thank you for meeting with me on 27 November. Following is our council's response to the questions in the commission's issues paper.

The council's members are major consumers of infrastructure services, such as electricity, rail, port and water that are either subject to national access arrangements or potential candidates therefore. Our aims are mainly to (i) unbundle natural monopoly and contestable services wherever possible, (ii) regulate natural monopoly elements through transparency and price control, and (iii) introduce effective competition in contestable ares. The main themes we wish to draw to the commission's are:

- Access regulation continues to be a essential instrument of microeconomic reform. It is important that the national access regime retain a strong pro-competition focus, and that the learning experience of the first five years of the regime be used to make changes designed to enhance its efficiency and effectiveness.
- The role of the national scheme in encouraging state governments to develop effective state-based access arrangements is particularly importance to the Queensland mining industry. The National Competition Council needs to retain broad discretion in assessing the effectiveness of applications for certification of state regimes.
- The regime should be more prescriptive regarding the attributes of an effective access regime, especially in key areas such as access pricing and transparency. This would provide greater certainty and consistency in the regime's application, and less scope for disputes and process-driven delay.

Our council appreciates this opportunity to have input to the review. Please do not hesitate to contact me if your have any questions on any aspect of our response.

Yours sincerely

(signed)

Ben Klaassen
Economist

PC question	**QMC response**
4 Rationale for a national access regime	
Are the circumstances in which a facility owner would seek to deny access widespread? What sorts of costs does denial of access impose? Are there situations where denial of access would be desirable from the community's point of view?	Where the facility owner is part of a vertically integrated entity - as is the case with Queensland Rail's network access group - the incentive to deny access will be clear and compelling. There also will be a high risk of interference in the access process where the facility owner is a stand-alone entity, but is owned by an entity that also runs an upstream or downstream business. This is the case with electricity in Queensland where the state government owns generators, distributors/retailers and the transmission network provider. The costs of denial of access are substantial and include: • the over-pricing and under-provision of services arising from the exercise of market power; • the technical inefficiency and lack of innovation arising from a protected market position; • the allocative inefficiency and inequity arising from cross-subsidies and featherbedding. These widely recognised costs of monopoly were well canvassed in the Hilmer report, and reducing them is a key aim of national competition policy. Our council cannot envisage circumstances in which it would be preferable to deny access to an essential facility providing monopoly services to industry, other than those already provided for in the Trade Practices Act ie. where the service is part of a production process, or involves the supply of goods or the use of intellectual property, or where an access request is vexatious. The mining council strongly subscribes to the presumption in favour of competition that underpinned the Hilmer reforms. We believe that providing access is prima facie a good thing, and that the onus of proof to the contrary should be on those who would deny access and seek to preserve the status quo. This is implicit in the 'would not be contrary to the public interest' test that the act requires the National Competition Council and ministers to apply in considering applications for access declaration. Our council would be opposed to any move to reverse this onus of proof to require access seekers to demonstrate their proposals are in the public interest.
Should vertically integrated bottleneck facilities be treated differently than non-integrated facilities? Is the real concern underpinning access regimes denial of access, or the price and conditions of access? Are the two concepts separable from a regulatory point of view, or should they be addressed in tandem?	Where there is vertical integration, or an essential facility and an up/downstream user have a common owner, there is a particular need for measures to ensure non-discriminatory treatment of access seekers. These include the disclosure of access agreements, cost disclosure and other transparency measures, ring fencing arrangements and timely, independent appeal processes. Prejudicial terms and conditions can be an effective means of hindering access entry. A facility owner can price discriminate in favour of a preferred incumbent user, or access pricing can be uniform but set at a level that reflects a shifting of costs from the operating arm of an vertically integrated entity to its infrastructure arm. In either circumstance potential new entrants will be discouraged.

Similarly an access provider can contrive other non-price conditions - eg. relating to safety, environmental, or technical requirements - that make compliance difficult and obtaining access impractical.

Therefore the pursuit of access, and of reasonable access terms and conditions, will often coincide and competition policy regulators need to be able to deal with the issues in a way that reflects their interdependence. For example, in a vertically integrated context an access regime would need to do more than prescribe the method for calculating the facility's allowable revenue. It would also need to put conditions on how that revenue was obtained (eg. by posting access prices) and to require a sufficient level of disclosure by the facility owner to show that its operating arm is not receiving special treatment.

Accordingly, the mining industry is looking to the rail access regime being developed in Queensland to prescribe coal reference tariffs and other key rail access terms and conditions.

Also, the users of the Dalrymple Bay coal export terminal are seeking declaration of the facility's services under the Queensland access legislation, to enable regulation of the terminal's revenue following its forthcoming sale under long-term lease to private interests.

Does the denial of access (or monopoly pricing of access) have significant efficiency effects, or does it result mainly in transfers of income? Are there circumstances where one or other effect would predominate? From a policy perspective, is this distinction important?

Our council would contend that the denial or monopoly pricing of access will typically have substantial negative impacts beyond the distributional effects noted by the commission. Bulk rail freight services are a case in point.

Pricing rail access in a manner that does not reflect the actual costs of the various elements of the service (eg. capacity, infrastructure maintenance, energy) will send inappropriate signals for investment in both above and below-rail assets. For example, a price structure that understated fixed capacity costs and overstated variable track maintenance costs would not encourage the higher payload trains and heavier gauge track needed to maximise the productivity of the rail system.

This alignment of tariff structure with differential costs is the basic aim of efficient multi-part pricing, and is a rule that access providers will often violate if they are given the latitude to do so. A monopolistic access provider may depart from cost reflective pricing to maximise rent extraction, as the commission observes; while a vertically integrated access provider will want to give advantage to its incumbent user by structuring prices in a way that reflects, and therefore perpetuates, the prevailing operating mode and technology.

This insular rent-seeking behaviour will impact most negatively on industries such as mining that compete internationally and therefore are unable to pass the costs of overcharging and inefficiency onto customers. In these cases the resulting income transfers will be not just among different groups within the community, but between Australia and competitor countries, and at the cost of national welfare lost or forgone.

What is the evidence that access regulation reduces prices and/or improves the range and quality of services available to end users?

Previous reports by the commission and the National Competition Council document the manifest improvements in public infrastructure provision resulting from access and related competition policy reforms. Consumers of electricity, gas, water, telecommunications and rail services have benefited from reduced prices and improved services, and this has occurred in concert with significant productivity increases in the government enterprises that typically deliver these services.

Mines in Queensland have benefited directly and substantially from deregulation of the state's electricity industry and creation of the state market. The retail cost of electricity went down by 20-25 percent for the large scale consumers - of which mines make up the majority - that became contestable from late 1998, while many smaller scale consumers obtained significant reductions on previously prescribed tariffs from mid-1999.

It is regrettable that a substantial portion of such cost savings have been subsequently eroded by large, and largely unexplained, increases in regulated national electricity market charges - notably network management and ancillary service charges - under the apparently exclusive control of NEMMCO. This highlights the need for careful design of the non-contestable as well as the contestable side of any access regime, and for management bodies to be accountable so that they do not develop monopolistic habits themselves.

How do the costs of access regulation compare with the costs of not facilitating access for third parties? Does the magnitude of the costs of access regulation primarily depend on the associated pricing principles/rules?

Are disincentives to investment in bottleneck facilities likely to be significant? To what extent could any such disincentives be offset by greater incentives to invest in upstream and downstream activities? Is increased investment in related activities necessarily desirable from the community's point of view, or does it depend on whether the specific access requirements are appropriate?

Does the relativity between benefits and costs vary across infrastructure sectors? Do relativities change over time, or in response to other policy changes? For example, is access regulation necessary to underpin structural separation of some government infrastructure providers? Will technological developments make infrastructure provision more contestable and thereby reduce the need for access regulation in the future?

Our council is confident that in almost all cases the costs of regulating access - in terms of administration and compliance - will be substantially lower than the alternative costs to business - in terms of higher charges and lower quality services - of not facilitating access.

That said, access regulation costs can be substantial and can get out of hand as electricity network management costs appeared to have done. Access regime design can play an important role in minimising administration and compliance costs - the need to guard against unaccountable management structures is one aspect noted above. Further, the incidence of costly, time consuming appeals and arbitrations can be kept down by having access regimes that are comprehensive and provide features such as posted access prices, and access agreement and cost disclosure, which enhance transparency and reduce the field of possible dispute.

Access should improve the quality of investment decision making in respect of essential facilities and related activities. Faced with the new threat of competition, formerly monopolistic incumbent operators will focus on improving capital utilisation and avoiding unnecessary expenditure, and will pressure facility owners to provide access charges reflecting comparable asset efficiency (although this will not be sufficient to ensure against facility owners gold plating their assets; access regimes also need to contain incentive regulation specifically aimed at preventing over-capitalisation).

Access should not deter necessary, viable investment in infrastructure provided the terms and conditions of access strike an appropriate balance between the interests of providers, operators an end-users, and are periodically reviewed against changes in market conditions and against experience. Since the advent of access there has developed a solid body of analysis on subjects such as allowable access revenue, incentive regulation and tariff design, and a growing consensus among academics and regulators, which is cause for confidence that regulated access terms and conditions will be appropriate.

That said, access providers need to be able to take normal market risks on investment. Often this is not the case with government owned facilities that are required to consistently achieve prescribed annual rate of return targets. Up/downstream competition can make it harder for a GOE to deliver that constant dividend stream, particularly if faced with a lumpy infrastructure investment that will lose money for a period while demand grows, and may not ever deliver the target return. Our council believes this to be the main cause of disquiet from government owned facility providers about making large investments under access conditions, and that the issue lies with how governments regulate their GOEs rather than with access regulation.

This is one example of how access does not exist in a policy vacuum. The benefit/cost profile of an access arrangement can be enhanced by complementary policies and, conversely, countervailing policies can detract greatly from regime effectiveness. Our council is concerned that the Queensland government's policy of retaining Queensland Rail's vertically integrated structure may limit the contestability of coal and minerals haulage services and generally compromise the effectiveness of the rail access regime currently being developed (we would contend that as well as access regulation being necessary to underpin the structural separation of government owned infrastructure providers, the reverse is also true).

It is crucial that the end-users of Queensland Rail's coal and minerals network have resort to the national access regime in the event they believe the state rail regime to be ineffective for this or any other reason.

What are the regulatory alternatives to access regimes? When might they be more effective or cost-efficient? In the longer term are the differences between access regulation and more explicit price control likely to be significant and, if so, why?

Could alternatives to the national access regime operate through existing regulation, or would they require new or modified regulation? For example, would reliance on the general competitive conduct provisions in the TPA be more effective if those provisions, as they relate to essential services, were based primarily on outcomes rather than establishing the use of market power to damage a competitor or competition?

Our council does not believe the alternative regulatory approaches mooted by the commission would be adequate substitutes for national and state access legislation.

The Trade Practices Act would be more effective against essential facility owners if it were based on the effect, rather than the purpose, of anti-competitive conduct. Misuse of market power is currently difficult to prove under the TPA because of the need to provide evidence of an essentially subjective purpose ie. to damage a competitor, prevent entry to the market or prevent competitive conduct.

Other TPA provisions, such as those against exclusive dealing, are easier to use because they rely on the observable facts and likely effects of anti-competitive conduct, irrespective of the purpose behind the conduct. However these provisions are complementary to statutory access rights rather than alternatives to access. For example, in circumstances where a statutory monopoly would otherwise apply, third party access rights are necessary to establish the possibility of competition so that conduct that 'has the effect or likely effect of substantially lessening competition' then may be challenged pursuant to the TPA.

Nor would prices oversight be an adequate substitute for access, whether or not in concert with more enabling TPA provisions. Existing prices oversight of state GOEs is effectively at the discretion of their state government owners; it is very unlikely that federal government-initiated oversight by the ACCC of a state GOE will happen in opposition to the wishes of the relevant state government under the present arrangments.

Further, while price regulation is an integral part of any effective access regime, it is only one of a range of essential elements. Even where vertical integration is not an issue, the facility owner should be required to develop procedures and publish information in non-price areas such as:

- the physical characteristics of the facility;
- capacity management;
- interface issues, including safety and environmental aspects;
- the process for applying for and negotiating access;
- appeal and arbitration mechanisms.

These subject headings represent the minimum needed for informing potential upstream or downstream markets. The national access procedures for certifying effective regimes and approving access undertakings, or something like them, are needed for establishing such basic access requirements and encouraging providers to deliver them.

Should access regulation be in the form of a national regime, industry-specific arrangements, or a combination of both? In practice, would the outcome from a national regime as opposed to a series of industry-specific regimes operating under the same principles and broad rules be significantly different?

If a dual system were to be retained, would the current relationship between the national and industry-specific regimes be broadly appropriate? Does Clause 6 of the CPA provide an appropriate link between them?

Our council is broadly supportive of the structure of access regulation, the essential elements of which are:

(i) provision for industry-specific regimes via national access undertakings;

(ii) a COAG programme for developing industry-specific access arrangements for specified nationally significant activities;

(iii) provision for certification of effective state-based access regimes;

(iv) the 'default' national access provisions to apply when no other effective arrangements are in place.

We regret that rail access was not adopted by COAG as one of the specific microeconomic reform areas on which Commonwealth competition policy implementation payments would be contingent, which is the main reason why rail access has generally lagged behind electricity reform and been more disparate from one jurisdiction to the next.

That said, the above structure is capable of accommodating the range of access scenarios that might arise.

The state regime certification process is particularly important in our council's view. There is no question that, in the case of state government owned infrastructure that does not cross state borders, a state-based regime is preferable, provided it is effective. It is essential that the national access regime remain in place as the default regime, to encourage state governments to develop their own effective arrangements. This is so particularly in respect of essential services like rail access which are not specifically included in the COAG reform agenda.

Further, it is important that the National Competition Council continue to be able to exercise reasonable discretion in evaluating the state-based regimes against the principles for effectiveness contained in clause 6(4) in the Competition Principles Agreement. For example, that the NCC has required rail access regimes to contain a threshold level of detail and information on access costs in order to provide for balanced access negotiations [and fulfill CPA clause 6(4)(a)] has thwarted attempts by states to get away with minimalist regimes. Our council believes this has influenced in a positive way the development in Queensland of what coal and minerals rail users expect will be a comprehensive and rigorous rail access regime.

5 *Improving the current national access regime*

Should the national access regime contain a clearer statement of objectives? What should these objectives be? Is promoting competition in related markets an objective in its own right? Or is it a means to fulfil broader objectives?

A clearer statements of objectives would be serve a useful interpretive purpose, provided it was faithful to the Hilmer principles. We would be concerned that an attempt to articulate the original aims of access might turn into a reinterpretation reflecting the current less favourable political climate. As mentioned, the present law is premised on the fact that competition and the public interest are almost always aligned, and that in the absence of evidence to the contrary, competition should be seen as an objective in its own right. We would see any stepping back from that approach as a weakening of resolve on access, and an opener for the detractors of competition policy and vested interests who would seek to frustrate access processes.

Should Part IIIA focus on access provision, or more broadly on the exercise of monopoly power by owners of 'essential' facilities when dealing with access seekers? Would the latter require a change to the broad orientation of the regime, or could it be accommodated through the regime's detailed requirements? Could other parts of the TPA or prices control/surveillance provide a more effective remedy where access is generally provided, but at monopoly prices? If so, should access regulation focus solely on vertically integrated infrastructure providers? Given the coverage of existing industry-specific regimes, if Part IIIA were to be limited to vertically integrated facilities, in practical terms, how many other facilities might it apply to?

Is Part IIIA an appropriate vehicle for pursuing distributional concerns (for example, the interests of consumers relative to facility owners), or are these better addressed through other measures? Have distributional concerns influenced decision making under Part IIIA to date?

Our council would support further development of the national regime to lessen the negotiate/arbitrate nature of the process. Greater certainty and a reduction in the incidence of disputes, appeals and arbitrations would be achieved by incorporating guiding principles relating to key characteristics of access regimes, such as pricing, transparency, ringfencing (in the case of vertically integrated entities), efficiency and incentive regulation. These could be introduced into Part IIIA, Subdivision C - Arbitration of access disputes as principles to guide determinations by the Australian Competition and Consumer Commission, and in Division 6 - Access undertakings for non-declared services as necessary attributes of any access undertaking approved by the commission.

As mentioned, access regulation should not be confined to vertically integrated infrastructure providers. The functions of an access regime extend beyond measures to counter anti-competitive conduct.

The aim of the principles would be to enshrine characteristics that aid the effectiveness of any access regime and therefore enhance its contribution to net economic welfare in the Kaldor-Hicks sense of the winners from change being capable of compensating the losers. We do not believe it would be appropriate to include distributional issues in such principles, relating as they do to whether losers should actually be compensated and by whom - in our view that is a matter for governments to determine outside the operation of access regimes.

Should Part IIIA apply only to natural monopoly facilities? If so, how should natural monopoly be defined/assessed? Should the focus be on natural monopoly technology (eg rail infrastructure) in the broad, or more narrowly on situations where a natural monopolist has the scope to obtain significant monopoly rents?

Our council would accept limiting the application of Part IIIA to natural and legislated monopolies, but believe this has implications for the nature of the access regime. In a natural or legislated monopoly context, a light-handed negotiate and arbitrate approach will be unnecessarily time consuming and expensive in terms of administration, compliance and the costs of delayed competition. Almost invariably, the negotiating position of a monopolist will be contrary to the interests of users and the public interest, and disputes, arbitrations, appeals and hence delay will ensue. This does not rely on the facility owner being vertically integrated and wanting to hinder access, but merely from its natural inclination to use its of monopoly power to extract consumer rent through the terms on which it provides access.

If Part IIIA were to have application beyond natural monopolies, what other market situations should it target? Would it be possible/desirable to be prescriptive in this regard, or should the legislation simply leave open the option for wider application? Where monopoly power arises from a legislative restriction on competition, would it be better to address that restriction directly, rather than attempting to offset its impacts through mandated access?

Would it be sensible to define a list of industries to which the regime applies, or does changing technology make this an inappropriate approach? Were a listing approach adopted, what sort of facilities should be included?

The smaller the range of matters on which the monopoly facility owner may exercise discretion, the more efficient an access regime will be, and the more interest will be generated in up/downstream markets by potential third party operators encouraged by the greater certainty of the arrangements. Part IIIA could assist by providing guiding principles in regard to access pricing, costs disclosure and incentive regulation and requiring access undertakings and effective state regimes to be comprehensive and prescriptive in such key areas.

Certainty and regime efficiency would also be assisted by a register of industries/facilities to which the national regime is deemed to apply, provided the list was not meant to exhaustive and could evolve over time. This approach is taken in the Queensland Competition Authority Act which provides for two declaration routes:

(i) ministerial declaration similar to the national regime approach; and

(ii) regulated declarations of obvious economically significant monopoly facilities (eg rail infrastructure).

The second option avoids the steps implicit in the conventional ministerial declaration route (application/ assessment/declaration or refusal/appeal) without limiting the use of that option for access to less obvious candidate facilities.

Is the list of activities currently excluded from Part IIIA appropriate? Does the exclusion of 'production processes' create particular problems? For example, could it encourage firms to integrate vertically to avoid declaration under the regime?

Is the distinction between access to services provided by a facility, and access to the facility, important? Would provision for access to a facility potentially lead to the application of Part IIIA to some contestable services? What adverse consequences would this have?

Our council has no issue with the exclusion of production processes from the national regime, or its limitation to facility services rather than facilities themselves. In the case of rail, which is our council's main focus, rights of access to the facility itself - allowing for the 'subcontracting' of access capacity and for third parties to deliver their own version of services like train scheduling and control - could be highly disruptive. We accept that in a multi-user network context it is preferable to have a single provider of services, and that the main issue is the terms and conditions on which that monopoly provider provides access.

Should Part IIIA explicitly recognise issues raised in relation to about to be/recently privatised public infrastructure, or situations where governments have granted exclusive rights to encourage private developments? Can these issues be adequately handled under existing access instruments and processes, or do they require legislative changes?

It is important that privatised monopoly facilities be subject to strict revenue regulation - a private monopoly can be expected to be even more diligent than a public one in extracting rent from end-users, particularly if that monopoly rent was capitalised in the original sale price.

Subjecting monopoly facilities to access should be a routine condition of their sale. As mentioned, this route is being sought by the users of the Dalrymple Bay coal terminal prior to the sale of that facility, and could be a more dependable and durable approach than other forms of regulation such as prices oversight or reliance on the ant-competitive conduct provisions of the TPA.

Is the emphasis in Part IIIA on prior negotiation between the parties likely to encourage efficient access arrangements, or better outcomes than would eventuate in an unregulated environment? What changes to the negotiating framework would improve outcomes? For example, would a requirement for the facility owner to disclose certain information to the access seeker help to address the problem of information imbalance? What level of public disclosure should apply to negotiated terms and conditions?

Is collusion likely to be a significant problem under the negotiate/arbitrate approach? For example, will it be feasible where there are, or could be, multiple access seekers? Would general competitive conduct provisions in the TPA be a deterrent to collusion?

As mentioned, our council believes the negotiate/arbitrate approach is not the most efficient option, although it is preferable to an unregulated outcome in which access seekers would have to rely solely on the competitive conduct provisions of the TPA.

The mining council prefers the approach being taken in Queensland to rail access, the main features of which are:

- regulated declaration of the rail infrastructure, avoiding the need to resort to the application/assessment/ declaration/appeal processes associated with a ministerial declaration;
- the state competition regulator (Queensland Competition Authority) having the power to require the facility-owner (Queensland Rail) to produce an access 'undertaking' and, if necessary, to determine the content of that undertaking;
- a requirement that the undertaking and any variations thereof be the subject of a public inquiry.

Our council expects this process to result in a comprehensive regime in which key rail access terms and conditions are prescribed and, therefore, made certain for prospective third parties and accountable to end-users and the public. These include:

- 'reference tariffs' for access to the coal and minerals rail network;
- the asset values, costs and methodology underlying those reference tariffs;
- network capacity and available capacity;
- principles for balanced access agreements;
- cost allocation and public reporting by the facility owner;
- ringfencing arrangements;
- performance monitoring and incentive regulation.

The Queensland Competition Authority considers the production of a comprehensive rail access undertaking as necessary to inform potential above-rail markets and as a means of minimising subsequent access disputes/arbitrations, which is an approach we commend to the commission.

In the absence of measures to limit its negotiate/arbitrate aspect, the national regime would be made more effective by measures to address the information asymmetry between access providers and seekers. Our council believes that regulated access agreements should be discoverable - the national and state competition bodies should establish access agreement libraries - and that a high degree of disclosure of costs and performance indicators should be a standard condition of any approved/certified access regime. The reasons are mainly two:

- First, a monopoly facility owner will not have a competitive position to defend and therefore no legitimate basis for commercial-in-confidence protection of its cost and performance details. Monopolists argue strongly for non-disclosure for no other reason than it limits their ability to exercise market power.

Disclosure of access agreements is the surest way of guarding against the type of provider/user collusion to which the commissions refers, and the other forms of special deals and discriminatory treatment of users to which monopolists are naturally inclined. It is particularly important when the facility owner is vertically integrated and can be relied on to provide access on more favourable terms to its own incumbent than to new entrants.

What are the pros and cons of separating the decision to declare a service under Part IIIA from any subsequent arbitrated decision on terms and conditions? Would handling the two together always be feasible?

Would a half way house be to establish some pricing principles or indicative terms and conditions at the time of declaration, to provide some guide to the access seeker about whether it is worthwhile to continue pressing the claim? If so, how specific could any such prices or conditions feasibly be?

An access seeker will seek declaration of a facility if the facility owner has denied access outright, or has agreed to access but on unacceptable terms or conditions. Either way, if the facility is declared, the parties will almost invariably disagree about the terms and conditions in the subsequent negotiation phase. Therefore the present approach does seem to enshrine an unnecessary additional step on the way towards what will be an arbitrated outcome.

As mentioned, guiding principles on pricing and other access conditions - including a requirement about the comprehensiveness and subject matter of an access regime - should be developed and applied at key decision points ie. recommending certification of state regimes, arbitrating disputes and accepting undertakings. These could apply to declarations as well, or alternatively either of the parties could be given the option of seeking guidance on terms and conditions from the NCC as apart of a decision to recommend declaration.

Does the limited declaration case history, together with general guidance from the NCC on the interpretation of the declaration criteria, provide sufficient certainty to access seekers and providers? Should there be more guidance in Part IIIA itself?

Our council sees no need for further guidance in the act on the criteria as they stand.

What modifications, if any, are required to the 'promotion of competition in related markets' criterion? Does any need for change stem solely from suggested changes to the broad objectives of Part IIIA, or are changes also required to give better effect to the current legislation?

Is the requirement to distinguish the market(s) in which competition will be promoted necessary? Is the NCC's current approach to defining markets appropriate? Does the inclusion of the rider 'whether or not in Australia' in the related market test serve a useful purpose?

We see no need for the criterion to be modified, and we support the broad approach to markets taken by the NCC. Further, the reference to 'whether or not in Australia' is an important clarification that recognises the benefits from greater Australian penetration of oversea export markets.

Should there be a need to demonstrate that the provision of access would lead to a large increase in competition? Should there also be a requirement to demonstrate resulting benefits for end users? Would this be possible in advance of the event, other than in 'in principle' terms?

We would oppose any qualification to the effect that an increase in competition be actual or large or demonstrably beneficial.

What modifications, if any, are required to the 'uneconomic to develop' criterion? If Part IIIA were only to tackle natural monopolies in the future, would a tighter test be required? How would it best be expressed? Alternatively, were the focus of Part IIIA to be more broadly on addressing monopoly power in the provision of essential infrastructure services, would the criterion be necessary?

Our council has no issue with the 'uneconomic to develop' criterion, provided it can be interpreted to include a facility that would be uneconomic because of a law that restricts competition or otherwise gives preference to an incumbent provider. While the criterion might be imprecise, it does attempt to capture the distinguishing feature of natural monopoly, and any attempt to be more precise might prove limiting rather than enabling

What is meant by national significance? What sorts of facilities clearly meet, or fall outside, this test? In seeking to delineate the national and State-based access regimes, could the national significance criterion leave important intrastate facilities outside the purview of any regime?

Our council believes the national significance test is potentially too hard strict and therefore unnecessarily limiting. A facility need not be of national significance for access to it to deliver tangible net benefits and be consistent with the aims of competition policy. That said, the NCC needs to be able to turn away an application for declaration of a trivial facility for which the costs of achieving and administering access would clearly outweigh the benefits.

Provided that there is a certification or similar mechanism in place for State-based access regimes to minimise the potential for regulatory duplication, is a national significance test for declaration necessary? Could materiality concerns be adequately addressed by a requirement that the denial of access to a facility would have large and adverse economic effects?

Are the NCC's current indicators of significance appropriate? If not, what indicators should replace them?

Is a specific criterion on health and safety necessary, or could such matters be adequately handled under the public interest test?

It is difficult to conceive of circumstances where the health and safety issues raised by third party access to a facility could not be managed and therefore would be a legitimate barrier to access. To the extent that health and safety considerations impinge on the efficacy of an access proposal, they could be adequately dealt with under the public interest test without detracting in any way from their importance.

Given the other criteria, is a specific public interest test in Part IIIA necessary? If so, should the legislation spell out the matters to be considered under the test? Should the focus of the test be on efficiency, or is this better spelt out in the overall objectives for the regime, with the test providing a way to take other issues into account?

As mentioned, our council strongly supports the criterion being expressed in the negative and the presumption in favour of competition that underpins this approach. We would oppose any proposal to reverse the onus of proof in favour of those who would make change more difficult given that, when it comes to monopoly, the status quo is characterised by inefficiency and inertia.

Further, we believe the public interest should be defined mainly in terms of economic efficiency. Other considerations such as health & safety, environment, equity and regional development are matters that may condition an access arrangement, but should not be of nature to warrant rejection of a declaration application.

What guidance, if any, should be provided to regulators on the relative importance of particular public interest test considerations?

Is it appropriate that the onus of proof in the public interest test be at odds with the usual presumption that the party seeking change should demonstrate a benefit from that change? Or does the public interest test simply offer the facility owner a chance to present other arguments against declaration when the key considerations suggest there is a strong case for doing so?

How well are the certification and undertaking mechanisms working? What improvements could be made to them? What are the reasons for the limited use of undertakings to date?

What would be the pros and cons of combining the current certification and undertaking arrangements in a single 'certification' regime? Does the current dual arrangement have a strongly grounded public policy rationale? Does it increase the potential for inconsistencies in regulatory approach?

Is there a rationale for having different criteria for the three access routes accommodated by Part IIIA? In practical terms, do these differences matter much? If the criteria were to be aligned, which of the current three sets would be the most appropriate?

Does the specification of the tests for an effective State or Territory regime provide scope for significant variation in industry-specific access requirements, either for like facilities across jurisdictions, or between different classes of infrastructure? Does this enhance or reduce efficiency? Does it increase compliance costs for firms operating in more than one jurisdiction?

Our council's main interest in Part IIIA is its role as the potential default regime for rail access in Queensland in the event that effective state arrangements are not developed. As such the national regime has worked satisfactorily to date; it was instrumental in encouraging the development currently underway of a comprehensive, and hopefully effective, state-based regime.

That said, the regime's role in this regard would be made more certain and reliable by introducing t he pricing principles and other enhancements already mentioned, and by streamlining the process. The appeal of the national access regime as an alternative to ineffective state arrangments is lessened by the expectation that it involves a minimum three year, and more likely five year, process.

Commonality across the mechanisms would be a good thing and, as mentioned, could be achieved by laying down guidelines for the characteristics of an effective access regime to be applied in NCC determinations and recommendations on certification and the ACCC's assessment of undertaking applications.

What are the pros and cons of Ministerial involvement in Part IIIA processes? Is involvement necessary to maintain support for a national access regime? Does it help to reduce the scope for regulatory failures? Is there sufficient onus on Ministers to justify departures from recommendations by the NCC? Would it be possible, or desirable, to provide for a greater onus in the legislation? What is the rationale for the different decision making structure for undertakings?

The role of ministers in deciding declarations and certifications, subject to review by the Australian Competition Tribunal is appropriate, as is the lack of involvement of ministers in determinations on terms and conditions of access to declared services. However, a designated minister who chooses not to follow an NCC recommendation to declare a service should be more strongly encouraged to publish the reasons for the refusal. This could be achieved by amending section 44H(9) of Part IIIA to say that if the designated minister fails to publish his decision and reasons, then she is taken to have declared the service.

Are current appeal processes effective and appropriate? How could they be modified to reduce processing times? What is the rationale for not having a general right of appeal in relation to undertakings?

Our council has no direct experience with the these processes.

Do current revocation procedures provide facility owners, access seekers and regulators with sufficient flexibility to address changing circumstances? Do they provide sufficient scope for the review of previous decisions in the light of growing experience with the Part IIIA regime?

However, we are aware of the substantial delays and expense incurred by the NSW Minerals Council in appealing against a deemed decision by the designated NSW minister not to declare the Hunter Valley coal rail system. Proceedings before the Australian Competition Tribunal were very legalistic and drawn out. This was were not helped by the tribunal's refusal to accept submissions from prior steps in the process, effectively requiring the parties to start over.

How well does Part IIIA perform in terms of administrative efficiency? To what extent are the regime's administrative costs an outcome of the complexity of the issues it is addressing?

Where are the main bottlenecks in Part IIIA processes? How might these be addressed? Would it be possible, or desirable, to use some form of sanction to increase the incentives for timely negotiation of terms and conditions for declared services?

Why is there a need for both the NCC and the ACCC to be involved in the administration of Part IIIA? If a single body were to administer the regime, which of the current two bodies would be preferable?

It would be preferable to have one body rather two performing all functions, which should be more efficient and promote greater consistency of decisions and recommendations across the various processes. Further, the distinction between the roles of the NCC (establishing access rights) and the ACCC (access terms and conditions) would be lessened by the concept mentioned earlier of all decisions and recommendations under Part IIIA being subject to common guidelines on key access terms and conditions.

Does the ACCC's role in policing other parts of the TPA that potentially impinge on access arrangements create any problems? Or does it help to promote a more uniform approach to related regulatory issues? Should these be considerations in determining which body should administer Part IIIA, were a single regulator model adopted?

Are additional measures needed to promote open and transparent procedures for decision making under Part IIIA? If so, what might these involve?

As mentioned, section 44H(9) should be amended to require the designated minister to publish the reasons for refusal of a declaration to avoid the facility being declared by default. Further, the NCC should be required by law to publicly review declaration and certification applications, rather than it being up to the council's discretion.

6 *Pricing issues*

Should Part IIIA include some explicit pricing principles/rules? Is there a need to tailor pricing regimes to the circumstances of particular industries? Does this militate against going beyond the inclusion of broad pricing principles in the legislation?

What should be the balance between pricing existing capacity efficiently, and encouraging investment in maintaining and developing existing facilities or in new facilities? Are the two goals necessarily at odds? For example, can two-part pricing regimes accommodate both short and longer-run requirements? How can access pricing regimes best deter the entry of firms that are unable to deliver services in related markets as efficiently as the facility owner?

If Part IIIA is to be used to deal with distributional concerns as well as efficiency goals, what are the implications for pricing arrangements?

What constitutes anti-competitive discriminatory pricing? For example, should pricing principles allow for some price discrimination between access seekers based on the nature and level of their demand?

Our council believes it would be possible to develop some generally relevant pricing principles that would enhance the certainty and effectiveness of the national access regime. Following are some suggestions.

- Prices should reflect efficient operating costs and embody a reasonable risk-related return on optimised assets.
  - The maximum allowable rate of return should be based on the facility owner's estimated weighted average cost of capital, with the capital asset pricing model approach used to derive the cost of equity.
  - Assets should be valued on an optimised deprival value basis.
  - Where current cost based asset valuation is used, the applicable ROR for determining revenue requirements must be a real rate.
  - Depreciation should be based on the lesser of an asset's physical or economic life, and where applicable, should be adjusted to reflect the expensing of expenditure on assets renewal.
- Prices should be determined on a fully distributed cost basis, with any unattributable costs allocated in accordance with users' relative demands on the separate elements of those common costs.
- Any market-based pricing must be constrained, such that:
  - Transparent, fully costed CSOs should be provided for users/groups incapable of paying average costs.
  - There should be no price differentiation among users within the same class.
  - Price differentiation between different classes of users should be confined to groups using the same assets and relate only to the allocation of the costs of those shared assets.
  - The admission of new users should not result in increases in charges on established users.

If so, how should regulators differentiate between efficiency-enhancing discrimination and anti-competitive behaviour? Does Clause 6.4 (f) of the CPA — stating that terms and conditions need not be exactly the same for all access seekers — provide sufficient scope for efficiency-enhancing price discrimination?

Should access prices be based on the existing configuration of facilities, or should they try to anticipate technological developments and the like? Would there be dangers in requiring regulators to speculate on future developments when setting access prices? If so, would such developments be better accommodated by reducing the time period for which particular access determinations apply?

What are the pros and cons of the various asset valuation methodologies available to access price regulators? What lessons have emerged from the methodologies adopted for industry-specific arrangements?

Are access holidays an appropriate option for addressing some of the adverse impacts of mandated access on investment in infrastructure facilities? What scope does Part IIIA currently provide for such arrangements? Under an access holiday approach, what sort of investments should be eligible? Should the duration of the holiday be uniform, as for a patent, or dependent on the facility concerned? Is the pricing regime in place for the Tarcoola to Darwin rail link broadly equivalent to an access holiday?

Should access pricing principles acknowledge that other regulations and policies may be a consideration in setting prices for access? Given the industry-specific nature of most of these 'external' influences, would it be possible to do any more than acknowledge their relevance in a set of general principles?

How well do the various access pricing methodologies rate against the considerations outlined above?.. etc ...

- Access prices for different classes of users should be posted, and should be in the form of multi-part tariffs reflecting fixed and variable cost drivers.
- There should be sufficiently precise definitions of costs, and sufficient information on the attribution and allocation of those costs, to demonstrate compliance with the user-pays and efficient cost pricing principles.

The above principles reflect our council's priorities to:

- guard against monopoly rent taking by ensuring that access pricing is user-pays based and cost reflective;
- encourage technical and allocative efficiency by not entrenching existing inefficiencies in asset valuations or prevailing operating practices; and
- encourage dynamic efficiency by ensuring that prices send appropriate signals for investment in new capacity and technology.

Implicit in these principles is a strong aversion to price discrimination. Our council would be deeply suspicious of any claim by a monopolist that it needed to be able to exercise price discretion in the pursuit increased efficiency; that simply does not accord with a monopolist's motivations. Regardless, we seriously question the ability of any access provider to make the judgements about relative demand elasticities required to give proper effect to the Ramsey pricing concept, and of any regulator to guard effectively against misuse of such pricing latitude.

The mining council favours a first-come-first-served approach to allocating access capacity, subject to right of renewal/first refusal for existing users. Unlike such administrative approaches, auctioning would afford no avenue for price controls or other safeguards against monopoly rent taking by the provider.

7 *Implications for Clause 6, industry-specific access regimes and other regulation*

How effective is Clause 6 in providing an underpinning for the national access regime and in establishing guiding principles? Does it have any major shortcomings? If so, how might these be addressed?

It is essential that applications for certification of state access regimes be subject to strict tests of effectiveness, whether those tests continue to exist in the CPA or are written into the TPA. Preferably, the existing tests would be expanded and made more exacting - for example by importing some of the above pricing principles - but as a minimum the NCC must continue to exercise reasonable ad discretion in their interpretation.

Now that Part IIIA is in place, is Clause 6 necessary at all? For example, could the States and Territories agree to legislative amendments to Part IIIA as an alternative to renegotiating Clause 6? Would such an approach be procedurally cumbersome? Would dispensing with Clause 6 require changes to pieces of legislation other than Part IIIA?

Aside from the proposed regime for postal services .. etc Do overlaps between Part IIIA and other pieces of legislation create problems which need to be addressed?

No comment.

8 *Any lessons from other countries*

What lessons can Australia learn from approaches used in other countries? Does the overseas experience suggest that any particular approach is generally superior? Does it point to differences in the impacts of the various approaches on individual interest groups?

No comment.