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**PRODUCTIVITY COMMISSION INQUIRY
REVIEW OF THE NATIONAL ACCESS REGIME**

SCT SUBMISSION

1. Executive Summary

Part IIIA of the Trade Practices Act 1974 as amended (TPA) needs to expressly include price and non-price principles so as to give some certainty to third party access applicants.

Part IIIA of the TPA should expressly require the Australian Consumer and Competition Commission to take into account the interests of existing users when considering whether or not to accept an Access Undertaking.

It is important that Part IIIA focus not only on the denial of access by vertically integrated providers, but also seek to address monopoly pricing of access by non-integrated access providers. Monopoly pricing will, in most circumstances, adversely affect competition.

It is also important for the Commonwealth and State Governments to recognize that an access regime will not be effective whilst strategic assets, necessary for access, are the subject of different regimes.

2. Specialized Container Transport

SCT was the first private company to commence an interstate freight train service between Melbourne, Adelaide and Perth in July 1995.

SCT is still a small family owned company operating up to three train services per week in the east/west corridor.

Since SCT entered the rail freight services market in 1995, freight rates have decreased by more than 30% directly attributable to the introduction of SCT's train services. This is one of the most significant benefits that have been delivered to Australian consumers following the Hilmer Committee's report. It is important to note that this benefit is not as a result of any existing undertaking or certified regime.

SCT has invested in excess of 50 million dollars in new rail infrastructure and rolling stock. In particular, SCT has constructed new terminals in Perth and Melbourne and is presently completing construction of a rail terminal in Adelaide. SCT has also invested in new state of the art refrigerated rolling stock.

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Since commencement of operations, SCT has on two occasions successfully applied to the National Competition Council for recommendations that certain services be declared pursuant to Part IIIA of the Trade Practices Act 1974 as amended (TPA).

3. Pricing Issues

Part III A of the TPA should include explicit pricing principles/rules that address the following:-

(a) Efficient Infrastructure

Access costs should reflect the cost of efficient provision of infrastructure. This is especially important where, for example "below rail" costs are not contestable in the same way that "above rail" operations are. A regime should impose some requirement on the access provider to demonstrate efficiency improvements by:-

- (i) introducing market based efficiency measures;
- (ii) comparing those agreed measures to relevant targets within agreed time frames; and
- (iii) regularly reporting the results of actual performance compared to targets.

(b) Sub-Standard Infrastructure

A regime should ensure that an access provider's costs do not reflect the costs of maintaining sub-standard infrastructure. The additional component of current maintenance cost that arises from past decisions to reduce maintenance resources should not now be borne by access seekers.

It is important that a regime require the access provider to specify the standard to which the infrastructure will be maintained.

Further, if it is determined in the future that a higher standard needs to be applied compared to the present standard, the access price should not be increased as a consequence unless those higher standards directly benefit operators and are not the result of past neglect.

(c) Cross-Subsidization

There should be no cross subsidization in circumstances where access prices are based on certain segments of an access provider's infrastructure and operators use certain segments and not others. The regime must prevent an access provider from applying the revenue from, for example, one rail corridor to another rail corridor.

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In the case of the transcontinental railway, the current access provider, Australian Rail Track Corporation Ltd (ARTC) has indicated in the past that income it has received from the east/west corridor may be potentially used for purchases and investments in other corridors of Australia. The access fee represents a cost to rail operators, and that cost translates into price signals. There is no cross subsidization by road competitors in this corridor and therefore, the ARTC, if they were to operate truly in a competitive environment with road, which they are, should not also cross subsidize other rail corridors.

(d) Increased Usage

The price for access needs to be regularly reviewed to ensure that where the access provider has achieved benefits from increased usage, these benefits are passed onto all operators by way of a lower access price.

Presently, there has been no significant reduction in the access price on the east/west rail corridor notwithstanding that there has been an increase in the rail volume.

(e) Price Determination

A regime needs to provide that where:-

- (i) the infrastructure provided by an access provider is broken up into segments; and
- (ii) operators use certain segments and not others,

then the access price for a particular segment should only reflect the cost of providing access to that segment together with an appropriate return on investment for assets relating to that segment.

(f) Return On Investment

The regime needs to provide that access providers are not entitled to earn a return on assets in circumstances where those assets were either provided to the access provider at no cost or were provided or constructed with the assistance of Government subsidies.

We submit that it is important that Part IIIA more than just acknowledge the relevance of "external" influences in a set of general principles. The regime needs to reflect the fact that it would not be fair for access providers to earn a return on assets or parts of assets that have zero historical cost.

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(g) Price Discrimination

The regime needs to provide that there will be no price discrimination between users with similar access requirements.

(h) Other Access Costs

A pricing regime needs to take into account that in addition to direct access charges, there are further costs arising from the demands of the access provider. Access providers currently seek to impose technical standards on operators that can add cost for the operator, and arguably are not relevant to the specific task. For example, standards required by access providers for private sidings can create unnecessary barriers to new entrants, and thereby limit benefits available through competition. The consequence is to increase the cost of rail transport, and make it less favourable compared to other transport options. These standards should be chosen by the operator on a fit for purpose basis, as provided by AS4292.

(i) Cancellation Fees

The regime needs to provide that when access has been granted, the access provider will not charge fees in circumstances where access is not utilised as requested.

Cancellation fees will hinder attempts by companies to promote growth and consequently will adversely impact on growth.

Cancellation fees/penalties for non-use are not required because the access provider is in a position to control capacity by refusing continued access in the event of under-utilisation.

In the absence of certainty in respect to price conditions, investor confidence will be adversely affected as will competition.

4. Non-Price Principles

We submit that Part IIIA of the TPA should include explicit non-price principles/rules addressing the following:-

(a) Term

Part IIIA needs to provide that the term or period for which access is to be granted be sufficient having regard to past investment and future investment by users.

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(b) Transparency

The terms of access need to be transparent in relation to both price and non-price conditions.

In the absence of transparency or openness, the user is not in a position to know whether the access price has been calculated in accordance with the pricing principles or know whether some operators and not others have benefited from price and non-price conditions.

(c) Indemnities

Part IIIA needs to provide that, when determining liability for damage to infrastructure to which access has been granted, the access provider must consider the following:-

- (i) whether it is reasonable to expect the access seeker to be liable for that damage having regard to the profit that could be earned by the user from being granted access; and
- (ii) whether the operator or access seeker is able to effect insurance, on reasonable terms, to cover that risk.

(d) The Standard To Which Infrastructure Must Be Provided

It is important for the terms of access to ensure that the standards required of access providers in maintaining the infrastructure is reasonable and at least as high as the standard required of users when accessing the network.

In the absence of certainty in respect to non-price conditions of access, investor confidence will be adversely affected as will competition.

5. ACCC Decisions

We note that Part IIIA of the TPA does not provide for appeals against the ACCC's decision on an Undertaking (although compliance with legal requirements is subject to the Administrative Decisions Judicial Review Act).

We submit that in the absence of a right of appeal for existing users and access seekers, it is important to have price and non-price principles or rules expressly provided for in a regime.

6. Protection Required for Existing Users/Operators

Presently, there is insufficient protection for existing operators or users in circumstances where:-

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- (a) Government infrastructure providers have granted those operators or users access to certain infrastructure for the purpose of promoting competition;
- (b) That access has been granted pursuant to a set of terms and conditions agreed to between those operators and the Government access provider;
- (c) It has not been previously necessary for those operators to make an application under Part IIIA of the TPA for a declaration;
- (d) Those operators have invested considerably to improve the services they provide;
- (e) The term or period of the access previously granted has or is about to expire; and
- (f) The infrastructure provider submits an Access Undertaking with the Australian Consumer & Competition Commission (ACCC) but fails to take into account the interest of those operators and in particular, their investment.

SCT is in this situation now. Having invested considerably in its business and having provided significant benefits to the Australian consumer, it is now forced to respond to an Access Undertaking submitted by the Government monopoly infrastructure provider, ARTC that does not take into account SCT's interests.

Part IIIA of the TPA provides that the ACCC must not make a determination (in the case of an arbitration of an access dispute) which would, amongst other things, prevent an existing user from obtaining a sufficient amount of the service to meet reasonably anticipated requirements.

We submit that Part IIIA should expressly require the ACCC to take into account the interests of existing users, like SCT, when considering whether or not to accept an Access Undertaking.

7. Role Of Ministers

We submit that Ministerial involvement adds to the uncertainty of Part IIIA procedures, and consequently, we support the proposal to remove ministerial involvement in the Part IIIA processes altogether.

If ministerial involvement is retained, then, at the very least, the reasons for decisions should be published and if there are no reasons, then the service should be declared.

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8. Part IIIA Should Cover Both Integrated and Non-Integrated Facilities

We strongly support the position that there should be explicit recognition in Part IIIA that the regime covers eligible services provided by both vertically integrated and non-integrated facilities (Proposal 5.2).

We do not believe that an access regime should be any less prescriptive only because it deals with a service provided by a vertically separated facility.

In the case of the rail industry, the non-integrated ARTC has submitted that the "competitive forces in the markets from which it derives a significant portion of its revenue do not permit it to conduct its business with market power". We strongly disagree with this statement. ARTC has in the past unilaterally altered existing terms of access to the detriment of operators, with the threat of denying access if those terms were not agreed upon.

Further, a vertically separated access provider may act in a way that concentrates the market with a few access seekers which would limit competition.

An example of this may be found in the Access Undertaking presently before the ACCC where the ARTC has proposed that train paths be auctioned.

The auctioning of train paths would favour larger companies, reduce the number of smaller companies wishing to remain or enter the market and consequently reduce competition.

The issue of denial of access and the price and non-price conditions of access are not separable and need to be addressed in tandem.

Further, it is not correct to say that monopoly pricing of access results mainly in the transfer of income. Monopoly pricing (or the denial of access) could adversely affect competition as noted above.

Part IIIA should therefore not just focus on the denial of access by vertically integrated providers, but should seek to address monopoly pricing of access by non-integrated providers.

9. Undertakings Considered by the ACCC

As noted in the Issues Paper, the ACCC is presently considering whether or not to accept an Access Undertaking submitted by the ARTC.

In view of the infancy of rail access arrangements in Australia, we submit that it is not appropriate for the ACCC to be presently considering such an important undertaking when the Productivity Commission is simultaneously conducting its Inquiry into Part IIIA and considering submissions such as those in this paper.

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10. Industry Specific Regimes

We do believe there is a need to tailor pricing regimes to the circumstances of particular industries. Consequently, we submit that there would be a benefit in industry-specific regimes that would allow more specific price and non-price guidelines that may not otherwise suit other industries.

These industry-specific price and non-price guidelines would provide greater certainty to market players and increase investor confidence and competition.

11. Coverage of a Regime

One of the main limitations of the existing national access regime is that the "services" to be covered do not always include strategic assets that are important for access.

In the case of the rail industry, we are being required to submit our comments on an Undertaking (submitted by the ARTC) where that Undertaking does not address critical assets which, for the most part, are the subject of other access regimes. For example, the Kalgoorlie to Perth interstate rail line, which is an integral part of the transcontinental railway service, is the subject of another access regime.

The Commonwealth and State governments must recognize the fact that an effective national access regime cannot exist whilst strategic assets, critical for access, are dealt with under different regimes.

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