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**THE CHAMBER OF MINERALS AND ENERGY  
OF WESTERN AUSTRALIA INC**

Ref: et1347

31 May 2001

**Facsimiled Letter: (02) 6240 3311**

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

Dear Ms DiMichiel

**REVIEW OF PART IIIA OF THE TRADE PRACTICES ACT**

On behalf of the Western Australian minerals and energy industry, the Chamber of Minerals and Energy wishes to make the following comments on the Productivity Commission's position paper *Review of the National Access Regime*.

**General**

The Chamber's members undertake over 90% of the State's minerals production and exploration. In an environment of inexorably falling real prices, the challenge to remain competitive is being met by continued attention to input costs. Microeconomic reform is a key element of competitiveness and hence the Chamber has a keen interest in this area. Chamber members are both access seekers and facility owners and thus have seen the impact of the part IIIA provisions from both perspectives.

On a general level, the Chamber's position is that optimal outcomes result from commercial negotiations where agreement is reached on a basis that meets both parties' interests and, in particular, that the property rights of owners should not be unduly infringed. However, the Chamber does acknowledge that there may be circumstances where the outcome of commercial negotiations may not be the most efficient outcome and that there is a case for third party access provisions. Chamber members have not expressed major concerns with the way the part IIIA provisions have operated to date, although there does appear to be a concern that the prospect of regulated rates of return may be deterring investment in items of infrastructure potentially subject to part IIIA coverage. The relatively few determinations to date mean there still remains a substantial degree of uncertainty as to the circumstances in which part IIIA applies and the outcomes of declaration.

In these circumstances the Chamber believes that the current review is timely and looks forward to changes to the regime addressing these issues.

## **Position Paper Recommendations and Findings**

### *Potential Costs*

The Chamber concurs with the paper's findings that part IIIA access will bring with it costs that need to be balanced against the benefits and that the major such cost is discouraging future investment owing to a perception of reduced returns. The Chamber is aware from member feedback that a number of facility owners take this view. Another potential cost is inefficient behaviour by facility owners to preclude declaration – not allowing for expansion for instance because of fears that spare capacity could be used by competitors through the part IIIA process.

The minerals and petroleum sectors in WA are generally located in remote areas and are increasingly dominated by a small number of large companies. Provision of potential third party infrastructure may provide significant advantages to a company's key competitors. The provision of infrastructure in ways to avoid such a benefit is a logical business response. If the community seeks additional resource development, it may have to allow appropriate rates of return to achieve this.

### *Retention of the Regime is Warranted*

The Chamber agrees with the paper that, despite the real issues identified, a national access regime is still justified. There is little doubt that third party access provisions, whether actually used or seen as part of the negotiation framework, have resulted in increased third party access to monopoly facilities, with greater economic efficiency and productivity benefits.

The Chamber also agrees with the paper's conclusion that, despite this clear overall benefit, there are a number of specific issues requiring attention.

- The lack of pricing principles to guide negotiations and underpin regulatory determinations.
- Efficiency is pursued indirectly via promoting competition.
- Differing criteria according to the access route chosen.
- Problems with incentives to deliver new infrastructure projects.
- Lengthy and complex administrative procedures.

### *Recommendations*

The Commission has addressed these concerns via two series of recommendations. The first, "Tier 1 Recommendations" are those it regards as self evidently beneficial while the second are considered by the Commission to be more contentious.

### *Objects Clause*

The paper proposes insertion of an objects clause, stating that the ultimate goal of access is efficiency. The Chamber does not disagree, however, there is a concern that focusing on efficiency may suggest that competition is not in most circumstances the best way to promote that efficiency. The Chamber suggests consideration be given to including a statement along the lines that competition will generally be the best way to achieve efficiency and that exceptions to this rule need to be justified. A similar philosophy permeates the Competition Principles Agreement.

### *Pricing Principles*

The insertion of pricing principles to provide greater certainty once access is granted appears sensible, although there will be a trade-off between the certainty given and the flexibility required to take account of the industries involved and their individual requirements.

### *Change to s 44G(2)(a)*

It is proposed to change the test so that there must be a substantial increase in competition rather than just an increase as at present. The aim is apparently to prevent trivial declarations. The Chamber is not convinced that this is a sufficient problem to require changing the criterion.

A second tier recommendation is to make more fundamental changes to the declaration criteria. The Chamber agrees with the Commission that this would tighten the application of declaration from its current scope, however, it repeats the statement above that there is little evidence of excessive use of the declaration process. It does not seem that this would address in any way the concerns over investment disincentives as some facilities would continue to be subject to declaration and there is no linkage between the proposed new criteria and marginal projects.

### *Information Provision by Providers of Declared Services*

The Chamber concurs with the proposed requirement to require the owner of a declared service to provide sufficient information to access seekers, given the very high degree of information asymmetry between access provider and seeker. While facility owners should not be required to provide commercially confidential information, most access regimes the Chamber is aware of do have provisions requiring the facility owner to make certain information available. This generally includes capacity available, pricing principles and/or reference prices. Providing all details of previous access arrangements probably goes too far, however, some suitably sanitised summary of what other access seekers have been able to negotiate might be appropriate.

### *Arbitration to Commence 30 Days After Declaration*

Currently, the impact of declaration is to provide an enforceable right to negotiate access. If this fails, the seeker can then seek arbitration and presumably would do so. The Chamber is not convinced there is any requirement for an automatic initiation of arbitration.

### *Extension of Certification to all Regimes*

The Commission proposes that the Commonwealth Government's access regimes should be subject to part IIIA and that privately provided services subject to statutory regimes should be similarly subject. The Chamber agrees. There is no good reason for treating these cases differently and this will add to regulatory consistency.

### *Principles for Assessing Effectiveness of Access Regimes*

As a second tier proposal, the Commission argues for the inclusion of the principles used to assess effectiveness within part IIIA. Leaving aside exactly what these principles are, it is not clear that the current situation where the principles are contained within the Competition Principles Agreement is deficient as long as their status in assessing declaration applications is clear and the Chamber argues that it is.

There is a further proposal that part IIIA should include a number of elements. The Chamber reiterates its comments above concerning the objects clause but does not disagree with the proposed provisions.

#### *Part IIIA Undertakings*

The Commission suggests that there should be an ability for an access provider to lodge an undertaking after a service has been declared. The Chamber agrees with this as it provides an additional incentive to lodge undertakings post declaration which may prove a more mutually satisfactory process than the individual negotiate-arbitrate model currently applying post declaration. However, it should be noted that the incentive to put in an access undertaking prior to declaration as protection will be lessened as owners would now have the ability to take a chance on not being declared and, if they were, then to lodge an undertaking.

The Commission also proposes that the criteria for assessing undertakings be aligned as far as possible with arbitrations for declared services and testing the effectiveness of existing access regimes. The Chamber is less comfortable with this recommendation as, despite the attractions of uniformity, one of the advantages of the undertaking route is that it offers a much greater amount of flexibility than effective access regimes, allowing for consideration of an industry's particular needs.

#### *Access Pricing Principles*

The Chamber supports the proposed access pricing principles, particularly the clarification that price discrimination is permissible. Currently, this is not particularly clear within the legislation or clause 6, being put forward as a negative – “access need not be on exactly the same terms and conditions” – which may or may not be the same as price discrimination.

#### *Price Cap Arrangements*

The Chamber supports greater coordination in developing appropriate regulatory price caps and developing additional information will be useful in this area. While price cap regulation has clear efficiency attractions, it is not clear, however, that the second tier recommendation to incorporate price caps in the certification criteria are warranted, as there may still be some instances where alternative regulation is appropriate. The Chamber notes, however, its preference for light handed, output based regulation.

#### *Future Part IIIA Administrative Arrangements*

The Chamber agrees with the proposal to remove the decision making role of ministers in part IIIA declaration processes. Provided the current appeals mechanisms are retained, it is not clear that the ministerial role adds anything to the process. Indeed, the Chamber notes that a not unusual pattern has been for an NCC recommendation for declaration, a rejection by the relevant State premier followed by eventual acceptance by the Treasurer. Certainly this intermediate step is of little substance.

The Chamber is less convinced, however, that the ACCC should take over all part IIIA responsibilities. While there must be some degree of overlap at the moment, there is some merit in having a separation between the body making the decision on whether the regime is adequate and that determining what regulatory outcomes should apply to that regime. Of course, under this split, the role of the ACCC in undertakings is somewhat anomalous.

### *Appeals*

The Chamber agrees with the proposal to allow full merit review by the Competition Tribunal on applications decisions. The Chamber does not, however, agree with the second tier proposal to remove appeals on declaration decisions. Regardless of whether they can be justified on utilitarian grounds, declarations are necessarily an infringement of property rights and must have adequate means of review.

### *Access Holidays*

The Commission notes that access regulation may have the effect of discouraging only marginally profitable investments from proceeding and that this would deny the community the benefits of these investments. The Chamber agrees with this finding. The Commission proposes that this be dealt with via an "access holiday" which would provide that access not apply for a specified period. Presumably during this time, prices would reflect purely commercial negotiations, with no recourse other than not to use them if customers find the terms unreasonable.

The obvious difficulty is in determining which projects should merit this exemption and for how long. Underlying this proposal is the notion that, if the project does not go ahead, then the community will not enjoy the benefits and if, access is on commercial terms, then by definition users will be better off than before otherwise they would not contract. Of course, this applies to any access regime, no matter how above normal the returns, and so cannot be used as a selection criterion. Presumably reference would have to be made to some normal rate of return. A difficulty here is that regulators are already making decisions on a fair return and these returns are not being regarded as sufficient by industry. There is no clear solution to this problem.

One possibility is for infrastructure proponents to participate in a reverse tender of terms and conditions for a standard project, with the lowest bidder able to charge those terms for a specified period. However, this would only be applicable in sufficiently deep markets, would raise difficulties in cases where private firms wish to develop their own ideas and still provides no answer to the question of how long the holiday should be for.

### *Coverage*

A case currently before the National Competition Council, where the facility owner has argued that part IIIA has no application, has highlighted the still considerable degree of uncertainty surrounding the provisions. While case by case assessment is appropriate given the need to balance the costs and benefits of declaration, some legislative clarification of what types of facilities are subject to coverage might be appropriate. Decisions as to declaration would of course remain subject to the full part IIIA process.

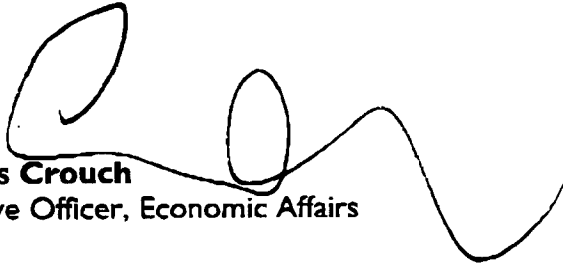
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I hope that these comments are of assistance. Please contact me if any further information is required.

Yours sincerely

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long, sweeping tail that ends in a small hook.

**Charles Crouch**  
Executive Officer, Economic Affairs