GOVERNMENT OF WESTERN AUSTRALIA

Submission to the

Productivity Commission Inquiry into Part IIIA of the *Trade Practices Act 1974* and Clause 6 of the Competition Principles Agreement

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PRODUCTIVITY COMMISSION INQUIRY INTO PART IIIA OF THE *TRADE PRACTICES ACT 1974* AND CLAUSE 6 OF THE COMPETITION PRINCIPLES AGREEMENT

WESTERN AUSTRALIA'S FIRST SUBMISSION

EXECUTIVE SUMMARY

Introduction

- Western Australia recognises the importance of access regulation in promoting economic activity and increasing efficiency of production. Accepting the merits of both the generic Part IIIA access framework and the various industry-specific regimes, Western Australia suggests that there is some scope to improve the framework so as to provide greater certainty in its application and ensure that incentives to invest in key infrastructure industries are not distorted.

- Access on reasonable terms to the services of gas pipelines and transport facilities, for example, is important in development of the State's vast but isolated oil, gas and mineral reserves. Western Australia welcomes the opportunity the review affords to consider the effectiveness of Part IIIA as a key component of access regulation in Australia, and options for improvement.

Objectives and Key Principles of Access Regulation

- Access, at the correct price, permits competition to emerge in markets that rely on monopolistic providers for key business inputs. The benefits of competition can include lower prices for business and household consumers, improved export competitiveness, and overall improvements in the allocation of scarce resources.

- Access regulation should seek to balance investment incentives and reasonable returns to the provider against the broader social and economic benefits of reducing the scope for monopoly pricing. In some cases, such as the telecommunications access regime and the Gas Code, complementary criteria apply to inform this regulatory balancing of interests.

- In an industry with concentrated market power (and in related industries where providers are vertically integrated), tracking financial returns serves as one method for identifying possible exploitation of monopoly power. This raises the question of potential integration between prices surveillance, other information gathering powers for regulators and access regulation.

- One type of cost access regimes can impose is over-regulation due to overly extensive coverage. The key risk in this regard is that substitutes may be treated differently, introducing distortions to the market and investment incentives. Given that access regulation intrudes significantly into commerce and private investment, it is, prima facie, desirable to limit its application. Containing the scope of access regulation by focussed tests for its application is seen as important.

- A second potential cost arises from possible errors in regulatory outcomes where access regulation is used. While there is a place for the generic and administrative access procedures of Part IIIA, primacy should be given to sector-specific regimes enacted by Parliaments. Discretion as opposed to prescription is considered necessary where the individual facts of a case determine the appropriate terms and conditions. Co-operation by all parties, and consistency among jurisdictions and between industries are also important to promoting confidence and comparability in regulatory outcomes.

Operation of Part IIIA and Industry-Specific Lessons

- The Federal Court decision in the Hamersley/Robe River case raised questions as to whether interstate and intrastate services can be treated as distinct services by access regimes. By potentially casting doubt on the competence of States to establish stand-alone intrastate regimes, the decision exacerbated the tension in clause 6 between the desirability of consistent interstate access provisions and the constitutional role of States in establishing their own access regimes.

- This tension was manifest in the course of Western Australia's application for certification of its rail access regime, which was ultimately withdrawn. The Inquiry could consider how to improve Part IIIA's capacity to encourage States to provide consistent access regimes for similar services, without infringing on the States' constitutional powers.

- The Hamersley case also raised the question of the scope of the "production process" exemption from the definition of "service". The broad interpretation of the exclusion may reduce the likelihood of declaration where there is vertical integration, a result seemingly at odds with Hilmer's view that an access regime would focus on vertically integrated monopolies.

- The NCC has appropriately suggested that the term "uneconomical to duplicate" requires evaluation on the basis of what is economically optimal for society as a whole, taking into account matters such as the environmental dis-benefits and disruptions to civic amenity that might be associated with duplicating infrastructure. If there is general agreement with this approach, it would provide certainty to include these matters in Part IIIA.

- There is a question whether the "uneconomical to duplicate" criterion adequately rules out declarations in cases where real substitutes exist, for example where intermodal competition precludes a natural monopoly existing, suggesting that regulation is not needed. In such a case, regulation of one industry and not the other could be potentially deleterious to longer term, more robust competition where the other industry is highly concentrated. The Inquiry could consider whether the criterion appropriately reflects the significance of substitutability and the extent of competition in substitute markets.

- Clause 6(2) does not make sufficiently clear what "difficulties" need to be identified before a State regime is refused certification as an effective regime, giving rise to a risk that it can be used as a veto wherever there is any interstate effect. Clause 6(2) is intended to promote **consistency** across access regimes with an interstate aspect. The more exacting task of achieving **uniformity** will generally require sector-specific agreement between governments rather than a Commonwealth administrative decision.

- Legislated, industry-specific regimes are considered by Western Australia to be superior to other means of establishing access; and Part IIIA should be constructed so that these are the required regulatory route wherever there is currently any prospect of forum shopping or procedural overlap. For example, an amendment to Part IIIA could remove the ability of service providers to submit undertakings to the ACCC in relation to services already subject to an effective regime, such as (new) gas pipelines which are potentially regulated under the Gas Code.

- The NCC's explanation for certifying the NT/SA rail access regime but not the Western Australian regime is that the development of the Alice Springs – Darwin line requires "special treatment in the Certification process". The Inquiry could examine whether the effectiveness tests adequately preclude differential application of the clause 6(2) test.

- There is a risk that the broad discretion given to the NCC in deciding what is an "effective" regime leads the NCC to cover all bases by seeking regulatory "purity", without sufficient attention being given to the costs of this approach. Costs are evident both in the time and effort taken to achieve certification, and the overly prescriptive nature of the regime that results. There appears a need to strike a balance between allowing a regime based on agreed principles to work and develop in practice against overly scrutinising its design in theory.

Improving the Framework

- Greater recognition should be given to state-based regimes that generally comply with the Clause 6 principles of effectiveness. One limited change option would involve permitting interim certifications (eg. pending developments nationally or in neighbouring states). This may encourage a State in which the industry in question is particularly important to take the lead on access and influence the direction of national developments.

- There is an argument for having a single regulatory body for Part IIIA. The ACCC would have the advantage of being able to link its approach to access issues with its general regulatory approach to competition issues. The ACCC has responsibility for declaration issues in regard to telecommunications. Similar arrangements could be considered for Part IIIA.

- Maintaining Ministerial responsibilities for declaration is seen as an important check in the process. Ministers are subject to requirements of due consideration and natural justice, which are important constraints on their exercise of administrative power. The dual process of NCC and Ministerial consideration may not be necessary when it is considered that Ministers will seek expert advice in carrying out their administrative responsibilities.

1. INTRODUCTORY REMARKS

The Western Australian Government is committed to implementing the National Competition Policy (NCP). This broadly entails:

- systematically identifying and analysing the impact of barriers to competition;
- considering the community-wide merits of retaining any barriers; and
- ensuring that regulatory frameworks achieve their objectives in optimal ways.

The current review of Part IIIA of the *Trade Practices Act 1974* (TPA) and Clause 6 of the Competition Principles Agreement (CPA) is part of this continuing exercise and also satisfies participating governments' undertaking to review the CPA after 5 years of operation.

Access regulation is a tool that can overcome barriers to competition presented by monopolies. In the first instance, it seeks to do this by encouraging commercial negotiations between the owners and prospective users of key infrastructure; or where commercial negotiations fail, providing for regulated ceiling terms and conditions for key services. However, regulating ceiling terms and conditions can present significant risks insofar as any regulatory errors can lead to inefficiencies or wealth transfers. Key inefficiencies can include distortionary impacts on infrastructure investment incentives causing over or under-investment in inputs. Wealth transfers can also occur when regulatory errors redistribute resources unfairly between the parties involved.

Western Australia recognises the importance to the Australian and State and Territory economies of administratively effective access regulation. With the lion's share of Australia's oil and gas reserves, Western Australia is well positioned to realise broadly based benefits from increased economic activity from the national gas pipelines access regime. Moreover, given the State's vast but isolated mineral endowments, effective and competitive rail freight, port services and other forms of transport will be of vital importance to the State's international competitiveness and economic well-being.

Access regulation, together with some broader structural reforms that seek to reduce the anti-competitive impacts of concentrated market power, will underpin more effective competition in key input industries resulting in benefits not only to the direct users (eg industrial gas users and commercial rail freight customers) but to the economy as a whole.

Therefore the Western Australian Government welcomes the opportunity to participate in this review of the National Access Regime. It is hoped that this review process will:

- bring greater depth and clarity to the arguments for access regulation;
- explain the circumstances in which it is an appropriate regulatory initiative;
- clarify the objectives of the national regime;

- clearly identify the existing and potential regulatory alternatives including State-based access regulation; and
- having determined the ongoing scope for access regulation, suggest improvements to the regulatory processes that may apply.

This submission reflects the views and experience of a number of policy and regulatory agencies within the Western Australian Government. The Department of Resources Development, Department of Transport, Office of Energy, the Rail Freight Sale Task Force and the Treasury Department have contributed to this submission. The submission also incorporates suggestions and comments from the Office of Gas Access Regulation which supports the Western Australian Independent Gas Pipelines Access Regulator.

A number of State Government Trading Enterprises (eg. Western Power Corporation, the Water Corporation and the Port Authorities) have also been encouraged to lodge independent submissions, recognising that as operating entities, they may have particular views on the practical operation of access regulation.

2. OBJECTIVES AND KEY PRINCIPLES OF ACCESS REGULATION

This section provides Western Australia's views on the objectives and key principles underlying access regulation. It is hoped that this can assist the Inquiry in promoting discussion of the objectives of the national regime and contribute to debate on the place of access regulation within the broader picture of economic regulation.

Access regulation as currently applied in Australia, is generally driven by a desire to promote more efficient use of strategically significant or 'essential' infrastructure by ensuring the availability of services provided by such facilities. In one sense it could be said to be based on a presumption that duplication of infrastructure is wasteful from a societal viewpoint. However, duplication can also be the hallmark of healthy competition.

Access, at no higher than the correct price, permits sustainable competition to emerge in markets that rely on monopolistic markets providing key business inputs. The benefits of competition can include lower prices for business and household consumers, improved export competitiveness, more efficient investment in upstream and downstream markets and overall improvements in the allocation of scarce resources.

Access regulation is based on the assumption that where a service provider enjoys a natural monopoly there is a risk that the owner may seek to extract excess profits flowing from provision of services through the facility to the detriment of society as a whole. In ordinary circumstances, the capacity to earn superior profits may attract new entrants to the market, driving down profitability to ordinary levels. To sustain a monopoly position or a situation of efficient advantage, barriers to entry are required. The owner can then exploit the lack of alternatives available to those needing to acquire services provided by the infrastructure, by setting prices higher than would be sustainable in a competitive market, or excluding use of the facility by competitors altogether.

Left unchecked by competitive responses or appropriate intervention, the end result of such monopoly pricing behaviour is generally an under-utilisation of the facility's services accompanied by excess consumer end prices and under-consumption of the final goods and services that rely upon it. There may also be an international dimension to the impacts such as reduced export competitiveness that diminishes the quantity and value of exports (especially in a price-taking scenario). In that sense, monopoly pricing could be seen as one method of partial exclusion, in that a pricing policy may be used to constrain the outputs of competitors. Unwinding these impacts therefore increases consumer welfare domestically and international competitiveness.

The key behaviour that access regulation seeks to address could be characterised as the *potential* misuse of market power by facility providers. In this sense access regulation seems to differ from provisions of Part IV of the TPA that prohibit the actual misuse of market power for proscribed purposes and other anti-competitive conduct, providing civil remedies that are only available after the fact.

The potential for misuse of market power is not reliant upon, but may be heightened by the simultaneous operation of the monopoly in upstream or downstream markets (vertical integration). In situations where access regulation is considered an appropriate policy response, the presence of vertical integration can cause difficulties in ascertaining the true costs of the service with monopoly characteristics; and it is likely to be difficult to ensure that third party users are not disadvantaged compared to the 'own use' of the service by the upstream or downstream arms of the monopoly. Issues similar to those arising under vertical integration may arise through less formalised arrangements such as strategic alliances.

That a provider is (over) exploiting its position could be evident in it earning superior returns on investment over the longer term than providers of similar facilities in more competitive circumstances (eg. markets in other regions). Evidence of a provider successfully exploiting a vertically integrated position may also include that it possesses an ability to earn superior returns in a related activity, or to prop-up an otherwise loss-making venture which through 'transfer pricing' or 'cross-subsidisation', hides the true earning power of its monopoly facility.

Tracking financial returns may serve as one indicator of exploitation of monopoly power. This suggests some potential for integration between prices surveillance, or refined information gathering powers and access regulation - at least in determining the scope of services or industries in which access is necessary and constitutes the most effective regulatory response. However, high returns *per se* do not of themselves warrant regulatory intervention. Superior earnings may be due to proprietary technology or efficiency - the realisation of which may encourage efficient new entry; or as in the case of intellectual property rights reflect the opportunity to realise returns from successful development of new technology in high risk industries. It would also appear sensible to consider whether, due to the place that a service may occupy in the production chain, it would have an appreciable impact on competition (eg. mis-pricing at a later stage in production may be less distortionary), and whether real substitutes may be available (eg. alternative transport services, alternative fuels).

One key principle of access regulation is that in the first instance, commercially negotiated outcomes are preferable to more direct regulatory intervention. However, the threat of more onerous outcomes (such as declaration and arbitration) increases the incentive for the party with the superior bargaining position to attempt effective negotiation. In some circumstances, where negotiations fail, access regulation involves a power to arbitrate or determine the ceiling terms and conditions as a starting point for further negotiations.

Determining terms and conditions as a last resort (where negotiations fail) is consistent with a view that the greatest degree of regulatory intrusion should be reserved only for those cases where the potential for monopoly pricing is actually misused. That said, the potentially intrusive nature of setting prices also requires other constraints to the application of such regulation. Public consultation, transparency and review of decisions provide important checks in the process.

The provider of a monopoly facility may be able to exert substantial market power in a range of circumstances, such as:

- The facility may be a natural monopoly in that the average costs to the owner of serving additional customers declines over all levels of production. It is therefore uneconomic for an alternative provider to enter the market. This may be due to significant economies of fill or economies of scale, the large fixed costs involved in building a competing facility and a climate of insufficient overall demand, or simply the superior technical efficiency exhibited by the provider in operating the facility. The Goldfields Gas Pipeline is possibly one example of such a facility.

- The facility may be owned or operated by a statutory monopoly such as a public utility with a reserved market. Cross-subsidisation may occur between the reserved and contestable parts of the market such that the owner leverages off its reserved market to gain an advantage in the contestable part of the market. The Parmelia Gas Pipeline exhibits these characteristics.

- The facility may have formerly been a statutory monopoly and the existing ubiquity of the infrastructure and services provided by the utility may be sufficient to sustain monopoly power for a period while competition emerges in response to the superior profit opportunities. In such cases structural reform and effective access regulation may be appropriate complementary policy responses to permitting the emergence of efficient competition. The Dampier to Bunbury Natural Gas Pipeline fits into this category.

There are various other principles and policy outcomes that access regulation has sought to address. Promoting upstream or downstream industry development and increasing the positive externalities of networks by increasing the number of users are often compatible objectives to those of access regulation. Various industry-specific regimes have such particular policy objectives – for example the telecommunications access regime has as an overriding objective to promote the long term interests of end users by promoting competition, encouraging efficient use of infrastructure and fostering any-to-any connectivity.

Access regimes can and have pursued broader policy objectives than the promotion of competition or efficient investment objectives of Part IIIA, for example the pursuit of state or industry development. In Western Australia, access regulation or similar provisions, have been applied to participants in particular industries (eg. the National Third Party Access Code for Natural Gas Pipeline Systems (the Gas Code)), to only the most significant facilities in an industry on a discretionary basis (eg. petroleum pipelines common carrier provisions), and in some cases to individual facilities or developments (eg. under State Agreement Acts).

Some general propositions that emerge from the above discussion are as follows:

The addition of clear objectives to the National Access Regime may assist in reducing uncertainty as to its application. Competition should not be for its own pure sake and nor should regulation. Both may be appropriate where they serve to achieve outcomes in the community's interest. Access regimes may quite justifiably be used to achieve broader policy objectives than those countenanced through Part IIIA, as long as this is consistent with promoting sustainable competition and is not against the public interest. Access regulation may not be the best response to all aspects of monopoly power.

Access regulation seeks to address a perceived imbalance between the bargaining position of the facility provider and third-parties seeking access. Excessive pricing is considered to be as important to an access seeker as other exclusionary tactics.

Access regulations should seek as far as possible to promote the type of commercial negotiations that would take place in a competitive market between willing buyers and sellers of services. In circumstances of disagreement, where the ceiling terms and conditions are arbitrated or determined by a regulator, efforts must be expended to ensure that the outcome is fair and reasonable to the parties concerned.

Access regulation should seek to balance the investment incentives and reasonable returns to the provider against the broader social and economic benefits of reducing the ability to price monopolistically. In some cases, such as the telecommunications access regime and the Gas Code, additional (complementary) statutory criteria apply to inform this regulatory balancing of interests. These may be appropriate if they are consistent with the objective of facilitating efficient competition.

It would be helpful for the Inquiry to address the degree to which dealing with exclusionary behaviour and monopoly pricing with access regulation is likely to result in improved efficiency rather than only distributional changes. With the focus of access regulation on securing the 'correct' price by exhaustive consultation, exercise of regulatory discretion and aspirations of continuous improvement of pricing methodologies, it is difficult to translate or apportion the potential for mis-pricing (and the actual amounts by which prices are 'wrong') into the component theoretical effects.

It would also be helpful if the Inquiry were to outline the relative importance to the economy and the community of the industries in which access is currently applied. The current focus on 'transmission and transportation services' (eg. telecommunications, gas, electricity, rail, etc) could be compared with key 'transformation' activities in which a degree of (regional) monopoly power is evident and shielded from actual competition by transport cost differentials (eg. petroleum refining and marketing).

Turning to potential costs of having an access regime, the initial risk of significant cost derives from inappropriate coverage by an access regime, eg. coverage of a facility that does not have market power because of the existence of alternative services which can be substituted at low cost. Given the highly intrusive nature of access regulation into areas of commerce and private investment, it would appear desirable to limit its application where benefits are small. Parliaments have a role in regard to managing the growth of industry-specific regimes and ensuring they are appropriate to the regulatory objectives. Responsible Ministers and the Regulators have a role in applying the statutory tests and balancing of interests of the administrative path.

The second major area of potential cost arises from errors in regulatory outcomes. Provision for appeal by aggrieved parties against such regulatory decisions seems to be an appropriate safeguard, although the resulting delays and disputes carry their own cost. Facilitating comparison between outcomes and with widely used indicators of financial returns will also be important should the number of regulated services grow.

It is Western Australia's observation that the various Regulators appear to co-operate in the interests of pursuing national consistency. Such co-operation aids comparison of regulatory outcomes and may work to reduce the risk of regulatory errors.

3. GENERAL ACCESS ISSUES

This section outlines a number of general comments and concerns with the application of Part IIIA with reference to the earlier discussion of the objectives and principles of access regulation. Throughout the section, various themes raised by the Inquiry's issues paper are addressed.

Application of Part IIIA

The following comments are offered in regard to the provisions of Part IIIA which define the scope of the circumstances in which the National Access Regime may apply.

Definition of Service

A threshold requirement for application of Part IIIA is that there is a "service" to which Part IIIA can apply. The definition of "service" raises several difficulties, some of which were considered by the Federal Court in the Hamersley and Robe River case, but remain unresolved. Western Australia does not have a view on whether Hamersley's rail service should ultimately have been declared, but makes some observations on some apparent consequences of the decision.

One area of uncertainty is whether or not services are different services by reason only that they are respectively interstate and intrastate. Given the potential for constitutional complications when State legislation impacts on interstate services, it would appear sensible that Part IIIA should leave open the option of a State access regime applying only to intrastate services, quarantined from interstate services in appropriate circumstances.

However, the Federal Court's decision could make it difficult to create an intrastate-only regime where there is a comparable interstate service. If a regime purporting to cover only intrastate services in fact also covers interstate services, it becomes more difficult for the State's regime to be evaluated on its merits, without also considering how it fits with other regimes. The problems that this scenario has caused for the NCC in considering the effectiveness of Western Australia's rail access regime are discussed later in this submission.

This uncertainty exacerbates the tension in clause 6 between the desirability of having consistent interstate access provisions and States' constitutional role in establishing their own access regimes.

The Inquiry could consider how to improve Part IIIA's capacity to encourage States to provide mutually consistent access regimes for similar services, without infringing on the States' constitutional rights and powers.

The Hamersley case also raised, without adequately resolving, the question of the scope of the "production process" exemption from the definition of "service". The Federal Court decided that a private rail service in the Pilbara formed part of a production process and therefore did not constitute a service to which Part IIIA could apply.

The incorporation of a production process within a broader service potentially subject to declaration may in fact be a defining feature of vertical integration. The Federal Court's broad reading of the production process exclusion may reduce the likelihood of declaration where there is vertical integration, a result at odds with Hilmer's suggestion that the focus of the Commonwealth's access regime would be on vertically integrated monopolies.

For example, any rail owner could potentially bring its services within the grounds of the exclusion by adding a goods handling business (say coal, wheat, minerals) to its rail transport business, and configuring its goods handling arrangements in a manner similar to the infrastructure owner in the Hamersley case. The same could presumably be done for ports, airports, and other goods-handling or transport-related services.

Under the Federal Court decision it might not even be necessary that the infrastructure owner itself uses the infrastructure for a production process. For example, if a firm (not the runway owner) used a runway to land planes in a particular order, to facilitate the packing of goods in a way that produced a product characterised as 'packed goods', would this amount to a production process? By analogy with the Federal Court's decision, it could be argued that this use of the runway exempted all services provided by the runway, whether or not the services are involved in producing "packed goods", from being subject to Part IIIA. This would not appear consistent with Hilmer's findings, clause 6 or the policy underlying Part IIIA.

In deciding that the rail service was not a "service" for the purposes of Part IIIA, the Federal Court also appears to have been influenced by the need that would result to negotiate scheduling and timepaths as part of the regulatory process. However, these matters can be negotiated under other avenues to access contemplated by Part IIIA - other access regimes, access undertakings and access negotiations. It seems anomalous that in the case of declaration, the need for scheduling and timepaths to be negotiated should be regarded as exempting the service from declaration.

Another effect of the 'goods' and 'production process' exclusions is to rule out access regulation as a policy response to monopolies that engage in the 'transformation' of goods as opposed to the 'transportation' of goods. This can result in situations where two goods which could be viewed as broadly substitutable (eg. natural gas and distilled fuel products) are regulated in different ways, only because the monopoly characteristics reside at different points in the value chain. It is also of interest that misuse of market power involving denial of access to goods rather than services (notably, such as the pivotal Queensland Wire v BHP case) continues to be dealt with only by Part IV, despite the effort put into establishing the Part IIIA framework.

At the same time, an access seeker pursuing a narrow enough definition of a service in its declaration ought to be capable of side-stepping this issue in some but not all circumstances.

There are conflicting signals as to what the definition of service and the exemptions seek to achieve. It is understood that the focus of the Hilmer recommendation was to apply access regulation to vertically integrated natural monopolies. Paraphrasing clause 6 of the CPA suggests that the Commonwealth undertook to implement a National Access Regime for services provided by nationally significant infrastructure facilities. Part IIIA narrows the application to 'transportation type services' but extends the application beyond situations of vertical integration. It is considered that the objectives need to be clarified.

One possible explanation as to why production processes are excluded from access could stem from the proposition that in a market with competitive transportation and sufficient free trade, import competition may provide or threaten to provide a robust substitute for markets served by 'domestic monopolies'.

Access to a facility versus access to a service

The Inquiry's issues paper seeks comment on whether the distinction between a facility and the services provided by a facility is an important one.

Granting access to the facility, rather than to services, could allow access seekers to demand, for example, that their employees actually control the facility for the time that their product uses it. Apparently, when the third party access policy was first released, a number of facility owners and prospective access seekers believed that this was what the policy meant. Access to the facility, rather than to the services of the facility, may raise issues of third party liability, insurance and safety. It would also increase the likelihood of the regulator being required to intervene in commercial and risk management matters relating to physical control of the facility.

Some facilities provide multiple services, not all of which have monopoly characteristics, so to expand declaration to entire facilities may result in the infringement of property rights to a greater extent than originally intended by the policy.

There is some risk that the focus on services rather than facilities might result in Part IIIA failing to give access seekers much greater opportunities than are already available to them as customers of the infrastructure owner. However, it is expected that regulators and courts will take the view that Part IIIA should apply to a broadly defined suite of services provided by a facility, as has generally been the case in, say, the telecommunications sector.

For these reasons the current approach in providing access to a service, not a facility, appears soundly based.

Declaration and Certification Criteria

Sections 44G, 44H of the TPA and Clause 6 of the CPA contain criteria against which applications for declaration of services and applications for certification of State and Territory regimes respectively are heard. The criteria for declaration are more comprehensive but include some of those applicable to applications for certification. The Issues Paper seeks comments on the reasonableness of the six declaration criteria.

Access must promote competition in at least one market other than the market for the service

Without such a requirement to distinguish the market(s) in which competition will be promoted, there is a possibility that declaration will be sought to permit entry into markets where there is already substantial competition and where access to the infrastructure services will have no discernible effect on competition while adding to the costs of the service. The requirement also prevents general assertions that competition will be promoted without any definition or evidence.

This criterion is generally consistent with the philosophy underpinning the CPA that restrictions on competition be removed. However, the criterion does nothing to ensure that access regulation is the optimal regulatory solution in the circumstances.

It must be uneconomical for anyone to develop another facility

If the access regime is not restricted in this way, there is a risk that an access seeker would try to avoid investment risk by seeking access to competitors' facilities simply because it doesn't have the capital or prefers not to risk its own capital in building facilities.

The 'economics' of duplicating such facilities would appear to draw on similar principles to that of access pricing regulation in respect of the first facility. Whether the expected returns from building a second facility fairly compensate for the full cost and private risk involved, with comparison to industry norms; the extent of spare capacity on the existing facility; and the time dimension within which further (sufficient) upstream or downstream development may occur are all relevant questions. However, the process for assessing this criterion does not appear as robust as that which has emerged in access pricing regulation.

There is a question whether this criterion adequately rules out declarations in cases where there is the opportunity for low cost substitution, such as may be provided by intermodal competition. Where the cost of actual or potential substitution is low there may be effectively no natural monopoly, suggesting that regulation is not needed.

In such a case, regulation of one industry over another would appear to be potentially deleterious to longer term, more robust competition. The Inquiry could consider whether the criterion should be altered, so that it refers directly to the concept of substitutability using the existing facility or any other actual or potential facility.

The degree of substitutability would differ on a case-by-case basis. For example, technological change is increasing the substitutability between telecommunications carriage services, perhaps because it has permitted the advent of feasible facilities based competition. In contrast, some types of bulk haulage services for commodities do not appear capable of readily substituting between transport services.

Where monopoly power arises from legislative restrictions on competition, these should where possible also be addressed directly. In managing the transition however, access regulation may be a key driver in permitting the establishment of access based competitors that become facilities based competitors as the market grows (or capacity of existing facilities is reached).

A focus on natural monopolies should remain to avoid the declaration provisions being used to unjustifiably infringe property rights. Access can promote superior outcomes in certain cases by avoiding duplication that is wasteful from a community-wide viewpoint. A case can be made that "uneconomic to develop" does not and should not mean "too expensive/inconvenient for me to provide my own". However, wider public interest benefits (beyond those accruing to the access seeker) and the efficient allocation of resources also need to be considered, and may align with the interest the access seeker has in avoiding such expense and inconvenience.

The NCC has appropriately suggested that the term requires evaluation on the broadest basis to consider the costs and benefits to society as a whole, taking into account matters such as the environmental dis-benefits and disruptions to civic amenity that might be associated with duplicating infrastructure. If there is general agreement with this approach, it would provide certainty to include these matters in Part IIIA.

The facility must be of national significance having regard to particular matters

This provision was included to try to avoid similar problems to those seen in the USA where local facilities such as convention centres and sports stadia were declared "essential facilities".

Because access involves some costs, some materiality criterion is necessary to avoid demands for declaration of facilities for no other reason than that they are the only ones in the neighbourhood. "National significance" is not a clear-cut measure (it is not immediately evident whether it includes or excludes, for example, regional ports or rail facilities), but there would appear to be no obvious term that could replace it as a test for materiality. It is noted that state regimes are able to cover cases that fail this criterion, but where access regulation is nevertheless appropriate.

It is noteworthy however, that a focus on regional market power has emerged in recent times, especially in respect of Part IV and its associated tests. In addressing the linkages between Part IIIA and Part IV, there is a question of whether the two have or should remain similar in their focus.

The vagueness of this criterion emphasises the advantages of legislative rather than administrative decisions being made as to what types of facilities are of national significance or otherwise warrant intervention. The Gas Code, by contrast with Part IIIA, gives legislative effect to the view that gas pipeline access generally has merit, and establishes objective criteria for coverage of individual pipelines.

This criterion is considered to be necessary to restrict the application of the national regime and to permit state-based regimes to emerge on their merits where the need is identified.

Access must not result in undue risk to human health or safety

This criterion may be more clearly stated by replacing "undue" with the words "an undue increase in", reflecting a comparison between cases with and without access.

Users are unlikely to have the same safety cultures or objectives as each other or the facility owner. In rail transport for example, safety risks tend to increase with the number of interfaces, which increase with the number of players. Recent events in the UK and NSW suggest that the need to manage the increased safety risks of multi-user railways should be carefully considered.

No doubt some owners may try to impose unreasonable safety standards as a way to discourage access, so an objective assessment is needed of the standards necessary to manage risk appropriately. The proposed National Code of practice in the rail industry may go some way to addressing this issue.

It is also possible that this criterion could be subsumed within a broader consideration of the public interest.

Access must not already be the subject of an effective access regime

This submission makes some broader comments on removing the risk of 'double jeopardy' and the ability to 'forum shop' between the various options for access regulation. The basic contention is that industry-specific regimes, where they are already in place, ought to be preferred given their clearer statements of policy objectives. However, given that Part IIIA also provides a useful incentive to commercially negotiate outcomes, it appears well suited to continue to sit to one side. It also provides an incentive for jurisdictions to enact their access regimes based on sound principles and to seek certification where they do so. Where this occurs, the opportunity for double jeopardy or forum shopping should be minimised.

Access must not be contrary to the public interest

The public interest test appropriately allows issues other than "economic efficiency" to be taken into account. Allowing for access to be denied where, despite meeting the other criteria, broader public interest considerations outweigh the in-principle benefits of access is consistent with the Competition Principles Agreement presumption that restrictions on competition only be retained where the benefits to the community as a whole exceed the costs. It appears consistent with the CPA's approach to competitive neutrality and legislation review.

Role of Restrictive Trade Practices Provisions

It has been suggested that Part IIIA of the Trade Practices Act was developed on the basis of limitations in the capacity of the restrictive trade practices provisions of Part IV of the Act, especially s.46, to achieve desired pro-competitive outcomes in respect of the services provided by significant infrastructure facilities.

While the relationship is noted in the Inquiry's Issues Paper, it would be useful for this Inquiry to further consider, compare, contrast and generally document the relevant Part IV provisions that seek to deal with similar problems arising from monopolistic behaviour such as the misuse of market power or other behaviour exhibiting exclusionary motives. In line with the established NCP legislation review framework, the two broad alternatives could be compared in terms of their ability to achieve (clarified) regulatory objectives.

In addition to adding to the general public debate of the appropriate regulatory response to various manifestations of monopolistic behaviour, it could allow better comparisons to be made between the effectiveness and costs of Part IIIA when compared to the existing alternative of Part IV.

One dimension of difference between Parts IIIA and Part IV is the fact that the former focuses on services and excludes goods, while the latter applies to both. In addition, the former seeks to limit its application to natural monopolies, the latter extends to misuse of market power (ie. including oligopolies, vertically integrated non-monopolies).

National Consistency in Access Regulation

Western Australia has participated in numerous national initiatives designed to foster greater consistency in key areas of regulation affecting business. In the case of access regulation, this includes the regulation of gas transmission and distribution pipelines.

At both Commonwealth and State levels, it is evident that the most effective way to apply access regulation in a consistent manner across jurisdictions has been through legislated industry-specific regimes. The threat of administrative application of access through Part IIIA, has not been a highly used path, with only one service declared to date, and no known undertakings.

Part IIIA treats the Commonwealth differently from the States/Territories in terms of the legal status of legislated regimes outside of Part IIIA. Where the Commonwealth enacts an access regime, its effectiveness would not be considered unless an application for declaration is received. The Commonwealth, unlike the States, cannot seek certification of its stand-alone regimes as effective. Instead, their effectiveness is considered only when there is an application to declare a particular service. Alternatively, the Commonwealth may remove the potential application of Part IIIA through the legislation establishing sector-specific regimes (eg. telecommunications).

It may simplify the process if the effectiveness of state regimes were to be assessed only when an application for declaration is considered. This is the case for the Commonwealth and it is not evident that this has resulted in any problems. The relevant question is whether certification of a state regime results in such reduced uncertainty as to be preferred compared with the situation where a state's policy intent to regulate the service is made clear through the passage of legislation. As a back-up, third-parties operating under 'deficient' state regimes could always seek declaration under Part IIIA and have the effectiveness of the regime considered against Clause 6.

One common complaint aired by industry is the need to deal with a large and growing number of regulators. Western Australia contends however, that principles of national consistency are not undermined by the involvement of different regulators covering the different jurisdictions. That is, consistency does not require uniformity but a common base for comparison. For Western Australia, having one regulator for all covered gas transmission and distribution pipelines in the State (with powers soon to be extended to electricity access) is considered preferable to having different regulators for transmission (eg. ACCC) and distribution (State Regulator) pipelines as occurs in other states. In the case of gas, it has allowed consistency in the terms and conditions, asset valuations and allowable rates of return for all regulated gas infrastructure in the state.

Where the field of operations is wholly within state boundaries, it may be appropriate to enact regulatory regimes that give due weight to the specific circumstances within the state such as promoting industrial development and pursuing distributional concerns to ensure the benefits are shared by the resident community.

The more difficult case is where a service operating within a state affects another jurisdiction. Two provisions of clause 6 deal with this scenario. Clause 6(2) allows the NCC and Commonwealth Minister to consider the interjurisdictional implications of a regime covering a service provided by means of a facility that is situated, or has influence, in more than the one jurisdiction. Clause 6(4)(p) requires that where more than one regime applies to a service, the regimes be not only compatible but conjoined into a 'seamless' process.

The clauses appear to distinguish between 6(2) cases where a state regime can be effective as a stand-alone regime as long as it is not incompatible with other regimes, and 6(4)(p) cases where a state regime cannot be a stand-alone regime. The Inquiry could usefully clarify and expand on this distinction, to assist regulators and jurisdictions in understanding when a state can expect certification of a stand-alone state regime, and by contrast when only an interjurisdictional regime can be effective.

Clause 6(2) does not make sufficiently clear what "difficulties" need to be identified before a state regime is refused certification as an effective regime. The vagueness of the clause gives rise to a risk that it can be used as a veto over certification of an otherwise effective intrastate regime, wherever there is any interstate effect.

Had it been the intention, the CPA could have precluded certification of state regimes applying to facilities with both interstate and intrastate impacts. However, governments did not agree to preclude certification in these circumstances, and in the absence of such a clause, principles of state sovereignty over intrastate matters should be respected. Clause 6(2) is intended to promote consistency in access regimes with an interstate aspect, as opposed to the more exacting task of achieving uniformity. While uniformity is desirable in many sectors, it will generally be achieved by agreement between governments rather than imposition by Commonwealth regulators.

It is not suggested that 6(2) be deleted, as there are good reasons to promote consistency. As discussed further in section 4 with respect to Western Australia's experience in rail, the Inquiry could consider whether clause 6(2) should be sharpened so that:

- interstate "difficulties" can only **preclude** certification where there is an **existing** interjurisdictional regime with which the State regime is inconsistent, in such a way as to create practical difficulties for service providers or access seekers; but

- interstate "difficulties" can lead to **conditional or interim** certification where there are grounds for believing that the regime will be incompatible with a **future** interjurisdictional regime; and

- the certification process should consider whether the lead jurisdiction's model is a suitable basis for a future interjurisdictional regime.

Legislated access regimes provide a more robust access route than Part IIIA. Part IIIA and clause 6 should therefore encourage their development. Where a regime complies with the design elements of clause 6 of the CPA, declaration or undertakings under Part IIIA should not be an available option.

Forum Shopping & Procedural Uncertainty

If legislated regimes are accepted as superior in a policy sense to administrative regimes, it may be appropriate to consider a hierarchy through which interaction occurs between the two and to reduce the risk of forum shopping or procedural uncertainty.

There are two key areas of overlap between state-based or industry specific regimes and the national regime. As it is this submission's contention that legislated, industry-specific regimes are superior to other means of establishing access (such as the administrative fall-back under Part IIIA), this section proposes a means of dealing with the potential overlap.

The first area of overlap occurs where a facility is, or is potentially, subject to coverage by an industry-specific access regime. Given possible difficulties with timing, or the application of such regimes to new projects (before they are built), the owner/operator may seek to have an undertaking accepted in respect of the services provided by the facility so as to invest on a firm basis. The contents of an undertaking are likely to be similar but not identical to the contents of an access arrangement, meaning that either route is acceptable but it is clearly undesirable that both be available simultaneously. Leaving this potential overlap unresolved would appear to add to regulatory uncertainty. This issue is afforded more substantial discussion below in regard to the gas industry.

A second potential forum shopping issue emerges where an application for declaration occurs while an industry-specific regime has been enacted but has not yet been certified as effective or an undertaking has been submitted. It is not clear what the hierarchy of arrangements would be in such cases.

It is considered that the current relationship between declaration and undertakings presents no difficulties (ie. in industries that do not have an alternative legislated regime.) Undertakings under Part IIIA would appear to continue to have merit to allow the emergence of individual or collective voluntary arrangements where no legislated regime applies or a service has not been declared.

Investment Incentives - Greenfields vs Existing Projects

Recently a contention has emerged (especially in regard to gas and electricity industries) that investment in new facilities may be better encouraged by not applying the respective industry-specific access regimes to new investments.

For example, in the National Electricity Market, so called entrepreneurial transmission links have been built that appear to fall outside the usual application of the access arrangements for that industry, at least for some period. The Alice Springs to Darwin rail link is another example of proposals for different standards to apply to greenfields investment.

Similarly, in the gas industry, pipeline owners have been arguing for certain new investments to fall outside the operation of the code, or to be subject to preferential arrangements (such as higher rates of return or being permitted to defer recovery of investment) perhaps through individual undertakings.

Western Australia believes that consistency in the application of access arrangements within an industry is vital. In respect of the gas industry, it does not accept that the Code is currently deficient in accommodating the legitimate business interests of owners/operators of new pipeline investments. The Code specifically provides that the Regulator must take this into account. Western Australia understands that the lack of foundation customers for the Central West Pipeline in NSW led to special considerations being allowed for the Access Arrangement.

If there is some deficiency in the operation of the Code in terms of the way it permits new investment to be added to the regulatory capital base, or the rate of return allowed is not commensurate with the risk, Western Australia believes that that is an issue to be addressed through the Gas Code to maintain a uniform framework, and a single regulator for the industry.

Other alternatives to access regulation

One alternative to access regulation is broad monopoly regulation/price control, since price is as often the issue as actual denial of access. Because prices serve a rationing function in the economy, strict regulatory price setting is considered too inflexible to promote efficient outcomes and arbitrated prices introduce their own distortions. For example, the mixed objectives that uniform pricing seeks to achieve (eg. constraining market power and achieving distributional objectives) may be more efficiently targeted through direct subsidies to end-users in a competitive environment.

4. INDUSTRY-SPECIFIC CONSIDERATION OF ACCESS ISSUES

Western Australia's experience in access regulation derives primarily from its regulation of the natural gas pipeline and rail services industries. It has also enacted a regime for access to Western Power's transmission and distribution networks but has not to date sought certification of that regime. The following observations and comments are provided to the Commission to assist in its deliberations over the efficiency and effectiveness of the current arrangements.

Railway Services

Certification of the Western Australian rail access regime as an effective regime under Part IIIA of the TPA was seen by the Western Australian Government as an important means of demonstrating that the State has appropriate access arrangements in place while also removing the risk of declaration. Negotiations with the NCC commenced in early 1998 and the Premier applied for certification of the regime in early 1999.

After nearly three years of negotiation with the NCC, the Western Australian Government withdrew its application to have the regime certified. While agreement was reached on a wide range of issues after extensive negotiations, the matter of how to apply a State-based access regime to interstate rail services has not been possible to resolve. Interstate issues apart, the NCC has concluded that the Western Australian regime meets the requirements for an effective access regime.

Interstate Issue

The Western Australian Railways Access Act and Code submitted to the NCC for certification on 24 February 1999 covered both interstate and intrastate access. The State subsequently agreed to amend the regime to cover only intrastate services, in response to the NCC's concern that the regime would require Westrail to negotiate interstate access (which the NCC regarded as properly the role of ARTC) if approached by an access seeker.

However, this change to limit the regime to intrastate access opened another area of contention in view of Justice Kenny's 3 August 1999 decision in the Hamersley Case. The decision raised doubt as to whether under Part IIIA of the TPA intrastate traffic can be considered a separate "service" from interstate traffic on the same portion of line. If the intrastate leg of an interstate service is in fact the same type of service as an intrastate-only service, then having the Western Australian regime covering only the latter could create difficulties under Part IIIA.

Acting on legal advice, the Western Australian Government decided to reinstate the interstate service into the regime.

The State also took the view that the Western Australian access regime should not require that all access seekers obtain access through ARTC to interstate services under the State regime. There is some question as to whether establishing ARTC as the exclusive avenue for access is a justifiable restriction on competition.

Clause 6(2) of the CPA provides that a state access regime might be found to be ineffective due to:

- Its influence beyond the jurisdictional boundary of the State; or

- Substantial difficulties arising because the infrastructure subject to the regime crosses a State border.

In its application for certification of the rail access regime, the Western Australian Government argued that clause 6(2) does not present an obstacle to certification, as the regime allows sufficient scope for commercial negotiation to ensure that national operators will not be disadvantaged by having to operate within it. Furthermore, access to that part of the interstate system was being negotiated between Westrail and the ARTC.

Nevertheless, the NCC indicated that certification of the regime would not be possible on the basis of its interpretation of 6(2). It decreed that the Western Australian regime should be amended to require the track owner to submit an undertaking to the ACCC, and to amend the undertaking as necessary for the ACCC to accept that nationally consistent arrangements could be developed.

Western Australia decided against this approach as it required the State to legislate to require the track owner to commit to an access undertaking in advance of knowing its content. The NCC's proposed amendments also raised constitutional uncertainty as to whether the State could require the track owner to submit an undertaking when this is optional under Commonwealth legislation.

While Western Australia supports "seamless" interstate arrangements, it can do nothing more to achieve these, given the absence of any form of interstate rail access regime east of Kalgoorlie. Without this, Western Australia cannot take action to "line up" its access arrangements with those over the border.

Certification of the Western Australian regime was not supported by the NCC and Western Australia withdrew its application for certification. This outcome was disappointing given the resources and effort put into the certification process by the State, the lengthy process of negotiation with the NCC and the State's willingness to amend the regime to incorporate the NCC's suggestions on matters such as the establishment and powers of an independent regulator.

Issues to be Addressed

Western Australia's experience with the certification process, including the interstate matter outlined above, has highlighted several issues which the Inquiry could address:

- Interpretation of clause 6(2):

  Clause 6(2) is clearly intended to encourage development of "seamless" access arrangements across interstate networks. It is questionable however whether 6(2) should be interpreted as going further to give the NCC an effective veto over any arrangements other than national arrangements. There are a number of ways in which seamless access can be achieved consistent with the existence of State-based regimes, including through the arrangements envisaged in the ARTC IGA.

  There is a question as to whether the certification process should be used as a tool to deliver broad national rail policy issues. Western Australia's view is that such matters are outside the intent of the access provisions in the CPA and Part III.

- Inconsistency of Certification Approach:

  The NCC certified the NT/SA regime as effective. However, the NT/SA and Western Australian regimes raise the same kinds of "difficulty" for the purposes of clause 6(2). That is, both have intra-regime and inter-regime traffic and both are linked to networks that are not covered by a Part IIIA-certified access regime.

  The NCC's explanation for certifying the NT/SA regime but not the Western Australian regime is that the development of the Alice Springs – Darwin line requires 'special treatment in the Certification process'. This is not readily reconcilable with Part IIIA. Clarification of the context within, and principles by which, the effectiveness tests are to be applied would be worthy of examination if differential application is to occur.

- Cost and Extent of Prescription:

  There is a risk that the broad discretion given to the NCC in deciding what is an "effective" regime leads the NCC to cover all bases by seeking regulatory "purity", without sufficient attention being given to the costs of this approach.

  There would appear to be two types of cost. First, the process of negotiating certification is a costly one in time and resources, especially where as in this case certification did not result. Secondly, the NCC's risk averse approach leads it to take a prescriptive view, requiring matters that might appropriately be left to the discretion of the regulator to be spelt out in legislation. For example, where some parts of a network are likely to be of more interest to access seekers than others, the degree and method of public consultation on proposed access arrangements could be left to the State regulator to decide, rather than being mandated by the legislation.

Gas Transmission & Distribution Services

Western Australia considers that the Gas Code, although a long time in its development, has proven so far to be a sound workable model for access. At a very high level, some differences between the access provisions of the Code and the National Access Regime under Part IIIA are as follows:

- The Code initially appears to apply to infrastructure rather than the services provided by infrastructure, in the sense that the coverage processes (involving the NCC and relevant Minister) apply to pipelines. The criteria for coverage under the Code are essentially equivalent to the Part IIIA declaration criteria but do not include the national significance criterion;

- Coverage of a pipeline gives rise to a requirement for the facility owner/operator to submit an access arrangement (similar to an undertaking with the required detail defined by the Code) within a specified time;

- An independent Regulator then manages a public consultation process and must approve, request changes to or reject the access arrangement. It is the content of the access arrangement which defines the exact services which are to be subject to access;

- The access arrangement also sets out maximum terms and conditions, vetted by the Regulator which, according to the Code, establish a starting point for commercial negotiation and a reference where negotiations fall down; and

- The Code establishes processes and the appropriate bodies for arbitrating disputes and hearing administrative appeals and merits reviews.

In addition to its objectives of promoting competition and balancing the legitimate interests of parties, the Gas Code includes additional steering principles that seek to:

- provide regulator approved reference tariffs as the basis for guiding commercially negotiated outcomes;
- encourage new investment in gas pipeline infrastructure;
- provide regulatory certainty to facilitate decision making for future development;
- establish uniformity of principles across geographical boundaries resulting in consistency of decision making between regulators;
- facilitate economic development in the relevant jurisdiction; and
- favour efficient administration over exhaustive appeal.

Since the criteria for coverage of gas pipelines are essentially identical to those for declaration, it may prove useful for the Inquiry to consider the consistency of application of the statutory criteria to date. For example, the "uneconomic to duplicate" criterion was exhaustively considered in the context of two recent Gas Code matters in NSW.

The Gas Code has proven to be a flexible and robust model to date, but will undoubtedly require further fine tuning. The benefits of it include its broadly consistent application to an entire industry, and convergence in regulatory outcomes and comparability of tariffs would be expected with further experience in its operation. It is understood that a review of the Code will commence as soon as practicable in 2001 after the Commission reports on the current Inquiry.

There is one level of duplication between the Gas Code and the National Access Regime that Western Australia believes requires closure.

The undertakings provisions of Part IIIA existed at the time the Commonwealth and South Australian legislation implementing the Gas Code was drafted. However, due to perceived difficulties with progressing a successful amendment, the TPA was not amended when the Code was given legislative effect to avoid the duplicate application of the two regimes (undertakings under the TPA and access arrangements under the Code) to pipelines which fall under the Gas Pipelines Access Law.

The pipeline industry has made a case that the simultaneous application of Part IIIA and the Code to the same pipeline may expose proponents of 'greenfields' pipeline projects not yet covered but potentially covered under the Code to 'double jeopardy'. That is, if such a proponent takes the undertaking route, it may subsequently also be required to submit an access arrangement under the Code if the pipeline in question becomes covered under the Code.

The situation is troublesome because requirements may differ under each approach, and in Western Australia the regulator would differ in each case. In addition, the ACCC's interpretation of the public interest, in assessing a proposed undertaking under Part IIIA, differs from (but may not be inconsistent with) the policy objectives and principles defined by Western Australia's enactment of the Code.

It is noted that various sections of the Code were intentionally designed to provide for the specific requirements of 'greenfields' pipeline developments, such as the Goldfields Gas Pipeline project which was being developed at that time. So far no convincing argument has been put forward by industry identifying inherent deficiencies of the Code in this respect. Subject to industry providing, during the expected review of the Code in 2001, evidence that such deficiencies exist the Code may need to be amended accordingly. However, at present Western Australia has not been convinced that the Code is deficient in catering for new pipeline developments.

Western Australia considers that Part IIIA should be amended to remove the ability of service providers to give undertakings to the ACCC in relation to pipelines that are pipelines subject to the Gas Pipelines Access Law. Where a pipeline is potentially subject to the Gas Pipelines Access Law but is not a covered pipeline within the meaning of that Law, the only path to achieve access regulation should be via an application for coverage and the associated Code processes.

Electricity Transmission & Distribution

As is plainly evident (and mentioned briefly above) Western Australia's electricity market is physically separate from the National Electricity Market. Accordingly, the State has developed its own regulatory arrangements for access to transmission and distribution networks that are informed by developments elsewhere. While the Government has not sought certification of the regime to date, future developments are planned that should allow it to do so.

For example, the Government has announced that it will expand the functions of Western Australia's Independent Gas Pipelines Access Regulator to establish an independent Energy Access Regulator to encompass electricity access in accordance with the Government's timetable for introducing further contestability. In addition, it is proposed to enhance the ring-fencing arrangements applying to Western Power and private operators, where necessary, and to develop an electricity code that includes the functions of the Energy Access Regulator in regulating access to electricity transmission and distribution systems.

Should certification of an electricity access regime occur, Western Australia would be concerned that the same 'double jeopardy' scenario discussed above in respect of the Gas Code and Undertakings under Part IIIA should not arise for new electricity transmission lines or distribution networks. That is, the owner of a new investment, given the existence of a certified regime, should not be able to have an undertaking accepted under Part IIIA.

Telecommunications

There are a number of design elements of the telecommunications competition regime that Western Australia considers are worthy of note, if only to draw some contrasts with the Part IIIA regime.

The first is the apparent closer regulatory integration between the telecommunications specific anti-competitive conduct provisions and the access regime.

A second element is the means by which particular services become 'covered' under the access regime which included an initial deeming of core services, followed by an industry based consultative process to suggest further services, followed by a standing administrative role for the ACCC in conducting public hearings to decide on whether yet further services should be 'covered'.

A third element is that the Regulator, in this case the ACCC hears declaration (or coverage) matters as well as playing a role of ultimate arbiter of the terms and conditions where access disputes arise. This is in contrast to having multiple bodies (eg. the relevant Minister advised by the NCC and the ACCC or State Regulators) involved in other industries or under Part IIIA.

5. BENEFITS AND COSTS OF PART IIIA AND CLAUSE 6

Access regulation in the various infrastructure industries has contributed to increased competition and resulted in net community benefits. It is difficult to separate this impact from other micro-economic reforms (such as structural reform and commercialisation and corporatisation of GTEs) and extraneous factors such as technological change, the emergence of symbiotic relationships between previously distinct infrastructure sectors, utility market convergence and macroeconomic influences.

The national regime has not been in place for long enough to determine its overall costs and benefits. The various industry-specific regimes may be easier subjects in any ex-post consideration of the merits of access. It is recognised that Part IIIA may have produced difficult-to-measure indirect benefits, for example by acting as a catalyst for the development of industry-specific solutions, and as a catalyst for successful commercial negotiations.

To date the key benefit to Western Australia under Part IIIA has been in having its Gas Access Regime certified as effective, which serves to reduce the uncertainty for owners of pipelines covered by that regime. Deregulation of the Western Australian gas market, which has included access regulation, has delivered lower prices of gas boosting regional and state economic development. It is difficult to measure the incremental benefit that certification has over and above the gas access regime itself. The delays in certifying similar access regimes in other jurisdictions appear not to have presented any significant difficulties.

Another benefit is that Part IIIA was a driver in the development of the State's most recent rail access regime in that it was developed with the aim of certification in mind, and for which Western Australia expended best endeavours to achieve. The State's application for certification was ultimately withdrawn, as discussed in section 4.

The costs of access could be split into two key areas: administrative and compliance costs; and the costs of regulatory errors where access applies and regulation is necessary. To date, under Part IIIA, only the first category has been relevant to Western Australia.

Administrative and compliance costs affect access providers, access seekers, industry bodies, GTEs and central government and therefore taxpayers. These are potentially higher than would be the case if certain refinements were made to the number of regulators, clearer decision making responsibilities and hierarchies between the various processes introduced. These costs ought to be optimised if the criteria for invoking access or the proliferation of legislative arrangements work to ensure that access is the best means of promoting competition in the given situation. While allowing for 'cheaper' regulatory alternatives could defeat the purpose of reducing the ability of service providers to 'forum shop', the promotion of commercial outcomes is an important feature in allowing for regulatory cost containment.

Part IIIA is currently not administratively efficient and its processes are very time consuming. Partly this is due to the complexity of the issues and the novelty of the regime, and partly to the extent of interpretation and negotiation required where its provisions are vague or ambiguous. Consideration could be given to imposing time limits on the various bodies for decisions on certification.

The current scarcity of declared services means that there is limited evidence about whether there is a bottleneck in negotiating terms and conditions. This scarcity of declared services could be a benefit of Part IIIA posing an effective threat and encouraging commercial outcomes outside the regulatory framework, but there is also little evidence of this. Provisions such as those included in the Western Australian rail access regime seek to impose time limits on elements of the negotiation process, while allowing for these to be varied with mutual consent.

It would be instructive for the Inquiry or relevant regulators to provide some details of governments' regulatory costs, and estimates of private regulatory costs involved in access regulation.

Regulatory balancing of interests ought to *approach* the correct outcomes if objectives of transparency and consistency are pursued by regulators; and given greater experience to facilitate comparison.

It may not be possible to determine whether access regulation of a given service or industry sector has led to net benefits. Firstly there will always be a lack of a counterfactual state of affairs to form the basis of any comparison. There are always other variables involved. Secondly, where regulation occurs it does not appear readily possible to identify, quantify and analyse the impacts of any regulatory errors or gaming given the high degree of subjectivity involved. There is an inability to determine the 'true price'.

Given work in other areas, the Inquiry may be able to provide further information on the general economic benefits of competition reforms, if not access, that have been realised across the key infrastructure sectors. In this regard, improved capital utilisation may be a partial indicator.

6. IMPROVING THE FRAMEWORK

The procedural complexity of dealing with Part IIIA and clause 6 makes it likely that there will continue to be a paucity of case law on Part IIIA. This means that serious consideration should be given to clarifying the terms of Part IIIA and clause 6 where there is a concern about the way they have operated thus far, rather than waiting for further judicial refinement of aspects of the law that are currently obscure or difficult to apply.

It could be argued that Clause 6 granted a position of primacy to state-based regimes (that accord with the design principles), with the threat of declaration under Part IIIA important as an administrative back-up of achieving access where it is otherwise not available. This position has not been translated into practice via Part IIIA or the NCC's recommendations as to effectiveness under Clause 6. Moreover, where state-based regimes and Part IIIA now potentially co-exist, there is a need to reduce the possibility of 'double jeopardy'.

It is Western Australia's view that greater recognition should be accorded to state-based regimes that generally comply with the Clause 6 principles of effectiveness. One limited change option would involve permitting interim certifications (eg. pending developments nationally or in neighbouring states). This may encourage a state in which the industry in question is particularly important to take the lead on access and influence the direction of national developments.

There is also an argument for a single regulatory body for Part IIIA. The ACCC would have the advantage of being able to link its approach to access issues with its general regulatory approach to competition issues. The ACCC already has responsibility for declaration issues in regard to telecommunications.

Maintaining Ministerial responsibilities for declaration is seen as an important check in the process. Ministers are subject to requirements of due consideration and natural justice, which are important constraints on their exercise of administrative power.

The NCC was established as an advisory body to the Commonwealth on the implementation of the NCP. It does not have any legal decision making capacity. While not disputing the value the NCC brings to the debate in promoting national consistency, the regime needs to ensure that the roles of Ministers, advisory bodies and regulatory agencies are clear and distinct.

One area of tension between the advisory and decision making roles arises by virtue of clause 6 holding legal status as guidelines to support consideration of effectiveness of state regimes under Part IIIA. While under Part IIIA, the relevant Minister must decide upon effectiveness, paragraph 6(2)(a) of the CPA suggests that the NCC also has some decision-making capacity in this regard. The respective roles of the Minister and NCC need to be clarified.