

REGULATORY ACCESS TO FACILITIES:
COMMENTARIES
ON ISSUES REQUIRING RE-ASSESSMENT OF THE
TRADE PRACTICES ACT

Submission to the Productivity Commission's Annual Review
of the Regulatory Burden on Business

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INTRODUCTORY OBSERVATIONS

The Institute of Public Affairs has long been concerned with the Access Provisions (PART IIIA) of the Trade Practices Act. For this reason it has prepared two research projects analysing these provisions.

The projects analyse the position from a legal and an economic perspective. The economic analysis is by the undersigned, who is the Director of the IPA's Deregulation Unit, and formerly a Deputy Secretary in the Victorian Government and a First Assistant Commissioner in the Productivity Commission. The legal analysis is by Professor Warren Pengilly, a Foundation Commissioner of the Trade Practices Commission and a well-known legal practitioner and academic in the trade practices field.

PART IIIA of the Trade Practices Act resulted from a perception in the 1990's that the Trade Practices Act was not capable of dealing effectively with competition where a single firm was in a dominant position. It drew heavily upon the processes that the United States courts developed to deal with this issue and was introduced after a comprehensive review of competition policy published as the 1993 Hilmer Report. Its aim is to prevent the owners of a monopoly facility from using this to obtain excessive profits or impose excessive costs either by charging too much for access or by restricting access to affiliated businesses.

The IPA is concerned that the legislation has created greater intrusiveness than envisaged by the Hilmer Report, and the subsequent provisions of the Commonwealth/State/Territories Competitive Principles Agreement, which constituted the agreed terms that would be legislatively implemented. In addition, in some cases the government institutions tasked with administering the legislation have interpreted their role in ways that add even greater intrusion. The overall effect of this has been to produce a far greater level of intrusion than exists in the United States legal setting upon which the Access Regime was based.

Australia seems to be the only country in the world that has both a generic access regime and a general prohibition on the misuse of market power. The access regime was conceived at a time when the misuse of market power provisions were seen as inadequate. Since that time other High Court decisions, the most recent being NT Power, have added greater clarity to the notions of such misuse and made the Part IIIA provisions unnecessary and, indeed, in the light of the dual system they entail, confusing.

The legal framework under which businesses may be required to provide unrelated businesses access to their facilities impacts across the whole economy and particularly on those industries which are required, for their operation, to invest heavily in such facilities. The acquisition of market power by firms that have innovated and invested wisely is something that is considered generally within the economy as bringing benefits. For the same reasons, IPA believes firms' acquisition of market power through investment in facilities is something not to be discouraged as it is an inducement to investment and economic growth.

The Commentaries attached offer compelling evidence that the Access Regime provisions of the Trade Practices Act are hindering overall economic welfare in not reflecting the experiences and economic analysis relating to infrastructure investment.

Alan Moran
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1 May 2007

The Economics of Essential Facilities Regulation

By Alan Moran

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About the Author

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Among his publications on housing regulation is a book, “The Tragedy of Planning”, which was launched by the Federal Treasurer in August 2006.

Before his present role, he was a senior official in Australia’s Productivity Commission and Director of the Commonwealth’s Office of Regulation Review. Subsequently, he played a leading role in the development of energy policy and competition policy review as the Deputy Secretary (Energy) in the Victorian Government.

He was educated in the UK and has a PhD in transport economics from the University of Liverpool and degrees from the University of Salford and the London School of Economics.

The Economics of Essential Facilities Regulation

Abstract

Australia has benefited from competition reforms that have opened up previously closed sectors of the economy, especially in areas where government owned monopolies were prevalent. Owners of natural monopoly facilities are required, under provisions of the *Trade Practices Act* particularly Part IIIA, to allow access to them on terms that are fair and cost-reflective. Supporting and monitoring this provision is the National Competition Council (NCC), and the Australian Competition and Consumer Commission (ACCC).

Most governments are concerned about firms gaining and exploiting monopoly powers. Fears that monopolies in many transport and communications services were natural and inevitable led Australian governments to opt for public ownership.

Though inspired by US legal developments, Part IIIA's provisions provide greater scope for regulatory intervention because of the conditions under which a facility can be "declared" a natural monopoly. US law bases such a declaration on a potential user being unable practically or reasonably to duplicate the essential facility. Australia's "uneconomical to develop" test is more accommodating to the interest of potential users. However, mindful of the dangers of regulatory interventions, the Government excluded production processes from the ambit of regulatory control. Distinguishing manufacturing from primary and services operations is becoming increasingly artificial as stages of production converge.

Whether or not fears of natural monopoly were originally justified, economic and technological developments have brought competition to many of these services. Yet, regulatory agencies have required owners of rail lines, gas pipelines, telecom lines and airports to give other businesses access to them at a specified price even where the facilities do not dominate their markets. The consequent loss of flexibility and the lower prices inevitably discourage investment in new capacity.

With private rail lines that carry iron ore in the Pilbara, two Federal Court judgments covering substantially identical cases have delivered conflicting findings. The first of these determined that the rail lines were essentially part of a production process and not therefore eligible for declaration. The second took a more literalist view and, noting that Part IIIA specified that rail lines were likely to be essential facilities, required consideration of whether access should be given.

These rail facilities serve an area that will shortly have three differently owned lines. Such alternative supply options remove any rationale for declaration. If competing facility owners won't offer access to unrelated businesses, this must be because the conditions sought are too difficult operationally to arrange, owners require the capacity themselves or the price is likely to be too low.

Regulatory and bureaucratic controls like those embodied in Part IIIA have already led to reduced and distorted investment and wasted resources in the public sector, lobbying and legal services. They are now threatening the creation of infrastructure vital to export industries like iron ore.

1. **Limiting the Role of Government**

Property rights in 'long and thin' assets like networks should be respected, just as we recognise property rights in 'short and fat' assets like houses, cars and television sets.¹

1.1 **Private Ownership and Competition**

When twinned with open competition, private ownership gives firms considerable incentives to discover and meet demands at lowest cost. Control and exclusivity rights are major benefits of ownership. Assured property rights are crucial to promoting increased wealth. Indeed, civil law based systems which are arguably less protective of personal property appear to deliver inferior economic outcomes than common law based systems².

Business deregulation and privatisation have been major factors behind the improved economic performance of Australia over the past 15 years. Although the Productivity Commission³ identified only 2.5 per cent of direct gains from the post 1995 National Competition Policy (NCP) reforms, it estimated that the indirect gains were much greater and have been the key factor in delivering 13 years of unbroken growth. This lifted Australia's ranking within the OECD in terms of GDP per capita from 16th to 8th.

In specific industries, very impressive gains from deregulation and privatisation can be observed. Labour productivity has more than doubled in the electricity generation industry since the mid 1990s, including a fivefold increase in Victoria. Equally impressive gains are to be found in gas, the ports, and telecommunications⁴.

1.2 **The Notion of Essential Facilities**

The justification for regulation of services is where they are provided by a facility that has characteristics of a natural monopoly. Such conditions entail only one provider being ever likely to be viable, combined with a degree of essentiality in the services provided. Unambiguously essential facilities were historically epitomized by a desert oasis or a ship passing survivors of a shipwreck. In these sorts of cases, long traditions require assistance be given.

More modern requirements of access to essential facilities date back to sixteenth century ports and later to railway bridges that were choke points. Access to a Missouri bridge at St Louis was granted in the 1912 *Terminal Railroads* seminal case. However within a few years that facility turned out to be far from essential as other bridges were built.

¹ Adam Thierer and Clyde Wayne Crews, *What's yours is mine*, Cato Institute, Washington DC, 2003.

² See P.G. Mahoney, 'The Common Law and Economic Growth', *Journal of Legal Studies*, Vol. 30, 2001, pages 503–525; B. Heitger, 'Property Rights and the Wealth of Nations', *Cato Journal*, Vol. 23 (3), 2004, pages 381–402.

³ Productivity Commission, *Review of National Competition Policy Reforms*, 2005, available at: <http://www.pc.gov.au/inquiry/ncp/finalreport/ncp.pdf>

⁴ See Alan Moran, *Impact and Outcome of Deregulation*, available at: http://www.ipa.org.au/publications/publisting_detail.asp?pubid=612

Even when accurately defined, natural monopolies are far from permanent. In the first Australian edition of Samuelson's *Economics*⁵ examples cited were "water mains, gas pipes, electricity wires, telephone cables, train tracks and postal services". Not all aspects of these would now be considered natural monopolies.

Australian network businesses prior to NCP were usually protected from competition and were either government-owned or, like AGL's NSW gas monopoly, franchised by government. Governments sought to maintain control over these businesses' entire production chain, including those aspects that were highly vulnerable to competition, often to facilitate cross-subsidies or to influence general labour market policy.

At a time in Australia when monopolies had legal protection from competition, price gouging by monopolists was pervasive. This was usually dissipated in operational inefficiencies such as over-manning and inappropriately selected or located investments. The 1993 Hilmer Report was fundamentally concerned with removing monopoly powers of these mainly government owned firms. In adopting its findings, Australian governments had come to accept that sheltering activities from competition had impaired productivity. Because rival facilities can no longer be excluded, the risk of price gouging is much reduced.

1.3 Access Regulation's Dampening Effect on Efficiency

Access regimes are departures from the standard rules about owners' use of their property. The standard rules promote efficiency (and perhaps preserve liberty) by allowing owners to use their property as they please (as long as they do not harm others). Inevitably, forcing firms to offer access to their facilities also entails the prospect of regulated price and service levels more advantageous to the non-owner than could be obtained in a voluntary contract. If this were not the case the access seeker would have little reason to pursue a regulatory approach.

Normally, potential customers cannot be compelled to use and pay for a particular facility and price controls largely involve an upside limit on an investment's economic returns. A limit on the upside returns with no limit on the downside creates an asymmetric (probability) distribution of potential economic returns. This reduces the weighted average potential overall gain from a prospective investment and diminishes the incentives for further investment.

In the short term a price that is regulated below market levels means lower costs for users and higher demand for the services. Over the longer term regulated prices are likely to undermine incentives to maintain facilities and to modernise them. Important in this respect is modification or suspension of investment by firms seeking to avoid unwanted customers.

⁵ P. Samuelson, K. Hancock and R. Wallace, *Economics*, McGraw Hill, Sydney, 1970. As well as writing a standard economics text book, Samuelson is generally credited with originating the theory of public goods in a paper published in 1954.

In addition, regulated prices reduce the “headroom” for alternative or competitive providers to enter the market. In reducing the incentive for users to develop their own facilities, regulated prices are intended to allow a greater economy of facility use but this also means less capacity is made available as some parties modify their business strategies to seek access while others defend their assets from unwanted encroachments. This also brings wasteful litigation and paperburden costs where firms seek to recruit government assistance to obtain cheaper access to other firms’ facilities.

Only under two circumstances can a mandatory access regime encourage investment. The first is when customers are obligated to pay whether or not they use the facility. This occurs with electricity lines and creates its own risks for efficiency because an institution, rather than an entrepreneur, is deciding the case for the investment. The second set of circumstances arises if investors perceive that the alternative to the regulation is even more intrusive government behaviour. In that case regulation may offer some reassurance but this merely demonstrates the degrees to which regulation can be onerous.

Forced sharing of facilities not only affects firms that have seized dominant market positions through innovations, but it may also have adverse effects even if the facilities were originally built under some form of protective regime. Thierer and Crews disparagingly refer to this as “a reparations policy”. They argue that forced sharing is always counterproductive because it, “breeds dependency on existing systems, resulting in numerous competitors haggling with network owners and regulators over the best terms of access to increasingly technologically obsolete networks of the past”⁶. Because of this and because regulators will inevitably push rates too low they contend that the policy always backfires.

It is the “chilling” effect on investment that represents the major cost of access regulation. Preventing handsome returns will prove especially deleterious to investment in the more risky infrastructure that has uncertain returns. In terms of the infrastructure built, we would therefore see a concentration on serving existing known markets with known resources and far less activity on projects that contain considerable up- and down-side uncertainty.

In this respect the Export and Infrastructure Taskforce concluded:

A quest for ‘first best’ solutions, combined with a focus on removing monopoly rents, has distracted from what should be the regulatory task: which is not to determine whether what has been proposed by way of access conditions is optimal, but whether it is reasonable. The search for optimality and precision in regulatory decision making has not only made the regulatory process less predictable than it should be, but has also added greatly to regulatory delay, hindering investment in infrastructure used by export industries.

Australia’s exporters operate in highly competitive global markets. They are reliant on infrastructure investment that is undertaken in a timely way, not a time frame

⁶ Thierer and Crews, *op. cit.*, page 33.

dictated by regulatory processes. Waiting two or three years for regulatory decisions is as unacceptable as it is unnecessary.⁷

Access policy also causes features of ownership rights to migrate to the incumbent users. These may not provide the best signals for efficient capacity expansion and might see an interest in blocking expansions that increase competition for their own outputs. If incumbent users have adequate capacity for their own needs, they would certainly resist price increases as a basis for expansions in capacity. Attempting to negotiate capacity increases where the owner considers the regulated price is too low has proven difficult for a number of facilities, notably the Dampier to Bunbury Natural Gas Pipeline and the Dalrymple Bay coal loading facility in Queensland.

Price constraints, in bringing about inadequate capacity increases and surplus demand, also present problems of allocating the available capacity. Preventing price flexibility entails inefficient rationing through queuing for capacity. Anticipating this in the Gas Code, Australian regulatory authorities actually require facility owners to have a queuing policy as a condition for approval of their access proposals. This recognises that policy is likely to create a market scarcity situation that requires blunt tools to allocate it between competing needs.

The different sorts of essential facilities and experiences of some other industries subject to access regulation are discussed in Attachment 1. The adverse effects of regulating firms designated as natural monopolies can be summarised as:

- First the regulated firm is not incentivised to innovate. Indeed, unless given a guaranteed return, out of fear of regulatory expropriation the firm will avoid all but defensive capital investment.
- Secondly, the low price will leave access seekers with no incentive to build new facilities for themselves. Competition, except in the form of re-sale of the regulated facility, will thereby be constrained.
- Thirdly, the availability of a recourse to government to fortify one side's commercial negotiations leads to strategic business approaches which deflect firms from a customer focus. These include seeking to design facilities so that they are not readily useable by those underpaying.
- Related to this, the regulatory procedure for fixing prices is necessarily highly procedural and time-consuming and can paralyze commercial decision-making; while the adverse impact of forced delays in a rival's decision-making may advantage the applicant, it is detrimental to the economy as a whole.
- Finally, the procedural nature of the regulation involves government and private legal and administrative resources that represent serious costs.

The world business landscape is littered with firms with strong market positions whose supply assets have atrophied as a result of government controls. Hence, regulation of firms, even of monopolies should be undertaken only with great reluctance.

⁷ B. Fisher, M. Moore-Wilton and H. Ergas, *Australia's Export Infrastructure*, Report to the Prime Minister, 2005, page 2.

Stigler⁸ inspired a great deal of regulatory literature with his work featuring the notion of regulated firms capturing the regulator. Yet, in more recent years at least, the risk has been in the opposite direction with the regulatory authorities engaging in what Shuttleworth⁹ has called “regulatory opportunism” to please public opinion and government by reducing prices. A self-interested regulator’s time horizon will place a lower priority on the longer term. By contrast, a business that is accountable to private shareholders has a combination of capital maintenance and current income as the focus of its self-interest. The Productivity Commission Chairman, Gary Banks, has also recognised the phenomenon of regulatory opportunism¹⁰, which results in a bias in favour of insufficient rather than excessive supplier returns.

1.4 Constraints on Government Regulatory Excesses

A powerful discipline on governments to avoid exploiting businesses is provided by the globalisation of markets. This includes financial markets which increase capital costs to ventures where property rights are vulnerable to government regulation.

This facet of globalisation is not a new impediment to governments’ arbitrary and unjust property seizures, onerous taxation, etc.. The internationalisation of commerce in the Middle Ages was a precursor to current conditions. It led to the development of the *Law Merchant* as a means of allowing trade to take place. Governments that favoured some parties, either on their own behalf or on behalf of their citizens, found their lands were less patronised by traders and that some of their more productive citizens migrated. Without anyone planning it, the law developed and has remained as a constraint on government action.

Even so, in a modern economy the mobilisation of these capital disciplines can be a lengthy process. Much damage can be masked by other features of the economy before a “capital strike” becomes clearly apparent. This is particularly the case in a resource abundant economy such as Australia.

General welfare is most vulnerable to intervention where the importance of new investment and innovation outweighs that of static efficiency. Hence, only if the investment need is known and stable can we have confidence that an access regulation regime may be benign. With the exception of roads, such situations are rare. Accordingly, it is preferable to err on the side of failing to declare essential facilities, rather than on the side of declaring non-essential facilities.

⁸ G.J. Stigler, ‘The Economic Theory of Regulation’, *Bell Journal of Economics*, Spring 1971.

⁹ G. Shuttleworth, *Updating Price Controls: Rationale and Practicalities*, a report to the ORG, June 1998.

¹⁰ G. Banks, *Competition regulation of infrastructure: getting the balance right*, Presentation to IIR Conference, National Competition Policy Seven Years On, Melbourne, 14 March 2002.

2. The Australian Legal Framework for Essential Facilities

2.1 Treatment of Regulatory Sharing Requirements

Australia's provisions that the owner of essential facilities may be required to offer services to all comers, even competitors, follows developments in the US and the EU. US courts recognise that in declaring a facility essential, they must then set business terms and conditions, something they are reluctant to do because they are ill-equipped for the task. There has been less trepidation in these regards in Australia. In the US, a threshold test for government involvement specifies that an asset would be 'impractical to duplicate'. Australia however uses the term 'uneconomical to develop', a phrase which opens many more vistas for regulatory intrusion.

US and European developments are outlined in Attachment 2.

Recognising that economic disincentives flow from requiring firms to relinquish their property rights, Hilmer was keen to narrowly define an "essential facility". The report set criteria which included the "significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness". It argued, "Clearly, access to the facility should be essential, rather than merely convenient"¹¹.

In amplifying its reasons for limiting the requirement for access it said:

Any assessment of the public interest would need to place special emphasis on the need to ensure access rights did not undermine the viability of long term investment in important infrastructure projects. Accordingly, wherever possible the likely obligations to provide access should be made clear before an investment is made. ... where this is not possible, due account of the likely impact on incentives to invest should be made in determining whether or not to create a right of access, and if access is declared, through the declaration of appropriate pricing principles and other terms and conditions.¹²

The Hilmer Report also recognised that the residue of public ownership meant that almost all areas where competition reforms should apply in opening essential facilities were in public or former public facilities. Moreover it said, "At the same time, technological and other developments have eroded the extent of most genuine 'natural monopolies' and eliminated others altogether".¹³

Though Part IIIA of the TPA was introduced in response to the Hilmer Report the two diverge in some important respects. Thus, the provision in Hilmer paralleling the US terminology ("Clearly, access to the facility should be essential, rather than merely convenient") becomes in 44G(3)(b), "that it would be uneconomical for anyone to develop another facility to provide the service".

¹¹ F. Hilmer, M. Rayner and G. Taperell, *National Competition Policy, Report by the Independent Committee of Inquiry*, 1993, page 251.

¹² *Loc. cit*

¹³ *Ibid.*, page 193.

The increased scope that this provided for regulatory intrusion was welcomed by the NCC¹⁴. The NCC said:

Building and activating such (gas or electricity) networks is extremely expensive, but sending more gas or current around a network once it is operating is relatively cheap. Clearly, rather than making a competitor build a second network to compete with the existing network, it would make more economic sense in such situations to give the competitor access to the existing network.

Hence, the NCC at the outset proclaimed a willingness to intervene to require access be given so that applicants would be able to gain advantage by using an owner's facility in a way that leverages off marginal costs that are frequently much lower than average costs. That philosophy has been re-affirmed on a number of occasions. Thus the then Chairman of the NCC, Mr Graeme Samuel, said in an address to Utilicon 2000 Melbourne 7 August 2000 said,

... it is important to remember that not all investment is good investment. Critics ignore the effects of NOT granting access – what happens to investment in other markets if access is denied? More broadly, investment is not desirable for its own sake, but rather for the benefits it brings in increasing living standards. Does anyone want or need two electricity distribution networks running down their streets? Does anyone argue in favour of such investment, regardless of whether it is public or private? Society is best served by investment that involves the most productive use of its resources.

While taking advantage of lower marginal costs is standard business practice for a single entity to pursue internally (for example, firms normally take advantage of their existing sales team in launching a new product line), it is an extraordinary intervention to require a firm to extend such cost-saving to unrelated entities, especially competitors. Establishing terms of access to a facility that is not duplicable and is genuinely essential to the maintenance of a business or the life of an individual is one thing. Extending it to matters of convenience is an action pregnant with investment disincentives and lobbying costs.

2.2 Access to Production Facilities

In seeking to limit the scope of declarable essential facilities, the Hilmer report made a general caveat for “products, production processes or most commercial facilities (other than electricity transmission grids, major gas pipelines, major rail-beds and ports)”. This caveat was taken up in the TPA's Part IIIA amendments where section 44B limits declarable facilities to a service other than the use of a production process (except to the extent that it is an integral but subsidiary part of the service).

Heirs to Adam Smith's description of an eighteenth century pin-manufacturing facility, include car plants which bring together many sub-components from other suppliers as well as in-house fabrications for final assembly. Those plants essentially

¹⁴ National Competition Council, *The National Access Regime, A Draft Guide to Part IIIA of the Trade Practices Act*, 26 August 1996

comprise conveyor belts along which specific assembly tasks take place. Normally the facilities are capable of assembling a considerable variation of products, sometimes not even in batches.

Other production processes are found in industries like steel or oil refining. In these cases a basic input is refined into a more useable product in the case of steel or into several such products in the case of crude oil.

Many other processes are less easily defined as production. Thus sorting of product inputs is commonly referred to as a pre-manufacturing process, while simple beneficiation of raw materials is often not considered to be manufacturing.

The difficulty of defining industries is compounded when they metamorphose. In previously integrated industries such as electricity production-transmission-distribution-retailing the original structural separation has changed. Distribution and retail, originally joined under single firms, have separated from each other in recognition that totally different skills and business models were needed. The retail arm manages volatile wholesale costs and a fixed retail price. It is highly motivated to mitigate the risks involved. Risk mitigation is best handled in part by ownership and, as a result, retail-generator alliances have emerged.

The creation of these electricity “gentailers” illustrates how defining where manufacturing or a production process starts and another commercial activity ends have no corporate governance significance. Importantly from the perspective of Part IIIA’s exclusion of production facilities for coverage, manufacturing, primary production and services are no longer meaningful terms for operational and hence for regulatory purposes.

Risk mitigation and price security are increasingly central to business strategies. Judgements on these matters drive a great deal of the make or buy-in decision making frameworks of firms whose classifications as manufacturers, primary producers, transport contractors and so on are irrelevant.

2.3 The Development of Australian Essential Facility Provisions

General Approach

Some areas of commerce were excluded from the reach of the general competition provisions of the Trade Practices Act from the outset. Notable in this respect is international liner shipping.

Since the introduction of the Part IIIA provisions, other areas have been separated out in distinct parts of the legislation (telecommunications) or for special treatment (electricity transmission and distribution, and gas). These are designed to allow greater industry specific expertise to be brought to bear and perhaps, inter alia, to facilitate prior approval ‘safe harbour’ regulatory holidays for new proposals, although this has not been effective in the case of telecommunications. In the case of the Gas Code the stated aims were to:

- facilitate the development and operation of a national market for gas;
- prevent abuse of monopoly power;

- promote a competitive market for gas in which customers may choose suppliers, including producers, retailers and traders;
- provide a right of access to gas pipelines on fair and reasonable terms for both pipeline owners and those seeking access; and
- provide for resolution of access disputes

The aim was “to achieve the same sort of outcome in terms of access prices and quality of service that would occur in a competitive market.”¹⁵

Water and Sewerage

This has been rarely tested. Sydney Water sewage transmission services were declared in 2004. Sydney Water has a monopoly of sewage transportation and treatment and all parties agreed that it would be uneconomical for anyone to produce another such facility. In 2005 the Tribunal found that competition would be promoted in the recycled water market if access was granted and declared the service for a period of 50 years.

The applicant, Services Sydney, has rejected an access offer from Sydney Water and has applied to the ACCC for a determination of the prices and conditions of access. The NSW Government is to rescind Sydney Water’s status as a legislative monopoly.

Gas

Regulators have frequently claimed (sometimes with the support of commissioned research) that the gas access regime has delivered considerable gains to the economy. Indeed citing industry developments the Chairman of the ACCC said, “All of which I would have thought rather put the lie to the industry’s claim that ACCC regulation has, in the words of one major player ‘had a chilling effect’ on investment in the industry.” He went on to say, “While there are numerous plans mooted for the construction of new transmission pipelines in Australia, there does not appear to have been any significant shortfall in investment under the gas access regime.”¹⁶

ACCC Commissioner Ed Willett said (op.cit.), “The evidence supports a conclusion that the regime as applied is facilitating and could continue facilitating new pipeline development.” He argued that major new pipelines have been built under the regime included

- Eastern Gas Pipeline (\$450m, 795km)
- Tasmanian Gas Pipeline (\$440m, 730km)
- SEA Gas Pipeline (estimated \$500m, 680km)
- North Queensland Pipeline (\$160m, 390km Coal Seam Methane from Moranbah to Townsville)
- Telfer Gas Pipeline (estimated \$114m, 442.5 km from Port Hedland to Telfer).”

¹⁵ see Australia and PNG Gas Conference, 6th December 2005, Ed Willett, Commissioner.
<http://www.accc.gov.au/content/item.phtml?itemId=716598&nodeId=ce692a205821b43f55b813e0433886f0&fn=Developing%20gas%20pipeline%20infrastructure.pdf>

¹⁶ Graeme Samuel, Chairman ACCC, Promoting Competition and Fair Trading, Australian Council for Infrastructure Development, *The Case for Regulation*, 22 July 2004.
<http://www.accc.gov.au/content/item.phtml?itemId=560097&nodeId=fc57d88c0cfd97e8b70cccaf82122a3b&fn=2004-07-22%20AusCID.pdf>

Contrary to such assertions, no pipeline has been built as a result of the alleged greater certainty that Part IIIA and the Gas Code offers. No new pipeline has been built in the expectation that it would be regulated¹⁷.

Most gas pipelines were declared with the adoption of the Gas Code. In the following period many declarations have been revoked by the NCC. These have largely been cases where there was only one customer (e.g. Southern Cross Pipelines to Leinster power station) or where the pipelines were small, could not exercise market power and had regulation costs disproportionate to the returns (e.g. South West Slopes and Temora pipelines).

Others have been revoked after their operators appealed to the Australian Competition Tribunal (ACT), following rejection by the NCC. This was the case in 2001 with the important Longford to Sydney Eastern Gas Pipeline (EGP) after the NCC had rejected revocation. Once that line had been built, competition caused the price on the existing Moomba to Sydney line to fall from 71 cents to 66 cents per gigajoule. However the NCC's consultants (Drs Ordover and Lehr) argued that under true competition the price should fall to around 50 cents per gigajoule (the authorities concluding that there was "implicit" collusion between the parties). The consultants and the NCC considered regulation to be warranted as long as there were not parallel lines. This

¹⁷ This should have been well known to the ACCC. At the 2001 APIA Convention respected former CEO of APT, Jim McDonald, in an address titled 'Gorillas in the Myths' examined all contemporary pipelines developments and showed that none were developed because of regulation. The matter was later addressed at length in the PC's Gas Access Review (<http://www.pc.gov.au/inquiry/gas/finalreport/gas2.pdf>)

In the PC review, the ACCC argued that coverage risk is low for new pipelines but the Commission considered, "that the regime subjects most, if not all, new pipelines to coverage risk". (P111) Specific references in the Report included:

APIA maintained that "Of the seven pipelines completed since 1996, only the \$30 million Central West Pipeline (that proceeded on the basis of direct government financial assistance) is regulated under the Gas Access Regime. That is, less than 2 per cent by value of new investment in transmission pipelines since the introduction of the Gas Access Regime is actually regulated under the Gas Access Regime, and arguably the investment decision in relation to the covered pipeline was affected by government assistance. Moreover, where investment faced the threat of regulation (as with the Goldfields pipeline), measures were taken to insure the pipeline owners against potential detriments. APIA believes that this clearly indicates the reality that the investment that has occurred over the last eight years has occurred in spite of the Gas Access Regime rather than because of it. (sub. 74, p. 14)

Regarding the SEAgas pipeline a number of submissions provided evidence of deliberate undersizing purely to avoid regulatory coverage APT said, "From a pipeline owners' perspective, this reduces the potential for coverage under the [Gas] Code; and even if a coverage application was successful, the absence of spare capacity would be expected to reduce regulatory uncertainty. The adverse consequence of minimum pipeline sizing is that opportunities to induce investment in pipelines sized for future market growth have inevitably been lost. (Australian Pipeline Trust, sub. 55, pp. 6-7)

The PC's Finding 4.3 (p. 139) was, "The Gas Access Regime is likely to be distorting investment in favour of less risky projects, including altering the nature and timing of pipeline investments. Pipeline construction might be delayed, for example, and there might be greater emphasis on building capacity that is essentially fully contracted prior to construction."

notion of essentiality is capable of a very wide application across the economy and the ACT rejected it.

Revocation of the coverage over the EGP pipeline left a strong case for the competing Moomba-Sydney pipeline to be uncovered (leaving it under regulatory coverage would frustrate the rationale for removing coverage over the EGP since this would automatically fix both pipelines' prices). Although the NCC rejected revocation, the Minister revoked coverage over the part of the pipeline that competed with the EGP, in effect, revoking coverage over the whole of the pipeline.

An earlier case involved a new pipeline in NSW, the Central West. AGL and the users agreed prices for this (and the facility received a Commonwealth subsidy). After its commitment the ACCC required its price be lowered, a decision heralding considerable risk to pursuing business opportunities without regulatory clearance.

Such outcomes doubtless influenced business strategies for the SEA Gas pipeline from Victoria to Adelaide. This was built with the intention of avoiding the regulatory costs and distortions of coverage. The partners inflexibly designed the capacity to prevent any availability for other users and therefore any case for declaration. As building-in some provision for increased demand is relatively inexpensive, this represents regulation forcing sub-optimal investment¹⁸.

SEA Gas competes with the established Epic pipeline from Moomba to Adelaide and once it commenced operation, the NCC in 2005 agreed to revoke coverage of the Epic pipeline. However, the SA Minister has not concurred.

Some pipelines, though under coverage, have proceeded because the parties have agreed to contract with each other to circumvent regulatory intrusion. This has been the case with the Roma to Brisbane pipeline expansion and the expansion of the Dampier to Bunbury Pipeline, where the customers and the owners (who overlap) all shared a common interest in expansion and agreed to pay a premium over the price for regulated capacity¹⁹. The new Fairview to Wallumbilla and the Moranbah to

¹⁸ The Australian Pipeline Industry Association's submission to the Productivity Commission's gas inquiry said, 'In any proposed project, the developer must weigh up the probability and timing of future demand growth and whether it is best to build a smaller diameter pipeline with the thought of increasing capacity in the future via an option such as adding additional compression or simply building a larger diameter pipeline in the first instance which will be capable of satisfying future forecast demand. A simple example of the impact of this trade off which reflects the relative costs of the different options is as follows:

	Scaled to Initial Demand (300 mm)	Scaled to Future Demand (400 mm)
Demand	100 TJ/Day	180 TJ/Day
Construction Cost \$/KM	\$225,000	\$300,000
Compression Cost \$/KM	\$150,000	-
Total Cost \$/KM for 180 TJ/Day	\$375,000	\$300,000

The presence of regulatory risk will reduce the willingness of developers to invest in initial uncontracted capacity and instead will result in only higher cost developable capacity being available. Moreover, the development of partial spare capacity can only enhance a pipeline owner's incentive to increase throughput.' Submission available at: <http://www.pc.gov.au/inquiry/gas/subs/sub044.rtf>

¹⁹ In that case there remain commercial concerns because the regulatory coverage is presently envisaged to revert to the State regulatory authority in 2016.

Gladstone pipelines followed a similar approach and the PNG to Brisbane pipeline, if it eventually proceeds, is to be uncovered.

It is prudent for new facility investors to engage with prospective customers and, where possible, to tie down long term contracts prior to commitment. The measures new pipeline developers feel obliged to follow are, however, of a different nature. Detailed negotiations with customers prior to development are designed to circumvent regulatory oversight and are especially difficult since they require all parties' agreement.

Amendments to the gas law will also provide for access holidays for green field sites. There is an irony, apparently lost on the proponents of the regulatory provisions, in formulating a code designed to regulate an essential facility that is yet to be brought into existence. New pipelines have no franchise and, not having been built already, are clearly neither "essential" nor commercially certain. Oxymoronic though such a green field provision is, it also relies upon agreement to the holiday by the ACCC, which has in the past suggested price conditions for such sites that are more suitable for established facilities facing little risk than for entrepreneurial facilities.

An additional pipeline brings new competition. The regulatory arrangements are posited on natural monopoly, an inappropriate market depiction where new competition actually emerges. Yet the regulatory agencies have too often contrived to regulate new ventures and to retain controls—even with an outbreak of competition. Regulation in those cases contains all the inevitable downside costs but no upside benefits.

Coal Terminals

Unsatisfactory outcomes are evident in the provision and expansion of coal port and rail facilities where users and owners are unrelated parties and the facilities are regulated.

Faced with an expansion of demand for coal in 2004 the BHP owned Hay Point facility saw an approval and commissioning of a 25 per cent increase in capacity in a little over 3 years.

By contrast, a comparable multiple-user regulated facility at Dalrymple Bay took an additional year, albeit with a larger planned capacity increase. The owner of that facility sought a 35 per cent increase in the Terminal Infrastructure Charge in June 2003 but the regulator sought a 24.6 per cent reduction. Agreement was reached in April 2005, with the delays causing \$1 billion in forgone sales. Though regulated under the Queensland Competition Authority Act rather than Part IIIA, the Dalrymple Bay coal loading facility demonstrates how the gestation time of approvals is often much greater with regulated facilities than with single user facilities.

Even greater delays are being experienced in expanding the facilities serving Port Waratah, the rail capacity to which has been increased following Commonwealth Government intervention. However the coal exporters' different agendas have held up funding for expansion of the multi-user open access terminal by the coal exporting facilities but now face transport bottlenecks.

Airports

Price monitoring of airport charges was abandoned by the Commonwealth following a Productivity Commission report in 2002. Price monitoring was put in place for most airside airport services. Parties still have access to generic provisions under Part IIIA. Sydney Airport Corporation Limited (SACL) and Virgin are currently in legal dispute over the applications of Part IIIA provisions.

The PC in its present review saw the positive outcomes of the current approach of price monitoring (with the option of Part IIIA declaration) as being:

- there is no evidence of systematic misuse of market power by airports in setting charges for aeronautical services;
- it has been much easier to undertake the investment necessary to sustain and enhance service provision in the face of growing demand for air travel;
- airports' productivity performance has been high by international standards, with service quality rated satisfactory to good;
- compliance costs have been lower than under the previous regime; and
- some progress has been made in building commercial relations.

The declaration process for SACL has undergone several twists with the NCC first indicating that it would declare and then opting not to do so, the Tribunal then deciding to declare the services and the Full Federal Court upholding that but using a markedly different interpretation of Part IIIA.

Among the issues determined by the Full Federal Court are:

- Part IIIA is not a measure to remedy unacceptable conduct but is an instrument to allow more efficient working of essential facilities;
- The important aspect is whether “access or increased access” not “declaration” would promote competition;
- If “the service has been provided in a fair or even handed means and in a way to maximise vigorous competition in the downstream market, that may be a powerful and relevant consideration as to why no declaration should be made”(para 85);
- Declaration is required because:
 - “(a) Sydney Airport is a natural monopoly and SACL exerts monopoly power;
 - (b) the Airside Service is a necessary input for effective competition in the dependent market;
 - (c) neither Bankstown (nor) Richmond Airport could provide the service; and
 - (d) the parent company of SACL had the first right of refusal to build and operate any second major airport within 100 kilometres of the Sydney CBD.

“Further, ... access to Sydney Airport is essential to compete in the domestic air passenger market.”

These provisions may be of considerable importance in defining the future reach of essential facilities regulation.

Electricity Transmission

Electricity transmission has its own regulatory arrangements with principles outlined in the National Electricity Law (s. 16(2)) that identify the industry as highly regulated with its own access scheme.

Present policy recognises generation and retailing as market driven contestable sub-industries, and transmission and distribution as natural monopolies that require regulatory control. The interplay between regulated and deregulated parts of the industry poses considerable risks to efficiency and commercial viability. Since transmission and new generation are alternative approaches to market supply, this has required a regulatory assessment of whether a transmission development may proceed. The trade-off between nearby and remote generation (via transmission) is especially marked in Australia, where distances between load centres are vast and transmission costs can therefore be high.

There is no shortage of proposals for new regulated links since the revenue is from a compulsory charge on users and is widely considered to be guaranteed.

Two entrepreneurial links have been built to take advantage of price differentials where transmission shortages were evident. These developments gave rise to issues concerning the circumstances under which a regulated augmentation of links should be permitted²⁰. In the event, the merchant links in Australia could not compete against the links receiving a regulated return and have been given regulated status.

The case for regulated transmission rests on its indivisibility and the consequent externalities which are too great to allow profitable merchant transmission because the price benefits accrue to all and not only to those paying for the asset. But a new generation facility will also tend to suppress the price of all delivered electricity in its interconnected region in a process similar to that of a transmission link introducing new power. Few would argue that generation should therefore be government-owned or subsidised. All forms of supply across the economy are accompanied by some externalities.

The present position in Australia regarding transmission is that regulated links will be permitted as long as a net market benefit is judged by the regulator to be the outcome and as long as the proposed link is the best of a range of feasible alternatives. This, however, remains dissimilar from the decision making structure that is seen in the generation sector (or in markets more generally) since the value attributed to the

²⁰ This brought about a voluminous level of studies. Those in Australia include the sceptical like B. Mountain and G. Swier, 'Entrepreneurial Interconnectors and Transmission Planning in Australia', *The Electricity Journal* March 2003. In its work for the ACCC, London Economics (*Review of Australian Transmission Pricing* 1999) also concluded that entrepreneurial links could not cover their fixed costs. This scepticism is also seen in the work of P. Joskow and J. Tirole (e.g. *Merchant Transmission Investment*, CMI Working Paper 24 The Cambridge-MIT Institute, 2003). The Australian 2002 Parer *Independent Review of Energy Market Directions* (www.energymarketreview.org) saw a possible role. Littlechild has been more supportive both in studies in Australia and Argentina (e.g. S. Littlechild, (2004) "*Regulated and merchant interconnectors in Australia: SNI and Murraylink revisited.*" Applied Economics Department and The Cambridge-MIT Institute, Cambridge University, Cambridge Working Papers in Economics CWPE No.0410 and CMI Working Paper 37; and S. Littlechild and C. Skerck *Regulation of transmission expansion in Argentina* CMI, Working Paper 61, University of Cambridge, Department of Applied Economics, 15 November 2004).

transmission investment may incorporate network benefit externalities some of which a comparable investment in a new generator would not capture.

Cook²¹ assembled the following estimates of four proposals' regulatory benefits, which are dominated by deferred investment.

Table 1

The Calculation of the Regulatory Test Benefits				
Benefit (\$M)	Riverlink¹	QNI²	Murraylink³	SNI⁴
Energy	4	90	82	25
Reliability	-	-	62	-
Deferred generation	158	571	54	154
Deferred network	15	-	24	18
TOTAL	177	661	222	197

1 Report on Technical Issues, Costs and Benefits Associated with the Riverlink Interconnection – Between the Electricity Networks of South Australia and New South Wales, undated, Schedule 2

2 London Economics, 1997

3 Murraylink Transmission Company Application for Conversion and Maximum Allowed Revenue, Decision 1 October 2003, ACCC, page 75

4 Economic Evaluation of the Proposed SNI Interconnector, Roam Consulting Pty Ltd, October 2001, Results for Simulation 1-S-M

Note: SNOVIC400 Regulatory Test benefits unavailable

In the case of the proposed regulated Riverlink line between NSW and South Australia, the estimated value of deferred investment was \$158 million. This was largely predicated on reserve capacity estimates being a relatively low 12.5 per cent. However in the three years following the proposal over 1000 MW of new capacity was commissioned on top of the pre-existing South Australia capacity of 2980 MW bringing the reserve capacity margin to 32.8 per cent.

Similarly, the Queensland/New South Wales Interconnector (QNI) was estimated to bring \$571 million of deferred generation benefits including \$351 million for Queensland where supplies were tight at that time. In the event, in the subsequent two years, Queensland's pre-existing capacity of 8,400 MW was augmented by 2,500 MW of additional capacity.

In these and other cases, the estimates of value of the proposal were based on a static situation in which other suppliers are assumed not to react to the same opportunities. Yet the inclination at the time was to further facilitate the allowance of regulated links by incorporating into the estimates of their value the lower prices their "competition benefits" bring. This is a departure from the outcome obtainable by a private entrepreneur, who would not be able to capture the consumer surplus value that stems

²¹ A. Cook, 'Maintaining the Security of Supply to South Australia through Interconnections', Address to South Australian Power Conference, 2004.

from the price reductions forced on incumbent suppliers. Hence a regulated investment justified on the basis of such benefits is overvalued vis-à-vis a private investment.

No jurisdiction anywhere in the world has developed a system for new transmission that does not presently rely on regulated prices and approvals. A comprehensive assignment of property rights to the transmission system has been advocated previously by the present author²². This would assign a share of the available transmission to incumbent generators. Major new generation would then be required to finance any additional transmission capacity that its output required (or buy such capacity from a plant that was contemplating retirement).

This would avoid the tortuous public hearings and risks of inappropriate customer funding of new transmission.

In any event, the electricity industry's highly meshed system based on alternating current has brought general agreement for its need for a variation of the generic Part IIIA provisions. No jurisdiction has developed a satisfactory means of allowing market processes to efficiently augment transmission.

Private Railways

Significant Cases

Several cases for rail track services to be declared have been considered. Rail services for the Gulf of Carpentaria, Sydney to Broken Hill, Hunter Valley, and Victoria intrastate were all decided by agreement of the parties.

Two Federal Court cases have been heard. In *Robe River* (1998) Kenny J. determined that access was not justified because the rail facility was part of an integrated production process "by which a marketable commodity is created or manufactured" and thereby excluded from coverage. In *BHP Billiton Iron Ore v NCC* (2006) Middleton J. considered this to be incorrect and ruled that access to the railway is not "use of a production process" but rather it is a transport or conveyance service and cannot fall within the production process exception. Attachment 3 outlines the two judgements.

The Pilbara Rail Lines

The rail lines in the Pilbara were developed through State Agreements which were seen as a package which would ensure that:

Through the resulting legal framework, major resources development would be recognised, encouraged, assisted and promoted. (Department of Resources Development 1997, p. 6)

However, although the companies agreed to carry people and freight of third parties, this was highly conditional (Hamersley agreed to do so only if this was possible "without unduly prejudicing or interfering with its operations").

²² A. Moran, 'Firm access rights: The key to efficient management of transmission', Submission to The NECA Transmission Pricing Review, Energy Issues Paper no. 12, 1999.

The State Government agreed to facilitate the removal of government barriers to the construction of the Pilbara railways but contributed no capital, land or other services. It did allow “for nominal consideration – townsite lots: at peppercorn rental – special leases of crown lands within the harbour area the townsites and the railway; and rentals as prescribed by law or are otherwise reasonable – lease rights mining tenements easements and licences in or under Crown lands.”²³

None of these constitutes things of value except in so far as the State has a monopoly of certain assets which assume a scarcity value once someone finds something which must be mixed with these assets to create wealth. The support that Western Australian Governments extended to the iron ore developments was no more than would be offered to any new major investment. It was rather less than State and Commonwealth governments have extended to new or updated motor vehicle plants, and few would maintain that such support confers some level of ownership or a case for special favours. The rail lines were not built under some protective covenant or with the assistance of the government which therefore might be said to have acquired an implicit lien on them for the greater good of the State in general. The State Agreements, in short, placed no unusual call on government funds or facilities that might require some *quid pro quo* in return.

Competitive Provision of Rail Lines in the Pilbara

BHP and Rio Tinto both have integrated iron ore production facilities in the Pilbara. Each firm’s rail lines are almost exclusively for their own use. Hope Downs had announced it was to build a rail system to service its developments but has since reached an agreement with Rio Tinto to augment and make use of the latter’s facility. And FMG is to build a rail line of its own (the Chichester Line) to service its extensive Christmas Creek and Cloud Break deposits.

This would mean three different lines serving the southern Pilbara area. In its assessment of the analogous Duke Pipeline case the Tribunal firmly determined that, “there is no logic in excluding existing pipelines from consideration of whether criterion (b)²⁴ is satisfied”. It went on to argue that it is “appropriate to enquire whether the Moomba to Sydney Pipeline or the interconnect provide or could be developed to provide the services provided by means of the Eastern Gas Pipeline²⁵.”

There is no monopoly over actual or potentially available services (one of which is for a rail spur to the Mindy Mindy deposit from FMG’s own Chichester line). Businesses will rarely reject profitable opportunities and the fact that there are three rail operators in the area means that none has market power. If none are made available this indicates that:

- the sort of facility employed in this line of business must be totally controlled by the integrated firm and that an unrelated entity operating on the tracks would create too many managerial difficulties;
- there is no spare capacity or those presently having unused capacity envisage it being required in future; or

²³ Kenny J., *Hamersley v NCC* 164 ALR 203 p. 221.

²⁴ *that it would be uneconomical for anyone to develop another facility to provide the service.*

²⁵ Para 57 of the Council’s Guide to Part IIIA of the Trade Practices Act 1974, Part B Declarations, December 2002.

- any apparently spare capacity may be needed for built-in redundancy purposes as and insurance against unplanned events.

In any event the track owners see the risk of contracting to transport for an unrelated entity as placing too great a risk on their integrated business.

It has already been observed that the language in criterion (b) *uneconomical to develop another facility* is more receptive to regulated access than the US formulation of *Where facilities cannot practicably be duplicated by would-be competitors*. Even so the language is not totally open since it does not say for example *that it would be less economical*, and it does introduce the word *anyone*, both of which impose limits on the declaration.

The BHP/NCC process brought evidence from some very prominent economists. Important in this respect is the position of Professor Ordovery, who provided expert advice in the case of the Eastern Gas Pipeline to the degree that he endorsed the position of the regulatory authorities that a pipeline should be declared unless it is duplicated by a parallel line. That position argues the case from the perspective of the production source as well as the point of consumption. It seeks to reduce the bargaining power of a facility over a supplier as well as over the consumer. Other authorities consider such measures would attract undue regulation.

Notably however, in the FMG/BHP case even Professor Ordovery could find no reason to support declaration. He said that whether or not outside parties think it uneconomic “to build a parallel facility is ‘trumped’ by the revealed behaviour of market participants”. He took to task the NCC in its view that “it is possible to envisage a case where criterion (b) is satisfied even though competing services exist. Criterion (b) is a test of whether a facility can serve the range of foreseeable demand for the services provided by the facility at less cost than that of two or more facilities. The status of a facility against this test does not change merely because another facility is inefficiently developed.”²⁶ He argued logically that whether or not something was thought to be economical is irrelevant if it is in place or will shortly be in place.

Professor Ordovery’s views on this matter are important because of his interventionist position on infrastructure sharing. Thus, on the matter of whether or not a new facility would negate a natural monopoly he goes further than both the US guideline of *cannot practically be duplicated*, and the Australian *uneconomical for anyone to develop another facility*. He endorsed the NCC guideline which proposes coverage as long as the overall cost to the economy – the social cost - of a single facility is lower than with two or more facilities. In this respect he considered that the sunk cost should be disregarded in assessing whether an existing facility should be covered. Most authorities would argue that such a position would cause excessive caution in new infrastructure investment as it would not only negate the rewards accruing to a successful innovatory entrepreneur but would provide the initial risk-bearer with a disadvantage over subsequent cheap riders on its assets.

²⁶ The National Access Regime: A Guide to Part IIIA of the *Trade Practices Act 1974*, Part B Declaration National Competition Council December 2002 para 4.35.

Other economists passing judgment on the issue have not relied on the fact that the facility has already been duplicated to conclude that the NCC case is fatally flawed.

Professor Kalt of Harvard University had no doubt that the test of whether intervention is justified rests on whether for the applicant it is “infeasible or impractical to provide its own services”. He shows that the US policy of a feasible threat of entry is market based and the best means of ensuring that the social cost of inefficient duplication of facilities will be avoided. The profit maximizing incumbent will readily grant access at a charge slightly below that which the entrant would bear in bypassing the facility. Noting that such facilities had considerable sunk costs, he pointed out that this results in an incumbent being particularly concerned to avoid a new entrant building its own facilities since the excess capacity this would create would bring steep price discounts. Professor Kalt pointed out that the lesser test outlined by the NCC would lead to excessive paperburden and strategic costs by applicants in evidence to persuade a tribunal to grant it access to a rival’s facility. This would apply even more if, as the NCC argues, sunk costs need not be included.

Professor Baumol, among the most authoritative economists in the world, endorsed this approach. He added that intervention by the public sector, an excessive amount of which is invited by the NCC approach, would introduce additional costs generally. Importantly this is likely to involve a firm that cannot succeed on its own merits recruiting the regulator to assist it. In doing so it will be seeking access at a fee well below that which market forces would provide.

These views are also supported by Professor Willig of Princeton, who has special acclaim as a network economist. Professor Willig, like Professor Ordover, could see no possible basis for applying a test to assess whether entry is possible. He also maintained that the ex ante determination of costs that the NCC argues for is by no means as straightforwardly simple as the regulator imagines. He drew upon the transaction cost literature developed by Coase and Williamson²⁷. This alerts one to the dangers of contracting where information is incomplete and contingencies may arise. Hold-out problems can occur which often make integration through ownership a preferable option.

The more recent statements by economists on this matter reinforce concerns expressed in the earlier Hamersley case regarding North and Rio Tinto. Unease was expressed about the possible far-reaching implications of Part IIIA in terms of government regulatory intrusion unless restrained in its interpretation²⁸.

²⁷ The ‘transaction cost’ theory of the firm and vertical integration is principally attributed to Coase and to Williamson. See R.H. Coase, ‘The Nature of the Firm’, *Economica*, 4, 1937, pages 386–405, and O.E. Williamson, ‘Transaction-Cost Economics: The Governance of Contractual Relations’, *Journal of Law and Economics*, 22, 1979, pages 233–261.

²⁸ National Competition Council, Application by Robe River Iron Associates for Declaration of a Rail Service Provided by Hamersley Iron Pty Limited, Discussion paper, March 1999.

In *Unlocking the Infrastructure* Stephen King²⁹ and Rodney Maddock³⁰ discussed their concerns about the risks that can arise if the test of ‘uneconomical to develop another facility’ is not carefully applied. They argued that access should apply to services provided by facilities that are natural monopolies. They raised several concerns about expanding the test too far. One of their key concerns would be realised if the criterion were considered from a private rather than a social perspective.

King and Maddock pointed to the situation where there are many facilities in competition but the market demand and prices may not be sufficiently high to make it possible for one more entrant to build a new facility and earn a positive return. In those circumstances, they noted, the industry is already highly competitive and firms can freely enter or leave the industry.

It is the existence of free entry that makes it uneconomical for anyone to develop another facility. If it were not uneconomical, someone would enter. But this means that any of the 50 facilities operating in the industry could be liable for declaration. By applying the test only to ‘another’ facility, the Act opens the door to declaration of facilities even in those industries where competition is robust.³¹

Costs of Requiring Third Party Access to the Pilbara Rail Lines

Over the past ten years, Australia’s iron ore exports have more than doubled. With coal export growth not far behind, the two commodities have been responsible for virtually all of Australia’s export growth over the past four or five years. It is this export growth that has enabled a strong balance of payments, a firm Australian dollar and lowered the costs of imports of consumer goods, capital and business inputs.

While forecasts can readily be made, nobody can be certain about the future demand for Australian commodities that rely on infrastructure developments in the Pilbara and east coast coal production. Iron ore annual market growth at some 7 per cent over recent years may well continue and Australia’s share could easily be maintained. There are reasons to believe the share may increase (proximity to the fastest growing markets, abundance of supply, political stability, strong skills) but also reasons why it may fall (less supportive regulatory arrangements, excessive taxation etc.). Australia has some 15 per cent of the world’s iron ore market but faces strong competition from Brazil (where BHP and Rio Tinto are also active) as well as from India and South Africa.

With a doubling of output, a doubling of infrastructure investment is necessary. There may be some economies from sharing existing facilities but these are likely to be modest in such a magnitude of expansion. Moreover, almost by definition, the most economic deposits have been located first and subsequent extractions are likely to be from deposits that are further afield, less easy to mine, lower grade and so on. Somewhat offsetting this, technology and know-how is improved over time.

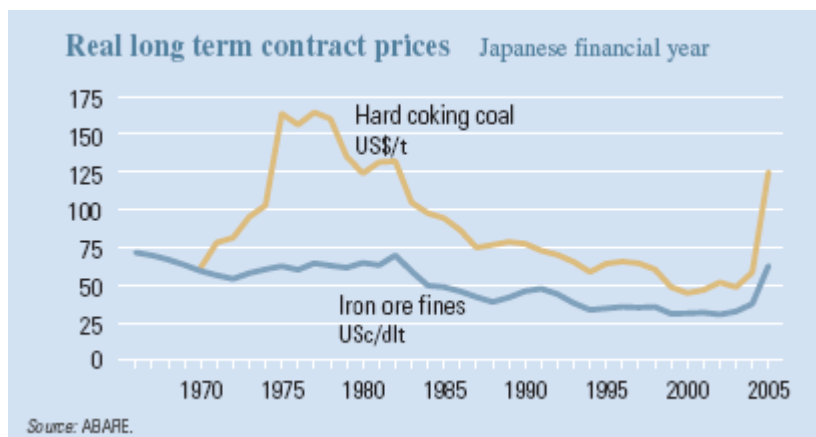
²⁹ S. King and R. Maddock, *Unlocking the Infrastructure: The Reform of Public Utilities in Australia*, Allen & Unwin, 1997. At the time, King was Professor of Economics at the University of Melbourne, and is now an ACCC Commissioner.

³⁰ Then Professor of Economics at La Trobe University.

³¹ King and Maddock, pages 79–80. 1997.

From a global perspective, the bottom line, of such considerations has been a slight downward trend in long term average prices of minerals. This is in line with popular wisdom that the terms of trade between raw materials and manufactured goods show the former to be on a long term declining trend³². This trend has become far more difficult to measure over recent decades because the notion of goods especially manufactured goods has changed. How for example do we measure the value of a silicon chip when its power doubles every year and its price halves?

Real prices are however mightily important in establishing new contracts and infrastructure to support output increases. Mining tends to be highly cyclical. Real coal and iron ore prices are illustrated in the following figure.



Such trends tend to bring surges in investment followed by little such activity. The industry in the major supply areas is highly dependent on infrastructure being put in place so that increased production can be available when the customers need it.

This in turn means early commitments to investment if the portended demand increase is to be met by one supply source rather than another. Losing out at an early stage of the planning means losing out on a whole cycle. This is the nub of the present regulatory actions to declare access to private facilities. Few firms would be willing to take the risk of major new capital investment if the investment were to be controlled or restricted by a government entity.

In the context of the Pilbara BHP access dispute, three respected economic consultancies have sought to investigate the implications of regulators' requiring access. These are the Centre for International Economics (CIE), Charles River Associates (CRA) and Port Jackson Partners. All three have used conservative assumptions in estimating outcomes but have still arrived at large costs. All three see regulatory intrusion as bringing about delays in investment as a result of:

- the machinery of regulatory approvals,
- the diminished control of the investor over his investment expenditure and the need to engage in commercial negotiations outside the framework of an individual firm, and

³² A contrary and since discredited view was offered by the Club of Rome's Donella H. Meadows *et al.*, *Limits to Growth*, Universe Books, New York, 1974.

- a higher risk premium required as a result of the increased uncertainty about when the investment can commence.

In addition, the uncertainty over future controls over the investment and the possibility that it might be opened up to parties that have not been engaged in the initial negotiations would add a further risk premium that is difficult to estimate.

CIE examined a deferment of six months in the commencement of an investment program which would eventually duplicate the estimated \$35 billion in capital investment in the Pilbara mines and associated transport and port facilities. The outcome involved a net loss over 20 years of \$20 billion.

CRA estimated a one year investment delay in annual spending of \$2 billion investment with a catch up in the following year would still mean a permanent loss of output of \$400 million.

In both these cases the losses were borne by the economy as a whole – that is by businesses and consumers that were not necessarily related to the iron ore miners. The cost is transmitted through the economy largely by the effect of a reduction in exports and the associated effect of a lower value of the Australian dollar.

Port Jackson Partners used a different approach which arrived at similar outcomes. They estimated the value of exports forgone from a one year delay at \$21 billion over a 20 year period.

The actual delays would far exceed the assumptions that these models used. Indeed, if the investments were to await the finalisation of a Part IIIA dispute they would according to estimates made by the Queensland Mining Council take a minimum of three years and more likely five years³³. But even the conservative assumptions used by the three consultancies indicate the huge penalty the economy pays for the sort of intrusive approach to property rights that key regulatory agencies are taking. And although the agencies argue that the costs will be offset by lower prices from increased competition in the use of the facilities they want to control, this would not be a long term outcome.

In March 2007, BHP announced a major upgrade of its integrated facility to raise capacity from the current 109 million tonnes and the previously planned 129 million tonnes to 155 million tonnes by 2010. In terms of the railway infrastructure, this entailed additional locomotives, ore wagons and sidings, rather than line duplication.

Finally, in addition to the economic distortion costs that these studies examined there is a resource cost in terms of government regulators and associated costs in the regulated businesses themselves.

³³ Productivity Commission, “Review of the National Access Regime. Position Paper”, 2001, p. 399.

3. Economics of Access

3.1 Regulatory Measures that Modify Market Outcomes

Types of Regulatory Costs

The costs of the effects of the regulation comprise three parts:

- The economic costs (net of benefits) resulting from the deviation from unfettered competition
- Paperburden for the taxpayer
- Costs incurred by the regulated firm and those seeking the regulation.

Pioneering work on the costs of regulation by Murray Wiedenbaum, former Chairman of the US Council of Economic Advisers, estimated the costs of US regulations at over 8 per cent of GDP. This included the economic distortion costs and the administrative or paperburden costs. It is the economic distortions to investment and operations that constitute the vast bulk of these costs.

Costs of Regulatory Distortion

In the US, the Office of Management and Budget undertook a considerable range of regulation impact statements as part of the regulatory review arrangements that successive US Administrations required from the mid 1970s. Journals like the Cato Institute's *Regulation* and the *Yale Journal on Regulation* developed a stream of studies which costed different aspects of regulation.

In Australia, from the early 1970s, the Productivity Commission undertook several hundred reviews of particular industries or sets of regulatory arrangements the costs of most of which were estimated. Recent economic management has required a dismantling of a great deal of those "economic" regulations over price and of entry barriers, to the great benefit of economic prosperity.

In previous eras, reasonable estimates of such costs could be made. The distortions in the form of external tariffs, restraints on airline competition, on the dairy industry and on electricity supply could all be quantified. Means of doing so comprised such measures as comparisons of prices on imported goods and domestically produced import substitutions; or the observations of air travel costs or electricity prices in comparable markets to those of Australia.

The costs imposed by the regulations over "essential facilities" are costs that occur as a result of investment that is not made, that is delayed or that is modified from the optimal configuration that would occur without the regulatory distortion. Estimating such costs has proven to be much more difficult and regulatory appraisals often confine judgments to general terms like "a chilling effect on investment". Among the few rigorous quantifications of these effects that have been made are those previously discussed in the context of the Pilbara rail facilities³⁴.

³⁴ The ACCC commissioned ACiL Tasman to quantify the benefits of gas and electricity regulations but these simply assumed permanent price reduction from the regulations. See <http://www.accc.gov.au/content/item.phtml?itemId=506371&nodeId=e5ecb71be83de39f23e6bb0c879b3c6c&fn=Breakout%20Session%202:Gas%20-%20Paul%20Balfe%20presentation.pdf>

If they are not to impede the creation of general prosperity, governments should not use the monopoly they have over land use or land itself, which is otherwise of trivial value, to build hold-outs to the wealth-generation process.

Unfortunately this is often misunderstood by politicians. Thus, influenced by the NCC's cast on the application of FMG to obtain access to BHP's rail lines for its Mindy Mindy deposit, Senator Andrew Murray, on 10 August 2006 said:

“I was disappointed to hear at Estimates that the fact that even though the Western Australian government facilitated the building of the BHP rail line which is now privately owned by BHP, the taxpayers contribution to this private asset was not a matter which the NCC took into account when making its decision.

“In his own words Mr Feil said, ‘The contribution the state made some time ago in facilitating the construction and planning of the railway line was reflected to a degree in the state access regime, so the quid pro quo was some conditions for third party access and a number of other things including royalties. As it turns out, the state access regime does not appear to have provided the degree of access that perhaps at the time parties thought might have occurred but it is very hard to read exactly what the trade-offs were. So we treat this as a fresh application for an asset that is essentially privately owned.’ He went on to say, ‘I do not think it is necessary or appropriate to consider how much the state government or the people of WA might have contributed some time in the past.’”

The treatment of the Pilbara rail facilities has implications that go much wider than the iron ore industry. The matters go to the heart of the scope of law, economics and policy on essential facilities.

This is illustrated in the evidence to the Senate Committee given by the NCC's CEO Mr Feil where he argued that the caveat of production process is used to escape coverage. He said that the danger is that, “we run the risk that either the ore assets will be stranded and unable to be developed or they have the unpleasant choice of whether or not they sell to one or other of the incumbents”. He saw the process of declaration as “jogging the parties to a commercial solution” which he thought “would be a positive in terms of promoting competition”.

There are four matters of considerable concern in this approach, aside from the issue of whether it is appropriate for an administrator of regulation to be championing an increased regulatory vista for his agency.

The first of these is the “unpleasant choice to sell to one or other of the incumbents”. This is an acknowledgement that the facility in question is not a monopoly. The fortunate finder of the deposits has the option of parlaying his find to at least two parties (in addition to developing its own facility). And it is abundantly clear that the two parties in this instance, Rio Tinto and BHP Billiton, are in intense competition one with the other.

The second matter of concern was the stated aim of the NCC of “jogging the parties to a commercial solution”. This smacks of bureaucratic hubris by suggesting that businesses are unable to reach commercial deals without the assistance of a prodding regulator.

Even bitter rivals will readily combine to pursue particular opportunities while remaining adversaries in other theatres. Indeed, the management of any firm that avoided such opportunities would actually be behaving against the fundamental requirements of a public company – that of acting to maximise the wealth of its shareholders.

Capital markets are formidable means of disciplining such management lapses. Commercial opportunities are not so abundant that managements can ignore them to spite or victimise another party. Foregoing commercial opportunities means lower profits and a lower share price, making the business vulnerable to takeover by a party that carries none of the personal baggage that might impede sensible decision making.

It might be said that capital market disciplines would seldom apply because most decisions to exclude profitable gains by major firms like BHP Billiton or Rio would be lost in the plethora of other decisions. While no corporate theatre operates exactly as theorised, capital market disciplines are reinforced by the fact of business divisionalisation. Each profit centre has management that is accountable and, to some degree in competition with its peers for remuneration and promotion. Non-commercial decisions would have a major impact on certain personnel within the firm and it would be difficult to compensate them for the loss of status, etc..

The “jogging” that Mr Feil referred to is designed to pressure the facility owner to sell access on terms that the regulator rather than the property owner himself sees as appropriate.

The third matter is that requiring facility sharing is only justifiable if spare capacity exists and the Trade Practices Act (44W(1)) rightly restricts the declaration possibilities where owners need the capacity themselves. In the case of the Pilbara rail facilities, it is not difficult to envisage a doubling of demand in the next decade or so in the light of the booming Chinese economy. Moreover, redundancy may be built in to ensure availability under unforeseen eventualities. The SEA Gas pipeline from the Otways to Adelaide, as previously discussed, was deliberately and wastefully under-sized to reduce the scope for declaration under the Trade Practices Act. Such outcomes amount to regulatory driven inefficiency.

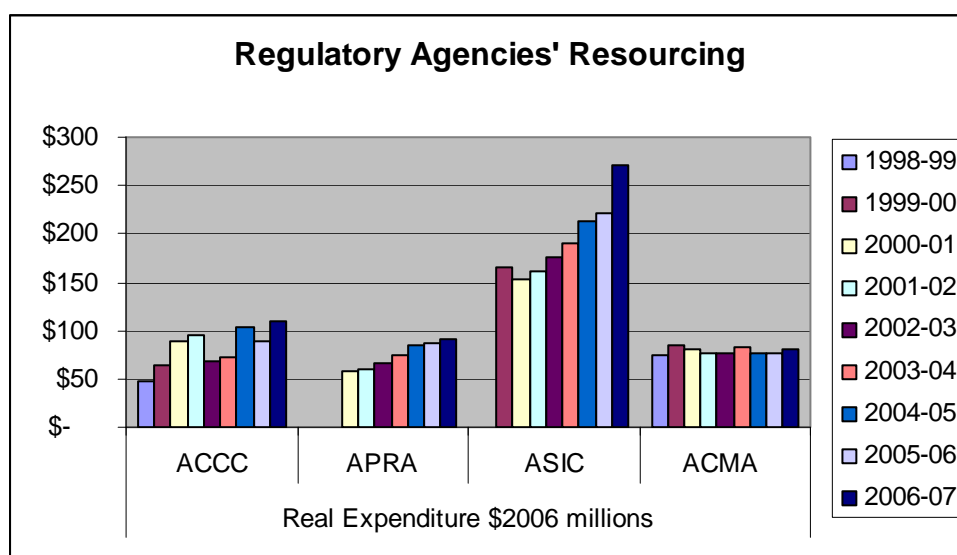
A fourth matter refers back to the nature of the deposits. Iron ore, like stone or bauxite is not a rare mineral, though it is valuable in high concentrations as in the Pilbara region. Although the producers only count a few years available resources, this is because proving up more reserves is not worthwhile and is unnecessary in view of the abundance of deposits.

A major part of the marketable worth of the iron ore is created not by the discovery of a particular concentration but by the measures that allow it to be transported cheaply to a port. The core business of the producer is the transport, preparation, and marketing of the ore, not its discovery. Requiring a firm with such facilities to share them with others is to take its core capabilities and redistribute them. In effect, this socialises those features of production that the Hilmer Report and the Trade Practices Act (s.44 B) sought to reserve from such control.

Paperburden Costs

The paperburden costs of regulations comprise only a small share of the total.

Australian agencies do not report their costs and functions in categories that allow such analysis. Regulatory agencies have however seen considerable growth in their overall resourcing. Expenditure in real terms by the ACCC more than doubled between 1998/9 and 2006/7. The following chart illustrates the growth of four major regulatory agencies.



It is however unlikely that Australia's costs would be any less than those in the US.

Telstra has estimated the regulatory resources devoted to itself as follows³⁵:

Every year Telstra is required to submit paperwork to comply with regulation totalling more than 162,000 pages, this:

- equals approximately 163 editions of 'War and Peace'
- stacks to a combined height of around 15 metres - taller than a 3 storey apartment block
- weighs the equivalent of around 790kgs
- requires more than 75 full-time Telstra staff
- the compliance costs for Telstra staff alone are more than \$10 million - enough to upgrade 155 rural exchanges for broadband
- employs more than 500 full-time public servants to manage it

A survey of the gas and electricity supply industries undertaken by the IPA in association with the industry associations estimated the paperburden costs of the businesses in the transmission and distribution sectors at \$74 million³⁶. This is out of a turnover of about \$9 billion per annum (with value-added comprising about 40 per cent of this).

³⁵ Available at <http://www.nowwearetalking.com.au/Home/Page.aspx?mid=18#telcoInvest>

³⁶ *Paperburden Costs of Economic Regulation in the Gas and Electricity Supply Industry*, IPA, November 2003. Generation comprised a further \$13 million. See <http://ipa.org.au/files/Energy29.pdf>

Costs in terms of regulatory personnel, legal, engineering and economic expertise and consultancies, including the in-house resources of the firms themselves are clearly considerable. However, over and above these more readily allocatable costs are the far greater cost magnitudes brought about by diverting key managerial effort from customer and production focuses and by deterring new investment.

3.2 Setting Access Prices

Requiring access to be given involves regulators in the difficult task of setting its price and other conditions of that access. The market price has to take into consideration many factors, including the chance that the facility may fail (unanticipated competition, failure of demand, cost overruns etc). Products and services exhibit considerable diversity in their features with complex consequences for the most appropriate approach to their pricing:

- At one extreme are fashion goods with a premium price lasting only months or products within rapidly developing technology sectors, like computer chips which are worth a fraction of their previous price a year or so later on.
- Pricing strategies for some other new products follow the opposite approach. Often goods are given away or offered cheaply in an effort to persuade the consumer to try them and if successful the prices are increased.
- Other products are charged at very high prices because they have established a niche of excellence that alternatives are unable to breach. Microsoft's and Apples' products best describe this class. The product breakthroughs they represent allow pricing that incorporates considerable monopoly rents in the sense of being far above what would be necessary to maintain output.

For major innovations, the “killer apps”, regulatory intervention would have a dramatic effect in discouraging investment. Microsoft, for example, with most of its products near or actual monopolies gets an average 100 per cent annual return on its tangible capital assets. Had it been controlled by a regulator, and compelled to charge ‘reasonable’ rates, such returns would not have been allowed. Hence the business is unlikely to have been so successful and the world's real income levels would be appreciably lower. Because price setting is so difficult, assuming control over a facility is something that courts are reluctant to do.

Premium prices and high profits are the reward for successful innovatory activity. The attraction of these prices has been the driving force behind information technologies and of transport innovations that have been at the heart of modern economic growth. Each innovation has displaced something else and its owner has sought to maximise profits from it. Many businesses—Boeing or Airbus for example—“bet the firm” on each new product. And an interventionist interpretation of a successful project outcome would argue that it has become an “essential facility”. Businesses who anticipated the regulatory implications of such an interpretation would not undertake the risks involved. Because they have allowed these developments to proceed on the basis of prices that are unregulated, market economies have prospered and socialist economies or economies without the impartial operations of the rule of law have failed.

US courts have been more articulate than those in Australia in explaining the reasons behind a reluctance to override market outcomes. Thus the US Supreme Court in the Verizon case said, “Mere possession of monopoly power and .. charging of monopoly prices, is not only not unlawful; it is an important element of the free market system.” The Supreme Court recognised the ability to command very high prices for a successful undertaking as encouraging innovation, risk-taking and economic growth.

Monopolies which would be welcome in such situations include an infrastructure developer who spots an opportunity for providing a service that is highly prized by the consumer and for which a premium price can be charged.

The infrastructure developer in Australia today, like the jet plane manufacturer, has no franchise protection and will always be vulnerable to competition. The appropriate regulatory model is not one of price or profit control.

Requiring an open access regime at a specified price provides a cheap ride on existing investments and discourages new investment. These outcomes are exacerbated where rate regulation drives down revenues towards variable costs³⁷. For many facilities this means losses on the very large fixed and common costs such as those incurred by railroads in laying track or digging tunnels. No firm will make investments unless it expects to recover its full costs including a premium for risk.

As addressed in Part 1, products themselves are not so readily defined as goods or services and are increasingly not a purchase at a given point of time but a stream of intermediate purchases that feed businesses which are heavily economising on inventories. Hence the product’s worth is deeply discounted if it is not produced at the right time and at the place where it is needed. Businesses that can guarantee delivery on time and that can quickly adjust supplies to the customers’ needs receive a premium price. This premium for reliability is intrinsic in commerce with the pervasive adoption of Just-in-Time management. Buyers contract with suppliers to ensure components are there when needed, a contract which requires the supplier to set its investment, transport and employment strategies so that it retains the business.

3.3 The Arbitrary Application of Part IIIA

Part IIIA is set in the context of a monopoly facility. Even so, businesses will normally willingly share their facilities with all parties, including competitors, as long as they can profit from the undertaking.

Many raw material producers effectively have only one plant as a customer. This is the situation that confronts a great many small oil fields. Indeed, in WA there is only one oil refinery, (owned by BP). There are 22 crude oil producing fields in the Perth

³⁷ This was the case with rail regulation in the US for nearly a century until, in an early example of deregulation, stifling layer of price regulation were removed by the Staggers Act of 1980. The outcome was an upsurge in investment and productivity. In the past courts have sometimes attempted to set prices with farcical outcomes. Thus in *Pont Data v ASX* in 1991, Justice Wilcox set the price as being the marginal cost of connecting to the ASX system at \$100 per annum, compared to a price of \$1.45 million set by the Full Federal Court. Former ACCC Chairman Allan Fels had also called an approach that did not incorporate pricing principles (AFR, 7 April 1995).

Basin, 11 of which are operated by Arc Energy in the Dongara field. The owners of these fields have the option of seeking refinery services from BP, developing their own refinery facility, or the very expensive solution of sending their crude to Singapore.

BP clearly and quite properly exploits its location to the full in terms of the charges it requires. Anything else would be inefficient. The wells close to its facility now account for around 15 per cent of the refinery throughput.

This is a variation of an “essential” facility in its wider definition employed by some regulators (and access seekers). Certain choke points have been developed by businesses, whether in manufacturing facilities as traditionally defined or in transport and communications. For many such facilities it would certainly be “uneconomical for anyone to provide another facility to provide the service”. Yet governments have correctly avoided and intervention in the associated commercial conditions.

Similar sorts of issues about where one unregulated function (production) starts and a regulatable function (transport) begins have be confronted in gas. Although the ACCC sought to bring gas producer pipelines (which transport gas from wells to the shore or processing plant) within the regulatable framework, this has not been allowed. Producer pipelines from wells are not regulated under Part IIIA of the Trade Practice Act or the National Gas Code, as they are considered integral to the gas production system.

Decisions on which facilities are generically eligible for regulation are increasingly arbitrary. The concept of manufacturing, if it ever was neatly segregated from transport and communications is certainly not so today. The continuous nature of the iron ore mining-transport-preparation system was prominent in Justice Kenny’s insights in *Robe vs Hamersley*. Justice Kenny determined that Hamersley’s rail lines take on a production process role akin to manufacturing in the course of conveying the product to the port since the sequencing of the shipments allows for ensuring the contracted mix on arrival at the port.

Arbitrary though the concept of a production processes is, those framing essential facility laws have excluded it from their reach conscious of the massive and debilitating scope such laws would have if they encompassed manufacturing facilities across the economy. The US Supreme Court was similarly mindful in expressing concerns about restricting the reach– and perhaps the very existence – of such laws in the *Verizon* case.

3.4 Vertical Integration and Risk Mitigation

Inevitably, business firms have to take decisions about what products and services they produce in-house and which ones to buy-in. And the buy-in decision itself contains variants, for example, is the product or component uniquely available or is it a standard item available generally? Nor is the decision one that necessarily endures. Often firms shift from internal supply to outsourcing and back again both in the light of experience and because of the changed nature of technology and customer needs.

Costs and risk management are the key features of the make or buy decision, particularly where, as with some manufacturing plant, firms have some form of final assembly into which the parts are brought together.

For products that are critically dependent on the various components being brought together precisely as required the supply will often need premium service and frequently a built-in redundancy of availability. With highly integrated production systems, product and transport is required to be available on demand. This is a characteristic of rail lines transporting bulk products to ports or power stations. The transport services being contracted often comprise more than a single trip, a series of journeys or the availability of track for such journeys. The services are actually a guarantee that the journeys can be undertaken and not necessarily at times when they were planned. This requires flexibility of the transport medium with the contract being a sort of insurance under which the services can be adapted to compensate for unexpected occurrences. In this respect the contract is for a form of chauffeur service dedicated to a single customer rather than for a scheduled bus service.

While it is often possible to arrange for this service to be bought-in, doing so often involves highly complex contracts where there are supply uncertainties. Frequently it is preferable to retain the supply in-house, which is practical with rail, shipping and elements of telecommunications.

The advantage of internalising activities within the firm has long been recognised by management theorists. Thus, Barnard³⁸ stressed the importance of a coordinated administration with deep knowledge in a “conscious, deliberate and purposeful” way. This allows adaptation without lengthy negotiation. It may be too difficult to write contracts that cover every eventuality.

The firm is best thought of as a governance structure rather than a production function. It provides greater certainty when long time periods are involved by allowing contractual decisions to be internalized. In that way the contractual uncertainties that are ever-present with independent bodies become less relevant and subject to cost saving management short-cuts. Important matters for governance are

- Asset specificity
- Likelihood and impact of disturbances to transactions
- The frequency of disturbances

Coase in the theory of the firm³⁹ saw transaction costs as the key to why most integration takes place. Unlike with bilateral binding contracts, the firm becomes its own court – it contracts within itself allocating overheads and determining accounting practices and changing conditions without recourse to a third party. Vertical integration becomes a way of relieving bargaining where there is a bilateral monopoly and the correct division of profits is difficult to determine⁴⁰.

Bargaining is not costless. Where tasks are known with considerable certainty and contracts are therefore easily transmitted and recorded vertically integrated firms are

³⁸ Chester I. Barnard, *The Functions of the Executive*, Cambridge University Press, 1938.

³⁹ R. H. Coase, *The Firm, the Market, and the Law*, University of Chicago Press 1991.

⁴⁰ F. Machlup and M. Tabor, ‘Bilateral Monopoly, Successive Monopoly and Vertical Integration’, *Economica*, May 27 1960, pages 101–119.

not usually the best vehicle for production. Contracts in the house building industry allow smooth production processes using independent contractors who have a very high degree of motivation. Repeat contracts and the need to ensure a good name are important adjuncts to the efficiency of such arrangements.

Other types of production, especially those where a process is concerned, leave too many risks if they are based on independent contracting rather than under a management system. As the Infrastructure Task Force expressed it⁴¹,

The difficulties associated with physical coordination of complementary investments are, however, greatly complicated by disputes over the division of the gains from those investments. Historically, vertical integration between infrastructure providers and the activities that most rely on their services has been a way of avoiding these complications. In some cases, this has taken the form of direct ownership of infrastructure assets by their sole or major user; in others, ownership has been through what amounts to buyers' joint ventures. But where vertical integration is impossible, or for wider policy reasons judged undesirable, coordination issues — be it for complementary or for substitutive investments — are likely to arise. Difficulties in organising all the parties required for complementary investments to occur, and in securing agreement as to the sharing of the costs of needed capacity expansion, can paralyse the capacity expansion process — perpetuating bottlenecks that all parties would be better off resolving.

UK Railtrack is an example of how things can go wrong where de-integration is made mandatory. Gomez-Ibanez⁴² addressed the difficulties in maintaining coordination in a vertically unbundled British Rail. He found that co-ordination proved too difficult with rail track and trains being separately owned because it was difficult to reach agreement on network enhancements to improve safety in the light of expanding usage. The lack of investment, because the formulae adopted by the regulator did not permit its recoupment, led to a deterioration in track quality and hence to disasters.

The Railtrack experience also illustrates the difficulties with contracting out aspects of supply where the capital assets are not easily compartmentalised. The fact is that rail and the rolling stock are jointly provided and forcing the track to be independent creates an economic incentive problem. Rolling stock owners have an incentive to economise on that asset even if this imposes excessive costs on the track owner. Contracting to avoid such inefficiencies can often lead to prohibitive complexities.

Whether a supplier chooses to integrate or contract to ensure delivery precisely as required, it will, if the cost of missing a desired delivery time is high, ensure considerable redundancy in the delivery system. That redundancy is not capacity 'surplus to needs' but represents a supply buffer to meet unknown eventualities. The supplier in that situation may also consider any form of sharing to provide risks too great for any level of compensation to mitigate.

⁴¹ Australia's Export Infrastructure Taskforce, available at: <http://www.infrastructure.gov.au/pdf/Report.pdf>, page 18.

⁴² José A. Gómez-Ibáñez, 'Regulating Coordination: British Railroads' in *Regulating Infrastructure: Monopoly, Contracts, and Discretion*, The Harvard University Press, 2003.

This heightened importance of certainty of delivery is a familiar feature of modern commerce where inventory reductions are a considerable source of cost saving. Most vehicle assemblers, for example, have adopted just-in-time systems of component delivery whereby stock of some components is limited to a few hours production.

Thomas Friedman has proven to be a highly perceptive student of modern globalisation trends and their managerial implications. In *The World is Flat*⁴³ he describes how the world's most successful retailer, Wal-Mart, has reached its current position by developing a distribution network that ensures timely delivery of goods from all over the world to all of its thousands of stores at the best prices. The kernel of its success is the management of its distribution chain – an unexpected form of asset specificity.

Doubtless Wal-Mart could offer the use of that supply chain to third parties. However, the supply chain is integrated into its business, just like the assembly line of some manufacturers, is at the heart of the firm's competitive advantage. For this reason very rarely will a major manufacturer agree to assemble a rival product on terms and with priorities that were the same as those of the in-house product. To require a supply chain or assembly line to be opened to third parties would mean, in effect, government seizing the firm's key asset and determining at what price it would be made available to others. Such action would send messages across the economy that no advantage a firm had developed is safe from confiscation.

⁴³ Thomas Friedman, *The World is Flat*, Penguin 2006.

4 Concluding Comments

Requiring that owners to allow unrelated parties to make use of their assets is a clear exception to the general rules of commerce. It is one that must be used sparingly if ownership incentives are not to be blunted and excessive resources are not to be siphoned off into regulatory hearings rather than the management of businesses.

It should be generally accepted that where a number of alternative facilities are in place that regulation requiring any one of these be made available to third parties has no justification.

The Australian law has made an exception for production processes in the ambit available for regulatory coverage. This recognizes the potentially debilitating effect of regulation that requires facilities be made available (essentially at a regulated price) where suppliers do not wish this to be the case. Such a distinction of a production process, commonly associated with manufacturing, if it ever was a meaningful means of distinguishing commercial activities, no longer is. Production functions are changing throughout industries and no clear demarcation of the different stages of these, particularly regarding manufacturing and services is either meaningful or appropriate.

Many businesses opt for vertical ownership for a variety of reasons, including to maintain control of a centrally important facet of production. In some cases there may be built-in redundancy to ensure that the facility is available on demand to combat unforeseen eventualities.

Already there has been considerable economic damage in terms of delays to developments and costly legal challenges stemming from the considerable reach that Part IIIA brings to the regulatory framework of Australia. The illumination of these costs in the case of the Pilbara rail lines highlights the problem the regulatory framework is bringing specifically to one key industry. Its adverse effects however extend beyond this industry and its legal reach has been wound back by industry specific provisions for gas, electricity, airports, and communications. A further wind back of the legal reach is necessary.

Attachment 1: Considerations Regarding Essential Facilities

Historical Perspective

Professor Richard Epstein⁴⁴, one of the world's leading authorities on constitutional and property law, considers a case for controlling "essential facilities" is both sound and founded on the common law rules of reason. Much of his analysis (like the key English and American cases that established precedents) rests on the seventeenth century tract by Lord Matthew Hales *de portabis mari* ("concerning the gates of the sea"). In that tract, which was not published until the 1780s, Hales argued, that an asset (he was discussing cranes in ports) can be "affected with the public interest" either "because they are the only wharfs (sic) licensed by the queen" or "because there is no other wharf in that port".

One important facet of the Hales dictum as adopted by Epstein is one of the two riders justifying the control, namely "they are the only wharfs licensed by the queen". Hales, and hence Epstein, glosses over the important distinction of monopoly powers developed organically and those created by regulation. But this is an important distinction in justifying overriding the property rights of the business concerned.

It would seem reasonable to argue that where the monopoly is created by law, the monopolist is clearly bound by the terms of the original grant which include the *quid pro quo* for that grant. Such a monopoly must surely be different from and one achieved in the open market by the skills and foresight or luck of a firm or individual. A business achieving dominance by its own commercial efforts would not unreasonably expect to be subject to less severe oversight. Those undertaking a development of that kind would reasonably expect to have no obligation to face regulation regarding access or price.

Although not accepting a sharp dichotomy of approach between government supported and purely entrepreneurial infrastructure, Epstein does argue that:

"....regulation must be justified on the grounds that any monopolist charges too much and sells too little relative to the social – that is the competitive – optimum. But even when true, the case for regulation is hardly ironclad. The situational monopoly may confer only limited pricing power, and its durability could be cut short by new entry, or by technical innovation. Regulation could easily cost more than it is worth, especially if the regulation entrenches present forms of production against the innovation needed to undermine its economic dominance." (p. 284)

Epstein's view is that an essential facility will inevitably be regulated. Some credible support for this is offered by the progressive regulation of the railways in England and the US from the mid nineteenth century. That point also underlines the hazards of regulation since the railways in the UK and in the US both faced such regulatory stringency that they were driven into parlous commercial positions, particularly once road systems undermined their monopolies.

⁴⁴ Richard A. Epstein *Principles for a Free Society*, Perseus Books, Reading Mass, 1998.

The issues remain to define the facility, whether or when it is to be regulated, and how to ensure its owners have sufficient incentive to operate efficiently.

The different sorts of essential facilities

Essential facilities have been identified as covering a wide variety of services. They tend to take two forms: a network or a single vital node within a network.

The facilities themselves can be physical in the form of a constructed line or port. And they can comprise non-physical resources like those using the electromagnetic spectrum. They may have no lines on which their services travel – postal services, for example (which at least at one time were monopolies) comprise sorting facilities and technologies but transport the materials themselves along public highways. This is also the nature of other networks such as eBay, Google, and bank clearing systems. Microsoft operating systems and Microsoft Explorer in particular are not networks but have assumed such predominance within their service class that European Union courts have treated them as essential facilities.

Ports, airports, and bridges are examples of single node based facilities which are sometimes thought of as being “essential facilities”. In many respects some of these network nodes are similar to manufacturing plant. A port comprises a series of services: navigation control, tug operations, wharves, unloading and loading facilities and so on. All of these are amalgamated in some order, perhaps not as inflexibly as a manufacturing assembly plant but no less so than many other manufacturing facilities that operate on a batch production process.

Falling under the rubric of networks are at one extreme telecommunication systems linking millions of different origin and destination points and at the other a pipeline or train line linking just two points.

Telecommunications are perhaps the purest form of network with origins and destinations both being highly diverse. They also, in the main, have no predominant flow direction from particular origins to particular destinations. In the case of telecommunications systems, there is built in redundancy and no single node is itself likely to be a bottleneck.

By contrast another line based system, that of broadcasting and cable television, is exclusively in one direction. Gas and electricity distribution lines, some rail systems and many gas transmission pipelines share this characteristic of transporting product exclusively in one direction.

Electricity transmission lines tend to operate as two way carriers. In some cases electricity transmission lines link just one supply source with a few customers and occasionally only customer. Local distribution lines are almost entirely one way.

The Table below offers a classification schedule.

Table 2 A Taxonomy of Essential Facilities

	Line-based facilities	Virtual facilities	Node-based facilities
Multiple connections, multi-directed	Telecommunications Electricity, gas, water transmission Roads Mobile phones Wireless Intra-city rail lines	Bank clearing systems Postal systems Instant messaging services	Google eBay Microsoft operating systems Microsoft Explorer General ports Airports Bridges
Multiple connections predominantly one directional	Electricity, gas, water distribution Broadcasting Cable companies		Special cargo ports
Few connections	Inter-regional rail lines,	Firms internal messenger systems	

In addition to being assigned into one of the seven relatively arbitrary categories, all of the facilities identified above have their own internal differentiations. For example, although most rail lines have flows that are preponderantly in one direction at a particular time (New York’s subway system being a rare exception) some have no backhauling at all. Many rail networks have several lines interconnected and operated in common with scheduled services and specific access and exit points. Others serve only one exit point, sometimes with only one access point and with no backhaul. In between are systems, often using a single track that service several suppliers moving goods to an end point. Among these are the rail lines conveying coal or wheat from the interior to ports like Melbourne and Port Waratah.

Priest⁴⁵ considers the distinction between network industries and hard goods industries to be crucial. The latter were the traditional targets of anti-trust agencies but the validity of their pursuit has been discredited. With hard goods the consumer’s use has little to do with the benefit obtained by other consumers. The consumer obtains all the value for himself and there is no externality of a public goods nature. With network industries “the value of the product or service to consumers increases as the size of the network over some range increases” (p.118). There is no advantage in having a wide coverage for those users of a rail or gas line that do not interact with other users on the same network.

These access externalities are important for Windows or airlines or Visa card networks, though the advantage of regulating them is lost if there are resulting disincentives for upkeep and expansion. The public goods case diminishes where the natural monopoly features are eroded as has been the case with most telecommunications and rail facilities.

⁴⁵ George L Priest, “Flawed Efforts in Network Industries” in *High Stakes Antitrust*, ed. Robert Hahn, AEI Brookings.

Attachment 2: Access Requirements in the US and EU

US Developments

In the 2003 case *Verizon vs Trinco*, (540 U.S) Scalia, leading for the Supreme Court citing *United States v. Grinnell Corp.*, 384 US 563, 570-571 (1966) noted that:

“It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, “the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident’.”

He added:

“The mere possession of monopoly power, and the concomitant charging of monopoly prices is not only not unlawful; it is an important element of the free-market system.” (p. 7).

The judgment noted that pursuit of a monopoly produces innovation and risk taking. He notes that compelling firms “to share infrastructure that renders them uniquely suited to serve their customers” lessens the incentive “to invest in those economically beneficial facilities”. He adds that enforced sharing requires the courts to act as a central planner and identify the “proper price, quantity and other terms of dealing – a role for which they are ill-suited”.

The Court also said, “Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law since it may lessen the incentive for the monopolist, the rival or both to invest in those economically beneficial services”. The *Verizon* case has guaranteed broadband providers in the US that they will not be forced to share new investments with their competitors⁴⁶.

The first US “essential facilities” case *Terminal Railroad* 1912 dealt with a bridge owned by a group of railroads who refused to let others use it. All successful cases have involved vertical integration. But very few have in fact succeeded. Court cases in the past that have required facilities to be shared have had specific features. Thus:

Aspen Skiing was characterized by a history of sharing tickets and offers by the plaintiff of better terms which the defendant rejected indicating a wish to achieve monopolization. The right to refuse to deal is not total and Aspen Skiing is at the periphery of such enforced rights. Aspen was also one of the few cases where vertical integration was not a characteristic of the predator. In that case a prior agreement was in place and the defendant took measures to refuse to extend that in a way that the court determined was calculated to drive its smaller rival out of business.

⁴⁶ Corroborating the notion that enforced sharing has a negative effect on new capacity, cable companies whose broadband services will not be regulated invested more quickly than telephone companies subject to requirements on regulatory sharing. See Thomas Hazlett, *Rivalrous Telecommunications Networks With and Without Mandatory Sharing*, AEI-Brookings Joint Center for Regulatory Studies Working Paper (2005).

Otter Tail was similar case of a business providing services (transmission) but not extending this to others.

Verizon relied on an Act of the state to ensure a service that had not been available previously was made available to a competitor. Hence the requirement to deal in Verizon had no precedent in earlier decisions. The judgment added that this would remain the case even if the “essential services” doctrine crafted by some lower courts were to be considered law.

The Court ruled that there were other laws under which Verizon was controlled that performed a role sought of the anti trust laws much more effectively since they are tailored to the specific circumstances of the industry. It took the view that such industry-specific measures where they were present were preferable to using general anti-trust law. This is because the former can contractually lay out the terms of the requirements and ensure on-going monitoring of those terms together with an expert body to rule on disputes in such a way that a court of law was not able.

Pitofsky, Patterson and Hooks⁴⁷ writing prior to the Verizon decision point out that though there is a strong school of thought favouring abandoning the doctrine, courts in the US have not done so. They argue:

If the facility is truly essential, a denial of access means the monopolist will be immune, at least for some time, to most instances of competition. On the other hand, a policy that defines access generously encounters the ... practical concern that it will be likely to reduce incentives to innovate. Added to these conflicting policy concerns is the further complication that a simple declaration of access is seldom enough, and that government authorities, legislative, judicial or regulatory, must also define the terms of access—price, priority, and other terms and conditions of sale—usually on a basis that requires continuing supervision.

They point to cases in support of the notion;

The essential facility doctrine has been articulated as a subset of the so-called “refusal to deal” cases which place limitations on a monopolist’s ability to exclude actual or potential rivals from competing with it. The doctrine is one long-standing limitation on the general rule that a firm has no obligation to deal with its competitors. As stated by the Ninth Circuit in *Alaska Airlines, Inc. v. United Airlines, Inc.* “[T]he essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.” Other courts of appeal have made similar statements: “[A] business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.” “[W]here facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.

US liability under anti-trust requires:

- (1) control of the essential facility by a monopolist;
- (2) a competitor’s inability practically or reasonably to duplicate the essential facility;

⁴⁷ Robert Pitofsky, Donna Patterson and Jonathan Hooks, ‘The essential facilities doctrine under U.S. antitrust law’, *Antitrust Journal*, Vol. 70, 2002, pages 443–462.

- (3) the denial of the use of the facility to a competitor; and
- (4) the feasibility of providing the facility to competitors.

These tests, particularly the second are more limiting than the Australian “uneconomical to develop” version of the same criteria.

EU Developments

Article 86 of the EC Treaty introduces requirements on dominant firms to deal, whereas in the US “essential facilities” doctrine is an exception to the rule that a firm may deal with whom it pleases. According to Lang⁴⁸ a firm may not refuse to deal if this means one of very few competitors is forced out of business.

“[A] dominant company has, at least in some cases, a duty to supply, if a refusal will cause a significant effect on competition....When a customer is also a competitor of the dominant company in some market, usually downstream from the point at which the refusal to supply occurs, the effect on competition largely depends on three factors:

- 1) whether the buyer can obtain the goods or service elsewhere;
- 2) whether there are other downstream competitors; and
- 3) how important the goods or services are to the buyer's business.

He places the issue as important in “harbour facilities, television programme listings, bank check clearing facilities, computer reservations systems, airports, telecommunications networks, electricity transmission grids, natural gas pipelines, and performing rights societies”. Other potential essential facilities are interface information, intellectual property rights that span an entire market, “a raw material, a service, or access to a physical thing or place, such as a harbour or an airport.” He adds, “A natural monopoly is not necessary for a facility to be essential.”

Lang⁴⁹ argues that “it is pro-competitive to allow companies to keep for their own exclusive use assets which they have required to be acquired or constructed”. He maintains that the only exception is for downstream competition that is only possible if access to the facility is given. He states that it is required only if the competitor cannot obtain the goods or services elsewhere or cannot build or invent them itself.

In the Bronner case⁵⁰ the following principles were agreed:

- the company must be dominant in the supply of the product or services in question;
- for access to be ordered, the refusal to contract must be likely to eliminate all competition on the part of the company requesting it;
- access must be indispensable, i.e. there is only one source of the product or service and there is no actual or potential substitute;
- the refusal must be incapable of being objectively justified;

Lang puts some further flesh on this, arguing

⁴⁸ John Temple Lang: "Defining Legitimate Competition: Companies' Duties to Supply Competitors, and Access to Essential Facilities"; Fordham International Law Journal Vol.18, No.2, December 1994.

⁴⁹ The principle of essential facilities, in European Community competition law -The position since Bronner. Notes for a Lecture in Copenhagen.

⁵⁰ Case C-7/97 Bronner v. Mediaset [1998] ECR I-7791, at paras. 38-41: Cases 6 and 7/73 Commercial Solvents [1974] ECR 223: see also Case T-374/94, European Night Services [1998] ECR II-3141.

"for example where duplication of the facility is impossible or extremely difficult owing to physical, geographical or legal constraints or is highly undesirable for reasons of public policy. It is not sufficient that the undertaking's control over a facility should give it a competitive advantage. I do not rule out the possibility that the cost of duplicating a facility might alone constitute an insuperable barrier to entry... if the cost of duplicating the facility alone is the barrier to entry, it must be such as to deter any prudent undertaking from entering the market...."⁵¹.

⁵¹ 1998 ECR I, at pp. 7813-7814. The phrase "any prudent undertaking" implies a "rational investor" test.

Attachment 3: Legal Judgments on the Pilbara Rail Lines

There have been two legal cases on producer based rail networks – the Hamersley case (Justice Kenny J) and the BHPBILL case (Justice Middleton J) and these are set out below in summary form followed by a discussion.

The types of infrastructure services that are declarable under the National regime are defined in Section 44B of the Trade Practices Act which states:

“services” means a service provided by means of a facility and includes:

- (a) the use of an infrastructure facility such as a road or railway line;*
- (b) handling or transporting things such as goods or people;*
- (c) a communications service or similar service;*

but does not include:

- (d) the supply of goods; or*
- (e) the use of intellectual property; or*
- (f) the use of a production process;*

except to the extent that it is an integral but subsidiary part of the service.

The Kenny Judgment

Justice Kenny found in favour of Hamersley, holding that the rail track was not a service within s 44B of the TPA and as a result the NCC did not have power to make a recommendation regarding declaration of the rail track service. She stated that the critical question was whether the use by Robe of the railway line (and associated infrastructure) that Hamersley owns and operates would involve the use of a production process. She found that the term 'production process' ordinarily means the creation or manufacture by a series of operations of some marketable commodity.

Justice Kenny found that Hamersley's use of its railway line was an integral and essential operation in its production process, as the railway line was used to make up the 'recipe' formulated for a particular batch of Hamersley's product.

While the respondents submitted that only the use of an entire production process would bring the relevant service within the production process exemption, Justice Kenny disagreed, and found that it suffices if the use of the railway line is an integral and essential operation. Her Honour found that it would defeat the purpose of the production process exemption in s 44B of the TPA if the exclusion were construed as not extending to the situation where the service involves the use of an operation integral and essential to the production process. Use of the rail track was therefore not a 'service' as it fell within the production process exemption.

The Middleton Judgement

Justice Middleton considered that Justice Kenny's construction of the "service" definition in Hamersley was "clearly wrong" or "plainly wrong", and made the following observations.

- Although Kenny J's consideration of the dictionary definitions of the terms in the composite phrase "production process" was appropriate, the meaning of the phrase should depend on its context and subject matter, not merely the combination of dictionary definitions. The appropriate emphasis is on "a process of production",

and the BHPBIO railway does not produce anything.

- Kenny J's "marketable commodity" was based on tax law cases, and was not helpful to understanding the "service" definition".
- Given that the "service" definition contemplates the use of a railway line as a service, Kenny J's interpretation could potentially exclude infrastructure that would normally be expected to be considered under Part IIIA, and does not assist in promoting the purposes of Part IIIA.
- Kenny J wrongly considered the phrase "involving the use of a production process" rather than simply "the use of a production process".
- The fact that the use of a railway might be essential to operations does not mean it is a production process.

Justice Middleton said that the question about whether the relevant service fell within the production process exemption could be resolved, putting aside *Hamersley*, was as follows.

- BHPBIO's mine and port facilities depend on BHPBIO's use of its railway; FMG might interfere with BHPBIO's rail operations, but that matter could be addressed at a later stage (eg arbitration), and does not mean that access to the railway is "use of a production process".
- The natural and ordinary meaning of "production process" is "the creation or making of a product or the transforming of one thing into another." The relevant enquiry must focus on the essential nature of the facility and the particular claimed production process. The railway is integral and essential to BHPBIO's overall process, but it provides a transport or conveyance service (similarly to a gas pipeline), not "a process of transformation", and as such could not have been intended to fall within the production process exception.

Justice Middleton held that the relevant service was a "service" within s 44B of the TPA.

The argument by Justice Middleton appears to be that although the railway is essential to the operations of the mining plant because it is a railway it can take other traffic due to the nature of rail network businesses providing there is excess capacity. However, this view does not consider the issue of the benefit to competition test which needs to be considered in a cost benefit framework. This would look at the benefits and costs to society from access compared with no access.

**ACCESS TO ESSENTIAL FACILITIES:
A COMMENTARY ON THE DECLARATION AND
ARBITRATION PROVISIONS OF THE TRADE PRACTICES ACT**

by

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In 2005, the Law Society of New South Wales conferred Life Membership on Professor Pengilley "in recognition of his long and meritorious period of practice and service to the profession".

**ACCESS TO ESSENTIAL FACILITIES:
A COMMENTARY ON THE DECLARATION AND ARBITRATION PROVISIONS
OF THE TRADE PRACTICES ACTS**

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**ACCESS TO ESSENTIAL FACILITIES:
A COMMENTARY ON THE DECLARATION AND ARBITRATION
PROVISIONS OF THE TRADE PRACTICES ACT**

ABSTRACT

This commentary discusses the Trade Practices Act PART IIIA Access Regime and specifically the declaration and arbitration provisions of that regime. It reaches the following conclusions:

- 1. In evaluating the Access Regime, certain basic philosophical norms should be applied. These are set out in **Part 8**. United States jurisprudence is a good guide to the relevant problems and to the detriments (primarily the discouragement of investment) which can be found in any too free grant of access to facilities. Australia, it seems, is the only country which subjects its business **both** to a **general prohibition** on misuse of market power (s.46 of the Trade Practices Act) **and** to a **generally applicable** access regime (PART IIIA of the Trade Practices Act). This, in itself, must constitute a case of prima facie regulatory overkill.*

The Hilmer Report, upon which the Access Regime was based, considered Australian misuse of market power (s.46) jurisprudence at a time when there had been one High Court decision (Queensland Wire). This decision was, in some ways, an unsatisfactory one. The jurisprudence of s.46 has now changed. It is now clear (though previously doubtful) that s.46 applies to access regimes and provides a remedy for non-access involving a misuse of market power. It is now time to re-assess access questions in light of jurisprudence subsequent to that upon which the access regime rationale was based.

- 2. The mechanics of the Access Regime legislation are set out in **Part 6**. Questions are raised in **Part 5** as to whether courts or administrative decision makers are better placed to judge access issues. The writer (at **Part 9**) suggests what the legal position would be if we relied only on s.46 for facility access. The conclusions from all this analysis are that the s.46 law is quite adequate as an access regime control mechanism and (at **10.17**) that the courts are the better adjudicators subject to there being an administrative body to implement access remedies when these require constant supervision. This body should not be the ACCC. A significant reason for this conclusion is the “agenda” bias which many may see in ACCC administrative adjudicative decisions on access and terms of access issues (**5.9-5.13 and 7.10-7.11**).*

3. *Shortfalls in the Australian Access Regime are:*

- *there is a multiplicity of decision makers, in many cases on essentially the same issues;*
- *there is an inability of facility holders to raise at first instance matters of “business justification” which would merit a denial of access. The facility holder has to suffer a declaration on stated criteria and subsequently argue against access on other criteria. The criteria are arbitrarily drawn. Access declaration criteria in some cases are duplicated by arbitration criteria. There is no reason why all issues could not be considered in one proceeding and bifurcation of proceedings results in costs and inefficiencies;*
- *because of a dual system of decision making (court and administrative agency), there is a general uncertainty as to whether courts or administrative decisions are to take precedence;*
- *in some cases there is statutory “overkill”. In the writer’s view, there is, for example, no case for regulation of non-integrated monopolies under an access regime. A non-integrated monopoly cannot exercise upstream or downstream market power and this is the rationale of the need for access intervention;*
- *the Australian regime, in order to apply, does not require a denial of facility access to a “competitor”. This is of the essence of the US access regime. The result is that the Australian scheme operates in many areas where problems should be subject to the application of market supply and demand mechanisms and do not raise competition issues;*
- *one major access “test” (that access will materially increase competition) is too weak. Almost any access will do this if there is spare capacity on an existing facility. But this test ignores the reasons for constructing facilities which, often enough, are to obtain a higher profit through risk taking. American courts have recognised this. The Access Regime does not do so adequately. Further, there is no reason why the Access Regime should operate if its effect is to increase competition in overseas markets. This is directly counter to the expressed intention of the Act which is that it is to benefit Australians and that competition has to be assessed in relation to a market in Australia;*

- *another major access “test” (that access will not be granted unless it is “uneconomic” for anyone to develop another facility to provide the service) is too weak. The equivalent US test is that the facility holder must have the power to eliminate competition on a relatively permanent basis and that duplication of the facility is either impossible, or non feasible. Both the Hilmer Report and the Commonwealth States Co-operative Agreement stated that essentiality was to be the basis of access. The legislation does not implement this.*
4. *It is a misconception that there is a “fair” access price which can be objectively determined. All prices, other than those agreed by inter-partes bargaining, have deficiencies as regards their calculation. The fact that price determinations by external authorities have these difficulties is reason, of itself, to be cautious in providing access too freely. A particular problem involves the rewarding of investment incentive (5.10-5.11 and 7.6-7.9).*
 5. *The writer also argues that there is merit in raising as a public issue the question of whether the access regime should be limited in its application only to government facilities and governmentally “privatised” or “corporatised” entities. The government may well regard it as appropriate to impose a system of access to its own facilities and perhaps this would satisfy the basic access needs of the nation. The Hilmer Report was fundamentally aimed only at government facilities. Declaration applications have been almost totally in relation to such facilities. Section 46 seems to be adequate in the case of private facilities. If there are private enterprise industries requiring regulation, this can be done by specific legislation rather than by the imposition of a generic access regime.*
 6. *Above all, one cannot but agree with the description of the Access Regime given by one commentator. He described it as a “Monster” in light of its multi-faced decision makers, its multiplicity of adjudication procedures and the number of involved parties. Whatever the description, the Access Regime certainly demonstrates the truth of the well known adage that a camel is a horse created by a committee. Regardless of the creature analogy, the Access Regime has serious and blatant inadequacies.*
 7. *The writer suggests (at 9.7(8)) the questions of relevance to any access adjudication. These are:*
 - (i) *Is the facility essential (as distinct from desirable) to an outside party in order that that party can enter the market?*
 - (ii) *Is there control of the facility by a monopolist?*
 - (iii) *Could a competitor practically or feasibly duplicate the facility?*
 - (iv) *Is the denial of the use of the facility to a competitor?*
 - (v) *Is it feasible to provide access to the facility? (This involves an evaluation of whether or not a facility holder has a valid business justification for denial of access.)*

If (i), (ii), (iv) and (v) are answered “Yes” and (iii) is answered “No”, access should be granted.

The writer suggests that, despite the prolixity of the PART IIIA Access Regime, in the ultimate the above constitute the only issues for evaluation. An access regime, if one is thought necessary, should be aimed at addressing these questions and jettisoning anything irrelevant to them.

- 8.** *The Productivity Commission’s review of the Access Regime was based on acceptance of the basic propositions of the Hilmer Report. This is no longer an acceptable basis for assessing the worth, or otherwise, of the regime. The next review should re-assess fundamental principles in light of developments over more than a decade. At the very least, any re-assessment should include a re-evaluation of the role of s.46 of the Trade Practices Act in light of decisions made since the Hilmer Report, a re-evaluation of whether a generic access code is merited (Australia being the only country in the world to have such a code in tandem with a generic prohibition on misuse of market power) and whether the access tests are appropriate. United States jurisprudence, and in particular, the 2004 US Supreme Court decision in Trinko, deserves further evaluation as to its relevance to Australian facilities access.*
- 9.** *This commentary is limited to the declaration and arbitration provisions contained in PART IIIA of the Trade Practices Act. The reason for this limitation is that a study of industry specific codes or other aspects of PART IIIA would make the commentary of excessive length and complexity. Furthermore, the PART IIIA access code is generic, rather than industry specific, and thus of more general interest. The PART IIIA Access Regime has, however, “set the scene” for some specific access codes and much of what is said in relation to it has application to such codes. The Gas Code, for example, contains provisions akin in many ways to the PART IIIA access code. Thus, although only the PART IIIA code is discussed, this commentary in many respects has an application wider than this.*
- 10.** *Ideas are not normally totally good or bad. Those who disagree with the writer’s conclusions may nonetheless find in them some concepts which can, if considered further, lead to something better than what we currently have. All that can be asked is for a constructive assessment of this commentary. The status quo should never be defended simply because it is the best we have been able to devise to date.*

ACCESS TO ESSENTIAL FACILITIES: A COMMENTARY ON THE TRADE PRACTICES ACT'S DECLARATION AND ARBITRATION PROVISIONS*

by

Warren Pengilly**

“It is not contended that the unification of the terminal facilities of a great city where many railroad systems centre is, under all circumstances and conditions, a combination in restraint of trade or commerce. Whether it is a facility in aid of interstate commerce or an unreasonable restraint, forbidden by Congress . . . will depend upon the intent to be inferred from the extent of the control thereby secured . . . , the method by which control has been brought about, and the manner in which that control has been exerted.”

[US v Terminal Railroad Association of St Louis 234 US 383 (US Sup. Court 1912)]

1. THE BASIC PROBLEM

1.1 The 1912 United States Supreme Court decision in the Terminal Railroad Case¹ is generally regarded as the genesis of the essential facilities “doctrine” – a “doctrine” which may permit parties to have access to the facilities owned by another for the purposes of furthering competition. The above citation illustrates the basic problem dealt with in this commentary. Apart from differing terminology, the expression of the difficulties involved has not really changed in nearly a century. Nor, it is suggested, have the problems involved in seeking solutions to these difficulties. So, it can fairly be said, that now, as then, the basic issues involved are:

- What is an essential facility? One of many working expressions of the concept, adequate for present discussion purposes, is that an essential facility is involved when, by refusing to provide access, a party can use its monopoly power in the facility either to fend off competition in a market where it enjoys a monopoly² or, more typically to maintain, achieve or enhance monopoly in a second market.³ The second market may be either an upstream or downstream market. Some standard text book examples given are telecommunications systems, railway lines and power transmission lines.

* This commentary is written as at 31 December 2006.

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¹ US v Terminal Railroad Association of St Louis 234 US 383 (US Sup Ct 1912).

² See Aspen Skiing Co v US 410 US 366 (1973).

³ See Otter Tail Power Co v US 410 US 366 (1973). The principle usually applies to enhancing power in downstream markets. However, it also applies, but less frequently, to enhancing power in an upstream market. An essential facility can also be one controlled by a number of firms through some kind of arrangement, as in the case of Terminal Railroad (n.1). This issue is more easily dealt with, as is explained later, because of the specific provisions of s.45 of the Trade Practices Act covering anticompetitive conduct, price fixing and collective boycotts.

Without the ability to access these facilities a new entrant cannot access the market involved and, by denying facility access, the facility owner can use its monopoly power to maintain, achieve or enhance its power in a relevant second market.

- When should a party have access to an essential facility and on what terms? On the one hand access to a facility may promote new market entrants – a competitive plus. But those who would otherwise construct facilities may well not do so at all if they can be compelled to share the fruits of their enterprise with competitors on terms they regard as “unfair” – a clear competitive minus. A major complaint by facility owners when forced by law to share with others is that “We construct the facility and take all the risks. Then the law compels us to ‘give away’ access to some competitor ‘free rider’.”
- What is the compromise?

This commentary primarily covers essential physical facilities.

1.2 Whilst the problem remains the same, attempted solutions have changed. At the time of the Terminal Railroad Case in 1912, the basic method of dealing with the issue was a court evaluation of the competition principles involved. We still have this though the reach of competition law has been ever expansive and the 2007 competition law bears little resemblance to that of 1912. But we also have tried, both in the United States and Australia, to achieve solutions with the aid of a plethora of regulatory statutes – sometimes industry specific and sometimes of general coverage. These statutes have spawned a multitude of extra judicial regulatory agencies to administer them.⁴

1.3 This commentary aims to examine the various issues in relation to essential facilities and access regimes. It cannot cover the whole area and does not purport to do so. It does not cover specific access codes other than where reference to them illustrates a more general issue (for the reasons for this see **6.3**). Coverage is also restricted to competition evaluations in the United States and Australia and to certain aspects (primarily the declaration and arbitration provisions) of the Australian regulatory access regime under PART IIIA of the Trade Practices Act. The United States is chosen as the most relevant overseas country of comparison for two reasons. First, it is generally recognised worldwide as the country of birth of the essential facilities “doctrine”. Secondly, of all overseas countries, the United States has undoubtedly had a greater influence upon Australian jurisprudence than any other.⁵

⁴ In Australia, for example, the Australian Competition & Consumer Commission (ACCC) has a general competition enforcement role. This includes an enforcement role in relation to s.46 of the Trade Practices Act covering misuse of market power and a provision directly relevant to the rights of access to essential facilities. It also has a strong regulatory role under PART IIIA of the Trade Practices Act in relation to access rights as well as a regulatory role in relation to specific industries – for example, the industry specific role under the Trade Practices Act in relation to telecommunications. Each State also has a general regulatory body. They rejoice in titles such as the Economic Regulation Authority, The Independent Pricing and Regulatory Tribunal and the Essential Services Commission. The acronyms for these regulatory authorities are (in addition to the ACCC), NCC, IPART, ESC, QCA, ESCOSA, OTTER and ICRC so their similarity of function has not led to any similarity of descriptive titles or acronyms.

⁵ The Australian Courts have often been wary of directly adopting United States decisions. Frequently the Courts point out that the wording of US and Australian competition statutes is different. Having said that, the Australian Courts have frequently adopted United States principles in light of US experience – for example, see McHugh J in Boral Besser Masonry Ltd v ACCC (n.53) in relation to predatory pricing. See also in that case the general views expressed on the principles of competition law directly adopted from the holdings of United States courts. In Melway (n.52 hereunder) the High Court cited and followed a number of United States decisions. However, it declined (at [70]) to follow a decision of the European

Though denial of access by concerted action is discussed, the thrust of this commentary is in relation to unilateral denial of access. It is in this area that greatest controversy is found.

- 1.4 In the ultimate, it has to be realised that it is not always rationality which determines policy and, indeed, there is probably no such thing as “rational” decision making in this, and many other trade practices fields.⁶ All views have various degrees of subjectivity. But without discussion and debate, the law is never critically examined. This commentary is a contribution to discussion and debate though necessarily the writer brings to it elements of his own subjective views.

Court of Justice interpreting the abuse of a dominant position under the Treaty of Rome because that legislation was “different” from s.46 of the Trade Practices Act. In Carter Holt Harvey v Commerce Commission (NZ) [2004] UKPC 37, the Privy Council was called upon to interpret s.36 of the New Zealand Commerce Act (in all relevant respects the same as s.46 of the Australian Trade Practices Act). The Privy Council cited Boral and various US cases but noted that no conclusions could be drawn from cases under the European Community Treaty because of the difference in wording between the European provisions and the misuse of market power provisions in New Zealand. Because of different approaches to competition law principles, United States, rather than European Union principles, more closely represents the Australian law.

⁶ See W J Pengilly: “Baby thrown out with Trade Practices bathwater” Australian Financial Review 13 October 2006. The government intends to keep third line forcing as a per se banned breach of the Trade Practices Act even though acknowledging that the practice frequently promotes competition. Nothing seems more basic to a competition law than that something which can actually promote competition should not be per se banned. The writer commented in this regard that “In Australia, there is no such thing, apparently, as the automatic rejection of that which makes no common sense”.

2. COLLECTIVE ARRANGEMENTS DENYING ACCESS TO ESSENTIAL FACILITIES

*“Respondent relies upon US v Terminal Railroad Association . . . and Associated Press. These cases involved **concerted** action, which present greater anticompetitive concerns and is available to a remedy that does not require judicial estimation of free market forces.”*

[Verizon Communications v Trinko 340 US 398 fn.3 (Court Emphasis)]

2.1 Not infrequently commentators confuse two aspects of the essential facilities debate. These are:

- Power to exclude from an essential facility being obtained by an arrangement between parties who together control or own the facility.
- The power to deny access to an essential facility being held and exercised by a single entity.

2.2 The essential facilities “doctrine” undoubtedly had its beginnings in relation to the first of the above i.e. to a denial of access pursuant to an arrangement between parties. Terminal Railroad (the Genesis of all access discussion and theories)⁷ was such a case. A short illustrative selection of cases in this category, commencing with Terminal Railroad itself, is:

- Terminal Railroad.⁸ A group of companies acquired the only railroad bridge access across the Mississippi River at St Louis. This access was the only rail track available to link the east and west railroad systems in the United States, St Louis then being (and still advertising itself as being) “the gateway to the West”. The positioning of St Louis in a valley precluded construction of adequate alternative rail access by-passing the access controlled by the Terminal Railroad Association. Access to “outsiders” was permitted by the association only on highly disadvantageous terms. The Court ordered that rail access be granted on non-discriminatory terms.
- Associated Press.⁹ In Associated Press membership of Associated Press was restricted or totally denied to new member applicants who were competitors of existing members. The Court found as a fact that it was practically impossible for any one newspaper alone to establish or maintain the organisation requisite for collecting all the news of the world, or any substantial part of it. Apart from administrative difficulties, the financial cost was so great that no single newspaper alone could sustain it.¹⁰ The Court ordered Associated Press to operate on a basis of non-discrimination to non-members.
- Silver v New York Stock Exchange.¹¹ Silver, a New York Stock Exchange member,

⁷ n.1.

⁸ n.1.

⁹ Associated Press v US 326 US 10 (1945).

¹⁰ n.9 at fn.10.

¹¹ Silver v New York Stock Exchange 373 US 341 (1963). The case also involved consideration of the interaction of the Stock Exchange Rules, the Securities Exchange Act and the Sherman

was ordered by the Exchange to remove the direct telephone wire connections from his offices to the Stock Exchange. No notice was given of the decision and no reason given. Without this facility, Silver could not conduct business and closed down. The conduct was characterised by the Supreme Court as a collective boycott. The Court ordered damages to Mr Silver and ordered the Stock Exchange to implement a system of fair hearings for all actions taken and that its actions and decisions in future not breach the Sherman antitrust legislation.

2.3 There are several significant differences between single party power cases (the major topic with which this commentary is concerned) and denials as a result of combinations. In summary, these are:

- Denials involving multiparty participants have different applicable statutory provisions. In Australia s.45 of the Trade Practices Act is the major applicable provision. It illegalises per se contracts, arrangements or understandings which involve price fixing or collective boycotts (in Australia called “exclusionary provisions”). Section 45 also illegalises arrangements which are anticompetitive. The treatment of such arrangements is thus far simpler than the exercise of value judgments required in order to apply s.46 of the Act relating to misuse of market power. In all the multiparty cases cited above, the anticompetitive and boycott activity is clear and findings of illegality by virtue of the concerted actions involved were not difficult to make.
- Multiparty activities are not specifically covered by the Access Regime in PART IIIA of the Trade Practices Act.
- The Courts do not have the same difficulties in devising remedies when multiparty activity is involved. For example, in the recent decision of the US Supreme Court in Verizon v Trinko (hereafter referred to as “Trinko”),¹² the Court noted¹³ that remedy in concerted action cases does not require the judicial estimation of free market forces which is basic to the evaluation of single party actions. The remedy which can be granted simply requires that the denied outsider be granted non-discriminatory admission to the club.
- In particular, courts do not have to calculate access prices in cases where denial is by a combination. If access is already granted to some, then a market determined dealing price already exists. The court only orders that others be supplied at that price. In the case where there has been no prior dealing (the usual unilateral denial case), the court is faced with the problem, if it is to order dealing, of having itself to determine a market price – a task which courts have had great difficulty adequately fulfilling (see **PART 5** hereunder).

Act. The lower court decisions (Silver v New York Stock Exchange 196 F.Supp 209 (DC – New York) and 302 F.2d 714 (CA 2d Cir)) are also interesting in their discussion of the interaction of competition laws with specific regulatory laws. The District Court decision was upheld by the Supreme Court. Mr Silver was held by the Stock Exchange to be “scurrilous” without a single fact being given to justify this conclusion. The District Court concluded that (the) material (on which the Stock Exchange ruled) had to be regarded as “dubious gossip emanating from unreliable sources and totally unworthy of credence” (DC at 225). A denial of a security clearance was also used as a reason for the action “despite the fact that the security clearance program has been held to be unlawful and void and the action on which the Exchange relied has been vacated and expunged from the official record” (DC at 226).

¹² Verizon Communications v Law Offices of Curtis V Trinko LLP 540 US 398 (US Sup. Ct 13 Jan 2004).

¹³ n.12 at fn.3, citing Terminal Railroad (n.1) and Associated Press (n.9).

- The US Supreme Court noted in Trinko that concerted action cases present greater anticompetitive concerns than unilateral exercises of power.¹⁴ Concerted action can be characterised, in some cases as collusion – “the Supreme evil of antitrust”.¹⁵ No such unforgiving characterisation has ever been levelled at unilateral conduct.

2.4 Unilateral denial of access to facilities is now discussed. This, rather than denial of access by multiparty facility owners, is where the area of complexity, difficulty, controversy and interest lies.

¹⁴ n.13. See also discussion of this issue and citation of relevant authorities in Alaska Airlines Inc. v United Airlines 948 F. 2d 536 (9th Cir. CA 1991).

¹⁵ US v Colgate & Co. 250 US 300, 307 (1919); approved in Trinko (n.12) at p.408.

3. UNITED STATES ESSENTIAL FACILITIES JURISPRUDENCE

“If we truly learn everything we need to know in kindergarten, the concept of sharing is fairly easy to understand. In the grown up world of antitrust law, however, the notion of “share and share alike” becomes much more complicated.”

C M Seelen: “The Essential facilities “doctrine”: What does it mean to be essential?” 80 Marquette L Review 1117 (1996-1997)

The essential facilities “doctrine” is not entrenched in US jurisprudence

- 3.1 The United States essential facilities “doctrine” is frequently cited and undoubtedly is the forerunner of legal thought in both Australia and the United States.

But the “doctrine” is not as clear cut as it may otherwise appear, especially in relation to single firm denial of access. Reconsideration of the status of the essential facilities “doctrine”, especially in the single firm denial context, is mandated by the 2004 comments of the United States Supreme Court in Trinko. In this case the Supreme Court stated that its conclusion was reached independently of the essential facilities “doctrine” characterising this “doctrine” as:

“a “doctrine” crafted by some lower courts”

stating:

“we have never recognised such a “doctrine”;” and

that it was a “doctrine” which

“we find need neither to recognise ... nor to repudiate ... here.”¹⁶

- 3.2 In light of this statement, many commentators who thought, in view of its frequent citation, that the essential facilities “doctrine” was reasonably well entrenched in United States jurisprudence must now search the precedents again to see if their perceptions are, in fact, correct.¹⁷

Rather than go through the ritual of citing detailed precedents, it conveys the message more dramatically to state the views of American antitrust guru, Professor Phil Areeda. Areeda’s views were cited with approval by the US Supreme Court in Trinko. He notes that:

¹⁶ Trinko n.12 at 410-411. In its analysis, the Court cited with approval the article by Areeda (n.18 below).

¹⁷ The writer regards himself as one who thought, perhaps too readily in the case of unilateral refusals of access, that the essential facilities “doctrine” was an accepted “doctrine” of US jurisprudence (see, for example, W J Pengilley “Hilmer and ‘Essential Facilities’” 17(1) UNSWLJ 1). This conclusion is now, of course, open for renewed debate. There are good grounds, however, for believing that such a “doctrine” does exist, and has been accepted by the US Supreme Court, in relation to collective refusals of access (see notes 7-9 and related text). Collective refusals to deal are not the prime concern of this commentary. The real debate is in relation to unilateral refusals to deal.

“There is much talk these days (1989), particularly in the context of deregulated industries, about so-called essential facilities “doctrine” – “so-called” because most Supreme Court cases invoked in support do not speak of it and can be explained without reference to it. Indeed, the cases support the “doctrine” only by implication and in highly qualified ways. You will not find any case that provides a consistent rationale for the “doctrine” or that explores the social costs and benefits or the administrative costs of requiring the creator of an asset to share it with a rival. It is less a “doctrine” than an epithet, indicating some exception to the right to keep one’s creations to oneself, but not telling us what those exceptions are.”¹⁸

The basic US law on monopolisation

3.3 The competition law of the United States is judge made and, under s.2 of the Sherman Act, involves the interpretation of a broad prohibition on “monopolisation”. It is under s.2 that the essential facilities “doctrine” has come into being. Numerous cases can be taken as seminal decisions in the monopolisation area. One which stands out, and which was cited in Trinko, is the Supreme Court decision in US v Grinnell.¹⁹ The case involved monopolisation proceedings brought by the government against Grinnell, the manufacturer of fire protection sprinkler systems and the provider of fire protection services. Grinnell controlled over 87 percent of the United States fire protection services market. The basic holding of the Court was that, in order to violate the United States Sherman Act prohibition on monopolisation, two elements were necessary, these being:

- the possession of monopoly power in the relevant market; and
- the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.

The latest application of these principles in a context directly relating to access to facilities is

¹⁸ P Areeda: “Essential Facilities: An Epithet in need of limiting principles” 58 Antitrust LJ 841 (1989-1990) 841. Areeda cites (at 843) the following scenarios in which the essential facilities “doctrine” has been pleaded (case citations here omitted): a rock impresario seeking admission to the local auditorium; a teletype machine marketer complaining that its competitor will not sell machines for it; a ski resort complaining that a rival resort will not engage in joint marketing with it; a maker of “muscle building” food supplements demanding that a body building magazine accept its ads; a paper retailer complaining that other paper retailers will not admit it to their wholesale buying co-op; an anaesthesiologist insisting that the local hospital, using in-house anaesthesiologists, allow him to perform anaesthesiological services as well; or the would-be oil seller, who has no storage tanks of his own, demanding to use those of an incumbent seller – to say nothing of Berkey, who wants to know the results of Kodak’s research before Kodak markets its own innovations. He observes “we have moved a long way from Justice Frankfurter’s narrow concept [in Associated Press (n.9)] of the extraordinary circumstances in which intervention is essential to protect the Republic.”

Though Areeda was correct in scorning most of these applications, it is to be noted that his ski resort example was subsequently held to breach s.2 of the Sherman Act (Aspen Skiing n.26).

For factors which Areeda suggests limit the application of the essential facilities “doctrine” see n.38 below.

Areeda’s views were cited with approval by the Supreme Court in Trinko (n.12 at 411).

For other comments in relation to Areeda’s article see n.38, n.48, n.112 and n.150.

¹⁹ United States v Grinnell Corp. 384 US 563 (1966). The argument in the case, and the issues involved in the decision largely related to market definition.

the US Supreme Court decision in Trinko.²⁰ Discussion of this case follows.

2004: Enter Trinko

3.4 Trinko is an important, and the most recent, United States Supreme Court decision on the obligations of facility holders to deal with access seekers.

Verizon, the respondent in the case, was the incumbent local exchange telephone carrier serving New York State and having an exclusive franchise for the State. Trinko, the petitioner in the case, alleged that Verizon’s discriminatory dealing “with respect to providing access to its local loop” denied interconnection services in order to limit market entry by rivals.

Citing Grinnell, the US Supreme Court in Trinko commented that:

- *“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful, it is an important aspect of the free market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking and produces innovation and economic growth.”²¹*
- *“To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive **conduct**.”²²*
- *“Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities.”²³*
- *“... compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter the Sherman Act does not restrict the long recognised right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.”²⁴*
- Mistaken inferences from conduct are easy to draw because of the myriad reasons for engaging in conduct. Mistaken inferences resulting in false condemnations are especially costly because they chill the very conduct which the antitrust laws are designed to protect. The cost of “false positives” counsels against an undue expansion of monopolisation liability.²⁵

The right to refuse to deal with other firms was not regarded as absolute. But courts should be cautious in circumscribing it because of “the uncertain value of forced sharing”, “the difficulty of identifying the virtue of forced sharing” and “the difficulty of identifying and remedying anticompetitive conduct by a single firm”.

²⁰ n.12.

²¹ n.12 at 407.

²² n.12 at 407. Emphasis is that of the court.

²³ n.12 at 407-408.

²⁴ n.12 at 408.

²⁵ n.12 at 408.

Aspen Skiing in light of Trinko

3.5 In Trinko, the Supreme Court relied upon its decision in Aspen Skiing²⁶ in which a joint ski ticket relating to four mountain areas had been issued by ski operators for a number of years. The defendant cancelled the joint ticket. The plaintiff, concerned that skiers would by-pass his mountain without some sort of joint offering, tried ever increasingly desperate measures to re-create the joint ticket even to the point of offering to buy the defendant's tickets at retail price. The Supreme Court held that a trial jury may rightfully have concluded that the defendant elected to forego short run benefits because it was more interested in reducing competition in the long run by harming its smaller competitor. In Trinko,²⁷ the Supreme Court, in reviewing Aspen Skiing²⁸ held that it was "near the outer boundary" of monopolisation liability. The case, said the Court, involved the discontinuance of an existing arrangement which was voluntary and profitable. Monopolistic purpose to achieve an anticompetitive end could be concluded, said the Court, by the fact that the defendant would not renew the arrangement "**even if compensated at retail price**".²⁹

The facts in Aspen Skiing, concluded the Court in Trinko,³⁰ were not the usual ones involved in refusal to deal cases. Trinko, and most refusal to deal cases could be distinguished from Aspen Skiing in that there were no prior dealing arrangements. Therefore, in such cases:

*"the defendant's prior conduct sheds no light upon the motivation of its refusals to deal ... (or) whether these were prompted not by competitive zeal but by anticompetitive malice."*³¹

This is so even if a refusal to deal is because of a refusal to accept statutory cost-based compensation. Even in this case the refusal "tells us nothing about the (defendant's) dreams of monopoly".³² But Aspen Skiing was the termination of an existing profitable arrangement and monopolistic purpose could be found on the facts.

The essential facilities "doctrine" and its future in light of Trinko

3.6 Trinko is not free from controversy as to exactly what it means for the future.³³ Undoubtedly

²⁶ Aspen Skiing v Aspen Highlands Skiing Corp 472 US 585 (1985).

²⁷ n.12.

²⁸ n.26.

²⁹ Trinko n.12 at 409 (Court's emphasis). In determining whether or not the actions of the defendant were motivated by a valid business justification, the court held in Aspen Skiing that it was significant that the defendant "was willing to sacrifice short term benefits and consumer goodwill in exchange for a perceived long run impact on its smaller rival". However, it does not follow that an entity can escape liability that is otherwise actionable simply because that conduct also provides short term profits. (Delaware & Hudson Railway Company v Consolidated Rail Corporation 902 F 2d 174 (2nd Cir. CA 1990).)

³⁰ n.12.

³¹ Trinko n.12 at 409.

³² Trinko n.12 at 409.

³³ Articles abound on all aspects of Trinko and what it means for the future. A whole 200 page special edition of The Antitrust Bulletin (Vol.50 No.4 – Winter 2005) is devoted to the topic. Some articles (other than contained in the Antitrust Bulletin referred to above) are: J Thorne, A Categorical Rule Limiting Section 2 of the Sherman Act: Verizon v Trinko, 72 U. Chi. L. Rev.289 (2005); N R Stoll & S Goldfein, Antitrust Trade and Practice: Is Section 2 of the Sherman Act on Hold?, 231 NY LJ (2004); H Hovenkamp, Exclusion and the Sherman Act, 72 U. Chi. L. Rev.147 (2005); K Lavalley, 2004 Legal Perspective: Antitrust and Business Litigation, 68 Tex. BJ 24 (2005); A J Lazzaro: Monopoly leveraging in Verizon

the decision in Trinko was made in the context of a particular industry (communications) and in the context of an existing regulatory regime (the United States Telecommunications Act 1996) which the Court noted was an alternative access regime. It can be argued that this influenced the Supreme Court's view and the decision has to be interpreted narrowly and in context. To the contrary is the Court's own assertion that its decision is based solely on whether "the activity of which the respondent complains violates pre-existing antitrust standards".³⁴

Clearly Trinko was able to be distinguished from Aspen Skiing. In Aspen the court found no general duty to cooperate with a competitor. However, it had little difficulty in finding that the termination of a pre-existing profitable arrangement showed monopolistic purpose. No such purpose could be shown simply by a refusal to enter into a new access arrangement.

- 3.7 Notwithstanding Trinko³⁵ the essential facilities "doctrine" has been, and remains, influential. Virtually every federal judicial circuit has recognised the essential facilities "doctrine" as a subcategory of s.2 Sherman Act jurisprudence and all of them require roughly the same elements.³⁶ One commentator states that "As in the case of Mark Twain, reports of the death of the essential facilities "doctrine" may be exaggerated".³⁷ Even before Professor Areeda's advocacy of limiting principles to the "doctrine", the courts were applying such limitations.³⁸
- 3.8 Undoubtedly the United States case which has been most influential in the essential facilities area has been the 7th Circuit Court of Appeals decision in MCI Communications v AT&T Co.³⁹ That case held that there are four elements necessary to establish liability by use of the

Communications v Law Offices of Curtis V Trinko LLP: Why the United States Supreme Court should draw a clear line for anticompetitive behaviour violative of the Sherman Act 51 Clev. St. L. Rev. 235; M L Fiala: Verizon v Trinko: Limiting Section 2 Liability for Regulatory Enterprises 19 Fall Nat Resources & Env't 72 (2004); M L Cantor: Is Trinko the Last Word on a Telephone Monopolist's Duty to Sell? 231 NYLJ 4 (2004).

³⁴ Trinko n.12 at 407.

³⁵ n.12.

³⁶ See J L Rubin "The Truth about Trinko" 50(4) The Antitrust Bulletin (Winter 2005) 725, 734.

³⁷ Rubin n.36.

³⁸ Rubin (n.36). Areeda's principles are set out in the article cited at n.18 pp.852-853. His suggested limitations on the "doctrine" are

- There is no general duty to share. Compulsory access, if it exists at all, is and should be exceptional.
- A single firm facility, as distinct from a combination, is "essential" only if both critical to the plaintiff's competitive vitality and the plaintiff is essential to competition in the workplace. "Vitality" means that the plaintiff cannot compete without the facility and duplication of practical alternatives are not available.
- Access should be allowed only if there is an improvement in competition. This is unlikely, amongst other things, if the plaintiff is not an actual or potential competitor.
- Denial of access is never per se unlawful. Legitimate business purpose always saves the defendant.
- The defendant's intention is seldom illuminating because every firm that denies access does so to limit competition with itself and increase profits. Only an intention to exclude by *improper means* should be a breach of competition law (Areeda's emphasis).
- No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.

See also n.48 and n.112 and n.150 for other comments in relation to Areeda's article.

³⁹ MCI Communications v AT&T Co. 708 F 2d 1081 (7th Cir 1983) at 1132-3 citing extensive

essential facilities “doctrine”. These are:

- control of the essential facility by a monopolist;
- the competitor’s inability practically or reasonably to duplicate the facility;
- the denial of the use of the facility to a competitor; and
- the feasibility of providing the facility. In relation to feasibility, the defendant will be entitled to deny access for legitimate or technical reasons.⁴⁰

3.9 The “essentiality” of the facility involved was subsequently clarified in Alaska Airlines.⁴¹ There the Court said:

“As the word ‘essential’ indicates, a plaintiff must show more than inconvenience, or even some economic loss; he must show that an alternative to the facility is not feasible.”⁴²

The Court held in that case that a facility that is controlled by a single firm will be considered essential

*“only if control of the facility carries with it the power to **eliminate** competition in the downstream market.”⁴³*

The Court noted that the power to eliminate competition must not be momentary but must be at least relatively permanent.⁴⁴

precedent.

⁴⁰ Examples given for justified denial of access for legitimate or technical reasons were (case citations here omitted) denials:

- to a building because of limited space;
- on the basis of applicant's financial soundness;
- because the access sought was preferential access;
- because the access required the facility holder to abandon its facilities.

For an extended coverage of reasons put for denial of access to facilities, both upheld and rejected, see Kench at 4.3 under heading *A Second Conclusion from Melway: A business justification for doing so permits non-supply.*

The diminution of efficiency is possibly the most generally acceptable business justification for denial of access. Aspen (n.26) refers extensively to this as a valid reason for access denial concluding, however, that the defendant had not proven its case. Indeed, the court concluded that a “four mountains ticket” had many advantages in efficiency and other terms over the “three mountains ticket” to which the defendant’s denial gave rise.

⁴¹ Alaska Airlines Inc. & Ors v United Airlines Inc. & Ors 948 F 2d 536 (9th Cir. CA 191).

⁴² n.41 at 544 citing Twin Laboratories v Weider Health & Fitness 900 F 2d 566 (2nd Cir. CA 1990).

⁴³ n.42. Emphasis is that of the Court.

⁴⁴ Alaska Airlines (n.41) at fn.11 citing MCI (n.39) which spoke about the “virtual impossibility” of duplicating AT&T’s local distribution facilities.

Conclusions from the United States essential facilities cases

3.10 Undoubtedly, the US essential facilities “doctrine” has had a significant impact on legal and economic thought. The impact of this jurisprudence has, however, to be tempered. The essential facilities “doctrine” has not yet been adopted by the United States Supreme Court and that court has been at pains in Trinko⁴⁵ to state that it neither embraces nor rejects it. What is apparent, however, is that the Supreme Court has expressed significant reservations as to the application of the “doctrine”.⁴⁶ One cannot escape the conclusion that the Supreme Court will, in future, be reluctant to mandate facilities access and will do so only in the clearest of circumstances.

Academic opinion differs as to the future of the essential facilities “doctrine”. One view is that the “doctrine” is “stubbornly robust”.⁴⁷ The contrary position is that:

“One must feel sorry for the essential facilities “doctrine”. It had a singularly modest ‘career’ so to speak ...

It enjoyed one brief moment in the sun when the Seventh Circuit relied on it to condemn then monopolist AT&T’s refusal to connect MCI and permit MCI to compete in long distance telephone business (MCI Communications Corp v AT&T 708 F 2d 1081)

... that is pretty much all there is to the doctrine’s career. In 1989 antitrust guru Phillip Areeda drove a knife into the heart of the “doctrine” in one of his most influential writings [Philip Areeda – Essential Facilities: An Epithet in Need of Limiting Principles 58 Antitrust LJ 841 (1989)]. The “doctrine” has been on life support ever since.

... whilst Trinko did not pull the plug, it did everything but ...”⁴⁸

Regardless of one’s views of United States cases dealing with essential facilities, some conclusions are apparent:

- The US essential facilities “doctrine” has had significant influence upon Australian regulatory arrangements. Indeed, it is fair comment to say that the Access Regime under PART IIIA of the Trade Practices Act attempts (somewhat unsuccessfully in the writer’s view) to transplant the principles behind the United States essential facilities “doctrine” into an Australian statutory scheme. An examination of PART IIIA and the United States essential facilities cases shows a common philosophy, albeit, in this writer’s view, a mistranslation of Sherman Act principles downunder.
- The difficulty with a statutory scheme is that it lacks the flexibility of application to specific situations. The Australian scheme thus will require frequent re-evaluation. It was re-evaluated in 2001 when it was conceded that Australian “access regulation is still in its infancy”.⁴⁹ This would indicate that further reviews should, and hopefully

⁴⁵ n.12.

⁴⁶ See n.21-25 and related text.

⁴⁷ Rubin n.36, 37.

⁴⁸ Stephen Calkins: “Developments in US Monopoly Law: Much ado about —?” Paper given at the 16th Annual Workshop of the Competition Law & Policy Institute of New Zealand 6 August 2005 pp.27-28.

The AT&T Case referred to by Calkins is discussed in this commentary (see n.39 and 40 and related text). The Areeda article referred to by Calkins is discussed in this commentary (see n.18, n.38, n.112, n.150 and related texts).

⁴⁹ Productivity Commission: Review of the National Access Regime Report No.17

will, follow when further experience is gained. Any such further review cannot ignore the United States developments so strongly apparent in the Trinko decision; given that the initial statutory scheme in Australia is as philosophically based on United States jurisprudence as it is.

- Whether one thinks the Trinko view or the essential facilities view will triumph or whether one thinks that Trinko and the essential facilities cases represent, in essence, the same view, it is apparent that there are significant limitations imposed in the United States on any access which will be given. Trinko stresses the considerations which militate against access. An application of the essential facilities line of cases also gives rise to similar restraining factors. In applying US access doctrines, one cannot overlook the significant caveats contained in them.

4. AUSTRALIAN ESSENTIAL FACILITIES JURISPRUDENCE

“The limits of the US “doctrine” are not yet clear, and it has been observed that the “doctrine” has not yet developed with clarity, coherence and consistency, let alone with strong economic foundations. The Committee is not satisfied that the “doctrine” has sufficiently developed to provide a suitable model for Australian law.”

“National Competition Policy: Report by the Independent Committee of Inquiry (August 1993) [The Hilmer Report] pp.73-74 (Citations omitted).

“In the present case PAWA did take advantage of market power because it was only by virtue of the market or markets for the supply of services for the transport of electricity along infrastructure, including its transmission and distribution network, that PAWA could in a commercial sense withhold access to its infrastructure; if PAWA had been operating in a competitive market for the supply of access services, it would be very unlikely that it would have been able to stand by and allow a competitor to supply access services . . .”

“The power in both classes of markets – the transmission/distribution markets and the electricity supply/electricity sale market (is) derived in part from PAWA’s ownership of infrastructure (which) constitutes a natural monopoly (for which) there (is) no credible threat of entry by another competitor. That ownership operated as a barrier to entry in both classes of market and was hence a source of market power in both as well . . .”

[NT Power Generation v PAWA (2004) HCA 48, [63] and [127] (Judgment of McHugh ACJ, Gummow, Callinan and Heydon JJ (citations omitted) holding that s.46 of the Trade Practices Act relating to misuse of market power was breached by the PAWA’s denial of transmission line access to a competitive electricity generator.)]

The purpose of this **PART** is to set out in detail the High Court decisions in relation to misuse of market power (s.46 of the Trade Practices Act). A summary of the conclusions in this **PART** is set out at **9.7**.

Times have changed

4.1 Australia, like the United States, has general competition law prohibitions against the misuse of market power. Both the Australian and the American prohibitions are expressed in somewhat generalistic words and are aimed at similar ends. Though the Australian Courts have been careful in not adopting US principles verbatim, it is clear that US decisions have been influential in Australia. The Australian misuse of market power provisions are contained in s.46 of the Trade Practices Act. They are directly relevant to the rights of facility owners in dealing with, and giving access to, their facilities.

In order to breach s.46, there must be a taking advantage of a substantial degree of market power for the purpose of eliminating or substantially damaging a competitor, preventing market entry or deterring or preventing competitive conduct.⁵⁰

The Hilmer Report, which led to the establishment of the Australian Access Regime, is dated 1993. At that time, there was but one High Court decision on misuse of market power (Queensland Wire).⁵¹ Thus, at least as far as High Court precedent is concerned, the establishment of the Access Regime under PART IIIA of the Trade Practices Act necessitated a view of competition law based on only that precedent. It was not for some 12 years, and after implementation of the Access Regime, that the High Court next considered s.46 in Melway (2001).⁵² In a comparatively short time thereafter, the High Court gave s.46 judgments in Boral (2003),⁵³ Rural Press (2003)⁵⁴ and NT Power (2004).⁵⁵

The aim of this **PART** is to ascertain whether Hilmer would believe now, as distinct from in 1993, that the Australian competition law is inadequate to ensure facility access. When evaluating the impact of Australian competition law, a different perspective is now available to that in 1993 and the High Court decisions subsequent to that date must be factored in.

⁵⁰ For purposes of this commentary s.46 relevantly provides that:

- a corporation that has a **substantial degree of power in a market**;
- shall not **take advantage of** that power;
- **for the purpose of**:
 - eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
 - preventing the entry of a person into that or any other market; or
 - deterring or preventing a person from engaging in competitive conduct in that or any other market.

The major provisions specific to s.46 and about which there has been greatest debate to date are emphasised above.

Under s.4F of the Trade Practices Act “purpose” includes a relevant purpose or a purpose that includes a relevant purpose so long as that purpose is or was a substantial purpose.

⁵¹ Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited (1989) ATPR ¶40-925.

⁵² Melway Publishing Pty Ltd v Robert Hicks Pty Ltd [2001] HCA 13; (2001) ATPR ¶41-805.

⁵³ Boral Besser Masonry Limited v ACCC [2003] HCA 5; (2003) ATPR ¶41-915.

⁵⁴ Rural Press Limited v ACCC [2003] HCA 75; (2003) ATPR ¶41-965.

⁵⁵ NT Power Generation Pty Ltd v Power & Water Authority [2004] HCA 48; (2004) ATPR ¶42-021.

Queensland Wire

4.2 Bearing in mind that it was the initial decision in point, Queensland Wire⁵⁶ is of interest in the essential facilities context at trial,⁵⁷ and at Full Court level⁵⁸ as well as in the High Court.⁵⁹

- Queensland Wire: The brief facts

BHP produced a star picket fence post, a popular rural fence post, which it did not sell outside its company group. Queensland Wire competed with BHP at retail. Queensland Wire, however, could not obtain Y-bar, an important element (Queensland Wire said an “essential” element) in the manufacture of star picket fence posts, from BHP, which held 97% of Australia’s steel producing capacity. Queensland Wire thus alleged that it could not produce star picket fence posts itself. It wanted BHP to supply it with Y-bar so that it could do this and thus compete more effectively with BHP at the retail level. BHP refused supply.⁶⁰

- Queensland Wire at trial

At trial, Justice Pincus found no breach of s.46 of the Act. He rejected the BHP argument that because it owned the goods it produced, it could do what it liked with them. He held that the words “take advantage of” in s.46 were pejorative and not neutral. Although he did not embrace American law, he concluded that a “pejorative” interpretation was consistent with it. He expressly referred to Aspen Skiing⁶¹ concluding that there was no violation of competition law if “a valid business reason” existed for the action taken. Thus, although BHP had, within s.46, the requisite prohibited “purpose”, it did not “take advantage” of its market power and thus did not infringe the section.⁶² Mere possession of market power did not breach the section. Refusing to supply a competitor wanting to compete at retail level would not ordinarily be regarded as reprehensible or deserving of criticism, his Honour said. His Honour also thought his views were aided by the difficulty he found in ordering an appropriate remedy – an issue discussed later in this commentary (see **PART 5**).

- Queensland Wire: The Full Federal Court decision

As here relevant,⁶³ the Full Federal Court, although not adopting United States monopolisation law, held that United States authorities had “particular significance”. On this basis, it concluded that the use of monopoly power, however acquired, was illegal only if used “to foreclose competition, to gain a competitive advantage or to destroy a competitor”.⁶⁴

⁵⁶ n.51 (High Court). For lower court decisions see n.57 (Trial Judgment) and n.58 (Full Court judgment).

⁵⁷ Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Limited (1987) ATPR ¶40-810 (Pincus J).

⁵⁸ Queensland Wire Industries Pty Ltd v BHP Co. (1988) ATPR ¶40-841 (Full Court).

⁵⁹ n.51.

⁶⁰ More accurately, BHP offered to supply at an excessively high price relative to other BHP products. This was regarded as a “constructive refusal”.

⁶¹ n.26.

⁶² For the provisions of s.46 see n.50.

⁶³ The Full Court held that there was no “market” in Y-bar because there had not been any trading in it (n.58 at p.49,075). This holding was clearly erroneous on its face and has not subsequently been followed [see NT Power v PAWA (n.55 (discussed at 4.6 below) and specifically to comments in text relating to n.93 below)]. Therefore, it is not here discussed.

⁶⁴ n.58 at p.49,075 citing US v Griffith 334 US 100 (1948).

It had been pressed in argument on appeal that Y-bar was an essential facility to making of star picket fence posts. The Court thus examined the essential facilities “doctrine”. The Full Federal Court did not accept the essential facility analogy although conceding that it may have application to monopolies of “electric power, transport, communications or some other essential service”.⁶⁵

The Full Court held that BHP had not breached s.46.

- Queensland Wire: The High Court decision

Contrary to the trial and appeal findings, the High Court held that BHP had breached s.46. In doing this, the Court set down some guiding principles which still remain basic to the interpretation of s.46. These principles are:

- The phrase “taking advantage of” in s.46 is not a pejorative term. Thus tests of predation, unfairness or reprehensibility are not appropriate to the interpretation of the section.
- “Take advantage of” means “use”.
- The test of “use” is whether the conduct in question could have been engaged in in a competitive market.
- In a competitive market, BHP would have supplied Y-bar. It would not have stood back and allowed other steel suppliers to supply Queensland Wire’s raw material requirements.
- BHP’s purpose in refusing supply to Queensland Wire was thus to prevent Queensland Wire competing at retail with the BHP Group as a manufacturer and wholesaler of star picket fence posts. This was a proscribed purpose under s.46 of the Trade Practices Act because it aimed at preventing Queensland Wire entering the market.⁶⁶
- BHP did not offer any legitimate reason for its effective refusal to sell.⁶⁷

It should be noted that no High Court judgment made any reference to the United States essential facilities “doctrine”. Neither did any High Court judgment make reference to the

⁶⁵ n.58 at 49,076-49,077. In brief terms, the court rejected the analogy because:

- it was not readily accommodated by the words of s.46;
- the “doctrine” was a “gloss” on the specific wording of the Sherman Act;
- it was hard to see the limits of such “doctrine”;
- there is particular difficulty in requiring BHP to accept Queensland Wire as a new customer;
- other “doctrines”, particularly that of upholding conduct engaged in for “legitimate business purposes” counteracted the essential facilities “doctrine”;
- the “doctrine” did not apply to a monopolist producing solely for its own use.

The Court conceded that the “doctrine” may apply to monopolies of “electric power, transport, communications or some other ‘essential service’”.

⁶⁶ See n.50 for the provisions of s.46 and the proscribed purposes of the section.

⁶⁷ There were four separate judgments written in the case. All reached the conclusion that BHP had breached s.46 and, broadly speaking, for the same reasons. The points set out in the text were made by all judges though the wording differed in the various judgments.

appropriate remedy for breach (discussed later in this commentary – see **PART 5**).

- Conclusions from Queensland Wire

Queensland Wire was not an easy case to apply as the judgments gave rise to significant unanswered questions. In some respects, the difficulties of the case were magnified by the fact that fully 12 years elapsed before the second s.46 case found its way to the High Court. Thus Queensland Wire stood for a long time as the sole High Court illumination in relation to s.46. Queensland Wire was a twentieth century decision. It was not until this century that further light shone.⁶⁸

It was the perceived wisdom after Queensland Wire that the essential facilities “doctrine” had been rejected in Australia. This was because the Full Federal Court poured very cold water on the “doctrine” as it applied to the facts and the High Court said nothing about the “doctrine” in any of its judgments. The Hilmer Committee concluded that the Federal Court had rejected the essential facilities “doctrine” and the High Court had not embraced it.⁶⁹ This was the basis on which it concluded that s.46 was inadequate as a method of ensuring access to facilities. But the conclusion is not correct. Y-bar was a “product” not a “facility”. The Full Federal Court specifically left open the possibility of the essential facilities “doctrine” applying to “electric power, transport, communications or some other ‘essential service’”. The High Court said nothing about the “doctrine” because it did not have to, its judgment being based on reasoning which did not necessitate any consideration at all of access to facilities.

The chief concern for business as a result of Queensland Wire probably was that the case seemed to give rise to a duty on a monopolist to deal with all comers. Commercial opinion at that time certainly was that Queensland Wire left very little scope for individual discretion in the making of supply decisions. Of course, the truth is that BHP had declined to give reasons for its refusal to supply Queensland Wire and the court had drawn its own conclusions.⁷⁰ However, business was uncertain as to what reasons for refusing supply might be acceptable ones or if any reasons at all would find favour. There was also the over arching problem as to what type of a remedy the court would construct in the case of a s.46 breach. There might be an obligation to deal but what would the court say about the central issue of supply price. And, of course, price is not the sole issue floating in the ether. What would the court say about quantity of supply contracts, payment and credit terms and the like. All of these doubts were simply untouched by the Queensland Wire judgment.⁷¹

It is not, therefore, surprising that there was dissatisfaction expressed to the Hilmer Committee⁷² in relation to s.46 as a means of providing access to essential facilities – particularly in relation to markets traditionally supplied by public monopolies. Whether this would currently be so is more conjectural in light of subsequent s.46 decisions and the elimination of State Crown immunity from the Trade Practices Act in relation to business activities. The fact that s.46 can now be used to access State owned business facilities is clearly illustrated in the 2004 NT Power Generation decision (discussed at 4.6 below).

⁶⁸ See cases cited n.52-55.

⁶⁹ National Competition Policy: Report of the Independent Committee of Inquiry [F Hilmer: Chairman (August 1993)] at p.243.

⁷⁰ BHP argued its case on the basis that it had a right in law to refuse to deal. Thus it did not believe there was any need to supply justification for the decision it made.

⁷¹ The case was referred back to Justice Pincus for appropriate remedy. His Honour was not greatly enamoured by this, having said at trial that he could not construct a remedy and that this was a major reason for his finding BHP not to be in sin. The case was settled between the parties on terms not to be disclosed so no guidance was given as to judicial thoughts on appropriate remedies. The question of remedies is discussed in **PART 5** of this commentary.

⁷² Hilmer Report (1993) n.69 at p.243.

Melway

4.3 Melway,⁷³ the second High Court case on misuse of market power, arrived 12 years after Queensland Wire⁷⁴ and after both the Hilmer Report and the enactment of the Access Regime under PART IIIA of the Trade Practices Act.

- *Melway: The brief facts*

Melway produced a highly popular Melbourne Street Directory. It had 90% of the Melbourne Street Directory market which was conceded to be the relevant market.

Melway distributed its street directory through specialist distributors. A terminated distributor, Robert Hicks Pty Ltd, sought supply of 30,000-50,000 directories. Melway refused this supply saying that it operated only through specialist distributors, each of which sold to niche outlets.

Robert Hicks, relying on Queensland Wire, argued that the only reason for non-supply to it was to prevent competition at the retail level. Melway, on the other hand, argued that the best way to promote sales was through specialist distributors and supplying Robert Hicks would not increase sales. Melway also had “runs on the board” in this regard. It had, even with a small market share in Melbourne, always sold through exclusive distributorships. It also marketed in this way in Sydney where it had a ten percent market share. Melway thus argued that this is what it would do in a competitive market (the Queensland Wire test) and it was thus not taking advantage of its market power.

- *The importance of Melway*

Melway was an important precedent for the circumstances in which a powerful market entity may refuse to deal. Clearly in the United States there is such a general freedom. But, in view of Queensland Wire, did the same logic run in Australia?

- *Melway: The decision*

A powerful joint judgment (Gleeson CJ; Gummow, Hayne and Callinan JJ) held in favour of Melway. Justice Kirby was in dissent.

Relevant points made by the majority were:

- In Queensland Wire, the basis of the conclusion that BHP was “taking advantage” of market power was not entirely clear from the evidence. However, the conclusion seemed to follow because BHP had offered no justification for its conduct.
- It is dangerous to proceed too quickly from a finding of a purpose to engage in hostile conduct to a finding that a purpose involves taking advantage of market power;
- A refusal to deal may be explained in terms which justify the conclusion that restricting competition was no part, or no substantial part, of the relevant purpose involved;⁷⁵

⁷³ n.52.

⁷⁴ n.51.

⁷⁵ n.52 at p.42,756.

- It does not follow that a monopolist has to supply everyone seeking supply.⁷⁶ It is not the purpose of s.46 to dictate to a party how to choose its distributors;⁷⁷
- The overall effect of restraints imposed by suppliers may be positive and such restraints are not necessarily negative in competition terms. Such restraints may enhance or diminish competition and hence overall consumer welfare;⁷⁸
- Thus Melway, which acted in its own self interest, and would have so acted in a competitive market, did not have to supply Robert Hicks. Melway offered rational reasons for what it did even though its decision was primarily based only on its belief and experience and the fact that the exclusive distributor system worked well for it.
- *The major conclusion from Melway: There is no necessary obligation to supply*

Melway put paid to the fears instilled by Queensland Wire that a party having a substantial degree of market power had to supply everyone requesting such supply. Non-supply, as well as supply, could be beneficial to the competitive process.

- *A second conclusion from Melway: A “business justification” for doing so permits non-supply*

Although Melway did not specifically hold that a “business justification” test was written into s.46, the High Court found in favour of Melway because of the explanation Melway gave for what it did – something lacking in Queensland Wire. One must, therefore, conclude that a business justification for conduct is, as a result of the case, a highly relevant factor in assessing whether or not a party is “taking advantage” of its market power. It is to be noted that “business justification” is basic to United States access evaluations. John Kench in his article entitled “PART IIIA UNLEASHING A MONSTER” (contained in Williams (Ed) 25 years of the Trade Practices Act) sets out the following business justifications for refusal to deal which have been upheld in United States Courts (case citations here omitted):

- “free riding”. Without restrictions a manufacturer may not be able to encourage investment by distributors to distribute the manufacturer’s product;
- decreasing or limiting take or pay liability or exposure;
- legitimate quality control concerns;
- unwillingness to extend credit facilities;
- protecting the value of exclusive promotions in order to foster consumer loyalty;
- vertical integration flowing from a patent monopoly;
- a decision to increase capacity thus limiting the excess capacity available to competitors;
- a facility holder using all its capacity;
- a declining to supply uninterrupted access to transmission lines, having offered only

⁷⁶ n.52 at p.52,759.

⁷⁷ n.52 at p.42,752.

⁷⁸ 52 at p.42,752-42,753.

interruptible access because the facility holder expected to use its full capacity for the benefit of all its consumers;

- a declining to grant access because it might significantly alter the way in which the facility holder did business;
- refusing hospital access to incompetent or unqualified doctors; and
- requiring registered nurse anaesthetists to practice under the supervision of a licensed hospital physician.

Other reasons for upholding decisions to deny access are given in MCI Communications v AT&T (see n.40). The issue is further discussed generally at 4.8 following.

An important point to note about the United States business justification test is that it is not a carte blanche for an entity to do as it will. An otherwise condemned practice does not violate the antitrust laws only “if implemented for a legitimate purpose” and “if no less restrictive alternative is available” (Phonetele Inc v American Tel & Tel Co. 664F 2d 716, 738-39 (9 Cir. 1981)). The onus of proving that the conduct falls within this principle lies on the defendant. Frequently less restrictive alternatives do exist [see cases cited in Mozart Company v Mercedes 833 F 2d 1343 (9th Cir. CA 1987) at 1349].

Kench notes the following as cases where claimed business justifications for denying access have not been upheld:

- short term profit maximisation (see principle stated in Delaware & Hudson Railway Co. Case (n.29));
- a claim that access will result in the facility holder losing revenue to a competitor’s product, the facility holder having facilitated the marketing of the competitor’s product and then attempted to replace it with the facility holder’s own product; and
- a claim that quality control will be compromised, the claim having been raised as an after the fact rationalisation.

In this writer’s view, Melway would permit the above issues to be argued with the probability of the same result in relation to justifications for non-supply or non-access.

Boral

4.4 The principles of misuse of market power were further extended in Boral.⁷⁹

- Boral: The brief facts

The facts of the case are prolix and can be set out here only in the briefest form. In short, Boral was a large manufacturer of concrete masonry products in Victoria. It had two large competitors, (one of which left the market) and two smaller competitors (one of which, C & M, was very efficient and gained significant market share and the other of which was forced to leave the market). The only competitive weapon in the sale of concrete masonry products was price as concrete masonry products were uniform in size and performance characteristics. Boral was selling at a loss but had to do so to meet competition. It decided to stay in the market rather than leave because it thought the market would come good in the long term. The ACCC took proceedings against Boral alleging, amongst other things, that its below cost

pricing constituted a misuse of market power engaged in for the purpose of driving smaller competitors from the market.

- Boral: The decision

The High Court found in favour of Boral.

The following points follow from the Boral decision:⁸⁰

- To point to conduct which damages competitors is not helpful in deciding whether a firm has been, or is, taking advantage of market power;⁸¹
- It is dangerous to proceed too quickly from a finding about purpose to damage a competitor to a finding of taking advantage of market power (confirming Melway in this regard). The purpose of Boral's pricing policy was to take away business from competitors. This necessarily results in damage to a competitor and perhaps its elimination. But this is inherent in the competitive process.⁸²
- Market power must be derived from the market. Thus financial power is not market power;⁸³
- Competition laws are concerned with the protection of "competition" not "competitors";⁸⁴
- Even an act of pure malice by one business competitor does not, without more, state a claim under competition law;⁸⁵
- It is in the interests of competition to permit firms with substantial degrees of market power to engage in vigorous competition;⁸⁶
- A corporation should not be taken to have contravened s.46 merely by reason that it acquires plant and equipment. It is desirable that the section not be used as an excuse for failure to invest;⁸⁷
- Misuse of market power cases should not fix upon intent because this does not assist in separating beneficial aggressive competition from attempted monopolisation. It invites penalisation of hard competition and that "greed driven desire to succeed" over

⁸⁰ Judgments in favour of Boral were given by Gleeson CJ and Callinan J (Joint judgment); Gaudron, Gummow and Hayne JJ (Joint judgment); and McHugh J. Kirby J dissented. The material in the text is a synthesis of points made in the judgments favourable to Boral.

⁸¹ n.53 at 46,683.

⁸² n.81.

⁸³ n.53 at 46, 685.

⁸⁴ n.53 at 46,688 citing Brown Shoe v US 370 US 294, 320 (1962); Brooke Group Ltd v Brown & Williamson Tobacco Group 509 US 209, 224 (1993). See also Queensland Wire cited at p.46,689 "the purpose of s.46 is not the economic well being of competitors but the interests of consumers ... the relevant question is whether ... a firm with ... market power has used that power for a purpose proscribed in s.46 thereby undermining competition". See also n.53 at 46,701, 46,705.

⁸⁵ n.84 citing Brooke Group.

⁸⁶ n.84 citing Cagill Inc. v Monfort of Colorado 479 US 104, 116 (1986).

⁸⁷ n.53 p.46,690.

rival firms. This desire is not a basis for competition law liability nor a ground for inferring the existence of such a basis;⁸⁸

It follows from this that each element in s.46 must be independently proven. An express intent, for example, to “kill the bastards” does not mean that an entity has the market power to do so. Nor does it mean that an entity is “taking advantage” of its market power as it may be acting as it would in a competitive market. “Market power” and “taking advantage of” it must be independently proven and intent is, of itself, not such proof. In the United States, the equivalent case holding to this effect is Olympia Equipment Leasing Co. v Western Union Tel. Co. (797 F 2d 370 – 7 Cir. 1987) in which the stated company objective that “these turkeys must be flushed” was held not to give rise to liability;

- It is necessary to draw a line between factors that make entry difficult because of superior efficiency and size and those that are strategic barriers to entry. A failure to do this gives rise to a result inconsistent with the consumer oriented policy of the Act. Consequently, firms may be found to be in breach of the Act when they should not be. Efficiency itself will then be a burden on firms and make it easier to find them guilty of breaches of the Act;⁸⁹
- Financial strength is not equivalent to market power though it may go to the reasons explaining the reasons for a firm’s power.⁹⁰

Rural Press⁹¹

4.5 • Rural Press: The brief facts

Rural Press, a well resourced national rural newspaper publisher, issued a threat to Waikerie Printing, a small provincial publisher, not to extend its distribution into an area traditionally the domain of Rural Press. If this warning was not heeded Rural Press threatened to publish in the Waikerie Press area in which it had never previously been involved. The threat was, of course, backed up by the fear that Rural Press’ entry into the Waikerie Press area would have a severe effect on the latter’s business. Waikerie Press determined not to extend its distribution into the traditional Rural Press area and advised Rural Press of its decision. The ACCC alleged a breach of s.46 and other sections of the Trade Practices Act.

• Rural Press: The decision

The High Court held that Rural Press had not breached s.46 of the Trade Practices Act though it had infringed other provisions of the Act.

Only points from the case relevant to s.46 are here discussed. They were, two:

- There had to be a causal connection between the substantial market power and the conduct involved. Market power was obtained from the market as distinct from strength obtained from the possession of material, financial and organisational assets. Thus the potential use of these assets was not a factor in evaluating s.46. The relevant evaluation to be made was of the Waikerie Press market area. In this area, Rural Press

⁸⁸ n. 53 p.46,685 citing Judge Easterbrook in AA Poultry Farms v Rose Acre Farms Inc. 881 F 2d 1396, 1402 (1989).

⁸⁹ n.53 at 46,715, McHugh J.

⁹⁰ n.53 at 46,717.

⁹¹ n.54.

had no market power. It had only resources which it could potentially use as a new market entrant.

- The test from Queensland Wire was whether an entity with substantial market power could behave in the manner it did in a competitive market. The ACCC invited the Court to hold that the true test was whether an entity would, as a matter of commercial reality, have behaved in a competitive market in the manner it did. It argued that Rural Press certainly could have acted as it did in the sense that it was physically capable of doing so but, as a matter of commercial reality, it would not have done so. The result, if the ACCC's argument were accepted, would have been to lower the behavioural threshold test. The Court declined the ACCC's invitation to adopt a "would" test with a vehement dissent from Justice Kirby. Justice Kirby's conclusion from the "would" test he favoured was that Rural Press, in a competitive market, would not as a matter of commercial actuality have issued the threat which it did because it would have lacked the clout to back it up and, in a competitive market, no-one would have taken the threat seriously.

- Conclusion from Rural Press

The case gives rise to a test of misuse of market power involving the ability to act in the relevant manner in a competitive market as distinct from a test of whether it is commercially likely that an entity would act in a certain way in a competitive market. Minds may differ as to the merits of this test. Many, no doubt, will argue that the "could" test is the more relevant one in light of the objects of s.46. Section 46, they will argue, should deal with the capacity of parties to act in a certain way and not with more hypothetical court evaluations as to how parties might act in hypothetical circumstances. The opposite view, strongly argued in dissent by Justice Kirby, is that the Trade Practices Act is concerned with commercial likelihoods and what "would" happen should be the relevant issue for evaluation.

NT Power⁹²

4.6 NT Power is an important case in relation to facilities. Not only does it develop and apply the foregoing principles of misuse of market power, it does this in the very context of a refusal of access to a facility – the very area in which s.46 and its interpretation have been criticised as being without strong foundation. Those who so criticise are now compelled to re-visit and re-assess their views. The court judgment is an exceptionally strong one (McHugh ACJ; Gummow, Callinan & Heydon JJ in a joint judgment, Kirby J dissenting).

- NT Power: The brief facts

Shorn to its basics, NT Power generated electric power in a plant which it owned. It wished to sell its power to Northern Territory consumers but, in order to do so, needed access to existing transmission and distribution infrastructure in and around Darwin and Katherine. This infrastructure was owned by the Northern Territory Power and Water Authority (PAWA), a Northern Territory government owned entity. PAWA denied access without giving reasons though it appears that the Northern Territory government did not wish to grant any third party access until it had finalised an access regime which it was in the process of planning.

- NT Power: The decision

The majority judgment held for NT Power. Relevant issues determined were:

⁹²

n.55.

- There was a relevant market even though there had been no prior dealings in it. PAWA had a substantial degree of market power in that market. The decision of the Full Federal Court in Queensland Wire was thus not followed.⁹³
- PAWA could not justify its conduct on the basis that it was taking advantage only of its property rights.⁹⁴
- PAWA was a government instrumentality carrying on business and was thus within the provisions of the Trade Practices Act.⁹⁵
- *“PAWA made a decision ... not to use or permit the use of its transmission and distribution infrastructure services for the transmission and distribution of electricity generated by a competitor or potential competitor, namely NT Power, to customers, because of the negative impact this would have in the short term on its business of selling electricity to consumers.”*⁹⁶
- There were transmission/distribution markets and PAWA had a substantial degree of power in them. PAWA took advantage of its market power for proscribed purposes.⁹⁷

The NT Power judgment, is complex and deals with many other issues. For purposes of present relevance, the above encapsulate all issues needing to be discussed. The case is a precedent one of the courts dealing with access to facilities under the general law without the aid of an access regime.⁹⁸ Had the decision been made in 1993 when the Hilmer Report was compiled one must wonder whether the demand for an access regime would have been as great or the dissatisfaction expressed with s.46 so vehement.

A diversion: Comments on the question of purpose as applied to s.46

- 4.7** Section 46 requires that conduct, in order to infringe, be done with a proscribed “purpose”. It is clear enough that this means a “subjective” and not an “objective” purpose.⁹⁹ However, it has been noted that in most cases the exact test to be applied will probably make little difference to the outcome.¹⁰⁰ In particular the application of the subjective test does not exclude a consideration of the relevant circumstances and using surrounding circumstances, to determine such purpose.¹⁰¹ As was noted in General Newspapers,¹⁰² even in the case of an evaluation of subjective purpose, factors relevant to the decision may bring a transaction within the section even if purely objective considerations would not. Further, the thinking

⁹³ n.55 at 49,023; 49,039 et seq. For Full Federal Court decision to the contrary see n.63 and comments there set out.

⁹⁴ n.55 at 49,023; 49,042 et seq.

⁹⁵ n.55 at 49,029 et seq.

⁹⁶ n.55 at 49,032.

⁹⁷ n.55 at 49,049. For details of s.46 and the “proscribed purposes” in the section see n.50.

⁹⁸ The question of who is an appropriate adjudication body in relation to access the courts or a regulatory regime) is discussed in **PART 5** below.

⁹⁹ News Ltd v South Sydney District Rugby League Football Club Ltd (2003) ATPR ¶41-943 per McHugh J at 47,176: “No judge has ever applied the objective test to the term ‘purpose’ since ... 1996”; see also Gummow J at 47,179-47,180. Kirby J at 47,191 noted that nothing turned on the difference.

¹⁰⁰ n.99 at 47,177.

¹⁰¹ n.99 at 47,178.

¹⁰² General Newspapers Pty Ltd v Telstra Corporation (1993) ATPR ¶41-274 at p.41,698.

behind a transaction may clarify what it aims to achieve and is likely to achieve. Ordinarily indeed those matters can be inferred from the terms of arrangements made and from the way they are implemented.

Much criticism has been made of s.46 on the basis that the “subjective purpose” test makes proof of breach difficult. In the writer’s view, this criticism is not warranted. The courts will be pragmatic in assessing conduct basing their findings on all relevant factors. This will occur regardless of the test specified. What the subjective test does do is permit explanations of conduct and not condemn non-intended consequences. Misuse of market power requires conscious conduct. The purpose test does no more than preserve this important requirement.

Conclusions from the Misuse of Market Power provisions (s.46) of the Trade Practices Act

- Section 46 applies to essential facilities

4.8 With no change to the law, it is clear that misuse of market power applies to the grant of access to typical essential facilities. The conduct expected of the owner of such a facility is that in which such an owner could engage if s/he were in a competitive market.

- “Business justification” permits non-supply

A major concern to Australian facility holders lies in the fact that the High Court has not yet specifically adopted a “business justification” test to permit certain conduct. There is little doubt that Australian facility holders would be much happier if the court did this. However, the analysis in Melway¹⁰³ clearly accepts that the business justification for conduct is able directly to be considered in relation to whether or not a misuse of market power is involved. In principle also this must be so. The argument to the contrary is that such a test would re-introduce “moral reprehensibility”, discarded in Queensland Wire¹⁰⁴ in another form. This view appealed to the Full Federal Court in Boral¹⁰⁵ - a decision which it released 16 days prior to the High Court decision in Melway and which must be taken to be overtaken by Melway. A rational business explanation of conduct is relevant because surely the business reason for which one engages in conduct is relevant to ‘purpose’, whether or not moral reprehensibility is involved in the interpretation of the section. A rational business reason for doing something at minimum shows the purpose of conduct is not wholly one of the proscribed purposes under s.46. A rational business reason for conduct surely prevents a proscribed purpose being drawn from conduct alone. A legitimate business purpose can clearly show that a party has a purpose other than a purpose which involves detriment to another. Even if there are detrimental effects on others, surely a rational business purpose can at least show, on balance, that it was not a substantial purpose to produce those detrimental effects. The writer believes that the High Court in Melway has accepted much of this logic. The High Court in Melway, for example, specifically embraced the view that there may be explanations of the purpose of a restraint which justify the conclusion that restricting competition was no part, or no substantial part, of the purpose of the manufacturer.

For further general discussion of this issue see n.40 and 4.3 above under heading “A second conclusion from Melway: A “business justification” for doing so permits non-supply”.

¹⁰³ n.52.

¹⁰⁴ n.51.

¹⁰⁵ ACCC v Boral Ltd (2001) ATPR ¶41-803 (Full Federal Court). See, for example, ACCC submission p.42,668 and Judgment of Beaumont J at p.42,675 holding that there was no exception from s.46 for “rational” or “commercial” activities.

- *Facility access should be treated in the same way as other misuse of market power issues*

The s.46 case law to date shows that access to facilities is covered by s.46 in the same manner as it applies to all other misuse of market power issues. The relevant test to be applied is whether access denial is permissible because the facility owner could act the way it would in a competitive market (usually a competitive facilities market). At the time of the Hilmer Report (1993), it could not be said with certainty that this was the legal position. The major problem in relation to court adjudication lies in the issue of remedy – discussed in **PART 5** following.

5. ACCESS TO FACILITIES: IS THE COURT OR A REGULATOR THE BETTER ADJUDICATOR?

“The institutional structure and processes of courts, including lifetime appointments, strict ex parte communications rules, and requirements that decisions be justified by factual records and elaborations of neutral legal norms, are all designed to encourage reasoned and impartial decision making. Agencies are structured very differently, perhaps due to the fact that they perform both legislative and adjudicatory functions.”

R A Jablon, M S Hegedus and S M Flynn: “Dispelling Myths: A real world perspective in Trinko” 50(4) The Antitrust Bulletin (Winter 2005) 589, 615.

“Modern agencies do not act like courts over a broad range of regulated agency decision making and enforcement. Increasingly, agencies inform themselves and make decisions not through administrative hearings or an official record, but through more informal rulemakings, policy statements, and various forms of conferences, meetings and communications with interested parties of all stripes, including those who are regulated, and with those who are benefited or hurt by regulation or non-regulation. Agency policy is negotiated in both subtle and non-subtle ways.”

Jablon, Hegedus & Flynn (above) at 619.

The various forms of adjudication available

- 5.1 Consideration of the sort of access law we want is determined not only by black letter law but also by the adjudication of rights under that law. Traditionally, this debate in Australia has been between the desirability of adjudication by a court system or by an administrative agency processes.
- 5.2 The New Zealand Treasury has issued a discussion paper which conveniently tabulates the advantages and disadvantages of each form of adjudication. It covers the merits and disadvantages of adjudications by:
- courts;
 - arbitrators;
 - a regulatory authority; and
 - the government.

This New Zealand **TABLE**,¹⁰⁶ which must, of course be adapted to Australia, is reproduced as an Appendix to this **PART**.

- 5.3 The **APPENDIX TABLE** short circuits the need for elaborate textual detailed comparisons. It is appropriate, however, to make some observations relevant to the Australian context.

¹⁰⁶ This **TABLE** is taken from Regulation of Access to Vertically Integrated Natural Monopolies: A Discussion Paper (New Zealand Treasury 1995).

- 5.4 Aspects of Australian access law and adjudication of legal rights are partly court based (the relevant holdings being described in **PART 4**) and, partly based on the statutory Access Regime provided for in PART IIIA of the Trade Practices Act (described in **PART 6**). The PART IIIA Access Regime incorporates all of the other three methods of adjudication set out in the **APPENDIX TABLE** i.e. it is partly dependent for adjudication upon arbitrators, partly upon not one, but two regulators, partly upon an administrative tribunal, and partly upon political decision making.

Australian constitutional complications

The Australian access adjudication provisions are further complicated by its constitutional system. So the involvement of “the relevant Minister” in the Australian Access Regime does not incorporate the involvement of only one Minister. Any State or Territory government is a potential decision maker. In this area, as well as many others, our nine regulatory clocks frequently do not chime in unison. One regulatory scheme does not mean one consistent nationwide regulatory interpretation.

The Constitution is also relevant in other ways. Legal rights can be affected, at the Commonwealth level, only by judges and not by administrative agencies. Judges have, under the Constitution, “life tenure”. This has its problems if the perceived solution to particular problems is seen to be a strong administrative agency presided over by limited term appointees.

The courts: The major problem is that of remedy

- 5.5 The major problem facing the court system is the question of remedy. Traditionally courts function through the award of damages and the issue of injunctions prohibiting future conduct. There are provisions in the Trade Practices Act for the issue of “other orders” but their relevance in the present context is doubtful.

Courts traditionally do not become involved in any remedy which would require constant court supervision or involve the courts in making business marketing decisions. They do not have the expertise in most cases but, in any event, courts do not have the staff or resources to enable them to fulfil this role.

- 5.6 Reflecting the view that courts do not make business marketing decisions, we saw Justice Pincus at trial in Queensland Wire¹⁰⁷ declining to find BHP had breached s.46 for reasons, in part, related to the non-availability of remedy. His Honour observed that:

“It is likely that if the applicant succeeds in forcing BHP to supply Y-bar, another would be manufacturer of the fence posts . . . may well be able to force supply also. Then how is available Y-bar to be distributed among the participants? Awarding damages on the basis sought necessarily involves the court in retrospectively setting a proper price . . . as well as fixing fair distribution of Y-bar.”¹⁰⁸

He concluded that these were matters outside the competence of the court.

Courts also have been at pains to point out that the injunctive remedy must be one which can be expressed in clear terms. This is not unreasonable, given that a breach of an injunction carries a contempt penalty of imprisonment. As the High Court said in Melway:

¹⁰⁷ n.57.

¹⁰⁸ n.57 at p.48,820.

“An injunction expressed in terms which leave unclear the form of conduct which will expose a party to the consequences of breach of a court order, and which beg the major question in issue in the case, is inappropriate.”¹⁰⁹

5.7 The wisdom of the courts in not involving themselves in the setting of prices is clear from the one case in which the Federal Court found itself necessarily involved in determining price as a basis of its remedy. This resulted in the trial judge setting an access price of \$100 and the Full Federal Court setting a price of \$1.45 million. The Full Court said that \$1.45 million was a price which was “designed to obtain broad and substantial justice between parties”. This exercise was hardly a recipe for confidence in the capacity of the judicial system to evaluate the “reasonable price”.¹¹⁰

In the case of multiparty agreements inhibiting access, the court’s task is not prohibitive. It can:

- order access to other parties on non-discriminatory terms to that already granted. The court is not then “setting” a price. The market price is set by forces of supply and demand. The court is merely requiring another party to be admitted on the same basis. Neither is the court required to become involved in the day to day supervision of its order; or
- it can, if appropriate, order that a party be admitted to the relevant organisation on

¹⁰⁹ n.52 at 42,760.

¹¹⁰ The inability of the Courts to set prices in the absence of prior market based transactions was demonstrated in Pont Data v ASX Operations Pty Ltd (1990) ATPR ¶ 41-038 (at first instance); (1991) ATPR ¶ 41-069; ¶ 41-109 (Full Federal Court). The issue of appropriate or reasonable price was directly relevant to the decision in this case. The very essence of the Pont Data claim was that it had been forced by the Stock Exchange to pay too much for data purchased by it and it wanted relief against the charging of such “unreasonable prices”. The Court held the Stock Exchange in breach of s.46. The major problem was that of calculating the “reasonable” supply price.

At trial, Justice Wilcox held that the competitive price of data supply was the relevant price. The problem was, as in the case of non-supply by many monopolists, that there was no comparative market as there was no other supplier of the relevant services. Thus it was impossible to measure by market prices what was “reasonable”. So, said Justice Wilcox, one had to go to a second standard and look at the cost of production and add to it a reasonable profit. On this test, the marginal cost of production was, said his Honour, what was relevant. On this basis, the appropriate supply price had to be calculated as being the cost of connecting a new purchaser to the already existing information gathering system. In effect, this was the cost of inserting a plug into the existing system. The marginal cost to do this, said his Honour, was \$100 per annum. Not surprisingly, Pont Data thought the cargo cult had come to town.

On appeal, the Full Federal Court held that Justice Wilcox was wrong. The appropriate supply price was, said the Full Federal Court, the price “designed to obtain broad and substantial justice between parties”. This, said the Full Federal Court, was the supply price negotiated between the parties prior to the commencement of the litigation between them. The Court refused Pont Data permission to introduce evidence to demonstrate that the Stock Exchange had been misusing its market power prior to Pont Data instituting proceedings. Likewise, it refused an application by the Stock Exchange for indexation of the pre-litigation price for inflation which had been running at 17-18 per cent per annum during many of the years in question.

What is of greatest interest is the dollar variation between these two judgments. The Full Federal Court awarded a supply price of \$1.45 million per annum – quite some way from Justice Wilcox’s supply price of \$100 per annum. The case is hardly one which gives certainty to business in predicting what the courts will hold to be a “reasonable” price.

non-discriminatory terms so that the party ordered to be admitted gains the same access rights as other organisation members.¹¹¹

Some pragmatic solutions have sometimes been adopted by courts. If there is a regulatory agency with a statutory duty to set and regulate prices, the Courts will delegate their “price setting role” to this agency.¹¹² Where there is some prior history of dealing between the parties or some comparable market price available, the courts may, as a short term remedy, impose a compulsory dealing order based on previously agreed terms. As a short term measure in these cases, the court may use the available price as the price at which a monopolist should deal¹¹³ and feel that it can supervise such a price.

- 5.8** Other than in the above cases, if terms of compulsory dealing are to be mandated in detail, inevitably the question of price will come up. There will, therefore, inevitably be charges and counter-charges that prices charged are so high as to amount de facto to a continuation of a refusal to deal or to deal only at an “unreasonable” price or, alternatively, that the price is so low that the defendant cannot possibly make a profit on supply. Even if some sort of “cost based” return on capital can be worked out, there are still formidable difficulties. How should an access owner be compensated for his risks in developing the facility, for example?

Are agencies any better?

- 5.9** The benefit of agency administration is that agencies have presumed expertise. They can be “activist” to achieve desired ends. They can initiate, negotiate and supervise solutions to problems. The downside of agency administration is that there is a real or perceived view that agencies have agendas which preclude unbiased adjudication in individual cases and that the merits of individual cases are sublimated to the objectives the agency wishes to achieve pursuant to its general policy goals.

Agencies, commendably, often issue Guidelines. But there can be a tendency for these Guidelines to take on a life of their own and become, as far as the agency is concerned, “the law”. Such Guidelines are really “lore” not “law”. But applications may be rejected because they do not “comply” with them.

- 5.10** One must wonder whether agencies, despite the wisdom which they are perceived to have, are, in fact, really well equipped to set a “proper” or “fair” price of access. The initial access regime had no pricing guidelines in it at although this has now been varied.¹¹⁴ Former ACCC

¹¹¹ See discussion in **PART 2**. The principles stated are those applied in Terminal Railroad (n.1), Associated Press (n.9) and Silver (n.11). The US Supreme Court noted in Trinko (n.12 and related text) the appropriateness of such a remedy contrasting this remedy with the difficulties involved in the case of a single firm seeking access when no such access had been previously provided. See also Robertson Wright: “Injunctive Relief in Cases of Refusal to Supply” (1991) 19 ABLR 65.

¹¹² As in Otter Tail Power Co. v US 410 US 366 (1973). Areeda commented in his well publicised and influential article in this area (n.18) that “the Court could airily require Otter Tail to deal but never burden itself with administrative details, because the Federal Power Commission had statutory authority and presumed expertness to regulate prices and terms of dealing” (n.18 at 848). See other comments in relation to Areeda’s article at n.38, n.48 and n.150.

¹¹³ See article by Robertson Wright n.111.

¹¹⁴ The Council of Australian Governments (COAG) in February 2006 amended the Competition Principles Agreement to provide guidance as to how pricing should be determined. Section 44ZZCA (inserted by the Trade Practices Amendment (National Access Regime) Act 2006) provides that regulated access prices should be set so as to:

“i. generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to them and include a return on

Chairman, Professor Alan Fels, argued in favour of a *carte blanche* approach and that there be no established pricing principles saying that legislative pricing principles were “not appropriate” as this might deny “flexibility” to the ACCC in making price determinations in accordance with market standards.¹¹⁵ This view, espoused by Australia’s head regulator at the time, undoubtedly created concern to facility owners. Facility owners in these circumstances were, by definition, denied any certainty as to returns on a facility to which access may be ordered. Rates of return could be arbitrarily and retrospectively imposed – hardly an incentive to construct a major facility and something which could play havoc with any investment analysis.

- 5.11** Prices set by administrative bodies inevitably commence with calculations of rates of return. There must be considerable doubt as to whether any “cost based” system is appropriate to determine access prices. This is partly because there are a considerable number of ways of computing “cost” and there really is no logical basis for selecting one over the other.¹¹⁶

The “worth” of access, and hence the price which will be paid for access, may, of course, be

- investment commensurate with the regulatory and commercial risks involved;
- ii. allow multi-part pricing and price discrimination when it aids efficiency;
- iii. not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
- iv. provide incentives to reduce costs or otherwise improve productivity.”

The ACCC is required to take into account those principles when:

- making a final determination on an access dispute;
- assessing a proposed new access undertaking or access code;
- considering whether to vary the terms of, or extend the expiry date of, an existing access undertaking or access code.

The Act does not require the decision maker to be satisfied that each and every principle has been met when making its decision, but that the decision maker “have regard to” the (new) objects of Pt IIIA.

¹¹⁵ Australian Financial Review 7 April 1995.

¹¹⁶ The ACCC’s Guideline in relation to Access Undertakings lists, for example, the following methods by which assets may be valued for purposes of calculating returns:

- historical cost;
- replacement cost;
- optimised replacement cost;
- reproduction cost;
- deprival value;
- optimised deprival value.

The Guideline also lists various bases for calculating returns (e.g. cost of service, price capping, efficient components pricing etc.) and imposes a number of requirements on parties such as accounting separation. [Access Undertakings: A Guide to Part IIIA of the Trade Practices Act (ACCC 1999).]

For a case demonstrating differing views of the ACCC and the Australian Competition Tribunal as to correct application of regulatory principles in the gas industry see ACCC v ACT ([2006] FCAFC 83; [2006] FCAFC 127). In this case, the Full Federal Court had to resolve these differences in litigation brought by the ACCC against the Tribunal.

This case is discussed in greater detail at n.179.

totally unrelated to its cost. An asset owner, in imposing a high access price, may not be exploiting market power but simply be doing what vendors of all products do i.e. attempting to obtain the best market price. Regulators may well fail to recognise this point because of their broader agendas. This, amongst other things, gives rise to the not infrequent complaint by access owners that government policies force them to “give away” access to their facilities rather than sell it for what it is worth.

Agencies also are faced with the important, formidable and seemingly impossible task of setting a price which will take into account rewarding investment risk. This issue is discussed at 7.8 below.

- 5.12** Agencies are not infrequently perceived to have broad agendas independent of any adjudication role. In the case of the ACCC, its broad agenda role is to further competition. Facility holders may well believe that their interests are downgraded pursuant to an agency’s general charter and, because of this, individual justice is not done. Parties may also wonder whether an entity which has been prosecuted by the ACCC for, say, a consumer protection breach will receive a hearing in access arbitration proceedings as if it were a cleanskin. The present writer has also highlighted various “arm twisting” tactics which can compromise the actuality of, or the perception of, the impartiality of the ACCC in exercising its functions.¹¹⁷

Under the Australian Access Regime (discussed in greater detail in **PART 6**) detailed access terms are determined by a process described as “Arbitration”. But the “arbitrator” is the ACCC. Questions of impartial balancing of criteria necessarily arise in these circumstances.

- 5.13** The independence of enforcement, administration and adjudication is no quaint legal aphorism which can be sacrificed on the altar of “efficient administration”. To do this necessarily involves both a social and credibility loss. It is not really surprising, therefore, that the Law Council of Australia believes that the various divergent administrative adjudications in the Access Regime should be fulfilled by different bodies in order to retain the independence of the relevant adjudicator.¹¹⁸

In conclusion: the appropriate adjudicator of access

- 5.14** Views as to the most appropriate adjudication of regulatory access will undoubtedly vary. However, commentary on this issue is merited. There is more to the evaluation of regimes than the criteria on which they are based. The party performing the access adjudication is crucial to the perception of the impartiality of the whole of such arrangements. Ideally one should aim for a body of expertise, with no actual or perceived outside agenda and thus with clear impartiality. This would combine the best features of both judicial and administrative strengths.
- 5.15** Courts are not good at setting market prices or terms of access. Administrative agencies, subject to the problem of actual or perceived partiality being overcome, perform better in this area. “Better performance”, however, is not perfection. The very function of price setting, and the application of any “objective” pricing standards or formulae inherently have inadequacies. No administrative agency has the wisdom to overcome the inadequacies of the data with which it has to deal. So, for example, there is a variety of “cost bases”, any one of which may be appropriately chosen for rate of return purposes (see n.116). The case for setting a return rate which will encourage investment in facilities has been regarded as “compelling”. But no-one has yet worked out what this rate should be (see discussion 7.6 to

¹¹⁷ See W J Pengilley – “Competition Regulation in Australia: A discussion of a spider web and its weaving” 8(3) CCLJ 255, 284-295.

¹¹⁸ Law Council of Australia: Submission to Review of National Access Regime (July 2001). Some further specific observations on problems of regulation are discussed in **PART 7**.

7.9). The inadequacies which necessarily accompany regulatory solutions constitute, in the writer's view, a significant reason for keeping such solutions to a minimum (see **8.2(1) to 8.2(4)** below).

APPENDIX TO PART 5
TABLE 1
(Refer Par 5.2)

COMPARISON OF REGULATORY INSTITUTIONS

**Source: Regulation of Access to Vertically Integrated Natural Monopolies:
A Discussion Paper (New Zealand Treasury 1995)**

	Courts	Arbitration	A Regulator	The Government
Functions; Rules for determining standing and admissibility of evidence	Functions limited to the resolution of particular disputes.	Laid out in empowering legislation; similar to courts, but broader.	Laid out in empowering legislation; more flexible than necessary for arbitration.	Not constrained except by legislative and constitutional safeguards.
Vulnerability to outside influence	Not very vulnerable; judges are appointed for life; strict procedural and substantive safeguards; extensive peer review.	A little more vulnerable than the courts. Not appointed for life; fewer safeguards; can reduce vulnerability through peer review.	Long term relationship with regulated firms conducive to capture; some safeguards; limited public oversight.	Quite vulnerable but subject to wide public scrutiny.
Access to technical and economic expertise	Judges unlikely to be experts but at first instance has lay members;* evidence from experts.	Arbitrators may have industry expertise; can receive evidence from expert witnesses.	More likely to have in-house expertise; some opportunities to build up specific expertise.	Some expertise available amongst officials; other expertise can be purchased.
Precedent Value	Decisions of higher courts binding on lower courts.	Decisions in themselves not binding but, if public, may carry some weight depending on status and logic.	Decisions not binding. Personal continuity may promote policy continuity. Obligation to act consistently.	Changes in government may cause radical changes. Ministry staff continuity may promote policy continuity.
Range of solutions that can be imposed	Unlikely to impose prescriptive solutions. Remedies likely to be limited to damages and injunctions.	Can impose access agreements, although unlikely to administer remedies that require continuing oversight.	Can impose solutions which entail continuing oversight; and a range of ancillary matters.	Range of solutions constrained only by legislation.
Cost and delay of making decisions and taking action	Relatively slow and costly, especially if appeal rights are exhausted.	Can be faster and less costly** than courts, particularly if appeal-constrained.	Delay depends on complexity and institutional capabilities; fiscal costs borne by the state.	Delay depends on political processes; fiscal costs borne by the state.

* Lay members sit on the High Court of New Zealand at first instance. This is not the case in Australia where, constitutionally, it is mandated that all decision makers be judges with "life tenure".

** Arbitration may be less costly overall, but may be more costly to the parties, as the costs of the hearing in a legal action are subsidised by the state.

6. THE ACCESS REGIME: AN OVERVIEW

“The access regime gives business (or individuals or other organisations) a legal avenue through which to share the infrastructure services owned by another business. The rationale for access regulation is that the owners of major infrastructure facilities often have substantial market power that they can exploit.”

National Competition Council 2004-2005 Annual Report p.9

The Access Regime: Three ways of activating the access provisions

- 6.1** The purpose of this PART is to set out the technical aspects of the PART IIIA Access Regime. This is no small feat. PART IIIA contains some 74 sections (plus countless subsections and sub-subsections) all of which are numbered 44 with an addition of a single letter or multiple letters. Section numbering such as s.44ZZNA which one hoped had been banished to the turgid prose of the Income Tax Act now appears in the Trade Practices Act. No longer can one ask students doing trade practices law to buy a copy of the Act. This is a request which now, sadly, defies the economic purchasing capacity of nearly all students.
- 6.2** There are three ways in which access to facilities under PART IIIA can occur. They are:
- (1) *Certified (effective) regimes.* The designated Minister may certify an access regime to be effective. This removes the possibility of a declaration (see (3) below). Because of this the National Competition Council (NCC) seeks to ensure that certified access regimes provide a viable pathway for access. When there is an effective access regime in force, a business seeking PART IIIA access must use that regime.
 - (2) *Undertakings.* An infrastructure operator may make a formal undertaking to the ACCC as to the conditions upon which it will provide access to services. If accepted, an undertaking is legally binding so other businesses can use it to gain access. Services covered by an undertaking are immune from declaration under PART IIIA (as to which see (3) below).
 - (3) *Declaration (and subsequent arbitration).* A business that wants access under PART IIIA to a particular infrastructure service can apply to have the service “declared”. The National Competition Council (NCC) considers the application against the criteria in PART IIIA of the Trade Practices Act and makes a recommendation as to declaration or not (including a recommendation as to a relevant time period if declaration is recommended) to the relevant Ministerial decision maker (the relevant State or Federal Minister). If the service is declared, then the business and the infrastructure operator try to negotiate terms and conditions of access. If unsuccessful in this then the terms and conditions are determined by binding arbitration. The ACCC is the arbitrator. At various stages there are appeals to the Australian Competition Tribunal. A subsequent appeal may be made to the Federal Court on any question of law.

Limitations of this commentary’s coverage

- 6.3** It is declaration and arbitration (6.2(3)) proceedings which are of most relevance to the present commentary and only this process is here examined. This is because it is primarily declaration

and arbitration proceedings which involve individually contested applications and it is thus these proceedings which, in the writer's view, will ultimately determine the law and practice in relation to access. In evaluating this commentary, the reader must bear in mind that it covers only one third of the regulatory morass.

No attempt is made here to discuss industry specific codes (for example, codes relating to gas, electricity and telecommunications) in which the ACCC has a role either under the Trade Practices Act or other legislative provisions. This is done in order to prevent this commentary expanding exponentially in both length and complexity. The PART IIIA access code is generic and thus of general interest. Industry specific codes, by definition, have only an industry specific interest. It must be said, however, that the PART IIIA access code has "set the scene" so to speak for some industry specific regulatory codes and the comments here made do, for this reason, have an application wider than only in relation to the generic code in PART IIIA. The Gas Code for example contains provisions in many ways akin to PART IIIA.

- 6.4** As stated, declaration and arbitration proceedings are complex. Whilst necessarily textual commentary must be made to outline the procedures, it is convenient to summarise the overall declaration arrangements and this is done diagrammatically (in relation to declaration proceedings only) in an **APPENDIX** to this **PART**.

Declaration

- 6.5 (1)** A party wishing to have a service declared may make an application to the National Competition Council for a declaration. This is the first step in activating the declaration/arbitration process under PART IIIA.

The NCC cannot make a declaration unless it is satisfied as to the matters specified in **TABLE I** following.

TABLE I

Matters to be taken into account by National Competition Council before recommending declaration of service*
[Trade Practices Act s.44G(2)]
<p>44G (2) The Council cannot recommend that a service be declared unless it is satisfied of all of the following matters:</p> <ul style="list-style-type: none"> (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; (b) that it would be uneconomical for anyone to develop another facility to provide the service; (c) that the facility is of national significance, having regard to: <ul style="list-style-type: none"> (i) the size of the facility; or (ii) the importance of the facility to constitutional trade or commerce; or (iii) the importance of the facility to the national economy; (d) that access to the service can be provided without undue risk to human health or safety; (e) that access to the service is not already the subject of an effective access regime; (f) that access (or increased access) to the service would not be contrary to the public interest.
<p><i>* Incorporates amendments in Trade Practices Act Amendment (National Access) Act 2006.</i></p>

- (2)** On receiving a declaration recommendation, the designated Minister must either declare the service or determine not to declare it.¹¹⁹

For declaration decisions involving infrastructure owned by a State or Territory, the

¹¹⁹

Trade Practices Act s.44H.

designated Minister is the State Premier or Territory Chief Minister. Responsibility for all other declaration decisions lies with the Commonwealth Treasurer.

- (3) The designated Minister cannot declare a service unless he or she is satisfied as to the matters set out in s.44H(2) and (4) and in the **TABLE II** following. These matters are very similar to the prior **TABLE I** setting out considerations to be taken into account by the National Competition Council.

TABLE II

Matters the designated Minister must take into account before declaring a service* [Trade Practices Act s.44H(2); (4)]
<p>44H (2) In deciding whether to declare the service or not, the designated Minister must consider whether it would be economical for anyone to develop another facility that could provide part of the service. This subsection does not limit the grounds on which the designated Minister may make a decision whether to declare the service or not.</p> <p style="text-align: center;">.</p> <p>(4) The designated Minister cannot declare a service unless he or she is satisfied of all of the following matters:</p> <ul style="list-style-type: none"> (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; (b) that it would be uneconomical for anyone to develop another facility to provide the service; (c) that the facility is of national significance, having regard to: <ul style="list-style-type: none"> (i) the size of the facility; or (ii) the importance of the facility to constitutional trade or commerce; or (iii) the importance of the facility to the national economy; (d) that access to the service can be provided without undue risk to human health or safety; (e) that access to the service is not already the subject of an effective access regime; (f) that access (or increased access) to the service would not be contrary to the public interest.
<p><i>* Incorporates amendments in Trade Practices Act Amendment (National Access) Act 2006.</i></p>

- (4) If the designated Minister declares the service, the declaration must specify the expiry date of the declaration.¹²⁰
- (5) If the designated Minister does not publish a declaration of a service within 60 days of receiving a declaration recommendation; the designated Minister is taken at the end of that period to have decided not to declare the service.¹²¹
- (6) The whole process is politically geared to the apparent result that the designated Minister is the final decision maker. However, there is a review process available. The Australian Competition Tribunal may review the matter on request of the service provider if the Minister declares the service¹²² or, if the Minister decides not to declare the service, at the request of the person who applied for the declaration.¹²³ The review by the Tribunal is a reconsideration of the matter¹²⁴ and, on review, the Tribunal has the same powers as the Minister.¹²⁵ The Tribunal may affirm, vary or set aside the Minister's decision and the Tribunal's decision is to be taken as a declaration of the

¹²⁰ TPA s.44H(8).

¹²¹ TPA s.44H(9).

¹²² TPA s.44K(1).

¹²³ TPA s.44K(2).

¹²⁴ TPA s.44K(4).

¹²⁵ TPA s.44K(5).

designated Minister for all PART IIIA purposes.¹²⁶

Arbitration

- 6.6** (1) An access declaration does not give a right of access. It gives a right to negotiate access and, if these negotiations fail, a right to a legally binding arbitration. If parties are unable to agree on access terms, they may request arbitration by the ACCC. In making an arbitration decision, the ACCC must take into account the matters specified in the **TABLE III** following.

TABLE III

Matters that the Commission must take into account in arbitration proceedings*	
[Trade Practices Act s.44X]	
44X	<p>(1) The Commission must take the following matters into account in making a determination:</p> <ul style="list-style-type: none"> (aa) the objects of this Part (a) the legitimate business interests of the provider, and the provider's investment in the facility; (b) the public interest, including the public interest in having competition in markets (whether or not in Australia); (c) the interests of all persons who have rights to use the service; (d) the direct costs of providing access to the service; (e) the value to the provider of extensions whose cost is borne by someone else; (ea) the value to the provider of the interconnections to the facility whose cost is borne by someone else; (f) the operational and technical requirements necessary for the safe and reliable operation of the facility; (g) the economically efficient operation of the facility; (h) the pricing principles specified in section 44ZZCA.** <p>(2) The Commission may take into account any other matters that it thinks are relevant.</p>
<p>* <i>Incorporates amendments in Trade Practices Amendment (National Access) Regime Act 2006.</i> ** <i>For these pricing principles see fn.114.</i></p>	

- (2) An access declaration relates only to the services provided by the infrastructure facility and not to the facility itself. This is because some facilities may provide a range of services, some only of which may be eligible to be declared.
- 6.7** In arbitration proceedings, there are certain restrictions in what can be determined. The relevant provisions are set out in the **TABLE IV** following:

¹²⁶

TPA s.44K(7)-(9).

TABLE IV

<p>Restrictions on matters the Commission can determine in access arbitration proceedings* [Trade Practices Act s.44W] <i>[incorporating amendments in Trade Practices Act (Access Amendment) Act 2006]</i></p>
<p>44W (1) The Commission must not make a determination that would have any of the following effects:</p> <ul style="list-style-type: none"> (a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified; (b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person's actual requirements; (c) depriving any person of a protected contractual right; (d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider; (e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions to the facility (see n.127 re cost restriction); (f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility.
<p>* NOTE:</p> <ul style="list-style-type: none"> ▪ <i>(a) and (b) above do not apply in relation to rights of a third party and the provider if the arbitration relates to a determination made in arbitration proceedings (s.44W(2)).</i> ▪ <i>If a party is deprived of a pre-notification right by a determination to supply a service to a second person, compensation must be supplied to the deprived party (s.44W(4)).</i>

6.8 Subject to the above, the ACCC may in arbitration proceedings deal with any matter relating to access to the service. By way of example, the ACCC's access determination may:

- require the provider to provide access to the service by a third party;
- require the third party to accept, and pay for, access to the service;
- specify the terms and conditions of the third party's access to the service;
- require the provider to extend the facility;
- specify the extent to which the determination overrules an earlier determination relating to access to the service by the third party.¹²⁷

Appeals, Enforcement and the relationship of PART IIIA processes with PART IV of the Trade Practices Act

- 6.9** (1) An ACCC arbitration decision is, however, not final. A right to review by the Australian Competition Tribunal is available and the Tribunal, on review, has the powers of the ACCC. It may affirm or vary the ACCC's arbitration determination.¹²⁸
- (2) Under s.44ZZD of the Trade Practices Act the Federal Court may make orders restraining the contravention of a determination and awarding compensation to parties suffering loss or damage as a result of such contravention. Orders may also be made against parties aiding and abetting a contravention.

Under s.44ZZE the Federal Court may make orders against any person obstructing

¹²⁷ TPA s.44V. Note, in relation to extension of the facility the restriction in s.44W(1)(e) (see **TABLE IV** above) is that the service provider is not to be liable to the cost of extensions to a facility.

¹²⁸ TPA s.44ZP.

access to a facility in breach of a determination.

- (3) Under s.44ZZNA nothing in the PART IIIA Access Regime is to affect PARTS IV and VII of the Act. The main impact of this provision is that the Access Regime is to operate in conjunction with s.46 of the Trade Practices Act and remedies under both provisions are possible. Section 44ZZNA also means that other breaches of the Act, in particular *per se* breaches for price fixing and collective boycotts under s.45 and third line forcing under s.47, are not affected by the Access Regime. Even a successfully arbitrated access arrangement may still infringe these provisions.

Goods, Production Processes and use of Intellectual Property are excluded from the Access Regime: The Western Australian (Pilbara) Railway Access Decisions

- 6.10 (1) There are some important definitional provisions in the Access Regime. Chief amongst these is the definition of a “service”. The provision of a “service” is within the PART IIIA scheme but there are qualifications as to what is meant by this term. The definition of a “service” in s.44B of the Act is as follows:

“service” means a service provided by means of a facility and includes:

- (a) *the use of an infrastructure facility such as a road or railway line;*
- (b) *handling or transporting things such as goods or people;*
- (c) *a communications service or similar service;*

but does not include:

- (d) *the supply of goods; or*
- (e) *the use of intellectual property; or*
- (f) *the use of a production process;*

except to the extent that it is an integral but subsidiary part of the service.

- (2) To date there are two major cases¹²⁹ dealing with the definition of a “service”. They both relate to claims for exemption from the Access Regime and both involve declaration proceedings relating to iron ore railway lines in Western Australia. In each case the relevant lines ran from the Pilbara to the Western Australian coast. In each case, access was sought to interconnect with the lines in question. In each case the issue was whether the line was part of a “production process” and thus exempt from declaration under the Access Regime as being within the exemption contained in the definition of “service” in s.44B. The two cases are first instance decisions and reach opposite conclusions. We deal with each in turn.

- *Hamersley Iron (1999): Kenny J*

- (3) The PART IIIA regime is specifically stated to be concerned with access to railway lines. It would thus appear at first sight to be a strange conclusion to uphold Hamersley’s claim that its Pilbara rail line was exempt from the Access Regime because it did not provide a service.¹³⁰ However, Justice Kenny upheld Hamersley’s claim that the relevant rail line was the use of a production process and thus, on this

¹²⁹ Hamersley Iron Pty Ltd v National Competition Council & Others (1999) ATPR ¶41-703; [1999] FCA 867; BHP Billiton Iron Ore Pty Ltd v The National Competition Council [2006] FCA 1764.

¹³⁰ Questions of national significance did not arise in the case as the court proceedings were seeking a declaration that the Access Regime was not applicable. Hence issues for determination under that regime (one of which is national significance) did not arise.

basis, exempt from the Regime. She found that there was substantial integration between the mining activities of Hamersley and the transport of iron ore for shipment. This was because of the ‘batch system’ which Hamersley had instituted and which was estimated to save it \$80 million per annum. The evidence in this regard was as follows:

“21. *The batch system is a relatively recent innovation at Hamersley. According to Mr Walsh:*

“The essence of the batch system . . . is the operation of Hamersley’s mines as one single unit. This is referred to as the ‘one mine policy’, where each mine is treated as though it were a pit within the same mine and the activity within each pit (or mine) is co-ordinated with the activity in all other pits (or mines) to provide ore which is fed into conveying systems (including the railway) for blending at the port to create Hamersley’s export product. [Memorandum, par 2.9]”

The introduction of an integrated approach to planning has led, so Mr Walsh said, to cost reductions in the order of \$80 million per annum.

22. *The railway line (mostly, single track with passing sidings at about twenty kilometre intervals) is built to carry heavy loads. Hamersley’s standard ore train (or consist) is two kilometres in length with a gross train weight of about 27,000 tonnes. The rail system and the train scheduling and rescheduling that it permits is critical to the efficacy of the batch system. Train schedules are fixed to meet the requirements for each batch. Each batch has a different recipe and requires a different number of trains from each mine, depending on ore grade, mine resources, where the ore is to be stockpiled at the port, and other factors. The order of train arrivals is controlled to complete the making of a port stockpile to meet the specifications for Hamersley’s export product. The blending and stockpiling is monitored as it occurs: trains can (and are) rescheduled to meet batch needs as they arise. In other words, the rail system is operated so the train-loads from the different mines of different grades of ore arrive at the port in a planned sequence to facilitate stockpiling and blending operations at the port, to produce export product ready for loading onto vessels.*

23. *Stockpiles at the port are blended in accordance with the recipe for each batch. Blending is achieved by carrying ore from rail wagons to a stockpile and then “chevron stacking, with full face reclaiming”. “Chevron stacking”, so Mr Walsh said, “involves dropping the ore on the centre line of a [chevron-shaped] stockpile while continuously moving along the length of the stockpile, in either direction”. Full face reclaiming ensures that average stockpile grade with minimum variability is loaded onto ships. The blended lump product is screened during ship-loading.”¹³¹*

(4) Justice Kenny defined “production” as being:

“a continuous or regular action or succession of actions, taking place or carried on in a definite manner, and leading to the accomplishment of some

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Hamersley Iron n.129 at [21]-[23].

result; a continuous operation or series of operations.”¹³²

Her Honour held that “production process” in s.44B of the Act means:

“a series of operations by which a marketable commodity is created or manufactured”

concluding that:

“Hamersley’s production process in the Pilbara extends, on this view, from the commencement of mining operations at the mines to the completion of the product that it sells, namely, export product. There was no evidence to show that Hamersley produces a marketable product at an earlier stage.”¹³³

There can be no doubt that the railway was integral to Hamersley Iron’s business plan and integral to its getting its product to port and into the hands of overseas buyers. The argument is whether this fact makes the railway a “production process”. It was this issue which caused Justice Middleton to refuse to follow the Kenny decision when the same point came before him in BHP Billiton Iron Ore.¹³⁴

- (5) Important to the Hamersley Iron Case was that the relevant product mined was found to be “export iron ore” and that there was considerable integration between production and transportation. It is unlikely, in this writer’s view, that a similar conclusion would have been reached in the case of a non-export product or if there had not been the same degree of integration as there was. Further, it was basic to the decision that all activities were conducted by one entity. Her Honour made it clear that the case was quite different from one where rail track facilities were provided by a different entity from the entity producing the product to be transported on such rails.

● BHP Billiton Iron Ore (2006) Middleton J

- (6) This case was in all relevant respects similar to the Hamersley Iron Case just discussed. Justice Middleton accepted the evidence of integration of production and transportation set out in (3) above. However, he reached the opposite conclusion to that reached by Kenny J essentially for the following reasons:
- Even a declaration of a facility does not necessarily ensure access to the service. It confers only a right to negotiate access. This, his Honour considered, was “an important consideration” (at [53]). Fortescue, by gaining access, may well interfere with BHP’s operations and scheduling of trains. This, however, was a matter to be assessed later in the PART IIIA investigation (i.e. in declaration and arbitration proceedings). The fact that access to a service may impact on BHP’s operations does not mean that access to rail lines and associated infrastructure and systems is access to the “use of a production process” (at [151]).
 - In the interpretation of the words “production process”, an interpretation that

¹³² Hamersley Iron n.129 at [32]. Her Honour utilised the definition in the text which was taken from the Macquarie Dictionary. Her Honour also utilised the Oxford English Dictionary of production as “the act of producing, bringing forth, making or causing, the fact or condition of being produced”.

¹³³ Hamersley Iron n.129 at [34].

¹³⁴ BHP Billiton Iron Ore n.129.

would promote the purpose of the Act is to be preferred to one that does not (at [91]). In this regard, the purpose of the Act could be found in the Hilmer Report (at [95]).

- A “production process” emphasises the creation of one thing into another. It is to be distinguished from a series of operations whereby a product is transported from mine to port (at [118]). A railway in itself is not designed to make or create anything. The “batch system” does not affect the character of the railway itself. It is only a management tool, albeit from Hamersley’s point of view, an important one (at [119]).

The question of whether a production process is involved depends upon whether the activity is “actually creating or making a product or transforming one thing into another” (at [153]).

- Economic evidence, evidence ‘from an economic perspective’ as to what is meant by certain terms and economic evidence in the interpretation of technical or specialist terms can be admitted only when the ordinary meaning of terms cannot be ascertained. But the term “production process” is a term of ordinary meaning and its interpretation is a judicial function (at [161] to [176]). Accordingly economic evidence as to the appropriate interpretation of these words was inadmissible (at [176]).
 - A judge should not depart from a prior decision of a single judge unless satisfied that the prior decision was “clearly wrong” or “plainly wrong” (at [98]). In this case, and applying these criteria, his Honour was satisfied that the decision of Kenny J should not be followed.
- Conclusions in relation to the “goods”, “production process” and intellectual property exemption
 - (7) The two decisions in this area are of equal seniority and the game is currently “One All”. It would be most surprising if the issue did not find its way to the Full Federal Court and possibly to the High Court. The ultimate steps of declaration and arbitration of access conditions (assuming arbitration is necessary) are thus some way off yet and it may be expected that these will not be short matters unless the parties “do a deal”.
 - (8) The litigation in the case illustrates one of the many problems in the structure of the Access Regime. There are really only two issues in the two Western Australian railway access cases – whether access is justified on the Act’s criteria and whether access can be denied for reasons set out in the Act. Yet they are determined by different bodies in different proceedings and indications are that fully fought proceedings will be far lengthier than might be envisaged in even the most highly complex party and party litigation conducted before a single adjudicator.

The Access Regime: In conclusion

- 6.11**
- (1) The purpose of this **PART** has been to sketch in the mechanics of the Access Regime. Without a knowledge of these mechanics, it is not possible to evaluate the regime as a whole. The brief conclusion which can be drawn at this stage by any person reading this **PART 6** is that the Access Regime cannot be regarded as a creation of statutory simplicity.
 - (2) It is apparent from a consideration of the two Western Australian Rail Access Cases (see **6.10(1)** to **6.10(8)**) that new regimes create their own uncertainties and take time

to settle down. The PART IIIA Access Regime was introduced at a time when s.46 of the Trade Practices Act covering misuse of market power was regarded as inadequate in the case of regime access. In light of subsequent decisions, particularly NT Power (see 4.6), the access coverage of s.46 is much clearer. The previously believed inadequate coverage of s.46 has now been replaced by an access regime replete with its own inadequacies and concerns.

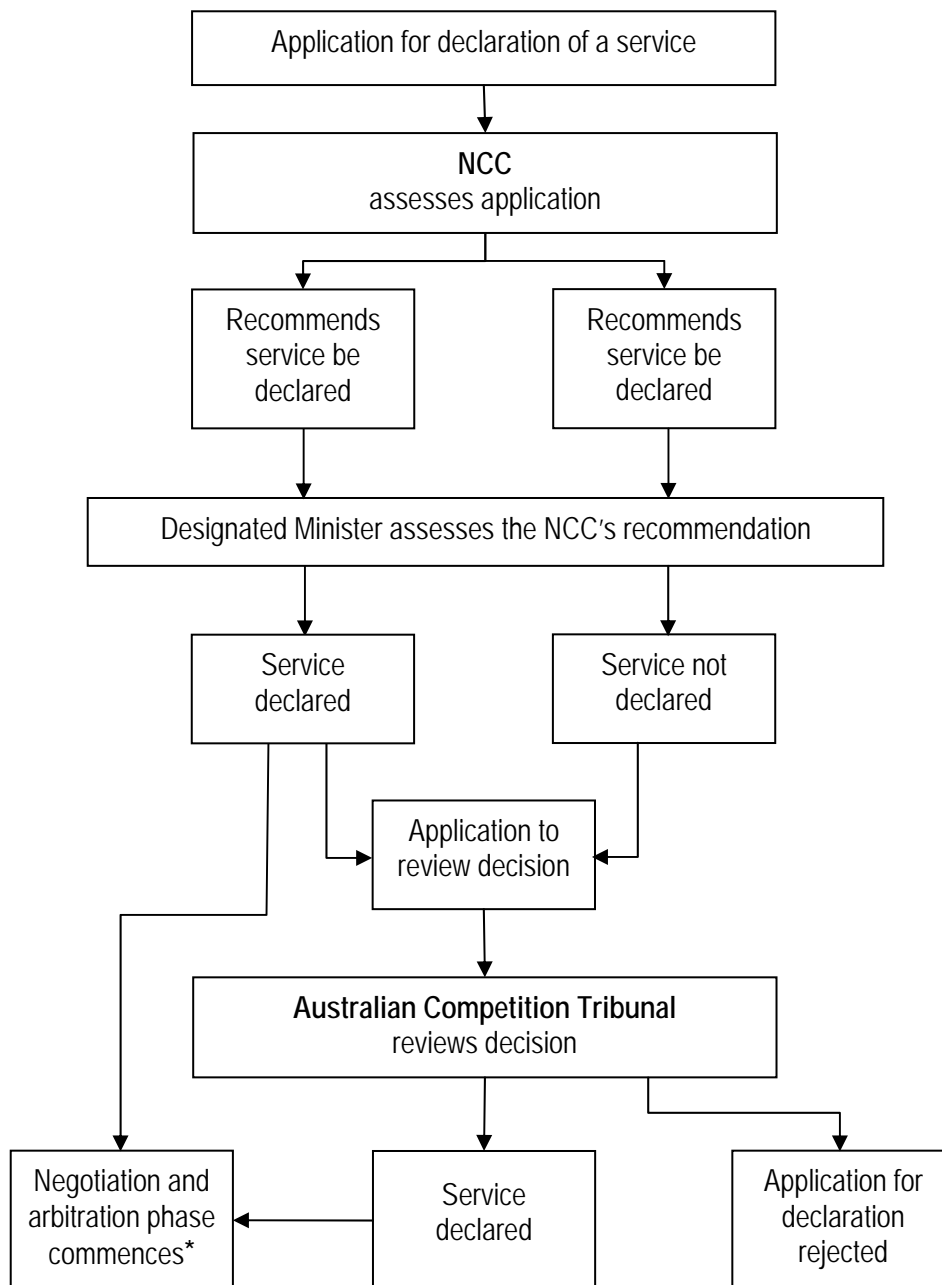
The Billiton Iron Ore Case illustrates significant problems with the regime. The decision of Justice Middleton at first instance was handed down 1,183 days after the relevant declaration application was made to the National Competition Council. Any further court cases by way of appeal must be expected to occupy at least another year or more. With appeals and the prolix declaration and arbitration procedures still undetermined, there is clearly a long journey ahead before this case, if it is defended at all stages, is finally determined.

TABLE

[Refer to Par. 6.4]

THE DECLARATION PROCESS

(Note: This Productivity Commission Table does not cover the arbitration process subsequent to declaration)*



Source: **Review of the National Access Regime: Inquiry Report No. 17 Productivity Commission (28 September 2001).**

* If negotiations fail, the ACCC arbitrates the terms and conditions of access. The ACCC's arbitration decision is subject to appeal to **The Australian Competition Tribunal**. Experience in relation to arbitrations in the telecommunications industry is that they may take up to 2 years to complete (see 7.3).

7. REGULATORY REALITIES

“Nearly all antitrust has taken place at a blackboard. Academic commentary and actual policy have both relied on a mixture of theory, rhetoric, anecdote, supposition and case study. The sorely missing ingredient has been cold, hard, systematic fact.”

G Bittingmayer: “The Antitrust Vision Thing: How did Bush measure up”
(2005) 45 The Antitrust Bulletin 291, 304.

The coverage of this PART

- 7.1 This PART discusses some regulatory realities. It relies significantly upon the Review of the Access Regime conducted by the Productivity Commission in 2001.¹³⁵ This Report has the distinct benefit of having some of the actualities put before it.

It is the function of this PART to draw the reader’s attention to some of the industry and other costs and some of the pragmatic difficulties faced by a regulator in carrying out its legislative task. The examples given do not relate only to declaration and arbitration proceedings (with which this commentary is basically concerned) but also to proceedings relating to regime certification and undertakings (see **6.2(1) and 6.2(2)**). Issues in these other areas are commented upon in the belief that regulatory costs and delays are of a general nature and that examples given have relevance to all aspects of regime regulation under PART IIIA.

Examples of compliance costs

- 7.2 When there are claims as to compliance costs in relation to the Access Regime, it is all too easy to dismiss these in favour of the theoretical arguments as to access benefits. True it is that some entities reported fairly low compliance costs – for example BHP Billiton thought that its cost of compliance with access regulation requirements in NSW was about \$2.5 million or less than 3 cents/GJ, a small fraction of the retail price of gas.¹³⁶ However, this was not a uniform view. The estimated access scheme compliance costs of the 164 km Palm Valley to Alice Springs gas transmission line represented about 15 per cent of the final tariff to users. The access scheme compliance costs of the Alice Springs distribution network equated to \$400 for each of the network’s 625 customers.¹³⁷ The Australian Gas Association estimated its cost of developing gas access arrangements was \$13 million excluding ‘numerous’ arrangements prepared by gas distribution networks. Goldfields Gas Transmission said that Gas Code Compliance Costs exceeded \$1 million per year. Duke Energy International said that the appeal against the initial decision to cover the Eastern Gas Pipeline under the Code had cost the company in the order of \$3 million.¹³⁸

¹³⁵ Review of the National Access Regime: Inquiry Report No. 17 of Productivity Commission (28 September 2001).

¹³⁶ n.135 p.63. In a later submission to the Productivity Commission BHP Billiton suggested that low compliance costs partly reflected the imprecise nature of the asset valuation methodology involved.

¹³⁷ n.135 p.64.

¹³⁸ n.135 p.61.

These figures show that regulatory compliance costs are real. Sadly, detailed and extensive figures are not generally available even in the case of commissioned inquiries.

7.3 Regulatory compliance costs are not only monetary. They may be costs in delays (which, no doubt, also reflect monetarily). The Productivity Commission's Report notes that:

- The Part IIIA experience to the date of the report suggested that an access seeker should expect that the declaration process could take several years, particularly if appeals to the Australian Competition Tribunal eventuate. While the arbitration process in Part IIIA had at that time yet to be tested, it too was, in the view of the report, likely to be time consuming. The report noted that the experience to date with the telecommunications Access Regime was that arbitrations could take up to two years to complete.
- It took more than two years to achieve certification of the New South Wales rail Access Regime under Part IIIA. Similarly, the Northern Territory Government said that its application to have the Territory's electricity Access Regime certified had, at the time, taken around eighteen months and was still to be completed.
- Setting terms and conditions within the framework of a certified regime, or securing a Part IIIA undertaking, was also likely to be time consuming. For instance:
 - The Australian Gas Association provided data showing that final approvals for access arrangements for gas transmission pipelines had generally taken between 12 and 20 months to secure.
 - More specifically, Epic Energy referred to its experience with the access arrangements for the Moomba to Adelaide Pipeline, where it took the Australian Competition and Consumer Commission (ACCC) more than two years to make a final determination. It further noted that it had been waiting for 18 months for a draft determination on a proposed arrangement for the Dampier to Bunbury pipeline, resulting in a potential revenue loss of over \$20 million.¹³⁹

The resource costs for firms of complying with the regulatory requirements could be considerable. The Australian Gas Association commented to the Productivity Commission that:

“These costs include demands on the in-house senior management resources and the provision of external specialist legal/economic advice. In addition to these resources, many gas industry network businesses employ over 5 in-house specialists in the area of regulatory affairs. Estimates of the total costs of developing and negotiating Access Arrangements for small extensions to gas distribution networks range from \$200,000 to \$250,000. . . . Costs for development of Access Arrangements for transmission pipelines are even greater. So far (i.e. till 2001), these Arrangements have been estimated to cost \$10 million, with associated annual costs of \$1-2 million.”¹⁴⁰

A Table of delays involved in declaration applications made to the National Competition Council and not finalised as at 30 June 2005 is set out in **APPENDIX A** to this **PART**. At the

¹³⁹ n.135 p.60-61. Not all of these examples relate to declaration but they still show the delays involved in access regulation. For brief commentary on certification of regimes and undertakings see **6.2(1) and 6.2(2)**.

¹⁴⁰ n.135 p.61. See also comment and text related to n.139.

date of writing, these figures appear to be the latest ones giving actual days of delay in relation to declaration applications made. In order to give the story of how delays impact on general applications, as distinct from industry specific applications, declaration applications in the gas and electricity industries have been omitted from **APPENDIX A**.

The disposition of all declaration applications since the enactment of PART IIIA is set out in **APPENDIX B** to this **PART**. It is to be noted that virtually all applications relate to governmentally owned or controlled facilities with the exception of some privately constructed railway lines (though most applications for access to railway facilities relate to government railways). Applications relating to airport services have, in some cases been made academic pursuant to subsequently enacted specific access provisions in the Airports Act 1996.

- 7.4 It is to be noted as the most recent example of the type of delays involved, that the BHP Billiton Rail Access Case had a judicial decision made at first instance 1,183 days after the application for declaration was made but nothing on the merits of the application has yet been decided (see **6.10(6) to 6.10(8)** and observations at **6.11(2)**).

Much of the Productivity Commission's Report and much of the statutory provisions of the Trade Practices Amendment (National Access Regime) Act 2006 is addressed to timing issues. This may improve the position but the problem will still exist.

- 7.5 Access regulation can entail a significant attenuation of private property rights. This may give rise to a range of costs, particularly if access regulation is poorly specified, meaning that the implications for property rights are ill-defined. Uncertainty about the property right implications of changes to access regulation may also give rise to similar costs.

These costs can take a number of forms, including:

- administrative costs for government and compliance costs for business;
- constraints on the scope for infrastructure providers to deliver and price their services efficiently;
- reduced incentives to invest in infrastructure facilities;
- inefficient investment in related markets; and
- wasteful strategic behaviour by both service providers and access seekers.¹⁴¹

The difficulty of regulators performing their regulatory tasks with certainty: some examples

- 7.6 One reason for keeping regulation to a minimum is that regulators under the Access Regime, because of the very fact of what they are asked to do, probably cannot perform their functions with any great degree of certainty. This proposition, no doubt, puts under challenge the whole rationale of the Access Regime which hinges on the concept of access at the “right”, “proper” or “reasonable” price. However, the Productivity Report itself was unable to come up with some definitional certainty of these terms in light of objectives to be achieved.
- 7.7 One of the most fundamental aspects of access determinations is the “cost base” upon which returns are to be calculated. There are any number of possible “cost bases” which may be appropriate. The Productivity Commission could **not** recommend that certain cost bases

¹⁴¹ n.135 p.59. See also comment in text related to n.139 and n.140.

should be utilised in certain industries or criteria which would be suitable in certain circumstances. It could recommend only that the ACCC should give reasons in its decisions for its choice of asset based methodology.¹⁴²

- 7.8 Similarly, the Productivity Commission has noted that the case for providing specific measures to encourage new investment is “compelling”. It states that:

*“the focus for policy makers should not be on **whether**, but **how** best to address the new investment issue.”¹⁴³*

However, “how best” to encourage new investment in a pricing access formula is something upon which the Commission could give us no advice as it had been “unable to resolve” the various issues and weightings involved.¹⁴⁴ The Commission could only recommend that the Commonwealth Government, through the Council of Australian Governments, should initiate a process to refine mechanisms to facilitate efficient investment within the PART IIIA regime in particular and access regimes generally. This process should, the Commission said, be completed to allow legislative implementation no later than 2003.¹⁴⁵ Not surprisingly perhaps, this issue is still unaddressed.¹⁴⁶

The fact that the encouragement of new investment has not received any real consideration is not surprising. The construction of a major facility necessarily involves estimates of industry and economic performance. If either does not eventuate as predicted, then a facility will turn out not to be profitable or not to be as profitable as first thought. It will then constitute a major investment which is, in all likelihood, unable to be used in any other way. It is, of course, one thing to play the odds using one’s own money thus risking its loss and, if successful, reaping its benefits. It is quite another, in the case of a successful facility being constructed, for a regulator, with the benefit of hindsight, to say that, because the facility turned out to be a success, there was no real initial risk or that the risk was far lower than thought at the time. An *ex post facto* successful investment result can all too often be used to reach this conclusion.

The access regime is, however, not a compensatory one so losses, if incurred, lie where they fall.

Facility holders, because of the above, often believe they are in a classic “No Win” situation.

General downsides of regulation

- 7.9 Notwithstanding the apparent benefits of regulation and the theoretical arguments which may be advanced in its favour, it is fundamental to regulatory evaluation to recognise the pragmatic realities. Regulators are not always right, though there is a community perception, often

¹⁴² n.135 p.367. The Productivity Commission cannot be criticised for its inability to define the relevant “cost base” with greater precision. The point made is simply that an apparently objective criterion of “cost base” is, in fact, a mirage.

¹⁴³ n.135 p.281. The emphasis is that of the writer.

¹⁴⁴ n.135 p.281. The Commission did recommend “access holidays” and “greenfield investment” provisions but these would cover only some cases and these cases themselves had significant problems (see n.135 pp.282 et seq.).

¹⁴⁵ n.135 p.320.

¹⁴⁶ The government response to the Commission’s recommendation was that it would consider the practicality of the recommendation in the context of industry-specific regimes. This indicates a “case by case” evaluation which is contrary to the concept of the Access Code which applies across the board.

enough, to the contrary. Sometimes the questions they are asked to resolve are not resolvable with any degree of certainty. (Two such examples are given in 7.7 and 7.8.)

These observations are made not to disparage the ability of regulators. They are made simply to recognise reality and as a basis for suggesting that a sound basic norm for policy in this area should be that regulation must be kept to a minimum. Regulations necessarily deal with concepts having no totally adequate and universally accepted criteria. The observations in 7.6 to 7.8 are but two examples of this point.

7.10 In addition to the above examples, specifically related to the regulation to the Access Regime, there are the more general issues which have been highlighted as reasons for regulatory failure. The Productivity Commission found that the spectre of “regulatory failure” “loomed large” in submissions put to it. In citing one submission as “summarising” opinions on this point, the Commission said:

“Typical behaviours identified by the Regulation Business Forum include inconsistency, subjective judgments, cherry picking methodologies, use of false benchmarks and asymmetrical approaches that cannot be consistently maintained into the future . . . All such behaviours raise regulatory risk.”¹⁴⁷

Other issues which may be put as raising regulatory risk are:

- inability of regulators to have resort to adequate resources of information accurately to determine the social costs associated with the supply of the facility. Cost estimation is a formidable problem for regulators;
- problems of regulators in dealing with estimations made as the basis for investment decisions;
- problems of regulators dealing with rapid technological change;
- problems of regulatory capture in ways inimical to the public interest. A number of submissions to the Productivity Commission referred to political influence in access and other regulation impinging on the price of infrastructure services. In the political context, price reductions are always attractive and apparently consistent with the public interest and can thereby give legitimacy to regulatory processes and institutions to the detriment of facility owners.

Some submissions to the Productivity Commission Inquiry alluded to problems of ‘capture’ by access regulators. In broad terms, such capture could take a number of forms. For example, regulators may be reluctant to admit errors in previous decisions (capture by precedent). Also, particularly if significant administrative discretion is involved in the application of a regulation, there may be a tendency for regulators to bring their own values and predilections to the decision making process. As noted previously, a number of participants considered that access regulators in Australia have focussed too heavily on the short term interests of consumers. In relation to the Gas Code, the Australian Pipeline Industry Association commented:

“Given that Part IIIA does not currently have specifically outlined objectives regulators have considerable scope to exercise discretion under regulatory regimes based on Part IIIA. Understandably, given the primary role of regulators as ‘consumer advocates’ they have applied this discretion with the primary objective of ensuring lower reference tariff prices for consumers, with

¹⁴⁷

n.135 pp.90-91. See also general observations **5.10 to 5.13**.

little – if any – regard to the implications of their actions on the term development needs for energy infrastructure such as gas transmission pipelines.”¹⁴⁸

It is one thing for those involved in commerce to make mistakes. If they do, they wear the consequences of their error. It is quite another thing for a regulatory body to impose its mistakes on business entities. In these circumstances, the decision maker suffers no consequences if its decision is wrong but the impact on the regulated entity may be catastrophic. Above all, it is quite idealistic and impractical to believe that there is a regulatory formula which, like the temperature of Goldilocks’ porridge, is “just right”.

- 7.11** Given the problems discussed in this **PART**, the option of no access regulation cannot be dismissed. Even if regulation is merited, this writer believes, as the Productivity Commission and the Hilmer Committee emphasised, there is a need for policy makers to tread very carefully in the access regulation area.¹⁴⁹

¹⁴⁸ n.135 p.93. The issue of “agendas” has previously also been discussed at **5.12** and following in relation to evaluating the merits, or otherwise of agencies as adjudicators. Note that objectives were included in legislation in 2006. These objectives necessarily are expressed in general terms. The objectives are stated to be to:

“(a) *promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and*

(b) *provide a framework and guiding principle to encourage a consistent approach to access regulation in each industry.” (Trade Practices Act s.44ZZCA)*

¹⁴⁹ n.135 p.93. The Productivity Commission believes that access regulation in Australia is in its infancy and that abandoning access regulation at this stage (2001) would be inappropriate. However, this was not an endorsement of the status quo.

APPENDIX A TO PART 7

(Refer Par 7.3)

Declaration matters not finalised as at 30 June 2005
[excluding Gas & Electricity Specific Industry Regulation Applications]
(Amended Table from Table A1.2 of National Competition Council Annual Report 2005-2006)

Applicant	Application Date	Time to Council Recommendation (Days)	Time to Ministerial Decision (Days)	Time to Application for Review (Days)	Status at time of Report
1. Virgin Blue (Airport facilities)	1 October 2002	425 (Not to declare)	485 (Not to declare)	1,168 (Declare for 5 years)	Decision challenged in Federal Court
2. Services Sydney (Sewerage reticulation interconnection)	3 March 2004	273 (Declare)	336 (Deemed not to declare)	658 (Declared for 50 years)	Declared for 50 years
3. Fortescue Minerals Group (Mt Newman Railway)	15 June 2004	647 (To declare for 20 years)	707 (Deemed not to declare)	Various reviews in Federal Court 24/12/04 28/12/05 9/6/06	Awaiting Federal Court decisions*
4. Lakes R Us (Snowy River Water Transport)	12 January 2005	398 (Not to declare)	455 (Not to declare)	602 (Application withdrawn)	Services not declared

* Determined at first instance since date of Report – see **6.10(6)** – **6.10(8)** and **6.11(2)**. Days from application date to date of first instance court decision total 1,183. Further litigation is expected.

**APPENDIX B TO PART 7
(Refer Par 7.3)**

**Summary of all declaration applications to the Council since the enactment of Part IIIA
[excluding Gas & Electricity Specific Industry Regulation Applications]
(Amended Table from Table A1.5 of National Competition Council Annual Report 2005-2006)***

Applicant	Service	Council recommendation	Minister's decision	Outcome
Australian Union of Students (April 1996)	Payroll deduction service	Not to declare (June 1996)	Not to declare (August 1996)	Tribunal Appeal. The Tribunal determined not to declare (July 1997).
Australian Cargo Terminal Operators (November 1996)	Qantas ramp and cargo terminal services at Melbourne and Sydney international airports (two applications)			The application was withdrawn.
Australian Cargo Terminal Operators (November 1996)	Ansett ramp and cargo terminal services at Melbourne and Sydney international airports (two applications)			The application was withdrawn.
Australian Cargo Terminal Operators (November 1996)	Particular airport services at Sydney International Airport (three applications)	To declare (May 1997)	To declare (July 1997)	Tribunal Appeal. Tribunal determined to declare the services for five years from 1 March 2000.
Australian Cargo Terminal Operators (November 1996)	Particular airport services at Melbourne International Airport (three applications)	To declare (May 1997)	To declare for 12 months (July 1997)	Services were declared from August 1997 until 9 June 1998, and since have been subject to access provisions of the <i>Airports Act 1996</i> .
Carpentaria Transport (December 1996)	Queensland rail services, including above-rail services	Not to declare (June 1997)	Not to declare (August 1997)	Tribunal appeal withdrawn.
Specialised Container Transport (February 1997)	New South Wales rail track services (Sydney to Broken Hill)	To declare (June 1997)	Deemed decision not to declare due to expiry of 60-days following the Council's recommendation (August 1997)	Tribunal appeal withdrawn following successful access negotiations.
New South Wales Mineral Council (April 1997)	New South Wales rail track services in the Hunter Valley	To declare (September 1997)	Deemed decision not to declare due to expiry of 60-days following the Council's recommendation (November 1997)	Tribunal appeal withdrawn following the certification of the New South Wales Rail Access Regime.
Specialised Container Transport (July 1997)	Western Australia's rail track services (five applications)	To declare the rail track service; not to declare other services	Not to declare any of the five services (January 1998)	Tribunal appeal withdrawn following successful access negotiations.

* The NCC Annual Report 2005-2006 does not state the period covered by these statistics. Despite being dated 30 August 2006, some statistics in the Report (e.g. those in **APPENDIX A** above) relate to the period ended 30 June 2005. From some dates in this **APPENDIX**, it appears that the statistics here given may, however, relate to the period ended 30 June 2006.

Applicant	Service	Council recommendation	Minister's decision	Outcome
		(November 1997)		
Robe River (August 1998)	Hamersley rail track services			The Federal Court decided that the service was not within Part IIIA of the Trade Practices Act (June 1999). The Federal Court decision was appealed. Robe River withdrew the application for declaration before the Full Federal Court hearing. The appeal was stayed.
Freight Australia (May 2001)	Rail track services provided through Victoria's intrastate rail network	Not to declare (December 2001)	Not to declare (February 2002)	Tribunal appeal withdrawn. The Victorian Government is reviewing the Victorian Rail Access Regime to consider alternative arrangements.
Portman Iron Ore Limited (August 2001)	Rail track services provided through the Koolyanobbing-Esperance rail track			The application was withdrawn.
AuIron Energy Limited (November 2001)	Rail track services provided through the Wirrida-Tarcoola rail track	To declare (July 2002)	To declare (September 2002)	Tribunal appeal (October 2002). In March 2003, the Tribunal set aside the Minister's decision on the procedural basis that there was no probative material before it that could affirmatively satisfy the matters in s44H(4) of the Trade Practices Act.
Virgin Blue Airlines Pty Ltd (October 2002)	The use of runways, taxiways, parking aprons and other associated facilities.	Not to declare (November 2003)	Not to declare (January 2004)	Tribunal appeal (18 January 2004). On 12 December 2005 the Tribunal determined that the airside service be declared for five years expiring on 8 December 2010. On 6 January 2006 the service provider (Sydney Airport Corporation Limited) lodged proceedings in the Federal Court to challenge the Tribunal's determination. The Federal Court has reserved its decision.
Services Sydney Pty Ltd (March 2004)	Services for the transmission of sewage via Sydney Water's Sydney sewage reticulation network from the customer collection points to the interconnection points (transmission services) Services for the connection of new trunk main sewers owned and operated by Services Sydney to the existing Sydney sewage reticulation network at	To declare sewage transmission and sewer connection services for a period of 50 years (December 2004)	Deemed decision not to declare due to the expiry of 60-days following the Council's recommendation (April 2005)	On 18 February 2005 Services Sydney applied to the Australian Competition Tribunal for a review of the Minister's decision. On 21 December 2005 the Tribunal determined that the services be declared for 50 years from 21 December 2005.

Applicant	Service	Council recommendation	Minister's decision	Outcome
	the interconnection points (interconnection services)			
Fortescue Metals Group Ltd (June 2004)	Services described as the use of the facility, being that part of the Mt Newman railway line that runs from a rail siding to be constructed near Mindy Mindy in the Pilbara to port facilities at Nelson Point in Port Hedland; and the use of that part of the Goldsworthy railway line that runs from where it crosses the Mt Newman railway line to port facilities at Finucane Island in Port Hedland	To declare for a period of 20 years (March 2006)	Deemed decision not to declare due to the expiry of 60-days following the Council's recommendation (May 2006)	Applications to the Federal Court by Fortescue Metals Group and BHPBIO on the application of the production process exemption proceeding.* On 9 June 2006 Fortescue Metals Group applied to the Australian Competition Tribunal for a review of the deemed decision not to declare.
Lakes R Us Pty Ltd (October 2004, further information January 2005)	A service described by Lakes R Us as a water storage and transport service provided by Snowy Hydro Limited and State Water Corporation	Not to declare (November 2005)	Not to declare (January 2006)	On 30 January 2006 Lakes R Us applied to the Australian Competition Tribunal for a review of the Minister's decision. On 31 May 2006 Lakes R Us was granted leave to withdraw its application for review.

* Determined at first instance since date of Report – see **6.10(6)** – **6.10(8)** and **6.11(2)**. Days from application date to date of first instance court decision total 1,183. Further litigation is expected.

8. PHILOSOPHICAL BASICS OF A REGULATORY ACCESS SCHEME

“We shall compare the challenged practice’s likely anticompetitive effects with its potentially legitimate business justifications . . . in doing so, we shall bear in mind that a practice is not “anticompetitive” simply because it harms competitors. After all, almost all business activities, desirable and undesirable alike, seek to advance a firm’s fortunes at the expense of its competitors. Rather, a practice is “anticompetitive” only if it harms the competitive process . . . we shall take account of the institutional fact that antitrust rules are court-administered rules. They must be clear enough for lawyers to explain them to clients. They must be administratively workable . . . They must be designed with the knowledge that firms ultimately act, not in precise conformity with the literal language of complex rules, but in reaction to what they see as the likely outcome of court proceedings.

These last-mentioned administrative considerations are particularly important when courts apply antitrust law to a regulated industry. That is because “regulation” and “antitrust” typically aim at similar goals – i.e. low and economically efficient prices, innovation, and efficient production methods – but they seek to achieve these goals in very different ways. Economic regulators seek to achieve them directly by controlling prices through rules and regulations; antitrust seeks to achieve them indirectly by promoting and preserving a process that tends to bring them about.”

Judge Breyer in Town of Concord v Boston Edison Company 915 F.2d 17 (1990) at 21 (case citations omitted).

Outline of approach

- 8.1 All attempts to deal with the effect of legislation and its problems, are significantly subjective, buoyed hopefully, however, by cogent reasoning. It is relevant to this commentary, therefore, for the writer to set out the major philosophical norms against which he believes it appropriate to measure the effectiveness, or otherwise, of PART IIIA.

Ten basic philosophical norms

- 8.2 The writer’s ten major philosophical evaluative norms in evaluating the Access Regime are:
- (1) That regulation should not intrude into private property rights any more than necessary. Liberty to deal freely with one’s own property is a right which cannot be lightly taken away or interfered with. In many respects, this right is the foundation of competition and the free enterprise system. As the author of much of the theory of supply and demand, philosopher Adam Smith was quick to point out (but his successors have often enough not as readily recognised) that there are some values seemingly external to, and not adequately taken into account by, economics which values underpin the functional reality and community acceptance of any economic system. Respect for private property and non-interference with the rights which attach to it clearly is such a value in free enterprise economic systems. This value restrains the State in what it can and should do, no matter what economic theory may say to the contrary and no matter how picturesque the algebraic theorems, formulae, graphs or diagrams upon which any such economic theory is based.

- (2) That individual decisions are, by and large, to be favoured over regulatory decisions. Detailed regulation usually has within it the concept of having key decisions made by, and supervision of activities being carried out by, an outside authority, actually or potentially on an ongoing basis. Outside decision makers reap no benefits if their decisions are right and suffer no detriment if they are wrong. Decisions by market participants on the other hand are made by those individuals who reap the rewards, and suffer the detriments, of their risk taking. That decision makers should feel the impact of their decisions is of the essence of the initiative which the free enterprise system is said to nurture.
- (3) Any regulatory scheme should be efficient and capable of realising its goals. A “second best” solution may well be better than a theoretically perfect solution which involves inefficiencies and massive paperwork. Inefficient regulation simply outweighs the capacity of individual and societal mechanisms to cope. Excessive regulation is bad for business in that business is put to the cost of having to be involved in representations to government, often on a regular basis. Paperwork is bad for the public because not all regulatory decisions can be made both expeditiously and after careful and well considered judgment. If this occurs, business and consumers alike suffer from the regulatory system.
- (4) Given the above, it is obvious, even on a cursory evaluation, that government regulation can be a productive solution only to select problems. Government regulation at best can be seen only as a method of curing specified ills. Like medication, regulation should not become the basic norm for an essentially healthy free enterprise system. A major problem in regulation is keeping it to the minimum necessary to cure specific ills and clearly identifying what those ills are.
- (5) Individuals, not government, should determine who:
- sets prices;
 - enters into or exits from the market;
 - determines patterns of distribution; and
 - controls other significant aspects of economic activity.
- (6) Whenever regulation intervenes to force action, its rules of engagement should be that intervention is in conformity with community views of social justice. A crucial aspect of this is that a regulator must adjudicate impartially and fairly. Any regulatory mechanism should be such as to ensure that this result does, in fact, occur. Areeda states in his much cited article that no decision maker:

“should impose a duty to deal that it cannot explain or adequately or reasonably supervise . . . the availability of a remedy is not a reason to grant one.”

He concludes on this basis that:

“compulsory sharing should remain exceptional.”¹⁵⁰

Fair and impartial adjudication is fundamental to good regulation.

¹⁵⁰ n.18. Necessarily this comment also applies to regulatory agencies. For other comments in relation to Areeda’s article see n.18, n.38, n.48 and n.112.

(7)

It can be dangerous to weaken the strong in our attempts to strengthen the weak.
 Jim Rohn: American business philosopher

Access regimes and adjudicators under them should recognise that they are not established to favour competitors who may be “small”, “weak” or otherwise disadvantaged. Neither are they established to carry into effect some policy of balancing the scales in favour of those who would find access to another’s facilities desirable or advantageous to them. Access regimes, like all other aspects of the Trade Practices Act, should be seen to encourage “competition” and not to favour individual “competitors”. In the words of the Hilmer Committee:

“It is the essence of competition that firms should attempt to outperform competitors in a manner which, if successful, could have adverse consequences for those competitors. For example, the introduction of a new and better product might put competitors at a disadvantage or in extreme cases even put them out of business, but is not the sort of conduct which should be prohibited.”¹⁵¹

It is difficult not to have sympathy with the underdog. This, no doubt, is why all political parties at elections do not promote themselves as potential winners regardless of opinion polls. Trinko (see 3.4) speaks of the dangers of what it describes as “false positives”. In Queensland Wire (see 4.2). Queensland Wire obtained a favourable High Court supply judgment against BHP arguing that it could not act competitively without the ability to acquire Y-bar rod from it. Yet despite such judgment, Queensland Wire took no BHP product in commercial quantities, finding instead that Smorgon was a more favourable supply source. In Boral (see 4.4), a prime allegation of the ACCC was that Boral, by its pricing policy, was taking its advantage of market power to exclude C & M, a small but innovative competitor, from the market. But C & M’s innovation proved the contrary. C & M in fact increased its revenue fivefold to \$60 million per year from 1994 to 2003 (see Financial Review 8-9 February 2003 p.12). Even the essentiality of access over the Mississippi River at St Louis in the father of essential facilities cases (Terminal Railroad (see 2.2)) did not mean that subsequent river crossings were unable to be constructed and, in fact, they were.

It should not be forgotten that David, despite his disadvantages, beat Goliath and that claims of inability to duplicate facilities should not be uncritically conceded. The result of a too ready acceptance of “false positives” (to use the Trinko terminology) can be to inhibit the introduction of better and competitive facilities and to inhibit innovative competitive practices.

(8) That the rationale of access regimes and adjudications under them, is to enforce the object of the Trade Practices Act which is:

“to enhance the welfare of Australians”

and that the Act does this:

“through the promotion of competition . . .”¹⁵²

¹⁵¹ Hilmer Committee Report (1993) n.69 p.62.

¹⁵² Trade Practices Act s.2. It can be argued philosophically (and in the writer’s view, somewhat theoretically) that s.2 of the Trade Practices Act and PART IIIA have similar, but not identical, objects. Section 2 is concerned only with competition. PART IIIA has objectives to promote

Regimes which do not carry this objective into force or which have effects contrary to this general expressed objective should be jettisoned. Generally speaking, a competition statute should not seek to promote goals other than those of competition because competition itself is regarded as promoting national welfare. If it is desired to promote other goals, then these other goals should be clearly articulated and promoted in ways independent of a competition statute. Further, it is not the objective of the Act to enhance the benefits of those outside Australia or to contribute to some perceived benefits of enhancing world competition as a whole.

It was stated in the 1995 House of Representative Explanatory Memorandum to the Competition Policy Reform Bill (Par 182) that the provision in relation to overseas competition was inserted because some access regimes could help Australian companies gain access to overseas markets. But if this was the intention of the provision, such intention has not been translated into the legislation which is far more general. If this was the intention, it could easily have been specifically provided to this effect in the Act.

- (9) There should be recognition that whilst the Access Regime is largely about economics, economics is itself a discipline in respect of which expert opinions may reasonably differ. This point is somewhat whimsically made by US lawyer, Peter Rodino, who was Chairman of the US House Judiciary Committee and one of the sponsors of the United States Hart-Scott-Rodino Antitrust Act. Referring to the role of economists in antitrust law, Rodino said:

“The question before us today is whether economic analysis alone should control antitrust enforcement policy. For me the answer is not a difficult one . . .

The answer is “Yes” . . .

PROVIDED THAT I choose the economist.”¹⁵³

The implementation of economic theories in competition law gives rise to good grounds for lawyer scepticism. In order to give a basis for this scepticism in Australia, one need go no further than to observe the swings and roundabouts of the various tests of merger and price discrimination legality.¹⁵⁴ The writer, being a lawyer, shows in his

efficiency “thereby promoting effective competition in upstream and downstream markets” (For details see n.148). Regardless of how it is expressed, the ultimate objective of PART IIIA is to promote competition, greater efficiency being a method of doing so. In the 1995 Second Reading Speech to the Bill, the emphasis was clearly on the promotion of competition as the ultimate purpose of the Bill and, in some ways, the objects clause (see fn.148) is not consistent with this stress [e.g. “This Bill is a central element of a new national competition policy. It will establish processes and institutions to encourage competition . . .” (Hansard (Senate) 29 March 1995 p.2434 (Second Reading Speech))].

Given all this, it seems axiomatic to the writer that the competition which PART IIIA is aimed at promoting should as a matter of policy be, and as a matter of actuality is, the same competition as that which the Act as a whole seeks to promote.

¹⁵³ Report 531 Trade Regulation Reports – “House Judiciary Chairman criticises US Antitrust Policy”. The comments were made at an address to a Japan and American Bar Associations’ seminar on international antitrust law.

¹⁵⁴ This is not the place to go into changed economic fashions but simply to acknowledge them as a fact. The point may be made by brief reference to the Australian test for merger legality. From 1974-1977, a merger was legal unless it led to a substantial lessening of competition. From 1977-1986 a merger was legal unless it led to control of dominance in a market. From 1986-1993 one could legally still dominate a market but not control it. In 1986, a “market”,

attitude to economic theorising the scepticism to which his legal training has, no doubt, given rise.

- (10) Finally, all too often there are misconceived views about the individual motivation of decision makers. Whether or not it is chivalrous to do so, we must concede and implement the basic reality of the free enterprise system that:

“Every individual endeavours to employ his capital so that its produce may be of greatest value. He generally neither intends to promote the public interest, nor knows how much he is promoting it. He intends only his own security, only his own gain. And he is in this led by an INVISIBLE HAND to promote an end which was no part of his intention. By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it.”

Adam Smith, Wealth of Nations (1776)

- 8.3 The writer’s evaluations of s.46 and the PART IIIA Access Regime are based on the above philosophical norms. They are norms which the writer believes implement a sensible basis of evaluation. However, such norms are themselves sometimes inconsistent with each other. This cannot be avoided when public and private objectives themselves necessarily clash. It is in resolving these necessary clashes that objectives have to be compromised and weighing processes indulged in.

instead of being a market in Australia was defined as a substantial market nationally or in a State or Territory. In 1993, we returned to the concept of 1974 that a merger was illegal if it was substantially anticompetitive but the extended market definition remained. This change was made even though a number of committees had recommended the retention of the dominance test. Mr McComas and Professor Baxt, two then former Chairmen of the then Trade Practices Commission, recommended retention of the dominance test. Professor Fels, the then Chairman of the then Trade Practices Commission, successfully argued for a substantial lessening of competition test. In doing so, he attached himself to the then newly emerging academic, Harvard’s Michael Porter, as the percussion section of an admiring band. For an evaluation of the doubtful logic upon which the Fels arguments were based, see W J Pengilley “Merger Policy: Why did the Cooney Committee answer the Trade Practices Commission’s Prayers?” 22(2) WALR (December 1992) p.300. All of this was more than technical drafting to meet problems involved in legal decisions. It was a reaction to changed economic merger theory and political lobbying from time to time. In essence, 30 years of experience and debate has brought us full circle back to the initial position.

One could give a similar scenario in relation to the 1974 introduction of s.49 banning price discrimination and its retention despite the numerous reports recommending its repeal. The section was ultimately repealed in 1995.

Economics is far from a static discipline. One wonders sometimes whether recently deceased US economist guru, J K Galbraith, was closer to the mark than many may think when he quipped that economics makes astrology appear respectable.

9. WHAT WOULD WE HAVE IF THERE WERE NO ACCESS REGIME?: AN UPDATED EVALUATION OF S.46

“The concept of an essential facility has been used by would-be competitors who do not have the skill or drive to “blaze their own path”, but instead simply wish to appropriate, under the guise of requiring “fair” access to “essential” facilities, the capital investment and business efforts of their successful predecessors in the relevant market.

. . . the courts have generally recognised that the antitrust laws were never intended to serve the purposes of jealous competitors who merely seek to require a successful competitor – even a monopolist – to redistribute the wealth it has lawfully earned. The legitimate goals of antitrust are . . . said to be promotion of economic efficiency through protection of the competitive process itself, rather than of any individual competitor. As the Supreme Court has put it, the antitrust laws were enacted ‘for the protection of competition, not competitors’.”

A Kezshom: No Shortcut to Antitrust Analysis: The Twisted Journey of the “Essential facilities “doctrine”” 1996 Columbia Bus. L. Rev. 1 at 2.

Times have changed

“As the case is anew, we must think anew.”

[Abraham Lincoln]

9.1 The Productivity Commission Report into the Access Regime was completed on 28 September 2001, on a reference given on 11 October 2000. Legislation to implement the Report was introduced in 2006. It is thus now more than a decade since the initial legislation setting up the Access Regime in 1995 and almost 14 years since the Hilmer Report of 1993 recommending that an access regime be implemented.

9.2 Times have changed. Perhaps the major change has been in relation to the jurisprudence under s.46 of the Trade Practices Act. With the exception of the Queensland Wire Case,¹⁵⁵ none of this jurisprudence had been definitively determined by the High Court at the time of the Productivity Commission’s Report. The 2006 legislative provisions implementing that Report did not consider any High Court jurisprudence subsequent to Queensland Wire.¹⁵⁶

Further, another important change in the law has occurred. Although Commonwealth business activities have been under the Trade Practices Act since its inception, State Crown immunity applied to all State business enterprises at the time of the Hilmer Report. This is not now the case. So State railways, electricity transmission lines and the like, which are classic enterprises to be subject to an access regime, are now under the general provisions of the Trade Practices Act. Perhaps a political access regime process was needed to effect this result but it never was needed as a matter of law. It is no longer needed to ensure that State business enterprises are subject to s.46 of the Act.

¹⁵⁵ Discussed at length at **4.2**.

¹⁵⁶ The relevant High Court decisions are discussed at length in **PART 4** above.

9.3 A well known managerial saying is:

“When you are up to your arms in alligators, it is hard to remember that your first advice was to drain the swamp.”

In other words, often it is a good idea to think about basic solutions before patching up those which do not fix the real problem.

9.4 The Productivity Commission in its 2001 Report discussed the numerous uncertainties involved in access regulation and noted that “the option of no access regulation cannot be dismissed completely”.¹⁵⁷ In evaluating any access regime, we should not overlook the possibility that the objectives of access can be achieved without the necessity for any access regime or, alternatively, by scaling it back.

9.5 If an access regime were to be abolished, what would occur? In making this evaluation, we must assume that enterprises would remain subject to s.46 of the Trade Practices Act and make an assessment on the basis that State enterprises are subject to the provisions of that section.

The law under s.46 without a specific access regime

9.6 Australian essential facilities jurisprudence is discussed at length in **PART 4** and this discussion will not be here repeated in detail. The effect of s.46 can now be stated with reasonable certainty whereas at the time of the Hilmer Report and at the time of the Productivity Commission Report, s.46 was at the heart of the Trade Practices Act fog. This writer joined the chorus of those not greatly enamoured of the Queensland Wire decision commenting in 1990 that the decision in Queensland Wire:

*“sets Australian business on a sea of commerce without even a buoy let alone a beacon with which to guide its conduct.”*¹⁵⁸

This writer would thus have echoed the views of those at the time seeing s.46 as a somewhat inadequate tool for access regulation. However, the writer at that time believed it appropriate to “wait and see” what s.46 subsequently delivered. Every change in law involves periods of uncertainty and the necessity for precedent decisions to be made. The interpretation of s.46 has now been significantly clarified over a period of 30 years. The Access Regime has itself introduced new uncertainties which have yet to be clarified. At the moment, we cannot, for example, assert with any degree of certainty whether a railway line is or is not within the Access Regime – surely one of the regime’s most basic issues (see **6.10**). One must believe that a thirty year time period, an akin period to that in which s.46 has been interpreted, will be required before any degree of workable certainty exists in relation to the Access Regime. So far it has had but one decade of existence.

Conclusions from the s.46 jurisprudence as it relates to access issues

9.7 From the detailed analysis in **PART 4** the writer believes that the following principles, as relevant to access issues, emerge from the case law in relation to s.46:

¹⁵⁷ n.135 p.93.

¹⁵⁸ W J Pengilley: “Misuse of Market Power: Queensland Wire and Beyond” Commercial Law Quarterly (June 1990) p.18 at 22.

- (1) Prima facie, access will be required if a facility holder has a substantial degree of market power by virtue of facility ownership and:
- denial of access would not be the conduct of a facility owner if it were in a competitive market; and
 - access denial has the “purpose” of preventing the access seeker from entering a market or engaging in competitive conduct.¹⁵⁹
- (2) A proper business justification will be a defence to a denial of access. A denial of access in these circumstances would be conduct which would be engaged in by an entity in a competitive market. The areas of business justification have not yet been spelt out in detail but will have to be spelt out in court decisions on a “case by case” basis. A business justification defence is, however, available only if there is no less restrictive alternative available to implement a legitimate business purpose. There is no reason to believe that American grounds of business justification would not also be regarded as likely justifications in Australia.¹⁶⁰
- (3) Section 46 will not be interpreted in a manner which will inhibit competition. It will not be able to be utilised to advance the cause of a particular competitor and will not be given an interpretation which will inhibit investment nor in a manner which will inhibit the desire of firms to succeed over rivals. Although the exact test to be applied in Australia has not yet been totally articulated, it is likely to be encompassed by the concept that access to a facility will be granted only if the facility is essential (as distinct from desirable) to the access seeker’s carrying on business.
- (4) Access will be available only if the facility holder, in denying access, has the relevant proscribed “purpose”. If a facility holder is engaged in no upstream or downstream competition with the access seeker, then there is no improper “purpose” in denying access to an outsider. The owner of a bridge, for example, whose sole function is to connect two points would not breach s.46 merely because it sought a certain price from those wishing to pass over the bridge. The facility owner, whose sole interest is selling the right to cross the bridge is entitled, like anyone else in business, to maximise its profits. The price of access will depend upon the price mechanism. If the price charged is too high, then users will not utilise the bridge. Pure supply and demand bargaining does not involve misuse of market power issues. If, however, the bridge owner is a railway freighting company and competes with other such companies in upstream and/or downstream markets then issues of upstream and downstream market power by virtue of the bridge ownership become relevant and denial of access to the bridge raises issues under s.46.¹⁶¹

¹⁵⁹ This is a shortened statement of a relevant prohibited purpose. For a lengthier elaboration of s.46 see n.50.

¹⁶⁰ See grounds of justification from American jurisprudence set out in article by Kench: “UNLEASHING A MONSTER” at 4.3 under heading “A second conclusion from Melway: A “business justification” for doing so permits non supply”. See also discussion at 4.8. For justifications accepted in MCI Communications see n.40.

¹⁶¹ Non access to the bridge may create a “bottleneck” monopoly and inconvenience. But if the bridge owner is not integrated upstream or downstream, then the reason for denial of access is a supply and demand bargaining one to be corrected by the price mechanism and not by mandated access. The concept of “bottleneck monopoly” is frequently used to cover both integrated and non-integrated facilities yet the treatment of each under competition law should be far from identical.

In this example, we are discussing single owner conduct. The position would be quite different if the bridge owner were a consortium. As to this position see the discussion in **PARTS 1 and 2**. See also comments at **10.7(2)** relevant to this issue.

- (5) The issues to be evaluated in determining the justification for access denial relate solely to conduct reasons vis-à-vis the parties themselves. A list of reasons for access denial cannot be set out in advance. Any such specification of reasons will almost certainly be either too narrow or too broad.
- (6) Broad based criteria of “public interest” are not relevant to access adjudication unless a facility owner or access seeker raises a particular issue in inter-partes proceedings. In this case, the specific issue can be evaluated. Widespread debate on general public benefit issues is not, however, relevant. There is thus no reason in access adjudications to debate broad based issues such as some of those currently specified in s.44G(2)¹⁶² and s.44X¹⁶³ of the Trade Practices Act.
- (7) The NT Power Case¹⁶⁴ makes it abundantly clear that s.46 applies to facility access denials. In light of submissions put in that case and in cases before it, previously there were real doubts in many quarters that this was so.¹⁶⁵
- (8) Section 46 asks the questions set out hereunder. If the answers are as indicated, then access will be ordered (subject to the availability of a remedy – see **9.8 to 9.11** below).

¹⁶² See **TABLE I** at **6.5(1)** identifying matters to be taken into account under s.44G(2) in declaring a facility.

¹⁶³ See **TABLE III** at **6.6(1)** identifying matters the ACCC must take into account under s.44X in relation to arbitration of access conditions.

¹⁶⁴ Discussed at **4.6**.

¹⁶⁵ For example, that the owner of property was entitled to deal with such property as it wished or that there was no market for access to a facility if there had been no access previously given. Various arguments as to the non-application of the Trade Practices Act to Territory Crown instrumentalities were also rejected.

**QUESTIONS AND ANSWERS TO DETERMINE WHETHER
ACCESS SHOULD BE GRANTED TO A FACILITY**

(Access granted if all answers are as indicated)

Question	Answer
(i) Is the facility essential (as distinct from desirable) to an outside party in order that that party can enter the market?	Yes
(ii) Is there control of the facility by a monopolist?	Yes
(iii) Could a competitor practically or feasibly duplicate the facility?	No
(iv) Is there denial of the use of the facility to a competitor?	Yes
(v)* Is it feasible to provide access to the facility? (<i>This involves an evaluation of whether or not a facility holder has a valid business justification for denying access – see discussion at references referred to in n.160.</i>)	Yes

* These questions are relevant to the issue of “taking advantage” of market power and the “purpose” of the denial of access.

It is submitted that, despite the prolixity of the PART IIIA Access Regime, in the ultimate the above constitute the only issues for evaluation. Any access regime should be aimed at answering these questions and jettisoning all others as irrelevant. The above tests are aimed at a pro-competitive result. The writer believes that s.46 and PART IIIA have the same objective of furthering competition even though there are theoretical arguments which can be mounted that the tests in each case may be somewhat different (see n.152).

The nature of the adjudication

9.8 There are significant advantages in the court adjudication of access issues. These are:

- Procedures adopted are familiar to lawyers and business and no separate organisations have to be set up specifically for access adjudications. Criticism has been made that the Court process is expensive. However, it seems no more expensive than the current Access Regime with its multiplicity of decision makers (see **6.1 to 6.8 and 6.11**) and the possibility in any event that the whole issue may find its way into the court system.
- In terms of adjudication, the court does not suffer the same criticism as those levelled at regulatory agencies. Prime amongst these criticisms are partiality, or the perception of it, and “agenda setting”.¹⁶⁶
- It is doubtful if court delays are any greater than those under the PART IIIA regime replete with its many decision makers.¹⁶⁷ Indeed, in NT Power, the High Court gave a court remedy under s.46 of the Trade Practices Act commenting (at [137]) that the Northern Territory PART IIIA Access Regime was so prolonged in gestation that a remedy under it could “take years, even with the best will of all persons participating”. Thus a curial remedy was the best method of delivering reasonably expeditious adjudication to the applicant.

9.9 The major reasons in favour of access regimes being administratively rather than court

¹⁶⁶ See discussion at **5.9 to 5.12** and at **7.9 and 7.10**.

¹⁶⁷ See, for example, discussion of delay at **7.3 to 7.5**.

adjudicated are:

- That courts do not have the necessary competence to adjudicate commercial and competition issue. Views on this are more frequently than not subjective to the belief holder. However, it is a strange proposition that all aspects of s.46 should be court adjudicated other than when access issues are involved. There seems to be nothing so inherently different in access issues which make them unsuitable for court adjudication.
- That courts cannot give an appropriate remedy in many cases. Undoubtedly, the remedy question is one which courts must face and in respect of which inadequacies have been noted (at 5.5 to 5.8). In particular the courts are not appropriate bodies to set access prices, upon which ultimately all access issues will turn.

9.10 In most adjudicative matters, other than ones requiring constant supervision, the adjudicative competence of a court is, the writer believes, adequate though, as in all things in life, the more technical the issues get, the harder it is for the non-expert. As noted US antitrust judge, Richard Posner, has said:

“We deal with technical questions in the judiciary not by having judges or jurors who have the requisite technical knowledge or by giving them technical assistants, but by having technical experts present evidence which the judge and jury (if it is a jury case) are expected somehow to assimilate. This system does not work as badly as its critics maintain; but the more technical the area of litigation and the fewer experts are disinterested, the worse it is apt to work.”¹⁶⁸

Those critics of the judicial system bear the onus of proof in claiming lack of competence. One wonders how an economist employed by an administrative agency has any more competence than a judge in evaluating a complex engineering issue. Only in areas requiring ongoing supervision are the courts not up to the task. This is not because of the lack of adjudicative skill but because of the nature of the court structure, its traditional role and its resourcing.

9.11 Courts are, and are seen to be, independent with no bias and no agendas. There is little doubt that there is, in the eyes of many, however, presently a perception as to “agendas” in the case of the ACCC.¹⁶⁹ It is vital to confidence in the adjudication of disputes that agenda bias, and the perception of it, be removed.

Conclusion: s.46 should be re-evaluated. PART IIIA may no longer be necessary

9.12 No re-evaluation of the role of the courts in access disputes has been carried out. In light of updated High Court s.46 decisions, this should be done.

¹⁶⁸ See Richard Posner: “Antitrust in the New Economy” 68 Antitrust Law Journal 925 (2001).

¹⁶⁹ See discussion at **5.9 to 5.12** and **7.9 and 7.10**.

10. THE ACCESS REGIME: AN EVALUATION

“Throughout its creation, transition and implementation from fiction into fact, Part IIIA has retained an essential characteristic of an imaginary monster: it is composed of incongruous elements drawn into complicated cumbersome multi-stage declaration, arbitration, review and enforcement processes, without time limits, involving ten sets of players:

- 1 *State and Territory governments;*
- 2 *facility owners, public and private;*
- 3 *applicants for declaration;*
- 4 *initial users;*
- 5 *subsequent users;*
- 6 *the Commonwealth;*
- 7 *the National Competition Council;*
- 8 *the Australian Competition and Consumer Commission;*
- 9 *the Australian Competition Tribunal; and*
- 10 *the Federal Court.*

Its shape has been driven by trade practices legal history and Federal-State political-constitutional compromise. It has become “inessential” and “inefficient”, and is a poor heir to s.46, with most of the problems traceable to the need to produce a politically acceptable result for acceptance across the entire country. As one of six national competition policy reforms . . . it retains its prominent position as the most complex and complicated reform.”

John Kench¹⁷⁰

The nature of the monster

- 10.1** The above characterisation of PART IIIA as a “Monster” by Australian trade practices practitioner, John Kench, dramatically but, in my opinion, totally accurately describes the multi-stage evaluative and decision making process involved in the Access Regime.¹⁷¹

Nothing in principle has changed since Kench’s observations were written. An attempt has been made to impose some time limits on decision makers but one wonders whether there will be much material difference resulting from this.

¹⁷⁰ See John Kench in his article: “PART IIIA – Unleashing a Monster” in Williams (Ed) The Twenty Fifth Anniversary of the Trade Practices Act.

¹⁷¹ For a detailed description of the Access Regime see **PART 6**.

Outline of the matters covered in this PART and some general observations on access criteria

- Outline of matters covered in this PART

- 10.2 (1)** This PART deals with an overall evaluation of the Access Regime and comments on the criteria against which this regime should be evaluated.
- (2)** The criteria against which the Access Regime should be evaluated are briefly commented upon at **10.2(3) to 10.2(4)**. Other issues covered in this PART are discussed in the following paragraphs:
- **Is the regime a monster?: The tedious procedural path** 10.3 – 10.5
 - **Is the regime a monster?: The interaction, inadequacy and duplication of criteria** 10.6 – 10.11
 - **The problem of the ACCC as arbitrator having a perceived “agenda”** 10.12
 - **The goods, “intellectual property” and “production process” exemption** 10.13
 - **Problems of the interaction of differing provisions of law** 10.14
 - **Overseas experience: Is there a need for generic misuse of market power provisions in tandem with a general access code?** 10.15
 - **Courts and regulatory authorities in demarcation disputes** 10.16
 - **The case for court adjudication and the demise of much of the Access Regime** 10.17
 - **Is there a case for applying the Access Regime only to government and akin entities?** 10.18

- Criteria against which the access regime should be evaluated

- (3)** The writer’s ten suggested criteria on which access should be based are set out in **PART 8**. Only some of these criteria relate to economics and the improvement of competition. Indeed, as Adam Smith in a sociologically based observation has commented (see **8.2(10)**) a person:

“by pursuing his own interest ... frequently promotes that of society more efficiently than when he really intends to promote it”.

The extension of Smith’s logic is that the interests of society are frequently more effectually promoted by individuals promoting their own interests than by legislators and administrators, even with the best will in the world, telling market participants what they should do in order to promote the benefit of society.

Adam Smith is often described as an economist. He was, in fact, a Professor of Philosophy. Perhaps his ability to go beyond marketplace evaluations is what makes his writings so penetrating even in the field of economics itself. Wider issues than

dollars and cents require recognition when discussing access regimes. Economists and regulators, sadly, often overlook this fact.

- (4) Of the ten criteria set out in **PART 8**, it is, in my view, of particular importance in an access regime that there be:
- minimum intrusion into property rights (**8.2(1)**);
 - clear identification of the ills to be cured (**8.2(4)**);
 - consistency with the overall objectives of competition law (**8.2(7)**);
 - administrative regulatory efficiency (**8.2(3)**); and
 - fair and impartial adjudication of issues (**8.2(6)**).

Is the regime a monster? The tedious procedural path

10.3 Details of the access scheme are set out in **PART 6** above. The procedural path involved is both tedious and time consuming. In order to get from the beginning to the end of a declaration/arbitration proceeding, assuming all legal rights on both sides of a dispute are utilised, involves the following:

- *An application to the National Competition Council for a declaration.* The NCC's criteria of evaluation are set out in **TABLE I** at Par **6.5(1)**. It is to be noted that these criteria do not permit a facility owner to plead for non-declaration on the basis (which is possibly the most commonly successfully pleaded defence in the United States) that there is a valid business justification for denying access.¹⁷² A facility holder wanting to plead this most common reason for not granting access is forced to suffer a declaration and then plead the justification in a second round (i.e. the arbitration round) of the contest.
- *A decision by the relevant Minister as to declaration or non-declaration.* If the National Competition Council recommends declaration, the relevant Minister has then to decide what to do with the NCC's recommendation. The Minister may recommend declaration. The Minister may, however, simply do nothing – often a highly attractive option in politics. If this is done, the declaration is deemed refused. An applicant who has, no doubt, put a good deal of time and money into convincing the NCC of its case and has received a favourable NCC recommendation is thus back to square one because of Ministerial inaction. An applicant, whether the Minister declares the facility or takes no action, still faces the prospect of an appeal to the Australian Competition Tribunal. This is effectively lining up at the start line again despite having twice run, and won,¹⁷³ the same race.

¹⁷² See grounds set out by Kench at **4.3** under the heading "*A second conclusion from Melway: A business justification for doing so permits non-supply*". See also n.40 for "business justification reasons accepted in MCI Communications. See also general discussion at **4.8**."

¹⁷³ In the case of a favourable NCC recommendation and a favourable Ministerial decision, the applicant has succeeded twice. In the case of a favourable NCC recommendation and no action by the Minister, it can be argued that the applicant has had two "wins" because nothing has been done to counter the NCC recommendation by contrary reasoning. The Act provides, however, in these circumstances, that there is a deemed refusal of a declaration application. In either case, despite these two procedures, an applicant whose case has had no reasoned decision put against it, may still be compelled to face the Tribunal to establish yet again the merits of its claim.

- *An appeal to the Australian Competition Tribunal.* Any party may appeal to the Australian Competition Tribunal from a Ministerial decision to declare, not to declare or to do nothing (and thus give rise to a “deemed refusal” to declare). Effectively the Tribunal is the starting gate, despite the running of prior races, as an appeal to the Tribunal, according to the Productivity Commission, is likely in most cases.¹⁷⁴ Given this, logic dictates that an initial application to the Australian Competition Tribunal would considerably expedite matters and should be the only necessary step. The NCC recommendation seems to serve no role that the Tribunal itself could not fulfil and the intermediate process of Ministerial determination serves no ascertainable purpose at all.¹⁷⁵
- *An arbitration procedure.* A favourable declaration gives only a legal right to arbitrate. It gives no rights of access as such. Because of the inability to address “business justification” reasons for a denial of access in declaration proceedings, arbitration is the first stage at which a facility owner can put forward its case as to why access should not be granted.¹⁷⁶ Experience as to the time arbitration proceedings will take is very limited at the moment. However, based on telecommunication arbitration time periods, an arbitration could take up to two years to complete.¹⁷⁷
- *An appeal from an arbitration is permitted to the Australian Competition Tribunal.* If an arbitration by the ACCC is estimated to take two years, it is hard to see one before the Competition Tribunal taking any shorter time.
- *Various applications as to issues of law may be taken to the Federal Court.* Proceedings may be delayed by legal issues being taken to the Federal Court. This may occasion a delay of yet another year or more, based on present experience.¹⁷⁸ There are also unexpected areas where the Federal Court may be asked to adjudicate at the behest of the regulatory authorities and quite independently of the parties. The unedifying spectacle of the Australian Competition Commission taking proceedings in the Federal Court against the Australian Competition Tribunal in a “demarcation dispute” has already occurred. This case gives rise to a possible avenue of appeal by the ACCC against Tribunal decisions by which, under the access structure, it is bound but which it does not like and seeks to set aside on procedural or other grounds.¹⁷⁹

¹⁷⁴ Productivity Commission Report (2001) n.135 at p.376.

¹⁷⁵ The 2001 Productivity Commission Report thought that the Ministerial role was important in negotiation of the State/Federal “compact”. This may have been so but the actuality now shows that any Ministerial power over the declaration process is illusory. Indeed abolition of a Ministerial role may well be now welcomed by Ministers. It seems quite unwarranted for there to be nine staffs of expertise (6 State, 2 Territories and the Commonwealth) to be retained to advise Ministers on matters over which they have so little influence.

¹⁷⁶ See n.172 for references to the most common “business justification” grounds on which access has been denied. The difficulty involved and the prolixity caused by dual adjudication on differing criteria is illustrated in relation to the Western Australian rail access cases discussed at **6.10(6) to 6.10(8)** and at **6.11(2)**.

¹⁷⁷ Productivity Commission Report estimate based on telecommunication arbitration – see **7.3**.

¹⁷⁸ See observations at **6.11(2)**.

¹⁷⁹ In Australian Competition Commission v Australian Competition Tribunal ([2006] FCAFC 83; [2006] FCAFC 127) a decision of the ACCC was varied by the Tribunal. The Tribunal’s decision, by the hierarchy of things, should thus have been implemented. Undaunted by its loss, the ACCC took the Tribunal to the Federal Court claiming, in essence, that the Tribunal had erred in law by applying wrong pricing and asset valuation criteria. The Federal Court concluded (at [176]) that, under the Gas Code, the “Tribunal is not empowered to set aside (an ACCC’s) decision simply because it thinks another decision would have been preferable”. The Tribunal could, under the Gas Code, set aside an ACCC decision only if such decision was

- 10.4** The Productivity Commission has recommended some tightening of time periods in the tortuous decision making path. Whether this will, or will not, make much difference remains to be seen.

In contested cases, the access regime gives rise to possibly three decisions on facility declaration and two decisions on access arbitration. This excludes court decisions on questions of law. The real problem is that delays occur every time a new forum is accessed whereas, if all determinations were made in one forum, the process would be inherently speedier. If the sole decision forum were the Federal Court, or the Australian Competition Tribunal, then questions of law would be decided as part of the overall proceedings rather than as separate issues in separate forums which cause a halt to all proceedings pending decision. (In the Tribunal, the President, a Federal Court judge, determines issues of law.) Further, of course, proceedings and preparation for them are necessarily lengthier when separate criteria are evaluated in different adjudicative forums. Quite separate criteria apply to declaration proceedings to those applicable to arbitration proceedings and each form of proceedings is conducted before a different adjudicator.

- 10.5** It would be only a guess but I believe that fully contested declaration and arbitration proceedings could take 7-10 years for completion (and more if there were contested issues of law). Practitioners with whom I have discussed this issue do not think this to be an unreasonable estimate for fully contested proceedings.

Is the regime a monster? The interaction, inadequacy and duplication of criteria

- Business justification: An inadequacy of coverage¹⁸⁰

- 10.6** (1) Reference has been made to the fact that parties are not permitted to raise business justifications for non-access at the declaration stage. Given that this is possibly the most common reason for holding that access is not merited, it is contrary to adjudicative efficiency for this to have to be raised only later at arbitration proceedings.
- (2) The defence of “business justification” should, of course, be a complete defence to an access claim. There is no reason at all why a facility owner should have to share its facility when it has an appropriate business justification reason not to do so. This should be provided in the access regime. It is quite contrary to access investment encouragement to have a valid business justification for non-access not only not pleadable in initial declaration proceedings but also, even in arbitration proceedings, being only a “matter to be taken into account” along with a number of other issues variously described.¹⁸¹

- Access would create a material increase in at least one other market (whether in Australia or otherwise): s.44G(2)(a): An inadequate criterion.

- 10.7** The above access criterion is inadequate for at least three reasons.

“unreasonable”. The prospects of this decision being used by the ACCC to upset Tribunal decisions it does not like seem, potentially at least, to be of great appeal to lawyers seeking regulatory litigation briefs.

¹⁸⁰ See n.172 for references to “business justification” reasons for denial of access.

¹⁸¹ See **TABLE III** at **6.6(1)**. Presumably “business justification” is considered as being a matter relating to “the legitimate business interests of the provider, and the provider’s investment in the facility”. Rather than a matter of crucial importance, “business justification” is only one of a number of matters which the ACCC “must take into account”.

- (1) It is unexplained why the market set out should be contrary to all other aspects of the Act dealing with relevant markets. The Act in s.4E describes a “market” as being a market in Australia. Section 2 of the Act provides that the object of the Act is to enhance the welfare of Australians. Promotion of some theoretical enhancement of world competition is contrary to the essential national aspect embodied in the general principles of the Act. The criterion should be changed so that it relates only to markets in Australia or, as appears to have been the original intent, access gives greater potential for Australian companies to access overseas markets.
- (2) The criterion does not limit its application to markets in which the facility holder is integrated into markets either upstream or downstream and thus can use the facility to disadvantage upstream or downstream competitors. It is for this reason that the United States essential facilities law is limited in its application only to those cases where access denial is to “a competitor”.

Infrastructure owners which control a single asset integrated neither upstream nor downstream have no incentive to use market power, if it exists, to reduce the level of service offered.¹⁸²

The Productivity Commission believed that a non-integrated monopoly, even if having no reason to deny services, should still be covered by PART IIIA because it would have an incentive to exploit market power when setting prices and conditions of access.¹⁸³ This view, with respect, denies a monopolist the right to set prices and to maximise its profits in doing so. A monopolist, like everyone else, has the right to profit maximise without, by doing so, breaching competition law.¹⁸⁴

The declaration criterion is a confusion of competition control with price control. Only competition control should be circumscribed by an access regime. The supply and demand mechanism is the appropriate control for pricing issues.

The writer believes that it was not the Parliamentary intention that PART IIIA should apply to non-integrated entities. The 1995 Second Reading Speech in relation to the introduction of PART IIIA said:

“The notion underlying the regime is that access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets, such as electricity generation or gas production.” [Hansard (H of R) 30 June 1995 p.2799. Writer’s emphasis]

This principle is provided in the objectives of the Act itself (see n.148) but the “objects clause” was inserted into the legislation only in 2006.

Presumably competition in related markets can be encouraged only if the entity controlling the facility is distorting competition in a related market. If the entity has no presence in a related market, then, in the absence of a general price control power (never claimed to be the basis upon which PART IIIA is justified), the Ministerial prerequisite to the application of PART IIIA does not apply.

The current law (which the writer believes confuses price control with competition

¹⁸² See **9.7(4)** and n.161.

¹⁸³ Productivity Commission Report n.135 at p.52.

¹⁸⁴ Such action would not appear to breach s.46 of the Trade Practices Act (see discussion of U.S. cases in **PART 3** and general discussion of s.46 at **9.7(4)**).

control) is that PART IIIA is not limited to vertically integrated organisations although the Australian Competition Tribunal noted in the Sydney Airport Freight Handling Case (see n.186 at [11]-[12]) that, in non-integrated circumstances, “the principal competition concern is not access to the facility but rather the prices which the owner of the facility charges for access” or, alternatively, the issue is “access itself”. The Tribunal also noted that where the owner of a facility is not competing in upstream or downstream markets, it usually has little incentive to deny access.

The United States monopolisation law does not impact upon access decisions made by non-integrated entities unless accompanied by anticompetitive conduct [see Trinko (n.21, 22 and related text)].

If a price issue is significant enough in individual cases, this is a matter for specific government action in those individual cases. It is not a matter for coverage in a general access code.

- (3) The criterion applies in such a manner that it will almost always increase competition. In 2006, this test was amended to provide that the increase in competition in another market had to be “material”. Whether this alteration will have any real impact remains to be seen. The United States test is that competition in a competitor’s market must be **eliminated** by the refusal of facility access and hence, necessarily, there is a substantial increase in competition if access is granted.¹⁸⁵

The Australian “material increase in competition” test will be all too easily satisfied if the present interpretation of the National Competition Council remains. The NCC’s current view, based on the Tribunal’s Sydney Airport Freight Handling Decision,¹⁸⁶ is that an **actual** or **likely** increase in competition does not have to be proven for the “material increase” in competition test to be satisfied. The purpose of the test, says the NCC, is to “**unlock the bottleneck**”. The test is satisfied so long as the “**competitive environment**” is “**improved**”. In the Sydney Airport Freight Handling Decision¹⁸⁷ the Tribunal put the test as being that competition would be “**better**” with a declaration than without it. In nearly every case this will be so because the power of all facility holders will necessarily be decreased by an access declaration. The “materiality” addition in 2006 may heighten the test but, even so, it is an easy threshold to cross.

The incentive to construct facilities must be preserved. This will not be done if access is granted on the low, and easily satisfied, threshold test provided by the Tribunal decisions to date. The writer believes that the U.S. test has considerable merit i.e. for illegality to occur, access must be denied to a competitor and competition must be **eliminated** if access is not granted. If Australia wants to adopt a lesser threshold, we could at least adopt the test elsewhere used in the Act. It would be in keeping with evaluations elsewhere in the Act to provide that access is not to be granted unless it is **demonstrated** that such access will result, or will be likely to result in, a **substantial increase** in competition.

¹⁸⁵ See discussion at 3.9. Indeed, the US Supreme Court says that profit maximisation even by a monopolist is to be encouraged. The opportunity to charge monopoly prices is what attracts ‘business acumen’ in the first place. It induces risk taking and produces innovation and economic growth (Trinko (n.12) and text relating to n.21-n.25).

¹⁸⁶ Review of Declaration of Freight Handling Services at Sydney International Airport (2000) ATPR¶ 41-754. See discussion in National Competition Council: The National Access Regime: A Guide to PART IIIA of the Trade Practices Act – Part B Declaration at pp73-81.

¹⁸⁷ See n.186.

- *That it would be uneconomical for anyone to develop another facility to provide the service: s.44G(2)(b): An inadequate criterion.*

- 10.8 (1) The above access criterion is in marked contrast to its United States counterpart. Access in the United States will be granted only if the provision of alternative facilities is not “feasible”.¹⁸⁸ The Competition Principles Agreement entered into between the Commonwealth and the States and Territories on 11 April 1995 provided that the Commonwealth would put forward legislation for third party access to infrastructure facilities where “it would not be **economically feasible** to duplicate the facility” (clause 6(1) – writer’s emphasis). The Hilmer Committee’s Report recommended that the relevant test be one of “essentiality”.¹⁸⁹ Neither the Hilmer intention nor the terms of the Competition Principles Agreement have been implemented by the “uneconomical to develop” test in s.44G(2)(b).
- (2) The National Competition Council, on its face, gives good reason for facility owners to believe that they are unfairly asked to share facilities with competitors who find access convenient to their competitive position, as distinct from essential to their survival. The NCC takes the view that if a single facility can meet market demand at less cost than two facilities, it is uneconomic to construct a second facility and thus this declaration criterion is fulfilled.¹⁹⁰ It seems a fair conclusion, and one which potential facility holders are certainly entitled to believe in making their business decisions as to facility construction, that if ever there is excess capacity on a facility, it will be cheaper from a social cost viewpoint for a competitor to use any excess capacity on their facility rather than require a competitor to enter the market by constructing a second facility. This is particularly so if the facility involved is expensive to construct but its use is cheap. Gas lines, telecommunications, railway lines and electricity distribution networks are all expensive to construct yet individual transactions are relatively cheap. The NCC view gives such facility holders little incentive to construct a facility when they perceive that others will be allowed access to it at a relatively cheap transaction cost. A current example of such a decision is Telecom’s ring fencing its ADSL+2 network so that it covers only those locations already served. It has limited the roll out in this way because of a fear that the Access Regime may be utilised to declare any areas not so covered. Necessarily, because of this, the Australian telecommunications system is not the equivalent of that of most advanced nations.

A facility holder’s major fear often is that statutory access regulation will permit “free riding” by price adjudication decisions of administrators whose agenda is to lower prices (and concentrate on direct transaction costs rather than overall costs and risk factor evaluations) allegedly to achieve pro-competitive benefits. In certain cases a facility owner may simply believe that desired access is not worth the disruption it may cause to the owner’s system. On this basis, a facility holder may well believe that even a relatively small amount of access may justify a relatively high price. Regulators are, however, not likely to see matters this way when making access determinations on “transaction based” criteria.

The above hardly encourages the construction of capital intensive facilities, especially if there is a high risk in doing so. Alternatively, the lower threshold may encourage the construction of a first facility deliberately designed so as not to have excess capacity. Neither result is a desirable one. Neither would result if the relevant

¹⁸⁸ See generally discussion in **PART 3** and specifically in relation to Alaska Airlines n.41 to n.44.

¹⁸⁹ Hilmer Committee Report n.69 at p.251.

¹⁹⁰ NCC Guide (n.186) p.82. The NCC view is based on the Tribunal decision in Duke Eastern Gas Pipeline Decision (2001) ATPR¶ 41-821.

evaluative test were “not feasible to duplicate” rather than “uneconomic to develop”.

In short it may well be uneconomic to duplicate a facility, especially when seen from the subjective viewpoint of a party desiring access, without access being essential to that party’s ability to compete in the market. The declaration test should clearly reflect this fundamental difference. Currently it does not.

- *Health and Safety – s.44G(2)(d) in Declaration Proceedings; Necessity for “safe and reliable operation of the facility” – s.44X(f) in arbitration proceedings: A demarcation dispute between the NCC and the ACCC?*

10.9 The specified grounds for consideration in declaration and arbitration proceedings are necessarily arbitrarily selective. This point is clearly shown when we talk about health and safety. The following comments can be made in relation to this issue:

- (1) Whilst not denying that health and safety issues are important, providing these specific grounds for consideration clearly has the potential for other grounds to be left out. A general specification of a justifiable business reason for non-access (leaving these to be evaluated on a “case-by-case” basis) would better serve.
- (2) The National Competition Council in its Declaration Guide¹⁹¹ gives examples of health and safety issues in declaration proceedings being related to such matters as the safety of gas transmission lines and the safety of airport operations. The issue comes up again in arbitration proceedings when what is to be considered (this time by the ACCC) is “the operational and technical requirements necessary for the safe and reliable operation of the facility”.¹⁹² Some questions which immediately come to mind are:
 - is health and safety a declaration or an arbitration issue?;
 - why is the same basic issue considered twice?;
 - does some sort of issue estoppel arise from the NCC declaration proceedings or a Tribunal declaration determination such as to inhibit reconsideration of the issue by the ACCC in arbitration proceedings?;¹⁹³ Such a submission at the very least could be utilised as a delaying tactic and litigation involving “declaration” issues of this kind has already occurred.¹⁹⁴
 - Does selective specification of criteria not also involve the potential for other criteria not on “the shopping list” (and perhaps not even currently envisaged) not receiving consideration?

It is a nonsense to try to establish selective criteria when the range of possible factors cannot be contemplated in advance and necessarily must surface on a case-by-case basis (see n.160 for references to the various grounds of “business justification” which have been evaluated. No-one but a clairvoyant

¹⁹¹ NCC Guide n. 186 p.114.

¹⁹² TPA s.44X(f).

¹⁹³ The way this could arise is if the Tribunal, for example, specifically found in a certain way on an issue in making a declaration. A declaration is pre-requisite to arbitration. Thus the argument would run that arbitration proceedings being legally possible only because certain facts were found by the Tribunal in declaration proceedings, the ACCC cannot re-evaluate these facts.

¹⁹⁴ See n.179.

could predict these grounds and write them into a statute). It is realistically impossible to segment issues as the Act has done. All that the declaration and arbitration criteria have done is to specify a few randomly selected grounds which might be relevant in some cases. It is also a nonsense to have the same issue determined at both declaration and arbitration stages – as is the case with health and safety issues.

- Other comments on criteria specification

- 10.10** There are numerous other issues of importance in relation to evaluation criteria but which will not be here canvassed in detail. One wonders for example why matters of public interest are relevant to declaration proceedings. I have advocated throughout this commentary that business justification should be permitted as a basis for denial of access to a facility. But business justification and public interest are, of course, not the same. A facility owner may well want to resist a declaration on the basis that access would involve it in inefficiencies. This would be a valid justification for not granting access under s.46. But the inclusion of a vague “public interest” test must make facility owners less secure in PART IIIA Access Arbitration proceedings. An argument could be mounted that the inefficiency caused to the facility owner by a grant of access has to be borne by it as there is a wider public interest in parties accessing the facility involved. This would be quite contrary to the concept that a facility holder is not required to grant access if such grant would cause inefficiency – no matter how much other parties may want this access.

The National Competition Council states that matters which may be considered in public interest terms include:

- social welfare and equity considerations;
- employment and investment growth;
- the interests of consumers generally.

All these are policy issues. Policy is laid down by law and, as far as competition is concerned, it is laid down in the Trade Practices Act. Inter-partes disputes should not be turned into roving Royal Commissions on the economy.

Given that access disputes are inherently only inter-partes disputes, the public interest test should be dropped from declaration criteria. It is included purely as a “catch all”. It could, however, be misapplied. Matters of social welfare and employment raised by the NCC and set out above have nothing to do with the obligations of parties to each other or to the community under competition law.

- Pricing criteria: a 2006 improvement

- 10.11** The establishment in 2006 of pricing criteria in s.44X(h) is an improvement on the initial position under the regime. Initially no pricing provisions existed at all and total uncertainty faced the facility holder. All pricing will be too low if a vendor and too high if a purchaser. This is the nature of all bargaining. But any access regime must ultimately have some basis of determining prices, whether the initial decision making is by a court or by an administrative body.

There are aspects of pricing criteria which create their own vagaries, give rise to argument and, no doubt, form the basis for future litigation. Section 44X(1) (see **TABLE III at 6.6**) requires the ACCC in arbitration proceedings to take into account “the direct costs of providing access to the service”. Are “indirect costs” ruled out and, if so, why? Are “indirect costs” not relevant to “the economically efficient operation of the facility”? Can indirect costs

be taken into account as a matter of public interest or even, perhaps, a matter which the ACCC may take into account because it thinks it is a matter which is “relevant”?

This commentary is not one on the adequacy of the specified pricing criteria. All pricing criteria, because of their very nature, are far short of perfect (see discussion at 5.9 to 5.11; 5.15 and 7.6 to 7.9). The point made is that prior to 2006, the Access Regime, in having no pricing criteria, was highly deficient. The regime has been improved in this regard.

Despite the improvement in the Access Regime by the specification of pricing criteria, the necessary “second best” nature of regulatory pricing is reason itself for conservatism in access legislation. An already given simple example illustrates this. The Productivity Commission has stressed the necessity to devise a pricing formula to best address new investment issues (see 7.8). Not only has no such formula been able to be articulated but the issue receives no specific mention as a matter for consideration in arbitration proceedings. Instead, this vital issue is left for consideration as a matter which might receive possible evaluation as a matter of “public interest”.

- *The problem of the ACCC as arbitrator having a perceived “agenda”*

10.12 Probably the major procedural reform to arbitration proceedings would be to have them determined by an entity or entities other than the ACCC. The ACCC has no specific expertise which is not available through private arbitrators or through the Australian Competition Tribunal (or members of it). The ACCC has, or is perceived by many to have, “agenda issues” in certain areas (see 5.12 and 7.10). This must create, at least in the mind of those who see the ACCC as having an “agenda”, a lack of faith in the arbitration aspect of the Access Regime.

10.13 Nothing can poison an arbitration more than a perception, whether justified or not, that the arbitrator has bias. This can be overcome in private arbitrations because parties choose the arbitrator. No such luxury is allowed under access regime arbitration procedures. To rub salt into the wounds of those who feel injured by the arbitration set up, under s.44X(2):

“The Commission may take into account any other matters that it thinks are relevant.”

Despite arbitration being essentially an inter-partes procedure, the parties do not have the legal ability to keep the ACCC to those issues which the parties believe to be the essence of the dispute between them.

The “goods”, “intellectual property” and “production process” exemption

10.14 Sensibly, in the writer’s view, s.44B excludes from the Access Regime “goods”, “services” and “intellectual property”. This precludes the argument run before the Full Federal Court in Queensland Wire¹⁹⁵ in a s.46 context that denial of the supply of “Y-bar” could have access connotations. The exemption in s.44B, and the Western Australian Rail Access Cases interpreting it, are discussed in 6.10(1) to 6.10(8). No doubt there will be further developments in this regard. Interpretations will be watched with interest. However, in principle, the wisdom of excluding goods, intellectual property and production processes from access orders cannot be doubted. These are not “facilities”. Access to them should not be permitted.

¹⁹⁵ Discussed in 4.2 under the heading “Queensland Wire: The Full Federal Court Decision”.

The problems of the interaction of different provisions of law

- The law: The interaction between PART IIIA and s.46

10.15 (1) Section 44ZZNA of the Trade Practices Act provides that nothing in the PART IIIA Access Regime is to affect the operation of PART IV and PART VII of the Act. Section 46 is contained in PART IV of the Act. Several per se breaches of the Act are also contained in PART IV.

- The law: The interaction between PART IIIA and the per se prohibitions in the Trade Practices Act

(2) Even an agreement arbitrated by the ACCC is no guarantee of the legality of action under it. The Act has no provision negating the general law and an arbitrated agreement is not an authorisation to do so. So, for example, an agreement may be arbitrated which contains an illegal provision under s.45 of the Act or an illegal third line forcing arrangement under s.47 of the Act. Indeed, one might well believe that at least attempts to implement such provisions may be not all that unusual in arbitrated access agreements. The arbitrated agreement cannot legalise a breach of these per se provisions of the Act. Parties, in addition to the cumbersome declaration and arbitration procedures in PART IIIA may well also have, quite separately, to apply for an authorisation in order to implement the arbitrated agreement. The ACCC may be able to adopt a common approach to arbitration and authorisation issues. But there is no guarantee that the ACCC and the Australian Competition Tribunal will necessarily speak with a common voice. Yet another layer of litigation may be necessary to resolve this impasse. Even when the Tribunal resolves an issue, there is always the possibility of the ACCC going to the Federal Court arguing that the Tribunal has not adopted due process in its decision making.¹⁹⁶ The litigation prospects from all of this seem endless. They would be unnecessary if the Act itself proclaimed who was to reign or had some procedure to incorporate arbitration and authorisation into a combined procedure.

- Problems of uncertainty in dual coverage of access

(3) Any dual system involving access incites uncertainties of its own. The facility holder has to face two different and quite conflicting sets of rules. The possibility exists for duplication of actions or a second action under a second set of rules being taken after a first action under another set of rules has failed. The general commercial uncertainty created by legal doubts as to the limits of each set of rules vis-à-vis the other is not something which, in the interests of business certainty, should be permitted.

- The Hilmer report and the non-implementation of its recommendations in relation to s.46

(4) The Hilmer Report recommended that the Access Regime:

“... should constitute an exhaustive statement:

- (a) taking precedence over access rights created under existing legislation; and
- (b) excluding any right to bring an action in relation to an allegation of refusal to provide access to a declared facility under the misuse of

¹⁹⁶ See ACCC v ACT (n.179).

*market power provisions of the competitive conduct rules”.*¹⁹⁷

The legislation implementing Hilmer provided exactly the opposite.

- Overseas experience: Is there a need for generic misuse of market power provisions in tandem with a generic access code?

The Productivity Commission in its 2001 Review referred to overseas approaches to the interaction of general competition laws and regulatory regimes. It noted that overseas jurisdictions frequently had court based systems and industry specific regulatory systems running in tandem. However no examples of a general court based scheme running in tandem with a generic industry regulated access regime were found. Necessarily, this makes one wonder if a general conduct law coupled with a general administrative access law is not “overkill”. Why has Australia found these two sweeping provisions necessary when no other country has done so?

Courts and regulatory authorities in the demarcation dispute

- 10.16 (1)** Necessarily general competition law control coupled with a general regulatory access scheme creates significantly greater problems in Australia than in other jurisdictions. The initial issue can be characterised as a type of constitutional demarcation problem. Who is to triumph?

- Who is to triumph: Courts or administrative agencies?

- (2)** The “who is to triumph?” issue is at the heart of the Australian access fog. The main problem lies in the interaction of s.46 with the PART IIIA Access Regime but there are other interaction problems as well (see **10.15(2)**).

In Trinko,¹⁹⁸ the United States Supreme Court articulated a view, obiter, that the United States telecommunications regulatory scheme provided appropriate access provisions alternative to those of the Sherman Act and that this was reason for the court not to grant Sherman Act access orders. Trinko also pointed out the problems courts have in framing and supervising complex orders in industries such as telecommunications. As in Australia, the court held that a regulatory arrangement could not impliedly repeal or exclude general competition law because, as in Australia, the U.S. telecommunications legislature had expressly provided to the contrary. Weiser, a U.S. commentator, has suggested that:

*“Given the nature of Trinko’s analysis, it seems difficult to argue that the Court adopted the categorical view that the presence of regulatory jurisdiction equates to a ‘Do not Enter’ sign for antitrust courts.”*¹⁹⁹

Rather, Weiser suggested, the court deferred to the regulatory regime in Trinko because of the technical telecommunications issues in the case. Perhaps therefore, the whole issue of court or administrative agency jurisdiction will be determined by a

¹⁹⁷ Hilmer Report (1993) n.69 at p.267. Hilmer concentrates on the interaction of s.46 with the access regime. The same logic would, it seems, run to other prohibitions in the Act – particularly price fixing, exclusionary provisions and third line forcing.

¹⁹⁸ n.12. See discussion **PART 3**.

¹⁹⁹ PJ Weiser “The relationship of antitrust and regulation in a deregulatory era” 50(4) The Antitrust Bulletin (Winter 2005) 549, 565.

difficult test which will attempt to evaluate which legislative regime, the courts or the regulators, is more suited to be the decision maker and, in light of this evaluation, who should defer to whom. Even those whose knowledge of law is limited to the TV News Headlines will know that this is an issue of total uncertainty and the answer to the problem may vary on a “case-by-case” basis.

In Australia, there is currently no indication as to where the answer to the regulator/court demarcation dispute (or the s.46/PART IIIA dispute) lies. In NT Power²⁰⁰ the High Court followed its prior practice in Queensland Wire²⁰¹ of finding a breach of s.46 of the Act but not suggesting what specific remedy might be appropriate.²⁰² The High Court is yet to speak on the remedy issue. In the only case involving the potential conflict between the PART IIIA Access Regime and s.46 of the Trade Practices Act,²⁰³ the High Court had no hesitation in applying s.46. We must wonder, however, what will happen in the event that the court has to construct a remedy.

There is currently no indication at all as to how the “PART IIIA/s.45 and s.47” dispute is to be resolved (see **10.15(2)**). This issue does not seem to have been addressed by anyone. Neither has a common procedure to take in access adjudication with authorisation adjudication on the same issues been addressed in any legislation.

The case for court adjudication and the demise of much of the Access Regime

10.17 Given the widespread generalistic nature of both s.46 and the PART IIIA Access Regime, clarification of the role of each is crucial to business and legal certainty. The roles of courts and administrative agencies can well overlap. The writer believes the present s.46 law is quite adequate (see **9.7(8)** as to criteria for evaluation under s.46). His personal choice as to the demarcation dispute is that courts should determine access issues, and defences to access claims (primarily business justification issues), under s.46 but that, if the court believes it cannot implement or supervise an appropriate remedy, this issue should be delegated to an appropriate regulatory authority, subject to court oversight and final approval. The delegated regulatory authority should not, however, be the ACCC because of the necessity to negate beliefs as to actual or perceived bias when that body is an adjudicator (**5.12, 5.13 and 7.9 to 7.11**). It could be the Trade Practices Tribunal or Members of it. It could be ACCC Commissioners who had solely adjudicative functions and were independent of the ACCC’s administrative and enforcement functions. Or it could be suitably qualified individuals external to the regulatory network.

The above would be an adoption of the principle established in Otter Tail²⁰⁴ and would seem to have the best of both the court and the regulatory worlds. If this approach were adopted, the PART IIIA Access Regime would require restructuring and much of its present regulatory apparatus would be unnecessary.

Is there a case for applying the Access Regime only to government and akin entities?

10.18 (1) The Hilmer Committee Report concentrated its analysis on governmental facilities virtually to the exclusion of facilities in private hands. So, for example, it spoke about

²⁰⁰ NT Power (discussed at **4.6**).

²⁰¹ Queensland Wire discussed at **4.2**. Of course, at the time of Queensland Wire, there was no PART IIIA scheme in existence. Queensland Wire also related to “goods” hence would not, in any event, have involved the PART IIIA access regime.

²⁰² See discussion of the problem of courts devising an appropriate remedy at **5.5 to 5.8**.

²⁰³ NT Power (discussed at **4.6**).

²⁰⁴ Otter Tail n.112. See comments in n.112 and general observations in text at **5.5 to 5.8**.

vertically integrated markets “as is commonly the case with traditional public monopolies such as telecommunications, electricity and rail”.²⁰⁵

The majority of submissions on access “saw a need” to deal effectively with essential facilities issues in the context of introducing competition to markets “traditionally supplied by public monopolies”.²⁰⁶ A “frequent feature” of the industries upon which an access regime might impact was “the traditional involvement of government ... either as owner or extensive regulator”.²⁰⁷ The Committee noted that “in designing the regime the Committee was conscious that almost all cases of essential facilities identified for the Committee were in the public sector because of the history of government ownership of infrastructure”.²⁰⁸

- (2) The concentration upon government owned facilities is understandable in light of the industries so owned. Further, at the time of the Hilmer Report (1993), whilst Commonwealth business activities were under the provisions of the Trade Practices Act, State business activities were not. Not only, therefore, were most relevant facilities in public ownership but, because of such ownership, they were also exempt from competition law.
- (3) Although the Hilmer Committee recommended “general rules ... intended to cover essential facilities, irrespective of ownership”,²⁰⁹ it can be argued that private facilities were not the real issue before Hilmer and the extent of the problem was greatly magnified because of the then operating State government exemptions.
- (4) Government, State or Federal, can, of course, as owners of facilities decree the competition policy to which they should be subject. Governments may well see themselves, as a matter of policy, as having wider responsibilities to the community than simply that of trading. The encouragement of access to its facilities may well be one such responsibility. State governments, as part of the 1995 competition reforms, were compensated by the Commonwealth for bringing their facilities within the Trade Practices Act and the Access Regime so, States having been compensated for doing this, there is no case for State owned business facility exemption from competition law.
- (5) Given the apparently small number of relevant facilities held in non-governmental hands, it is perhaps worth asking the question of whether any great benefit follows from making non-government facilities subject to the Access Regime at all. The case for government subjecting its own facilities to such a regime is not necessarily a case for subjecting the private sector to the same regime. No doubt an empirical enquiry would have to be made on this point. The writer does not purport to have done this though he notes one figure put as stating that in 1992 (the time of the Hilmer Report) public utilities were estimated to supply 85 per cent of Australia’s infrastructure services.²¹⁰ Probably the figure is still of this order of magnitude if one also includes subsequently corporatised and privatised entities in the statistics.
- (6) With greater “privatisation”, it would, no doubt, be appropriate as a matter of policy,

²⁰⁵ Hilmer Report n.69 at p.241.

²⁰⁶ n.205 p.248.

²⁰⁷ n.205 p.251.

²⁰⁸ n.205 p.239.

²⁰⁹ n.205 p.250.

²¹⁰ EPAC Research Paper 1992 cited from Kench “PART IIIA – Unleashing a Monster” in P.L. Williams (Ed) The Twenty Fifth Anniversary of the Trade Practices Act p.131.

for privatised government facilities also to be subject to the Access Regime. This should be able to be achieved without legislative difficulty if the principle is accepted.

- (7) Private enterprise wants as much certainty as it can achieve in relation to its investment. To remove the general Access Regime from its application to private infrastructure if there is no compelling case for such application would clearly give greater private investment incentive. It may be that this can be achieved with very little downside. Specific regulatory regimes can, no doubt, be implemented in those few private industry infrastructures where public policy merits specific access regimes. These industries are well known both nationally and internationally. Many (airports, gas, electricity and communications for example), are already subject to specific regulation and PART IIIA plays no real role in relation to them (other than their specific regulatory codes incorporating concepts akin to PART IIIA).
- (8) Exempting private infrastructure from the Access Regime will, of course, not mean that such structures are totally exempt from competition law. They will still be subject to s.46 of the Trade Practices Act. That is all they are subject to in other developed countries in the word competing with Australia for investment to construct infrastructure.
- (9) The Hilmer Committee's assertions can now be field tested. **Par 7.3** and **APPENDICES A and B to PART 7** show that declaration applications relate almost exclusively to government owned or controlled infrastructures. Almost exclusively they relate to:
- airport facilities (which are also subject to specific regulation under the Airports Act 1996. This has brought about the withdrawal of some declaration applications;
 - government railways [though some applications have been made for access to privately owned railways (see Pilbara Rail Cases discussed at **6.10** to **6.11**);
 - electricity and gas which are subject to specific access codes and are traditionally regulated by specific regulatory codes around the world;²¹¹
 - other government facilities such as sewerage services.

Given this, and given that some industries the subject of applications (airports, gas, electricity, rail) are traditionally specifically regulated, and are so specifically regulated in Australia, clearly enough the Hilmer Committee is correct in its conclusions (at **10.18(1)**). It is thus doubtful that a general regulatory code serves a significant role other than in relation to government owned or controlled facilities or facilities of this nature which have been "privatised" or "corporatised".

²¹¹ Gas and electricity access codes are deleted in the **APPENDIX TABLES IN PART 7** so that the **TABLES** represent results in relation to general applications and not applications made under industry specific regulatory codes.

11. IN CONCLUSION

“I am now going to recapitulate back again to what I said previously.”

Rex Mossop: Former New South Wales Rugby League Commentator and master tautologist.

- 11.1 For a summary of my conclusions I recapitulate back again to that which is set out previously in the **ABSTRACT** to this Commentary.