

FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

AUSTRALIAN NEWSLETTER

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Reforms to Competition Policy — Regulation of Access to Essential Facilities

Regulatory arrangements have been established in Australia which provide rights of access on reasonable, non-discriminatory terms to essential infrastructure facilities where this is necessary for effective competition in upstream or downstream markets.

The access arrangements are given legal effect in a new Part to the *Trade Practices Act* and apply only to significant infrastructure facilities which have been "declared" by the Minister (on the recommendation of the National Competition Council (the "NCC")).

Before deciding to declare the facility as one to which the access regime should apply, the Minister must have regard to certain statutory criteria. Alternatively, operators of infrastructure facilities may avoid the uncertainty of the declaration process by giving an undertaking to the Australian Competition and Consumer Commission (the "ACCC") regarding the terms and conditions on which access will be provided.

The regime is predicated in the first instance on commercial negotiations between parties seeking access and the declared essential facility owners, with compulsory arbitration by the ACCC being available to settle any disputes that cannot be resolved by commercial negotiations. The arbitration decisions of the ACCC are also guided by broad statutory criteria.

Appeal mechanisms are available for the parties in relation to both declaration decisions by the Minister and arbitration decisions by the ACCC.

The legislation introducing the new access regime, creating the NCC and the ACCC was proclaimed late in 1995. Thus, there is no practical experience to date of the operation of these new regulatory arrangements governing access to essential facilities.

To a large extent, the Australian public policy debate preceding the introduction of these regulatory arrangements for essential facility services focused on the question of whether section 46 of the *Trade Practices Act* provides a sufficient basis for regulating access to essential facilities or whether more direct regulation of natural monopoly markets is warranted.

The August 1993 Hilmer Report addressed this issue and concluded that section 46 alone is unable

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to deal effectively with access to essential facilities. Section 46 of the *Trade Practices Act* prohibits the misuse of substantial market power and provides that a corporation with a substantial degree of market power cannot take advantage of that power for the purpose of:

- eliminating or damaging a competitor in that or another market;
- preventing entry to that or another market; or
- inhibiting competition in that or another market.

The reasons for the Hilmer Report conclusion that section 46 could not adequately address the access problem included:

- the inability of section 46 to deal directly with monopoly pricing that is not for a "proscribed purpose";
- the evidentiary difficulties in proving in court that refusal of access on reasonable terms is conduct for a proscribed purpose;
- the cost, time and risks involved in obtaining a court resolution of commercial access disputes; and
- doubts about the capacity of the courts to determine optimal prices, terms and conditions of access to essential facilities.

Instead, the Hilmer Committee recommended a three-pronged approach for the regulation of monopolies (including vertically integrated public utilities) involving:

- structural reform of public monopolies to separate natural monopoly and competitive services;
- a national access regime for essential facilities; and
- a prices oversight regime for declared monopoly industries.

With some variations to detail, these recommendations were accepted by the Council of Australian Governments (the "COAG") on April 11, 1995.

The principles to be applied by state and federal governments in reforming the structures of their public monopolies were included in the Intergovernmental Agreement signed by COAG in April 1995. Major structural reforms are already underway in Australia in sectors such as electricity, gas, water and railways with the objective of creating market structures which are more conducive to competition.

The national access and monopoly prices oversight regimes, to be administered by the ACCC, are set out in the amendments to the *Trade Practices Act* which were proclaimed late last year.

The Competition Principles Agreement (the "CPA") also provides for state-based arrangements for the regulation of access to essential facility services and of public monopoly prices which are to conform with the criteria set out in the CPA.

Current Access Issues before the ACCC

Although the ACCC has no practical experience to

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date with the arbitration of access disputes of acceptance of access undertakings, the Commission is currently working with government and industry representatives on a number of infrastructure industry reforms and negotiations which are likely to lead to undertakings or declarations under the *Trade Practices Act* in the coming months.

Major reforms are underway in the electricity and gas industries which are likely to involve approval of access arrangements under Part IIIA. The current Government has also announced reforms to the regulation of the communications sector, which, if they are to proceed following the election, would involve the regulation of access and competitive conduct under a new Division of the *Trade Practices Act*. Also, in the railways sector, current commercial negotiations on access arrangements and proposals for national railway reforms (to separate the services of railway tracks from the competitive business of freight carriage) are likely to involve the exercise of access rights under Part IIIA.

Electricity Reforms

COAG agreed that a national electricity market, to be governed by a code of conduct, is to be developed by the National Grid Management Council (the "NGMC"). The code of conduct is now at an advanced stage and will establish regulatory arrangements for the two main sectors of the market:

- it will establish principles and rules for the regulation of access to the monopoly transmission and distribution wires; and
- it will establish rules and institutional arrangements for a competitive wholesale market for the trading of electricity within and between the participating states.

The ACCC will have three main roles to play in relation to the implementation of these reforms:

- authorization of the code of conduct under Part VII of the *Trade Practices Act*;
- acceptance of access undertakings from operators of transmission and distribution facilities under Part IIIA of the *Trade Practices Act*; and
- ongoing oversight of electricity market conduct under Part IV of the *Trade Practices Act* and the ongoing administration of the price cap regulations under the access parts of the code of conduct.

Gas Industry Reforms

The ACCC will play a similar role under the proposed COAG gas industry reforms to achieve free and fair trade in gas by the end of June 1996. The COAG Gas Reform Task Force is working towards an agreed national approach for codes of conduct and access undertakings to provide for third party access to gas transmission and distribution pipelines. The Task Force is also examining options to promote further competition in the upstream gas exploration, production and processing sector.

These arrangements, including agreed codes of conduct and access undertakings, will need to be put to the ACCC for approval under both the authorization and access undertakings provisions of the *Trade Practices Act*. Commission staff have been working closely with the Task Force staff with this in mind.

Parallel with this COAG process, a number of States and Territories are developing state-based gas access

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regimes which may well be put to the NCC and the relevant Minister for registration as "effective" access regimes under the provisions of Part IIIA.

Finally, the ACCC has an access dispute arbitration role under the provisions of the *Moomba to Sydney Pipeline System Sale Act* which is distinct from the provisions of Part IIIA. The ACCC may be called upon to determine access disputes that arise in that context.

Telecommunications Reform Proposals

In July 1995, the Minister for Communications and the Arts announced "policy principles" for the regulation of telecommunications in the period after July 1997. While the extent to which those reforms will be implemented now depends on the outcome of the election, they are of interest from the point of view of their relationship to the general approach to the regulation of access to infrastructure services under Part IIIA of the *Trade Practices Act*.

The July 1997 "policy principles" set out a regulatory framework for telecommunications which includes the following:

- transfer of the "economic or competition" regulation of telecommunications to the jurisdiction of the *Trade Practices Act* under the administration of the ACCC;
- an access regime which provides carriers and service providers with rights of interconnection and access to carriers' networks;
- the basis of these interconnection and access rights to be set out in an industry determined code of conduct to be assessed by and registered with the ACCC; and
- all carriers are to give mandatory access undertakings (based on the code of conduct) to the ACCC in relation to carrier and service provider interconnection and access and the arbitration of access disputes.

While there are some differences to reflect particular features of the telecommunications industry (particularly the requirement for any-to-any interconnectivity) these regulatory proposals are based on the broad concepts of Part IIIA of the *Trade Practices Act* and would be administered by the ACCC.

Railway Reform

In the rail sector, the reform process is in the early stages and is proceeding on two fronts. In the short term, access to railway lines is being negotiated on a commercial basis between (integrated) railway operators and freight forwarders and other actual or potential users of railway services. In some cases, these negotiations have been successful and in others there have been difficulties which may result in one party, or both, exercising their respective rights under Part IIIA. That is, railway service providers may give access undertakings to the ACCC and/or railway service users may seek declaration of a particular railway line under Part IIIA.

In the medium term, there is the prospect of a railway code of conduct being developed to govern the terms and conditions of access to railway services for the interconnected national railway network. Discussions are underway to that end although there is a long way to go yet. Any such code of conduct would need to be authorized under the *Trade Practices Act* and would give rise to access undertakings under Part IIIA.

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Differences in Access Reform Models

One point to note is that the flexibility offered by the access undertakings provisions of Part IIIA is allowing for the development of access arrangements which are tailored to the industry-specific requirements of particular sectors, while reflecting the broad access regulation framework embodied in Part IIIA.

Thus we have regulatory models being developed for electricity, gas and rail which differ in their approach, detail and prescriptiveness and are being designed to reflect the technology, market arrangements and ownership structure of those sectors.

A further point to note is that some of the access arrangements (e.g., those for electricity and gas) represent departures from the declaration regulatory model of Part IIIA which involves commercial negotiation of access terms and conditions in the first instance with the availability of compulsory arbitration of disputes which cannot be resolved between the parties.

For example, the electricity code establishes direct price capping and other regulatory arrangements to apply to all access transactions. Regulation is not confined to those transactions that remain in dispute following commercial negotiations. A similar approach of "up front" regulation of all access transactions rather than confining regulation to the exceptional disputed transactions is also under consideration by the COAG Gas Reform Task Force.

The flexibility offered by the undertakings provisions of Part IIIA is a strength not a weakness. Already

that flexibility is being exercised to good effect in the infrastructure sectors we have mentioned.

Although there has been a change in Government in Australia much of the above will proceed, if not accelerate.
