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Allan Asher
Deputy Chairperson
Australian Competition and Consumer Commission
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THEN.....

As many of you are aware, Part IIIA was introduced into the *Trade Practices Act* (TPA) as part of the competition policy reforms adopted by COAG in April 1995 which were given effect to by the *Competition Policy Reform Act 1995*. At the time, Part IIIA was seen as being a revolutionary step in competition policy in that it introduced to the Australian economy a general access regime which established rights of access to the services of certain "essential facilities" [1] for competitors operating in markets upstream or downstream from such facilities.

Part IIIA represented a new and challenging field of regulatory responsibility for the ACCC requiring it to respond to a diversity of interests, circumstances and concerns including those of facility operators and of the parties seeking access. In performing its regulatory functions under Part IIIA, the ACCC has also been required to balance those private interests against the public interest.

The Part IIIA access regime represented a departure from the traditional economic and legal principles regarding private property rights. Part IIIA is based on the notion that competition, efficiency and community welfare can be increased in certain circumstances by overriding the exclusive right of monopoly facility owners to determine the terms and conditions on which they supplied their services.

There are often potential efficiency gains from monopoly (or near monopoly) supply of many essential infrastructure services due to the economies of scale and scope they involve. While competitive supply of such services by two or more facilities would be inefficient, monopoly supply of essential facility services also confers a high degree of market power which can be exploited in the form of monopoly pricing or operating inefficiencies. Monopoly pricing itself creates inefficiencies and distorts resource allocation by raising costs and distorting demand and investment patterns in downstream and end use markets.

Direct price (and sometimes service quality) regulation is the usual policy response to monopoly pricing with a view to imposing an approximation of the "efficient" or "competitive" price (and service quality) for the monopoly service. However, where the monopoly service is an input into other competitive markets and the monopolist is also vertically integrated into (or has long term contractual interests in) those markets, regulation may also be necessary to prevent the monopolist from distorting competition. For example, regulations may be needed to prevent the intermediate service monopolist from discriminating against its competitors in upstream or

downstream markets in the prices and other terms and conditions of supply of the facility services.

The Part IIIA access regime was intended to overcome these adverse consequences of monopoly power by giving competitors in upstream or downstream markets rights of access to essential facility services on "non-discriminatory" terms and conditions.

The general access regime set out in Part IIIA of the TPA established two alternative means by which third party access can be provided to the services of "essential facilities":

- **First** by having a particular service **declared** to be an essential facility such that disputes over the terms and conditions of access can be arbitrated by the ACCC; or
- **Second** by allowing the owner of an essential facility to enter into an access **undertaking** with the ACCC setting out the principles and terms and conditions on which access will be provided.

Under the declaration procedure, a third party may request the NCC to recommend declaration of the services of the facility to the Minister who, in deciding whether to declare, must be satisfied on certain matters, including that:

- access would promote competition in at least one other market;
- it would be uneconomic to develop another facility;
- the facility is of national significance;
- access would not be contrary to the public interest; and
- the service is not already subject to an "effective" access regime.

The access regime principles adopted by COAG in the Competition Principles Agreement (CPA) recognise that the national access regime set out in Part IIIA of the TPA would not be applied to a facility already covered by a state-based access regime **unless**

- the National Competition Council (NCC) judges that regime to be "ineffective" having regard to the relevant CPA principles; or
- the state-based regime is judged to be ineffective by the NCC, having regard to the influence of the facility beyond the boundary of the relevant state.

Part IIIA provides for the Minister to decide (on the recommendation of the NCC) that a state-based access regime is effective in terms of the CPA access principles and therefore cannot be subject to the declaration procedure under Part IIIA.

In arbitrating disputes regarding access to declared services, the ACCC must have regard to the rights of the operator and third party access seekers and to the wider public interest, including in having competitive markets.

The rationale for this approach is that the availability of compulsory arbitration gives third party access seekers considerable leverage in their negotiations with monopoly facility operators which should contribute to negotiated pricing outcomes closer to "efficient" access prices. If the matter does go to arbitration the disputes is then

determined by the ACCC having regard to the implications for the private stakeholders and for the wider public interest criteria in the Act, this should also achieve a closer approximation to any "efficient" access price.

The ACCC is currently developing a general guide to arbitrations under Part IIIA. This guide is expected to be publicly released in draft form within the next couple of months.

A facility owner who believes there is a high chance of the services being declared can avoid the declaration process by giving the ACCC an access undertaking. In accepting an access undertaking, the ACCC must have regard to:

- the business interests of the service provider;
- the public interest, including in having competitive markets;
- the interests of third parties who might want access to the service;
- whether the service is already subject to an access regime; and
- any other matter the ACCC thinks relevant.

AND NOW.....

Having given a brief outline of the objectives of Part IIIA, I would now like to discuss the industries which have been affected by the access regime to date. Although I will concentrate on the energy and telecommunications sectors, I will also discuss developments to date in relation to airports and rail.

Electricity

The reforms introduced, or being considered, in most States and Territories to facilitate competition on the electricity industry have involved the separation of integrated electricity authorities into independent bodies with responsibility for generation, transmission, distribution and retail.

The reforms have also involved the separation of regulatory and commercial functions in the electricity authorities (generation and retail becoming part of the competitive market while transmission and distribution ‘wires’ will be regulated). The goal is freedom of choice of electricity supplier for all customers.

The access regulation and the wholesale market trading arrangements are set out in a very detailed Code of Conduct which will have the backing of state/territory laws. The code was submitted to the ACCC for formal authorisation under Part VII of the Trade Practices Act (TPA) and for approval of the industry code and related access undertakings under Part IIIA of the TPA (the latter to avoid the risk of declaration the services of transmission and distribution facilities under Part IIIA of the TPA).

There are two elements to the Commission's assessment role in relation to the NEM Code of Conduct.

One is examining the NEM in terms of the potential for it to contravene Part IV (anti-competitive conduct provisions) of the Act. This assessment role is set out in the authorisation provisions of the Act (Part VII).

Basically the Commission's task is to evaluate any anti competitive detriment and weigh that against the public benefits that arise from the proposed market arrangements. Provided there is a 'surplus' of public benefits (as against the anti competitive negatives of the conduct) the Commission may authorise the arrangements. The value of authorisation is that it removes the uncertainty that may arise from possible legal action under the Act in respect of that conduct (note however, that the authorisation applies to anti-competitive arrangements and not misuse of market power).

On 5 March 1997, the Commission granted a conditional interim authorisation for the NEM1 Stage 1 market arrangements. The Commission's Energy Team is currently analysing submissions and compiling a list of issues to be used as a basis for public consultation.

The other element is the access code that has been submitted for acceptance. The NEM arrangements also provide mechanisms for accessing the distribution and transmission wires businesses. This will obviously be very important to the operation of the market as it will introduce an element of competition both up stream and down stream of the wires businesses. The access code has been submitted under Part IIIA of the Act.

In simple terms what this means is that if the 'wires' businesses provide an undertaking that sets out the terms of access to the wires, and this is subsequently accepted by the Commission, it removes the threat that their businesses may be declared under Part IIIA. Declaration provides a legal right to negotiate access which, if unsuccessful, can be referred to the Commission for resolution.

As stated earlier, Part IIIA has its own provisions for determining whether the Commission should accept an access code and or access undertakings. The criteria cover such things as the interests of the owners of the facilities covered in the application, the users of the facilities, public policy issues and some other matters, one of which is enhancing competition. The Commission is currently evaluating the NEM access code in respect of these criteria and I would expect a preliminary decision in the next month or so.

The ACCC will have to authorise changes to the Code and approve any changes to access undertakings submitted to it from time to time. The Commission will also act on any anti-competitive conduct which might occur in the electricity market that may contravene Part IV of the TPA, including proposed mergers or acquisitions which may contravene S.50.

Gas

The Australian gas industry has been characterised by monopolies in production, transmission and distribution. The majority of Australian population centres, including Sydney, Melbourne and Adelaide, are therefore subject to monopoly power in the supply of gas.

The monopoly characteristics associated with the supply of gas in Australia are attributable to a combination of the following factors:

- high capital sunk costs and risks associated with exploration and production;
- the absence of gas-on-gas competition and transmission pipeline interconnections;
- the lack of maturity of the Australian gas market; and
- the creation of long-term supply contracts.

In order to address these problems and to develop an efficient national approach to gas policy and regulation, COAG, in February 1994, agreed to a program of gas market reform based on guiding principles to achieve free and fair trade in gas by July 1996. These principles included:

- the removal of all remaining legislative and regulatory barriers to free trade of gas by July 1996;
- the implementation of complementary legislation so that a uniform national framework would apply to third-party access to all gas transmission pipelines within and between jurisdictions by July 1996; and
- the introduction of legislation to ring-fence transmission and distribution activities in the private sector.

In order to achieve these objectives COAG established the Gas Reform Task Force (GRTF). With the assistance of industry and government participants, the GRTF developed a National Third Party Access Code for access to transmission and distribution infrastructure.

Under the National Third Party Access Code for Natural Gas Pipeline Systems (also known as the National Gas Code) which is nearing finalisation, if initial coverage is limited to NSW, Victoria and the ACT, the only pipelines that would be covered are two transmission systems, the Moomba Sydney Pipeline System (MSPS) and the Gas Transmission Corporation System (GTC). The ACCC may be given the role of Regulator under the National Third Party Access Code but this issue has not yet been decided.

The Gas Reform Implementation Group (GRIG) published a revised Code in mid June 1997. There is to be a 'roadshow' of public hearings, with submissions on the revised Code due by the end of July. It is proposed that the National Competition Council will be involved in the public hearings, to facilitate its consideration as to whether the Code and related legislation and Inter-Governmental Agreement (which are currently being drafted) constitute an effective access regime.

The Code and related Inter-Governmental Agreement and enabling legislation are to be finalised by mid September. This will allow lead legislation to be introduced in the South Australian Parliament in October/November 1997. The remaining jurisdictions have between November 1997 and February 1998 to pass application legislation enacting the National Code.

Each jurisdiction is to apply to the National Competition Council in November 1997 to have its access regime (based on the National Code) certified as effective under Part IIIA of the Trade Practices Act.

The National Third Party Access Code for Natural Gas Pipeline Systems is to be implemented on 28 February 1998. Within 90 days of the National Third Party Access Code being implemented, both EAPL (which operates the MSPS) and GTC would be obliged to offer to the Regulator access arrangements for their respective systems.

The Regulator must either approve the proposed access arrangement or not approve it. If not approving it, the Regulator must either identify areas needing change, or if the Service Provider has already been given a second chance to fix it up, the Regulator can develop and approve its own access arrangement. The Regulator must also keep a public register of all access arrangements.

At any time after an access arrangement has been approved, the Service Provider can apply for a review of the access arrangement and propose revisions to it. The Regulator must then consider such proposed revisions, following an identical public consultation process to the initial approval process.

The Regulator has a significant ongoing monitoring and enforcement role. Areas requiring monitoring include compliance with the ring fencing arrangements and assessments as to whether they are appropriate given:

- any changes in market circumstances;
- any potential breaches of the 'hindering access' prohibition;
- whether target rates of return have been achieved;
- whether proposed costs are incurred;
- whether proposed demand projections are accurate; and
- the effectiveness of incentive mechanisms.

The Regulator must approve any related-party contracts. This involves a process of public consultation, including a draft determination, consideration of submissions and a final determination.

The Regulator also has a significant ongoing role in dispute resolution. Dispute resolution is limited to disputes over access to spare or developable capacity, where negotiations have broken down. The Regulator determines if there is a dispute or not. The Regulator can arbitrate and make determinations in relation to access to capacity and the Code sets out detailed principles the Arbitrator is to take into account in making any arbitration determination and also restrictions upon determinations.

The Code provides the Regulator with the right to appoint an agent to act as arbitrator.

The National Third Party Access Code is undoubtedly a major initiative which should promote greater competition and choice in the downstream distribution retail sector. However, the National Third Party Access Code alone cannot deliver competitive outcomes for downstream industrial and household gas users without addressing the remaining obstacles to effective competition in the upstream production sector of the gas market. These include:

- the practice of the Cooper and Gippsland Basin joint ventures marketing their gas on common terms when alternative sources of supply are limited and constrained by existing contractual and other obstacles to competition;

- substantial barriers to entry to the exploration and gas production sector in the form of joint venture control over large tracts of exploration acreage and the current absence of access rights to upstream facilities such as gathering lines and gas processing plant;
- the absence (as yet) of pipeline interconnections between producing basins and different population centres which would create a measure of basin-on-basin competition for the first time; and
- legislative exemption of anti-competitive arrangements entered into decades ago when the development of inter-basin competition and codes of access to infrastructure were unforeseen by policy makers.

To the extent that these obstacles to effective upstream competition persist, producers will remain in a position to appropriate a proportion of the potential gains from the energy reforms, and users and regulators will harbour lingering suspicion that they have copped more than their fair share. Rents from the exercise of market power would be passed on in the prices of energy as costs to downstream energy market participants and to final industrial and household energy users and the resulting economy-wide benefits from the reforms will fall well below the Industry Commission's prediction. Studies carried out by ABARE for the Industry Commission estimated that the economic returns from new gas pipeline interconnections alone would total $1.0 billion Australia-wide over 35 years in net present value terms.

Dealing effectively with these market structure/market power issues, particularly during the implementation phase of the reforms and the initial years of transition to more competitive markets for energy, will be a major challenge for policy-makers and regulators.

But the problem must be confronted. Failure to deal with the problem effectively in the medium term would substantially undermine the competitive objectives of the energy market reforms and the economy-wide cost structure and efficiency benefits they are intended to deliver.

Cooper Basin Ratification Act 1975

Reform of the South Australian and Victorian gas industries is crucial to the future well being of the competitive environment. A failure to reform could, indeed, lead to the failure of the reform process as a whole. In particular, the *Cooper Basin (Ratification) Act 1975* is an obstacle to gas users reaping the benefits of COAG's gas industry reform initiatives.

To promote informed debate on this topic, the ACCC has released for public discussion its submission to the South Australian Government's review of the *Cooper Basin (Ratification) Act 1975* ("Ratification Act"). The submission can also be accessed from the ACCC's Internet Home Page [2].

The Independent Investigator, appointed by the South Australian Government, will make two separate but related assessments of the Ratification Act and associated Indenture and agreements. These will comprise a Legislation Review under the Competition Principles Agreement (CPA), and an assessment of whether any

provision constitutes a barrier to free and fair trade in gas in terms of the Council of Australian Governments' (COAG) agreement of February 1994.

The National Competition Council (NCC) [3] has warned of the need for South Australia to ensure that the Ratification Act does not restrict competition. Mr Graeme Samuel, President of the NCC and Mr Ian Woodward, Chief Executive, Australian Gas Association, have recently stressed the importance of continued and timely reform nationally, particularly in the context of natural gas.

A failure by the South Australian Government to reform the Ratification Act and to embrace competition principles adopted by COAG may lead to a substantive failure of the entire reform process.

This review provides the opportunity to South Australia to ensure that the fundamental objective of the Ratification Act, of preserving a reliable supply of gas to consumers, is served by gas exploration, production, processing and supply arrangements that are nationally competitive and fully consistent with liberalised interstate trade in gas and the advantages that will bring.

In support of those objectives, the ACCC has made the following recommendations in its submission to the South Australian Government:

32. that the exception from the Trade Practices Act of the Letter of Agreement for supply of Cooper Basin gas to AGL be repealed because the tying and delivery point provisions of the Agreement make it an obstacle to the development of competitive alternative sources of gas for consumers in South Australia and New South Wales;
33. that the exception of the Unit Agreement from the TPA be repealed because the Unit Parties now operate their joint venture in conjunction with interests they hold outside the Subject Area, and the arrangements are potentially anti-competitive in terms of reinforcing a concentration of interests and posing a potential barrier to separate marketing when feasible. The arrangements between the joint ventures are the subject of applications to the ACCC for authorisation. Were the exemption of the Unit Agreement repealed, the scope of those applications for authorisation might need to be widened to include the Unit Agreement itself; however, that is a matter for decision by the parties;
34. that exception of the liquids sales contracts from the TPA be repealed because the exemption has become ineffective and because the underlying arrangements are interstate in character. Since 1995, inclusion of South West Queensland parties (who are not parties to the Indenture) in the collective marketing arrangements for Australia appears to have placed those arrangements outside the scope of the Ratification Act and Stony Point Act exemptions. There is an application for authorisation (which has interim authorisation) currently before the ACCC, and the ACCC is able to assess that application without further modification;
35. that the South Australian Government address those elements of the Unit Agreement and Indenture that are potentially anti-competitive by measures to foster third party access to upstream infrastructure by legislation or by an enforceable code of conduct devised under the auspices of the competition authority; and by committing to extending concessionary terms under the

Indenture associated with exploration and production leases on an equal basis to new entrants to the Cooper Basin. (The ACCC reserves its position in relation to assessing the balance of costs and benefits of the Unit Agreement.) There is a parallel between this proposal, in terms of the approach advocated towards incumbents and new entrants, and the principle of competitive neutrality towards the private and public sectors adopted by COAG; and

36. 5. that the South Australian Government remove the legislated limitations on Santos shareholdings. The ACCC notes information that the Santos legislation was originally passed in 1979 to prevent Bond Corporation gaining 51% control of the company and consolidating it into the Bond group. [4] Such an outcome could indeed, as events transpired, have had potentially adverse consequences for the company. However, the ACCC is concerned that leaving in place a protective device of this nature, with the potential advantages it confers on the company in relation to its acquisition strategies, may carry costs as well, in the light of industry concentration and upstream production arrangements as they stand, particularly with the current absence of third-party access. In this context, the ACCC recommends that the South Australian Government remove the legislated limitations on Santos shareholdings.

Telecommunications

In introducing full and open competition to the telecommunications industry from 1 July 1997, the Parliament's main objectives are that the new regulatory framework will:

- promote the long term interests of end users of carriage services or services provided by means of carriage services (eg content services); and
- promote the efficiency and international competitiveness of the Australian telecommunications industry.

The Government's package of legislation involves a new Telecommunications Act and amendments to other legislation, particularly the Trade Practices Act ("TPA"). The package establishes new economic regulation and competition rules for the industry that will help achieve the above objectives.

In particular, the new Part XIC of the Trade Practices Act establishes the access regime for telecommunications. It provides "foundation access rights" [5] to new and existing carriers and service providers and facilitates commercially negotiated access arrangements. The new Part XIC provisions are derived largely from Part IIIA of the TPA and like Part IIIA, the telecommunications access regime is designed to utilise infrastructure efficiently and encourage efficient investment.

The primary object of Part XIC is to establish an access regime that promotes the long-term interests of end-users. The legislation is quite specific regarding what can be taken into account in considering the long-term interests of end-users. The factors are:

- promoting competition in telecommunications markets;
- any-to-any connectivity (users of different networks can communicate);
- economic efficient use of, and investment in, infrastructure.

The Commission considers that the most fundamental competition issue at stake is ensuring that there is effective regulation of access by new entrants to the incumbent's network. In the telecommunications industry the incumbent has substantial advantage over new entrants through:

- control of access to key network elements;
- the historical development of an asymmetrical network and market information.

Denying or impeding access to key network elements, such as the Customer Access Network, can constitute a barrier to entry and efficient competition in dependent markets (such as long-distance telephony services). While infrastructure duplication is essentially an industry decision; the role of regulation is to ensure that industry's decision about whether to roll out a new network is not distorted by access conditions being too harsh (leading to either a lessening in competition or wasteful duplication)or too lax (leading to inefficient use of existing facilities). The aim therefore is to ensure that decisions are consistent with maximising benefits to end users.

It is important to bear in mind that the regulated access regime will not apply to all telecommunications services. It will only apply to declared services. Declared services will usually be those services which are considered important for competition to develop in related markets or for any-to-any connectivity. There are three methods by which a service can be declared:

- the Commission has already deemed services under existing carrier access arrangements to be declared;
- the Commission may declare those services recommended by the industry body, the TAF (which is registered under the business name of Australian Communications Access Forum- ACAF); or
- alternatively, the Commission may declare services after holding a public inquiry.

The Commission has recently released a draft statement specifying certain services to be deemed as declared services under the new telecommunications legislation. The deeming process retains the existing access rights of carriers, while extending access rights to new entrants and existing service providers. From 1 July, services deemed as declared services will be provided on request to carriers and service providers, by any carrier or service provider supplying the deemed services. This will provide a smooth transition from the present duopoly environment to open competition under the new telecommunications access regime.

Once a service is declared the access provider must make the service available to requesting access seekers on reasonable terms and conditions. The Act does not spell out the terms or conditions of access.

Under the new legislation, the terms and conditions of access can be established in three ways:

- an access provider may enter into a private, commercially negotiated agreement with a service provider regarding the price and quality of access to the declared service;
- alternatively, an access provider may register an access undertaking with the ACCC. (This undertaking must be consistent with either the ACAF Access Code or the ACCC code, whichever is applicable and must set out the terms and conditions of access); or
- where a access provider and a service provider cannot come to an agreement regarding the terms and conditions of access and where there is no undertaking in place, or the dispute involves an area which is not covered by the undertaking - the parties may notify the Commission of an access dispute.

Industry Self-regulation

A key feature of the new regulatory framework is its emphasis on industry self-regulation with legislative safeguards. This applies in a variety of areas including consumer and technical codes of practice and access. In a complex and technologically advanced network industry such as this, it is desirable to encourage participants to establish multilateral forums by which standard terms and conditions can be developed and applied. The legislation attempts to achieve this through the establishment of the TAF.

From the outset we have been encouraging the industry to develop such mechanisms and in particular have suggested that the TAF make an early start to the drafting of an access code with a view to it being ready and in operation for the new regime. The Commission is encouraged by the draft access code released by the TAF for public comment. Currently we are awaiting the revised access code which is to be registered with the Commission under the Act. Amongst other things, the access code includes model terms and conditions to be adopted in undertakings by individual carriers or carriage service providers in their provision of declared access services.

In a move to strike a balance between a ‘light-handed’ regulatory approach, such as that adopted by New Zealand, and regulation by an industry-specific body such as AUSTEL, the new regime provides a framework for the industry to take responsibility for key areas of regulation. This means that while the legislation provides important safeguards, it is incumbent on the industry to attempt to develop its own approach.

Under Part XIC, the industry through the access code and through TAF, has a significant opportunity to "set the goal posts" for commercial access arrangements and lay the ground work for a competitive and innovative telecommunications market. However, in some cases intervention will be required to safeguard against the use of market power to deny or restrict access.

Access Pricing

The Commission has determined its approach to access pricing following the issue of draft access pricing guidelines and inputs from industry. The Commission will follow these principles when assessing undertakings and conducting arbitrations.

The pricing principles are intended to guide the parties in their access negotiations. The Commission considers that in the usual case access prices should be consistent with the broad pricing principles and pricing rules specified in the draft guidelines. These principles and rules set limits on the pricing behaviour of access providers who could otherwise use their market power to set anti-competitive prices.

The Commission has also made a determination in accordance with the *Telecommunications Act 1997*, which reduces the price new carriers will pay for interconnection with Telstra's network through National Access. The determination will commence on 1 July for an interim period until the end of December. However, from 1 January 1998 charges will be subject to commercial negotiation between Telstra and industry players and, indeed those wishing to, are free to seek a better deal from Telstra immediately, rather than rely on the determination.

The determination provides an environment for new players to compete with Telstra and Optus on fair and reasonable terms and is an important step away from the duopoly arrangements. In all this work our approach is to go out to industry with exposure drafts of our work for feedback and comments. We encourage the industry to participate fully in this consultation process since its views and comments and suggestions for improvement will be critical to the successful operation of the new regime.

With telecommunications, the Commission will be required to strike a balance between industry self-regulation and its responsibility to promote competition and access, ensuring that the objectives of the legislation are met.

Having spoken briefly on telecommunications, I would now like to mention the current developments in relation to airports, given that privatisation of airports introduces a new operating and regulatory environment for airports in Australia.

Airports

The Government has put in place arrangements for economic regulation of the leased airports and has given the Commission primary responsibility for implementing them. In doing so it has established a regulatory regime that gives the Commission a range of tools to assist it in its new regulatory role.

Recently, the Government announced the selection of successful bidders for the long term leases of Melbourne, Perth and Brisbane airports. As you may be aware these leases were granted on 1 July 1997. The Government has also announced its intention to grant leases on a further 15 airports by mid 1998.

The ACCC will, from tomorrow, be responsible for the implementation of the new economic regulation of the leased airports. I would now like to briefly outline the Commission's role and approach in the regulation of these airports.

The regulatory regime to apply to privatised airports comprises a package of measures under the *Airports Act, the Trade Practices Act* and the *Prices Surveillance Act*. The main measures are a price cap on aeronautical services and access arrangements. The

package also includes a number of complementary measures including formal monitoring, quality of service monitoring and a review of regulatory arrangements.

The main objectives of the regime as stated in the *Airports Act* are to promote the efficient and economic development and operation of airports while at the same time protecting the interests of airport users and the general community. The Act also aims to facilitate the comparison of airport performance in a transparent manner.

The regulatory regime came into effect on 1 July 1997. Similar arrangements will apply to many of the "phase two" airports once the leases to those airports have been granted.

Airport services which are provided by significant facilities at an airport and which cannot be economically duplicated are covered by Part IIIA of the *Trade Practices Act 1974*. These services are automatically declared under the *Airports Act* 12 months after commencement of the lease unless an access undertaking has been accepted by the Commission.

Declaration gives airport and potential airport users the right to negotiate terms and conditions of access with the airport operator in the first instance, and, if the negotiations prove unsuccessful, the opportunity to have the Commission arbitrate the access dispute.

As an alternative to this process, airport operators can give access undertakings to the Commission specifying the terms on which airport services will be made available to airlines and other users of airport services.

The price cap and other prices oversight arrangements will apply for a five year period. Towards the end of the period the Commission will review the arrangements. The review will examine the appropriateness of the existing arrangements with the objective of ensuring that the aviation industry is adequately protected.

The Government has made it clear that the Commission can recommend stronger forms of prices oversight if operators have a consistent track record of abusing their market power. An important point here is that the Commission can make different recommendations for different airports - taking into account the different circumstances faced by each airport and the different track records of the airport operators. In this way the poor track record of one operator need not adversely affect other operators.

The Commission’s role as regulator of leased airports throughout Australia is clearly an area of responsibility in which the Commission must demonstrate it’s ability to juggle both the interests of industry and the interests of consumers.

I would now like to discuss another sector of the Australian economy which is making use of the Part IIIA provisions; the rail industry.

Rail

As mentioned earlier, central to the adoption of the competition policy reform agenda is the view that there are large benefits to economic development from competitive infrastructure. Competitive and efficient infrastructure is seen as promoting investment in industries using the infrastructure and promoting exports in the wider economy.

Structural separation of infrastructure industries involves the separation of the regulatory function, natural monopoly elements and competitive elements. This is based on the rationale that competitive services will not evolve where the one utility has regulatory powers and elements of natural monopoly as well as engaging in potentially competitive activities. For example, a private rail service is unlikely to offer a competitive service in a market which is regulated by that competitor and where it must use its competitors' track and other facilities. Structural separation of enterprises is an issue for government policy consideration.

As rail services have traditionally been provided on a State basis by State owned enterprises, the development of a national approach to service provision poses significant challenges. However, realisation of a national approach is critical to the development of efficient interstate rail services.

The NCC currently has three applications for declarations of rail facilities. These include:

- an application by Specialised Container Transport for declaration of services relating to the Sydney-Broken Hill rail track provided by the Rail Access Corporation;
- an application from the NSW Minerals Council Limited for declaration of services relating to the use of the Hunter Railway Line provided by the Rail Access Corporation; and
- an application from Carpenteria Transport Pty Ltd (wholly owned by TNT) for declaration of services relating to the use of the Brisbane-Cairns railway owned by Queensland Rail.

The NSW government has also established a legislatively based access regime for rail services which is expected to be submitted to the NCC for their consideration of whether or not that regime should be certified as effective.

Arrangements for access to the interstate rail network are an area where an access undertaking could potentially be developed and submitted to the Commission for acceptance. This could be a vehicle to provide certainty about access to rail facilities and facilitate the development of a national coordinated approach. It would also reduce the possibility of time consuming and expensive disputes about whether a service should be declared and terms and conditions on which access should be granted.

An individual track operator could choose to submit an access undertaking for services provided in a particular market. This is most relevant for access arrangements which are not covered by State or Territory legislated access regimes which have been recognised as effective. For example, privately owned railways may not be covered by State or Territory access regimes.

However, when considering an access undertaking, the Commission will be wary of vertically integrated service providers with an incentive to discriminate against upstream or downstream competitors. For example, access to track services could be provided on more favourable terms to an entity's own integrated operations that to their competitors. Under these circumstances, the Commission would normally expect an additional constraint on negotiation of access arrangements.

The Commission would expect that any entrant be offered no more adverse terms and conditions of access than the service provider provides to itself unless the service provider can demonstrate that the difference would not harm competition. That is, the differences arise from:

- differences in costs associated with providing access; or
- efficiencies which the firm can secure in dealing with itself.

The Commission is unlikely to accept undertakings which incorporate anti-competitive price discrimination unless the service provider can demonstrate offsetting benefits in terms of the public interest.

CONCLUSION.....

Having outlined the progress made to date in relation to access to essential facilities under Part IIIA of the Trade Practices Act, it is evident that a lot has happened in the last two years. However, the reforms cannot yet be seen as being "in the bag". A lot still remains to be done. In the future, many questions will arise in relation to access issues and many obstacles will need to be overcome. The ACCC intends to be part of the solution.

To this end, the ACCC has endeavoured to make its processes and procedures as transparent as possible. Guidelines relating to Part IIIA and the ACCC's arbitration obligations can be found at any ACCC office or on the ACCC's Internet Home Page at www.accc.gov.au. Similarly, information on the NCC's role and work to date can be found on the NCC Internet Home Page at ncc@c031.aone.net.au.

Footnote 1: Following the North American usage, "essential facilities" are normally understood to be services with natural monopoly characteristics, access to which is required by participants in upstream or downstream markets to be able to compete effectively in those markets. Access problems can be of particular concern where public utility monopolies are vertically integrated into competitive markets and are able to limit competition in this markets by restricting access to the essential facility services.

Footnote 2: ACCC Internet Home Page address: www.accc.gov.au

Footnote 3: NCC, Annual Report, 1995-96, p. 6.

Footnote 4: Australian Competition Tribunal, Review of ACCC Determination revoking Authorisation No A90424, No V1 of 1996, Attachment 1 to Statement of J W McArdle, extract from R Wilkinson, A Thirst for Burning, p. 357.

Footnote 5: Trade Practices Amendment (Telecommunications) Act 1997,Second Reading Speech pg 7.