

**THE MAN FROM MARS WOULD
HAVE
DONE BETTER: A
COMMENTARY ON THE
DECLARATION AND
ARBITRATION PROVISIONS
OF THE ACCESS REGIME UNDER
PART IIIA OF THE TRADE
PRACTICES ACT**

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I WHAT ARE THE CHARACTERISTICS OF FACILITIES SUBJECT TO ACCESS REGIMES?

A *What are the 'essential facilities'?*

It is important, of course, to give some initial idea of what we are talking about. What are those facilities where access issues cause problems?

Getting the fundamental concepts right is essential to our understanding of the problem because the law in relation to 'essential facilities' and access to them has quite distinctive features. It represents an intrusion into the basic principle of private enterprise in that it circumscribes the freedom of parties to deal with their property as they wish. Also it is a concept which does not slot into ready characterisation. Whilst it is justified on the basis that access to certain facilities is necessary to preserve the competitive process, its implementation involves highly regulatory intervention. In this commentary, I prefer to characterise the law of access to 'essential facilities' as regulatory because of the nature of the intervention involved. But it is important to remember that the fundamental justification for such intervention is that it is necessary

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to preserve the competitive process and, through it, competition itself.

What are ‘essential facilities’ which involve issues of access? For introductory purposes, facilities which are seen as meriting access regime control are those where a facility owner possesses monopoly power in a first market to achieve or enhance market power in a ‘second’ market. The second market may be either an upstream or downstream market. Without access to the facility, the new entrant competitor cannot access the second market involved and, by denying facility access, the facility owner can use its first market monopoly power to maintain, achieve or enhance its power in the relevant second market.

B *NT Power: An illustrative example of an access issue (dealt with under s 46)*

A 2004 High Court case illustrates the point. *NT Power*, an electricity generator in the Northern Territory, was unable to provide power to Darwin customers unless it could obtain access to the power transmission grid of the Northern Territory Power and Water Authority (PAWA), a competitive power generator. The High Court held that the denial of access by PAWA was a misuse of power in the distribution network for the purpose of preventing competition at the customer level (the relevant ‘downstream’ second market and a market in which PAWA traded) and thus involved illegal conduct under s 46 of the *Trade Practices Act 1974 (Cth)*.¹

C *How the PART IIIA Access Regime may have dealt with the NT Power Case*

The alternative method of dealing with the issue raised by *NT Power* would have been under the Access Regime set up under PART IIIA of the *Trade Practices Act*. In brief, this involves an application to a body known as the National Competition Council (NCC) for a declaration that the facility is one of national importance and otherwise comes within the criteria in the Act (see criteria set out in Table I in the Appendix). If successful in this application and if the relevant Minister approves the NCC recommendation, a party then has a right to arbitrate access conditions, the arbitrator being the Australian Competition and Consumer Commission (ACCC). (For arbitration criteria see Table II in the Appendix.) There are appeal provisions from all Ministerial and ACCC decisions to the Australian Competition Tribunal (ACT) and the criteria of evaluation are quite different in each case.

The Declaration Process is illustrated diagrammatically in Table III in the Appendix to this commentary. The ACCC arbitration process follows if a Declaration is made.

It would seem that a PART IIIA Access Order could well have been made in the *NT Power Case* if that procedure had been used but the time taken in PART IIIA proceedings would, it seems, have been far longer than that taken by s 46 court proceedings.

¹ *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48. The issue was decided under s 46 of the *Trade Practices Act 1974 (Cth)* (illegalising the misuse of market power). In broad terms, s 46 of the *Trade Practices Act 1974 (Cth)* illegalises parties 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.

D *Section 46 and PART IIIA co-exist in Australia*

Both s 46 and PART IIIA exist in Australia as generic regimes. In the case of a conflict between the two, there is no indication in the law as to which takes precedence.

E *This paper deals only with unilateral access denial*

Denial of access can also be created by an agreement between competitors. This type of agreement can be dealt with as an exclusionary provision (commonly called a 'collective boycott') or as an anticompetitive arrangement. It is thus subject to different legislation (s 45 of the *Trade Practices Act 1974* (Cth) and associated relevant sections) and, in fact, poses few of the difficult value judgments required when unilateral access denial is involved. This paper deals only with unilateral denials of access.

II COVERAGE OF PAPER AND AN EVALUATION OF THE ACCESS REGIME ON CERTAIN 'OUTCOME' TESTS

In this paper I will discuss the Declaration and Arbitration provisions of the *Trade Practices Act's* PART IIIA Access Regime. When I refer to 'the Access Regime' I refer to this aspect of it unless I state otherwise. This is, however, but one third of the access regime provisions set out in the 74 sections of PART IIIA of the Act. But it is, I think, the most important part and the area, ultimately, where the law will be made.

I would like to commence my evaluation by looking at the issue from the viewpoint of the Man from Mars. This creature, which figured in a number of the pontifications of former High Court Chief Justice and Federal Attorney-General, Sir Garfield Barwick, was a mythical beast who observed our laws with the detachment which comes from not being of this world and thus not having participated in the political process or the lobbying that led to the gestation and birth of the legislation in question. The Man from Mars asked, quite simply, firstly whether the law is administratively efficient and, secondly, whether it achieves its objective. Would that all legislation were subject to such a simple evaluation!

Sadly, in the case of the declaration and arbitration provisions of PART IIIA of the *Trade Practices Act 1974* (Cth), the answer to each question asked by our Martian visitor is a resounding 'No'. It is hopelessly inefficient and also fails to achieve its stated objectives.

III SOME RELEVANT 'OUTCOME' TESTS

Set out at Part I, Section C above, coupled with the Tables in the Appendix, is an outline of how the Access Regime works. I will later deal with the actuality of the workings of the Regime. Initially, however, let me say that the assertions I have made as to the answers to the questions asked by the Man from Mars can be justified by the application of what managers call basic 'outcome' tests. In the case of the Access Regime, these 'outcome' tests are fairly simple and the answers obvious.

A *The test of international comparison*

The first ‘outcome’ test is the test of international comparison. Is there any other country in the world which has both overall legislative control over misuse of market power (in Australia, s 46 of the *Trade Practices Act 1974* (Cth))² and a generic access regime such as that in PART IIIA of the *Trade Practices Act 1974* (Cth)? The answer is ‘No’.³ Does this not give rise to a very strong prima facie conclusion that in Australia, we have a classic case of overregulation? The answer is ‘Yes’.

B *Does the generic regime reduce the industry specific regimes?*

A general access regime can be justified on the basis that it takes the place of various specific regulatory access regimes. In virtually every advanced capitalist country, a common core of industries has been subject to specific regulatory access regimes. These, worldwide, are telecommunications, electricity and gas transmission and airports. In some countries, railways and ports may also be subject to specific access regimes. These facilities are seen to have certain monopolistic qualities which may lead to access being denied to a party thought to merit such access. A generic regime may be justified on the basis that it is in substitution for specific regulatory regimes and thus imposes no greater regulatory burden. Indeed, it can be argued that a generic scheme is more efficient than industry specific schemes and that it should be favoured for this reason.

1 What is the position in Australia?

The answer is that the generic access code has not replaced specific access regimes and cannot be justified on this basis. Telecommunications are closely regulated by specific PARTS of the *Trade Practices Act 1974* (Cth).⁴ Electricity⁵ and gas⁶ are also closely

² In broad terms, s 46 of the *Trade Practices Act 1974* (Cth) illegalises parties 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.

³ Commonwealth, *Review of the National Access Regime*, Productivity Commission Inquiry Report No 17 (2001) 34.

⁴ PART XIB of the *Trade Practices Act 1974* (Cth) contains some 86 sections governing telecommunications competition conduct and record keeping. In addition to this PART XIC of the Act has some 142 sections covering telecommunications access.

⁵ In December 1998, legislation was enacted in NSW, Queensland, South Australia, Victoria and the ACT to create a national electricity market. The regime created by this legislation was aimed at ensuring open access to the transmission and distribution networks in those States. Subsequently Tasmania joined the scheme. The sponsoring jurisdictions established a company limited by guarantee to administer the National Electricity Code established by the legislation. Subsequently, it was decided that administration of the Code should be taken over by an Australian Energy Regulator. PART IIIAA of the *Trade Practices Act 1974* (Cth) establishes that body.

⁶ The regulation of gas and access to gas pipelines is complex to say the least. A National Pipeline Access Agreement was signed between the Commonwealth, State and Territory Governments on 7 November 1997. Pursuant to this agreement, South Australia enacted the *Gas Pipelines Access (South Australia) Act 1997*. This set out in Schedules 1 and 2 what is termed ‘the Access Law’. Other States and Territories and the Commonwealth subsequently enacted legislation applying the principles of Schedules 1 and 2 of the South Australian legislation in their own jurisdictions. Functions were conferred on the Australian Competition & Consumer Commission (ACCC). An appeal body from ACCC decisions was set up which, according to circumstances, may be the

regulated by specific access regimes. Airports are subject to specific regulation under the *Airports Act 1996*.⁷

It is clear enough from the above that the generic regulatory access code in PART IIIA of the *Trade Practices Act 1974* (Cth) has not resulted in any significant abandonment of specific access codes. Australia is thus in the position that it has specific regulation akin to that in other advanced capitalist countries. The need for specific access codes has not been lessened by the PART IIIA generic code.

C *Is there consistency of philosophy between the access regime and other provisions of the Trade Practices Act?*

The *Trade Practices Act 1974* (Cth) was based on a general principle that ‘Parliament should, as far as possible, indicate what forms of conduct are prohibited’.⁸ This principle was a refutation of that previously expressed in competition law where a considerable number of criteria had to be balanced and a Tribunal order made prior to illegality in any practice being found. The new (1975) philosophical drafting approach was stated in the Second Reading Speech to be taken on the basis that detailed drafting does not necessarily lead to certainty and that often detailed drafting does no more than obscure the broad purpose of a provision. Whatever may or may not be said about PART IIIA, I doubt if anyone would claim that it delivers certainty. Significantly, this is because the 1975 drafting philosophy has not been adopted in the drafting of the Access Regime. The regime’s lack of certainty is illustrated by the procedures in it to determine what is essentially an inter-partes dispute. Such disputes are to be determined by criteria as broad as an access order not being ‘contrary to the public interest’.⁹

In order to determine whether this test is satisfied, the public interest issue is considered by three different bodies in two different contexts. A decision by the NCC or the relevant Minister on declaration criteria is no guarantee that the ACCC will think similarly on arbitration criteria. In arbitration proceedings, the parties cannot necessarily confine the issues to those in relation to which they are in dispute. The ACCC, as arbitrator, can ‘take into account any other matters it thinks are relevant’.¹⁰

The Access Regime is the embrace of broad non-specific evaluative criteria, a drafting

Australian Competition Tribunal. Under the legislation, each relevant service provider is to submit an ‘Access Arrangement’ to the relevant regulator for approval and is also to submit applicable Access arrangements information. Not surprisingly, this prolix set of arrangements has led to litigated demarcation disputes between agencies – see *ACCC v ACT* [2006] FCAFC 83. See below n 19 in relation to further comment on this case.

⁷ The *Airports Act 1996* PART 13 provides for access to, airport sites and demand management of, relevant airport sites. Section 193 of the Act provides that PART IIIA of the *Trade Practices Act 1974* (Cth) has effect subject to a number of Divisions of PART 13 (basically those relating to the administration of airport capacity). There are also a number of other provisions of the Act involving the ACCC in airport performance management.

⁸ Trade Practices Bill 1974 (Cth): Second Reading Speech, Hansard (H of R) 16 July 1974, 226.

⁹ *Trade Practices Act 1974* (Cth) s 44G(2)(f) re declaration considerations (NCC) and s 44H(2)(f) (Minister). This issue is also considered in arbitration proceedings [*Trade Practices Act 1974* (Cth) s 44X(1)(b) (ACCC consideration)]. All decisions are subject to an appeal to the Australian Competition Tribunal.

¹⁰ *Trade Practices Act 1974* (Cth) s 44X(2).

technique specifically rejected as appropriate for the drafting of the rest of the Act.

There are other obvious areas of inconsistency with the general provisions of the *Trade Practices Act 1974* (Cth). The *Trade Practices Act 1974* (Cth) states that its purpose is to ‘enhance the welfare of Australians’ and that it does this ‘through the promotion of competition’.¹¹ The market in which competition is to be assessed is ‘a market in Australia’.¹² The access regime, for reasons unexplained¹³ requires us to consider the impact of access in relation to a ‘market whether in Australia or otherwise’.¹⁴

There are more examples of inconsistency which can be given but the above will satisfy a ‘quick look’ evaluation of a relevant ‘outcome’ test.

D *Is the regulatory regime administratively efficient?*

Perhaps the major deficiency in the Access Regime is that it is anything but administratively efficient. Trade Practices practitioner, John Kench, has not unfairly described the scheme as a ‘monster’ commenting that:

Throughout its creation, transition and implementation from fiction to fact, PART IIIA has retained an essential characteristic of an imaginary monster: it is composed of incongruous elements drawn into complicated cumbersome multistage declaration, arbitration, review and enforcement processes...involving ten sets of players... Its shape has been driven by trade practices legal history and Federal-State 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.¹⁵

A fully fought PART IIIA proceeding could, it seems take 7-10 years. Practitioners with whom I have discussed this issue agree with this estimate. It is, however, hard to be too specific because, though the regime is now 12 years old, no fully contested case has yet made it to the finishing line.

¹¹ *Trade Practices Act 1974* (Cth) s 2.

¹² *Trade Practices Act 1974* (Cth) s 4E.

¹³ The 1995 House of Representatives Explanatory Memorandum to the Competition Policy Reform Bill [182] states that some access regimes could help Australian companies gain access to overseas markets. No examples were given. The legislation, as enacted, is, however, much wider than this. If overseas market access to Australian companies was the legislative intention, this could easily have been specifically stated.

¹⁴ *Trade Practices Act 1974* (Cth) s 44G(2)(a).

¹⁵ John Kench, ‘PART IIIA – Unleashing a Monster’ in Williams (Ed) *The Twenty Fifth Anniversary of the Trade Practices Act* (2001), 122. The ten sets of players identified by Kench are:

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 NCC;
8. the ACCC;
9. the Australian Competition Tribunal; and
10. the Federal Court.

Declaration proceedings, if fully contested, require a decision in three separate forums (the NCC, the relevant Minister¹⁶ and the ACT). This process which can take years decides only that there is a legal right to arbitrate access conditions. But arbitration proceedings are before yet another body, the ACCC, on brand new criteria. Based on telecommunications arbitrations, an arbitration before the ACCC could take up to two years with an appeal to the ACT likely to take a similar period.

There are other aspects of the regime which give cause to concern. After more than a decade of the regime's operation, we still do not know whether a private iron ore railway from the Pilbara to the Western Australian coast is within the scheme or excluded as a production process.¹⁷ An initial decision held for exclusion. A subsequent decision held for inclusion holding that the prior judgment was 'plainly wrong'.¹⁸ The case indicates the capacity of the regime to be sidelined on legal issues. In the second case dealing with the issue, it took 1,183 days from the date of declaration filing before a court decision was made and such decision will undoubtedly be appealed.* In the meantime, the whole administrative decision making process is on hold and the procedural regime is in a state of constipation.

The system also allows for inter-agency squabbles which can create even greater uncertainty and delay. It has given rise to the unedifying spectacle of the ACCC suing the ACT in the Federal Court. The Commission did not like a Tribunal decision by which it was bound. So it took proceedings against the Tribunal alleging that the Tribunal had erred in law by applying wrong pricing and asset valuation criteria and had thus not followed proper process.¹⁹ The scope in the regime for inter-agency 'demarcation disputes' seems enormous and the ACCC has, it seems, found a new way of upsetting decisions which, in the hierarchy of things, bind it but which it does not like.

This is not the stuff of efficient decision making.

¹⁶ In the case of infrastructure owned by a State or Territory, the designated Minister is the State Premier or Territory Chief Minister. Responsibility for all other decisions lies with the Commonwealth Treasurer. Thus it is necessary to retain nine centres of administrative expertise if Ministerial decisions under the Access Regime are to be competently made. If the relevant Minister simply does nothing (an appealing option in politically controversial areas), the Minister is deemed to have refused the declaration notwithstanding the NCC's recommendation that it be granted. An applicant for declaration has then to start anew in the Australian Competition Tribunal. Not surprisingly, political opinions have shown little consistency and this area is but another example of the point that Australia's nine regulatory clocks rarely chime in unison.

¹⁷ See definition of 'services' in s 44B.

¹⁸ Middleton J in *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2006] FCA 1764 held that the relevant railway line was not excluded stating that Kenny J's decision in *Hamersley Iron Pty Ltd v National Competition Council* [1999] FCA 867 to the contrary was 'plainly wrong' [98].

* [Author's note: Since the writing of this commentary, an appeal from the 2006 Billiton decision has been lodged. This appeal has been set down for hearing on 30 April 2007.]

¹⁹ *Australian Competition & Consumer Commission v The Australian Competition Tribunal* [2006] FCAFC 83. This case was brought in relation to the application of the gas regulatory regime (for details see above n 6) which is akin in many ways to the code certification regime under PART IIIA.

E *Does the access regime carry into effect the agreement made between the States, Territories and the Commonwealth?*

The Hilmer Report recommended that access be based on a finding that it was ‘essential’ for a party to enter the market in order to compete.²⁰ More importantly, clause 6(1) of the 1995 Commonwealth/State/Territory Competition Principles Agreement 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’. This requirement, which reiterates United States case law²¹ has not, however, been translated into the access regime.²² Whereas the United States test of not being ‘economically feasible to duplicate’ requires that competition must be eliminated by a refusal of access,²³ the Australian provisions provide that access should be favourably considered where such access would give a ‘material increase in competition’ or where it is ‘uneconomic’ to duplicate the facility.²⁴ These tests have been interpreted as giving rise to a favourable access evaluation so long as a ‘bottleneck is unlocked’ and the ‘competitive environment’ is thus ‘improved’. The test is simply whether competition will be ‘better’ with a declaration than without it.²⁵

The 1995 Co-operative Agreement was executed on the basis that only parties eliminated from the market would be advantaged by it. The Act, however, requires only that a material improvement in competition (not even a ‘substantial’ improvement) would be caused by an access order. These are quite different tests. Competition may be materially increased by a party obtaining access even though the access seeker is not eliminated from the market if access is denied and even if the access seeker is perfectly capable of constructing its own facility but chooses not to do so because it is ‘uneconomic’ compared with other expenditure choices.

The Part IIIA regime criteria do not match those agreed in the State/Commonwealth Co-operation Agreement. Indeed they promote access where this would not be allowed under the test envisaged by that agreement.

It can also be argued that the Access Regime has potentially imposed a price control system on monopoly pricing not envisaged by the Inter-Governmental Agreement. This issue is discussed at Part V, Section D following.

²⁰ National Committee Policy, Commonwealth, *Report of the Independent Committee of Inquiry* (The Hilmer Committee Report) (1993) 251.

²¹ *Alaska Airlines Inc v United Airlines Inc* 948 F 2d 536 (9th Cir CA) 1991.

²² In declaration proceedings, the NCC is required to take into account; amongst other things:

- that access...would promote material increase in competition...(Trade Practices Act 1974 (Cth) s 44G(2)(a)); and
- that it would be uneconomical for anyone to develop another facility to provide the service (Trade Practices Act 1974 (Cth) s 44G(2)(b)).

²³ *Alaska Airlines Inc v United Airlines Inc* 948 F 2d 536 (9th Cir CA) 1991.

²⁴ See *Trade Practices Act 1974* (Cth) s 44G(2)(a)(above n 22) and s 44G(2)(b) (above n 22).

²⁵ *Re: Review of Declaration of Freight Handling Services at Sydney International Airport* (2000) ATPR ¶41-754.

F *Conclusions from the above 'outcome' tests*

'Outcome' tests may be differently chosen by different commentators. The tests in Part III Sections A to E above are, in my view, reasonable ones for a 'quick look' evaluation as to whether the access regime is a 'success' or a 'failure'. Further analysis follows but the 'quick look' shows the regime to be a failure for at least the following reasons:

- no other country in the world has a generic coverage of misuse of market power and also a generic access regime. A generic access regime is simply not needed;
- the Part IIIA regime has not reduced the need for industry specific access regimes in the case of industries generally subject to specific regulation;
- the access regime has inconsistent philosophy from that in other parts of the *Trade Practices Act 1974* (Cth). The market test is different, the drafting philosophy is different;
- the access regime is highly inefficient;
- the access regime has not implemented the agreed principles of the 1995 State/Federal Agreement. The legislation has substantially lowered the access criteria agreed between the States, Territories and the Commonwealth in 1995. It would, I believe, be an interesting enquiry to see how many of the States and Territories were aware of this highly significant variation, and to pursue the path by which the 1995 agreed test was lowered to that enacted.

The Man from Mars would not give the Access Regime a favourable review in the Inter-Galactic Journal of Competition Law.

But, as they say on TV commercials these days, 'THERE IS MORE!!'. Later discussion canvasses a number of other areas in which the access regime is inadequate. Sadly there is not a great deal one can find in its praise. But firstly we must look at what access regimes are all about.

IV ACCESS REGIMES AND WHAT THEY ARE ALL ABOUT: SOME FURTHER DISCUSSION

A *Adam Smith*

When looking at fundamental supply and demand and competition issues, there is perhaps no place better to start then with the philosophy of Adam Smith. Smith stated:

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 interests, he frequently promotes that of society more effectively than when he really intends to promote it.²⁶

The extension of Smith's logic is that societal good is more effectively promoted by individuals pursuing their own ends than by legislators and administrators, with the best will in the world, telling people what they should do in order to promote the overall

²⁶ A Smith, *The Wealth of Nations* (W Strahan & T Cadell, 1776).

benefit of society.

B *Freedom to deal with property is a basic norm in the free enterprise economy*

Akin to Adam Smith's philosophy is that one should have freedom to deal with one's property as one wishes unless there are very good reasons for this right being circumscribed. This is clearly an underlying value of free enterprise systems. This value restrains States in what they should or should not do, no matter what economic theory may say to the contrary and no matter how picturesque the algebraic theorems, formulae, graphs and diagrams upon which any such economic theory is based.

C *The problem of defining the problem*

Extensive regulation is bad for business in that business is put to the cost of having to make submissions to government; often on a regular basis. There are also delay costs in this. Excess regulation is bad for the public because not all regulatory decisions can be made both expeditiously and after careful and well considered judgment. Even on a cursory evaluation, government regulation can at best be seen as a productive solution only to select problems. Like medication, regulation should not become a basic norm for an essentially healthy free enterprise system. A major problem of regulation is keeping it to the minimum necessary to cure specific ills and prescribing with precision the medication which will cure those ills.

D *The inherent inadequacies of regulatory solutions*

In my view it is sad that the inherent inadequacies of regulatory solutions are not widely enough recognised. These inadequacies of themselves are reason to keep regulation to a minimum and to prescribe regulatory criteria with precision. It is almost impossible for an outside party, having no responsibility for the decision it makes, to prescribe an access price which is 'right', 'proper' or 'reasonable' in the eyes of all parties.

General criteria can be laid down but often these depend upon ascertaining an initial investment capital base on which to calculate returns. An appropriate capital base is a valuation mirage and is certainly incapable of being ascertained with certainty. This is because there is always a variety of alternative bases from which to choose and no logical reason why one is superior to another. So, in any regulatory price dispute, there will almost certainly also be a dispute as to the appropriate asset base on which rates of return are to be calculated. Should, for example, the relevant capital base be that of:

- historical cost;
- replacement cost;
- optimised replacement cost;
- deprival value; or
- optimised deferral value

or calculated on some other basis?²⁷

²⁷ See Australian Competition and Consumer Commission, 'Access Undertakings; A Guide to Part IIIA of the Trade Practices Act' (1999).

There are similar problems in calculating rates of return which can be, for example, the cost of providing the service, price capped rates of return, efficient component return rates and so on, all of which must have a 'reasonable profit' inbuilt. But what is 'reasonable'?

The Part IIIA Access Regime makes the issue even more murky. It states that the ACCC can take into account only the 'direct costs' of providing access to the service.²⁸ Are 'indirect costs' (which may be very real) ruled out and, if so, why? Can indirect costs be taken into account as a matter of public interest or can the ACCC take these into account as a matter which is 'relevant'?

A prime problem in Access disputes involves the question of compensation for 'investment risk'. The fear of facility owners is that forced access to the investment of another can be 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.*²⁹

The 2001 Productivity Commission's Review of the Access Regime³⁰ concluded that '*the focus for policy makers should not be on whether but how best to address the new investment issue.*'

The Commission could not, however, give advice as to how this would be done because it had been 'unable to resolve' the various issues and weightings involved. It could recommend only that the Council of Australian Governments should initiate a process to refine mechanisms to facilitate efficient investment within the Part IIIA Access Regime in particular and access regimes in general. This process, the Productivity Commission said, should be completed to allow legislative implementation no later than 2003. Not surprisingly perhaps, the issue is still unaddressed. This, in my view, is because the issue is non-solvable on any 'objective' criteria.³¹ Investment planners are thus subject to considerable uncertainties as to just how their risk investment will be allowed for in any access order. A real disincentive to investment is the fear of an investor that, in the case of a successful investment, the access regulator, with the benefit of hindsight, will conclude that there was no real initial risk or that the risk was far lower than was thought at the time the investment decision was made. The regulator, of course, has the benefit of backing the winner after the race has been run.

All of these points make access regulation anything but a 'scientific' solution which is 'fair' to everyone. Access Regulation is very much a poor second best solution which

²⁸ Trade Practices Act 1974 (Cth) s 44X(1).

²⁹ A Kezshom, 'No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine' (1996) *Columbia Bus L Rev* 1, 2.

³⁰ Above n 3, 281. Present writer's emphasis.

³¹ The government response to the Commission's recommendation was that it would consider the context of industry specific regimes. This indicates a 'case by case' approach which is, of course, contrary to the concept of an Access Code which applies across the board.

impinges dramatically on property rights and makes investment and return on investment decisions quite uncertain.

Because forced access sharing is so much a poor second best solution, it is highly important that its use be constrained to those cases where it is the only solution to a basic identifiable and important problem which simply cannot be solved in any other way.

E *The downside of access*

In order to ascertain the downside of access, one has to look no further than *Trinko*, the latest United States Supreme Court decision in point.³²

Trinko involved access to a state telephone ‘local loop’, the denial of which was said to limit the market entry by rivals.

Trinko noted that:

- monopoly power, and the concomitant charging of monopoly prices is not unlawful. The opportunity to charge monopoly prices, at least for a short period, is what attracts ‘business acumen’ in the first place. It induces innovation and growth;
- firms may establish infrastructure that renders them uniquely placed to service customers. Compelling sharing of these economically beneficial facilities lessens the incentive for a monopolist to invest in them;
- sharing involves the possibility of the ‘supreme evil of antitrust’: collusion. The antitrust laws are aimed to encourage independent decision making;
- mistaken inferences from conduct are easy to draw. These can result in false condemnations. Such condemnations are costly because they chill the very conduct which competition law aims to protect. The cost of ‘false positives’ counsels against an undue expansion of monopolisation liability;
- there is an ‘uncertain value of forced sharing’ and difficulty in identifying its virtues; and
- there is a difficulty in regulators identifying and remedying conduct which is engaged in by a single firm.

F *United States monopolisation jurisprudence*

The problems of a law which grants access too easily are clear from *Trinko*. It is not possible here to analyse the United States jurisprudence in detail. Perhaps the most influential case in point, though one not specifically adopted by the United States Supreme Court, is the 7th Circuit decision in *MCI Communications*³³ which case concluded that, in order for an ‘essential facility’ to be found and for access to it to be ordered, there must be:

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

³² *Verizon Communications v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004).

³³ *MCI Communications v AT&T Co.* 708 F2d 1081 (7th Cir 1983).

- the denial of the use of a facility to a competitor; and
- access to the facility must be ‘feasible’. A defendant will be entitled to deny access for legitimate or technical reasons.

The ‘feasibility’ of denial is decided on a ‘case by case’ basis as advance identification of all such justifications considered in the absence of specific fact situations is simply not possible. Limited capacity and quality control concerns are probably the main reasons which have been held to constitute “feasible” reasons for denial of access where the first three of the above criteria have been established.

G *Australian s 46 jurisprudence*

The Australian access regime was the result of the 1993 Hilmer Committee Report and was enacted in 1995. At that time, there was but one s 46³⁴ High Court decision.³⁵ The Productivity Commission’s Independent Review of the Access Regime was conducted in 2001, and was also conducted when there was only one High Court s 46 decision. Since then, there have been four subsequent High Court s 46 decisions,³⁶ none of which could be taken into account in the Productivity Commission review.

It is clear from the last of these High Court decisions, the *NT Power Case*,³⁷ that s 46 applies to illegalise a refusal of access where a monopolist controls an essential facility which cannot practically or reasonably be duplicated and uses its control to advantage its competitive position in an upstream or downstream market. It is also clear from *Melway*³⁸ that a proper business justification for a refusal of access will justify such a refusal. From *Boral*,³⁹ it is clear that s 46 will be interpreted in a manner which:

- does not involve a contravention merely because an entity acquires plant and equipment because it is desirable that the section not be used as an excuse for failure to invest;⁴⁰
- recognises that competition laws are concerned with the protection of ‘competition’ not ‘competitors’;⁴¹ and
- recognises that it is the interests of competition law to permit firms with substantial degrees of market power to engage in vigorous competition.⁴²

In broad analogy, the Australian law on misuse of market power is in accord with that of the United States. Whatever may have been the perceived position at the time of the gestation, enactment and review of the Access Regime, in light of the decision in NT

³⁴ For a brief outline of s 46 see above n 1.

³⁵ *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* (1989) ATPR ¶40-925.

³⁶ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13, (2001); *Boral Besser Masonry Pty Ltd v ACCC* (2003) ATPR ¶41-915; *Rural Press Limited v ACCC* [2003] HCA 75, (2003); *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

³⁷ See above n 1. See general outline of the facts and holdings in this case at Part I, Section B of this article.

³⁸ *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13.

³⁹ *Boral Besser Masonry Pty Ltd v ACCC* (2003) ATPR ¶41-915.

⁴⁰ *Boral Besser Masonry Pty Ltd v ACCC* (2003) ATPR ¶41-915, 46,688.

⁴¹ *Ibid.*

⁴² *Ibid.*

Power⁴³ there can be no doubt that s 46 deals with the politically expressed ‘notion underlying the (access) regime’ which 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.’⁴⁴

It was precisely this issue which was before the High Court in *NT Power*⁴⁵ and an analysis totally in accord with the above objectives of the PART IIIA regime was adopted by the Court.

Given the above objective of the Access Regime and the present state of the s 46 law, one wonders why the PART IIIA Access Regime’s objectives are not presently achieved under s 46.

V THE ACCESS REGIME: SOME DETAILED COMMENTS

A *Essentiality*

Some specific comments on the Access Regime are in order. In discussion of these specifics, however, what is perhaps the Regime’s major point should not be overlooked. This is that it does not require that a facility be ‘essential’ and ‘unable to be duplicated’ before access may be granted. This is an important threshold reduction from the tests in United States (and, it is submitted, Australian) jurisprudence⁴⁶ and has resulted in the Act implementing a regime far different from that agreed in the Intergovernmental Agreement to establish the regime.

B *Competition and philosophy*

The Act also envisages a different competition evaluation to that in the balance of the *Trade Practices Act 1974* (Cth). The reason for this has not been credibly explained.⁴⁷ The Act also lays down broad enquiry criteria which are philosophically inconsistent with the approach taken to breach in the rest of the Act.⁴⁸

C *Evaluative Criteria Inadequacies*

The basic evaluative criteria in the access regime (see Tables I and II in the Appendix) are quite inadequate. They have been scrambled together without great thought as to what is involved and certainly with no attempt to give a facility owner any real idea of how the facility will be evaluated for access purposes. The following will illustrate the point:

⁴³ *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48. See also details of case set out in Part I, Section B.

⁴⁴ Hansard (H of R), 30 June 1995, 2755.

⁴⁵ *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48. See also details of the case set out in Part I, Section B.

⁴⁶ See Part III, Section E, Part IV, Section F and Part IV, Section G of this article.

⁴⁷ See Part III, Section C. The only possible explanation is set out above n 13.

⁴⁸ See Part III, Section C.

- The same criteria have to be evaluated by both the NCC and the ACCC. There is no guarantee that the view of one regulator will be accepted by the other. So, a favourable ‘public interest’ finding by the relevant Minister is a pre-requisite to a declaration of a facility and arbitration by the ACCC as to terms of access to it. Can the ACCC, on the criteria set out for it, re-assess an issue previously determined by the Minister? Indeed, one can foresee potential litigation here. Should the ACCC seek to re-assess, say, the public interest criteria, it is arguable that it could be ‘estopped’ from doing so as the Minister had already determined the same issue and a favourable Ministerial finding was a pre-requisite to the ACCC having any jurisdiction to arbitrate the matter.
- A similar position to the above applies in relation to differently worded criteria. In declaration proceedings, the NCC and the relevant Minister have to consider, amongst other things, whether access can be provided without undue risk to human health or safety.
- The NCC says in its Declaration Guide⁴⁹ that the above assessment may involve an evaluation of the safety of gas transmission lines or airport facilities. The ACCC in arbitration proceedings is to consider ‘the operational and technical requirements necessary for the safe and reliable operation of the facility’. Are these two things the same? Why do they have to be considered twice? In the case of a disagreement between the two regulatory bodies, who wins?
- The selective specification of criteria necessarily means that some criteria are omitted from the ‘shopping list’ and some on it are irrelevant to particular cases. No-one but a clairvoyant could contemplate all cases where ‘business justification’ might be a valid ground to deny access. The Regime has chosen a few randomly selected grounds and, because of this, has necessarily had to include ‘catch all’ public interest criteria. The more logical step would be to allow an adjudicator a broad discretion to determine whether grounds for denial are legitimate rather than attempt to specify those grounds in detail. A general safeguard could be added that a business justification is not a valid reason for access denial unless there is no less restrictive alternative available, as is the case in the United States.⁵⁰
- The result of the public interest criteria appearing in the relevant tests is that access applications can become a type of roving Royal Commission. The NCC, for example, says that public interest matters it may consider in access applications include:
 - social and equity considerations;
 - employment and investment growth; and
 - the interests of consumers generally.

⁴⁹ National Competition Council, *Guide to the National Access Regime (Part IIIA of the Trade Practices Act 1974)* (2006) 114
 <<http://www.ncc.gov.au/publication.asp?publicationID=166&activityID=32>> at 19 April 2006.

⁵⁰ *Phonetele Inc v American Tel & Tel Co* 644 F2d 716 (9 Cir 1981). The onus of proof in this regard is on the defendant. Frequently less restrictive alternatives do exist. See cases cited in *Mozart Company v Mercedes* 833 F2d 1343, 1349 (9 Cir 1987).

These are policy issues. Access is about competition. Access applications should not be turned into roving Royal Commissions on the economy.

- Because of a confusion of criteria, some criteria are evaluated by the wrong regulatory body. In the United States, probably the most common reason pleaded to deny access when it would otherwise be granted is that there is ‘business justification’ for such denial. Yet under the Access Regime this cannot be pleaded in declaration proceedings. A facility holder wishing to make this plea should be able to do so at the first available opportunity and not be required to suffer NCC, political and ACT evaluations before having a right to plead its basic defence.
- The criteria are not mutually exclusive. An access order may, for example, be able to be provided without undue risk to human health or safety but only if certain procedures are adopted. These may involve significant expenditure. The basic issue of health and safety has to be considered by the relevant Minister in declaration proceedings. Questions of expenditure, or willingness to engage in it, are, however, not matters for the NCC or the relevant Minister in declaration proceedings but matters for the ACCC in subsequent arbitration proceedings. Artificial segmentation of these issues means that they cannot be determined by anyone as a totality.

One can conclude only that the selectivity of criteria causes considerable difficulty, that the division of regulatory adjudicative functions is far from satisfactory and that the artificialities involved can result in confusion and perhaps in some cases in relevant considerations not being considered at all. One adjudicative body and one set of evaluative criteria would seem to be an obvious solution. Such a step would also be a considerable help, one would think, in the overall efficiency and smooth running of the regime.

D *The coverage of the regime is too wide. It covers matters which have nothing to do with competition.*

As is apparent from the comments in Part I above, access regimes aim to correct the position where a monopolist can take advantage of a monopoly position in one market by denying facility access to a competitor, actual or potential, which wishes to compete against it in another. It is axiomatic from this that one competitor is denying access to another competitor, actual or potential. Absent a denial of access to a competitor, there is no competition issue.

To take an example. If I own a bridge (assuming that the bridge is a monopoly facility) and am not engaged in an ‘upstream’ or ‘downstream’ transport market, I am not disadvantaging a competitor in a second market by charging high prices for access to that bridge. This is a simple supply and demand situation. My incentive to maximise profit from the bridge is to have as many people as possible use it at the price I set. This is a decision I take to maximise usage, not to deny it.

Similarly but not identically, if I am a railway company not engaged in telecommunications and a telecommunications company would like to buy land I own adjoining my railway line in order to lay a telecommunications cable, my incentive, if I

wish to sell the land, is to obtain the best price for it. I am merely doing what all vendors do. This is a vendor/purchaser relationship and, regardless of the fact that potential buyers may regard my asking price as “exorbitant” and only possible because of my ‘monopoly’, it has nothing to do with advantaging my position vis-à-vis a competitor.

Neither the bridge usage nor the rail land sale scenario involve my taking advantage of a monopoly market to disadvantage my competitor, actual or potential, in another market. However, at least the bridge example (and possibly both examples) is within the Access Regime as it is currently interpreted by the NCC.

Access regimes are aimed at protecting the competitive process and to provide access to facilities when denial of such access brings about the breakdown of that process. Access regimes are not aimed at correcting individual hardships which may be suffered because an individual believes he or she is paying too much for a product. This is a question of supply and demand or, if the government feels there is reason to do so, for legislative intervention by way of price control measures.

Owners of non-integrated facilities have no incentive to use market power, if it exists, to reduce the level of service offered. As stated in the Sydney Airport Freight Handling Case,⁵¹ in the case of non-integrated monopolies, ‘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 the facility is not competing in upstream or downstream markets, it usually has little incentive to deny access.

Submissions were put to the Productivity Commission that a non-integrated facility owner, even if having no reason to deny access to facilities, should still be covered by PART IIIA because it would have an incentive to exploit market power when setting the price and conditions of access.⁵² Perhaps a non-integrated monopolist would have such an incentive but this view denies a monopolist the right to set its prices and maximise its profits in doing so. A monopolist, like everyone else, has the right to profit maximise without, by doing so, breaching competition law.⁵³

⁵¹ *Review of Declaration of Freight Handling Services at Sydney International Airport* (2000) ATPR ¶41-754. Concern could be felt if exclusivity arrangements grew up between parties which were affiliated. See, for example, submissions to Productivity Commission cited at p 52 of its Report (above n 3). However, these arrangements would, it is submitted, fall for evaluation under s 46 of the *Trade Practices Act 1974* (Cth) (misuse of market power), s 47 (exclusive dealing) and perhaps s 45 (arrangements between competitors) and would be illegalised if falling foul of them.

⁵² See submissions set out in Productivity Commission Report above n 3 at p 52 as to the issue of non-integrated monopoly holders being ‘affiliated’ with other entities. See above n 51 as to the operation of the *Trade Practices Act 1974* (Cth) in relation to these ‘affiliations’.

⁵³ It is to be noted that, in *Verizon Communications v Law Offices of Curtis V Trinko LLP* 540 US 398 (2004) the United States Supreme Court specifically held that charging monopoly prices was of itself not unlawful. Indeed, said the court, the ability to charge monopoly prices, at least in the short term, is what attracts ‘business acumen’ in the first place, induces risk taking and produces innovation and growth. It is submitted, for akin reasons, s 46 of the *Trade Practices Act 1974* (Cth) is not breached simply by monopoly pricing.

On the above issue, the NCC has opined that:

*provided the infrastructure operator is not vertically integrated (affiliated) with upstream/downstream business interests, the public policy issue is about dealing with monopoly pricing. An access regime is one means of restraining prices and maintaining efficient levels of output in these situations.*⁵⁴

This brings the bridge example previously given within the Access Regime.

The Productivity Commission recommended that the Access Regime should ‘continue to cover eligible services provided by both vertically integrated and non-integrated facilities’.⁵⁵ The access regime, as it is currently administered, has thus introduced a form of price control not justified to protect the competitive system itself and not in accordance with the policy of its enactment, which policy said nothing about the control of monopoly pricing decisions.

Those who believe in conspiracy theories could well see the Access Regime as being the introduction of price control by stealth.

VI PROBLEMS OF ADJUDICATION

A *The adjudicative options*

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. The options are amongst:

- courts;
- a regulatory authority;
- arbitrators; and
- the government.

The Access Regime has them all. There are three regulatory decision making authorities [The NCC, the ACCC and the ACT (though the latter may be regarded as a quasi court)]. The ACCC has an arbitration function as does the ACT on appeal. There are potentially nine ministerial decision makers.⁵⁶ The Federal Court is involved in appeals on questions of law. Different bodies decide different issues on different criteria. A cursory evaluation of this structure must indicate a managerial disaster waiting to happen. Efficiency has, therefore, not surprisingly, not been an outstanding feature of the Access Regime.⁵⁷

B *The merits of the courts as adjudicator*

Courts are regarded as not vulnerable to outside influence, as having strict procedural and substantive safeguards and as making decisions on a reasoned and impartial basis.

⁵⁴ National Competition Council, *National Access Regime – Guide to Part IIIA of the Trade Practices Act: Part A Overview* (2002) [2.3].

⁵⁵ Productivity Commission Report, above n 3, Finding 6.2, XXXII.

⁵⁶ See above n 16.

⁵⁷ See Part III, Section D of this article: *Is the regulatory regime administratively efficient?*

Consistency of approach and adherence to precedent principles are also highly regarded factors in court evaluations.

Courts as dispute solvers thus have high credibility and acceptance. However, they have downsides. These are perceived primarily as being:

- an inability to set and monitor prices and access terms when these must necessarily be part of an access order;
- the inability to give remedies other than the traditional remedies of damages and injunction;
- the inability, by virtue of their role, to gather their own facts and evidence and the necessity, therefore, to rely only upon evidence submitted by parties to the dispute; and
- a perceived lack of commercial expertise. (This may be put from the subjective view of the proponent. I am not sure that an economist employed by a regulatory agency has any better capacity than a judge to appreciate a complex engineering issue. Each necessarily depends upon outside experts.)

C *Regulators as adjudicators*

The advantages of regulatory authorities as adjudicators are that they are perceived as having commercial expertise and they do have staff to collect evidence. The problem arises when the regulator is also the adjudicator and when the regulator is perceived as having agendas outside those of the issue directly before it.

The ACCC, being the prime regulator in the Access Regime, was seen by many in submissions to the Productivity Commission of Inquiry Report to be in a number of areas less than objective in making its adjudicative decisions. Not unexpectedly, a major complaint was delay and the attendant costs involved in this. But the criticisms went deeper than this. They included:

- inconsistency;
- subjective judgments;
- cherry picking methodologies;
- use of false benchmarks and asymmetric approaches such that consistency could not be maintained into the future.⁵⁸

Submissions made to the Productivity Commission also noted that regulators had:

- formidable problems dealing with cost estimations;
- problems dealing with estimations made as the basis for investment decisions; and
- problems dealing with rapid technological change.

No doubt these problems confront the judiciary as well though criticisms of the judiciary in this regard do not seem to be as vehement as those of regulatory authorities. Probably this is because the judiciary is, whatever its faults, seen as impartial and as having, in its decision making, no political, social or economic 'agenda'.

⁵⁸ Productivity Commission Report, above n 3, 90-1.

Submissions to the Productivity Commission noted ‘regulatory capture’ in ways inimical to the public interest. This was said to take a number of forms. Regulators:

- may be reluctant to admit prior errors;
- may tend to bring their own values and predilections to the decision making process;
- could focus too heavily on the short term interests of consumers rather than identifying the wider picture. One submission stated:

given the primary role of regulators as ‘consumer advocates’, they have applied (their) discretion with the primary objective of ensuring lower reference tariff prices for consumers with little – if any – regard to the implications of their actions on the term development needs for energy infrastructure such as gas transmission pipelines.⁵⁹

The above observations are made to illustrate the types of problems seen by regulated industries in the regulatory decision making process to which they are subject. The comments are not made to denigrate the ability of regulators for, as has been previously noted⁶⁰ many regulatory problems, by their very nature, are incapable of an ‘objective’ solution acceptable to all. This, indeed, is of itself a strong reason why access orders should be kept to a minimum and used as a pro-competitive tool only where the competitive process itself is in danger of collapse without an access order being made.

A major problem perceived by regulated industries in regulatory decision making was that of actual or perceived regulatory bias. Whatever the merits of the industry views, I believe that no adjudicative system can enjoy support if those subject to it see actual or a perceived bias in those adjudicating their rights and obligations. This industry perception is of itself a major reason for circumscribing the amount of regulatory decision making in the access regime.

D Arbitrators as decision makers

Arbitration by a party appointed by disputants is a highly attractive dispute settlement tool. The essence of commercial arbitration is, however, that the parties choose the arbitrator (or there is some pre-dispute default arrangement for doing so in the event of non-agreement) and the parties determine the issues to be decided. In the case of the Access Regime, the term ‘arbitration’ is somewhat misused. The ACCC is, by law, the arbitrator of access terms. The parties do not determine the agenda. This agenda is determined by the legislation and permits the arbitrator to take into account, in reaching its decision, ‘such other matters that it thinks are relevant’.⁶¹

Arbitration, as provided in the Access Regime, is thus not an independent means of adjudication. The various strengths and weaknesses of Regulators as adjudicators (see Part VI, Section C above) are totally applicable to the arbitration provisions of the Access Regime.

⁵⁹ Productivity Commission Report, above, n 3, 93. Submission of the Australian Pipeline Industry Association.

⁶⁰ See Part IV, Section D (above) of this article.

⁶¹ *Trade Practices Act 1974* (Cth) s 44X(2).

E *The government as an adjudicator*

The Access Regime provides for Ministerial decision making (or more accurately for the possibility of nine Ministers making decisions⁶²). The present position is that the relevant Minister can make a positive decision or do nothing. If the Minister does nothing, the application fails. The ‘do nothing’ option is, by the very nature of politics, highly attractive to politicians as it preserves the status quo. One would think that if the relevant Minister does nothing, the default position should be that the NCC recommendation is to be implemented. As the relevant Minister’s decision can be appealed to the ACT, intermediate political adjudicative intervention seems to have no effect other than to either ‘buck pass’ or delay the declaration process. Whatever its prior justification as a method of forging State/Federal/Commonwealth agreement on the law, there seems no present case for preserving the Ministerial decision making function or for injecting politics into a decision making process which should be based solely on the merits.

F *What sort of an adjudicative system?*

It is not intended here to put into Chapter and Verse the adjudicative system which would suit an access regime. Clearly the present system merits change. In principle, one would like to see a system which embodied judicial impartiality with administrative back up in any areas where court processes are inadequate.

In my view, this would involve the court determining on specifically stated criteria such as those which have found some favour in the United States:⁶³

- whether a prima facie case for access has been made out; and
- whether there is a ‘business justification’ made out whereby access can be denied.

If an issue arises with which the court believes it cannot deal (because, say, it involves setting of an access price or it involves continuous supervision which the court cannot perform), this issue could be delegated to an administrative regulatory authority. This authority would function under court auspices. It should not be the ACCC because of perceived bias seen in the adjudicative reasoning of that body. It could be the Trade Practices Tribunal or members of it, some of whom might be appointed for this purpose. It could be someone totally external. It could perhaps even be Commissioners of the ACCC specifically appointed as ‘Judicial Commissioners’ and having no administrative or policy responsibilities.

It may be that all decision making issues under the Access Regime could be put in the hands of the ACT, somewhat revamped to fulfil this function. This too would achieve an appropriate independence of decision making and may well have the administrative plus of keeping all proceedings under one roof – a roof which can be seen as genuinely independent of the policy role served by the ACCC.

⁶² See above n 16.

⁶³ See MCI Communications above n 33.

VII THE MISUSE OF MARKET POWER LAW VERSUS THE ACCESS REGIME: WHO WINS?

It is obvious that the Access Regime and s 46 of the *Trade Practices Act 1974* (Cth)⁶⁴ each cover substantially similar territory. Indeed, in all advanced countries other than Australia, there is no generic access regime and access issues in industries other than those subject to specific regulation are covered by statutory provisions akin to s 46.⁶⁵

The writer's view is that s 46 is a far superior law covering access regimes, though perhaps the judicial machinery may need some revamping to deal more adequately with the issues.⁶⁶

Regardless of the above, what is clear is that there is potential for conflict between s 46⁶⁷ and PART IIIA. In view of the fact that both laws are generic, a resolution of this conflict is essential. Which law is to triumph?

The Hilmer Report recommended that the Access Regime should have precedence and that the Access Regime should exclude any right to bring an action in relation to refusal to provide access to a declared facility under the misuse of market power provisions of the Act's competitive conduct.⁶⁸

The legislation implementing Hilmer did exactly the opposite.⁶⁹

We are thus faced with the possibility of dual obedience and the problem of precedence in the case of conflict. This could easily have been avoided.

VIII IS THE ACCESS REGIME TOO WIDE? SHOULD IT BE LIMITED TO GOVERNMENTAL ENTITIES AND CORPORATISED OR PRIVATISED GOVERNMENTAL ENTITIES?

The Hilmer Committee Report,⁷⁰ upon whose findings the generic access regime was enacted, recommended the same access rules, irrespective of facility ownership. This was a conclusion reached as a matter of principle. However, the Hilmer Report was unable to identify any services to which its recommended access regime might apply apart from those traditionally supplied by government monopolies and which had significant government involvement either as owner or extensive regulator.

Given that s 46 is a general provision illegalising misuse of market power, the inability of the Hilmer Committee to identify any privately owned industry to which the access regime would be applicable indicates to me that s 46 is adequate and that there is no justification at all for the extension of the PART IIIA regime to privately owned

⁶⁴ See above n 1 for a brief summary of s 46.

⁶⁵ See Part III, Section A (above) of this article.

⁶⁶ See Part VI and, in particular Part VI, Section F above.

⁶⁷ There is also the possibility of conflict between s 45 and s 47 of the *Trade Practices Act 1974* (Cth) with PART IIIA but these possibilities are not here discussed.

⁶⁸ Above n 20, 267.

⁶⁹ Under s 44ZZNA nothing in the Access Regime is to affect PARTS IV and VII of the *Trade Practices Act 1974* (Cth). Section 46 is in PART IV of the Act.

⁷⁰ Above n 20.

facilities. The need for some kind of access regime for government owned facilities was demonstrated to the satisfaction of the Hilmer Committee. This need was even more apparent, given that at the time Hilmer was considering the matter State conducted business activities were totally exempt from the operation of the *Trade Practices Act 1974* (Cth) and that it was primarily these businesses where access was the greatest problem. Hilmer recommended that the State business exemption be changed, and it was.

No doubt the access regime should apply not only to government businesses but also to government subsequently corporatised and privatised institutions, which could, no doubt, be identified reasonably easily. Government may well see its role in business as being one of fostering access to its facilities. No-one can complain at government taking this philosophical attitude to its business activities. Given, however, the presence of s 46 and the inability of Hilmer at the time (1993) to identify a single private enterprise activity to which the access regime might be applied, there simply has not been a proven case for the application, industry wide, of the access regime.

Any review of the Access Regime should also review whether it needs to apply to all enterprises or only to those of a governmental nature.

IX THE MAN FROM MARS WOULD HAVE DONE BETTER

From all of the foregoing, it is obvious that the Man from Mars,⁷¹ seeking only the achievement of a stated legislative objective in an administratively efficient manner, could have done much better in any legislation he might have chosen to enact.

A *The Man from Mars and administrative efficiency*

In considering administrative efficiency, the Man from Mars would have done at least the following:

- made the Access Regime consistent with the rest of the *Trade Practices Act 1974* (Cth) in philosophical approach and in relation to the competition test to be evaluated;⁷²
- created an arrangement which did not have obvious administrative difficulties. In this regard, he would not have made the scheme subject to a variety of tests adjudicated by different regulatory bodies – a scheme necessarily subject to delays and inter-agency demarcation disputes.⁷³ He would not have required the same criteria to be evaluated by two separate bodies⁷⁴ and would have chosen a clear adjudication concept after a detailed evaluation of the merits of the various adjudicative options available.⁷⁵ He would have created criteria of access which gave rise to the omission of no important matters.⁷⁶ He would not have failed to

⁷¹ See Part II above for an outline of the thoughts of the Man from Mars.

⁷² See Part III, Section C for problems in this regard.

⁷³ See general observations at Part III, Section D.

⁷⁴ See Part V, Section C. The same criteria have to be evaluated by both the NCC and the ACCC. A similar position to the above applies in relation to differently worded criteria.

⁷⁵ See Part VI above and particularly Part VI, Section F.

⁷⁶ See Part V, Section C. The selective specification of criteria necessarily means that some criteria are

conceptualise criteria adequately and accurately thus ensuring that no criteria were evaluated by the wrong regulatory body.⁷⁷ He would have ensured that evaluative criteria were mutually exclusive.⁷⁸ Any system introduced by the Man from Mars would not be, as the access regime is, an evaluation of such wide criteria that it is, in fact, a type of roving Royal Commission;⁷⁹

- prescribed in order to give clarity and certainty whether in cases of conflict, the access regime or s 46 covering misuse of market power was to be the law to be obeyed.⁸⁰

B *The Man from Mars, the necessity for an access regime and the scope of it*

The Man from Mars would also look beyond administrative efficiency into philosophy and ask a fairly simple question – ‘What are we trying to achieve through an access regime?’. He would recognise that:

- societal and competitive benefit is achieved by parties acting in their own self interest;⁸¹
- the right of freedom to deal with property is not one which should be interfered with except for highly compelling reasons;⁸²
- whatever the wisdom of regulators, regulation, because of its inherent difficulties, necessarily is very much a ‘second best’ choice.⁸³ Further, there are considerable downsides in regulatory solutions as they necessarily involve curbs on business incentives;⁸⁴
- any problems to be addressed have to be defined with specificity. This evaluation would lead to the conclusion that regulation should be kept to the minimum required to cure specifically defined ills.⁸⁵ The basic ill to be cured by an access regime is that, in certain cases, the competitive system will not work without access being ordered. As stated above, regulatory solutions have significant downsides and are very much ‘second best’ solutions. They must, therefore, be applied sparingly and only where the normal competition process is unable to function without them. This means that they should be applied to cure problems in the competition system and should be applied for the benefit of ‘competition’ not ‘competitors’.⁸⁶ The Access Regime is not a solution to high monopoly pricing unless a monopolist uses its market power to disadvantage a competitor in a second market. The problem of high monopoly pricing is not a competition issue.⁸⁷ Similarly the competitive

omitted from the ‘shopping list’ and some on it are irrelevant to particular cases.

⁷⁷ See Part V, Section C. Because of a confusion of criteria, some criteria are evaluated by the wrong regulatory body.

⁷⁸ See Part V, Section C. The criteria are not mutually exclusive.

⁷⁹ See Part V, Section C. The result of the public interest criteria appearing in the relevant tests is that access applications can become a type of roving Royal Commission.

⁸⁰ See Part VII above.

⁸¹ See Part IV, Section A.

⁸² See Part IV, Section B.

⁸³ See Part IV, Section D. Note also the difficulties experienced by industries subjected to regulation in relation to the regulatory decision making process [at Part VI, Section C].

⁸⁴ See Part IV, Section E.

⁸⁵ See Part IV, Section C.

⁸⁶ See text relating to Part IV, Section G and commentary citing Boral (text relating to above n 39- n 42).

⁸⁷ See Part V, Section D. Note that price control was never stated to be an objective of the Access

process has not broken down simply because a party cannot obtain access. An access order is appropriate only if an entity is unable to duplicate the facility in question, is precluded from the market and, because of this, competition is eliminated;⁸⁸

- only if a competitor, actual or potential, is eliminated from the market is the competitive process negated. The Access Regime does not provide to this effect;⁸⁹
- the State/Commonwealth Agreement explicitly provided that ‘essentiality’ of access was its basic rationale. Yet this did not get translated into legislation;⁹⁰
- the objectives of the Act have always been put in terms of protecting a competitor of an entity owner and never as a method of price control. On the interpretation of the Act at this stage, this too is not how the Act works.⁹¹

C *The Man from Mars in evaluating the Access Regime’s performance and scope*

The Man from Mars might reasonably also look at some outcomes of the access regime in terms of performance and scope. No other country in the advanced world has both a generic access regime and a generic provision covering misuse of market power. The Man from Mars might well ask ‘Is this not a prima facie case of overregulation?’ The answer to this question must clearly be ‘Yes’.⁹² He might not unreasonably conclude that any generic scheme should perhaps be limited only to ‘governmental type’ industries. After all, the Hilmer Report could identify governmentally operated facilities (and presumably those of industries of a governmental nature subsequently privatised or corporatised) as being the only ones where an access regime could be seen to deliver benefit.⁹³

The Man from Mars might also ask if the generic Access Regime has limited specific industry regulation in Australia or is there still in Australia specific industry regulation in those industries where such regulation is common overseas. Clearly the generic regulatory regime has not reduced specific regulation at all.⁹⁴

In short, the Man from Mars could well conclude that the access regulation scheme has been cast too widely and no real attempt has been made to determine where it may be needed.

I believe that an evaluation along the above lines would show that s 46 of the *Trade Practices Act 1974* (Cth) covering misuse of market power⁹⁵ and delimiting with specificity those factors necessary to preserve the competitive process⁹⁶ would be adequate protection in all but specifically regulated industries and ‘governmental type’

Regime but is apparently regarded by the NCC to be so.

⁸⁸ See Part III, Section E. Note this test was that provided in the Commonwealth – State Co-operation Agreement in relation to the principles of the regime but these principles were not carried into legislative effect.

⁸⁹ See Part III, Section E.

⁹⁰ Ibid.

⁹¹ See Part V, Section D.

⁹² See Part III, Section A.

⁹³ See Part VIII above.

⁹⁴ See Part III, Section B.

⁹⁵ See above n 1 for brief details of s 46.

⁹⁶ See, for example, *MCI Communications v AT&T Co.* 708 F2d 1081 (7th Cir 1983) and general commentary in Part IV, Section F.

industries. This is especially so in light to the High Court decision in *NT Power*.⁹⁷

D *The way forward*

Sadly, it is not possible to find great virtue in the Access Regime. It deserves overhaul. This, no doubt, will be a drawn out procedure. The first evaluation of the Act was in 2001.⁹⁸ The legislation implementing this review was enacted in 2006.⁹⁹ Thus legislative amendment of legislation having its gestation in 1993 with the Hilmer Committee Report is, on past performance, a 13 year process. The Productivity Commission's 2001 Report was delivered when only one High Court s 46 case had been determined. Whilst the inadequacy of s 46 was considered a major reason for the enactment of the Access Regime, it is time to consider whether this rationale is still valid and, if so, to what extent.¹⁰⁰ It is time to start a second review now in view of the inadequacies of the Access Regime, the changed s 46 jurisprudence and the fact that a review, if commissioned in 2007 will not, on present form, result in any legislative action until 2020.

It should be noted that, if my criticisms are considered extreme or if my view that the Access Regime should be pruned back is considered extreme, I am in good company. Those responsible for the recommendation to enact the access regime and those responsible for reviewing it are by no means implacable in their views. The Hilmer Committee¹⁰¹ commented that the Access Regime should be applied sparingly. The Productivity Commission's Review of the Regime noted that, generally, competitive pressures are likely to inhibit the ability of facility owners to restrict access and that this 'reinforces the need not to dismiss the "no regulation" option particularly given the likely costs of remedial intervention.'¹⁰²

X IN CONCLUSION

A review of the Access Regime would demonstrate that it has many defects. A number of these have been highlighted in this Paper. The only conclusion is that:

'The man from Mars could have done much better.'

Perhaps the next review of the access regime will evaluate it in terms of objectives to be achieved and the efficiency in doing this rather than as an issue of Federal/State politics. Undoubtedly, the political issues concerned in the Act's gestation resulted in the monster¹⁰³ which is the current regime. Now that the scheme is in operation and States have been 'compensated' for their 'sacrifices', we may be able to get around to the real issues of what an access regime is all about and the extent to which it is needed.

⁹⁷ See Part I, Section B and Part IV, Section G.

⁹⁸ Productivity Commission Report, above n 0.

⁹⁹ *The Trade Practices Act Amendment (National Access) Act 2006* (Cth).

¹⁰⁰ See *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13, (2001); *Boral Besser Masonry Pty Ltd v ACCC* (2003) ATPR ¶41-915; *Rural Press Limited v ACCC* [2003] HCA 75, (2003); *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48 for the four High Court s 46 decisions given since the Productivity Commission's review of the Access Regime.

¹⁰¹ Above n 20, 260.

¹⁰² Productivity Commission Report, above n 3, 58.

¹⁰³ See Kench, above n 15.

APPENDIX

TABLE I
[Refer Par 1.3]

<p>Matters to be taken into account by National Competition Council before recommending declaration of service* [Trade Practices Act s.44G(2)]</p>
<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>*NOTE NCC recommendations are subject to Ministerial decision on essentially the same criteria [Trade Practices Act s.44H(2); s.44H(4)].</p>

TABLE II
[Refer Par 1.3]

<p>Matters that the Commission must take into account in arbitration proceedings* [Trade Practices Act s.44X]</p>
<p>44X (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>

TABLE III
[Refer Par 1.3]

