Multi-User Infrastructure Access:
Implications of Third Party Access for Infrastructure Access

A presentation by Ed Willett
Executive Director, National Competition Council
to
Western Australia Infrastructure 2000 Conference,
Perth
17 & 18 July 2000

This paper provides an overview of access work by the NCC and canvases some likely and desirable future directions. It is a good time to provide this overview, because access regulation in Australia is approaching crossroads. A review of the scope and operation of telecommunications regulation (including access regulation under Part XIC) by the Productivity Commission has recently begun. A similar review of the scope and operation of Part IIIA will start later this year. Further, the Productivity Commission is about to release a draft report on the role of the Prices Surveillance Act. This report is likely to examine overlapping and/or complementary aspects of prices regulation and access regulation in relation to natural monopoly infrastructure.

In 1993 the National Competition Policy (Hilmer) Review recommended the creation of a new legislative regime for the general regulation of access to services provided by natural monopoly infrastructure. In 1995, the Competition Policy Reform Act introduced Part IIIA to the Trade Practices Act (TPA). Part IIIA creates three processes for providing access to infrastructure services:

- State and Territory access regimes, assessed as effective by the National Competition Council (NCC) against criteria in Clause 6 of the Intergovernmental Competition Principles Agreement (the criteria include consideration of whether a regime helps to develop national markets);

- voluntary access undertakings by the owner of the infrastructure for approval by the Australian Competition and Consumer Commission (ACCC); and

- applications to the NCC for a recommendation to the relevant Government Minister for 'declaration' of an infrastructure service to create a legal right to negotiate access agreements enforced by binding arbitration by the ACCC.

Part IIIA has three prime objectives:

- first, to ensure efficient utilisation of natural monopoly infrastructure;

- second, to facilitate efficient investment in natural monopoly infrastructure; and

- third, to promote competition in activities that rely on the use of the infrastructure service where competitive infrastructure services are not economically feasible.

Part IIIA is now about five years old. Access issues have been addressed under one or more of its three processes in relation to electricity, gas, rail transport, airport and commercial shipping infrastructure. Specifically, access is (or is about to become) available in relation to services provided by:

- electricity transmission and distribution wires servicing the National Electricity Market (NEM: which covers NSW, Victoria, Queensland, South Australia, the ACT and, with the construction of Basslink, Tasmania) under undertakings approved by the ACCC. An access regime for electricity and distribution wires in the Northern Territory is currently under development and consideration by the NCC, while a similar regime in Western Australia is yet to be formally considered by the NCC;

- gas transmission and distribution pipes throughout Australia under State and Territory access regimes approved as effective by the NCC;

- rail track in NSW and Western Australia and prospective track between South Australia and the Northern Territory under State and Territory access regimes considered (or soon to be considered) by the NCC. In addition, an access undertaking is currently being developed by the Australian Rail Track Corporation for interstate rail track services for approval by the ACCC;

- services provided by the 'privatised' international airports under the Airports Act, which provides the ACCC with separate authority to declare, or accept undertakings in relation to, these services. A Part IIIA declaration of certain international airfreight related services at Melbourne International Airport has, in accordance with NCC recommendations, expired to allow the Airports Act to operate, while a similar declaration of services at Sydney International Airport has been endorsed by the Australian Competition Tribunal; and

- commercial shipping channels in Victoria under an access regime approved as effective by the NCC.

In addition, a separate part of the TPA (in Part XIC) deals with access to telecommunications services.

This paper starts by briefly outlining the role of the NCC in access regulation.

Following is a discussion in trends in access regulation in industries where the NCC has been heavily involved:

- first, in relation to airports, with a focus on the recent Australian Competition Tribunal decision in the Sydney Airport matter;
- second, in relation to the implementation of the National Gas Code for access to gas pipelines; and finally
- in relation to the development of access to rail track infrastructure throughout Australia.

Role of the National Competition Council

The NCC is responsible for policy advice to all governments in Australia on competition policy reform. In providing this advice, the Council oversights the implementation of National Competition Policy (NCP).

In relation to access to natural monopoly infrastructure, the Council provides advice on the design and coverage of legislative access regimes. This is reflected in the Council's roles in making recommendations for declaration of particular infrastructure services and on the effectiveness of access regimes under Part IIIA of the TPA. These policy roles are quite distinct from the more detailed regulatory roles performed under access regimes by regulators such as the Australian Competition and Consumer Commission.

In effect, the Council is involved in the design of access legislation and helping to determine what infrastructure should be covered by that legislation, while regulators are involved in determining appropriate terms and conditions of access under that legislation.

Access to International Airport Services

The recent decision of the Australian Competition Tribunal in the Sydney Airports matter has clarified many of the contentious issues concerning the interpretation of the criteria for declaration. In particular, the Tribunal has endorsed the view that declaration is primarily concerned with the services of natural monopoly infrastructure where access (or increased access) to those services would promote competition in another market.

The Sydney Airport declaration proceedings have also, I think, clarified how the availability of declaration can ensure access to natural monopoly infrastructure, particularly where such infrastructure is structurally separated, as is the case for Australia's major airports.

Often I think that access regulation is about changing the culture of doing business. During the course of the Sydney Airports matter, I found it interesting to observe the gradually changing attitudes. By the time of the Tribunal hearing, the owner of Sydney airport, the Sydney Airport Corporation Ltd (SACL) recognised many of the problems associated with limiting access to airport services. Indications are that the

decision by the Tribunal has further shifted views in SACL toward a culture of doing business to maximise utilisation of Sydney Airport.

In this context, it is interesting to note that no further issues about access to Sydney Airport have arisen formally, or even informally as far as I know. This is despite the fact that two domestic airlines have recently either started operations on major routes on the east coast, or taken steps toward starting operations. Both appear to have successfully negotiated access to Sydney Airport.

There may be a number of reasons why these negotiations have been concluded without formal access regulation other than the threat of declaration. It may be that formal access regulation that is more intrusive than the threat of declaration is still desirable. But the prospect that light-handed regulation via the threat of declaration alone may be sufficient regulation in this instance does warrant some consideration.

Access to Gas Pipeline Infrastructure

NCP gas reform stems from the 1994 agreement by the Council of Australian Governments (COAG) on free and fair trade in gas. The national gas pipelines access code (the National Gas Code) was signed off by all Australian governments in November 1997, and implementation legislation has since been enacted in all mainland jurisdictions[1].

Like declaration, the National Gas Code provides for the negotiation of access with the infrastructure owner on a commercial basis, backed by mandatory arbitration of disputes. But the National Gas Code also provides mechanisms to provide information to parties to guide the negotiation process. These are contained in an access arrangement that each owner of a covered pipeline is required to submit to the regulator for approval. For example, each access arrangement must specify at least one reference service, which the pipeline owner must make available to access seekers at an approved capped price (the reference tariff). Other requirements on pipeline owners include ring-fencing arrangements separating pipeline businesses from other businesses.

The Council has two roles under the National Gas Code:

- first, the Council verifies that each government has implemented the National Gas Code in accordance with the intergovernmental agreement and as an effective access regime under Part IIIA of the TPA; and

- second, the Council makes recommendations on the coverage of particular pipelines by the National Gas Code – paralleling the Council's role in declaration under Part IIIA.

[1] Tasmania does not yet have a natural gas industry.

The National Gas Code is an important breakthrough in creating more competitive gas markets as it gives customers greater scope to negotiate with a range of gas suppliers, knowing that it is possible to access a pipeline to carry the gas to the required destination.

Although it is still early days, these developments offer the potential to expand the market for natural gas, fuelling the development of new pipeline proposals to link key gas basins with major markets. The $50 million Interlink pipeline from New South Wales to Victoria was opened in 1998, allowing natural gas trades between the two states for the first time.

Already, the Interlink has brought socio-economic benefits, allowing emergency supplies of gas to flow into Victoria from interstate when Victoria's gas production facility at Longford was immobilised in 1998. This enabled hospitals to be supplied with gas, and also enabled pressure to be maintained in the Victorian gas network, averting a major collapse of the system which could have shut down gas supplies in the State for several months.

Work on other new pipelines – like the AGL-Petronas pipeline from Papua New Guinea to Queensland, and the Eastern Gas Pipeline along the south-eastern seaboard –is well advanced. Other proposals would supply gas from Victoria's Otway Basin, the Northern Territory's Bonaparte Basin, and connect the Bass Strait gas fields with Tasmania. As the national pipeline grid fills out, the potential for interbasin competition is rising, with likely flow-on benefits in terms of gas prices. For example, construction of the AGL-Petronas pipeline will bring PNG gas into competition with Cooper Basin gas in Queensland.

1 Certification of State Regimes

To date, the South Australian and Western Australian gas access regimes have been certified as effective. The Council has made a recommendation on the NSW Regime to the Minister, but a decision has been delayed pending resolution of issues arising from the High Court cross-vesting decision in *Re Wakim; ex parte McNally*. The High Court decision has implications for the use of the Federal Court as an appeals body under the National Gas Code.

The Council expects to convey recommendations on the Victorian and ACT Regimes in the near future.

Following are some notable developments in the implementation of the National Gas Code.

Independent regulators

A significant achievement of the National Gas Code has been the development of *independent* regulatory agencies in all participating States and Territories. In some States, this has seen an important shift from the days when these responsibilities were

carried out by monopoly utilities and government departments. This new independence can only strengthen market confidence in regulatory outcomes.

While there has been some concern at the *number* of new regulatory bodies that have appeared recently, the Council notes that these agencies engage in active processes to ensure consistency of approach. For example:

- the heads of State regulatory agencies are appointed as associate members of the ACCC and participate on its Energy Committee to consider gas related issues. This allows expertise to be shared, regional considerations to be taken into account, while helping to forge consistent approaches to regulatory issues. Where responsibilities overlap, regulatory bodies work collaboratively. For example, the ACCC and Victoria's Office of Regulator-General determined a common approach to setting the rate of return and asset bases for Victoria's gas pipeline networks in 1998.

- the Utility Regulator's Forum, established in 1997 between the ACCC, State regulators and the Council, with an express aim of promoting consistent policy development.

In the longer term, regulatory processes may continue to converge. There are signs, for example, that some jurisdictions ultimately favour further development of national institutions in the regulation of the gas industry. The Council would see efficiencies in this approach in the longer term.

Queensland's derogations

By and large, the Council expected – and is finding – that for most jurisdictions, the certification process is raising only a handful of substantive issues. This was to be expected as the Council examined the effectiveness of the National Gas Code in 1997 and recommended a number of amendments, all of which were implemented. As such, most potential certification issues were addressed back in 1997.

Queensland's application has presented some unique difficulties. While the State's application of the National Gas Code is similar in many respects to that of other jurisdictions, there is one significant difference – it contains a number of derogations (variations) affecting major transmission pipelines (see Table 1). In effect, the access pricing principles in the National Gas Code do not apply to these pipelines for several years. The Council's public consultation process indicated considerable concerns about the impact of these derogations.

TABLE 1 QUEENSLAND PIPELINES SUBJECT TO DEROGATIONS

Pipeline License (PPL) Number	Description of pipeline	Revisions commencement date (derogation terminates)
2	Wallumbilla to Brisbane	29 July 2006
24	Ballera to Wallumbilla	30 December 2016
30	Wallumbilla to Rockhampton via Gladstone	The sooner of: (a) the date the capacity of the pipeline exceeds the nominal capacity specified in the pipeline license *or* (b) the date the regulator approves revisions that must be submitted by 31 August 2016
41	Ballera to Mt Isa	1 May 2023

When Queensland applied for certification of its Regime in September 1998, the Council was required to consider implications of the derogations. The approach agreed by the Council was to consider whether the regulatory processes for the derogated pipelines – including pricing outcomes – provide a *reasonable proxy* for the National Gas Code, and if not, whether discrepancies are significant. The Council sought the advice of the ACCC on these issues.

The ACCC has now completed a substantial report on these matters and the Council has held discussions with Queensland on its implications. The main body of the Report can be viewed on the Council's website at www.ncc.gov.au

The Council notes that the Queensland Regime was enacted in May 2000. While not currently certified as effective, the provisions of the Regime – including obligations on pipeline owners – now apply.

Access Outcomes

It is still early days in assessing the benefits of the National Gas Code, with only a handful of access arrangements under the Code now in place – but this will soon change. A significant constraint on price benefits may be that many major gas users will remain under existing contracts for some time before they are able to use the provisions of the Code. Another issue has been the difficulty faced by some access seekers – in New South Wales, in particular – in negotiating gas supplies with upstream producers. I will comment further on upstream issues a little later.

One of the central benefits of access reform is coming from the new investment in gas transmission pipelines now underway. Some of these projects probably would not be viable without access to distribution networks, made possible under the National Gas

Code. As major markets become linked to more than one gas basin, interbasin competition is likely to start delivering important gains for gas consumers.

2 Coverage issues

The Council's other principal role under the National Gas Code is its capacity as coverage advisory body. The Council understands the need for certainty as to the likely coverage of new infrastructure and is available to advise investors on whether a proposed new pipeline would meet the coverage criteria. Alternatively, investors may seek coverage prior to construction of a new facility by adopting the Code's competitive tendering principles for new pipelines, or by submitting an access arrangement for the pipeline to the regulator.

The Council has received one application for coverage of a pipeline under the National Gas Code. The application relates to the Eastern Gas Pipeline (EGP), currently under construction, linking Gippsland with the Sydney gas market. The Council recommended that the pipeline be covered.

The National Gas Code recognises that a gas pipeline should only be regulated under the Code where necessary to promote efficient utilisation of the pipeline and competition in related markets. The EGP application raised an important threshold issue for National Gas Code: should two transmission pipelines serving the same region from different gas fields be regulated under the Code. In recommending coverage of the EGP, the Council relied on three important findings:

- first, the services of the two pipelines were not good substitutes for each other because many gas users would want to source gas from one particular gas field;

- second, coverage of the two pipelines under the Code would be likely to promote competition in the south-east Australian gas sales market;

- third, any access regulation of gas pipelines should be conducted under the National Gas Code, rather than other Part IIIA mechanisms (that is, a declaration or an undertaking), as clearly intended by all governments.

The Council has now handled more than a dozen applications to *revoke* coverage of pipelines under the National Gas Code. To date, the Council has recommended revocation on eight occasions, and to retain coverage of two pipelines. Three applications regarding the Moomba to Sydney pipeline system remain under consideration.

The coverage and revocation processes seem to be working effectively. To date, each of the Council's recommendations has been followed by the relevant Minister. The coverage and revocation processes provide for two rounds of public consultation, release of a draft prior to the Council's final recommendation and delivery of a recommendation to the Minister within a tight timeframe. The speed of the process is helping to provide the necessary certainty to pipeline companies and access seekers,

while the two-tiered consultation process gives all parties an opportunity to air their views.

The Council's consideration of revocation applications has included scrutiny of the costs of access regulation in each case. These costs include the direct costs to pipeline companies, the regulator, and third parties that arise from the preparation and use of an access arrangement. More generally, the costs include any unintended effects of regulation, such as stifling of incentives and a switch in focus for management from its core activities to managing its relationship with regulators.

While these costs tend to fall on pipeline companies in the first instance, it is customers who bear the burden ultimately. For this reason, access regulation should only be applied where competition and public interest benefits are likely to outweigh the costs. This principle is codified through the coverage criteria set out in the Code.

In a number of cases, the Council has recommended revocation because there was no clear evidence that regulated access would promote competition in another market or that a net public interest benefit would accrue. These have often tended to be pipelines serving a single user (often under long-term contract) or a small regional market with limited prospects for growth in demand. As a result of revocation, the pipeline companies have been spared having to develop access arrangements for which there may be no potential customers. This, in turn, has saved passing on these costs to existing customers. It also allows regulators to focus their resources on those pipelines where access regulation is likely to bring tangible benefits.

In one recent application regarding a pipeline in central Australia, the Council's public process revealed only one potential access seeker. The revocation process acted as a spur for the access seeker and pipeline company to enter negotiations, which proved satisfactory to both. The Council considered this to be evidence that efficient outcomes could be achieved in this case through commercial negotiation, without requiring regulated access. As such, the Council considered that coverage of the pipeline was no longer necessary.

3 Reforming regulatory barriers to free and fair trade in gas

The COAG 1994 agreement called on governments to remove all remaining regulatory and legislative barriers to free and fair trade in gas.

While the access reforms have focussed on the downstream area, a major focus of the legislation review program has been to review *upstream* issues. The access reforms *alone* are unlikely to benefit consumers unless there is competition between gas producers.

Australian gas markets were traditionally – and to a large extent, still are – characterised by highly integrated supply chains in each State supported by long-term exclusive contracts between producers, pipeliners and retailers. It is difficult to assess the extent to which this structure has impacted on gas prices due to the lack of price transparency in the Australian market. It is frequently argued that well-head prices in

Australia are very competitive by international standards. But the same used to be said about electricity prices prior to reform, while gas prices reportedly fell by two-thirds in Canada after upstream gas monopolies in that country were disaggregated.

The Upstream Issues Working Group (UIWG), an intergovernmental group on which the Council was an observer, examined upstream gas reform issues in 1998. The Groups' final report focussed on three key upstream issues:

- barriers to competition arising from acreage management systems;
- third party access to upstream facilities; and
- contractual and marketing arrangements.

Acreage management issues

One of the best ways to promote upstream reform is through new discoveries of gas. The broad issue for the Council here is whether the legislative framework – under the various State, Territory and Commonwealth Petroleum Acts – creates conditions for the issue of exploration permits that are conducive to competition. The kind of issues here include the size and duration of permits, relinquishment and retention arrangements, the allocation criteria used when issuing permits, and publication of exploration data.

The Council accepts that there are issues of balance here. For example, if the size of permits is too small, especially for highly speculative sites, explorers may be reluctant to commit resources to exploration. But the danger of issuing large permits is that dominance may be conferred upon the successful permit holder in the event of a discovery.

The UIWG report highlights a number of critical issues in this area, including the need for greater transparency in acreage bidding processes. The Group identified one necessary condition as being to ensure that the details of winning acreage bids are published or made readily available to interested parties. Jurisdictions appear, on the whole, to have accepted this recommendation and are making the necessary changes to legislation.

Third party access to upstream facilities

Another potential barrier to competition is the monopoly ownership and control of upstream production facilities like gas processing plants and gathering lines. Bottlenecks can arise in the gas supply chain where these facilities are uneconomic to duplicate – that is where there are significant economies of scale and/or scope.

The UIWG identified a need for progress on access to upstream facilities, but was unable to reach agreement on an industry code. However it remains open to individual jurisdictions to introduce legislation providing a basic right for third party

access and binding dispute resolution. There are indications that some jurisdictions are considering this option.

Marketing issues

The UIWG report found that the present immaturity of Australia's gas markets would make *mandatory* separate marketing by partners in joint ventures premature at this stage. However, the UIWG also found that separate marketing would enhance intra-basin competition, and targeted this as the longer-term goal. In the meantime, it argued that the ACCC should continue to assess the actions of gas joint ventures on the basis of the public interest test, and that the ACCC should be mindful in its ongoing reviews of authorisations of the desirability of requiring separate marketing as soon as this becomes feasible.

Access to Rail Track Infrastructure

Gas was not the only industry where pre-existing national reform agreements were brought under the aegis of National Competition Policy. Others were the road transport, water and electricity industries.

Rail was the obvious omission: the only major infrastructure industry not to have its own specific reform program. While an Inter Governmental Agreement (IGA) was signed in 1997, setting in motion the ground work for a national rail access regime, this has neither the same force nor scope as the specific reform programs for the other infrastructure industries. Importantly, obligations under the rail IGA are not subject to the Council's assessment of NCP implementation for the purpose of the agreed competition payments to the states and territories.

As a result, the reform obligations in rail have fallen to the general provisions of NCP. Because of the way rail reform has proceeded and the continuing disquiet over progress in rail reform, considerable attention has focussed on the Council's processes. In particular, the slow pace of change has meant that parties have been relying on the general provisions of the Competition Principles Agreement and, in particular, Part IIIA of the TPA. However, as these processes have demonstrated, access arrangements alone cannot address all reform needs.

To date, Part IIIA has been used by the rail industry more than any other industry. The Council has dealt with applications for both certification of access regimes and declaration of rail track services.

While the threat of declaration has acted as an incentive for the States to develop access regimes – and three of these, NSW, Darwin to Tarcoola and WA have been lodged with the Council for certification – applications for declaration have highlighted some of the imperfections in the access declaration process.

For example, while five applications for access through declaration of rail services have been received by the Council, for the four on which the Council has made recommendations, the Minister responsible has accepted those recommendations on only one occasion. In all four instances, there has been an application to the Australian Competition Tribunal for review of the decision of the Minister. In three cases, the appeal was later withdrawn once access had been negotiated.

In addition, users of the declaration route can encounter other obstacles or problems:

- it can be lengthy;

- if the Minister does not make a decision, the application is not successful and because in this instance the Minister does not have to give reasons, the process can sometimes lack transparency; and

- while it may open up access for some, by encouraging negotiated agreements between the applicant and the infrastructure owner, the degree to which competition emerges can be compromised if that access is not available more widely.

While the provisions in the TPA have assisted negotiation of access on particular intra-state line sections, they have not achieved national reform. This is probably due to the objectives of Part IIIA and its process requirements. Part IIIA provisions were designed to assist customers gain access to services denied them or offered on uncompetitive terms and conditions. The provisions require that each declaration process relate to only one infrastructure owner. Therefore, declaration of track that crossed state boundaries would require as many processes as the number of track owners involved.

While the certification provisions can counter this by encouraging comparability of access regimes across states, certification of state regimes covering their rail line networks, has been slow. To date, only two regimes – NSW and the Darwin-Tarcoola line – have been certified. The Council has also received applications for certification of rail access regimes from Queensland and Western Australia. The Queensland government has withdrawn its application pending the Queensland Competition Authority's consideration of Queensland Rail's access undertaking. This process is still proceeding. The Council expects to make a recommendation on the WA regime shortly. I will discuss these applications more fully later.

The history of a fragmented rail system, the limited scope and slow progress with the national regime arising from the 1997 IGA and the reliance on Part IIIA processes for delivering rail reform has lead to calls for less circuitous national reform. In submissions to the Council's rail service applications for declaration rail operators have illustrated the limitations of the present approach using the example of the costs of meeting differing safety standards and access conditions across states. For instance, operators argued that while a national agreement on safety arrangements was in place, it was not fully effective because the states imposed significant additional

requirements. To conform to these requirements rail operators had to develop separate applications covering the differing technologies and practices used in each state. Further evidence regarding the fragmentation of the rail industry was also highlighted in the many submissions to the recent government inquiries relating to rail reform. (The House of Representatives Standing Committee on Communications, Transport and Microeconomic Reform (HORSCCTMR) reported in 1998 on the role of rail in the national transport network[2]. The Rail Project Taskforce (Smorgon taskforce) investigated the role of government in facilitating rail investments.[3] The report of the PC inquiry into progress in rail reform summarises the reform process so far, including other reviews which have reported.[4])

One of the criticisms that is frequently made of Part IIIA is the length of time which declaration processes take. Timing is an issue in these processes, but there must always be a balance between a party's right to have a Ministerial decision reviewed and achieving speedy outcomes. In Part IIIA the balance has been struck by allowing reviews of Ministerial decisions. In some areas of telecommunications, no review rights are available from ACCC determinations. Review rights are important at least in a generic access regime. From time to time, or for specific periods of time, particular industries may have special needs for more speedy resolution; those should be dealt with as special cases.

2 Certification Issues

In assessing State regimes for certification, the Council is required to consider national issues and determine the impact of the regime on rail operations across State borders. However, the Council's ability to take a national view is limited by the timing of the submission of the access regimes and the nature of those regimes.

Since the 1997 IGA, there has been much groundwork undertaken to enable interstate rail access arrangements to be implemented, although there is still some way to go and progress has been slow. Clearly, there are areas of overlap between interstate and intrastate regimes. In exercising its responsibility to assess State regimes, the Council places considerable weight on the treatment of interstate operations and the development of national markets. This means that the Council's assessment of state-based access regimes will focus, among other things, on ensuring that State regimes and the national process are compatible.

The issues discussed above, combined with the Council's obligations under access and its desire to promote national rail reform has meant that it has focused on a range of factors:

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[2]HORSCCTMR 1998 *Tracking Australia, an Inquiry into the Role of Rail in the National Transport Network*, (Neville report).
[3]Rail Projects Taskforce 1999, *Revitalising Rail: The Private Sector Solution*, (Smorgon Report), Department of Transport and Regional Services, Canberra.
[4]PC 1999, *Progress in Rail Reform*, Report no 6, 5 August Ausinfo, Canberra.

- the need for good access arrangements for the substantial intrastate rail industry, while not leaving interstate operations at a disadvantage and not inhibiting the future development of interstate access arrangements;

- treatment of those parts of the interstate train paths that are covered by intrastate regimes; and

- responding to applications now, when there is uncertainty about the interstate arrangements, including the ACCC's consideration of the ARTC undertaking under the IGA.

The Council is looking to certify regimes which encompass truly national access arrangements. In the certification applications which have come to the Council to date, it is looking to ensure adherence to a number of key principles using a negotiate/arbitrate model, including:

- a consistent approach to pricing, based on a pricing band between a floor and ceiling, where the floor is the incremental cost and the ceiling is the combinatorial stand alone cost (Baumol bands);

- independent, co-ordinated dispute resolution processes;

- the availability of cost information to guide price negotiations; and

- regulatory guidelines on particular matters such as timepath trading.

These principles are consistent with the PC conclusions on access in its report on Progress in Rail Reform.

Because of the ongoing consultation process in relation to the interstate regime, the Council is looking for flexible mechanisms which can operate immediately but which are capable of being adapted once the national processes have been finalised. To this end, the Council has generally favoured provisions for the establishment of codes of practice or conduct within the broad framework established by individual State-based access regimes. These Codes to date have principally covered issues such as safety and accreditation requirements, but there is no reason why they could not also cover other things, such as track management arrangements and more detailed pricing principles. The Council is taking a similar approach to ensure compatible arrangements for regulators and arbitrators. Providing that the regime itself provides an adequate framework and statement of the principles which are applicable, the development of Codes of this nature could be the most practical and low cost way of looking to achieve a common approach and consistency moving forward. It would seem to be a useful goal to have stated in the regime itself that these Codes will be developed with the objective of establishing common standards with other State regimes.

Given that framework, I thought it would be useful to discuss some specific issues which the Council has considered in its certification process.

In the case of NSW, one of the Council's main concerns was the inclusion of interstate train time paths in the regime. While there were efforts made to formulate ways of dealing with allocations, these were not finalised. The Council recommended that the regime only be certified until the end of 2000, by which time, the national regime should have been in place. The Council envisaged that at that time, any changes that needed to be made to the NSW regime to ensure that it is compatible with the national regime, could be made. However, it is looking like the national regime will not be in place before the NSW certification expires.

For the SA/NT application there was an additional issue. While the NSW and WA regimes have adopted the basic floor and ceiling approach to access pricing, the governments in this instance have added a new twist to the floor and ceiling band with their Competitive Imputation Pricing Rule (CIPR). In cases where road transport is competitive with rail operations, the CIPR stipulates how to formulate where, within the band, access prices should fall, using road transport prices as a point of reference. The CIPR states that in general the access price will be the difference between the maximum competitive price an access provider could charge for the transport of freight between two points and the above rail costs of the relevant train operations. The resulting price reflects the value the operator extracts from its use of the infrastructure.

The Council, with the assistance of a rail operator, selected a few scenarios to model likely access prices under CIPR. The results of this modeling indicated that where road is an effective competitor to rail, access prices around those currently being charged elsewhere in Australia are likely. However, the actual prices will be quite sensitive to a number of factors including the quantity of freight, the above rail technology used, the intensity with which the rolling stock is utilised, the length of trains and the degree to which freight is time sensitive.

The modeling has highlighted that the greater the volume, the more efficient the utilisation of capital and the less time sensitive the freight, the higher the access price will be.

In Western Australia, the original access regime proposed that, as with NSW, both inter and intrastate train paths be covered by the regime. After discussion with the Council about how this could be made compatible with a national regime, the WA government revised its regime to exclude interstate train operations.

However, there is now some legal authority suggesting that removing the interstate operations from the regime may not solve the interface issues. Specifically, in reaching her decision in the Hamersley matter, Kenny J noted that the definition of a service for the purposes of Part IIIA was not able to distinguish between services on the basis of the different operational ends. It could be argued that this means that the definition of a service does not allow for a rail service to be specified as interstate or intrastate.

The Council has suggested to the WA Government that the interstate/intrastate interface problem could be overcome by adopting the following model. The WA regime would distinguish between two classes of train operations:

- first, operations which originate or terminate in another state; and

- second, all other train operations.

For interstate operations, the track owner or operator would be required to submit an undertaking to the ACCC, which would ensure compatible regulatory arrangements with those submitted in the ARTC's undertaking to the ACCC under the IGA. The WA regime's Code would apply to all other train operations.

The WA Government is expected to formally respond to this proposal shortly. Therefore, the Council will finalise its recommendation on this regime in the very near future. The regime has developed substantially during the course the Council's consideration and through the public consultation process, including in response to the Council's draft recommendation issued in September last year. One issue aside and with the agreed changes implemented (including the amendments currently before Parliament), the Council considers that the regime constitutes a robust set of access arrangements that should well serve the infrastructure owner and users.

The one remaining issue – the treatment of interstate train operations – is, however, a critical one. The Council cannot recommend certification without this issue being resolved. As a result, declaration of at least the standard gauge track in Western Australia would remain a very real risk.

It is also notable that the Commonwealth has indicated that it is not willing to wait indefinitely for the development of national arrangements for track access. The Commonwealth response to the three rail reports foreshadows that, if track access arrangements are not working effectively by mid-2001, the review of the ARTC required under the IGA will consider alternative access harmonisation strategies.

Conclusion

With almost five years experience with Part IIIA, it is possible to draw some lessons.

First, the appropriate design and coverage of access regimes is critically important to ensuring that the benefits of access regulation exceed the costs in relation to every individual set of infrastructure. This balancing of costs and benefits involves difficult judgements, including about the likely impact on investment in areas of activity that rely on that infrastructure.

Secondly, the declaration processes under Part IIIA have been problematic in some respects. This has, in part, reflected the protections in the TPA afforded to infrastructure owners. It is important to effectively balance the interests of access seekers in the speedy resolution of issues with such protections to infrastructure owners. But importantly, every access seeker who has secured a favourable declaration recommendation from the Council has been able to negotiate access on acceptable terms.

Thirdly, the coverage and revocation processes under the National Gas Code have worked well, and some important threshold issues of coverage have already been

addressed by the Council. There is now, I believe, a high level of certainty associated with the Council's approach to the National Gas Code.

Finally, the development of national access arrangements in rail has been slow. But access arrangements in NSW are already delivering substantial benefits and there are good prospects of this experience extending throughout Australia. The Council is working to ensure that state and territory access regimes in rail are compatible and facilitate the development of national track access rules and national markets in rail services.