return to AMPLA 2004 Table of Contents

An Excess of Access? Unanswered Questions for the Resources Industry – Part 1

Russell Miller*

SUMMARY

Balancing the need for access to facilities essential to competition in upstream or downstream markets on fair and equitable terms against the property rights of facilities owners has been an issue for those involved in competition and industry policy development for many years. Nations have been wary of adopting essential facilities rules which override property rights and have only done so cautiously.

In Australia the essential facilities provisions of the Trade Practices Act reflect that caution. Furthermore, notwithstanding that those provisions have been in force for almost 10 years this remains a relatively unexplored area of the law.

This paper explores some of the unanswered questions in relation to access to essential facilities in the resources industry, building on the foundation provided by the previous paper by Norman O'Bryan SC. In the paper I consider the following questions: What resource infrastructure is at risk of an access application? How is the need for investment certainty for new resource infrastructure to be achieved if the infrastructure is susceptible to an access application? What happens to an access application if the infrastructure provider has no excess capacity?

In the following paper, Mark Carkeet explores two additional questions: How will access pricing be determined? What effect does Pt IIIA of the Trade Practices Act have on State Agreements?

INTRODUCTION

"Why do some nations succeed and other fail in international competition? This question is perhaps the most frequently asked economic question of our

* Partner Minter Ellison.

> times. Competitiveness has become one of the central preoccupations of government and industry in every nation."[1]

Nations adopt competition laws, not as an end in itself, but because it is universally recognised that a strong competition culture improves economic efficiency and consumer welfare. In the language of economists, competition is valued for what it can deliver in terms of allocative, productive and dynamic efficiency.

In the United States, courts recognised quite early in the development of that nation's competition laws that, if competition policy is to be effective in improving economic efficiency and consumer welfare, it has to deal with bottleneck monopolies – situations where, through control over infrastructure at one level in the supply chain can be used to lever out competition at another level.

The United States Supreme Court[2] used the *Sherman Act* to establish what became known as the "essential facilities" doctrine as a subset of the prohibition on monpolisation. Since that time courts in the United States have developed and applied the essential facilities doctrine without legislative intervention.

In Europe an essential facilities doctrine has developed more recently, but like in the United States, it has been developed by the courts as a subset of the *Treaty of Rome* prohibition against monopolisation rather than as a result of specific legislative intervention.[3]

Australia's first opportunity to follow the United States and European example arose in *Queensland Wire*.[4] In that case the appellant, seeking access to certain steel products only produced by BHP, invited the High Court to develop an essential facilities doctrine as part of the jurisprudence on s 46 of the *Trade Practices Act*. The High Court declined to do so, on the basis that the language of s 46 did not permit it, thereby setting Australia on a different path to that taken elsewhere in the world.

The consequence was the legislative "negotiate/declare/arbitrate" model which Australia adopted in 1995,[5] first in Pt IIIA of the *Trade Practices Act* and subsequently in Pt XIC[6] of that Act and in numerous other pieces of industry specific legislation.[7]

When the issue was first considered there was no expectation that essential facilities would become a central plank in active competition law enforcement, nor

1 Michael Porter, *The Competitiveness of Nations,* Macmillan Press, 1990.
2 *United States v Terminal Railway Association* 224 US 383 (1912).
3 See *B&I Line plc v Sealink Harbours Ltd & anor* [1992] 5 CMLR 255.
4 *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.
5 Following the Report by the Independent Committee of Enquiry (Hilmer) in August 1993.
6 The telecommunications access regime introduced in 1997.
7 See, for example, *Petroleum Pipelines Act* 1969 (WA), *Gas Pipeline Access (Western Australia) Act* 1998, *National Electricity (South Australia) Act* 1996, *Airports Act* 1996 (Cth).

is there that view today. The United States Supreme Court regarded *Terminal Railways* as a special and unusual case. Subsequent United States decisions have cautiously applied the doctrine while continuing to make it clear that "A monopolist has no general duty to share his essential facility, although there are certain circumstances in which he must do so".[8]

In Australia, although the essential facilities doctrine[9] is based on statute rather than judicial pronouncements, the same cautious approach as has been taken in other jurisdictions is reflected here as well. The essential facility provisions of Pt IIIA represent a balance between the need to curb monopoly power and the need to encourage efficient infrastructure investment. The Hilmer Committee was very aware of this. It said:

> "The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment."[10]

Part IIIA was designed to provide a subtle signal to the market that integrated enterprises that control bottleneck monopolies are not exempt from competition laws. That, as a matter of last resort, a regime for opening up access to bottleneck monopolies exists.

It is therefore not surprising that, even though the Australian essential facilities regime has been part of our competition laws for almost 10 years, many questions concerning it remain to be determined.

This paper explores a selection of those questions.

WHAT RESOURCE INFRASTRUCTURE IS AT RISK OF AN ACCESS APPLICATION?

Although essential facilities regulation in the United States is court based rather than legislatively based as in Australia, the test for determining whether or not to intervene is similar in both countries. In neither jurisdiction is there a general rule that a monopolist must provide access to its essential facilities. Rather, access can be required only if certain pre-requisites are met.

The United States Court of Appeals recently described those circumstances as follows:

> "In the special circumstances where there may be such an obligation, the elements of an antitrust claim for denial of access to an essential facility are

[8] *Caribbean Broadcasting System Ltd v Cable & Wireless plc* 148 F 3rd 1080 (1998).

[9] I refer for convenience to the "essential facilities doctrine" and access to "facilities" throughout this paper for convenience. The reader will be aware that, in Australia, Pt IIIA is concerned with access to *services* rather than facilities. This distinction is drawn only where there is a substantive difference.

[10] Report, p 248.

> (1) a monopolist who competes with the plaintiff controls an essential facility, (2) the plaintiff cannot duplicate that facility, (3) the monopolist denied the plaintiff's use of the facility, and (4) the monopolist could feasibly have granted the plaintiff use of the facility."[11]

In the United States, a facility will be considered to be an essential facility if control of that facility carries with it the power to eliminate competition on more than a transitory basis, in a downstream market.

A wide range of facilities have been regarded by United States courts as essential facilities to which courts have ordered access to plaintiffs. These include facilities that would be regarded as uncontroversial in Australia, such as electricity distribution infrastructure,[12] telephone switching networks,[13] railway lines[14] and gas pipelines.[15] However, US courts have also applied, or considered applying, the doctrine to a diverse range of other infrastructure, including airline reservations systems,[16] flour mills,[17] football stadiums,[18] technology and fuel for natural gas powered vehicles,[19] real time score data for golf tournaments[20] and telephone directories.[21]

What is the position in Australia? Is the difference here merely to be found in the procedures for determining an essential facilities claim[22] or are there substantive legal differences?

The short answer is that there are substantive legal differences as well as procedural differences. Although, in order to be regarded as essential a facility has, like in the United States, to be uneconomical to duplicate, there is a point of difference. In Australia, in order to be regarded as essential, access to the facility merely has to promote competition in another market – whether upstream or downstream from the facility and whether in Australia or not. As a consequence, the scope of the Australian doctrine is potentially much wider than in the United States, which limits its doctrine to effects in a downstream market only.[23]

Does this mean that, for example, an access seeker in Australia could apply for access to a mineral deposit or force itself into a mineral extraction project? What about access to mining infrastructure such as a dedicated port or rail line?

[11] *Caribbean Broadcasting System Ltd v Cable & Wireless plc* 148 F 3rd 1080 (1998) at 1088.
[12] *Otter Tail Power Co v United States* 410 US 366 (1973).
[13] *United States v Terminal Railway Association* 224 US 383 (1912).
[14] *MCI Communications Corp v AT&T* [1982-3] Trade Cases 65,137.
[15] *State of Illinios v Panhandle Eastern Pipe Line Co* [1991] 1 Trade Cases 69,455, but note *Consul Ltd v Transco Energy Co* [1986] 2 Trade Cases 67,347 and *Paladin Associates Inc v Montana Power Co* [2000] 1 Trade Cases 72,909.
[16] *Alaska Airlines Inc v United Airlines Inc* [1991] 2 Trade Cases 69,624.
[17] *Helix Milling Co v Terminal Flour Mills Co* [1975] 2 Trade Cases 60,554.
[18] *Hecht v Pro-Football, Inc* [1977] 2 Trade Cases 61,773.
[19] *Tate v Pacific Gas & Electric Co* [2002] 2 Trade Cases 73,873.
[20] *Morris Communications Corp v PGA Tour Inc* [2000] 2 Trade Cases 73,117.
[21] *Directory Sales Management Corp v The Ohio Bell Telephone Co* [1986] 2 Trade Cases 67,250.
[22] Individual court proceedings (USA) or negotiate/declare/arbitrate (Australia).
[23] *Intergraph Corp v Intel Corp* [1999] 2 Trade Cases 72,697.

The first consideration in addressing these questions is whether or not the facility is of national significance. No access will be granted unless the facility is of national significance having regard to its size, its importance to interstate or overseas trade or commerce, or its importance to the Australian economy.[24]

How these tests are to be applied in Australia is not yet clear. There has only been four Australian court decisions on issues relevant to Pt IIIA and none dealt with this point.[25] In Europe, the relevant test is similar, but more limited than the Australian test. The European test is whether the facility has a dominant position in a substantial part of the European Community. That test was satisfied in relation to the ports at Genova[26] and Holyhead,[27] but each is an important commercial shipping port rather than a minerals export port.

All that can be said in relation to the Australian position is that major mining operations and major oil and gas facilities are likely to be regarded as being of national significance because of their significance to the Australian economy and to our international trade position.[28] This is particularly so with projects of sufficient size or complexity to warrant a State Agreement.[29]

The second substantive difference between the Australian position and that of the United States is in the type of facility to which the doctrine may apply.

In Australia access applications cannot be made in relation to facilities for the use of a production process. The meaning of the term "production process" was considered by a single judge of the Federal Court[30] who expressed the view that the term meant "the creation or manufacture by a series of operations of some marketable commodity". This seems to be a sensible definition but it is not the only possible definition.[31]

[24] *Trade Practices Act,* s 44G(2)(c).

[25] *Hamersley Iron Pty Ltd v National Competition Council* [1999] FCA 867*, Re Michael (Dampier to Bunbury Natural Gas Pipeline)* [2002] WASC 231 (a case under the *Gas Pipelines Access (WA) Act* 1998*), Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd* (2000) 22 ATPR 41-784 (a case under the telecommunications access regime) and *Rail Access Corporation v NSW Minerals Council Ltd* (1998) 87 FCR 517. The National Competition Tribunal has also determined a number of cases in which this issue was considered: see *Miller's Annotated Trade Practices Act* (25th ed), para [1.44G.25]).

[26] *Merci convenzionali porto di Genova SpA v Siderurgica Gabrielli SpA* [1991] ECR I-5889.

[27] *B&I Line plc v Sealink Harbours Ltd* (1992) 5 CMLR 255.

[28] As a guide, the National Competition Tribunal decided that the rail line between Perth and Kalgoolie and the airport freight terminals at Sydney and Melbourne airports are of national significance.

[29] See, for example, *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA)*, Alcan Queensland Pty Ltd Agreement Act* 1965 (Qld). For a list of State Agreements see Dare Reed: Australian Mineral Resources – A Report on Law & Policy (1980).

[30] Per Kenny J. See op cit n 21.

[31] Other meaning include "to bring into existence" (*Faywin Investments Pty Ltd v FTC* (1989) 89 ALR 599) in the context of film production. In *FTC v Rochester* (1933) 50 CLR 225 the High Court decided that cooking fish and chips did not amount to "production" of the end products. Dixon J suggested that the court should "simply apply the terms used in the Act as they are ordinarily applied in English speech". According to the Macquarie Dictionary the term "production" means: "the act of producing (bring into existence); creation; manufacture."

In any event, accepting the definition adopted by Kenny J does not completely resolve the question in relation to access to resources infrastructure. Would extracting minerals, as opposed to processing them, or extracting oil and gas, amount to the "creation or manufacture" of a commodity? Does primary processing amount to creation or manufacture of a commodity, or merely treatment of an existing commodity? Access to mining, oil and gas infrastructure in Australia will turn on the answers to these questions, unless one of the other Pt IIIA exclusions applies.

Another relevant exclusion which may apply to mining infrastructure or oil and gas facilities relates to the supply of goods. In order to explain how this exclusion works it is necessary to refer to the fact that, although throughout this paper I have referred to access to facilities, an access declaration can only be made with respect to a service. The term "service" is defined to include the following:[32] "service means a service provided by means of a facility … but does not include … the supply of goods."

Minerals, oil and gas are certainly goods[33], but nevertheless this definition is susceptible to a number of interpretations. It is a good example of the complexity of language which pervades the whole of Pt IIIA. As Professor Maureen Brunt said in a submission to the Productivity Commission[34] "The access provisions are … written in cumbersome and uncertain language, in a structural design of Byzantine complexity".

The normal cannon of construction is that an exclusion is to be narrowly interpreted. One interpretation of this definition is that the exclusion only applies where access is sought to a service of supplying goods. On this approach, the exclusion would not apply to any services that might be involved in the operation of mining, oil or gas facilities other than the service of supplying goods.

If this is so, then the question of whether or not the exclusion applied will depend on the way in which the access application is cast. Would access to unextracted mineral, oil or gas deposits be regarded as a supply of goods? Leaving practicalities aside, would access to mining infrastructure or an oil or gas platform to win or process the access seeker's minerals, oil or gas be excluded on this ground?

The final aspect of Pt IIIA that I will refer to is that, even if access is sought for a production process or the supply of goods, that fact alone is not an excluding factor. If the production process or the supply of goods is an integral but subsidiary part of the service for which access is sought, then the exclusion does not apply.

As Norman O'Bryan SC has dealt in detail with the decision in *Hamersley Iron*[35] I do not need to repeat what he has written. The point he makes, with which I agree, is that notwithstanding the decision in that case, the extent to which one

[32] See *Trade Practices Act,* s 44B, definition of "service". The term "facility" is not defined.
[33] See *Trade Practices Act*, s 4.
[34] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, 28 September 2001, p 125.
[35] *Hamersley Iron Pty Ltd v National Competition Council* [1999] FCA 867. See O'Bryan SC: "An Excess of Access? The Uses and Abuses of Part IIIA of the Trade Practices Act in the Resources Sector" [2004] AMPLA Yearbook 181.

can effectively exclude resource infrastructure from an access declaration by regarding the service for which access is sought as integrated into a production process remains an open question. The answer turns on the answers to three other questions: Does the service to which access is required actually *include* use of a production process or the supply of goods? If so, is use of the production process or the supply of goods "integral" to the service? If so, is use of a production process or the supply of goods a primary part of the service or a subsidiary part of the service?[36]

HOW IS INVESTMENT CERTAINTY FOR NEW RESOURCE INFRASTRUCTURE TO BE ACHIEVED?

Infrastructure Susceptible to an Access Application

Striking the right balance by ensuring that the essential facilities doctrine only overrides proprietary rights where to do so produces improved economic efficiency and gains in consumer welfare has never been an easy task.

As the Productivity Commission noted:[37]

> "Access regulation can entail significant attenuation of private property rights. This may give rise to a range of costs. … These costs can take a number of forms, including … reduced incentives to invest in infrastructure facilities; insufficient investment in related markets; and wasteful strategic behaviour by both service providers and access seekers."

Although development of the essential facilities doctrine was closely related to bottleneck monopolies in vertically integrated enterprises, vertical integration is not a feature of the Australian approach. The Australian regime applies equally to stand alone monopoly facilities such as pipelines, rail lines, gas reticulation infrastructure, telecommunications infrastructure and electricity distribution networks.

Investment in infrastructure can be affected by perceptions of the extent to which third parties might seek access and, as important, the price at which any forced access might be required.

The Australian "negotiate/declare/arbitrate" approach may lend greater certainty to the position than the court approach in the United States and Europe, but does it provide sufficient certainty for new infrastructure investment?

In addressing that question it is useful to review how the Australian system works in relation to new infrastructure.

[36] It is interesting to note that the *Iron Ore (Hamersley Range) Agreement Act* 1963 (WA) includes a provision requiring the company to carry freight for the WA Government and third parties on its rail line.

[37] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 28 September 2001, p 59.

The starting point is the declaration process. Any person may make application to the National Competition Council for declaration of a "particular service".[38] The term "service" is defined to mean "a service provided by means of a facility". This static language seems to suggest that, before a declaration can be made, the service and the facility must exist. Whether or not a declaration can be sought for access to a *proposed* service to be provided by a facility proposed to be established in the future is an open question, but it seems doubtful.

However, even if a declaration application could be made for a planned facility, it is doubtful that declaration could be sought by the access provider rather than an access seeker. Certainly, Pt IIIA entitles "any other person"to make an application,[39] but the National Competition Council has a right to decline to deal with the matter.[40] It seems likely that they would do so if the developer of resource infrastructure sought a declaration for the purposes of having it rejected in order to provide investment certainty to the project. If such a right is to be established the legislation needs to be amended to provide specifically for it.

There is, however, a second method by which an infrastructure owner can have the issue dealt with. Part IIIA entitles a person who expects to be an infrastructure provider to give an access undertaking to the Australian Competition and Consumer Commission (ACCC) setting out the terms and conditions it proposes for access to the infrastructure.

Whether or not this mechanism allows an infrastructure developer to give an undertaking in relation to facilities not yet constructed is an open question. However, assuming that it does, the extent to which the developer can forward commit capacity sufficient to sustain the investment and questions of access pricing for third parties inevitably arise in formulating an access undertaking that would satisfy the ACCC for registration.

Could an undertaking under Pt IIIA in its present form include a holiday period – a number of years during which the access undertaking is suspended to allow the developer to recoup its investment? This is doubtful. The Productivity Commission recognised the problem. It recommended[41] that the Council of Australian Governments develop mechanisms to facilitate efficient investment in essential facilities, including fixed-term access holidays for contestable infrastructure projects and provision for a "truncation" premium to be added to the cost of capital, agreed prior to the project proceeding.

[38] *Trade Practices Act,* s 44F.
[39] *Trade Practices Act,* s 44F(1).
[40] *Trade Practices Act*, s 44F(3).
[41] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 320. The Commission made a series of other recommendations including that Pt IIIA should make provision for the proponent of a proposed investment in an essential facility to seek a binding ruling on whether the services provided by the proposed facility would meet the criteria for declaration, in order to give greater investment certainty and immunity for government sponsored essential facility tenders.

As the Australian Council for Infrastructure Development stated in its submission to the Commission:[42]

> "…the unique project risk, which investors in natural monopoly infrastructure face, should not be heightened by excessive regulatory intervention to a level which results in sub-optimal levels of investment."

For the sake of completeness, there is also provision in Pt IIIA for the registration of access contracts with the ACCC,[43] but that will be of no assistance to the developer of proposed infrastructure because only contracts in relation to declared services can be registered.

WHAT HAPPENS TO AN ACCESS APPLICATION WHERE INFRASTRUCTURE PROVIDER HAS NO EXCESS CAPACITY?

Assuming that an access declaration has been made in relation to resource infrastructure or an undertaking accepted by the ACCC, what happens if a new market entrant seeks access to the infrastructure but there is no additional capacity? Does this mean that the infrastructure owner has to curtail its own requirements? Is supply to existing customers to be rationed to allow supply to the new entrant? What if capacity is contracted forward but not currently being utilised?

A facility cannot be declared an essential facility unless access would not be contrary to the public interest,[44] but this is unlikely to mean that the public interest in the sanctity of contractual obligations would preclude the relevant Minister declaring the facility.[45] Declaration does nothing more than make the facility susceptible to an access application. It does not interfere with existing contractual rights.

It is only if an access seeker is unable to reach agreement on access arrangements with an infrastructure owner that interference with existing rights may occur. The access seeker may refer the matter to the ACCC for arbitration of the dispute.

Arbitrations are conducted in private.[46] The parties are limited to the infrastructure owner and the access seeker, but the ACCC may permit any other person who applies and who has a sufficient interest to become a party. The ACCC is required to decide the matter, including making a determination of the nature and extent of access, the terms on which access is to be provided and the price for access.[47]

[42] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 284.

[43] *Trade Practices Act*, s 44ZW.

[44] *Trade Practices Act*, s 44H(4)(f).

[45] As noted earlier, I have referred to declaration of facilities rather than services for simplicity, except where the distinction matters.

[46] *Trade Practices Act*, s 44ZD. However, the parties may agree that the hearing, or part of it, may be in public. The circumstances in which both parties may think a public hearing appropriate are unclear.

[47] *Trade Practices Act*, ss 44S, 44U & 44V.

There are some potential limitations on the determinations the ACCC can make, relevant to the questions posed above.

First, the ACCC cannot make a determination which prevents any existing user, including the infrastructure owner, obtaining sufficient supply to meet the user's reasonably anticipated requirements, measured at the time the dispute was notified. The issue here is: how are existing users' reasonably anticipated requirements to be determined and will the ACCC seek to second guess the owner's own planning decisions in this regard?

Secondly, the ACCC cannot make a determination which prevents a third party from obtaining, under a contract or determination that was in force when the dispute was notified, sufficient supply to meet the third party's actual requirements. The issue here is: what does the term "actual requirements" mean in the context of contracted future entitlements not currently being utilised?

Thirdly, in making a determination the ACCC is required to take into account, and consequently balance, a range of considerations including the legitimate business interests of the infrastructure owner, the public interest (including in having competitive markets) and the interests of all current users. However, these are matters to be taken into account rather than matters which determine the scope of the ACCC's determination power. As the Productivity Commission observed, no guidance is provided on the relative weight to be given to these factors.[48] The ACCC's balance will likely be in favour of granting access rather than restricting it.

Finally, the ACCC cannot make a determination which deprives any person (including the infrastructure owner) of rights under a contract that was in force at midnight on 29 March 1995.

Leaving aside grandfathered contracts, as noted above, a number of questions arise in relation to these limitations. Who determines what amounts to "sufficient supply to meet the user's reasonably anticipated requirements"? What happens to supply required to meet a third party's anticipated requirements? Will this be treated as part of an "actual" requirement or is it something more?

Each of these questions remain to be tested, but it seems likely that, in considering access applications, the ACCC will tend to narrowly interpret existing rights.

A further series of questions relevant to the question of access where there is no excess capacity arise in relation to the nature of the arbitration to be undertaken to resolve access disputes. Given that each arbitration is a private matter between the infrastructure owner and the access seeker and given that arbitration normally focuses only on the issues in dispute,[49] in what circumstances will the ACCC be

[48] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 217.

[49] The Productivity Commission recommended that, in arbitrating disputes, the ACCC should generally limit its involvement to matters in dispute between the parties: Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 220.

required to regard a third party's interests as sufficient to permit it to participate in the arbitration? Is it feasible for a third party potentially affected by an arbitration to effectively participate in proceedings? What information will be available to parties, including third parties, and to the ACCC, to enable an informed decision to be made?

Information asymmetry has always been a problem for access seekers and it remains the case, compounded by the fact that Pt IIIA contains no information disclosure requirements. It remains for the parties to present such evidence to the arbitration as each party thinks relevant to its case, although the ACCC may give directions in the course of the arbitration.[50]

Secondly, the private, inter parties nature of the arbitration limits the scope for broader considerations to be taken into account. Even if an interested third party is given leave to intervene, how effective will that intervention be and at what cost? If there are a number of separate access applications in relation to the one facility, how can they be efficiently determined?

Views differ on whether arbitration should be on a private, inter parties basis. In its submission to the Productivity Commission, Sydney Airport Corporation Ltd stated:[51]

> "property owners should be entitled to have access disputes dealt with individually if they so wish … It is a fundamental principle, embodied in clause 6 of the Competition Principles Agreement … that 'access to a service for persons seeking access need not be exactly on the same terms and conditions'…"

The ACCC, on the other hand, submitted that:

> "any particular input service is likely to be largely homogeneous and undifferentiated in both cost and quality, so that a similar price should be appropriate for all access seekers except where quantity discounts or other special circumstances exist. Multilateral, public processes would seem likely to provide faster, more effective and more transparent price determinations than the current arrangements."

Finally, one of the orders the ACCC can make in an arbitration is that the infrastructure provider extend an existing facility.[52] At first glance this seems to be a significant potential intrusion into the private interests of infrastructure owners, even though the Act contains a requirement that the infrastructure owner is not to bear the cost of extending the facility.[53]

No such order has been made by the ACCC to date so the practical impact of this provision, how the cost is to determined and paid and the methodology the ACCC might use to implement such an order, can only be surmised.

[50] *Trade Practices Act*, s 44ZG.
[51] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 228.
[52] *Trade Practices Act*, s 44V(2)(d).
[53] *Trade Practices Act*, s 44W(1)(e).

The first question to consider is: what is meant by extending a facility? Would this, for instance, encompass an access seeker interconnecting its pipeline or facility to that of the infrastructure provider? There seems to be some doubt whether this would amount to an extension and the Productivity Commission has recommended that the position be clarified.[54]

A second question relates to the circumstances in which an order to extend a facility might be made. The *Competition Principles Agreement*, which has status under Pt IIIA as a guideline rather than a binding ruling,[55] provides some guidance on this issue. The Agreement states:"[56]

> "The owner may be required to extend, or to permit extension of, the facility … if necessary but this would be subject to:
> (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
> (ii) the owner's legitimate business interests in the facility being protected; and
> (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension."

In the context of access undertakings, the ACCC has said that its expectation is that such undertakings would include an extensions policy outlining the method the infrastructure owner would apply in the treatment of an extension to the facility.[57]

A third question relates to cost. When Pt IIIA states that a determination may not require the infrastructure owner to bear "some or all of the costs of extending the facility", what costs is this referring to and how are those costs to be assessed, secured and paid? While the words might seem clear, the Productivity Commission had some concerns about how extension costs would be assessed and paid. The Commission said:[58]

> "The Commission presumes that this provision would not generally be interpreted in a manner which would result in a facility owner having to meet the up-front costs of an extension and then recouping the costs through usage charges."

This issue is complicated by the further requirement that, a determination cannot result in the access seeker becoming the owner of any part of the facility or an extension to the facility, without the consent of the infrastructure owner.[59]

[54] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 226.
[55] *Trade Practices Act*, s 44DA.
[56] Clause 6(4)(j).
[57] ACCC, Access Undertakings – A Guide to Part IIIA of the Trade Practices Act (1999), p 26.
[58] Productivity Commission Review of the National Access Regime, Inquiry Report No 17, p 224.
[59] *Trade Practices Act*, s 44W(1)(d).

CONCLUSION

These are a few of the questions concerning the essential facilities regime in Australia yet to be considered by our courts. The answers to them and to the questions addressed in the following paper by Mark Carkeet will materially assist in determining whether or not, in Australia, there is truly an excess of access.

return to AMPLA 2004 Table of Contents