Law Council
OF AUSTRALIA
Business Law Section

National Access Regime
Productivity Commission
Locked Bag 2
Collins Street East
Melbourne Vic 8003
Via email: accessregime@pc.gov.au

16 July 2013

Attention: Mr Barker

Dear Mr Barker

Draft Report of Productivity Commission Inquiry into the National Access Regime

I have pleasure in enclosing a submission in response to the Productivity Commission's Draft Report on its inquiry into the National Access Regime, published in May 2013. The submission has been prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Mr. Michael Corrigan, on , or Caroline Coops (Deputy Chair (Melbourne)) on .

Yours sincerely,

Frank O'Loughlin
Section Chairman

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Draft Report of Productivity Commission Inquiry into the National Access Regime

Submission by Competition and Consumer Committee of the Business Law Section of the Law Council of Australia
16 July 2013

1. Overview of submission

1.1 The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (Committee) welcomes the opportunity to make a submission to the Productivity Commission (Commission) in relation to its draft report on its inquiry into the National Access Regime published in May 2013 (Draft Report). This submission should be read in conjunction with the Committee's earlier submission of 20 February 2013 which commented on various aspects of the Commission's inquiry:

- the operation of criterion (b) (that could be uneconomical for anyone to duplicate the facility) and criterion (f) (that access would not be contrary to the public interest);
- the processes for certification of State based assess regimes; and
- the appropriateness of the current institutional arrangements for consideration of applications for declaration and review of declaration decisions.

1.2 The Committee chose to focus on those issues in part because of their current relevance in light of the High Court's decision in *Pilbara Infrastructure*[1] but also because it considered these to be areas where legal considerations may play a significant part such that the Committee may be able to best assist the Commission in its considerations. The Committee welcomes the Commission's consideration of the Committee's submissions on the Draft Report and proposes to adopt a similar although more narrowly focused approach in its submissions on the Draft Report. Representatives of the Committee would be happy to discuss or expand upon these submissions at the Commission's public hearings on 29 July 2013 if that would be of assistance.

1.3 The structure of the Committee's response to the Draft Report is as follows:

- general comments;
- the Commission's proposed reforms to
  - criterion (a); and
  - criterion (b).
- the Commission's proposed amendments to the provisions deeming particular outcomes where the Minister has not made a decision within the specified time; and
- the Commission's questions regarding sections 44W and 44X of Part IIIA of the *Competition and Consumer Act 2010* (Cth) and issues regarding the expansion of facilities.

(a)

[1] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

2. General Comments

2.1 The Committee acknowledges the Commission's careful consideration of the numerous issues and controversies that have arisen since the inception of the National Access Regime (Regime) in 1997. As the Commission is aware, views have been expressed by some commentators and practitioners that particular aspects of the Regime have failed to operate in an effective or efficient manner and that as a result the Commission should propose sweeping reforms or the removal of the Regime altogether. Equally others have expressed concerns about proposing drastic reforms in circumstances where many parts of the Regime (such as the arbitration processes) are yet to be fully tested. While the scrutiny that has been focused on the delays and costs associated with the disputes over access to rail infrastructure in the Pilbara and, to a lesser extent, the declaration of the airside service at Sydney Airport[2] may have led to some of these calls for sweeping reforms, the Committee sees merit in the Commission's view that the recent High Court decision in *Pilbara Infrastructure* and the 2010 amendments to Part IIIA may have addressed at least some of those concerns.

2.2 In its Draft Report the Commission has chosen to take an approach which asks the following questions:

- what is the Regime intended to achieve;
- is that the correct 'intention' (from a national productivity and welfare enhancing perspective); and
- what (if any) changes should be made to the Regime to ensure it fulfils these objectives.

2.3 The Committee considers this to be a reasonable approach, particularly in circumstances where there is a wide disparity of views on the utility and effectiveness of the Regime and the manner in which its objectives can best be met. However, in that context, the Committee notes that the Commission has not attempted a cost-benefit analysis in relation to whether the Regime is meeting its objectives and generating a net benefit.[3] While the Committee agrees with the Commission that this task is "difficult"[4], the Commission has a unique opportunity, and is the best placed inquirer, to undertake a detailed review of the costs and benefits of the Regime, drawing on the experience, both in particular industries and more broadly, with access regulation in Australia since the introduction of Part IIIA.

2.4 More generally though, as noted above, the Committee supports an approach which allows the (as yet relatively untested) impacts of both the 2010 amendments to Part IIIA and, more recently, the High Court's decision in *Pilbara Infrastructure* to be better tested and understood before making extensive changes to the institutional arrangements under Part IIIA.

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2 *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10.

3 The Commission's terms of reference requested the Commission to examine and comment on "the full range of economic costs and benefits of infrastructure regulation, including contributions to economic growth and productivity".

4 See page 11 of the draft report.

3. Criterion (a)

3.1 The Committee did not comment specifically on criterion (a) in its earlier submission. However, the Committee understands why the Commission may see the need to clarify the intended operation of criterion (a) in response to concerns that, notwithstanding the amendments made in 2010, it still fails to ask the right question, namely, will regulation under Part IIIA promote competition?

3.2 In that light the Commission's proposal that criterion (a) be expressly directed at assessing whether declaration (including reasonable terms and conditions of access as a result of negotiation or arbitration), as distinct from merely access, will result in an increase in competition makes sense. It also helps harmonise the operation of the declaration and (if required) arbitration stages of Part IIIA by clarifying that the Regime is intended to provide for reasonable terms and conditions if access occurs.

4. Criterion (b)

4.1 Criterion (b) has been a central issue in most of the disputes concerning the proper application and operation of the Regime. It was, in particular, a major issue in the long running dispute over access to rail infrastructure in the Pilbara and was considered at length by the High Court (and the Tribunal and Federal Court below) in the *Pilbara Infrastructure* case.

4.2 The Committee does not propose to comment further on the policy and economic underpinnings for criterion (b) and the merits or otherwise of the '*net social benefit', 'national monopoly'* and *'private profitability*' tests that have been variously applied by the Tribunal and the courts. These matters were considered extensively in its earlier submission.

4.3 However, if the natural monopoly approach is to be adopted, the Committee sees merit in the Commission's desire to ensure that compliance costs (such as scheduling costs) are taken into account in the criterion (b) assessment and its recognition that criterion (b) must operate harmoniously with the other declaration criteria, including criterion (f).

4.4 As in a number of the aspects of the Commission's proposed reforms, effective implementation will likely require that the drafting be more prescriptive than has previously been the case. It would also be desirable to ensure that explanatory materials clearly set out the intention of the reforms rather than, as is often now the case, simply reciting the provisions themselves.

4.5 Since Part IIIA commenced courts and the Tribunal have frequently needed to embark upon an extensive search for the intended meaning of the declaration criteria, including by reference to the Report of the Hilmer Committee, the Competition Principles Agreement and economic treatises. This has been both costly and time consuming and indicates that the clear drafting of the Commission's proposed reforms (if implemented) will be crucial to any improvements being achieved in practice.

4.6 The Committee notes that there is room for legitimate differences of opinion regarding the relative ease and certainty of application of the natural monopoly test, as compared with the private profitability test favoured by the High Court in *Pilbara Infrastructure*. There, the majority commented that "*whether it would be economically feasible to develop an alternative facility – is a question that bankers and investors must ask and answer in relation to any investment in infrastructure*."[5]

4.7 It may be that those questions will be able to be answered more readily in circumstances where duplication of the infrastructure has actively been considered by the access seeker, something that will not always be the case. In any event, the Committee agrees that constructing a workable test which is capable of ready application by parties, their advisers and decision makers is fundamental to the Regime's effectiveness.

5. Amendments to Deeming Provisions

5.1 Although the Commission has not chosen to propose significant reforms to the institutional arrangements under the Regime, it has proposed amendments to the operation of the provisions which deem particular outcomes when the Minister fails (whether intentionally or otherwise) to make a decision whether to declare a service. Currently the outcome of such a failure is the deemed non-declaration of the service. The Commission proposes instead that the Minister be deemed to have accepted the recommendation of the NCC to either declare or not declare the service. The Commission also proposes that the Minister be required to give reasons for any decision he or she makes. This is likely to be particularly significant where the Minister relies on new evidence to make a decision which, in effect, reverses the decision of the NCC.

5.2 The Committee sees merit in these proposed reforms as, on balance, they are likely to enhance the transparency of decisions made under the Regime whilst preserving a degree of political accountability for decisions which have the potential to significantly impact on private property rights.

6. Extension and Expansion of Facilities

6.1 One of the areas where the Commission has requested further information is in relation to provisions in Part IIIA which permit the ACCC, in arbitrating an access dispute, to require the access provider to:

- extend the facility by which the service is provided (s44V(2)(d)); and
- permit interconnection to the facility (s44V(2)(da)).

[5] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [106].

6.2 As the Commission recognises, the ACCC's power to do so is subject to some important conditions. Specifically, it may not make a determination which results in:

- a third party owning the extension without the provider's consent (s44N(1)(d)); or
- the provider having to bear any of the costs of the extension (s44W(1)(e)).

6.3 These issues raise a number of complex and fundamental issues which the Committee suggests require further evaluation and consultation with infrastructure owners and access seekers before more definitive views can be adopted. For that reason the Committee will confine itself to a few brief observations.

6.4 First, in considering the power of the ACCC to require extensions of existing infrastructure[6], the Commission might have further regard (prior to the formulation of guidelines by the ACCC) to how a regulator such as the ACCC would, practically, require an access provider to extend its infrastructure substantially (beyond an interconnection, or an "extension" of existing infrastructure, presumably in the same format). Particularly if the power to direct expansion is enlarged, the ACCC may find itself having to undertake the complex tasks of designing and overseeing the construction of significant infrastructure projects, where the access provider refuses, beyond compliance with the terms of enforceable orders imposed on it, to do so.

6.5 Another significant issue is the potential impact on individual property rights. For example, while bearing the entirety of the cost may seem burdensome for the access seeker, it reflects the fact the facility belongs to the access provider. To require the provider to bear the costs of an extension which it did not require would likely represent too great an intrusion on private property rights (as well as potentially giving rise to acquisition of property issues). As a basic principle, "user pays" is a reasonable starting point.

6.6 The adverse impact on access seekers is also mitigated by s44X(1)(e) which requires the ACCC, in making a final determination, to take into account the value to the (access) provider of a situation where the cost of an extension is borne by someone else. In effect this means that the ACCC must set a price for access which reflects the extent to which the access provider has the ability to enjoy some of the benefits of the extension, whether through its own use or by way of supply to parties other than the access seekers. The extent to which it can do so will be a question of fact and judgement to be determined in each case.

6.7 Another issue is the potential uncertainty involved with the application of these provisions by the ACCC and the consequent potential for impacts on infrastructure investment. While apparent clarification of the provisions by, for example, making an express reference to expansions in s44V may help reduce that uncertainty it should, in the Committee's view, be approached with caution

[6] See Draft Recommendation 8.7 on page 253.

in circumstances where there has been limited judicial or Tribunal consideration of the existing provisions. In addition, any changes would need to take account of the inter-relationship between the provisions in question and the remainder of Division 3 of Part IIIA.