4 Access to essential infrastructure

4.1 The importance of access to infrastructure

Fair and reasonable access for third parties to essential infrastructure facilities such as electricity grids, gas pipelines, rail tracks, airports and communications networks is important for effective competition.

Many infrastructure facilities exhibit natural monopoly characteristics that inhibit competition in related industries. For example, restrictions on access to rail track may prevent competition between different companies seeking to provide rail freight services. Similarly, where a gas producer cannot make use of an existing gas distribution network to reach potential clients, it may be difficult to compete in or even enter the wholesale and retail gas supply markets.

It is generally not economically feasible to duplicate such infrastructure, and given the historic likelihood of vertically integrated owners, it can be difficult for actual and potential competitors in downstream and upstream industries to gain access to these often vital infrastructure services. Even if access is technically available, there may be an imbalance in bargaining power between the infrastructure owner and potential third party users, influencing the terms and cost of access and making entry potentially prohibitive for competitors.

The outputs of these industries are significant inputs to a wide range of economic activities. Where restricted, access arrangements result in higher prices or lower service quality, and whether through reduced competition and/or limited supply, the impact is felt by businesses and consumers alike.

As a result, governments have given increasing attention to establishing a right of access to these facilities, under established terms and conditions, where privately negotiated access is not expected to be a viable option.
4.2 Part IIIA of the *Trade Practices Act 1974*

Clause 6 of the CPA requires the Australian Government to establish a legislative regime for third party access to services provided by means of significant infrastructure facilities where:

- the facility is of national significance having regard to the size of the facility, its importance to constitutional trade or commerce or its importance to the national economy;
- it would not be economically feasible to duplicate the facility; and
- access to the service is necessary in order to permit effective competition in a downstream or upstream market.

Further, this regime is not to cover a service provided by means of a facility located in a State or Territory that has established an access regime that both covers the facility and conforms with the principles set out in Clause 6, unless the NCC determines that regime to be ineffective in relation to the inter-jurisdictional impact or nature of the facility.

To give effect to this commitment, Part IIIA was inserted into the TPA. This part is referred to as the national access regime, and is intended to provide for minimum intervention by the Australian Government in determining actual terms and conditions of access.

The national access regime establishes three means by which parties may seek access to nationally significant infrastructure services. These are:

- declaration of a service provided by an infrastructure facility:
  - a person can apply through the NCC to have a service provided by a significant infrastructure facility ‘declared’ by decision of the relevant minister. Where a service is declared, access to the service may be negotiated on a commercial basis between the service provider and an access seeker.
  - if agreement cannot be reached, the terms and conditions of access can be determined by the ACCC through a legally binding arbitration process. In making an access determination, the ACCC must take into account a range of factors, including the legitimate
business interests of the service provider, the provider’s investment in the facility and the public interest.

- a minister’s decision on an application for declaration and an ACCC determination on a post-declaration arbitration can be reviewed by the Australian Competition Tribunal (ACT) upon application within 21 days.

- through an undertaking to the ACCC:
  - the operator of an infrastructure service can give a voluntary undertaking to the ACCC, setting out the terms and conditions on which access to that service will be provided. If an undertaking is accepted, this provides a legally binding means by which third parties can obtain access to the infrastructure service. A service that is subject to an undertaking cannot be declared as described above; and

- certification of a state or territory access regime as an ‘effective regime’:
  - State or Territory governments may apply through the NCC to have an access regime certified as effective in relation to a particular service. The NCC then makes a recommendation to the relevant Australian Government minister on whether or not to certify the regime as effective. On receiving a recommendation from the NCC, the Minister must decide whether the access regime is an effective regime by applying relevant principles under the CPA.
  - where an effective state or territory access regime is in place the relevant infrastructure service cannot be declared under Part IIIA.
  - a decision on an application for certification can be reviewed by the ACT upon application within 21 days of publication of the minister’s decision.

Specific access regimes have also been established for particular infrastructure facilities. Apart from the sector-specific telecommunications access regime, the access regimes for airport services provided at core regulated Australian Government airports and for
natural gas transmission and distribution pipelines, interact with the national access regime.


4.3 Australian Government activity under Part IIIA

This section identifies those actions under Part IIIA of the TPA involving infrastructure facilities under Australian Government jurisdiction or requiring a decision by an Australian Government minister during the period 1 July 2004 to 30 June 2005.

4.3.1 Application for declaration of airside services at Sydney Airport

In October 2001 the NCC received an application from Virgin Blue Airlines for declaration of airside services at Sydney Airport. On 29 January 2004, the Parliamentary Secretary to the Treasurer accepted a recommendation from the NCC and decided not to declare the services. In deciding not to declare airside services, the Parliamentary Secretary to the Treasurer agreed with the NCC’s assessment that it was not satisfied that declaration of airside services would promote competition in the market for domestic passenger services in Australia.

Virgin Blue applied to the ACT for a review of the decision, the matter was heard in October 2004. As at 30 June 2005, the ACT had not yet released its decision.

4.3.2 Application for declaration of rail track services in the Pilbara

On 15 June 2004, the NCC received an application from Fortescue Metals Group Ltd (FMG) for declaration of a service provided using parts of the Mount Newman and Goldsworthy railway lines in the Pilbara, Western Australia. BHP Billiton Iron Ore (BHP) owns both railway lines.
The NCC has released decisions on two preliminary issues in relation to the FMG application, concluding that the two railway lines each provide a separate service, and that the Mount Newman line service is capable of being considered further for declaration. However, the Goldsworthy line service was considered to be part of a production process and therefore exempt from declaration.

Following these decisions, BHP applied to the Federal Court for a declaration that the use of the Mount Newman railway line is not a service for which declaration can be sought. An order prohibiting the NCC from further considering FMG’s application was also sought.

FMG has applied to the Federal Court for a declaration that the use of the Goldsworthy railway line is a service for which declaration can be sought. FMG has also sought an order requiring the NCC to consider the application for declaration of the service.

The BHP and FMG proceedings are continuing. The NCC has commenced consideration of the application for declaration of the Mount Newman railway line only.