Access to rail infrastructure

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Australia is a large country with a small, dispersed population. This has implications for investment in and use of infrastructure.

First, it means that infrastructure investment is made in large chunks compared with the size of the market it is serving.
Second, it means that to get the most from this investment we need to use this infrastructure effectively.

This is not only an issue for private companies investing in infrastructure projects but it is something that we need to be interesting in from an Australia wide perspective. It is not good for Australia to have large infrastructure investments under-utilised or to loose the development possible from people using that infrastructure and investing in related activities.

These are the reasons why Part IIIA of the Trade Practices Act was originally developed. It sets out a National Access Regime that recognises that there are benefits to Australia as a whole of efficiently using our infrastructure.

This regime enables access to be sought to significant natural monopoly infrastructure using one of three processes.

The Regime enables the development of state and territory access regimes. These state regimes are assessed by the Council against agreed principles with particular consideration of whether each regime is contributing to the development of the relevant national market. Thus, state and territory access legislation that conforms to the agreed requirements can be brought under the aegis of the National Access Regime. This process is commonly referred to as 'certification'.

In addition, voluntary access 'undertakings' can be developed by infrastructure owners and submitted to the Australian Competition and Consumer Commission (ACCC) for approval. This can be done by way of an industry code submitted by an industry body. This was the approach adopted in electricity, where governments had already substantially developed access arrangements to apply to their electricity utilities prior to the implementation of the National Access Regime. An individual infrastructure owner can also submit an undertaking.

And finally, applications can also be made to Council by third parties wishing to use someone else's infrastructure. The Council can then in turn make a recommendation to the relevant Government Minister for 'declaration'. This effectively creates a legal right to negotiate access agreements to an infrastructure service, backed by mandatory arbitration of access disputes by the ACCC.

All three of these processes set up a legal right for a third party to negotiate to use infrastructure owned by other businesses and processes to settle disputes that arise out of that negotiation. Effective access regimes and Undertakings also provide more detail on the terms and conditions of access.

Establishing processes to ensure that access arrangements are developed and applied in appropriate circumstances is not an easy. Not providing access where it is needed will cause:

- under-utilisation of large facilities;
- deter invest in activities that need to use those facilities to compete; and
- a lack of competition which will increase prices and reduce service quality in related services.

Providing access to the wrong facilities will:

- discourage investment in large infrastructure projects; and
- unnecessarily impose regulation on areas where it is not appropriate.

Therefore, you need to look carefully at where access is applied. The Trade Practices Act sets out criteria that make sure access is limited to specific types of infrastructure.

The facilities need to be large. The legislation requires that they are nationally significant in the case of Commonwealth legislation and significant to the State or Region when they are covered by State legislation.

The facilities need to be natural monopolies: so that it is cheaper to supply all the demand for the services by one facility than it would be if there were two or more. This is assessed by determining whether it is uneconomic to have more than one facility to provide the service.

Using the facility needs to produce benefits that flow on to other areas of the economy and therefore there is a test to see that competition is promoted in other markets.

It needs to be possible for a number of people to use the facility without compromising safety.

And finally there is a public interest test to ensure that for each service specific issues do not arise that make access inappropriate.

These are the objectives of Access arrangements. The next question is what has been happening in practice.

There are many areas of infrastructure in Australia that are now the subject of access arrangements. I will look first at the rail industry specifically and then outline what is happening in other areas.

Rail

Throughout its history the rail industry has been characterised by State by State arrangements that were often inconsistent and incompatible. Trying to draw these divergent approaches together has been a focus of the Council's work on rail access.

Over the past few years three areas of access regulation in rail have emerged.

- First, there is an Intergovernmental Agreement that covers interstate track.
- Second, there are State regimes which have been brought to the Council to assess whether they are effective regimes.
- Third, there are State regimes where, at this stage, the respective governments do not intend to bring them to the Council to assess the effectiveness of those regimes.

National rail process

All Transport Ministers, except the Northern Territory, have signed an agreement that defines the interstate track network and commits governments to developing a mechanism for rail operators to gain access to the whole of the interstate network through a single organisation, without having to seek separate access in each state. It was also agreed that an undertaking would be lodged with the ACCC to define the terms and conditions on which rail operators can gain access to the interstate track.

The Ministers agreed to establish the Australian Rail Track Corporation (ARTC) to provide a "one stop shop" for national rail operators. For their part, the States agreed to enter into negotiations with the corporation to achieve arrangements over State track that would allow the corporation to operate as a "one stop shop" over a national network. While leasing of the interstate lines was the preferred approach, this has not proved possible for the entire track. While the ARTC has leases on the South Australian (Commonwealth owned) interstate track and the interstate track in Victoria, it has also entered into wholesaling agreements with three states – New South Wales, Western Australia and Queensland.

These wholesale agreements are still to be finalised and as yet the undertaking has not been submitted to the ACCC.

Effective state access regimes

The Four State and Territory Governments have brought their access regimes to the Council to assess whether they are effective Access Regimes.

New South Wales

New South Wales was the first state to apply to the Council for it to recommend that its Rail Access Regime is an effective regime. This regime covered the services provided by rail track in New South Wales. At that time, negotiations on how the national access arrangements would develop were at a very early stage. Therefore, it was not possible to determine how the NSW Rail Access Regime would interrelate to the National Rail Regime.

In November 1999, the NSW Rail Access Regime was certified as 'effective'. This certification is to expire in December 2000. The short duration of the certification reflects the need to again look at how this regime meshes with the National Rail Regime once there is more detail on how the national regime will develop.

Northern Territory and South Australia

In March 1999 the Northern Territory and South Australian Governments applied to the Council for it to recommend certification of an access regime to apply to the existing rail track between Tarcoola and Alice Springs and the new rail track that will be built between Alice Springs and Darwin.

In March 2000 the Treasurer certified the Darwin to Tarcoola Rail Access Regime until 31 December 2030. The Treasurer's decision was consistent with the Council's recommendation.

The regime submitted to the Treasurer for consideration was significantly different to that submitted to the Council for consideration.

The regime now incorporates a balanced approach to access. It provides a framework for access negotiations that gives investors sufficient certainty to proceed with the project, while ensuring access on terms and conditions that could be expected in a competitive market.

A key feature of this regime is that it allows for the central involvement of an independent regulator who can develop guidelines, assist in dispute resolution and generally monitor the effectiveness of the regime. The regime provides further safeguards against the infrastructure owner favouring its rail operator at the expense of others.

All prices for access are to be struck within a floor/ceiling band, set in accordance with efficient forward looking costs.

The certification recommendation is for a relatively long period. This gives further certainty to the access provider. However, as the rail line is yet to be built, there is no history to indicate how the access provider will manage its above and below rail businesses and a few of the regime's approaches are unique. Such a long certification could see inappropriate elements in the regime entrenched for the entire period, increasing uncertainty for rail operators.

To rebalance these respective risks, the regime incorporates a comprehensive review three years after operations commence. This review will be public and conducted by the Northern Territory and South Australian Ministers, supported by the independent regulator's assessment of the effectiveness of the regime. This gives the Northern Territory and South Australian Governments an early opportunity to make the changes necessary to address any problems revealed through the first years of operations.

The regime also includes specific provisions that are designed to ensure that the Tarcoola to Darwin Rail Access Regime operates in a way that is consistent with any National Rail Access Regime.

- Specific clauses facilitate the ARTC negotiating broad access contracts, covering a range of freight, that it can then onsell to other rail operators.
- The regulator is required to consider interstate issues when developing guidelines.
- The regime allows for an arbitrator to be selected who can conduct arbitrations under other regimes. If this is not possible the arbitrator under this regime must consult with arbitrators under other regimes when relevant to the dispute being considered.

Western Australia

The Western Australian Government applied for certification of the WA Rail Access Regime in February 1999. The Council's public process identified a number of issues, subsequently addressed by Western Australia. Among the refinements agreed to by the State was the creation of an independent rail access regulator with broad powers to enforce compliance with the regime.

The Council released a Draft Recommendation in September 1999, stating its preliminary view that the amended regime would be an effective regime. The Council received eleven submissions on the draft and liased further with key stakeholders. As a result of these processes, the Council identified a number of additional concerns. The Council has now reached agreement with Western Australia on all but one issue and considers that the regime constitutes a robust set of access arrangements for infrastructure owners and users. However, the one remaining issue – the treatment of interstate rail operations – is critical and the Council cannot recommend certification without this issue being resolved.

State based rail access regimes

Currently there are three State based rail access regimes where the Council has not assessed the effectiveness of the regimes. States are not required to bring their regimes to the Council. If a regime is certified as effective then the Council cannot accept an application to have those infrastructure services declared. If a regime is in place that has not been certified, and someone seeks declaration of the services provided by the infrastructure, then the Council will accept and consider the application and assess the effectiveness of the State regime at the time it considers the application for declaration.

Queensland

In June 1998 the Council received an application to certify as effective Queensland's Rail Access Regime. At the same time the Queensland

Competition Authority (QCA) was considering an undertaking by Queensland Rail which will set out the terms and conditions for access. Queensland subsequently withdrew its certification application while the QCA completed its assessment. The Council expects that Queensland will probably resubmit its application for certification after the undertaking has been finalised.

Victoria and South Australia

South Australia has a rail access regime that covers intrastate freight in that State. Victoria is currently developing their access regime. Both States have said that they do not intend to bring these regimes to the Council for it to recommend on whether they are effective access regimes.

Access in other sectors

Access regulation is now a common feature of many infrastructure services in Australia.

Electricity

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) are covered by undertakings approved by the ACCC. Under the certification process, an access regime for electricity and distribution wires in the Northern Territory is currently under development and consideration by the Council, while a similar regime in Western Australia is yet to be formally considered by the Council.

Gas

Gas transmission and distribution pipes throughout Australia are covered by State and Territory access regimes approved as effective by the Council.

Airports

Services provided by the 'privatised' international airports are covered by 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 Council 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.

Shipping channels and ports

Commercial shipping channels in Victoria are covered by an access regime approved as effective by the Council. There are no other access regimes covering shipping channel and port services. However, the Council is aware that a regime is being developed in South Australia.

Telecommunications

There is a specific access regime covering telecommunications that is included in Part XIB of the Trade Practices Act and is administered by the ACCC.

Thankyou