Third Party Access to Infrastructure in South Australia

Background

This paper provides information on current regulatory frameworks for third party access to essential transport, energy and water infrastructure services in South Australia.

Third party access arrangements are aimed at encouraging the efficient use infrastructure by facilitating access to services provided by essential infrastructure that cannot be economically duplicated, thereby promoting competition in markets that depend on using the services of the infrastructure.

An important aspect of such arrangements is that appropriate incentives exist for timely investment in infrastructure.

The nature and extent of regulation required will vary from industry to industry and on a case by case basis.

Competition and Infrastructure Reform Agreement (CIRA)

In February 2006, COAG signed the Competition and Infrastructure Reform Agreement (CIRA). The objective of the Agreement is to develop a simpler and consistent national approach to the economic regulation of significant infrastructure. The CIRA commits all jurisdictions with state based access regimes to ensure that access seekers can gain access to significant infrastructure in a more timely and nationally consistent way, to reduce compliance costs for stakeholders and encourage more efficient investment in, and use of, the nation's significant infrastructure.

A light-handed approach to economic regulation is promoted through the CIRA with terms and conditions for third party access to regulation to be commercially agreed between the access seeker and the operator of the infrastructure in the first instance.

The Agreement also ensures that jurisdictions will take specific measures to enhance regulatory outcomes for nationally significant ports and rail networks, through the adoption of consistent regulatory principles. These principles include:

- an objects clause that promotes the economically efficient use of, operation and investment in, significant infrastructure
- principles for regulated access prices
- a six month binding time limit for a regulatory decision
- a limited form of merits review for regulatory decisions (where merits review is already provided for).

Consistent with the CIRA, the South Australian Government has reviewed and amended its third party access legislation for ports. A recently completed review of the third party access legislation applying to rail lines has identified a need for minor amendments to ensure national consistency. The Government intends to apply for

both regimes to be certified as effective by the National Competition Council (NCC) by the end of 2010.

Part IIIA of the *Trade Practices Act 1974* (TPA) the National Access Regime- and the proposed reforms

Current Act

Part IIIA of the TPA provides the means for third parties to gain access to services provided by essential infrastructure of national significance on reasonable terms and conditions.

The objectives of Part IIIA are to:

- promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Under Part IIIA, there are 3 pathways to access: declaration, voluntary access undertakings and certification.

A service can be declared for access through application by an access seeker to the National Competition Council (NCC). If a service provided through infrastructure is declared by the designated Commonwealth Minister, and commercial access negotiations subsequently fail, the Australian Competition and Consumer Commission (ACCC) can make a binding determination. (For example, rail lines in the Pilbara were declared by the Commonwealth Treasurer in 2009.)

A voluntary written undertaking by the business entity providing access to services, which has been accepted by the ACCC, provides protection against declaration by the ACCC. The Australian Rail Track Corporation (ARTC) has a voluntary access undertaking for the main interstate rail lines.

Infrastructure covered by a state-based access regime can be also protected from declaration under the TPA, if it is certified as effective by the Commonwealth Minister. This is the case with the access regime which covers the Tarcoola-Darwin rail line.

A certified state-based regime offers some advantages over the other alternatives identified above:

- certainty to the access provider and access seeker over how access will be regulated;
- greater likelihood of national consistency as certification will only be granted to a state regime which conforms to CIRA principles (the focus of the CIRA is on the effectiveness of, or need for, economic regulation); and
- lower transaction costs for access providers and seekers in the event of a dispute.

Proposed Amendments

The Commonwealth Government has proposed a number of amendments to the national access regime aimed at increasing efficiency, timeliness and certainty for investors. The Trade Practices Amendment (Infrastructure Access) Bill 2009 was introduced to Parliament on 29 October 2009.

Potential infrastructure investors will be able to seek a binding exemption (for 20 years) from declaration "where that infrastructure would not meet the declaration criteria". The stated aim of this proposal is to "enhance regulatory certainty for potential investors in major new infrastructure".

A second amendment would limit merits review to information submitted to the regulator. This is based on merits review for merger clearance decisions by the ACCC under section 116 of the TPA.

The Commonwealth is also proposing to streamline the decision making criteria of Part IIIA and the processes, by:

- allowing access undertakings to include “fixed principles’ which will apply to subsequent undertakings covering that infrastructure service;
- removing the ‘health and safety’ criterion (limiting consideration of health and safety issues to the public interest criterion and the arbitration process, rather than under a separate declaration criterion);
- streamlining the ‘effective access regime’ criterion: services covered by a state/territory access regime would only be exempt from declaration where the regime has been certified as effective under Part IIIA; and
- deeming of ministerial decisions: amend the deeming provision so that in the event of no decision within the timeframe, the Minister is taken to have agreed with the NCC’s recommendation.

The NCC and ACCC administrative processes will be amended to:

- allow the NCC to accept alterations to declaration applications, addressing a current legal uncertainty;
- allow the ACCC to accept an undertaking subject to amendments; and
- allow the NCC and the ACCC to make decisions by circulation of papers.

The tribunal processes are also proposed to be streamlined by:

- allowing costs to be paid or awarded for review of declaration decisions before the Australian Competition Tribunal in certain circumstances; and
- when a decision is appealed allowing the Tribunal to determine whether a stay on a decision to declare a service is appropriate.

Rail

In South Australia third party access to rail infrastructure is covered by three different acts;

- *AustralAsia Railway (Third Party Access) Act 1999,* Tarcoola to Darwin railway
- *Railways (Operations and Access) Act 1997* (ROA Act). – Genesee & Wyoming Australia regional network and TransAdelaide urban network
- *Trade Practices Act 1974* (TPA), ARTC interstate rail corridors.

The Port Augusta to Leigh Creek railway line has a contractual obligation to provide third party access. Freight terminals and private terminals have been excluded from the access regime by proclamation.

The South Australian rail access regime is set out in Parts 3 to 8 of the *Railways (Operations and Access) Act 1997* (the ROA Act). The aim of the regime is to promote competition, the efficient use of existing infrastructure and avoid unnecessary duplication of infrastructure without compromising incentives for investment in infrastructure facilities. The regime has thus far succeeded in this light handed approach as there have been no disputes which have required arbitration.

The state access regime applies to all railways in South Australia, with the specific exception of the ARTC and Freight Link Pty Ltd interstate mainlines, the Glenelg tramline, the lines owned by OneSteel, the Leigh Creek line and tourist or heritage railways lines. The railway services covered by the access regime include those provided by rail track and yards, but exclude freight terminals and private sidings and the services needed for the operation of these.

In August 2008, Commonwealth Treasury advised the COAG Business Regulation and Competition Working Group (BRCWG) that, in relation to major intra-state rail networks, State Governments should continue to apply their own rail access regimes where they exist and seek certification of those regimes under the TPA. In its advice to the BRCWG Commonwealth Treasury noted that there is no compelling case for a uniform national approach to access for intra-state rail and concluded that a national approach for intra-state rail access risked an increase in regulatory burden and red tape without offering strong benefits arising from greater national consistency.

Under the CIRA, South Australia is committed to amend (where necessary) its state based rail access regime to include consistent regulatory principles aimed at promoting effective competition and streamlining regulatory processes.

The Essential Services Commission of South Australia (ESCOSA) has conducted a review of the regime to advise on amendments to the Act required to achieve consistency with the CIRA. ESCOSA was also asked to advise on other changes which could be made to improve the effectiveness of the access regime, having regard to other access regimes governing inter-connected rail lines, including the Victorian regime and the ARTC undertaking.

ESCOSA released a final report in late October 2009. The report recommended some amendments to the ROA Act in order to achieve greater consistency with CIRA

principles (objects of the ROA Act, principles of arbitration and timeframes for decision making by the regulator) and to improve the overall effectiveness of the regime (reviewing ESCOSA's information kit, introducing a confidentiality provision into the ROA Act, introducing procedural improvements into the negotiate-arbitrate framework).

Its recommendations will guide the development of amendments to the Act to improve the operation of rail access regime.

Ports

In 2000 the South Australian Parliament passed the *South Australian Ports (Disposal of Maritime Assets) Act 2000; the Maritime Services (Access) Act 2000*, and the *Harbors and Navigation (Control of Harbors) Amendment Act 2000*. These Acts established the legislative framework for the privatisation of the SA Ports Corporation and the subsequent management regime.

The Maritime Services (Access) Act 2000 established the price and access regulation of the State Government owned ports, with monitoring and control the responsibility of ESCOSA. The Act was enacted to:

- provide access to maritime services on fair and commercial terms;
- facilitate competitive markets in the provision of maritime services;
- protect the interests of users of essential maritime services by ensuring that regulated prices are fair and reasonable for the industry concerned;
- ensure disputes about access are dealt with efficiently.

The Act aims to ensure access to regulated services on fair commercial terms through a negotiate-arbitrate access regime. This light-handed form of access regulation is intended to strike the right balance between promoting competition and facilitating timely investment in port facilities.

A review of ports pricing and access was conducted by ESCOSA in 2007. The review of pricing concluded that there is potential for market power to be exercised by port operators but that there was no evidence to suggest that port operators were exercising such power. ESCOSA therefore recommended that the current light-handed form of price regulation (price monitoring) be maintained.

In terms of access, ESCOSA found that port users were able to negotiate their own contract terms and conditions under the negotiate/arbitrate access model and that users were actively negotiating prices with Flinders Ports below the listed prices.
ESCOSA concluded that the ports access regime is generally consistent with the relevant CIRA principles, although it identified some areas where greater consistency could be brought about and where some general improvements to the access regime could be made.

In terms of coverage of the access regime, the Commission concluded that greater consistency in the regulation of bulk loaders could be brought about by extending access regulation to the new bulk loader at Outer Harbor. It also recommended that the access regime be revoked at the port at Ardrossan, given that there is only one

main user at the port, with established long term arrangements in place, and little potential for additional port access in the near future.
The Commission also identified various procedural improvements that could be introduced into the negotiate-arbitrate framework.

An amendment bill based on ESCOSA's recommendations was passed by Parliament in May and proclaimed to commence on 1 November 2009. The length of the regulatory period for the price and access regimes has been extended from three years to five years.

The next step will be to seek certification of the regime from the NCC prior to December 2010.

Roads

Various Commonwealth and State legislation[1] provide specified service authorities with statutory powers to install their infrastructure in road corridors. The legislation also places certain obligations on the service authority to notify the Commissioner of Highways of proposed works, pay compensation for damage and to reinstate affected road or land to its previous condition.

The Electricity, Gas, Petroleum and Telecommunications Acts give the Commissioner the right to object to proposed installations and the opportunity to enter into agreements. The Commissioner may be able to influence the overall route of a proposal; the location and depth of the service within the road corridor and in some cases the method of installation. If future roadworks are proposed, agreement should be reached with the service authority to accept responsibility for any alterations to the service that may be required as a result of the roadworks.

An application to install private infrastructure in a road corridor from a party without statutory powers should be considered by the Commissioner on its merits. In such cases, a formal agreement shall be prepared with legal advice and signed by the party and the Commissioner. Authorisation to alter a road or install infrastructure is given by the Commissioner under Section 221 of the Local Government Act.
DTEI can facilitate and provide assistance in the preparation of agreements for the installation of services in road corridors.

Energy Access Framework

This section outlines the energy regulatory framework from the perspective of businesses wanting to get access to infrastructure/services.

Under the National Electricity Market (NEM) framework, customers have financial contracts with a retailer and the network operator for the energy consumed at their connection point, with the physical delivery of the electricity the result of competitive

[1] For a detailed explanation see Services in Road Corridors- Summary of Relevant Legislation available at
http://cms.dtei.sa.gov.au/__data/assets/word_doc/0008/17648/Services_in_Road_Corridors_-_Summary_of_Relevant_Legislation.doc

bidding and dispatch in the pool. Companies seeking access to electricity transmission and distribution need to negotiate connection and its cost with the regulated network service provider - ElectraNet for transmission and ETSA Utilities for distribution. While these negotiations would be on commercial terms specified by the negotiating parties, there are provisions in the regulatory framework to require that network service providers negotiate in good faith, provide cost based offers and do not arbitrarily discriminate, with the framework also including dispute resolution processes. In addition to connection to the network, companies need to contract with a retailer to provide their energy and if their consumption is greater than 160MWh per annum this is essentially unregulated.

This compares with the gas industry in Australia, where the network businesses have a key role in scheduling gas deliveries as retailers have to contract with a pipeliner to transport gas from producers to customers. Companies seeking access to gas transmission infrastructure need to negotiate with the pipeline owners (EPIC and SEAGas), as well as a retailer of gas. As the Moomba-Adelaide and SEAGas pipelines are uncovered (see section on gas below), access to them is largely a matter of commercial negotiation and would be mainly about connection of a lateral into the pipeline. Envestra is the owner of the distribution system which is predominantly located in metropolitan Adelaide and is covered by an access arrangement. The actual gas supply is provided by a retailer (potentially a producer for larger demands) and the negotiation is essentially unregulated for customers consuming more than 1TJ per annum.

If a company is not connected to the grid it will have to meet normal industry practice with regard to operating plant. If it wants to connect to the grid, it has to undertake the process described below even if it builds its own infrastructure to connect. As an example, Prominent Hill contracted ETSA to construct its power line to Olympic Dam but then negotiated with BHP Billiton (BHPB) for access to its network (BHPB is required to provide access on commercial terms).

Nationally the electricity and gas access regimes sit within the broader framework of Part IIIA of the Trade Practices Act 1974 (TPA) and the Competition Principles Agreement.

Electricity

The co-operative scheme for the regulation of the National Electricity Market (NEM) came into operation in December 1998 within the framework established by the National Electricity (South Australia) Act 1996 and is applied in the participating jurisdictions through relevant application acts. The National Electricity Law (NEL) is a schedule to the South Australian Act, with the National Electricity Rules (NER) made under the NEL.

The NEM encompasses New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory and Tasmania. The NER cover:

- the framework for achieving a secure power system;
- the framework to be followed by generators and users regarding connection to an electricity transmission or distribution network; and
- pricing arrangements.

South Australia has monopoly transmission (ElectraNet) and distribution (ETSA Utilities) providers.

NEM – A "Market or Common Carriage" model

The NEM has been established as a compulsory common gross pool operated by NEMMCO, with generators bidding their capacity into the central pool.

Customers have a right to access the grid, with a process for negotiating access to the networks as well as dispute resolution covered in Chapter 5 of the NER, with further access provisions provided for connection to the distribution network included in the Essential Services Commission of South Australia's (ESCOSA) Distribution Code.

Under the network regulatory framework, there are three general forms of price regulation: direct control (known as prescribed services in transmission), negotiated services and unregulated services. A direct controlled network service is a service for which the price is fixed by the AER in a revenue network pricing determination, such as the usage or maximum demand charges for energy consumed by the customer.

Negotiated network services are those transmission and distribution services regulated under a negotiate/arbitrate regime. These services are not subject to upfront price control, but a binding arbitration mechanism is provided for the resolution of disputes about price and non-price aspects of access between the relevant parties. An example of negotiated services is connection charges, which are difficult to establish up-front as they are heavily dependent on the specific requirements of each connection point.

Where electricity network services are neither classified by the AER as direct controlled network services or negotiated network services, the network service is not subject to economic regulation.

The NEL also provides for a procedure for disputes relating to access. A dispute occurs when a user or prospective user is unable to agree with an electricity network service provider about one or more aspects of access to an electricity network service. The rules specify price and non-price aspects of access to a network as aspects about which there can be an access dispute.

Gas Access Regime

The National Third Party Access Regime for Natural Gas Pipelines (the Gas Access Regime) is an industry-specific regime for third party access to natural gas transmission and distribution pipelines. The access regime for gas is based on the National Third Party Access Code for National Gas Pipeline Systems (Gas Code). Unlike the original National Electricity Code, the Gas Code is not an industry code provided as an undertaking to the ACCC. Instead, it operates through each State and Territory's gas access regime.

The Natural Gas Pipelines Agreement embodying the national access code was approved by the Commonwealth and the States in November 1997. South Australia is

the lead legislator for the national regime through the *Gas Pipelines Access (South Australia) Act 1997.*
It provides for right of third party access to natural gas pipelines under terms and conditions approved by an independent regulator, and for binding arbitration to resolve disputes. It also requires that regimes include reference tariffs to provide access to specific services at a known price.

The current gas market reforms are establishing the framework for the gas access regime modelled on the national electricity regime through the establishment of the National Gas Law (NGL) and National Gas Rules (NGR). The NGL will be contained under a new Act, the *National Gas (South Australia) Act 2008*, which will replace the *Gas Pipelines Access (South Australia) Act 1997*. The *National Gas (South Australia) Act 2008* came into operation on 1 July 2008.

The Regulations made under the *National Gas (South Australia) Act 2008* together with the NGR, will be applied in all Australian jurisdictions by Application Acts which apply our Law, Regulations and NGR.

Gas – A "Contract Carriage" model

The gas market in South Australia is based on a contract carriage model, with bilateral contracting arrangements for the physical transport of gas from producers to consumers. Gas users contract with producers for gas supplies and with pipeline system owners for transport services, which has traditionally underwritten pipeline investment through long term contracts.

The Gas Access Regime only applies to pipelines that are 'covered' under the regime. There are four ways a pipeline may be covered:

- listed in schedule A of the Gas Code, which was approved by COAG in 1997;
- a service provider requests coverage and has an access arrangement approved by the relevant regulator;
- the relevant Minister decides to cover, following a recommendation from the National Competition Council (NCC) and a request for coverage by any person; and
- where the outcome of a competitive tender process for a new pipeline is approved by the relevant regulator.

Once a pipeline is covered, a service provider is required to have an access arrangement approved by the regulator. Guidelines for access arrangements are set out in the Gas Code, such as the conditions under which access will be offered (including prices), policies relevant to the operation and extension of a pipeline, and a review date.

The NGL ensures that access arrangements do not infringe upon protected existing contractual rights, and service providers are free to negotiate terms and conditions of access with users which differ from an access arrangement.

The NGL adopts the procedure for disputes relating to access used in the NEL. The AER may terminate access disputes where it is clear that the service sought in the dispute is capable of being provided on a genuinely competitive basis. The NGL also

ensures that existing contractual rights are protected in access disputes and that, by obliging the AER to take into account the revenue and pricing principles, service providers are appropriately compensated for providing access.

There are mechanisms for appealing decisions, including those on coverage and access arrangements. The relevant Minister (in South Australia, the Minister for Energy) can also revoke coverage of a pipeline, following an application for revocation by any person and a recommendation by the NCC.

South Australia has two uncovered, unregulated transmission pipelines (Moomba to Adelaide Pipeline System and SEAGas), and a regulated monopoly distributor (Envestra).

Water

At present, anyone could approach SA Water or the Government and seek access to the State's water network services.

If a party seeking access to network services is not satisfied with the result of the negotiations with the government, they would be entitled to apply to the National Competition Council to have the relevant network services (or part of it) declared under the National Access Regime. This is set out in part IIIA of the Trade Practices Act.

The NCC would then make a recommendation to the responsible Minister as to whether or not the relevant network services (or part thereof) should be declared. The responsible Minister for State Government infrastructure is the Premier, while the Commonwealth Minister is responsible for all other infrastructure. The Minister's decision can be appealed to the Australian Competition Tribunal, which is able to declare the service.

Declaration of an infrastructure service provides the right to negotiate with the service provider and to use legally binding arbitration (by the Australian Competition and Consumer Commission) of disputes concerning terms and conditions of access and the price of the desired services.

It seems possible that some of SA Water's water and wastewater network services could be declared under the Part IIIA of the Trade Practices Act 1974. Certain services of Sydney Water's wastewater network were declared recently, following an application by Services Sydney. This declaration was revoked by the NSW Premier on the recommendation of the NCC on 1 October 2009, following the certification of the NSW Water industry Access Regime. Part IIIA of the Trade Practices Act 1974.

Consideration is being given to establishing a formal state based access regime. It is envisaged that the Government would retain control over whether recycled water could be inserted into potable water carrying storages and pipes.

In June 2009, the South Australian Government released the *Water for Good* plan, aimed at securing sustainable water supplies both now and into the future, enabling the state to diversify its water supplies and to reduce reliance on the River Murray and other rain-dependent water resources. This plan recognises the need for

institutional and regulatory reforms to the water and wastewater industry, including access to SA Water's network services to allow third parties to become new service providers in upstream or downstream markets without duplicating infrastructure.

On 9 November 2009, the South Australian Government released a discussion paper for a proposed Water Industry Act. The paper seeks public comment on a range of issues to assist the government in its consideration of the development of this Act, including water planning, economic regulation, technical regulation of the plumbing industry, environmental and health regulations and other various legislative amendments.

Further Information

For further information please visit the following websites:

Australian Competition and Consumer Commission: http://www.accc.gov.au
Australian Energy Market Operator: http://www.aemo.com.au/
Energy Industry Ombudsman (Energy or Gas): http://www.eiosa.com.au/
Essential Services Commission of South Australia: http://www.escosa.sa.gov.au/
Technical Regulator (Energy) http://www.technicalregulator.sa.gov.au/
Water for Good: http://www.waterforgood.sa.gov.au