



National Access Regime
Productivity Commission
accessregime@pc.gov.au

5 July 2013

Dear Sir / Madam

I am writing regarding the draft report on the National Access Regime (NAR) released by the Productivity Commission in May 2013.

CCI is the leading organisation representing business in Western Australia with a membership of over 8,500 employers in all sectors of the economy. More than 80 per cent of our members are small businesses, located across all regions of the State. Our members span the entire infrastructure sector, from owners and service providers, to users both large and small, upstream and downstream.

The NAR plays an important role in promoting competition and protecting consumers. Therefore, it is vital that the overarching objectives of the *Competition and Consumer Act 2010* remain at the forefront in proposing any changes. In making a submission CCI has concerns that some of the proposed changes might lose sight of these overarching objectives, in particular the proposed changes to the declaration criteria in section 44G(2).

Firstly, the proposed changes to criterion (f), the public interest test, could have significant implications for investors in infrastructure. To meet the core principles of the Act in promoting competition business needs a regime that minimises any arbitrary decisions regarding access – either for or against declaration. While the proposed change to ask decision makers to have regard of “specific matters” in criterion (f) could help limit discretion, it is unlikely to fully limit the range of issues that could be considered within the “public interest”. Whether a positive or negative test, defining the “public interest” could be open to discretion by either the National Competition Council or the relevant Minister. We therefore believe the Commission needs to consider in more detail the political risks this criterion poses and its fit with the overarching purpose of the Act.

Secondly, the proposed changes to criterion (b), the uneconomical to develop test, also raise some concerns. As the Productivity Commission’s analysis makes clear, improving productive efficiency is not a “compelling rationale for applying access regulation” for reasons well explained in the draft and supported by CCI. Furthermore, the case for access improving allocative and dynamic efficiency is muddy at best, often relying on complex analysis of the effects upstream and downstream of the infrastructure in question.

As the Commission correctly points out, a natural monopoly test does not stop a provider investing in duplicate infrastructure, but the incentive to develop competing infrastructure will be “muted”. This is assumedly to the benefit of competition in upstream and/or downstream markets. But encouraging competition in these markets seems perverse if it is at the expense of competition elsewhere in the supply chain. Furthermore, the uncertainty around the potential to actually improve allocative and dynamic efficiency further highlights the potential for perverse outcomes. Given the high degree of uncertainty, and the potential for regulatory error in determining wider efficiency benefits (false positive or false negative), the logic behind the proposed change does not seem clear enough to warrant change at this point.

I thank you for the opportunity to comment on the NAR Issues Paper. Because of the complexity of the issues, it is vital that a very clear case for change is made – a case underpinned by improved competitive outcomes. As it stands many of the changes proposed do not appear to make significant improvements to competition and could even deliver perverse outcomes. Therefore further work seems to be required to fully understand the operation of the NAR before embarking on changes.

Should you wish to discuss this issue further please contact Drew Pearman, Senior Policy Adviser,

Yours sincerely

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