

# REVIEW OF THE NATIONAL ACCESS REGIME

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*ACCI SUBMISSION  
TO THE  
PRODUCTIVITY COMMISSION*

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## **Background**

The Australian Chamber of Commerce and Industry (ACCI) is the peak council of Australian business associations. ACCI's members are employer organisations in all States and Territories and all major sectors of Australian industry.

Through our membership, ACCI represents over 350,000 businesses nation-wide, including the top 100 companies, over 55,000 enterprises employing between 20-100 people, and over 280,000 enterprises employing less than 20 people. This makes ACCI the largest and most representative business organisation in Australia.

Membership of ACCI comprises State and Territory Chambers of Commerce and national employer and industry associations. Each ACCI member is a representative body for small employers or sole traders, as well as medium and large businesses.

## **Review of the *National Access Regime***

### ***Overview***

#### ***1. National Competition Policy***

The Commonwealth State and Territory Governments agreed in 1995 to implement a National Competition Policy (NCP) package which, amongst other things, made provision for the development of a *National Access Regime* which was to apply to essential infrastructure services. The backbone of the *National Access Regime* is developed from Part IIIA of the Trade Practices Act and Clause 6 of the Competition Principles Agreement. The National Competition Policy Package was initially designed to promote competition across the economy, thereby enhancing Australia's economic performance.

The Productivity Commission, under the direction of the Assistant Treasurer, Senator Rod Kemp, has been appointed to undertake a review of Part IIIA of the Trade Practices Act and Clause 6 of the Competition Principles Agreement. The Commission was instructed to focus the inquiry upon legislation which restricts competition in Australia or that imposes costs or confers benefits on business.

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### 2. *The National Access Regime*

It is ACCI's belief that the *National Access Regime* should be focused primarily on improving access to these essential facilities which are not commercially or economically viable to replicate but should not provide a means for a potential competitor to gain access to the capital assets of a provider simply because it would be commercially convenient.

The *National Access Regime* offers a mechanism for business to seek access to a particular infrastructure service, on reasonable terms and conditions, if it is likely to promote competition in a market typically characterised by monopolistic conditions or a degree of market power. The *National Access Regime* is designed to apply only to "essential" infrastructure services, which is defined as assets which are critical to the growth of an industry.

The *National Access Regime* allows a third party to access the private investment of an infrastructure provider under the assumption that providing access would promote greater competition and benefit society as a whole. Competition amongst business is essential in ensuring that the prices of goods and services are primarily determined by the free interaction of the forces of demand and supply in the market. Competition not only delivers rational prices but also ensures efficiency in production. Goods that are produced in a competitive environment are often of higher quality than those produced under monopolistic conditions and more closely reflect consumer's desires.

The *National Access regime* provides three ways for a business to gain access to services provided by essential facilities:

- By having the service declared so that the access seeker has the right to initiate negotiations with the service provider,
- By seeking access through an industry specific regime, or
- By seeking access under the terms and conditions specified in a registered undertaking from the service provider.

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### 3. *The Productivity Commission's Review of the National Access Regime*

Among other things the inquiry asks the Productivity Commission to:

- Clarify the objectives of the *National Access Regime*,
- Analyse the benefits and costs of the regime and ways to improve its operation,
- Consider alternative ways of achieving the regime's objectives, and
- Examine the role of various regulatory bodies involved in administering the *National Access Regime*. (PC, 2001, pg xv)

The Productivity Commission's position paper details the importance of maintaining an effective regulatory framework for essential infrastructure services. However, the paper also suggests that measures to promote competition and lower prices should be avoided if it is likely to defer necessary infrastructure investment in the future.

ACCI concurs with the Productivity Commission's view that a review of Part IIIA of the trade Practices Act and Clause 6 of the Competition Principle Agreement must ensure that: the *National Access Regime* is given a tighter focus, greater emphasis is placed on incentives to invest, clearer guidance is given to regulators and industry, and measures are introduced to make the process more workable in general.

The Commission's Position Paper aims to address the concerns of business and community groups as to the current structure of access arrangements and the likely impact of changes. The position paper is structured with a focus on the following issues:

- Retention of a *National Access Regime* is warranted. However, access regulation is not without costs. Providing third party access to an owner's private infrastructure investment has the potential to significantly deter future infrastructure investment,
- The current framework has a number of deficiencies. These include:
  - (i) the lack of pricing principles to guide access seekers, service providers and regulators,

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- (ii) an emphasis on promoting competition rather than on efficiency, and
  - (iii) the cumbersome and time consuming administrative and institutional arrangements of the current regime,
- The success of the *National Access Regime* will be dependent on regulation from an external body. It has been suggested that rather than a series of industry specific regulatory bodies, a single national regulator would be more appropriate. It is likely that this role would be allocated to the Australian Competition and Consumer Commission (ACCC),
  - In its review of current access arrangements the Commission developed a series of proposals which have been allocated to one of two tiers. Tier 1 proposals are those which the Commission perceives to be clearly beneficial to the community while the Tier 2 proposals are considered to offer further gains but are recognised to have significant implementation costs.

*A decision to abandon the National Access Regime based on its limited practical experience would be premature. It is ACCI's view that the National Access Regime should be retained in order to provide a mechanism for third party access to essential infrastructure. However, business also recognises that there will be a need for refinement and improvement to current arrangements.*

#### *4. National Access and the Business Community*

While ACCI and the Australian business community believe that measures to promote competition will ultimately ensure that the economy is characterised by efficiency in production, high quality goods and services and the lowest possible prices for consumers. There remain a number of issues related to the limited practical experience of the current regime which need to be addressed. There is a clear scope for the retention of a modified *National Access Regime* in which the role of an external regulator is clearly defined.

ACCI also notes that competition is clearly beneficial to society in that the goods produced will accurately reflect consumer demand and the prices charged not only reflect what producers are willing to accept but also what consumers are willing to pay.

It is clear that in order to introduce competition into markets in which there exists a high degree of monopoly power, an appropriate access regime will be necessary. In the absence of some form of access regulation, a monopoly operator would seek to deny a

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potential competitor access to its private infrastructure investment in one market, if it considered that through doing so it could maintain a dominant economic position.

ACCI's position on competition policy has remained consistent since the adoption of the National Competition Policy (NCP) package in the mid-1990's. Monopoly pricing and action by a monopolist to deny a competitor access to essential facilities can severely reduce effective competition in a market. It is the view of ACCI and the Australian business community that third party access to essential infrastructure will add to the efficiency of the economy.

However, business has a number of concerns as to the manner in which a *National Access Regime* would be administered in Australia. Moreover, while it is clear that without some form of regulation, third party access to essential infrastructure may not be a realistic outcome, such regulation must be limited to matters of arbitration when an access provider and a potential competitor cannot reach agreement. An external regulatory body should exist with the sole purpose of ensuring negotiations are smooth, that owners of essential infrastructure are not disadvantaged and that further investment in infrastructure is not discouraged.

An external regulator should only be given power to set access prices when negotiations between a potential competitor and a facility owner fail. This could occur where an owner attempts to set an unrealistically high price for access to their assets in order to prevent competition. There should be a finite period in which negotiations are to take place. If no agreement is reached during this period then there is a clear case for the involvement of an external regulator. However, an external regulatory body should not have the power to overrule a market agreement, simply because it believes that the agreement is unfair.

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### **ACCI Submission to the Productivity Commission Review of The National Access Regime**

#### ***Introduction***

Competition between businesses essentially results in both cheap and efficiently produced goods and services. Producers who operate in a competitive environment are forced to offer goods and services for sale at a price which is determined in the market by the forces of supply and demand. A producer in a competitive market who consistently produces goods of an inferior quality or charges an excessive price compared with those of its competitors will be unlikely to capture a large enough proportion of the market to remain profitable.

In a perfectly competitive market consumers are free to substitute the output of one producer for that of another. The assumption of rationality suggests that consumers will always choose the cheapest good or service available, but it is true that a consumer may be willing to pay a premium for a good of superior quality. Competition, through providing consumers with choice, clearly benefits society and will ensure the continued growth and prosperity of the Australian economy. To this end, measures to increase competition amongst Australian business should be fostered.

Part IIIA of the Trade Practices Act and Clause 6 of the Competition Principles Agreement give effect to one area of the Hilmer competition reforms, which were introduced in the mid 1990's; that is, to create an effective regime to provide third party access to infrastructure facilities of national significance.

The business community has a specific interest in national access arrangements in that this legislation has the potential to directly impact the manner in which business is conducted in Australia. Through the effect on competition in the private sector, national access arrangements have the potential to significantly change the way in which businesses formulate prices for goods and services and the quantity of a particular good that a business decides to offer for sale. Competition will ensure that the goods and services produced closely match consumer demand.

#### ***Focus of the National Access Regime***

The *National Access Regime* essentially provides a means for business to access the services of a competitor's 'essential' infrastructure in the event that such investment would be uneconomic to duplicate. An infrastructure owner who holds a

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monopoly over infrastructure facilities in one market and is also involved in the production process in an upstream market will have an incentive to deny an upstream competitor access to its facilities so as to prevent competition and maintain a position of monopoly.

The application of the *National Access Regime* is commonly explained through the example of an owner of a gas pipeline who is also involved in the production of gas. Such an operator may wish to deny a competing gas producer access to the pipeline as this would allow the operator to maintain a position of monopoly in the sale of gas in downstream markets.

The Productivity Commission has recently been instructed to undertake a review of the *National Access Regime*, incorporating Part IIIA of the TPA and clause 6 of the CPA, with the intention of ensuring that current access arrangements are successful in promoting competition and allowing third party access to essential infrastructure facilities. Among other things the inquiry asks the Productivity Commission to:

- Clarify the objectives of the *National Access Regime*,
- Analyse the benefits and costs of the regime and ways to improve its operation,
- Consider alternative ways of achieving the regimes objectives, and
- Examine the role of various regulatory bodies involved in administering the *National Access Regime*.

The Productivity Commission’s recent position paper defines the focus of the *National Access Regime* as follows:

“The focus of the *National Access Regime* is on infrastructure services that are essential inputs to final (or upstream) services, and which involve ‘natural monopoly’ technology. The latter characteristic means that it is unlikely to be profitable for more than one firm to provide the essential service.” (PC 2001, p xiv)

It is ACCI’s belief that the *National Access Regime* should be focused primarily on improving access to these essential facilities which are not commercially or economically viable to replicate.

*The National Access Regime should not provide a means for a potential competitor to gain access to the capital assets of a provider simply because the competitor is unwilling to make the*



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*necessary capital commitments. The National Access Regime should only have application to those cases in which the development of additional infrastructure facilities would not be economically viable and consumers of the final good or service would benefit from competition in an upstream market.*

### **Operation of the National Access Regime**

The intended operation of the *National Access Regime* is clearly defined by the Productivity Commission as follows:

“Businesses can seek access to certain infrastructure services on ‘reasonable’ terms and conditions in cases where replicating the infrastructure would not be economically feasible.” (PC 2001, p xiii)

The Productivity Commission also notes that:

“the regime is not intended to replace commercial negotiations between service providers and access seekers. Rather, it seeks to enhance the incentives for negotiation and provide a means of access if negotiations fail.” (p xiii).

ACCI concurs with this broad assessment of the primary purpose of the *National Access Regime* and consider that commercial negotiations between a potential competitor and an access provider will result in an efficient market outcome which is acceptable to both parties. It is important to note that on some occasions the negotiation process may not produce a market outcome. There remains a role for a regulatory body to ensure that the negotiation process is smooth and disputes are appropriately resolved.

The success of the *National Access Regime* can be gauged in its ability to promote competition in an industry which has historically been characterised by monopolistic conditions or firms with a significant degree of market power.

It is ACCI and the Australian business community’s belief that in order to introduce competition into an industry characterised by monopolistic conditions some form of regulation will be essential. However, it must be noted that this regulation should provide a means for negotiation between an infrastructure owner and a third party. Only when negotiations fail should an external regulatory body have the power to set access prices.

It is also important to ensure that the process of allowing third party access will not reduce the incentive for efficient investment in essential infrastructure facilities in the future. An owner who

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believes that competitors will have unlimited access to their private investment may be discouraged from undertaking further innovation or research and development.

### ***Use and Impact of the National Access Regime***

Australia's experience of existing access arrangements remains limited. This limited application is demonstrated in the Productivity Commission's finding that to date only two access declarations have been made, concerning cargo handling services at Melbourne and Sydney airports. The experience with the certification process has been more widespread, used in seven cases, although only for gas and rail facilities. Only one undertaking has been accepted, for the code of conduct for the National Electricity Market.

ACCI considers that the quantity of declarations, certifications and undertakings which have been initiated should be regarded only as a matter of public record, which is in no way reflective of the quality of the processes and outcomes which have been achieved. The success of the *National Access Regime* should not be judged on the basis of its limited application in the past, with greater emphasis being placed on the quality of the outcomes obtained rather than the quantity.

The *National Access Regime* was developed during the Hilmer competition reforms of the mid-1990's, at which time it was not expected that it would have extensive application across more than a few sectors of the economy. It is ACCI's view that the application of the *National Access Regime* should continue to be considered in this context.

### ***Benefits and Costs of a National Access Regime***

The Productivity Commission details a number of benefits and costs associated with the application of national access arrangements. Firstly, the community is likely to benefit from competition between suppliers of goods and services in the form of lower prices, a wider range of goods and services and efficiency in the allocation of resources.

Secondly, access arrangements aim to reduce the misuse of inequality in market power between a facility owner and an access seeker. The reduced incidence of market power will not only benefit consumers in the form of lower prices, but the resulting increase in competition may also encourage efficient innovation and research and development.

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However, the Productivity Commission also notes that an inappropriately administered, access regime could intrude significantly on an individuals property rights and bring with it substantial costs, such as:

- Administrative and compliance costs for governments and business alike,
- An inability for access providers to deliver and price their services efficiently, and
- A reduction in the incentive for businesses to undertake future infrastructure investment ( PC 2001, p xviii – xix).

ACCI recognises that there are both potential costs and benefits associated with the implementation of a *National Access Regime*. Any review of national access arrangements must therefore give consideration to the net benefit to society which is achieved through allowing third party access to essential infrastructure facilities. What needs to be determined is that the benefits from increased competition in a market which has traditionally been characterised by market power, outweigh the potential administrative and compliance costs incurred by business.

### ***Retention of a modified National Access Regime***

It is clear that some aspects of current access regulations are largely inefficient. The existing *National Access Regime*:

- contains no objective or pricing principles to guide negotiations,
- pursues efficiency goals indirectly via the ‘promoting competition test’ which will not always result in improvements in efficiency, and
- contains no consistency in the criteria applying to different access routes, and
- contains institutional arrangements which are cumbersome and time consuming. (PC 2001, p xx).

However, despite these deficiencies, a clear case can be made for the retention of a *National Access Regime*, albeit in a modified form.

The nature of a monopoly ensures that in the absence of competition an entrepreneur is likely to charge a high price for the

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sale of goods and services. Under monopoly conditions, consumers are unable to substitute the produce of one supplier with that of another to obtain the lowest price. Thus, a monopolist, who supplies the entire market, has a unique advantage in the production process. This unique situation ensures that the monopolist will charge a higher price than would be achieved under a competitive environment.

A lack of competition also often results in poor quality control. Necessary goods such as electricity, housing and food not only absorb a large proportion of a society's disposable income but are also often characterised by inelastic demand. This means that in the short term an increase in price will not necessarily result in a large reduction in the quantity demanded.

The initial set-up costs associated with the development of essential infrastructure such as rail, electricity or telecommunications networks are extremely large. These start-up costs often represent substantial barriers to entry for a new firm. If access is provided at a reasonable price then the owner of such infrastructure will benefit through rental returns, while consumers will benefit through increased competition and choice and ultimately lower prices.

The Productivity Commission expresses a number of concerns related to the limited practical experience of current access arrangements. The fact that the *National Access Regime* remains in its infancy makes it more difficult to assess its effectiveness to date. Furthermore, in addition to its limited history a number of the regime's key concepts have yet to be fully exercised and many of Australia's infrastructure industries are still undergoing significant structural change. These factors suggest that a decision to abandon the *National Access Regime* would be premature.

*ACCI shares the Productivity Commission's concern that a decision to abandon the National Access Regime based on its limited practical experience would be premature. There exists a need for a well-functioning National Access Regime in order to provide a mechanism for third party access to essential infrastructure. It is business's view that the review of the National Access Regime should be considered an opportunity for refinement and improvement of the current system. The Productivity Commission inquiry should ensure an increase in competition and efficiency amongst infrastructure providers.*

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### ***The need for Access Regulation***

There clearly exists a role for the *National Access Regime* in order to overcome the problems associated with an intrinsic lack of competition. ACCI considers that in the absence of an external regulatory body a National Access framework will be ineffective. However, the regulator's role must be limited to dispute resolution and arbitration. The ultimate objective of an external regulatory body should be to ensure that the negotiation process between an access provider and a potential competitor is as smooth and trouble free as possible.

### ***Business Concerns***

Despite supporting a continuation of National Access arrangements, there are a number of concerns in regard to the operation of a *National Access Regime*. Firstly, the role and responsibilities of an external regulatory body must be clearly defined to ensure that access arrangements produce a result which is consistent with the interest of the general public, but also protects the private property rights of infrastructure owners.

Establishing regulations for access requires negotiations between a third party and an owner of essential facilities. There exists an important role for regulation of access so as to provide a mechanism for negotiation. However, an external regulatory body would most benefit the process if its function were limited to arbitration. The regulatory body should not be required to determine the conditions of access or access pricing arrangements as this would be best achieved by the free operation of the market.

In particular, it will be essential to ensure that the Australian Competition and Consumer Commission is not given the power to over-rule an access agreement which was developed through negotiation between an infrastructure owner and a potential entrant to the market simply because it does not agree with the outcome.

The role of regulatory bodies such as the Australian Competition and Consumer Commission (ACCC) and the National Competition Council (NCC) should be clearly defined. Any intervention on behalf of a third party or owner by the ACCC or the NCC must be clearly intended to promote competition.

Regulation must remain in place to ensure that the *National Access Regime* does not become a means for potential players to access private investment simply because it would be commercially convenient. Moreover, in the situation in which the infrastructure in question is considered essential and third party access would be

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beneficial, the terms and conditions for access must provide a mechanism for negotiation between a potential competitor and an infrastructure owner.

In order to allow the maximum benefit to society from competition it is important to ensure that access to a facility is not granted at an unreasonable cost to the owner. The development of fair and reasonable access pricing methods for both new and potential entrants as well as existing owners is vital to the success of the *National Access Regime*.

There is unlikely to be a set of general guidelines which will determine an appropriate fee for all circumstances, but factors such as capacity utilisation and the extent of recovery of capital costs as well as the implications for innovation and investment can be considered guiding principles.

While ACCI does not express a preference for any particular access pricing method, in reaching the ultimate goal of increased competition it will be essential to ensure that the costs to existing infrastructure providers are more than matched by the advantages to the community overall.

On the issue of Access Pricing, the Hilmer report cites a number of principles which are used in other countries such as an opportunity cost based approach, a necessary cost recovery based model and an apportioned cost/return on capital system. ACCI considers that there will be many difficulties in determining appropriate terms and conditions and fee arrangements for access to essential facilities at least at the outset and almost certainly across time.

The terms and conditions and fee arrangements must be fair and reasonable to the owner of the facility while also encouraging effective competition. The process of commercial negotiation between an infrastructure owner and a potential competitor will ensure that this is achieved. In the event that negotiations fail, there can be a clear case made for intervention by a specialist regulatory body.

An effective pricing regime will give consideration to the maintenance costs of an infrastructure facility (which would likely be borne by the owner) and the efficient cost of capital. It is important to ensure that allowing third party access to essential infrastructure does not discourage future investment in projects which are critical to economic growth.

Access arrangements must have relevance for both private and public organisations. The implications for investment, innovation

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and research and development of allowing third party access will be much greater in the private sector. A private sector owner of essential infrastructure is likely to be discouraged against further investment if there exists the possibility that potential competitors could profit as a result.

The trading enterprises of state and territory governments have often operated under monopolistic conditions, resulting in the production of overly expensive and poor quality goods. State owned enterprises have often operated under monopolistic conditions, utilising market power as a barrier to entry for potential competitors. It is important that the *National Access Regime* promotes competition in both the public and private sector.

### ***Proposals for Reform***

The Productivity Commission's review of Part IIIA of the trade Practices Act and Clause 6 of the Competition Principle Agreement has resulted in a series of proposals, which it considers will allow improvements to the operation of the *National Access Regime*.

The Commission details these proposals under two "tiers". Those proposals which fall under tier 1 are considered to be clearly beneficial, providing the base case for changes to Part IIIA. The tier 2 proposals are those which the Commission considers likely to deliver further gains but would involve more substantial change to the nature of the *National Access Regime*.

While ACCI considers it would be premature to make substantive changes to the current access arrangements, it appears that many of the tier 1 proposals would allow an improvement in the operation of current National Access arrangements. Moreover, ACCI does not necessarily agree with the division of issues between tiers 1 and 2; however, the clear identification of the issues is welcome.

There are a number of common themes between the two tiers. The Productivity Commission details these as follows:

- Part IIIA provides a framework for, and discipline on, industry-specific access regimes,
- A dual approach is a reasonable compromise between the costs/benefits of both generic and industry-specific models,
- Inclusion of clearly specified pricing principles and objectives is essential to the operation of the *National Access Regime*,

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- Coverage criteria and pricing principles should give consideration to the investors in essential facilities, allowing them to earn a rate of return which appropriately takes into account the risks involved, and,
- Access arrangements should facilitate investment ahead of the short term consumption of services and terms and conditions should reflect this objective. (PC 2001, p xxi – xxii).

ACCI is aware that these common themes exist and in broad terms, concurs with the framework role of Part IIIA and the need for access arrangements to take into consideration their impact on future infrastructure investment.

***Tier 1 Proposals***

*An Objects Clause*

In order to promote consistency in outcomes the Productivity Commission proposes the inclusion of an objects clause in Part IIIA of the Trade Practices Act. The objects clause would specifically relate to:

“the efficient use of, and investment in, essential infrastructure facilities and recognise the generic regime’s role in providing a framework for industry regimes.” (PC 2001, pg xxii)

The Commission notes that the purpose of the objects clause would be to clearly specify the intent of the legislation and reduce the incidence of divergent access regimes. The Productivity Commission proposes that the objects clause should state:

“The objective of this Part is to:

- a) enhance overall economic efficiency by promoting efficient use of, and investment in, essential infrastructure services; and,
- b) provide a framework and guiding principles for industry-specific access regimes.” (PC 2001, pg xxv)

ACCI would be in favour of the inclusion of an objects clause within Part IIIA of the Trade Practices Act as it is likely to clarify the objective of the regime and reduce the frequency of disputes. An objects clause would clearly facilitate a more consistent application of the *National Access Regime*.



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However, while the Productivity Commission’s proposed text appears broadly sound ACCI believes that it fails to reflect the broader competition policy framework within which the *National Access Regime* operates. The *National Access Regime* essentially falls under the National Competition Policy framework and as such a greater focus on competition as a basis for efficiency, rather than efficiency in itself may be more appropriate.

Against this background ACCI would propose sub-section (a) be modified to read:

“enhance competition, and through this economic efficiency by promoting competition in, efficient use of, and investment on, essential infrastructure services.”

*Pricing Principles*

In order to allow consistency in Access pricing arrangements, the Productivity Commission proposes that pricing principles should be incorporated under Part IIIA of the Trade Practices Act. The Commission notes that in addition to providing certainty for potential entrants and infrastructure owners alike, the inclusion of specific pricing principles under Part IIIA would ensure the speedy resolution of access disputes. The Commission also considers that the inclusion of Access Pricing Principles under Part IIIA would produce a fair outcome for both service providers and access seekers.

The Commission proposes the following:

“Pricing principles should be included in Part IIIA with application to arbitration for declared services, assessments of undertakings and evaluations of whether existing access regimes are effective” (PC 2001, pg xxvi)

ACCI recognises that the inclusion of pricing principles in Part IIIA of the Trade Practices Act would allow greater certainty and promote consistency in outcomes. However, there are a many access pricing methods, each of which have merit but no one method would be the most appropriate in every case. It is true that different cases will have unique characteristics and that difficulties would likely be experienced in determining appropriate terms and conditions and fee arrangements for access to essential facilities.

*A more appropriate proposal, and one which is consistent with the findings of the Hilmer Report of the early 1990’s, would be to recognise that there are a variety of access pricing methods and*

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*ensure that the most appropriate method is chosen on the specific merits of each case.*

*Moreover, ACCI considers it essential that the most important consideration will be to ensure that the terms and conditions and fee arrangements be fair and reasonable to the owner of the facilities while encouraging effective competition. Such arrangements must be sensitive to their implications for innovation and investment although this should not extend to preserving monopoly rent situations.*

### *Declaration Criteria*

The Productivity Commission also suggests that the declaration process should be amended so that the *National Access Regime* would only be administered if it was likely to create a *substantial* increase in competition.

Current access arrangements are not subject to such a test and it would be possible for a service to be declared even if it is only likely to result in a small increase in competition.

Proposal 6.1 states:

“The Part IIIA declaration criteria should be modified as follows:

- s 44G(2)(a) be amended to: ‘that access (or increased access) to the service would lead to a substantial increase in competition in at least one market, other than the market for the service.’
- s 44G(2)(b) be amended to: ‘that it would be uneconomic for anyone to develop a second facility to provide the service.’

It is ACCI’s view that an amendment of the declaration process in the above fashion may cause some inconsistency in outcomes. The definition of “*substantial*” competition may be unclear in some circumstances and be used by an owner of an essential service to dispute the validity of access arrangements. That said, we accept that the point is valid.

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### *Certification of Commonwealth Industry Regimes*

The Productivity Commission proposes under tier one that there should be:

“a requirement that the Commonwealth submit its industry access regimes for certification.” (PC 2001, pg xxii)

The Commission recognises that the fact that these regimes currently operate outside of the Part IIIA framework may lead to the possibility of inconsistencies.

ACCI shares the Productivity Commission’s belief that the same obligations that apply to private sector participants under a *National Access Regime* should also be extended to the Federal Government and its agencies. Furthermore, it should be recognised that the implications for investment are much more severe when a private sector owner is forced to provide access.

### *Ministerial Involvement*

It is the Productivity Commission’s view that the current role of ministers in the Part IIIA decision-making process should be ended. The Commission instead proposes that the responsibility for decision-making should become the sole responsibility of the designated regulatory body who is given responsibility for administering the *National Access Regime*. This responsibility would be subject to the specific criteria spelt out in the legislation.

The Productivity Commission notes that:

“Ministerial input has added to the time taken to reach decisions on declaration and certification applications, without being necessary to due process or the achievement of appropriate outcomes.” (PC 2001, pg xxii).

ACCI recognises that the ending of Ministerial involvement may improve efficiency, with regard to reducing the delays which are inherent in the current system, but that such a proposal would be unlikely to be accepted in the current political climate regarding national competition policy issues.

Moreover, ongoing Ministerial involvement will be necessary to ensure that the authority for decision-making is not given entirely to an external regulatory body such as the ACCC, which has a limited knowledge of the intricate workings of the particular industry in question.

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However, while ACCI broadly considers that Ministerial discretion should remain as a step in the declaration of an essential service, it should be noted that care needs to be taken to ensure that such decisions are taken for reasons of national not sectional or political interest.

Against this background, the better pragmatic approach is to pursue improvements in efficiency and transparency in Ministerial involvement in national access arrangements with a review of the process undertaken on a regular basis.

### ***Tier 2 Proposals***

The Productivity Commission's tier 2 proposals are those which are likely to improve Access Arrangements in the future, but would involve more substantial changes to the structure of the regime.

The Productivity Commission's tier 2 proposals can be considered under three broad headings: the efficiency objective, assessing effectiveness and a single regulator. A brief outline of the Commission's tier 2 proposal follows.

#### *The Efficiency Objective*

The first of the Commission's tier 2 proposals suggests that an overhaul of the declaration criteria is necessary so as to ensure that the *National Access Regime* would be focused more on the objective of efficiency rather than the means of achieving it. This would involve a change in the focus of the regime from promoting competition towards the promotion of efficiency.

ACCI considers that it is essential to recognise the context in which the *National Access Regime* operates. The *National Access Regime* was developed out of the Hilmer Competition reforms of the mid 1990s. The *National Access Regime* gives effect to a large area of National Competition Policy and it is business's view that it should remain in this context.

The underlying assumption of National Competition Policy is that enhanced competition leads to greater efficiency. However, ACCI does not accept that competition-based reforms are the only means for improving efficiency.

ACCI is therefore unconvinced as to the need to modify the declaration criteria to focus more on efficiency.

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### *Assessing Effectiveness*

In order to reduce the possibility of inconsistent interpretations under the various Part IIIA access routes the Productivity Commission proposes that there should be a:

“modification of the principles for assessing the effectiveness of existing access regimes, and their incorporation in Part IIIA rather than Clause 6 of the CPA.” (PC 2001, pg xxiii)

ACCI broadly supports this proposal as it would be effective in delivering more consistent outcomes, and ensure an improvement of existing administrative arrangements.

### *A Single Regulator*

In order to address some overlap in the role of the NCC and the ACCC in administering the *National Access Regime* the Productivity Commission proposes that there would be some merit in making a single regulator responsible for the administration of Part IIIA. The Commission suggests that the most likely candidate for such a role would be the ACCC.

ACCI is aware that there may be advantages in consolidating decision-making responsibility on *National Access Regime* matters. ACCI considers that it is not the issue of who should become regulator that is most important but the role that is given to that regulator. An external regulatory body must not be given the power to interfere in the negotiation process, but must provide a medium for negotiation.

While the ACCC has clear expertise in competition law and policy matters, there is also a high risk of excessive concentration of regulatory power in a single agency. Moreover, it would be unlikely that the ACCC would have an adequate and detailed knowledge of each industry to which the *National Access Regime* has relevance. Specialist knowledge will be the proper basis for decision making and ACCI would be extremely reluctant to see a shift from present arrangements.

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*REVIEW OF THE NATIONAL ACCESS REGIME**Conclusion*

The *National Access Regime*, introduced as part of the Hilmer competition reforms of the mid-1990's, is designed to promote competition through facilitating third party access to essential infrastructure. Competition amongst owners of essential facilities and potential operators will be vital in addressing the inefficiencies associated with monopoly firms. The Australian Chamber of Commerce and Industry (ACCI) recognises that competition amongst business will lead to the efficient production of goods and services as well as establish prices that accurately reflect market conditions. Access arrangements defined under the *National Access Regime* are essential in ensuring efficient usage of essential resources and are likely to provide significant economic benefits for the economy.

However, regulation of the *National Access Regime* must guarantee that an owner of an essential facility is not unduly disadvantaged through third party access. Access to essential infrastructure must be considered in terms of property rights with a focus on access pricing methods which are fair for both new and potential entrants as well as existing owners. The private property rights of an owner should be protected when formulating an access regime.

It would not be acceptable to force a private sector operator to allow third party access to infrastructure which was developed entirely from private funding if it was likely to represent a significant cost burden for the owner. This would remove incentive for the owner to invest in infrastructure or undertake research and development in the future. It would also inhibit others from building infrastructure if concerns that competitors could force their way into sharing these facilities once constructed.

Moreover, involvement by regulatory bodies has the potential to produce undesirable access arrangements. The regulator should act entirely as an arbitrator, existing to facilitate access when an owner and a third party cannot reach an access agreement amongst themselves. The regulator should not have the responsibility for determining if an outcome that was achieved through commercial negotiations between the third party and the owner is appropriate. It should merely be used as a mediator when negotiations fail. Finally, there should be no single generic regulator such as the ACCC but regulation should be conducted by bodies with specialist knowledge of the industry.

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*REVIEW OF THE NATIONAL ACCESS REGIME*

Furthermore, third party access should only be considered if the infrastructure in question is essential for growth amongst firms in a particular industry. A potential competitor should not be able to access an infrastructure facility simply because it would be commercially beneficial. This is particularly important when third party access to an infrastructure project is likely to result in a cost to the owner.

Access pricing methods must take into consideration the maintenance costs of an infrastructure facility and the efficient cost of capital. Access arrangements must have relevance for both private and public sector firms. However, the terms and conditions of access must ultimately operate to protect the interests of the private sector owner.