

**Further Submission  
Review of the National Access Regime:  
Comments on Position Paper**

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## **Further Submission to the Review of the National Access Regime: Comments on Position Paper**

### **Introduction**

The Australian Petroleum Production and Exploration Association is the national body that represents the upstream gas and oil industry, that is companies engaged in gas and oil exploration, development and production in Australia. APPEA membership includes essentially all companies involved in exploration and development in Australia.

APPEA made a submission to the Review in January 2001 supporting, in circumstances of market failure, a regulatory regime applicable to natural gas pipelines which has objectives of ensuring access on terms which are economically viable for service providers and users.

This further submission comments on a number of the proposals made in the Position Paper released by the Productivity Commission in March 2001.

### **A Preferred National Access Regime**

APPEA believes that the existing policy framework for providing access is broadly meeting the desired objectives of facilitating access to essential infrastructure services and allowing adequate incentives for service providers to invest in such facilities. We agree with the Commission's finding (Finding 4.1) that there is no reason for a significant change in the balance between the use of access regulation and other instruments addressing access matters. We also agree with the Commission that there is no reason for changing the current emphasis of Part IIIA on the services provided by essential infrastructure facilities, and that the current exclusions from the coverage of Part IIIA seem broadly appropriate and should be retained (Finding 5.3).

However, we do not agree that the current dual approach is appropriate, allowing an access provider to submit a Part IIIA undertaking for services (potentially) covered by an industry-specific regime - in the gas industry's case, the National Third Party Access Code for Natural Gas Pipeline Systems ('the Code').

APPEA's vision for a national access regime is that Part IIIA provides a universal access system applying to all eligible services economy-wide. An industry specific regime which has been certified as effective via the provisions of Part IIIA, in effect, has been found to be consistent with Part IIIA by some measure. Recognising this, the Part IIIA process should cause access to those services to be considered via the processes of the industry specific regime as the appropriate Part IIIA handling process. The industry regime is subsidiary to and consistent with the Part IIIA provisions against which access to any service can be tested. In the case of gas pipelines, a Part IIIA application regarding access would automatically and quickly find its way into the Code forum, obviating 'forum shopping'.

### **Consideration of Some of the Commission's Arguments**

The Commission's paper correctly points out the issues raised where an access provider has the ability to attain coverage under different instruments. The Commission does not favour closing

the avenue for dual coverage by including a provision within Part IIIA to the effect that undertakings could not be accepted from an access provider (potentially) subject to a certified industry-specific regime. Rather, it sees that Part IIIA should provide the lead as a framework for access regimes to create pressures to eliminate unwarranted differences in individual access arrangements, and to encourage regimes to replicate desirable features of the national regime.

The Commission finds that the scope for owners of infrastructure potentially covered by an industry access regime to lodge a Part IIIA undertaking should be retained. To the extent that 'forum shopping' or regulatory 'double jeopardy' is considered to be undesirable, it should be addressed by changes in the relevant industry regime, so as to align requirements with those in Part IIIA (Finding 7.1).

We argue that, where the industry regime has been certified as an effective regime, largely it has already been judged to be compatible with Part IIIA. Of course, as the Commission notes, the principles for assessing the effectiveness of access regimes are contained in Clause 6 of the Competition Principles Agreement and there are inconsistencies between some of the Clause 6 Principles and their counterpart criteria in Part IIIA. A principal difference is that Clause 6 requires determinations to provide some guidance on pricing whereas Part IIIA does not. This difference could be overcome if Part IIIA were to include pricing principles as the Commission recommends (Proposal 5.3).

Indeed, adoption of a number of the Commission's proposals would encourage and enhance convergence of Part IIIA and industry regimes and therefore facilitate the above approach envisaged by APPEA. These are:

- Proposal 5.1 that Part IIIA should have an objects clause, including to provide a framework and guiding principles for industry-specific access regimes;
- Proposal 5.3 to include pricing principles;
- Proposal 7.4 that the certification provisions in Part IIIA should specify what an effective access regime must include;
- Proposal 7.6 that the criteria for assessing proposed undertakings under Part IIIA should be aligned, as far as practicable, with those applying to arbitrations for declared services and the testing of the effectiveness of existing access regimes.

### **A Further Proposal**

APPEA proposes that, if these proposals were adopted, the approach envisaged by APPEA could then be given effect by changing the provisions of sub-section 44ZZA(3) of Part IIIA to require that the Commission accept an undertaking only if it is in accordance with an access code that applies to the service (a certified industry-specific access regime). This would then make the code forum the appropriate place to assess the Part IIIA application.

### **Conclusion**

APPEA supports the Commission's view that the existing access policy framework is broadly appropriate, and supports the view that there should be convergence and compatibility between

the provisions of Part IIIA and certified industry-specific access regimes (access codes). The codes would be subsidiary to and consistent with the overarching Part IIIA.

In that case, the code forum would be the appropriate place to test (applications for) undertakings under Part IIIA, which must be in accordance with the relevant industry code.