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**ESAA**



Electricity Supply  
Association of  
Australia Limited

ACN 052 416 083



The Australian  
Gas Association

## **Joint Submission to the Productivity Commission**

### ***A Response to the ACCC June Submission***

Submission by

The Australian Council for Infrastructure Development

The Electricity Supply Association of Australia

The Australian Gas Association

The Australian Pipeline Industry Association

August 17, 2001

## Introduction

The Australian Council for Infrastructure Development, the Electricity Supply Association of Australia, the Australian Gas Association and the Australian Pipeline Industry Association jointly represent the interests of investors, owners and operators of infrastructure in Australia. As such we have been closely involved with the Productivity Commission's review of the National Access Regime, offering previous individual submissions as well as support for two joint industry submissions, prepared by NECG.

At the end of June, the Australian Competition and Consumer Commission (ACCC) submitted two responses to the Productivity Commission's review of the national access regime and the review of telecommunications competition regulation. We are concerned that these submissions are intended to dissuade the Commission from developing several of its key proposals, notably with regard to the insertion of an objects clause, changes to the declaration criteria, and the formulation of legislative pricing principles. In each instance, we disagree strongly with the ACCC's argument that reforms to the existing legislation are unnecessary, and entirely reject any implication that it is important not to limit further the amount of discretion that is available to the regulator.

We believe that the ACCC's response to the Commission's work is a very good demonstration of the deficiencies in Part IIIA (and Part XIC). Furthermore, in light of the reaction that the ACCC has shown, we urge the Commission to be mindful of the need to ensure that the recommendations from its inquiry lead to binding and effective changes in the legislative framework. Only through very careful wording of the Final Report, and the final proposals therein, can the Commission be confident that subsequent re-interpretation of its findings will not undermine the benefits that it has been seeking to achieve.

## The ACCC responses

A consistent theme in the Commission's Position Paper is the need to minimise existing levels of regulatory discretion and thereby create a more consistent and predictable framework for investment in essential infrastructure. Indeed, right from the outset, the Commission expresses confidence that one of the benefits of its Tier 1 proposals would be the delivery of 'greater certainty for market players about the situations in which access regulation might apply and the likely outcomes in those situations'.

At a more detailed level, it is clear that the need for greater certainty underpins many of the individual proposals. For example, in recommending the proposed insertion of an objects clause, the Commission explains that:

*In sum, the Commission considers that an objects clause would help ensure that Part IIIA is well targeted, that it provides more certainty, enhances the accountability of regulators and facilitates greater consistency in decision making.<sup>1</sup>*

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<sup>1</sup> Productivity Commission (2001) 'Review of the National Access Regime: Position Paper', March, p. 98.

A similar argument is used to justify the introduction of legislated pricing principles:

*In sum, the Commission considers that incorporating pricing principles in Part IIIA would support the objectives of the national access regime, promote convergence of pricing approaches across the various access routes, and improve certainty for access seekers and facility owners.<sup>2</sup>*

In each of its two responses, the ACCC very clearly demonstrates that it is generally unsupportive of these objectives. Rather than suggest refinements to the Commission's proposals, as the majority of respondents have done where they foresee difficulties, the ACCC simply rejects the need for reform in both these areas. Instead, the ACCC appears to believe that it is helpful to retain the maximum possible discretion to interpret legislation on a case-by-case basis, and that the gradual development of precedent and case law is all that is required to remove any uncertainty surrounding regulatory decision making.

In this respect, we find the ACCC's response to the proposed pricing principles particularly worrying. In its response to the Position Paper, the ACCC states that:

*Access is about a large range of issues, only one of which is the price of access...The ACCC believe that introducing pricing specific principles would tend to over emphasise pricing issues at the expense of other, equally important, terms and conditions of access.<sup>3</sup>*

This echoes similar, and more detailed, comments made in the ACCC's Part XIC submission:

*The ACCC agrees that certainty concerning the approach that a regulator will take to pricing issues is beneficial to all market participants. However it submits that the existing guidance allows sufficient flexibility to determine appropriate price structures and price levels for a range of different services.<sup>4</sup>*

It is precisely this flexibility that our members have found makes it impossible to predict with any degree of certainty if and how access will be regulated. This has been apparent in a number of areas.

- *Ex-ante uncertainty*—investment in new infrastructure is currently hindered by the absence of any clear *ex ante* mechanism for ascertaining a regulator's approach towards matters such as setting the project-specific risk components of the cost of capital (the beta), or the valuation of assets at future regulatory resets.

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<sup>2</sup> *ibid* p.124

<sup>3</sup> ACCC (2001) 'Response to the Productivity Commission Position Paper: Review of the National Access Regime', June p. 27.

<sup>4</sup> ACCC (2001) 'Response to the Productivity Commission Draft Paper: Telecommunications Competition Regulation', p. 20.

- *Potential for stranding*—the same flexibility also enables a regulator to quite legitimately strand prudently incurred costs on the grounds that gradual changes in technology or demand have occurred. Firms, and their investors, have no ability to predict in advance the proportion of their initial investment that is exposed to this risk.
- *Inconsistency over time*—going forward, the ACCC's apparent faith in the value of precedent is not supported by the evidence. We note, in particular, that Telstra has expressed frustrations to the Commission over the ACCC's repeated (almost annual) revisions to the methodology it uses to determine prices of certain declared services.

The result of these deficiencies is vastly weaker incentives to invest in essential infrastructure than Parliament had originally intended when Part IIIA was first introduced to the statutes. It has also caused some regulated firms difficulties when raising finance for new investment.

In its Position Paper, the Productivity Commission rightly acknowledged these to be significant problems and we see no convincing grounds for the ACCC to simply dismiss these concerns.

## **Implications**

Our views on the appropriate refinements to the Commission's proposals were set out in a number of recent submissions. Our intention here is not to reiterate these views, but to impress on the Commission the need to consider very carefully how its recommendations will translate into legislative changes.

In this regard, we are particularly concerned that the Commission takes a detailed look at the final formulation of the legislated pricing principles. Given the ACCC's preference for retaining the maximum level of discretion, it is vital that the wording leaves no room for doubt as to the Commission's intentions, or the manner in which regulators are to interpret the Commission's findings. We believe that this requires that the Commission write its final recommendation in the precise wording that it wishes to see incorporated into Part IIIA.

Only by adopting this approach can the Commission ensure that its work genuinely brings about the 'greater certainty' it is seeking.