

GOVERNMENT RESPONSE TO PRODUCTIVITY COMMISSION REPORT ON THE REVIEW OF THE NATIONAL ACCESS REGIME

Overview

Essential infrastructure facilities, such as natural gas pipelines, the electricity grid and rail track, play a key role in Australia's economic and social development. The efficient use of, and continued investment in, facilities such as these is of strategic importance to the nation. Accordingly, the Government's policy is to assist realising the potential contribution of such services to economic growth and the improved well-being of all Australians.

An important element of National Competition Policy (NCP) reforms was the establishment of a National Access Regime (the Regime), allowing third parties to seek access to the services of certain essential infrastructure facilities on reasonable terms and conditions if commercial negotiations fail. This ensures that facilities with natural monopoly characteristics (ie. cannot be economically duplicated) do not create barriers to competition. This promotes competition in upstream and downstream markets which is essential for sustaining strong economic growth and job creation, and contributes significantly to efficiency and innovation. Importantly, the Regime is not intended to replace commercial negotiations between access seekers and providers, and seeks to support the legitimate interests of essential infrastructure owners.

The NCP reforms provided for a review of the Regime following five years of operation. As requested by the Government in 2000, the Productivity Commission (the Commission) has reviewed the Regime. The Commission supports the Regime's retention but has made thirty-three recommendations to improve the Regime's operation. In this interim response, the Government endorses the thrust of the majority of those recommendations.

The Government agrees that scope exists for improvements to the Regime. This includes, for example, making changes that clarify the Regime's objectives and scope, encourage efficient investment in new infrastructure, strengthen incentives for commercial negotiation and improve the certainty and transparency of regulatory processes.

The changes being proposed by Government provide a balance between ensuring a means for business to gain access to infrastructure while providing incentives for new investment in essential infrastructure. The changes are also designed to provide access seekers and investors with confidence and certainty about the regulatory framework so they are able to make well informed decisions.

Effective implementation of some proposals requires changes to clause 6 of the Competition Principles Agreement (CPA), to which all State and Territory governments are participants. The Government will write to relevant jurisdictions, asking them to consider the issues raised in the Report and the Commonwealth's interim response to its recommendations. Following these consultations, a final Government response will be released.

The Government has released an interim response at this time, since the review of the Regime has important implications for the current COAG Energy Market Review and the forthcoming review of the Gas Access Regime. The Government will closely monitor those issues it has referred for consideration in the context of industry specific regimes to ensure the Regime continues to reflect a best practice approach at the generic level. For example, the Government proposes to consider the practicality of additional regulatory measures, such as binding rulings, fixed-term access holidays and provision of a 'truncation' premium, in the forthcoming independent review of the operation of the Gas Access Regime.

Against this background, the Government's interim response to the Commission's recommendations is set out below.

Report Recommendations and Response

Recommendation 6.1

The following objects clause should be incorporated in Part IIIA of the Trade Practices Act 1974.

‘The object of this Part is to:

- (a) promote economically efficient use of, and investment in, essential infrastructure services; and*
- (b) provide a framework and guiding principles to discourage unwarranted divergence in industry-specific access regimes.’*

Government Response

The Government agrees in principle with this recommendation. The inclusion of a clear objects clause into Part IIIA of the *Trade Practices Act 1974* (TPA) will provide greater certainty for infrastructure owners, access seekers, investors and other interested parties. The Commission’s recommendation that decision-makers should be required to have regard to the objectives specified in the objects clause (see recommendation 6.2) will help to promote consistency and provide guidance in relation to each decision-maker’s approach, enhancing regulatory accountability.

Part IIIA should continue to provide decision-makers with sufficient scope to balance various stakeholders’ interests and to take into account a broad range of public interest considerations. The Government considers the adoption of the Commission’s proposed objects clause, with some amendments, meets these objectives.

‘The object of this Part is to:

- (a) promote the economically efficient operation and use of, and investment in, essential infrastructure services, thereby promoting effective competition in upstream and downstream markets; and*
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.’*

The promotion of economic efficiency is a fundamental objective of competition policy. The first objective explicitly recognises the importance of fostering efficient investment in new essential infrastructure, while at the same time encouraging the efficient use of existing facilities through innovation and productivity improvements.

Consideration of the impact of an access decision in a wider economic and public benefit context was one of the key reasons for including a statutory access regime within the NCP framework.

In relation to the second objective, the Government agrees that Part IIIA should continue to provide a framework and guiding principles for industry-specific access regimes.

This promotes a consistent approach to access regulation in each industry, while recognising that industry-specific access regimes accepted under Part IIIA may be divergent due to different market characteristics (as the Gas Code and National Electricity Code demonstrate).

Inclusion of the objects clause will improve procedures for reviewing decisions under Part IIIA. When decision-makers publish reasons for their decisions, a failure to address the objects clause will provide additional grounds for merit review by the Australian Competition Tribunal (ACT) and judicial review by the courts (see response to recommendation 15.5). This improvement in review processes benefits commercial parties and users and provides an incentive for responsible decision-making.

Recommendation 6.2

For all coverage decisions and determinations under Part IIIA, the relevant decision-maker should be required to have regard to the objects clause.

Government Response

The Government agrees with this recommendation.

Recommendation 6.3

Pricing principles should be included in Part IIIA with specific application to arbitrations for declared services, assessments of undertakings and evaluations of whether existing access regimes are effective (see recommendation 9.2).

Government Response

The Government agrees that statutory pricing principles should be established in relation to Part IIIA. Pricing principles will provide guidance for pricing decisions and contribute to consistent and transparent regulatory outcomes over time. They will also help to provide certainty for investors and access seekers alike and facilitate commercial negotiations between parties.

Decision-makers will be required to have regard to the pricing principles, rather than requiring each and every principle to be satisfied. Some slight modifications to the Commission's recommendations are proposed. These modifications are designed to provide general guidance about the approach to be taken by decision-makers, focussing on efficiency

and investment considerations, which are consistent with the Government's proposed objects clause for Part IIIA and existing pricing principles under certified access codes.

The Government agrees to include the following pricing principles in Part IIIA.

'The Australian Competition and Consumer Commission (ACCC) must have regard to the following principles:

(a) that regulated access prices should:

- (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and*
- (ii) include a return on investment commensurate with the regulatory and commercial risks involved.*

(b) that the access price structures should:

- (i) allow multi-part pricing and price discrimination when it aids efficiency; and*
- (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.*

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.'

The Government is concerned that the cost-based regulation access pricing principles set out in (a)(i) and (a)(iii) in recommendation 12.1 would require a more intrusive and complex regulatory approach than at present, in order to assess both the costs and the revenue generated by each service, as specified in the PC's principles. The two principles proposed by the PC would also risk unduly restricting the regulatory approach, by limiting a decision-maker's scope to introduce or retain alternatives such as price caps or benchmarking. These alternatives may be more appropriate than cost-based approaches for accommodating a particular market's individual characteristics. (The Government is supporting continued development of benchmarking and productivity approaches - see response to recommendation 12.2).

To achieve consistency in all three access routes under Part IIIA, it would be desirable to introduce the same pricing principles into the CPA for the purposes of assessing certification applications. Therefore, the Commonwealth Government will seek all participating jurisdictions' agreement to include in the CPA a principle to have regard to the above pricing principles for Part IIIA (see response to recommendation 9.2).

The above pricing principles for Part IIIA are consistent with the pricing principles under existing access codes. Importantly, this amendment to Part IIIA would not invalidate past decisions made under Part IIIA, but it will affect future decision-making made pursuant to Part IIIA. While the pricing principles in the Regime provide broad guidance on the approach to be taken by decision-makers, an industry-specific regime may include principles which address the individual characteristics of its regulated market.

Recommendation 6.4

While the current exclusions from the coverage of Part IIIA should be retained, developments in relation to the ‘production facility’ exemption should be monitored by the National Competition Council (NCC). Should judicial interpretation of that exemption lead to outcomes that detract from efficiency, it may be necessary to remove the provision or clarify its intent.

Government Response

The Government agrees that the current exclusions from the coverage of Part IIIA, including the ‘production facility’ exclusion, should be retained. The scope of these exclusions is a matter for the Courts to decide on a case by case basis and the caselaw is still evolving. These exclusions ensure that the Regime is not too broad in its application. Hence, they protect the legitimate interests of owners of essential infrastructure facilities and preserve incentives for investment in such facilities.

Through its annual report, the NCC already reports on activities concerning access to infrastructure each year. The Government agrees that the NCC should extend this existing report to include any judicial interpretations on the ‘production facility’ exclusion. A further substantial review of the Regime will, as recommended by the Commission, be undertaken after 5 years (see the Government’s support for recommendation 16.2). This review will examine, inter alia, the exclusion.

Recommendation 7.1

Clause 44G(2)(a) of the TPA should be amended such that access (or increased access) to the service would promote a substantial increase in competition in at least one market (whether or not in Australia), other than the market for the service.

If it is considered that the inclusion of the word ‘substantial’ carries a concomitant requirement for greater certainty of the outcome, an explicit concept of likelihood may need to be embodied in the revised criterion.

Government Response

The Government agrees in principle with this recommendation. The current declaration criteria, such as ‘the national significance’ test, preclude declaration where the relevant infrastructure and subsequent potential public benefits are not significant. However, this does not sufficiently address the situation where, irrespective of the significance of the infrastructure, declaration would result in only marginal increases in competition.

The Government considers that, in this context, the term ‘substantial’ may exclude situations where a small supplier is prevented from gaining access to nationally significant infrastructure. The Government therefore proposes to include the word ‘material’ to ensure access declarations are only sought where the increases in competition are not trivial.

Recommendation 7.2

The next scheduled review of Part IIIA (see recommendation 16.2) should examine the interpretation of the declaration (coverage) criteria, modified in accordance with recommendation 7.1, to assess whether further strengthening of particular criteria or recasting of the criteria to focus explicitly on market power and efficiency considerations is required.

Government Response

The Government agrees with this recommendation.

Recommendation 8.1

The arbitration provisions of Part IIIA should be amended to provide for ‘two-sided’ information disclosure requirements involving both the access provider and the access seeker. The access seeker should be required to provide sufficient information, including technical and commercial requirements, to enable the access provider to respond to the request for access. The provider of the declared service should be required to provide sufficient information to an access seeker to facilitate effective negotiation on the terms and conditions of access. This should include:

- *information on the availability of the service, including any reasons why the service is not available on the conditions sought by the access seeker;*
- *an offer of the terms and conditions of access to the service; and*
- *sufficient information (such as the costs of operating the facility and providing the service) to enable the access seeker to make a reasonable judgement of the basis on which the terms and conditions of access were determined.*

This information should be provided within 28 days of the access seeker submitting its request for access to the service provider.

Government Response

The Government agrees in principle with this proposal. The objective of this recommendation is to facilitate negotiations where possible between access providers and access seekers following declaration. Such a negotiation process would benefit from a balanced disclosure of information by both the access provider and the access seeker. However, it would be difficult in a generic regime to specify with adequate certainty, the exact nature of the information required. This uncertainty, and the need to provide a process to adequately protect commercially confidential information, creates the potential for further disputes, appeals and delays. Specific statutory information disclosure requirements are more appropriate for inclusion in industry-specific access regimes, rather than within Part IIIA.

This proposal may be reconsidered in the context of the next review of Part IIIA in five years time (see response to recommendation 16.2). In the interim, the ACCC may publish non-binding guidelines indicating to commercial parties what type of information is likely to best facilitate negotiations after declaration.

Recommendation 8.2

The ACCC, in arbitrating terms and conditions for declared services, should generally limit its involvement to matters in dispute between the parties. Where matters agreed between the parties are subjected to re-assessment, the ACCC should be required to explain its reasons for doing so in the post-arbitration report (see recommendation 15.6).

Government Response

The Government agrees with this recommendation. This is the current practice of the ACCC in the context of its arbitrations under the telecommunications access regime (Part XIC of the TPA). This is also consistent with the Government's introduction of a statutory requirement for all decision-makers to publish reasons for their decisions under Part IIIA processes (see response to recommendations 8.5, 15.5 and 15.6).

Recommendation 8.3

Where the ACCC introduces considerations other than efficiency when arbitrating disputes for declared services or assessing proposed undertakings, it should be required to make this explicit and explain its reasons for doing so.

Government Response

The Government agrees with this recommendation. The Government is also introducing a statutory requirement for all decision-makers to publish reasons for their decisions under Part IIIA processes (see response to recommendation 15.5). This will oblige the ACCC to provide reasons in relation to various considerations, including efficiency.

Recommendation 8.4

Section 44V of the TPA should make explicit that when arbitrating a dispute for a declared service, the ACCC can require a service provider to permit interconnection to its facility by an access seeker.

Government Response

The Government agrees with this recommendation. Statutory confirmation that the ACCC can require a service provider to permit interconnection in arbitrations will provide greater certainty to the scope of the ACCC's discretion than is currently available. As there has not yet been any arbitration determination under Part IIIA, no caselaw has been developed on whether the term 'extend' may include the power for the ACCC to order interconnection. The Government notes that the allocation of the costs for interconnection between the parties would be subject to existing provisions within Part IIIA.

Recommendation 8.5

The Part IIIA arbitration provisions should be amended to provide the ACCC with the discretion to conduct multilateral arbitrations following consultation with the parties to the dispute. If the ACCC rejects the wishes of the parties as to whether or not to engage in multilateral negotiations, it should explain its reasons for doing so.

Government Response

The Government agrees with this recommendation. Part IIIA should provide the ACCC with the discretion to conduct multilateral hearings in arbitrations following notification to the parties to the dispute. This would result in several benefits to both the regulator and industry.

Multilateral hearings in arbitration would allow the ACCC to consider the service in its entirety and could streamline administrative requirements and reduce costs. Where a service has not yet been declared, the statutory risk of multilateral hearings in arbitrations may facilitate the use of the certification and undertakings routes. Alternatively, if a service has already been declared the threat of multilateral hearings in arbitration may expedite commercially negotiated outcomes. This was the intention of introducing this regulatory discretion into the telecommunications access regime (s.152DMA of the TPA).

Provision will be made for a process to allow parties to safeguard commercially confidential information, particularly where it risks disclosure to parties in competition with each other. In addition, provision will be made to require the ACCC to explain its reasons for conducting multilateral hearings in arbitrations. This will enhance transparency in regulatory processes and provide guidance of circumstances in the future where the ACCC might conduct multilateral hearings in arbitration.

Recommendation 9.1

To discourage unwarranted divergence from the national access framework:

- *Immunity from Part IIIA afforded to Commonwealth access regimes should be removed and such immunity should not be conferred on new Commonwealth regimes;*
- *Clause 6 of the CPA should make provision for the Commonwealth Government to seek certification of its access regimes; and*
- *prior to enactment, any new Commonwealth access regimes should be submitted to the NCC for comment on their consistency with Part IIIA.*

Government Response

These Commission proposals are unnecessary. The Commonwealth continues to provide leadership in developing statutory access regimes. These are reviewed at least once every ten years, through a public consultation process, in accordance with CPA commitments (to assess whether any restrictions on competition and costs to business are justified). These reviews also ensure that the Commonwealth access regimes are consistent with the broader public interest.

Recommendation 9.2

The parties to the CPA should negotiate changes to Clause 6 with a view to aligning it, as far as practicable, with the modified Part IIIA. In doing so, the parties should have regard to the effectiveness criteria spelt out in finding 9.2.

Government Response

The Government supports in principle this recommendation and the Commonwealth proposes to write to States and Territories to encourage these parties to align Clause 6 appropriately with certain modifications to Part IIIA.

The Government agrees that it would be desirable that any Commonwealth-State discussions concerning changes to the CPA focus on introducing common pricing principles for all decisions under Part IIIA (see response to recommendation 6.3 and 12.1). The Government notes that currently, decision-makers in relation to certification recommendations may take into account additional matters that are not inconsistent with CPA principles (s.44DA(2) of the TPA).

Recommendation 9.3

The parties to the CPA and the NCC should investigate how best to provide for ‘interim’ and ‘conditional’ certifications, including whether such provisions would need to be reflected formally in Clause 6 of the CPA.

Government Response

The Government agrees with this recommendation. The Commonwealth proposes to write to States and Territories encouraging the parties to the CPA to investigate how it would be best to provide for ‘interim’ and ‘conditional’ certifications, including whether such provisions would need to be reflected formally in Clause 6 of the Agreement. Discussion by the parties to the CPA also needs to ensure that ‘interim’ and ‘conditional’ certifications do not increase uncertainty for industry. Discussions should also consider providing for revocation if conditions were not met. Introducing a mechanism to grant ‘interim’ and ‘conditional’ certifications would be likely to benefit all parties. Provision for flexible and timely decision-making should encourage investment and regulatory certainty. Infrastructure owners and investors will benefit from the decision-maker indicating early in the process what would be required in the future to attain effective certification. At the same time, the mechanism will assist access seekers gain access as early as possible.

Recommendation 10.1

There should be provision in Part IIIA for an access provider to lodge an undertaking after a service has been declared.

Government Response

The Government agrees with this recommendation. Provision to lodge post-declaration undertakings will provide a means for achieving certainty on access terms and conditions, thereby facilitating negotiations between access providers and access seekers.

Furthermore, in contrast to the private arbitration process, the undertaking process is a public process that may benefit from the input of a wider range of stakeholders such as consumer groups. Information would be available faster and more extensively for access seekers than under the arbitration process. Access providers could prefer the flexibility of the undertaking process, rather than arbitral processes before the ACCC, particularly as this will allow for multilateral hearings in arbitration in the future. By increasing incentives to negotiate for both parties, post-declaration undertakings should reduce recourse to arbitration, which could reduce the burden on the regulator and industry.

Difficulties may arise from parallel processes if an undertaking were lodged while arbitration had commenced. To avoid such difficulties, the Government considers that it is necessary to also provide the ACCC with discretion to determine whether the undertaking or arbitration

process should be suspended in each case. To ensure transparency in decision-making processes, the ACCC will be required to publish reasons for any decision to suspend either the arbitration or undertaking process.

The Government also agrees with the Commission's recommendation for Part IIIA to provide for merit review by the ACT of ACCC decisions on proposed undertakings (see the Government's response to recommendation 15.1). This provision will apply expressly to an application for post-declaration undertakings.

Recommendation 10.2

Criteria for assessing proposed undertakings under Part IIIA should be aligned, as closely as practicable, with those applying to arbitrations for declared services and the Clause 6 principles for certification. Specifically, the criteria should incorporate the recommended pricing principles.

Government Response

The Government does not consider it necessary or appropriate to align, as closely as possible, the criteria for assessing proposed undertakings under Part IIIA with those applying to arbitrations for declared services.

Although both processes aim to facilitate terms and conditions for granting access, their scope of operation and level of detail may be considerably different (eg. the number of affected parties, circumstances when the terms and conditions will apply etc). This warrants the different scope of discretion currently provided to the ACCC for each process.

The arbitration process concerns disputes between the access provider and an identified access seeker (or access seekers in the case of multilateral arbitration) after private commercial negotiations have failed. The ACCC has a broad discretion to take into account all matters which it considers relevant but generally would, in practice, limit its consideration to matters in dispute between the parties. In contrast, the undertaking process assesses proposed access terms for several different access seekers including future, as yet unidentified, access seekers whose specific requirements cannot be known. This involves a public consultation process, which can effectively establish a framework for an industry regime. Therefore the ACCC's discretion is appropriately broader in this context.

The Government notes the proposed new requirements, that all decision-makers have regard to the same objects clause and the same pricing principles, should ensure sufficient consistency in approach to decision-making under Part IIIA.

Recommendation 10.3

The Gas Code should be amended to provide that, where a pipeline owner potentially covered by the Code lodges a Part IIIA undertaking, this should trigger an assessment by the NCC to determine whether the pipeline meets the requirements for coverage under the Code. The ACCC assessment of the Part IIIA undertaking should be held over pending the outcome of the Council's inquiry.

Government Response

The Government agrees in principle with this recommendation as it would provide procedural certainty and address concerns about forum shopping. The proposal will be examined in more detail in the forthcoming independent review of the operation of the Gas Access Regime.

Recommendation 10.4

Part IIIA should be amended to make it explicit that the ACCC cannot accept an undertaking if the service concerned is subject to a certified access regime.

Government Response

The Government agrees with this recommendation. There are several benefits to precluding undertakings where an effective access regime exists. It would remove the incentive for industry gaming through forum shopping, reduce potential concerns about double regulation, provide procedural certainty and support the use of effective certified regimes. This is important as certified access regimes provide greater regulatory certainty for industry and investors than case by case undertakings. There may also be a reduced risk of industry gaming in relation to the introduction of merit review rights for undertaking determinations (see response to recommendation 15.1).

Recommendation 11.1

Part IIIA should make provision for the proponent of a proposed investment in an essential infrastructure facility to seek a binding ruling on whether the services provided by that facility would meet the declaration criteria. Where the Minister, after receiving advice from the NCC, determines that they would not, the services concerned would be exempt from declaration. A binding ruling should apply in perpetuity, unless revoked by the Minister on advice from the NCC on the grounds of a material change in circumstances. Such a revocation should be appellable to the ACT.

Government Response

The Government proposes to consider the practicality of this recommendation in the context of industry-specific regimes, for example, in the forthcoming independent review of the operation of the Gas Access Regime. Such considerations will inform a decision on whether

to pursue the adoption of this requirement in the Regime or in other access codes. The Government notes that consideration and implementation of any changes to certified access regimes would involve consultation with the relevant State and Territory governments.

Recommendation 11.2

Where the licence to construct and operate a government sponsored essential infrastructure facility is to be awarded by an appropriately constituted competitive tendering process, there should be provision in Part IIIA to provide the services concerned with immunity from declaration.

Specifically, the ACCC should be able to issue an immunity for the term of the tender where the government concerned can demonstrate that:

- *the licence to construct and operate the facility is to be awarded through a competitive process; and*
- *favourable terms and conditions of access will be a key consideration in selecting the preferred tenderer.*

Provision should also be made to revoke the exemption if it transpires that the conduct of the tender does not conform with the arrangements on which the ACCC's decision was based. Such a revocation should be appealable to the ACT. The ACCC's initial decision should not, however, be appealable.

Government Response

The Government agrees with this recommendation. Introducing this exemption mechanism should provide regulatory certainty for government sponsored investment in infrastructure that is likely to benefit the community and economy.

The current provisions of Part IIIA provide statutory guidance for conducting arbitration and undertaking determinations. Accordingly, this new process will be accompanied by statutory criteria to guide the ACCC on what might constitute a competitive tendering process and what factors should be taken into consideration for determining 'reasonable' (rather than 'favourable') access terms and conditions. Given this, it is appropriate that the ACCC's decisions, including initial decisions, will be subject to both judicial and merit review.

Provision will also be made to revoke this proposed exemption if it transpires that the conduct of the tender does not conform to the arrangements on which the ACCC's decision was based. Such a revocation will be reviewable by the ACT. The threat of revocation should safeguard the interests of access seekers if the terms and conditions are not reasonable in practice. At the same time, the appeals mechanism should safeguard the interests of access providers.

Recommendation 11.3

The Commonwealth Government should, through the Council of Australian Governments, initiate a process to refine mechanisms (additional to those provided for in recommendations 11.1 and 11.2) to facilitate efficient investment within the Part IIIA regime in particular and access regimes generally. The mechanisms to be considered should include:

- *fixed-term access holidays available to any proposed investment in essential infrastructure which is determined to be contestable; and*
- *provision for a ‘truncation’ premium to be added to the cost of capital that has been agreed between a project proponent and the regulator prior to investment.*

This process should be completed in sufficient time to enable legislative implementation within Part IIIA no later than 2003.

Government Response

The Government proposes to consider the practicality of this recommendation in the context of industry-specific regimes, for example, in the forthcoming independent review of the operation of the Gas Access Regime. Such considerations will inform a decision on whether to pursue the adoption of this requirement in the Regime or in other access codes. The Government notes that consideration and implementation of any changes to certified access regimes would involve consultation with the relevant State and Territory governments.

Recommendation 12.1

The ACCC, in seeking to reduce access prices that are inefficiently high, must also have regard to the following principles:

(a) that regulated access prices should:

- (i) be set so as to generate expected revenue across a facility’s regulated services that is at least sufficient to meet the efficient long-run costs of providing access to these services;*
- (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and*
- (iii) generate revenue from each service that at least covers the directly attributable or incremental costs of providing the service.*

(b) that the access price structures should:

- (i) allow multi-part pricing and price discrimination when it aids efficiency; and*

(ii) *not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.*

(c) *that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.*

Government Response

The Government agrees with introducing pricing principles into Part IIIA processes but has refined the Commission's proposed specification of these principles. See the Government's response to recommendation 6.3.

Recommendation 12.2

The Commonwealth, States and Territories, through the Council of Australian Governments, should initiate a process to develop further the productivity measurement and benchmarking techniques necessary for regulators to make greater use of productivity-based approaches to setting access prices.

Government Response

The Government agrees in principle with the proposal that a range of regulatory approaches to access pricing should be considered. However, given the issues involved are highly technical and require expert analysis, the Government considers that it would be more appropriate to direct such investigations to industry-specific access regimes (consistent with responses to recommendations 11.1 and 11.3).

Recommendation 13.1

When arbitrating a dispute for a service declared under Part IIIA, the ACCC should outline the reasons for its choice of asset valuation methodology in the post-arbitration report (see recommendations 15.6).

Government Response

The Government agrees with this recommendation. As it is the ACCC's existing practice to publish reasons for its decisions, it is easily accommodated. The requirement supports transparency, which benefits industry and may provide guidance for negotiations and future arbitrations.

Recommendation 15.1

Part IIIA should include provision for merit review by the ACT of decisions by the ACCC on proposed undertakings.

Government Response

The Government agrees with this recommendation. Provision of this additional appeal right is consistent with other access routes (ie. certification, declaration and arbitration determinations) and should encourage the use of undertakings by providing for regulatory accountability. This amendment will provide explicitly for merit review by the ACT of decisions by the ACCC on post-declaration undertakings (see response to recommendation 10.1).

Recommendation 15.2

A 60 day limit should be introduced for decisions by the Commonwealth Minister on certification recommendations from the NCC.

Government Response

The Government is committed to improving decision-making processes for Part IIIA where there is net public benefit. A statutory deadline of 60 days on certification decisions would risk compromising the decision-making process. This would be particularly inappropriate for complex cases requiring careful consideration of valuable property rights and wider efficiency and competition considerations. Although there is a 60 day statutory time limit for decisions on declaration recommendations, certification processes are generally more detailed and complex.

To ensure responsible decision-making, the Government considers it is more practical and flexible to introduce a target (non-binding) time limit of 60 days for certification decisions, following receipt of a NCC recommendation. Further, there will be an additional requirement to publish notification of any extension to the time limit. This will ensure transparent decision-making and be consistent with new similar publication requirements in relation to other decision-makers under Part IIIA (see response to recommendation 15.3).

Recommendation 15.3

In addition to a 60 day limit for Ministerial decisions on declaration and certification applications (see recommendation 15.2), target time limits should apply to the other steps in the Part IIIA process:

- *For assessments by the NCC of declaration applications, the target time limit should be four months.*
- *For assessments by the NCC of certification applications and by the ACCC of undertaking applications, the target time limit should be six months.*
- *For arbitrations for declared services by the ACCC, the target time limit should be six months.*
- *For the processing of appeals on any of these matters by the ACT, the target time limit should be four months.*

These targets should be specified legislatively, along with a provision that if the NCC, the ACCC or the ACT wishes to extend a target limit in a particular case, they be required to publish notification to that effect in a national newspaper. The annual reports of the NCC and the ACCC should contain information on the actual time taken to deal with matters subject to these time limits.

Government Response

The Government agrees with this recommendation except in relation to the proposal to introduce a time limit for Ministers' decisions on certifications (see response to recommendation 15.2).

These target time limits increase incentives for timely decision-making. In addition, the requirement that the decision-maker publish notification of any extension beyond the target time limit provides for regulatory transparency and flexibility for decision-makers.

In practice, an issue would arise if an access provider were to use the arbitration process as a strategy to delay providing access. This would render the proposed six month target time limit for arbitrations under Part IIIA unrealistic. In order to minimise this risk, the Government intends to provide discretion to the ACCC to grant interim arbitration determinations and to backdate a final determination to the date negotiations commenced. This should ensure that the access seeker obtains access to the service whilst the arbitration process is conducted. An interim determination, in providing an indication of the ACCC's view, may also facilitate commercial negotiations.

Recommendation 15.4

Part IIIA should make legislative provision for public input on declaration and certification applications, and proposed access undertakings, where it is 'reasonable and practical' to do so.

Government Response

The Government agrees with this recommendation. Public input into the regime's decision-making processes is desirable for more informed decision-making, particularly when assessing the public interest in each case. As this requirement accords with the NCC and the ACCC's existing practices and allows for practical limitations, it is easily achieved. Provision will be made for a process to accommodate commercial confidentiality concerns.

Recommendation 15.5

Ministers, the NCC and the ACCC should be required to publish reasons for their decisions or recommendations relating to applications for declarations and certifications and proposed undertakings. If Ministers fail to make a decision on a declaration or certification recommendation within the 60 day time limit, this should be deemed as acceptance of the NCC recommendation.

Government Response

The Government agrees with the recommendation to publish reasons for decisions or recommendations. This will ensure procedural transparency and regulatory accountability.

Introducing this requirement will facilitate informed consideration of whether there are grounds to challenge a decision by way of merit review before the ACT or judicial review by the courts. Provision will be made for consultation with the relevant commercial parties for exclusion of commercially-confidential information.

However, the Government considers that it would be inappropriate for Part IIIA to deem acceptance of a certification or declaration if a Minister had not provided a decision after 60 days of receipt of a NCC's recommendation. This would risk compromising the decision-making process, particularly in complex cases (see response to recommendation 15.2). Hence, the Government considers it is more appropriate to rely on Part IIIA's existing processes for merit and judicial review of Ministers' decisions on certifications and declarations. This already allows responsible, informed decision-making for declaration and certifications processes.

Recommendation 15.6

The ACCC should be required to publish reports on completed arbitrations for services declared under Part IIIA. Subject to the proviso that any information disclosed does not unduly harm the legitimate business interests of parties to the dispute, these reports should generally include the following:

- *an outline of the decision-making framework and methodologies underpinning the arbitrated outcome, including the reasons for the choice of asset valuation methodology (see recommendation 13.1);*
- *any non-confidential information provided by the parties to the dispute which has implications for the framework and methodologies adopted; and*
- *discussion of any implications of the determination for parties seeking access to the service, or a similar service, in the future.*

The reports should also include justification for any of the following actions taken by the ACCC as part of the arbitration process:

- *reassessment of matters agreed between parties to the dispute (recommendation 8.2);*
- *the introduction of non-efficiency considerations (recommendation 8.3); and*
- *decisions on whether or not to engage in multilateral arbitrations which are against the wishes of the parties to the dispute (recommendation 8.5).*

Government Response

The Government agrees in principle with this recommendation. Publication of arbitration reports, subject to the exclusion of confidential information, ensures regulatory transparency and may provide guidance for future cases.

Recommendation 15.7

Part IIIA should include explicit provision to expedite extensions of certifications and undertakings as follows:

- *Six months prior to the expiry of a certification or undertaking, the NCC or the ACCC would be required to seek public comment on the need for any change to the existing arrangements.*
- *On the basis of that input and other relevant information, the NCC or the ACCC would have the option of making a case for change.*
- *If the NCC or ACCC did not do so, and the service provider did not wish to make changes, extension of the arrangement in question would be automatic.*
- *For certifications, the duration of the extension would be determined by the Minister on advice from the NCC. For undertakings, the duration would be determined by the ACCC. Standard appeal rights would apply to these determinations.*

Government Response

The Government agrees in principle with this recommendation. Part IIIA should provide for expediting extensions of existing certification and undertakings. The Commission has proposed an approach that places the onus on the NCC and ACCC to make a case for change in relation to existing arrangements, such that failure to do so, would result in automatic statutory extension of the existing arrangement. The Government prefers a process where the regulator would only be required to assess cases where requested.

Accordingly, the Government is introducing a process to allow a service provider to request that the regulator assess extending a certification or undertaking, six months prior to its expiry. In doing so, an access provider will be able to submit any proposed revisions to the regulator. After public consultation, the regulator would decide whether to extend the undertaking in the light of the existing assessment criteria under the Regime (or recommend extension of a certification to the Minister). The certification or undertaking would expire unless the regulator (or Minister) decides that it should be extended. This process will be assisted by improvements to the decision-making process for assessments of undertakings and certifications in terms of timing and evaluation (see response to recommendations 15.3 and 15.4).

This process should benefit a wide range of stakeholders. It will allow infrastructure service providers the opportunity to streamline any application for extending certifications or undertaking, avoiding potential regulatory uncertainty and delay.

This process should, in turn, benefit access seekers by expediting regulatory certainty for the terms and conditions of access. Further, both access seekers and consumers should benefit from the inclusion of the public consultation process.

Recommendation 16.1

The NCC should be required to report annually on the operation and effects of the National Access Regime. Reporting by the NCC should contain information and commentary on:

- *statutory and judicial interpretation of the (strengthened) declaration criteria;*
- *any factors that have impeded the Regime's capacity to deliver efficient access outcomes;*
- *evidence of benefits arising from access determinations under the Regime;*
- *evidence of associated costs, including any evidence of disincentives created for investment in essential infrastructure; and*
- *implications for the national access framework in the future.*

Government Response

The Government agrees with this recommendation.

Recommendation 16.2

There should be a further independent review of the National Access Regime five years after the first group of changes to Part IIIA resulting from this inquiry is put in place.

Government Response

The Government agrees with this recommendation. This future review will provide a timely opportunity to reassess the extent to which Part IIIA and clause 6 of the CPA (incorporating the changes flowing from this review) are fostering efficient investment in new essential infrastructure, encouraging the efficient use of existing facilities through innovation and productivity improvements and thus contributing to sustaining strong economic growth.