Australian
Competition &
Consumer
Commission

Productivity Commission

Review of the National Access Regime

ACCC Submission on Draft Report

July 2013

1. Introduction

The ACCC welcomes the release of the Productivity Commission's (PC) Draft Report on Australia's National Access Regime and the opportunity to provide further comment.

This submission sets out the ACCC's response on draft findings and draft recommendations made in the Draft Report. The ACCC focusses on the PC's views in relation to:

(a) the provisions in Part IIIA of the Competition and Consumer Act 2010 (CCA) on access arbitration determinations, including section 44V(2);
(b) the declaration provisions in Part IIIA;
(c) access undertakings, and industry and facility-specific access regimes;
(d) the appropriateness of 'upfront' access arrangements; and
(e) implications from the implementation of the PC's proposed reforms.

It is hoped that these further comments, on specific recommendations and particular findings, and in response to the PC's request for further information, will be useful in helping the PC finalise its report. Whilst the ACCC welcomes the PC's draft findings, and the important contribution the Draft Report makes in evaluating the experience of the National Access Regime, the ACCC has not in this submission commented on every aspect of the Draft Report. For instance, the ACCC's views differ from the PC on some issues, such as the impacts of regulation and incentives for investment. The effect of what is sometimes referred to as 'asymmetric truncation on investment' also involves a difference of interpretation that the PC and ACCC have now canvassed across a number of reports since 2001. The ACCC's prior submission (of February 2013) provided a range of information on access regulation, including on these issues, and the ACCC would reiterate those views as applicable.

2. Access arbitration determinations & extensions/expansions

PC views

DRAFT RECOMMENDATION 8.7

The Australian Government should amend subsection 44V(2) of the Competition and Consumer Act 2010 (Cwlth) to confirm the prevailing interpretation by the Australian Competition Tribunal that, when arbitrating an access dispute, the Australian Competition and Consumer Commission can require a service provider to expand the capacity of its facility (in addition to being able to require a geographical extension).

DRAFT RECOMMENDATION 8.8

As soon as practicable, the Australian Competition and Consumer Commission (ACCC) should develop and publish guidelines on how its power to direct facility extensions (and expansions) would be exercised in practice. The guidelines should be developed by the ACCC using a process that includes the public release of draft guidelines, and is informed by stakeholder consultation.

INFORMATION REQUEST 4.1

The Commission is seeking further input on the adequacy and workability of the safeguards in the Competition

and Consumer Act 2010 (Cwlth) (CCA) related to the Australian Competition and Consumer Commission's power in an access determination to direct an infrastructure service provider to extend its facility. In particular:

- do the safeguards in sections 44W and 44X strike the right balance between the interests of infrastructure service providers and access seekers?
- are changes to the CCA necessary to enable effective funding arrangements for ACCC-directed facility extensions (and expansions, if permitted under the CCA)? If so, what changes should be made?

The Commission is also seeking views on the safeguards for the access rights of the infrastructure service provider in access determinations. In particular:

- are the current safeguards for the service provider and other users of the facility in sections 44W and 44X appropriate?
- what implications would strengthening the safeguards for the service provider have on other users of the infrastructure service?

ACCC comment

As noted in the ACCC's previous submission to the PC, there is limited experience of the application of the arbitration provisions in Part IIIA, (which contrasts with the greater experience of arbitrations carried out under Part XIC of the CCA).[1] The ACCC however acknowledges the attention given to the arbitration provisions, particularly around how the extension/expansion section of Part IIIA would be applied in practice.

Over the nearly two decades the National Access Regime has been in place, on only two occasions have parties sought to utilise the arbitration provisions, and in only one instance did the matter progress to a final determination. The PC has noted that, given the limited experience with arbitration under the Regime, any changes to the pricing principles in Part IIIA would be premature at this time.[2] This sentiment could equally apply to the other arbitration provisions, as in the absence of evidence, it is difficult to reach a firm conclusion on their adequacy or to justify changes.

Nonetheless, the PC has recommended that section 44V(2) of Part IIIA be amended to clarify its application to expansions of capacity as well as to geographic extensions of a facility. The ACCC supports this recommendation, as such an amendment would align the wording of the statute with the existing position at common law.

The PC has also recommended that the ACCC develop and publish guidelines on how section 44V(2) would be exercised in practice. The ACCC supports this recommendation.

It appears unlikely that section 44V(2) would be invoked other than in very exceptional circumstances. The section applies to a service that has been declared, and where there is an access dispute on foot the subject of an ACCC arbitration. The ACCC is not obliged to make an arbitration determination that results in access to the declared service. As recognised by the PC, sections 44X and 44W set out a wide range of matters the ACCC must take into account in making an arbitration determination. These include the legitimate business interests of the provider and the interests of all persons who have rights to use the service. There are also limitations on the extent of an arbitration

[1] ACCC, Submission to PC Issues Paper on Review of the National Access Regime (February 2013), pp. 114-122.
[2] PC, Draft Report of the Review of the National Access Regime (May 2013), p. 133.

determination that the ACCC can make in order to safeguard the interests of the parties. As stated in the ACCC's prior submission, the ACCC considers it is preferable to provide effective incentives to prompt the infrastructure operator to extend or expand its facility, including providing the option of user-funded extensions or expansions.[3]

The ACCC has never utilised section 44V(2) to direct an extension or expansion of a declared service. As noted above, the ACCC has only conducted one access dispute to conclusion during the existence of Part IIIA, and the determination did not involve an extension or expansion to a facility. As such, there is no evidence on the ACCC's application of section 44V(2). It is therefore difficult with respect to section 44V(2) to state with any certainty whether the current safeguards strike an appropriate balance between the interests of infrastructure service providers and access seekers.

Despite this lack of evidence on the use of the provision, the ACCC recognises that there are concerns around how the provision might be used in practice. There would therefore be merit in publishing guidelines on section 44V(2), to provide greater clarity and certainty to stakeholders. The ACCC would develop these guidelines through the public release of draft guidelines and consultation with stakeholders.

3. Declaration provisions

PC views

DRAFT RECOMMENDATION 8.1

The Australian Government should amend paragraphs 44G(2)(b) and 44H(4)(b) of the Competition and Consumer Act 2010 (Cwlth) such that criterion (b) is met where total market demand could be met at least cost by the facility. Total market demand should include the demand for the service under application as well as the demand for any substitute services provided by facilities serving that market. The assessment of costs under criterion (b) should include an estimate of the costs associated with additional maintenance and reduced operational flexibility imposed on the infrastructure service provider from coordinating multiple users of its facility.

DRAFT RECOMMENDATION 8.2

If criterion (b) continues to be applied as a private profitability test, the Australian Government should amend the definition of 'anyone' in paragraphs 44G(2)(b) and 44H(4)(b) of the Competition and Consumer Act 2010 (Cwlth) to exclude the incumbent service provider.

DRAFT RECOMMENDATION 8.3

The Australian Government should amend paragraphs 44G(2)(a) and 44H(4)(a) of the Competition and Consumer Act 2010 (Cwlth) such that criterion (a) becomes a comparison of competition with and without access on reasonable terms and conditions through declaration

DRAFT RECOMMENDATION 8.4

The Australian Government should amend paragraphs 44G(2)(f) and 44H(4)(f) of the Competition and Consumer Act 2010 (Cwlth) such that criterion (f) requires that declaration promotes the public interest. As part of their assessment of the public interest, decision makers should be required to have regard to the effect

[3] ACCC, Submission to PC Issues Paper on Review of the National Access Regime (February 2013), p. 49.

of declaration on investment in markets for infrastructure services and dependent markets, and compliance and administrative costs.

DRAFT RECOMMENDATION 8.5

The Australian Government should amend Part IIIA of the Competition and Consumer Act 2010 (Cwlth) to:

- remove paragraphs 44G(2)(e) and 44H(4)(e)
- introduce a threshold clause stating that a service cannot be declared if it is subject to a certified access regime
- include provision for the Commonwealth Minister to revoke the certification of an access regime, based on advice from the National Competition Council (NCC), if there has been a substantial modification to the certified regime or the principles in clause 6 of the Competition Principles Agreement (CPA), such that the regime no longer meets the principles in clause 6 of the CPA
- enable infrastructure service providers, access seekers and the relevant state or territory government to apply to the NCC to make a recommendation to the Commonwealth Minister for the revocation of certification. The NCC should also be able to initiate the revocation of certification (consistent with the current arrangements for revocation of declaration and ineligibility decisions).

The protection from declaration offered by certification should apply until the expiration of the certification, unless the certification is revoked by the Commonwealth Minister.

ACCC comment

The ACCC supports the proposal that the interpretation of criterion (b) be one of a 'natural monopoly test'. While the ACCC's submission advocated for a 'net social benefit test', it recognised that, in practice, there is little practical difference between the two tests.[4] This approach to criterion (b) would promote economic efficiency and the welfare of the whole Australian community. In contrast, a privately profitable test would be difficult to satisfy given the volatile nature of measures relevant to whether a facility is profitable. This uncertainty may result in a range of outcomes with adverse impacts on economy-wide efficiency and productivity.

The ACCC also supports the PC's draft recommendation that the term "anyone" in criterion (b) not include the incumbent monopoly infrastructure operator. The ACCC discussed this issue in its prior submission.[5] This change is particularly important in the event that the "privately profitable" test remains in place, as the incumbent monopoly infrastructure operator may be able to demonstrate privately profitable duplication over time, thus avoiding declaration while still having no legal requirement provide access.

Overall, the ACCC notes that the individual proposed changes to the declaration provisions are relatively minor. The combined effect of the proposed changes to the declaration criteria though is likely to be to raise the threshold for having a service declared. As a generic regime that can be applied across a wide range of industries, it is important to have an appropriate threshold for declaration.

[4] ACCC, Submission to PC Issues Paper on Review of the National Access Regime (February 2013), p. 16.
[5] ACCC, Submission to PC Issues Paper on Review of the National Access Regime (February 2013), p. 18.

The ACCC also notes that the declaration criteria have been the subject of much debate and judicial consideration throughout the life of the National Access Regime, some of which has helped clarify the interpretation and application of the criteria. While it is important that changes are made to the criteria where there is a pressing need to ensure the effectiveness of the Regime, the ACCC notes that pursuing less critical changes entails a risk of renewed uncertainty for the Regime's operation.

4. Access undertakings, and industry and facility-specific access regimes

PC views

DRAFT FINDING 6.1

Access undertakings have generally been effective at promoting access to infrastructure services on reasonable terms and conditions, particularly in transition phases.

However, there does not appear to be a need for further mandatory undertakings at this time. Mandatory undertakings have costs and if used, should be subject to upfront and ongoing assessment to ensure that they generate net benefits to the community.

DRAFT FINDING 8.2

The current approach of industry-specific access regimes operating alongside the National Access Regime is likely to provide greater net benefits than relying solely on either approach. Before any additional industry-specific regimes are introduced, it would need to be clearly demonstrated that there is a policy problem that is best addressed by access regulation, and that regulation would be best implemented at the industry level.

Part IIIA of the Competition and Consumer Act 2010 (Cwlth) plays an important backstop role for infrastructure services that are not covered by other access arrangements.

DRAFT FINDING 8.3

Facility-based access arrangements can be used to address a lack of effective competition in the provision of infrastructure services. However, facility-based access arrangements can impose net costs on the community if they are inconsistently or incorrectly applied, and provide incentives for lobbying. It is appropriate that the use of facility-based access arrangements is limited to where there is a clear need to tailor access arrangements for specific facilities. Decisions to apply facility-based access arrangements need to be transparent and robust and based on best practice regulation and policy making.

The National Access Regime can help to discipline the design of facility-based access arrangements. Where governments choose to adopt a facility-based approach they can make use of the provisions within Part IIIA of the Competition and Consumer Act 2010 (Cwlth) — by seeking certification of the access arrangement, or by using the undertaking or competitive tender pathways.

ACCC comment

The ACCC supports the PC's draft findings on these issues. The ACCC agrees with the PC that industry-specific access regimes operating alongside the National Access Regime provide greater net benefits than relying solely on either approach. The ACCC also agrees that 'facility-based' access

arrangements can be used to address a lack of effective competition in the provision of infrastructure services.[6] Part IIIA also provides an important backstop for infrastructure services that are not covered by other access regimes, and can help to discipline the design of industry-specific or facility-based regimes. The ACCC agrees that there should be a sound basis for a tailored access regime, and appropriate measures to ensure transparency and accountability in the operation of such regimes.

5. Broader policy context

PC view

DRAFT FINDING 10.2

Clause 4(3) of the Competition Principles Agreement requires that governments review the merits of structural separation and the design of price and service regulation for public monopolies that are to be privatised.

It is important that appropriate access arrangements are in place before public monopolies engaged in infrastructure service provision are privatised. This will promote competition and reduce regulatory and investment uncertainty for parties investing in infrastructure services and dependent markets. It is also good practice for governments to establish appropriate access arrangements upfront when they are involved in the development of major new infrastructure facilities.

ACCC comment

The ACCC agrees that it is important that appropriate access arrangements are in place upfront, prior to the privatisation of a public monopoly or the development of major new infrastructure facilities. The ACCC agrees with the PC that establishing access arrangements upfront helps promote competition and provide greater certainty for parties, including those investing in infrastructure services and those using such services to operate in dependent markets.

6. Implementation of review recommendations

PC views

INFORMATION REQUEST 10.2

The Commission is seeking input from inquiry participants on the potential transitional issues associated with changes to Part IIIA of the Competition and Consumer Act 2010 (Cwlth) and the Competition Principles Agreement recommended in this draft report. Among other things, the Commission would welcome information on the implications for:

- infrastructure services that are currently declared under the National Access Regime or any other

[6] The ACCC notes that in referring to 'facility-based' access arrangements, the PC is referring to specific access arrangements for individual infrastructure facilities (PC Draft Report, p. 272). The ACCC understands this to be different from facilities access, such as provided for under the telecommunications Facilities Access Code. That is, under access regimes, access is typically provided to a *service* provided by means of a facility, rather than to the facility itself. The Facilities Access Code is an example of a situation where access is provided to the physical facility itself.

access regime
- access undertakings that are in effect under the National Access Regime or any other access regime
- the status of currently certified state and territory access regimes.

ACCC comment

The ACCC notes that, given the changes recommended by the PC are concerned with the ACCC's arbitration powers (including the power to order a facility extension/expansion) and the criteria for declaration, there would not appear to be any implications from the proposed changes to access undertakings that are currently in effect under the National Access Regime (namely ARTC's Interstate and Hunter Valley rail access undertakings, and wheat port terminal access undertakings with Australian Bulk Alliance Pty Ltd, Cooperative Bulk Handling Limited, GrainCorp Operations Limited and Viterra Operations Limited).