

The Secretary, NCP Inquiry  
Productivity Commission  
PO Box 80  
BELCONNEN ACT 2616

Dear Sir,

### **Review of National Competition Policy (NCP) Arrangements**

Australian Pipeline Trust wishes to make a brief submission to the above-mentioned review.

As you may be aware, APT is Australia's largest transmission pipeline company, owning significant gas transmission assets in most States and Territories. We have been a willing and active participant in the development and implementation of the national gas access regime. We do not intend to comment on the operation of the national gas regime as such, as we are well aware of the separate review being undertaken by the Commission into that regime; instead, we wish to highlight several key matters arising from our experience with the gas regime which we believe should inform the consideration of on-going competition reform in Australia.

In summary:

- the objectives of the regime must be clear so that there is no doubt as to the intent of the regulatory regime
- the introduction of competition reforms must be accompanied by proper review mechanisms to protect owners and users against errors by the regulatory bodies
- the normal legal mechanisms applicable to business at large should continue to apply, including meaningful rights of review from substantive decisions affecting owners or users
- introduction of competition reforms must be implemented in such a way that they do not create a disincentive for investment by regulated firms
- the negotiate/arbitrate model under the Competition Principles Agreement should be implemented, and only if it is shown to be ineffective should more intrusive regulation such as price control be introduced
- the costs of regulation should be identified and assessed rigorously, not only when evaluating whether to reform the industry, but also when additional obligations are imposed either by government or regulatory bodies
- the normal separation of powers should not be lost – there is nothing so particular about access regulation to warrant the delegation to regulatory bodies of the power to create substantive new obligations

The attached report addresses these matters in more detail. It is also relevant to note that implementation of the Competition Principles Agreement in its terms would substantially address many of these matters.

We also note that the reform program is not completed in gas as reform of the whole chain of production has not been implemented. While the owners of sunk infrastructure have been subject to regulatory reform, there has been no meaningful development of reform in the upstream industry. We are not aware, however, of compelling evidence that there is yet sufficient competition between producers, or between basins, to ensure that the task of energy market reform is complete.

It is to be hoped that the lessons from the energy industry will be taken into account in developing future access regimes. We would be happy to expand upon any of these matters if this would assist the Commission.

Yours faithfully

**J K McDonald**  
**Managing Director**  
**Australian Pipeline Trust**

## **SUBMISSION TO PRODUCTIVITY COMMISSION -- REVIEW OF NATIONAL COMPETITION POLICY**

- *The objectives of the regime must be clear so that there is no doubt as to the intent of the regulatory regime*

The experience in the gas access reforms demonstrates the need for the objects of any access regime to be clearly stated. In the absence of this, uncertainty as to the objects of the regime can result in regulatory bodies implementing the regime to produce the outcomes they believe are intended, rather than the outcomes intended when the legislation was enacted. In gas and electricity, for example, there have been increasingly forensic approaches applied to establishing regulated firms' permitted revenues. However, there is nothing of itself in the Competition Principles Agreement or the relevant legislation which mandates such an approach.

Particularly in matters such as access regulation which involves an interference with an owner's normal rights, it is unacceptable that regulatory bodies are given the obligation and discretion to discern the objectives of the regime.

- *The introduction of competition reforms must be accompanied by proper review mechanisms to protect owners and users against errors by the regulatory bodies*

Experience in the gas industry has demonstrated the necessity to ensure that in any reforms, the appeal rights mandated by the Competition Principles Agreement are created. The fact that there have been successful applications for review of several regulatory decisions under the Gas Code demonstrates the need to ensure meaningful rights of review are available to both users and asset owners so that an error by a regulatory body can be corrected.

It is also important that the appeal mechanism is efficient, and enables the prompt hearing and resolution of the matter in dispute. It is therefore appropriate that merits reviews or similar are undertaken by a body such as the Australian Competition Tribunal.

- *The normal legal mechanisms applicable to business at large should continue to apply, including meaningful rights of review from substantive decisions affecting owners or users, and appropriate dispute resolution mechanisms.*

In the energy reforms, at least, there has developed a quasi-truth that the normal legal mechanisms generally applicable to conducting business in Australia do not apply because access regulation is somehow "special" – for example, while in most Australian jurisdictions there are generally rights of review against government or judicial decisions affecting a parties' substantive rights, this right has been substantially restricted in electricity and is constrained in gas.

Another significant departure from normal legal mechanisms in Australia is the identity of the arbitrator in an access dispute. In gas, the body which determines the prices to apply to

regulated services is also the body which determines arbitrations if the owner and a prospective user cannot agree. Independence of the arbitrator's decision therefore cannot be assured, to the potential detriment of both owners and users. Also, unlike in normal commercial disputes, there is no mechanism to ensure that the arbitration is conducted by a professional and qualified arbitrator.

Other examples exist, but these are sufficient to demonstrate the undesirability of the model adopted in energy of ignoring or overriding the normal legal mechanisms which typically are available to firms in operating in Australia.

- *The introduction of competition reforms must be implemented in such a way that they do not create a disincentive for investment by regulated firms*

The imposition of too intrusive a regime can impose costs to society in excess of the costs arising from a lack of competition. In the case of the gas access regime, these include the costs of deterring owners from expansion of existing facilities, diverting investment from marginal (and thus difficult) projects to "easier" projects, or developers structuring investments to avoid the imposition of regulatory oversight (such as through the construction of facilities to meet only contracted loads).

The introduction of reforms to other areas of the Australian economy must ensure there is a clear balance between the removal of any monopoly rents and the deterrent to investment which arises from too aggressive a focus by regulatory authorities on ensuring delivery of services at the lowest possible cost.

- *The negotiate/arbitrate model under the Competition Principles Agreement should be implemented, and only if it is shown to be ineffective should more intrusive regulation such as price control be introduced*

The question arises as to whether the difficulties and obstacles to investment created by the current gas regime would have arisen, or to this extent, if the Competition Principles Agreement had been implemented in its terms – that is, through creation of rights to negotiation with binding arbitration. The gas and electricity regimes are widely different from those contemplated by the Agreement, and the Commission should be cautious before recommending the imposition of similarly intrusive and onerous price control regimes to other industries.

- *The costs of regulation should be identified and assessed rigorously, not only when evaluating whether to reform an industry, but also when additional obligations are imposed either by government or regulatory bodies*

There must also be a recognition of the significant costs incurred by the regulators (and thus the community) and service providers (and thus users) in complying with regulation. There needs to be a proper application of the requirement for regulatory impact statements or similar, with meaningful assessments of the costs and benefits of all new regulatory requirements.

In the energy industry there is on-going “regulatory creep” through the issue of guidelines, licence conditions, standard contracts, policies etc. This often occurs without any apparent justification of the costs of compliance. This should not be permitted in future industries to which competition reform is introduced.

- *The normal separation of powers should not be lost – there is nothing so particular about access regulation to warrant the delegation to regulatory bodies of the power to create substantive new obligations*

Similarly, any future competition reforms must ensure that the rule of law is not subverted as is increasingly occurring in the energy and several other industries. It is not sufficient for the governments to establish a framework and to then effectively divest themselves of responsibility and oversight by delegation to regulatory bodies of the power to impose new significant obligations. However, this is effectively the regime that has been imposed in energy, where through the generic delegation to regulators of the power to impose guidelines”, parliament has effectively devolved to the regulators the power to create new statutory obligations. We would be pleased to provide examples of this if the Commission would find it helpful.