

Comments on the
Productivity Commission's
Discussion Draft
of the
Review of the National Competition
Policy Reforms

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (“**PIAC**”) is an independent, non-profit legal and policy centre located in Sydney. Its charter is:

To undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Although located in New South Wales, the matters PIAC undertakes are often of national interest or importance or have consequences beyond state boundaries.

PIAC’s work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact. PIAC’s clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

The Utility Consumers’ Advocacy Program (“**UCAP**”) was established by PIAC in 1998 with funding from the NSW Government. Its mandate is to represent the interests of residential users of energy and water—especially those on low incomes or facing disadvantage—to industry, regulators and government.

Background

PIAC made a submission to the first stage of the National Competition Policy (“**NCP**”) Review. That earlier submission addressed the inconsistent application by governments of the NCP Public Interest Test, the impacts on household consumers of application of competition to electricity, gas and water services, and the proposed application of competition principles to human services, including health services. PIAC continues to advocate the points made in that submission, many of which remain relevant to the Discussion Draft.

In order to avoid repetition, these comments on the Discussion Draft are confined to the specific area of regulation of prices for access to infrastructure.

Regulation of prices for access to infrastructure

The regulation of prices for access to infrastructure for essential services involves important public interest concerns. This is especially important in industries—such as energy, water and gas—that are capital intensive, often displaying characteristics of a natural monopoly, and where prices are passed on to consumers.

It is therefore disappointing to see that the Discussion Draft canvasses proposals for removing regulatory controls from the pricing of access to some infrastructure based on submissions from owners and investors that such regulation suppresses returns on investment and discourages investment (Discussion Draft p 236).

Complaints from investors about limits on rates of return are to be expected. However, the Commission appears to have responded to these complaints without having sought other views and properly evaluated the evidence.

The task for regulators in the energy and water industries is complicated by the continuing move towards private investment in infrastructure and services. Because governments have for decades undertaken the investment in these industries—generally in response to lack of investment by private capital—it is not possible to gauge accurately the nature or level of the signals that might be needed to attract new private investment. The “private capital” model now applied to Government Business Enterprises in the energy and water industries has resulted in a similar lack of certainty about the size of the investment task.

Decisions about investment and the strength of the signals provided by industry or regulators impact directly on consumers through the prices paid. In the case of residential energy and water services, households often have little discretion in their demand and can face considerable financial stress as a result of higher prices. While the Commission has made claims about the effect of NCP in reducing prices for electricity and gas, it concedes that the major efficiency and price gains in these industries were achieved prior to the initiation of fully competitive markets. That is, regulation rather than competition has driven much of the economic outcome.

PIAC agrees with the Commission about the extent of the problem of information asymmetry in these industries and the difficulties this poses for regulators. This problem is even greater for consumers. It is difficult for consumers to predict the signals needed to attract future investment. However, consumers use the presence and effectiveness of the relevant regulatory authorities to offer views about the nature of, the energy and water industries in terms of the level of risk they display and the comparative costs of public and private investment.

PIAC has offered its view to the Utility Regulators Forum about the possible evolution of the incentive-regulation model and a possible move towards a more “light handed” approach. Among PIAC’s concerns was the likely loss of transparency for these natural monopoly providers of essential services. It is reasonable for consumers to expect assurances that the prices of essential services reflect real and reasonable costs. This is an important balance to the demands of infrastructure providers for higher rates of return.

The request from investors for exemption from price regulation in infrastructure amounts to an attack on the regulatory function itself. This is not justified. There is already scope for use of the legal system to appeal particular decisions.

In recent years, there have been several examples of legal challenges to the decisions of regulatory authorities on access to infrastructure. Whatever the shortcomings of a system reliant on legal appeals, not least that the expense tends to preclude consumers, such appeals are open to public scrutiny and involve some weighing of different interests. The attempt to use the Commission and its review of NCP to reduce the role of the existing regulators seeks to take these decisions even further from public scrutiny and the participation of the consumers.

PIAC submits that there is no justification for the removal of regulation of prices for access to infrastructure provided by the independent regulators, and that no such recommendation should be made in the final report of the Commission.