



COMPETITION POLICY REVIEW

Response to Draft Report
17 November 2014

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EXECUTIVE SUMMARY

The Energy Networks Association (ENA) welcomes the Draft Report released by the Competition Policy Review Panel in September and the opportunity to provide a response to its findings and recommendations.

ENA particularly welcomes the highlighting by the Draft Report of significant outstanding competition-related reforms in the energy sector, and its close attention to energy market institutional structures and approaches as informing potential models for future utility-wide arrangements.

The network sector supports the goal of revitalizing a strong competition policy agenda which takes account of the significant progress made to date, encourages and incentivizes the timely completion of existing competition reform commitments, and extends the reform agenda to relevant new areas.

A key goal should be to ensure that a new national competition reform package puts governments, competition agencies and regulators in a position to work collaboratively with industry sectors to review and address in an orderly fashion the competition and industry structural issues that are emerging from current market, technology and competitive trends impacting on the energy networks sector (and other utility sectors).

BACKGROUND

The Energy Networks Association is the national industry association representing the businesses operating Australia's electricity transmission and distribution and gas distribution networks. Member businesses provide energy to virtually every household and business in Australia. ENA members own assets valued at over \$100 billion in energy network infrastructure.

COMPETITION INSTITUTIONS AND GOVERNANCE

Proposal for single national access and pricing regulator

The Draft Report proposes the development of a single national utility access and pricing regulator.

The key priority of the energy networks sector in considering the issue of the structure and form of the economic regulator is ensuring an independent, effective and credible regulatory body with resources to carry out its core function, applying best-practice regulatory approaches. In the scheduled COAG Energy Council review of energy market institutions and governance, the ENA will make specific recommendations for the achievement of this objective. ENA strongly supports the AER assuming residual jurisdictional network regulatory functions in NT and WA.

ENA considers that separation of the AER from the ACCC is a preferable model to the existing arrangements of the AER operating as a constituent part of the ACCC. The separation of the AER into a stand-alone independent industry-specific regulatory body would assist it in having the flexibility to further develop its specialist expertise in the energy sector and provide greater autonomy. Such a separation may promote an organizational culture focused on providing appropriate, predictable and credible long-term signals for efficient investment in the interests of consumers and reduce the risks of a narrower enforcement culture which quite appropriately informs the approaches and actions of the ACCC.

Independent assessment process for scope of monopoly regulation

The National Competition Council (NCC) plays a significant role under both the national and the gas access regimes in making recommendations on the appropriate scope of third party access regulation.

This distinct role of assessing whether third party access regulation is required, and in the public interest, should be exercised independently of the regulatory body that will eventually be tasked with applying such access regulation. This is because there are potentially poor incentives created by regulators effectively controlling the scope of their own authority, and the potential for third party access regulation to be applied where it is not required.

The institutional regime of the NCC assessing declaration applications (and under the gas regime, coverage determinations) and making recommendations to a Ministerial decision-maker was an appropriate recognition of the principle of separating the decision 'whether and what to regulate' from the day to day application of economic regulation to monopoly services.

Developments in both gas and electricity markets (such as the potential for significant wholesale gas price rises, and emerging competitive pressures around traditional monopoly electricity network services) makes this 'gate-

keeping' role of assessing the need for existing intrusive pricing and access frameworks more important than at any time over the past decade.

The final recommendations of the review, as with any subsequent institutional design choices made by Australian governments, should accommodate these considerations, by ensuring alternative independent agencies (such as the Australian Council of Competition Policy, or potentially in the future the Australian Energy Market Commission) are resourced and tasked by regulatory frameworks to carry out this function.

COMPETITION POLICY AND INFRASTRUCTURE MARKETS

ENA strongly welcomes the Draft Report's recognition that in energy there are significant incomplete areas of competition-related reforms, and its support for movement to deregulated retail energy charges and pricing reforms that better signal appropriate investment and consumption decisions.

Forward priorities for competition-related reforms in energy

There are a set of additional competition-related reforms arising from current technology, market and competitive developments in the energy market that should form part of a reactivated competition policy reform agenda, such as:

- » Implementing enhanced intergovernmental commitments and monitoring/assessment processes on energy pricing reform, including a systematic review and removal of barriers to pricing reform represented by jurisdictional pricing obligations;
- » Ensuring industry-specific regulatory regimes in electricity do not in practice foreclose on any participants (including networks, operating with any arrangements genuinely required to protect efficient and competitive outcomes) competing in emerging contestable energy services, distributed generation and metering markets;
- » Development of a system for regularly reviewing the continuing need for bespoke jurisdictional or energy industry specific arrangements (such as marketing codes, or the National Energy Consumer Framework regulations and *National Energy Retail Law*), with a policy preference for greater reliance where appropriate on general competition provisions of the *Competition and Consumer Act*.

- » Ensuring robust independent processes for evaluating the boundaries of competition and contestability which consider the full range of costs and benefits to consumers; and
- » Allowing efficient competition to emerge with flexible and dedicated processes to address where regulation can be removed or recalibrated.

A number of these reform elements are discussed in greater detail in ENA's recent publication *Evolving A Future Ready Regulatory Framework*, which is attached ([Attachment A](#)).

Mechanisms to promote ongoing competition-related reforms

A key current need to reinvigorate competition policy reform processes over the medium-term is establishment of a self-sustaining and reinforcing reform cycle. This must be supported by independent organizations able to monitor progress, challenge delays in implementation, and make recommendations regarding outstanding barriers or further required policy steps.

The review's recommendations to form a new Australian Council of Competition Policy capable of undertaking both annual and in depth market reviews would appear to be a useful mechanism to ensure continuing progress towards these reforms.

The competition reform payment process did provide a significant financial incentive for States and Territories to implement reform until the payments expired in 2006. ENA would support development of a further similar set of incentives in a cooperative process between the Commonwealth and States and Territory jurisdictions, but recognizes that these are matters for decision by governments.

NATIONAL ACCESS REGIME

Value of a 'model' national access regime

Part IIIA of the *Competition and Consumer Act* containing the National Access Regime continues to serve as an important guiding regime for utility infrastructure regimes. This continues to be a role that is highly valued by the energy networks sector, and which should be retained.

This role promotes high-level consistency in the economic principles underlying third party access pricing regulation, and in the best practice features of such frameworks

The quality of the energy regulatory framework has been enhanced by the guidance of the National Access Regime on efficiency-focused objectives, pricing principles and review mechanisms.

Key features which networks highly value in the national infrastructure access regime are:

- » A clear economic efficiency-focused objective, providing a transparent and certain basis for consideration of substantive interventions affecting the property rights and commercial interests of private infrastructure owners;
- » Competition, market power-based and public interest thresholds needing to be satisfied to justify the introduction, and continued imposition, of intrusive regulated access terms and conditions, with a presumption that commercial agreements and negotiations should be the primary basis for access terms and conditions;
- » Legislatively-backed revenue and pricing principles, setting out a transparent and certain basis for access pricing decisions with significant commercial impacts on proposed and existing long-lived infrastructure;
- » Mechanisms to allow both owners of new infrastructure facilities, or existing facilities to achieve upfront certainty around potential mandatory terms and conditions of access; and
- » Access to merits-based review on decisions which have the effect of requiring an infrastructure owner to provide third party access to the infrastructure.

Certification of the energy access regime

Under the *Competition Principles Agreement* and the *Australian Energy Market Agreement* the linkage of the energy and national access regimes was intended to be further formalised by the submitting of the revised energy access regimes to the NCC for certification as an effective access regime.

The currently outstanding commitment by Australian governments to formally recognize this linkage through certification should be met as soon as practicable, and represents a low-cost opportunity to reduce avoidable and unnecessary regulatory risk

NEW COMPETITION POLICY INSTITUTION

Proposed new Australian Council for Competition Policy

ENA supports the proposed establishment of the Australian Council for Competition Policy (ACCP)

A significant contributor to the successful prosecution of initial energy market reforms was strong policy advocacy arising from the original Hilmer Committee inquiry process, which was able to be sustained and promoted through the formation and activities of the NCC.

Consumers stand to benefit from the reinvigoration of incomplete and new, emerging areas of energy reform. A revitalized body such as the proposed ACCP would be a useful advocacy and policy advisory body in this regard, as well as potentially playing a role in holding all jurisdictions to account for delivering on reform undertakings.

ENA notes that the NCC was widely seen by a range of jurisdictions and stakeholders as an exclusively Commonwealth-led body. As the Draft Report identifies reforms across a range of infrastructure services require cooperative Federal approaches. The proposal to make the ACCP a joint Federal-State body is therefore a sound approach.

The network sector supports the proposed capacity of the new ACCP to initiate reviews which examine market efficiency in specific sectors impacted by new technology or other commercial risks.

Such mechanisms could promote a more flexible and holistic response to the changing competitive dynamics within a sector, including a structured recalibration of the applicable regulatory regimes.

The potential for emerging competition and contestability, changing market structures, technology capabilities and costs mean it is important that infrastructure access regimes have robust capacities not just in executing traditional natural monopoly regulation, but recognizing and flexibly and efficiently regulating only true 'bottleneck' infrastructure services.

Access regimes, including the 'model' National Access Regime, should evolve to ensure they recognise emerging effective competition, countervailing market power, as well as emerging areas of efficient integration and bundling of infrastructure and other services. The proposed ACCP and its

market review function are potentially valuable tools to ensure this occurs through time.

Transfer of National Access and Pricing Regulation

ENA welcomes the recognition in the Draft Report of the issue of promoting truly national access and pricing regulation through the transfer of remaining jurisdictionally based network regulatory functions to the AER.

Arrangements for such a transfer under any future national regulatory institutional architecture needs to ensure that the AER is provided with sufficient additional resources to undertake these new functions.

This transfer is consistent with the key objectives of the *Australian Energy Market Agreement* to enhance the national consistency and character of economic regulation and promote investor certainty. It is a reform that was completed across Eastern Australian States and Territories from 2005.

As an example, the WA Economic Regulation Authority has recently released a Rate of Return Guideline developed entirely in parallel to an equivalent guideline by the Australian Energy Regulator.

The WA ERA guideline adopts significantly different approaches to the estimation of the applicable regulatory cost of debt and equity than are applied under the AER Rate of Return Guideline. This has resulted in an unwarranted and significant divergence in investment incentives arising in regulatory decisions applying to gas network infrastructure, to no public benefit.

REVIEW OF DECISIONS

ENA strongly supports the role of the Australian Competition Tribunal in hearing limited merits review matters relating to key regulatory determinations made by the AER, WA Economic Regulation Authority (in the case of as of in Western Australia), and the NCC.

Merits review remains a fundamental part of ensuring accountable, high-quality regulatory determinations, and promoting the required investor confidence for major long-lived network infrastructure investments required to be made on an ongoing basis.

For these reasons, availability of merits review on decisions of a national access and pricing regulatory body is a fundamental principle.