

26 May 2015

Michael Willcock
General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Response to Competition Policy Review's Final Report

Dear Mr Willcock,

The Energy Networks Association (ENA) welcomes the opportunity to provide this submission in relation to the Competition Policy Review's Final Report and recommendations released on 31 March 2015.

ENA 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.

The ENA supports the goal of revisiting a strong competition policy agenda which takes account of the significant progress made to date, encourages and incentivises the timely completion of existing competition reform commitments, and extends the reform agenda to relevant new areas. The ENA has participated in the earlier stages of this Review by providing a response to the Issues Paper and Draft Report.

The ENA supports the Review Panel's focus on supporting economic regulation being actively refocused to ensure that it does not stifle innovation and new business models. The energy network sector industry is undergoing a transformation as a result of the emergence of competitive new technologies, government policy and customer preferences. Therefore, it is crucial that energy regulatory framework and institutional arrangements are capable of supporting and facilitating these changes.

The ENA welcomes the Final Report's recommendation to establish a new competition body - the Australian Council for Competition Policy (ACCP) in this regard. The ENA considers that this new body could play an important role in ensuring that competition drives the outcomes that are valued by consumers and the regulatory arrangements do not impede or stifle innovation in the context of changing competitive dynamics within the energy sector.

The ENA comments in relation to selected Final Report recommendations are provided in [Appendix A](#).

The ENA also notes that the COAG Energy Council's Review of Governance Arrangements for Australian Energy Markets is currently underway and represents an important first step in considering potential improvements to the energy market governance arrangements. The ENA considers that this review is the appropriate forum to consider the structure and form of economic regulator and has made a set of specific recommendations to the review.

Competition institutions

The ENA supports the proposed establishment of the Australian Council for Competition Policy (ACCP) which would provide competition policy leadership and drive the evolving competition reform agenda. This would also ensure that there is a competition-focused body embedded in energy market governance arrangements.

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 National Competition Council (NCC). Consumers stand to benefit from the reinvigoration of incomplete and new, emerging areas of energy reform. A revitalised 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.

The ENA notes that the National Competition Council was widely seen by a range of jurisdictions and stakeholders as an exclusively Commonwealth-led body. As the Final 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 recognising flexibly and efficiently regulating only genuine '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.

Access and pricing regulation

The ENA notes that the Final Report proposes the establishment of the Access and Pricing Regulator which would assume responsibility for economic regulation of telecommunications, water, gas and electricity. It is proposed that the Australian Energy Regulator (AER) would form part of this new body, and the new body would also absorb the access-related functions of the NCC.

While supporting in principle the separation of the AER from the ACCC, the ENA does not consider that large scale structural changes are the current priority. Rather, the tailored recommendations contained within the ENA's submission to the Review of Governance Arrangements for Australian Energy Markets are considered to be more likely to effectively target any performance enhancements required under current institutional arrangements (the ENA's submission can be found [here](#)). The ENA strongly supports the AER assuming residual jurisdictional regulatory functions in Western Australia and the Northern

Territory, as consistent with the objectives of the *Australian Energy Market Agreement* to enhance that national character of economic regulation of energy services.

Further, the ENA does not support the recommendation to transfer the NCC access- related functions (such as coverage and scope of regulation issues) to the economic regulator, regardless of what form it takes. The ENA considers that there needs to be an independent assessment process for scope of monopoly regulation, which 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 ENA considers that such agencies as the proposed Australian Council of Competitions Policy or the Australian Energy Market Commission would be better placed to carry out this function.

National Access Regime

The ENA welcomes the clear recognition in the report of the ongoing role of the National Access Regime contained in Part IIIA as a guiding 'model' access regime.

Part IIIA plays an important role in promoting a consistent approach to access regulation across monopoly infrastructure businesses and serves as a benchmark regime for industry-specific access regime. For example, the revenue and pricing principles set out in Part IIIA are also embedded in National Energy Laws.

The regime facilitates application of the same principals of access regulation to various infrastructure businesses, limiting possible perverse effects on investment due to divergence in legislative design. It also enables to limit the costs of regulatory oversight by providing an upfront certainty to the invertors in both regulated businesses and the markets reliant on their services.

If you have any questions, or the ENA can be of further assistance in developing the Commonwealth Government's views on this matter, please contact me on 02 6272 1555.

Yours sincerely,



John Bradley

Chief Executive Officer

Appendix A – Comments on specific recommendations

Recommendation	ENA comments
<p>Recommendation 42 — National Access Regime</p> <p><i>The declaration criteria in Part IIIA of the CCA should be targeted to ensure that third-party access only be mandated where it is in the public interest. To that end:</i></p> <ul style="list-style-type: none"> • <i>Criterion (a) should require that access on reasonable terms and conditions through declaration promote a substantial increase in competition in a dependent market that is nationally significant.</i> • <i>Criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service.</i> • <i>Criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest.</i> <p><i>The Competition Principles Agreement should be updated to reflect the revised declaration criteria.</i></p> <p><i>The Australian Competition Tribunal should be empowered to undertake a merits review of access decisions, while maintaining suitable statutory time limits for the review process.</i></p>	<p>The ENA has no strong view on this issue, however, considers that this measure will re-enforce the nature of the regime as a ‘last resort’ means.</p> <p>Generally, the ENA considers that the existing arrangements have performed well. It is reasonable to assume that a limited number of applications for declaration suggest that the existing regime has created the right incentives for access seekers and access providers.</p> <p>In essence, the regime represents a ‘last resort’ means of obtaining access to services operated by infrastructure which meets the declaration criteria. The regime does not intend to replace commercial negotiation between participants, but instead provides a way forward where negotiation was unsuccessful.</p> <p>In relation to the merits review regime, the ENA considers that availability of merits review on decisions of a national access is a fundamental principle.</p> <p>The 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. The ENA notes that the recently completed Review of Limited Merits Review in energy sector undertaken by the Expert Panel chaired by Professor George Yarrow concluded that the merits review mechanism is ‘an important component of a system checks and balances that supports the independence of delegated regulation’ and recommended to retaining access to the process.</p>
<p>Recommendation 43 — Australian Council for Competition Policy — Establishment</p> <p><i>The National Competition Council should be dissolved and the Australian Council for Competition Policy (ACCP) established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy</i></p>	<p>The ENA supports the proposed establishment of the Australian Council for Competition Policy (ACCP).</p> <p>This issue is addressed in Competition institutions section of the letter.</p>

Recommendation	ENA comments
<p><i>agenda.</i></p> <p><i>The ACCP should be established under legislation by one State and then by application in all other States and Territories and at the Commonwealth level. It should be funded jointly by the Australian Government and the States and Territories.</i></p> <p><i>The ACCP should have a five-member board, consisting of two members nominated by state and territory Treasurers and two members selected by the Australian Government Treasurer, plus a Chair. Nomination of the Chair should rotate between the Australian Government and the States and Territories combined. The Chair should be appointed on a full-time basis and other members on a part-time basis.</i></p> <p><i>Funding should be shared by all jurisdictions, with half of the funding provided by the Australian Government and half by the States and Territories in proportion to their population size.</i></p>	
<p>Recommendation 44 — Australian Council for Competition Policy — Role</p> <p><i>The Australian Council for Competition Policy should have a broad role encompassing:</i></p> <ul style="list-style-type: none"> • <i>advocacy, education and promotion of collaboration in competition policy;</i> • <i>independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;</i> • <i>identifying potential areas of competition reform across all levels of government;</i> • <i>making recommendations to governments on specific market design issues, regulatory reforms,</i> • <i>procurement policies and proposed privatisations;</i> • <i>undertaking research into competition policy developments in</i> 	<p>This issue is addressed in Competition institutions section of the letter.</p>

Recommendation	ENA comments
<p><i>Australia and overseas; and</i></p> <ul style="list-style-type: none"> <i>ex-post evaluation of some merger decisions.</i> 	
<p>Recommendation 45 — Market studies power</p> <p><i>The Australian Council for Competition Policy (ACCP) should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation, or to the ACCC for investigation of potential breaches of the CCA.</i></p> <p><i>The ACCP should have mandatory information-gathering powers to assist in its market studies function; however, these powers should be used sparingly.</i></p>	<p>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.</p> <p>This issue is addressed in Competition institutions section of the letter.</p>
<p>Recommendation 48 — Competition payments</p> <p><i>The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Australian Government and state and territory governments to estimate their effect on revenue in each jurisdiction.</i></p> <p><i>If disproportionate effects across jurisdictions are estimated, competition policy payments should ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.</i></p> <p><i>Reform effort should be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.</i></p>	<p>The ENA supports competition policy payments as a mechanism to promote ongoing competition related reforms.</p> <p>The competition reform payment process did provide a significant financial incentive for States and Territories to implement reform until the payments expired in 2006.</p> <p>The ENA would support development of a further similar set of incentives in a cooperative process between the Commonwealth and States and Territory jurisdictions, but recognises that these are matters for decision by governments.</p>
<p>Recommendation 50 — Access and Pricing Regulator</p> <p><i>The following regulatory functions should be transferred from the ACCC and the NCC and be undertaken within a single national Access and Pricing Regulator:</i></p> <ul style="list-style-type: none"> <i>the telecommunications access and pricing functions of the ACCC;</i> <i>price regulation and related advisory roles of the ACCC under the Water Act 2007 (Cth);</i> <i>the powers given to the ACCC under the National Access Regime;</i> 	<p>The key objective of the network sector in considering the issue and the structure and form of the economic regulator is ensuring an independent, effective and credible regulatory body with the resources to carry out its functions and apply best practice regulatory approaches. The ENA has made specific recommendations for the achievement of this objective in its submission to the COAG Energy Council Review of Governance Arrangements for Australian Energy Markets.</p> <p>While supporting in principle the separation of the AER from the ACCC, the ENA does not consider that large scale structural changes are the current priority. Rather, the tailored recommendations contained within the ENA's submission to the Review of Governance</p>

Recommendation	ENA comments
<ul style="list-style-type: none"> • <i>the functions undertaken by the Australian Energy Regulator under the National Electricity Law, the National Gas Law and the National Energy Retail Law</i> • <i>the powers given to the NCC under the National Access Regime; and</i> • <i>the powers given to the NCC under the National Gas Law.</i> <p><i>Other consumer protection and competition functions should remain with the ACCC. Price monitoring and surveillance functions should also be retained by the ACCC.</i></p> <p><i>The Access and Pricing Regulator should be constituted as a five-member board. The board should comprise two Australian Government-appointed members, two state and territory-nominated members and an Australian Government-appointed Chair. Two members (one Australian Government appointee and one state and territory appointee) should be appointed on a part-time basis. Decisions of the Access and Pricing Regulator should be subject to review by the Australian Competition Tribunal.</i></p> <p><i>The Access and Pricing Regulator should be established with a view to it gaining further functions if other sectors are transferred to national regimes.</i></p>	<p>Arrangements for Australian Energy Markets are considered to be more likely to effectively target performance improvements (the ENA’s submission can be found here). The ENA strongly supports the AER assuming residual jurisdictional regulatory functions in WA and NT.</p> <p>Further, the ENA does not support the recommendation to transfer the NCC functions to the economic regulator (regardless of what form it takes). The ENA considers that there needs to be an independent assessment process for scope of monopoly regulation, which 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.</p> <p>The ENA considers that such agencies as the proposed Australian Council of Competitions Policy or the Australian Energy Market Commission would be better placed to carry out this function.</p>