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The Productivity Commission commences a much-anticipated inquiry into the Australian National Access Regime

Simon Snow (Gilbert + Tobin) · Friday, December 14th, 2012

Australia has a statute-based access regime – Part IIIA of the Australian *Competition and Consumer Act 2010* (Cth) (**CCA**). The Commonwealth has recently announced a comprehensive review (**Inquiry**) of Part IIIA by the Productivity Commission (**Commission**).

The Inquiry's terms of reference were released on the 25 October 2012 and provide a very broad scope for the Inquiry. The Commission's Issues Paper responds to the wide terms of reference by posing over 80 separate questions. The questions address both specific issues about the structure, role, interpretation and performance of the current regime as well as others that go to the underlying policy rationale for Part IIIA including whether it needs to be retained at all or should be replaced with alternative policy options.

The Inquiry comes nearly twenty years after the idea of a single National Access Regime was first proposed in the report of the Independent Committee of Inquiry (the Hilmer Committee) in 1993. Based on the work of the Hilmer Committee, Part IIIA was introduced in 1995. However, since that time there have been a number of developments in the approach to access regulation both inside and outside of the Part IIIA framework which provide important context for the Inquiry.

Perhaps the most significant development is the emergence over the past two decades of access regimes tailored for specific industries. These include for instance: the telecommunications access regime in Part XIC of the CCA (introduced in 1997); national frameworks for electricity and gas regulation, which were initially developed as access codes and later developed into laws which have been adopted by the majority of state legislatures; and in some cases, access regimes developed *after* a decision had been made to declare the services under Part IIIA (eg Sydney's sewerage network services).

The development of sector-specific regimes has meant that Part IIIA has taken on more of a residual role, applying only to those industries and services that fall outside the scope of bespoke sector-specific regulation. This has led to questions about whether the original vision for Part IIIA is still relevant.

The need for Part IIIA is further undermined by the increasing use of alternative access arrangements which are contractual in nature and which have been used to facilitate Greenfield investment in the national broadband network, ports, railways and, more recently, water infrastructure. The contractual model appears to often be better adapted to deal with the

complexities of investment in new large scale infrastructure developments. In other cases, the unique way in which some types of facilities operate mean that the general model of access under Part IIIA is seen as unsuitable (e.g. grain handling ports).

Finally, there continues to be controversy over the criteria and mechanics of Part IIIA itself, exemplified by the recent High Court decision in *The Pilbara Infrastructure Pty Ltd & Anor v Australian Competition Tribunal & Ors* [2012] HCA 36. The Issues Paper raises a number of the specific issues identified by the High Court and other recent decisions under Part IIIA.

The 8-year Pilbara dispute exposed a number of flaws in the current two-stage process required under Part IIIA. Amongst other things, the High Court highlighted a tension that exists within Part IIIA between its economic and wider political functions, as well as continuing uncertainty about how individual statutory criteria operate.

The Inquiry invites stakeholder input in the form of written submissions (by 8 February 2013) and public hearings (due mid-2013). The recommendations that the Commission adopts in response to the Inquiry are likely to shape amendments over coming years as well as influence the principles and approaches adopted under other sectoral regimes (e.g. rail, telecommunications, gas, water, electricity, ports and airports).

This entry was posted on Friday, December 14th, 2012 at 12:00 pm and is filed under Australia, Source: OECD“>Competition
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