Australian Government

Australian Government Response
on the National Access Regime




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Australian Government response
to the

Productivity Commission and Competition Policy Review recommendations on the National Access Regime

ISBN 978-1-925220-69-8

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Background

The National Access Regime ('the Regime') was implemented as part of the National Competition Policy reforms in 1995 that followed the Hilmer Report. The Regime is a regulatory framework through which third parties may seek access to nationally significant infrastructure services. It is established by Part IIIA of the *Competition and Consumer Act 2010* (Cth), which sets out the architecture of the Regime, and clause 6 of the Competition Principles Agreement, which establishes general principles to assess the effectiveness of state and territory access regimes.

The objects clause of Part IIIA establishes the Regime's twin objectives:

- to promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The Australian Government ('the Government') decided to a progress a response to the Productivity Commission 2013 report on the Regime alongside its response to the Competition Policy Review led by Professor Ian Harper ('the Harper Review'). Recommendation 42 of the Harper Review was on the Regime.

The Australian Government response

The following table outlines the Government's position on the Productivity Commission and Harper Review recommendations on the Regime.

The Government agrees with the Productivity Commission and the Harper Review's findings that the Regime can help promote competition and should be retained. However, given that two decades have passed since the Regime was established, it is timely to consider their expert advice and, where necessary, refine the Regime. The Government's changes are intended to ensure that the Regime remains effective and efficient.

The Productivity Commission and the Harper Review took different approaches to ensuring the effectiveness of the Regime, by recommending alternative approaches to refine the Regime's declaration criteria. The Government has decided to implement the Productivity Commission's recommendations on the declaration criteria as they will ensure that the Regime continues to be an accessible and effective regulatory option which can boost competition in the economy. To ensure that the Regime does not extend beyond its intended purpose, the Government is amending criterion (f) in line with the recommendations of both the Productivity Commission and the Harper Review to require declarations to be positively in the national interest.

To ensure that the Regime operates efficiently, the Government is also agreeing the Productivity Commission's other recommendations regarding its operation.

Overall, the Government's position involves supporting 12 Productivity Commission recommendations, noting one, and supporting the Harper Review's recommendation in part.

The Government **does not support** the Harper Review's recommendation to the extent that it conflicts with the Productivity Commission's recommendations.

Aspect of the Regime	Productivity Commission	Harper Review	Australian Government response
Declaration criteria			
Criterion (a) Access would promote a material increase in competition in at least one market.	Recommendation 8.1 The Australian Government should amend paragraphs 44G(2)(a) and 44H(4)(a) of the *Competition and Consumer Act 2010* (Cth) such that criterion (a) becomes a comparison of competition with and without access on reasonable terms and conditions through declaration.	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.	The Government **supports** the Productivity Commission's recommendation, and **does not support** the Harper Review's recommendation. The Government agrees that this criterion should be a comparison of access under the current situation versus access on reasonable terms and conditions through declaration as this is the most meaningful, realistic measure. In effect, this would re-establish the pre-2006 interpretation of criterion (a). Criterion (c) already requires that an infrastructure service must be nationally significant. An additional requirement that a dependent market must also be nationally significant would shift the focus of the Regime from the infrastructure service in question. A requirement that declaration leads to a 'substantial' increase in competition is problematic, as many markets that are significant to Australia are unlikely to be 'substantially' affected by Australian industries' further access, though significant benefits may accrue within Australia from it.

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			Implementation The Government will seek to amend the *Competition and Consumer Act 2010* to implement this recommendation. The Government will develop exposure draft legislation for consultation to give effect to this position.
Criterion (b) That it would be uneconomical for anyone to develop another facility to provide the service In 2012, the High Court interpreted this criterion as a 'private profitability' or 'economic feasibility' test, requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility.	Recommendation 8.2 The Australian Government should amend paragraphs 44G(2)(b) and 44H(4)(b) of the *Competition and Consumer Act 2010* (Cth) such that criterion (b) is satisfied where total foreseeable market demand over the declaration period could be met at least cost by the facility. Total market demand should include the demand for the service under application as well as the demand for any substitute services provided by facilities serving that market. The assessment of costs under criterion (b) should include an estimate of any production costs incurred by the infrastructure service provider from coordinating multiple users of its facility.	Criterion (b) should require that it be uneconomical for anyone (other than the service provider) to develop another facility to provide the service.	The Government **supports** recommendation 8.2 of the Productivity Commission, and **does not support** the Harper Review's recommendation. The Government **notes** recommendation 8.3 of the Productivity Commission. The Regime encourages commercial negotiations to reach a reasonable settlement to promote efficient use of monopoly infrastructure. This avoids the cost of unnecessary duplication of infrastructure on the Australian economy. The Harper Review's recommendation for this criterion would keep the bar for a declaration very high, potentially leading to inefficient duplication of infrastructure and weakening the incentive for commercially negotiated outcomes. Amendments to declaration criterion (f) — see below — will strengthen protection for the rights of infrastructure owners under the Regime, to mitigate against the potential for regulatory overreach.

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	Recommendation 8.3 If criterion (b) continues to be applied as a private profitability test, the Australian Government should amend the definition of 'anyone' in paragraphs 44G(2)(b) and 44H(4)(b) of the *Competition and Consumer Act 2010* (Cth) to exclude the incumbent service provider.		In effect, this would amend criterion (b) to reflect the application of the law prior to the High Court's interpretation. **Implementation** The Government will seek to amend the *Competition and Consumer Act 2010* to implement this recommendation. The Government will develop exposure draft legislation for consultation to give effect to this position.
Criterion (e) That access to the service is not already subject to an access regime that has been certified as effective (barring that regime having been greatly modified since certification).	Recommendation 8.5 The Australian Government should amend Part IIIA of the *Competition and Consumer Act 2010* (Cth) to: • remove paragraphs 44G(2)(e) and 44H(4)(e); • introduce a threshold clause stating that a service cannot be declared if it is subject to a certified access regime; • include provision for the Commonwealth Minister to revoke the certification of an access regime, following a recommendation from the National Competition Council (NCC), if there have been substantial	No recommendation.	The Government **supports** the Productivity Commission's recommendation. The Government agrees with the Productivity Commission that this criterion is not needed in addition to the other four and that it should instead be a threshold clause. **Implementation** The Government will seek to amend the *Competition and Consumer Act 2010* to implement this recommendation. The Government will develop exposure draft legislation for consultation to give effect to this position.

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	modifications to the certified regime or the principles in clause 6 of the Competition Principles Agreement (CPA), such that the regime no longer meets the principles in clause 6 of the CPA`; • enable infrastructure service providers covered by the certified regime, access seekers, or the relevant state or territory government to apply to the NCC to make a recommendation to the Commonwealth Minister for the revocation of certification. The NCC should also be able to initiate the revocation of certification (consistent with the current arrangements for revocation of declaration and ineligibility decisions). The protection from declaration offered by certification should apply until the expiration of the certification, unless the certification is revoked by the Commonwealth Minister. Consequential amendments may be necessary to ensure that the designated Minister is able to revoke the declaration of a service if that service becomes the subject of a certified access regime.		

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Criterion (f) That access (or increased access) to the service would not be contrary to the public interest.	Recommendation 8.4 The Australian Government should amend paragraphs 44G(2)(f) and 44H(4)(f) of the *Competition and Consumer Act 2010* (Cth) such that criterion (f) becomes a test of whether access on reasonable terms and conditions through declaration promotes the public interest. As part of their assessment of the public interest, the National Competition Council and designated Minister should be required to have regard to the effect of declaration on investment in markets for infrastructure services and dependent markets, and administrative and compliance costs.	Criterion (f) should require that access on reasonable terms and conditions through declaration promote the public interest.	The Government **supports** the Productivity Commission and Harper Review recommendations. Expressing this test in the negative — 'not contrary to the public interest' — is too low a hurdle. Given that access is an imposition on infrastructure service providers, all tests should be framed from the perspective of protecting their property rights unless there are persuasive reasons not to. **Implementation** The Government will seek to amend the *Competition and Consumer Act 2010* to implement this recommendation. The Government will develop exposure draft legislation for consultation to give effect to this position.

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Administration of the Regime			
Role of the Competition Tribunal		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.	The Government **does not support** the Harper Review's recommendation. The Australian Competition Tribunal already has the power to undertake merits review of access decisions. The Government understands that the Harper Review Panel's preference is for the Tribunal's powers to hear and test new evidence to be expanded. The effect of this would be to reverse 2010 amendments intended to streamline the Regime.
Competition Principles Agreement	**Recommendation 8.6** If the Commission's recommendations to amend the declaration criteria are implemented, the Council of Australian Governments (COAG) should consider amending the Competition Principles Agreement (CPA) to align the principles in clause 6(3) with the relevant declaration criteria in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA). COAG should also consider streamlining the clause 6 principles in the CPA, in consultation with the National Competition Council, where appropriate.	The Competition Principles Agreement should be updated to reflect the revised declaration criteria.	The Government **supports** the Productivity Commission and Harper Review's recommendations. The Government will seek to amend the Competition Principles Agreement to reflect changes made to the declaration criteria. **Implementation** The Government will engage with the states and territories to progress this recommendation.

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	If the Commission's recommendation that the Australian Competition and Consumer Commission develop and publish guidelines on its power to direct facility extensions is adopted, then following publication of the guidelines COAG should consider including the safeguards in section 44W of the CCA in the CPA.		
State and territory requirements under the Competition and Infrastructure Reform Agreement to have regimes certified	Recommendation 8.7 The Council of Australian Governments should release the state and territory governments from the requirements in the Competition and Infrastructure Reform Agreement and the Australian Energy Market Agreement to submit their electricity and gas regimes for certification. States and territories would be free to seek certification of their regimes if they considered that there would be net benefits from doing so.	No recommendation.	The Government **supports** the Productivity Commission's recommendation. Certification under the Regime has some cost and in some cases there is potential regulatory duplication with state and territory regulators. **Implementation** The Government will engage with the states and territories to implement this recommendation.

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Access undertakings being assessed by the National Competition Council	Recommendation 8.8 Where an infrastructure service provider is required by a government to have an access undertaking in place in the future, the relevant government should request that the National Competition Council assess the service against the declaration criteria before the mandatory undertaking is implemented and at appropriate intervals after the mandatory undertaking is in place.	No recommendation.	The Government **supports** the Productivity Commission's recommendation. **Implementation** The Government will engage with the states and territories to implement these changes.
ACCC publishing guidelines on facility extensions.	Recommendation 8.9 As soon as practicable, the Australian Competition and Consumer Commission (ACCC) should develop and publish guidelines on how its power to direct facility extensions would be exercised in practice such that it is expected to generate net benefits to the community. The guidelines should be developed by the ACCC using a process that includes the public release of draft guidelines, and is informed by stakeholder consultation.	No recommendation.	The Government **supports** the Productivity Commission's recommendation. Public guidelines would provide clarity to the market about the ACCC's powers. **Implementation** The Government encourages the ACCC to implement this recommendation.

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Clarifying wording in the *Competition and Consumer Act 2010* relating to extensions	Recommendation 8.10 The Australian Government should amend the *Competition and Consumer Act 2010* (Cth) (CCA) to confirm the prevailing interpretation by the Australian Competition Tribunal that the terms 'extend', 'extensions' and 'extending' in sections 44V, 44W and 44X include expansions of a facility's capacity. The intent of this amendment is that when making an access determination, the Australian Competition and Consumer Commission can require a service provider to expand the capacity of its facility (in addition to being able to require a geographical extension) and that the safeguards in sections 44W and 44X apply to directed capacity expansions. In framing the amendments, consideration should be given to the use of the terms 'extend', 'extensions' and 'extending' in other provisions of the CCA, to ensure that the amendments do not give rise to any unintended consequences.	No recommendation.	The Government **supports** the Productivity Commission's recommendation. This will increase certainty both in the reach of the extensions power, and also ensure that, if this power is used by the ACCC, that the safeguards to protect the infrastructure owner would apply to both decisions to order geographical extensions and capacity expansions. **Implementation** The Government will seek to amend the *Competition and Consumer Act 2010* to implement this recommendation. The Government will develop exposure draft legislation for consultation to give effect to this position.

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Deeming treatment of National Competition Council decisions	Recommendation 9.1 The Australian Government should amend subsection 44H(9) of the *Competition and Consumer Act 2010* (Cth) such that if the designated Minister does not publish a decision on a declaration recommendation within the 60 day time limit, this is deemed to be acceptance of the National Competition Council's recommendation.	No recommendation.	The Government **supports** the Productivity Commission's recommendation. This recommendation would align the deeming treatment of declaration decisions with certifications in cases where the responsible minister has not made a decision within 60 days and would enhance the ability of aggrieved parties to seek judicial review by ensuring that there would be a statement of reasons to base an application. **Implementation** The Government will seek to amend the *Competition and Consumer Act 2010* to implement this recommendation. The Government will develop exposure draft legislation for consultation to give effect to this position.
Competitive neutrality	Recommendation 10.1 The Australian, state and territory governments should regularly review their competitive neutrality policies to ensure that they remain relevant and reflect contemporary practice. Specific matters that should be considered include: • clearer guidelines on the application of competitive neutrality during the	All Australian governments should review their competitive neutrality policies. Specific matters to be considered should include: guidelines on the application of competitive neutrality policy during the start-up stages of government businesses; the period of time over which start up government businesses should earn a	Please refer to the Government response to Recommendations 15, 16 and 17 of the Harper Review.

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	start-up stages of newly established government business enterprises that are or will be engaged in significant business activities • whether processes for handling competitive neutrality complaints are identifiable, independent and accessible • how governments respond to the findings of competitive neutrality complaint investigations. To strengthen accountability for competitive neutrality outcomes, the Heads of Treasuries should set a target for producing their annual competitive neutrality matrix report within six months of the end of each financial year.	commercial rate of return; and threshold tests for identifying significant business activities. The review of competitive neutrality policies should be overseen by an independent body, such as the proposed Australian Council for Competition Policy.	
Further review of the Regime	Recommendation 10.2 The Council of Australian Governments should commission a further independent review of the National Access Regime no more than 10 years after the Australian Government has formally responded to the recommendations of this inquiry.	No recommendation.	The Government supports the Productivity Commission's recommendation. This review should be commissioned by 2025.