
Regulatory issues

Telecommunications

Local telephony competition

On 9 June 1998 the Commission held a public hearing in Sydney as part of its inquiry into whether to declare local call and local interconnection services under Part XIC of the Trade Practices Act. The hearing was an important forum in which to gain comment from interested parties. The inquiry was initiated after earlier consideration of these matters at the industry level through the Telecommunications Access Forum (TAF). Members of the TAF were unable to reach consensus as to whether these services should be declared and accordingly the matter was referred to the Commission.

If these services are declared, carriers and carriage service providers supplying the services would be required to supply them, upon request, to service providers. This would enable service providers to supply competitive services to end-users. Various industry participants have advised the Commission that local call resale and local interconnection are important for the development of effective competition with a fully integrated service provider like Telstra.

During this inquiry the Commission will consider various ways in which competition could develop in local telecommunications and other communications markets with and without declaration. The Commission will issue a draft report on the findings of the inquiry. Once it has received comments from industry and the public it will issue a final report containing its decision along with its reasons.

Competition in data markets — digital data access and ISDN

In Sydney on 12 February 1998 and in Melbourne on 17 February 1998 the Commission held public hearings as part of its inquiry into whether to declare certain Integrated Services Digital Network (ISDN) services and whether to amend declarations for the digital data access service and transmission capacity.

On the basis of information received during the inquiry, on 30 April 1998 the Commission issued a draft report proposing the declaration of ISDN services. At that time, the Commission also released a report proposing to amend the service description for the digital data access service. These amendments would remove unnecessary technical requirements from the service description. Subsequently, on 8 May 1998, the Commission issued a draft report proposing to amend the service description for transmission capacity and declare new services.

The Commission is currently considering comments received in response to the draft reports. The final report will contain the Commission's decision and its reasons on all three matters.



Photography by Arthur Mostead

Electricity

Regulation of electricity transmission revenues

The Commission will assume responsibility for the regulation of transmission revenue in the National Electricity Market (NEM), on a progressive basis, from 1 July 1999. All transmission networks within the NEM will come under the Commission's regulation by 31 December 2002.

The National Electricity Code outlines the general principles and objectives for the transmission revenue regulatory regime to be applied by the Commission. The code prescribes the broad form of regulation to be applied to the revenues of transmission network service providers/owners (NSPs). It also grants the Commission the flexibility to use alternate methodologies, providing they are consistent with the code's objectives, principles, broad forms and mechanisms, and information disclosure requirements.

The code envisages that the Commission will develop a set of guidelines outlining how it will exercise its power to regulate transmission revenues. The Commission is in the process of developing a Statement of Regulatory Intent for the Regulation of Transmission Revenues (SRI).

As part of this process the Commission has released an issues paper to:

- outline its process for fulfilling the code requirement to develop national guidelines on how it will exercise its regulatory powers;
- identify where the code empowers the Commission with some discretion in its regulatory role;
- identify significant issues related to the regulation of transmission revenues in the NEM; and
- indicate the Commission's preliminary views on some of these issues.

The issues paper outlines the objectives and principles of the transmission revenue regulatory regime and sets out three

approaches to calculating the NSPs' maximum allowable revenues:

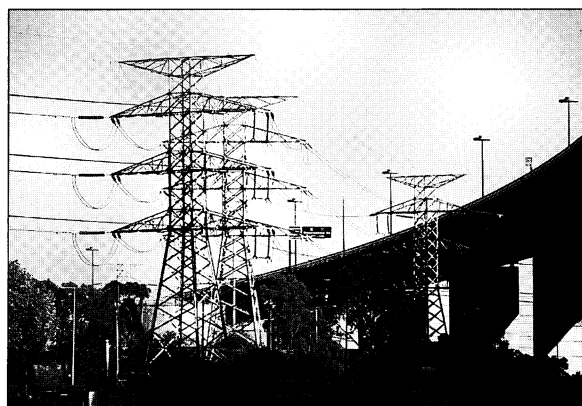
- accrual building block approach;
- cash flow analysis approach; and
- multi-financial indicator approach.

The issues paper discusses approaches to asset valuation, weighted average cost of capital, depreciation and operating and maintenance expenditure. It also examines the operation of a CPI-X incentive mechanism, including benefit sharing arrangements between the network service provider and network users, and looks at issues surrounding ring fencing arrangements and information gathering, analysis and disclosure by the Commission, including financial and non-financial information and the determination of service charters.

The Commission called for written submissions on the issues addressed in the issues paper, and/or any other relevant issues within the scope of chapter 6, part B of the code, by 31 July 1998.

A draft SRI will be developed taking into consideration submissions, expert advice and the Commission's own work in other areas, such as gas and telecommunications. The draft SRI will be released for public consultation by late 1998 giving interested parties the opportunity to provide submissions that will be considered in developing the final SRI.

Copies of the issues paper are available from the Commission's website or by contacting the electricity group at the Commission on (02) 6243 1249.



Photography by Arthur Mostead

Gas

Gas haulage arrangements approved

In a decision under s. 139 of the *Moomba-Sydney Pipeline System Sale Act 1994* (MSPSS Act), on 10 June 1998 the Commission approved, on the information available to it, an agreement for the haulage of gas from Moomba in the Cooper Basin gas fields to Stage 1 of the proposed ALISE gas-fired cogeneration plant at Botany, New South Wales.

The agreement is between East Australian Pipeline Limited (EAPL) and AGL Wholesale Gas Limited (AGLWG). EAPL is the operator of the Moomba-Sydney Pipeline System (MSPS). The agreement provides for a through rate of haulage over two pipeline systems (the MSPS gas transmission system and the Sydney gas distribution (reticulation) system of AGL Gas Networks Limited).

The Commission granted its approval to the agreement with a number of comments specifying and limiting the scope of the approval (refer section 9 of the decision). The Commission indicated that it was hampered in its decision as it did not have access from third parties to all pertinent information about the arrangements for supply and haulage of gas to the cogeneration project. As the relevant provisions of the MSPSS Act (and similarly, for future agreements, the provisions of the proposed National Access Code) require the Commission to consider whether the agreement would be likely to have the effect of substantially lessening, preventing or hindering competition, the Commission must consider the impact of the contract in the context of all the actual and potential market forces operating in the relevant market or markets.

The Commission understands that ALISE proposes to develop the project in two stages. It was satisfied that a process of competition had occurred for the initial supply to the ALISE project; however, at that stage the project was for 24PJ of gas yearly and it had since been scaled down to two stages, the first for approximately 12PJ of gas each year. The

Commission believes that, should the second stage proceed, arrangements for gas supply and haulage for that stage may require a competitive selection process. It may be that any public benefit arguments for not following that course could be considered in the context of an application for authorisation under the Trade Practices Act.

The Commission noted the benefit, for interstate trade in gas, to be gained by achieving regulatory coordination of approvals of cross-jurisdictional applications and, in section 10, set out guiding comments for the industry in lodging applications for approval of related-party agreements under the MSPSS Act and Associate Contracts (agreements between pipeline companies and related gas marketing companies) under the proposed National Access Code. The Commission indicated its preference for a consultative 'light-handed' regulatory approach, which would be possible only if there was a willingness amongst all relevant interests to participate in a transparent process of assessment.

The Commission invited comment from interested parties during July 1998 on section 10 of the decision, to assist it in drafting guidelines on its procedures for considering Associate Contracts once the National Access Code is operational.

Copies of the decision are available from Commission offices and its website.

Airports

Airport charges

On 24 June 1998 the Commission made its decision on increases in charges for aeronautical services at Sydney airport proposed by the Federal Airports Corporation (FAC). Aeronautical services include services related to the landing of aircraft and passenger processing.

Charges for aeronautical services at Sydney airport are declared under the Prices

Surveillance Act, and the FAC must notify the Commission of proposed increases.

Under the FAC's proposals, aeronautical charges were to be varied over three years. The first year involved a restructure of charges for aeronautical services with no net increase in average prices. Increased charges for aeronautical services in the second and third years are driven largely by the increased costs flowing from the FAC's capital expenditure program.

Capital expenditure is required at Sydney airport to ensure that capacity is available for expected future growth and to cater for the requirements of the 2000 Olympic Games. The \$700 million program includes an expansion and upgrading of the international passenger and freight processing facilities at Sydney airport.

The Commission did not object to the FAC proposal to restructure charges for the first year. The restructure is directed toward removing current cross subsidies which result in domestic regular passenger services subsidising international terminal users and small aircraft. In the Commission's view there is a strong case for the move to 'user pays' principles. The new charges will send appropriate pricing signals for efficient use of airport services and appropriate signals for new investment decisions.

The Commission was not in a position to make a decision regarding the proposals for the second and third years. Its legal advice was that the transfer of the FAC's assets to the Sydney Airports Corporation (SAC) and the separate declaration of the SAC under the Prices Surveillance Act means that the SAC would need to renotify the Commission of any future price increases. The SAC would not legally be entitled to impose the schedule of price increases proposed by the FAC for 1999/2000 and 2000/2001 even if the Commission accepted the FAC's proposals.

Notwithstanding the legal concerns, there were a number of other factors which prevented the Commission from forming a prudent decision on the proposals.

The increases in charges for aeronautical services for the second and third years are based on forecast increases in operating costs which flow predominantly from the proposed capital expenditure program. Assessment of unit costs led the Commission to conclude that the capital expenditure program will result in increased costs to users of those new capital works. It also concluded that there was too much uncertainty at this point in time to allow it to form a view as to the appropriate level of the increased charges. Users of aeronautical services at Sydney airport are also of this view, citing uncertainty surrounding the rate of return generated by the airport's aeronautical and non-aeronautical operations, traffic volume forecasts, the allocation and determination of costs (particularly depreciation charges), and the actual costs of the capital investment program.

While users generally support the level of investment being proposed, they are concerned that the charges proposed may be unnecessarily high. In particular they have expressed concerns about:

- high rates of return; and
- high depreciation rates on the new investment resulting in unnecessarily large price increases.

The Commission found that there was a significant degree of uncertainty surrounding the derivation, the quantum and the application of an appropriate required rate of return for Sydney airport. The issue is complicated by the prospective transfer of those assets to the Sydney Airports Corporation and a review of an appropriate weighted average cost of capital by the new owner, the Department of Finance.

The notification process also revealed significant differences of opinion between airport users and the FAC about the appropriateness of depreciation rates which the FAC applied. In assessing the various claims made by the airport users, the FAC and other parties it became apparent to the Commission that the depreciation issue could not be satisfactorily resolved within the time frame of the notification. It appears that the FAC assumes lives for some assets which are too short; that is, shorter than their useful lives.

The Commission believes that greater transparency in the FAC's costing of the components of large capital items and the depreciation rates to be applied to those components would address industry concerns and subject the FAC's depreciation policies to a commercial focus. The Commission therefore recommended that for the larger capital items the FAC/SAC should provide a higher-level breakdown of depreciable components and their associated rates and that the Commission consider this issue in the context of a future review of prices.

To help resolve the depreciation issues, the Commission encouraged the FAC/SAC to consult further with industry, possibly using a forum similar to the industry working groups established during the FAC's consultation process. Depreciation rates, including rates applicable to components of larger assets, should form part of a future review of prices.

Despite these areas of uncertainty the Commission recognises that investment expenditure at Sydney airport is required and will allow increases in charges for aeronautical services sufficient to justify the investment. The extent to which increases in charges are justified will depend upon resolution of issues relating to depreciation charges and rate of return and a review of traffic forecasts, capital expenditure incurred and other relevant variables. The Commission encourages the SAC to consult further with industry to help resolve remaining issues concerning rates of return and depreciation.

In reaching its decision the Commission took into account the extensive information provided by the FAC, comments from representatives of the aviation industry, a consultancy on airport depreciation rates, and the statutory and government guidelines given to the FAC. The Commission acknowledged the cooperation and assistance of the FAC throughout the notification process.



Photography by Arthur Mostead

National Competition Council

Review of TPA exemptions

The National Competition Council is currently reviewing ss 51(2) and 51(3) of the Trade Practices Act. The Commonwealth Government asked the NCC to review the exemptions as part of its commitment to review all legislation that restricts competition.

Sections 51(2) and 51(3) exempt particular arrangements and activities from the competition laws contained in Part IV of the Act. Section 51(2) provides a number of standing exemptions to the restrictive trade practices prohibited by Part IV of the Act, except for secondary boycotts and resale price maintenance. The exemptions, in general terms, relate to:

- employment conditions;
- restrictive covenants in employment contracts;
- sale of business contracts and partnership agreements;
- approved standards; and
- export contracts.

Section 51(3) of the Act also exempts certain restrictive trade practices prohibited by Part IV

of the Act. It does not extend to misuse of market power and resale price maintenance. The exemption covers certain conditions of licences or assignments of statutory intellectual property rights relating to:

- patents — patent rights give the patentee the exclusive right to exploit their invention for 20 years;
- registered designs — registered designs are protected from replication in appearance but not a method or principle of construction;
- copyright — material which has been granted copyright gives the author the exclusive rights to reproduce, publish, perform, broadcast, transmit and adapt the work for the life of the author plus 50 years;
- trade marks — a trade mark is a sign, symbol, word, brand or label used to distinguish between traders of goods and services; and
- circuit layouts — eligible circuit layout rights are exclusive rights to copy or exploit the layout (plan) of an integrated circuit.

The NCC has been asked to review whether the benefits of these exemptions outweigh the costs, and whether the objectives of the exemptions could be achieved more efficiently through other means, including non-legislative approaches.

It has published an issues paper and questions about the review or the issues paper can be directed to Michelle Groves on (03) 9285 7476.