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*From the Office of the President*

JOHN CORCORAN
president@lawcouncil.asn.au

**Via email:** economics.sen@aph.gov.au

Mr John Hawkins
Committee Secretary
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Mr Hawkins,

**Inquiry into the Trade Practices Amendment (Infrastructure Access) Bill 2009**

I have pleasure in enclosing a submission to the Senate Economics Committee in response to its inquiry into the *Trade Practices Amendment (Infrastructure Access) Bill 2009.*

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Dave Poddar, on (02) 9296 2281.

Thank you for giving us the opportunity to comment.

Yours sincerely.

**John Corcoran**

18 December 2009

Encl.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

# Senate Economics Committee Inquiry into the Trade Practices Amendment (Infrastructure Access) Bill 2009

## Submission by the Trade Practices Committee of the Business Law Section of the Law Council of Australia

## December 2009

**Trade Practices Committee of the Business Law Section of the Law Council of Australia**

**Submission to the Senate Economics Inquiry into the Trade Practices Amendment (Infrastructure Access) Bill 2009**

## 1 Introduction

### Context of process reforms contained in the Bill

The Trade Practices Committee of the Business Law Section of the Law Council of Australia **(Committee)** is pleased to offer the following comments on the Trade Practices Amendment (Infrastructure Access) Bill 2009 **(Bill)**.

The key purposes of the amendments proposed by the Bill are to increase regulatory certainty and to streamline administrative processes associated with the National Access Regime, including to "enhance regulatory certainty for potential investors in major new infrastructure facilities" (Explanatory Memorandum, pp 3 and 35; Second Reading Speech (Dr Emerson MP, 29 Oct 2009), p 11468).

When first announcing the amendments, the Hon Chris Bowen MP acknowledged that "there are concerns [Part IIIA] is generating regulatory risks that are hindering investment in essential infrastructure" (Hon. Chris Bowen MP (Assistant Treasurer) – Media Release, 7th April 2009 *Reforms to Streamline the National Access Regime*). Accordingly, the amendments proposed by the Bill respond to the fact that "infrastructure owners and access seekers have argued that processes under the regime are too lengthy and costly" (Second Reading Speech, p 11468). Further, in introducing the amendments, "the government acknowledge[d] that delays and costs in decision making under the regime may be having an adverse effect on important infrastructure investment that is needed to underpin economic growth and national productivity" (Second Reading Speech, p 11468).

### *It is time for a broader review of Part IIIA*

The Committee welcomes the reform intentions behind this Bill and in particular the proposals to create greater regulatory certainty. However, the Committee cautions against (and provides alternatives to) some of the reforms which seek to curtail merits review of regulatory decisions made under Part IIIA. The Committee believes that all regulatory decisions affecting the rights of individuals and companies should be subject to appropriate forms of review. It is axiomatic in a democratic society that there are appropriate checks and balances on the decisions of government regulatory bodies. This principle has particular importance where those decisions affect private property rights and core business activities, such as can occur under Part IIIA.

The Committee also supports Minister Emerson's recent comments that:

> *"... it might be timely to revisit the National Access Regime to ensure it is consistent with the imperative of meeting Australia's colossal infrastructure challenge."*[1]

[1] Address to the In the Zone Conference University of Western Australia, Perth, 9 November 2009

While this submission is limited to the amendments to Part IIIA of the *Trade Practices Act 1974* ("**TPA**") proposed by the Bill, the Committee believes that sufficient time has passed since the implementation of the Hilmer Reforms to warrant a more extensive review of the National Access Regime in Part IIIA of the TPA. In the Committee's view, such a review is warranted to ensure that Part IIIA is working in the national and consumer interest and to determine whether broader "fine tuning" is required to achieve an appropriate balance of the interests of infrastructure investors/owners and access seekers.

## 2 Executive Summary

In this submission, the Committee provides its preliminary observations on selected issues arising under the Bill. Those observations are set out in more detail below, but include the following:

- **The Committee supports the introduction of firm time limits to recommendations of the NCC and decisions of the ACCC and Tribunal.** The Committee submits that the proposed firm time limits, together with the provision for time extensions in appropriate circumstances, strike a balance between reducing delays in decision-making under the National Access Regime while providing sufficient flexibility to allow a regulator to obtain and consider relevant information and make a decision which fully addresses the issues raised in a particular matter.

- **In conducting merits reviews of decisions under Part IIIA, the Tribunal should not be limited to the material before the original decision maker.** Although the Committee recognises the Government's concerns that providing additional information to assist with the reconsideration of decisions will delay decision-making, in the Committee's view, the proposed limits on merits review are unduly restrictive, could seriously impair the review process and could lead to an incorrect decision. The Committee considers that the importance of merits review is well established as an essential aspect of good regulatory process and provides an appropriate check and balance. It is also likely that in many instances, limitations on merits review will in fact reduce procedural efficiency, as parties will choose to place more detailed and probative information before the original decision maker in an effort to ensure that this information will be available to the Tribunal, should the original decision proceed to review.

- **The Committee supports the concept of the proposal to allow the Minister to determine that services of infrastructure facilities are *ineligible to be declared services* but is concerned that the aim of certainty is undermined by several factors.** The Committee recognises that the ability to seek a decision on whether a service is ineligible for declaration could enhance regulatory certainty for potential investors in major infrastructure facilities. However, the Committee is concerned that the aim of certainty is undermined by the duration and forward looking, public and information intensive nature of the decision-making process. Except in the most obvious of cases of ineligibility, the potential infrastructure investor in fact runs the risk of a very public finding that the service to be provided by the facility is eligible for declaration. There is also ambiguity as to the circumstances in which an ineligibility recommendation can be revoked. Accordingly, while well intentioned, the Committee believes that this proposal may be rarely used. This issue in fact highlights that the criteria for declaration should perhaps be revisited as part of a broader review of Part IIIA to address issues of certainty and promotion of investment incentives.

- **The Committee supports the new fixed principle provisions in access undertakings.** The Committee strongly supports this concept, which is one of the most positive elements of this Bill. However, the Committee notes that the flow on benefits of regulatory certainty and greater investment incentives in infrastructure would be maximised if agreement to fixed principles on key financial inputs could be made in a timely way, that is, before an access undertaking is approved. This would allow investors to commit to an investment once the fixed principles are set, without fear of regulatory appropriation.

- **The Committee supports the proposal to allow the ACCC to propose amendments to a proposed access undertaking without the need for the original proposed undertaking to be withdrawn and resubmitted.** However, the Committee is concerned that the proposal to allow the ACCC to reject an undertaking if an amendment (proposed by the ACCC) causes undue prejudice or delay, will result in unfairness.

## 3 Comments and suggestions

### 3.1 Binding time limits

The Committee supports the introduction of firm time limits to apply to recommendations by the NCC and decisions of the ACCC and the Tribunal[2], provided that there is sufficient flexibility for the relevant time periods to be extended in appropriate circumstances.

Complex factual, economic and legal issues arise in relation to applications for declaration, ACCC determinations of arbitrations and decisions on competitive tender processes, access undertakings and access codes and Tribunal reviews[3]. Decisions made under Part IIIA will often be in force for very long periods and affect the rights and obligations of service providers and access seekers during that time[4]. In the Committee's view, the introduction of binding time limits without scope for extension in appropriate circumstances would create the risk of decisions which do not fully address all issues and could create uncertainty, particularly if a decision is made within a binding time period but the reasons for that decision (which are important to enable the parties to understand the decision and consider their position), are provided at a later time.

In the Committee's view, the proposed mechanisms for extending time limits under the Bill appropriately balance:

(a) the need for timely decisions;

(b) the need for the parties to have the opportunity to provide relevant materials and submissions to the relevant regulator; and

(c) the need for the relevant regulator to have sufficient time to properly consider relevant material and submissions and to make a recommendation or reach a decision

[2] The Committee notes that binding time limits already exist for declaration decisions by the Minister: see sections 44H.

[3] See the current applications for third party access to Pilbara railways; application by Services Sydney for declaration of sewerage transportation and interconnection services of Sydney Water; Virgin Blue application for declaration of services provided at Sydney Airport.

[4] For example, the services provided by Sydney Water's sewerage reticulation networks were declared for 50 years and the ACCC's determination of an access dispute about access pricing methodology was for a term of 20 years.

which fully addresses the issues raised and give reasons at the time the recommendation or decision is made.

The Bill provides that the binding time limits can be extended in the following circumstances:

(a) NCC:

- *the clock stoppers*: the clock stops where an agreement is made between the NCC, the applicant and the service provider, or where the NCC requests information in relation to the application from a person through a notice[5]; and
- *extending the time for making recommendation:* the NCC has the ability to extend the consideration period by giving notice to the Minister. This notice must include a statement explaining why the NCC has been unable to make a recommendation during the consideration period[6].

(b) ACCC:

- *the clock stoppers*: the clock stops where an agreement is made between the ACCC and the relevant parties to the application or dispute, the ACCC requests information from a person through a notice or direction under section 44ZG, the ACCC invites public submissions on an application, the ACCC defers an arbitration or access dispute under subsection 44ZZCB(4) or the ACCC defers arbitrating a dispute while a declaration is under review by the Tribunal.[7]

(c) Tribunal:

- *the clock stoppers*: the clock stops where an agreement is made between the Tribunal, the NCC, the ACCC and relevant parties to the review by the Tribunal, or the Tribunal requests information or clarification from a person through a notice issued under subsection 44ZZOAA(4) and the Tribunal requests information or reports from the NCC or ACCC[8]; and
- *extending the time for making recommendation:* the Tribunal has the ability to extend the consideration period by giving notice to the Minister. This notice must include a statement explaining why the Tribunal has been unable to make a recommendation during the consideration period[9].

The Committee considers that these mechanisms give applicants and decision makers a reasonably limited ability to seek to have the time period extended. They also allow the relevant regulator sufficient time to obtain and consider relevant information and make a

[5] See Schedule 1, Part 1 of the Bill, item 5 relating to subsection 44GA(3); item 31 relating to subsection 44NC(3); and Schedule 2, Part 1 of the Bill, item 7 relating to subsection 44LD(3).

[6] See Schedule 1, Part 1 of the Bill, item 5 relating to subsection 44GA(7); item 31 relating to subsection 44NC(7); and Schedule 2, Part 1 of the Bill, item 7 relating to subsection 44LD(7).

[7] See Schedule 1, Part 1 of the Bill, item 40 relating to subsection 44PD(2); item 50 relating to s44XA(2); and item 64 relating to subsection 44ZZBC(2).

[8] See Schedule 1, Part 1 of the Bill, item 71 relating to subsection 44ZZOA(3).

[9] See Schedule 1, Part 1 of the Bill, item 71 relating to subsection 44ZZOA(7).

recommendation or decision which fully addresses the issues raised and give reasons at the time the recommendation or decision is made.

The Committee notes that there is no corresponding ability of the ACCC to extend the expected period in the same way as the NCC and Tribunal is able to do so. Instead, the legislation sets out 'deemed decisions' if the ACCC does not make a decision in the expected period, as extended by the following clock stoppers:

- If the ACCC does not make a decision on an application for approval of a competitive tender process within the expected period it is deemed to have approved the tender process as a competitive tender process and deemed to have published that decision. *Notably, the parties are allowed to apply for a review of the deemed decision to the Tribunal.*

- If the ACCC does not make an arbitration determination on an access dispute within the expected period, it is deemed to have made a determination *that does not alter the status quo between the parties* and deemed to have published that decision.

- If the ACCC does not make a decision on an access undertaking or access code within the expected period, it is *deemed not to have accepted the access undertaking or access code* and deemed to have published that decision. This is due to the greater risk of accepting an access undertaking.

These are similar to the deeming provisions that apply to decisions of the Minister on declaration applications. The decisions of the ACCC fall into two categories - decisions on the terms and conditions of access (by way of arbitration, approval of an access undertaking or approval of an access code) and decisions on a competitive tender process.

Given the potential significance and complexity of the issues the ACCC may be required to determine in an arbitration, the Committee considers it would also be appropriate to enable the ACCC to extend the period in which it must make an arbitration determination.

### 3.2 Limited Merits review

The Committee submits that the proposal to limit the material able to be considered by the Tribunal may be overly restrictive and unduly impair the proper review process.

Review by the Tribunal is a merits review, not a judicial review. In 1999 the Administrative Review Council[10] observed that, "stepping into the shoes" of a decision maker is an essentially different process from the courts undertaking judicial review. In a merits review, the Tribunal reviews the facts, law and policy aspects of the original decision afresh, whereas a judicial review is limited to deciding whether there was an error of law. Judicial review may be available to the parties if they are not satisfied with the decision of the Tribunal. Merits reviews are designed to ensure that the correct and preferable decision is made[11].

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[10] Administrative Review Council (1995) *Better Decisions: Review of Commonwealth Merits Review Tribunals*, at viii and 15
http://www.ag.gov.au/agd/WWW/rwpattach.nsf/viewasattachmentpersonal/(CFD7369FCAE9B8F32F341DBE097801FF)~ARC+REPORT+39.pdf/$file/ARC+REPORT+39.pdf

[11] *Drake v Minister for Immigration and Ethnic Affairs* (1979) 24 ALR 577 at 589; see also Administrative Review Council (1995) *Report to the Minster for Justice: Better Decisions – Review of Commonwealth Merits Review Tribunals*, at page 16

The importance of merits review is well established. It ensures that the original decision making bodies are vigilant in the proper application of the law and the appropriate exercise of their decision making powers. Merits review often aids the development of the decision making process by giving additional guidance to the original decision makers. The Administrative Review Council ("**ARC**"), the peak Commonwealth Government body for administrative law policy, has observed that 'with very limited exceptions, a decision of government that will or is likely to affect the interests of a person should be subject to merits review'[12].

Currently, the Tribunal may have regard to any relevant information and documents in reviewing decisions referred to it[13]. The Bill proposes to limit the information the Tribunal may consider to the information which was provided to the original decision maker (with certain limited exceptions)[14].

The Committee recognises the Government's concerns about the timely provision of access to declared services and that in some cases the provision of additional information to the Tribunal may result in delay (whether unintentionally or sometimes a result of deliberate strategic "game playing"). However, the Committee is concerned that the proposed limits on merits review are overly restrictive and go further than is necessary to achieve the Government's purpose. In examining the issue of new information and issues in merits reviews, the ARC stated:

> "...merits review involves reconsideration of the original decision, not review of the reasonableness of the action of an earlier decision maker. New information can come to light at any point in the administrative decision making process...To preclude examination of relevant new information in the context of an administrative process would, in the Council's view, detract from the objective of reaching the 'correct and preferable' decision and would transform the process of merits review into something more akin to judicial review. [15]

A statutory regime of review (in the context of the *Migration Act* and the Australian Administrative Tribunal (AAT)) similar to that of the (Competition) Tribunal was considered by the High Court in *Shi v MARA* (2008) 235 CLR 286. There are some useful broad statements of principle made by the High Court in that judgment. In particular, Kiefel J stated [140]:

> "The term "merits review" does not appear in the AAT Act, although it is often used to explain that the function of the Tribunal extends beyond a review for legal error, to a consideration of the facts and circumstances relevant to the decision. The object of the review undertaken by the Tribunal has been said to be to determine what is the "correct or preferable decision". "Preferable" is apt to refer to a decision which involves discretionary considerations. A "correct" decision, in the context of review, might be taken to be one rightly made, in the proper sense. It is, inevitably, a decision by the original decision-maker with which the Tribunal agrees. Smithers J, in *Collector of Customs (NSW) v Brian Lawlor Automotive Pty Ltd*, said that **it is for**

[12] ARC (1999), *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation,* http://ag.gov.au/agd/WWW/rwpatch.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~d_ARC+Report+No.+49+Complex+Regulation.pdf/$file/d_ARC+Report+No.+49+Complex+Regulation.pdf

[13] Sections 44ZZBF of the TPA

[14] See Schedule 1, Part 1 Item 70, section 44ZZOAA(7) of the Bill

[15] Ibid at page 42

**the Tribunal to determine whether the decision is acceptable, when tested against the requirements of good government. This is because the Tribunal, in essence, is an instrument of government administration.** (Footnotes omitted, emphasis added).

And Kirby J stated [40]-[41]:

"It would be theoretically conceivable that the Tribunal might make a decision which ought to have been made years, months, weeks or many days earlier, leaving it to the primary decision-maker then to update or alter that decision if any new facts and circumstances required, or warranted, that course. However, given the obvious purpose of having the Tribunal (as it is commonly put) "step into the shoes" of the primary decision-maker, so as to make the decision that ought to have been made "on the merits", **this would appear to ascribe to the Tribunal an artificial function. It would not be the natural and appropriate function, given the role, purpose and powers of the Tribunal, viewed in its administrative setting.**

**When making a decision, administrative decision-makers are generally obliged to have regard to the best and most current information available. This rule of practice is no more than a feature of good public administration.** When, therefore, the Tribunal elects to make "a decision in substitution for the decision so set aside", as the Act permits, it would be surprising in the extreme if the substituted decision did not have to conform to such a standard.

In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, Mason J, who had earlier been a member of the Commonwealth Administrative Review Committee, said this of an analogous question, in words applicable to the present issue: "It would be a strange result indeed to hold that the Minister is entitled to ignore material of which he has actual or constructive knowledge and which may have a direct bearing on the justice of making the land grant, and to proceed instead on the basis of material that may be incomplete, inaccurate or misleading. In one sense this conclusion may be seen as an application of the general principle that an administrative decision-maker is required to make his decision on the basis of material available to him at the time the decision is made. But that principle is itself a reflection of the fact that there may be found in the subject matter, scope and purpose of nearly every statute conferring power to make an administrative decision **an implication that the decision is to be made on the basis of the most current material available to the decision-maker.** This conclusion is all the more compelling when the decision in question is one which may adversely affect a party's interests or legitimate expectations by exposing him to new hazard or new jeopardy." (Footnote omitted, emphasis added.)

Hayne and Heydon JJ were of a similar view [97]-[99]:

MARA's contention, in this Court and in the courts below, that the question for the Tribunal was whether the correct or preferable decision when MARA made its decision was to cancel the appellant's registration, should be rejected. It finds no footing in the relevant provisions. **To frame the relevant question in the manner urged by MARA would treat the Tribunal's task as confined to the correction of demonstrated error in administrative decision-making in a manner analogous to a form of strict appeal** [Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan (1931) 46 CLR 73 at 108-109 per Dixon J] **in judicial proceedings. But that is not the Tribunal's task.**

It has long been established [Drake (1979) 46 FLR 409 at 419; 24 ALR 577 at 589 per Bowen CJ and Deane J] that: **"The question for the determination of the Tribunal is not whether the decision which the decision-maker made was the correct or preferable one <u>on the material before him</u>. The question for the determination of the Tribunal is whether that decision was the correct or preferable one <u>on the material before the Tribunal</u>.** (Emphasis added.)"

Once it is accepted that the Tribunal is not confined to the record before the primary decision-maker, it follows that, unless there is some statutory basis for confining that further material to such as would bear upon circumstances as they existed at the time of the initial decision, the

> material before the Tribunal will include information about conduct and events that occurred after the decision under review. If there is any such statutory limitation, it would be found in the legislation which empowered the primary decision-maker to act; there is nothing in the AAT Act which would provide such a limitation. (Emphasis added.)

The High Court's statements of principle with regard to the AAT are apt in considering the similar scope of the Tribunal's role under Part IIIA, in so far as both tribunals stand in the shoes of the original decision maker, adopt the decision maker's powers and make decisions that are taken to be the original decision maker's. Under the principles referred to in *Shi* and by the ARC in its reports, limiting the information available to the Tribunal would tend to transform its role under Part IIIA into a legal appeal function and would be inconsistent with the ultimate aim of obtaining the correct or preferable decision, the latter being an essential aspect of good governance. As Kiefel J observed in *Shi*, the tribunal "is authorised and required to review the actual decision, not the reasons for it" [141].

As part of the Tribunal's reconsideration of the facts, law and policy of the original decision, the Tribunal may approach the decision from a different perspective to that of the original decision maker. The constitution of a Tribunal conducting a review includes a Federal Court judge and is likely to include a senior economist and a business person. The Tribunal may desire different information and evidence than that before the original decision maker. Information is usually presented before the Tribunal in detailed affidavit form whereas the procedure of the NCC relies more on submissions from parties. It is well recognised that a detailed and independent inquiry by the Tribunal is necessary for the Tribunal to determine the correct and preferable decision.

If merits review is restricted to the material before the original decision maker, this could lead to the parties placing extensive information, potentially in affidavit form, before the original decision maker in an effort to anticipate every piece of evidence that the Tribunal may be interested in if the original decision proceeds to merits review.

The ARC considered that ordinarily merits review will be a hearing *de novo* in the absence of express legislative provision to the contrary[16]. The ARC commented that[17]:

> A tribunal vested with full merits review powers is usually required to take a more investigative approach. The findings of fact the tribunal makes "are those that it, rather than the claimant, and let alone adversarial parties, considers to be necessary for it to make its decision" (citing *SZFDE v Minister for Immigration and Multicultural Affairs v Wang* (2003) 215 CLR 518 at 540–1 [71]).

The ARC took the view that it was preferable to provide the tribunal with flexibility in adapting its procedures to the particular needs of each hearing rather than adopting inflexible legislative limitations[18]. In particular, the ARC commented that:

> Legislative adaptations to merits review processes have the potential sometimes to jeopardise the ultimate objective of merits review, which is correct or preferable decision making. For example, in the interest of preventing delays and speeding up hearings, legislative limits can be imposed on the documents that can be reviewed by a tribunal. This can, however, result in the parties seeing no other option but to present a mass of evidence before the regulator in the first instance in order to cover every conceivable argument that might be raised.

[16] ARC (2008) *Administrative Accountability in Business Areas Subject to Complex and Specific Regulation* at page 34

[17] Ibid at 37

[18] Ibid at 39

And further:

> Some project participants expressed support for the limitations that exist in the Australian Competition Tribunal to review on the record. Consistent with its approach in What Decisions Should Be Subject to Merits Review?, however, the Council considers that in most instances full de novo merits review is appropriate. If tribunal review is limited to review on the record, there is a concern that agencies could be swamped with materials for consideration in the first instance. This would be inefficient. The Council acknowledges, though, that in some situations where the making of a decision has been preceded by an extensive inquiry process this may provide a legitimate basis for excluding merits review.

Given the broad scope of the merits reviews conducted by the Tribunal, the Committee submits that substantive justice in principle ought to outweigh practical considerations to the extent that they might lead to decisions being made with incomplete relevant information. Procedural considerations should not impinge upon the substantive principles of good governance expressed above, particularly since experience in the courts suggests that efficiency in procedural matters can be achieved with flexible discretion to make appropriate cost orders.

**Alternative proposal**

Although the Committee submits that there ought not to be any constraints on the material able to be considered by the Tribunal, if the Government is nevertheless minded to constrain the information available to the Tribunal, the Committee submits that the Tribunal ought to have broader powers than those proposed to access pertinent information.

The Bill proposes to allow the Tribunal to consider additional information which clarifies information before the original decision maker or information / reports from the ACCC or NCC[19]. It is not clear how related two pieces of information would need to be to fall within the "clarification" exception. The Committee is concerned that a narrow interpretation of a clarifying document may result in the Tribunal not having the best information available to undertake a fair and proper review.

There are ways in which the Government may achieve their purpose, without impairing the Tribunal's ability to conduct a full and fair merits review, including:

- only permitting the submission of additional information to the Tribunal with the leave of the Tribunal;
- permitting the provision of additional information on the grounds that the material presented to the original decisions maker contains errors of fact;
- allowing new material to be introduced only if such material will assist the Tribunal and was not unreasonably withheld in the first instance;
- imposing costs penalties on a party who could have provided the information to the original decision maker;
- allowing the Tribunal a wider power to request information (eg to request any information it deems necessary to allow it to come to a decision).

As a drafting point, the heading of proposed section 44ZZOAA(7) "Tribunal *only* to consider particular material" (emphasis added) appears to be inconsistent with the language and purpose of the subsequent sections. Section 44ZZOAA(7)(a) provides that the Tribunal

[19] See Schedule 1, Part 1 Item 70, section 44ZZOAA(4) of the Bill

"must" have regard to certain information and section 44ZZOAA(7)(b) provides that the Tribunal "may" have regard to certain information.

Neither section 44ZZOAA(7)(a) nor (b) suggest that the Tribunal can "only" consider particular material. If the aim of the sub-section is to restrict the ability of the Tribunal to consider any material outside of the material submitted the original decision maker, the Committee submits that section 44ZZOAA(7)(a) should read "must only" and that the word "only" should be removed from the sub-section's heading.

However, for reasons above, the Committee submits it would be more appropriate for the Tribunal's consideration of fresh evidence not to be so limited.

### 3.3 Services ineligible to be declared services

As noted above, the key purposes of the Bill are to promote regulatory certainty, streamline decision making and facilitate efficient investment decisions (including through providing certainty as to whether a facility is eligible for declaration).

The specific amendments concerning the introduction of ineligibility decisions under the Bill respond to the fact that "uncertainty about whether the regime will apply to new infrastructure may hinder investment decisions" and that "the regime does not currently allow a person who is considering building an infrastructure facility to determine with certainty whether or not the proposed facility would be declarable" (Second Reading Speech, p 11469).

**Are the ineligibility arrangements likely to promote or achieve the purpose and objects of the Bill?**

In general, introducing provisions that protect potential infrastructure providers from future regulatory uncertainty should promote incentives to invest in major infrastructure facilities.

However, the Committee submits that the aim of promoting certainty and therefore incentives to invest is hampered by several factors as outlined below:

**a) Duration of decision making process**

The footnote to section 44LB(1) states that the application must be made before construction of the facility commences. To be useful, however, the ineligibility recommendation would need to be locked in before the applicant had made a financial commitment to the project. The process established by the Bill requires completion of the following process in order to determine whether a service provided by a proposed facility is ineligible for declaration.

| Step | Timing |
|---|---|
| Application to NCC | Prior to construction of the facility |
| NCC recommendation | 180 days+ |
| Minister's decision | 60 days |
| Party may apply to Tribunal for review | 21 days |
| Tribunal conducts and determines review | 180 days+ |
| Appeals from Tribunal's decision | No time period |

Therefore, assuming no delays, and assuming no time for legal appeals, the decision making process alone is likely to take in excess of 440 days – in other words, over 14 months. In practice this period is likely to be significantly extended, as delays and legal appeals are common given the complexity and commercial significance of the matters that fall for consideration under the Part IIIA declaration criteria.

It therefore seems unlikely that the ineligibility decision making process will achieve the Bill's objectives as to streamlining of the process under Part IIIA. Rather, as the timeline above sets out, it is likely that the proposed process will be protracted and consume significant resources of the parties involved. Moreover, the "ineligibility" process could effectively provoke a further lengthy process, if an ineligibility decision is denied and an application for declaration is subsequently made. This protracted and potentially duplicative regulatory process does not promote the objectives of streamlining Part IIIA decision making.

Further, the 14 plus months that this process is likely to take to be completed is a significant time period to be built in to the planning phase of a major infrastructure investment. The outcome of a decision on ineligibility could determine the willingness of a firm to invest or not to invest in a new facility, and accordingly it would be likely that a firm would not be willing to commit funds to a new investment before this process was complete. Accordingly, the proposed process might have the effect of delaying rather than promoting efficient infrastructure investment.

**b) Forward-looking, public and information intensive nature of the ineligibility process**

The fact that the process contemplated by the Bill is forward-looking, public and information intensive, could have significant consequences for firms seeking to invest in infrastructure.

- First, the forward-looking nature of the process, which requires decision makers to conduct detailed economic analysis of factors that are likely to be remote in time (given that the analysis will be undertaken prior to construction of the facility), gives rise to the risk that infrastructure investment may be discouraged. For example, the initial application to the NCC may be made by a person with a "material interest" in a "particular service" to be provided by the facility. There is no requirement that the applicant itself have any plans to use the facility, and there is no requirement that the NCC, Minister or Tribunal be satisfied that there is actual demand for use of the facility. Accordingly, it is possible that a facility could be determined not to be ineligible for declaration even where there was not any actual demand for its use. In this situation, a firm might decide not to proceed with construction of a facility, on the basis of the risk of third party access, even where there was in fact no demand by third parties for use of the facility.

- Secondly, decisions on ineligibility are likely to be highly public (as contemplated by the Bill), and to involve commercially sensitive information, especially given that the process will be completed prior to construction of the relevant infrastructure, and potentially prior to any investment being approved by the Board of the firm considering the investment. Accordingly, the ineligibility process may require analysis of projects that are at an early stage of development. Depending on the outcome of the ineligibility process, a project may not receive Board approval at all. The use of a highly public and information intensive ineligibility process is inappropriate in this context – it may have the effect of discouraging firms from using the process, on the basis that it would involve disclosure of significant amounts of commercially sensitive information, or, for example, that it may encourage a firm's rivals to seek to use the infrastructure proposed to be developed by the firm, rather than executing investment plans they might otherwise have pursued, had the firm seeking an ineligibility decision not participated in the public ineligibility process.

Rather than streamlining the Part IIIA process, the two factors outlined above are likely to introduce additional complexities for firms seeking to invest in infrastructure, potentially with the consequence of deterring or delaying efficient infrastructure investments.

**c) Process for revoking ineligibility decisions**

The Committee submits that the Bill's objectives of providing regulatory certainty, and encouraging efficient investment could also be enhanced if the process for revoking ineligibility decisions were refined.

In particular, the standards that must be met in order for an ineligibility decision to be revoked are, as presently drafted, vague and unclear.

The NCC can recommend that an ineligibility decision be revoked when a facility is "so materially different" from the proposed facility described in the original application for an ineligibility recommendation that the NCC can no longer be satisfied that the declaration criteria are not met. It is not clear what "materially different" means is this context. It might include the situation where the physical infrastructure is the same as in the original application, but its economic significance has changed in light of developments in a market. It may also mean that a firm risked revocation where they decided, subsequent to receiving an ineligibility decision, to optimise, improve or otherwise develop the initially facility (for example, in order to meet increased market demand). Such a revocation option, if it entails significant uncertainty, may not encourage more investment. Additionally it may not encourage an optimal investment strategy in response to the market dynamics. The clarification on conditions under which the ineligibility recommendation can be invoked is essential to deter gaming from both sides.

Without greater clarity, the effect of the "materially different" standard may be to discourage a firm investing in a facility to develop, reconfigure, optimise or otherwise invest in its facility following receipt of an ineligibility decision, for fear that to do so may constitute a material change in the facility, such that it may be subject to revocation.

This lack of clarity is highly undesirable in the present economic environment. The revocation provisions of the Bill do not provide adequate certainty as to the basis on which a Minister could decide to revoke an ineligibility decision, and as such the revocation provisions of the Bill are likely to reduce regulatory certainty and discourage efficient investment.

**d) Uncertainty about the terms under which access will be granted if the facility is declared**

The stated aim of the amendments is to provide certainty to potential infrastructure investors. But the proposed ineligibility provision applies only to facilities that *do not* meet the criteria for declaration- i.e cases in which there are *no natural monopoly problems* giving rise to tensions between avoiding the exploitation of monopoly power and distorting investment incentives. Whether this provision is likely to be useful depends on how much ambiguity there is for investors about whether their planned infrastructure facilities involve natural monopoly issues and how long it will take to obtain a decision about ineligibility.

An additional issue is in relation to investors who are planning infrastructure facilities that *do involve natural monopoly problems*. Such cases are not covered by the provision. But there may be a genuine clash between pro-competitive gains available from declaration and distortions to investment incentives. The most commonly cited problem is that investors liable for declaration may undersize their facilities- i.e. build at a scale that is smaller than least cost scale. The issue here is not that the provider of the facility should be given investment certainty by making the facility ineligible for declaration but that there needs to be certainty

**about the terms under which access will have to be granted if the facility is declared.** The design of these terms is the instrument by which the balance will be made between the benefits of preventing the exploitation of monopoly power and the cost of distorting investment incentives.

### 3.4 Fixed principles in access undertakings

The Committee submits that the new fixed principles provisions may create some valuable certainty that would incentivise more proponents to invest in infrastructure. However, the effectiveness of the provisions depends upon how they are implemented.

More broadly though, the idea of fixed principles is appealing and should contribute to regulatory certainty. This certainty would positively influence infrastructure investment provided that decisions on fixed principles are made in a timely fashion--that is before the commitment to an investment must be made. The Explanatory Memorandum to the Bill supports the inclusion of Fixed principles on the basis that they survive the expiry of a single access undertaking, and provide continuity of certainty over a longer period that might match the payback period for a major investment. That is useful up to a point.

The Gas Code already includes certain fixed principles, notably the requirement that once established the Initial Capital Base ("**ICB**") (asset valuation) is unable to be revisited in subsequent regulatory reviews. In the Committee's view, this particular fixed principle is less useful than it may appear. The majority of gas pipelines and networks that are covered under the Gas Code were already in existence when the Gas Code was legislated and the ICB valuations were first determined. For that reason, virtually none of the proprietors of these pipelines had the opportunity to decide not to invest if the regulatory determination of the asset value was unacceptable. Some purchasers of second-hand pipelines would have found this certainty reassuring, but it would not have contributed to new pipeline construction.

However, a greater benefit would be obtained if it were possible to lock in certain fixed principles (say the asset valuation and certain parameters used in the cost of capital) relatively quickly. It is unclear from the explanatory memorandum whether this is intended, but if agreement to fixed principles on key financial inputs could be obtained in a shorter time than that required to get an access undertaking approved, investors could commit once the fixed principles were set, then complete the undertaking later without too much fear of regulatory appropriation. This type of approach might be more in tune with the Bill's objectives of promoting infrastructure investment and is likely to provide greater practical benefit.

### 3.5 Amending Access undertakings

The Committee supports the introduction of a mechanism by which the Commission can allow amendment to a proposed access undertaking without the need for the original proposed undertaking to be withdrawn and resubmitted.

The proposed amendment would also assist in reducing the risk of reputational damage and adverse publicity that a party may suffer as a result of withdrawal of an undertaking or a negative decision by the ACCC.

The Committee acknowledges that there have been various practical ways in which the Commission and access providers have worked to minimise inconvenience and delay arising from situations where amendments are desired after the Commission's assessment of proposed access undertakings has commenced; but it is nonetheless appropriate for the legislation to provide a more flexible mechanism.

The Committee submits, however, that the proposed new section 44ZZA(3A) (see item 1 of Schedule 4 to the Bill) creates potential unfairness as part of that mechanism. The section would operate to allow the Commission to reject an entire undertaking if it incorporates amendments which are of a kind, or made at a time, or in a manner that:

- unduly prejudices anyone with a material interest in the undertaking; or
- unduly delays the process for considering the undertaking.

In circumstances where the "nature of the amendment" must be first suggested by the Commission in an amendment notice (see proposed section 44ZZAAA(2)), there is a strict time limit for the access provider's response, and the Commission must not accept the revised undertaking if it considers the actual amendments proposed by the access provider are "not of the nature proposed in the amendment notice" (see proposed section 44ZZAAA((6)), it would be disproportionate for the Commission then to reject the entire amended undertaking because of prejudice or delay arising from those amendments.

The Committee suggests that matters of third party prejudice and undue delay contemplated in section 44ZZA(3A) would be better included as matters which the Commission may take into account in deciding whether to issue an amendment notice in the first place. In other words, amendments of a particular "nature" ought only be suggested by the Commission after taking into account whether such amendments would, if made, cause undue prejudice or delay.

## 4 Conclusion

The Committee supports the objectives of the Bill, which are to promote regulatory certainty and to streamline administrative processes associated with the application of the National Access Regime.

In the preceding sections, the Committee has provided comments on specific areas in which the Bill could, in the Committee's view, be improved so that it will be more likely to achieve regulatory certainty and procedural efficiency, without sacrificing good governance.

In light of developments in Australia's economy since the inception of the National Access Regime in 1995, the Committee also considers that a broader review of the National Access Regime is warranted.

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