



Trade Practices Amendment (National Access Regime) Bill 2005

Susan Dudley
Law and Bills Digest Section

Contents

| | |
|---|---|
| Purpose | 2 |
| Background | 2 |
| Creation of a national access regime | 2 |
| The national access regime | 4 |
| Part IIIA of the Trade Practices Act | 4 |
| Access through declaration of a service | 5 |
| Declaration of a service | 5 |
| ACCC arbitration for access to a declared service | 6 |
| Private contract for declared service | 7 |
| Effective access regimes | 7 |
| Certification process | 7 |
| Consequences of certification | 7 |

| | |
|--|----|
| The declaration process and certification of effectiveness | 8 |
| Undertakings | 8 |
| Main Provisions | 9 |
| Objects clause. | 9 |
| Declaration criteria | 9 |
| Pricing Principles | 10 |
| Exemption for Commonwealth facilities. | 12 |
| Procedural matters | 12 |
| Timeframes | 12 |
| Public comment | 12 |
| Publishing decisions | 12 |
| Appealing a decision. | 12 |
| Determinations for declaration of services | 13 |
| Access undertakings | 13 |
| Concluding Comments. | 13 |
| Endnotes. | 15 |

Trade Practices Amendment (National Access Regime) Bill 2005

Date Introduced: 2 June 2005

House: House of Representatives

Portfolio: Treasury

Commencement: A date to be fixed by proclamation or if 6 months after Royal Assent any provisions have not commenced the day after that 6 month period.

Purpose

The Bill amends Part IIIA of the (TPA) to implement many of the recommendations that were made by the Productivity Commission in its 2001 Review of the National Access Regime.¹

Background

Creation of a national access regime

One of the purposes of the TPA is to promote competition in markets. The TPA contains a number of parts that are designed to achieve this end, including Part IIIA. Part IIIA of the TPA puts in place a legal regime to facilitate user access to services provided by essential facilities that operate as natural monopolies such as rail lines, gas pipelines, electricity and water infrastructure. A separate regime, in Part XIC, applies to the telecommunications sector.

Part IIIA was inserted into the TPA in 1995 following recommendations contained within the Report on National Competition Policy (Hilmer Report). The Hilmer Report made broad, and highly influential recommendations regarding national competition policy. Chapter 11 of the Hilmer Report considered the issue of access to ‘essential services’ and contained the following discussion:

Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term “natural monopoly”, electricity transmission grids, telecommunication networks, rail tracks, major pipelines, ports and airports are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus “essential facilities” in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets. For example, competition in electricity generation and in the provision of rail services requires access to transmission grids and rail tracks respectively.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Where the owner of the “essential facility” is not competing in upstream or downstream markets, the owner of the facility will usually have little incentive to deny access, for maximising competition in vertically related markets maximises its own profits. Like other monopolists, however, the owner of the facility is able to use its monopoly position to charge higher prices and derives monopoly profits at the expense of consumers and economic efficiency. In these circumstances, the question of “access pricing” is substantially similar to other monopoly pricing issues, and may be subject where appropriate, to the prices monitoring or surveillance process outlined in Chapter 12.

Where the owner of the “essential facility” is vertically-integrated with potentially competitive activities in upstream or downstream markets – as is commonly the case with traditional public monopolies such as telecommunications, electricity and rail – the potential to charge monopoly prices may be combined with an incentive to inhibit competitors’ access to the facility. For example, a business that owned an electricity transmission grid and was also participating in the electricity generation market could restrict access to the grid to prevent or limit competition in the generation market. Even the prospect of such behaviour may be sufficient to deter entry to, or limit vigorous competition in, markets that are dependent on access to an essential facility.²

In summary, the Hilmer Report identified two aspects to the ‘essential facilities’ issue. The first relates to obtaining access to essential facilities and the second relates to the terms and conditions of access and, particularly, access pricing.

The Hilmer Report proceeded to consider possible paths to reform. It noted the following:

As discussed in Chapter Ten, the preferred response to this concern is usually to ensure that natural monopoly elements are fully separated from potentially competitive elements through appropriate structural reforms. In this regard it is important to stress that mere “accounting separation” will not be sufficient to remove the incentives for misuse of control over access to an essential facility. Full separation of ownership or control is required. In fact, failure to make such separation despite deregulation and privatisation is seen as a major reason why infrastructure reform in the UK has been disappointing.

Where such structural reforms have not occurred, the challenge from a competition policy perspective is to provide a mechanism that will support competitive market outcomes by protecting the interests of potential new entrants while ensuring the owner of the natural monopoly element is not unduly disadvantaged. A mechanism of this kind seems likely to play a pivotal role in a national competition policy as competition is introduced to areas previously reserved to public monopolies.³

The Hilmer Report recommended that:

11.1 Concerns over access to “essential facilities” be dealt with under a national competition policy by a new legal regime that creates a right of access in prescribed circumstances.⁴

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The national access regime

Following the Hilmer Report's recommendations, the Commonwealth and state and territory governments proceeded to implement the reform measures. The Commonwealth and states and territories all became signatories to the Competition Principles Agreement and the Commonwealth inserted Part IIIA into the TPA.

Clause 6 of the Competition Principles Agreement (CPA) sets down the principles for the national access regime. It specifies for the Commonwealth to establish a generic access regime. Part IIIA of the TPA puts this generic access regime in place. It also makes provision for state and territory access regimes to operate alongside the Commonwealth regime so that where a state or territory access regime has been certified as operating in accordance with the principles in clause 6 of the CPA, access to this regime cannot be sought under Part IIIA of the TPA.

It is important to keep in mind that the national access regime is designed to supplement the process of commercial negotiation. Therefore, where, through normal commercial negotiations, facility owners and access seekers fail to reach agreement on access to essential facilities, the access seeker can use an access regime to negotiate access to the services provided by that facility.

As already noted, access regimes operate at both the Commonwealth and at the state and territory level. Therefore, depending on the regime, access seekers may either have to rely on accessing the facility:

- under Part IIIA of the TPA,
- through a state or territory based industry scheme (which may or may not have the support of legislation), or
- through a Commonwealth scheme that falls outside the scope of Part IIIA of the TPA such as the telecommunications scheme in Part XIC of the TPA, or the airports scheme in the Airports Act 1996.

The amendments contained within this Bill relate to Part IIIA of the TPA.

Part IIIA of the Trade Practices Act

Part IIIA gives individuals and businesses the opportunity to seek access to services supplied by certain publicly and privately owned infrastructure facilities on reasonable terms and conditions and fair prices.

Part IIIA provides three paths to gaining access to an eligible infrastructure service:

- Having a service declared⁵
- Using an existing access regime which has been deemed to be 'effective'

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- Seeking access under the terms and conditions specified in an undertaking given by the service provider and accepted by the Australian Competition and Consumer Commission (ACCC)⁶

Access through declaration of a service

Declaration of a service

Where an individual or business has been denied access to a facility, they can apply to have the National Competition Council (NCC) declare the service. The NCC makes a recommendation to the Minister on whether or not the service should be declared.

In making its recommendation the NCC must consider whether it would be economical for anyone to develop another facility that could provide part of the service.⁷

The NCC must not recommend declaration of a service unless⁸:

- access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
- it would be uneconomical for anyone to develop another facility to provide the service;
- the facility is of national significance, having regard to:
 - the size of the facility; or
 - the importance of the facility to constitutional trade or commerce; or
 - the importance of the facility to the national economy;
- access to the service can be provided without undue risk to human health or safety;
- access to the service is not already the subject of an ‘effective’ access regime;
- access (or increased access) to the service would not be contrary to the public interest.

Once the NCC has made a recommendation to the Minister regarding the declaration, the Minister must then make a decision on whether the infrastructure should be declared (however, the Minister does not need to follow the recommendation of the NCC). When making the decision the Minister must consider the same factors (set out above) that the NCC was required to consider.⁹ The Minister must make and publish that decision within 60 days of receiving the NCC’s recommendation.¹⁰ At the same time, the Minister must notify the applicant and the infrastructure owner of the decision and provide both parties with a statement of reasons.¹¹

The applicant or infrastructure owner can appeal to the Australian Competition Tribunal (the Tribunal) for review of the Minister’s decision.¹² The Tribunal is required to reconsider whether or not the service should be declared, rather than review the decision

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

making process of the Minister.¹³ Matters of law raised in the Tribunal judgements are subject to judicial review.¹⁴

There have been only two declarations to date, both covering cargo handling services at Sydney and Melbourne airports. The Productivity Commission report notes that, even though there have been few declarations, the threat of declaration has helped shape the access regime at the State and Territory level.

ACCC arbitration for access to a declared service

Once a declaration has been made, the applicant who has applied for access has a legal right to negotiate on the terms and conditions of access and if those negotiations are unsuccessful the parties can seek to have the matter arbitrated by the ACCC.¹⁵

The ACCC is required to make a written determination setting out;

- whether the third party should have access to the facility,
- if access is granted, the terms and conditions of that access, and
- other matters such as the cost to the applicant of access and whether the provider should extend the facility.¹⁶

In the course of making the determination the ACCC is required to take into account the following factors¹⁷:

- The legitimate business interests of the provider, and the provider's investment in the facility
- The public interest, including the public interest in having competition in a market (whether or not in Australia)
- The interests of all persons who have rights to use the service
- The direct costs of providing access to the service
- The value to the provider of extensions whose cost is borne by someone else
- The operational and technical requirements necessary for the safe and reliable operation of the facility, and
- The economically efficient operation of the facility

Parties to the determination may apply to the Tribunal for a review of the determination.¹⁸ The Tribunal is required to reconsider the determination, rather than review the decision making process of the ACCC.¹⁹ Parties may appeal to the Federal Court on questions of law that arise in the course of the Tribunal's decision making process.²⁰

Once a determination has been made, the parties to the determination are bound by the determination. If either party fails to comply with its provisions, application may be made

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

to the Federal Court for injunctive relief, compensation and other orders that are appropriate.²¹

Private contract for declared service

Rather than having the ACCC arbitrate on a matter, parties may choose to negotiate a private contract which will set out the terms and conditions of access to the declared service. The parties can apply to the ACCC to have this contract registered. When deciding whether to register a privately negotiated contract the ACCC must consider²²:

- The public interest, including the public interest in having competition in markets (whether or not in Australia), and
- The interests of all persons who have rights to use the service to which the contract relates.

If registered, the contract is treated as if it were a determination of the ACCC and the parties are subject to the same rights and liabilities and enforcement procedures that attach to a determination.²³ If the contract is not registered, it is subject to the ordinary principles of contract law.

Effective access regimes

Certification process

Section 44M-44Q of the TPA sets out a process whereby an access regime can be certified as an effective access regime. A party cannot seek access to a facility through Part IIIA if the facility is an effective access regime. The only regimes that can be certified as effective are state and territory government access regimes. The TPA does not provide a certification process for Commonwealth government and non-government access regimes.

To be certified, the Minister in the responsible state or territory must apply to the NCC for a recommendation about whether the regime is effective. For an access regime to be certified 'effective' it must conform to the principles in clause 6(2)-(4) of the Competition Principles Agreement. Clause 6 of the Competition Principles Agreement is reproduced in the appendix. The NCC must make a recommendation to the designated Commonwealth Minister. Section 44M provides that the Minister must then decide whether to certify the state or territory access regime as effective. The Minister must take the requirements in clause 6(2)-(4) of the Competition Principles Agreement into account when making this decision.²⁴ The Minister's certification decision is reviewable by the National Competition Tribunal.²⁵

Consequences of certification

If a facility has been certified 'effective', the party seeking access to the facility must use the state or territory access regime. If the facility has not been certified 'effective', the

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

access seeker may either rely upon the state or territory access regime or apply for the facility to be declared and access negotiated under Part IIIA.

Certification provides all parties with certainty about how access will be regulated. While this benefits access seekers, it is also crucial for infrastructure operators and developers, particularly in relation to new investment.²⁶ It is noteworthy that certification can only be used by state and territory governments. Other entities wishing to achieve certainty in the status of their access regime must lodge an undertaking with the ACCC.

The declaration process and certification of effectiveness

As noted above (page 7), one of the matters that must be taken into account by the NCC and the Minister during the declaration process is whether access to the service is already the subject of an 'effective' access regime. In making this decision, it is not necessary that the access regime be one in which the Minister has made a section 44M certification. Rather the NCC or the Minister can apply the principles set out in clause 6(2)-(4) of the CPA to determine if a state or territory regime is effective. If a section 44M certification has been made this decision is however binding on the NCC and the Minister (subject to limited exceptions).

Undertakings

A facility owner may lodge a written undertaking with the ACCC setting out the terms and conditions on which it is prepared to provide access. If the ACCC accepts the undertaking, access seekers can only access the facility on the terms and conditions set out in the undertaking. If an undertaking is in place, access seekers cannot apply to have the facility declared and a determination made.

The ACCC may accept the undertaking if it thinks it is appropriate to do so after considering the following factors²⁷:

- The legitimate business interests of the provider
- The public interest, including the public interest in having competition in markets (whether or not in Australia)
- The interests of persons who might want access to the service
- Whether access to the service is already the subject of an access regime
- Whether the undertaking is in accordance with an access code that applies to the service, and
- Any other matters that the ACCC consider are relevant

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The ACCC is required to conduct public consultation before accepting the undertaking unless the undertaking complies with an access code which has been accepted by the ACCC.²⁸

Parties who own an essential facility may wish to lodge an undertaking so that they can get some degree of certainty about access arrangements and avoid disputes regarding the declaration of a service. The only undertaking that has to date been accepted by the ACCC has been for the National Electricity Code.²⁹

Main Provisions

The Bill amends Part IIIA of the TPA to implement many of the recommendations that were made by the Productivity Commission in its 2001 Review of the National Access Regime.³⁰ The majority of the amendments are procedural in nature. Only a small number of the amendments implement new policy.

The Bill makes the following key changes to Part IIIA of the TPA.

Objects clause

Item 5, proposed new section 44A inserts an objects clause into Part IIIA of the TPA. The clause provides that the object of Part IIIA is 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

Provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

The Bill specifies that the objects of Part IIIA must be taken into account by the NCC, the Minister and the Tribunal in regard to declaring a service, certifying that a regime is effective, approving access undertakings and accepting access codes.

Declaration criteria

As noted above, declaration of a service cannot be made unless access to the service would promote competition in at least one market, other than the market for the service. The Bill proposes to amend this requirement so that the declaration may be made only if access to the service will result in a 'material increase' in competition. The explanatory memorandum states that 'this change will ensure access declarations are only sought where increases in competition are not trivial'.³¹ This is how the Australian Competition

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Tribunal has interpreted the current requirement in the legislation and hence this amendment is not a shift in policy.³²

In regard to the declaration criteria, it is noteworthy that the Exports and Infrastructure Taskforce, established by the Prime Minister on 18 March 2005, in its report (Export Infrastructure Report), commented that:

Set against this background, the taskforce has concerns that the current provisions of Part IIIA of the Trade Practices Act, which define the economy-wide access regime, may cast the regulatory net too wide. More specifically, a service can be declared (that is, subjected to a regulated access regime) if doing so will promote competition in a market (other than the market in which the service itself is provided). In practice, this means that a facility may be subjected to a regulated access regime, with access made available on regulated terms to third parties, if the services it provides facilitate competition in some downstream market — for example, if access to a rail link will promote competition in the provision of transport services.

There are two difficulties with this test. To begin with, the market in which competition is promoted need not be in Australia. As a result, even if the entire impact of declaration is to provide gains to foreign buyers (at the expense of Australian producers), the regulatory apparatus can be brought into play.

Second, promoting competition does not necessarily equate to increasing efficiency. For example, third party access to a vertically integrated, tightly managed, logistics chain may promote competition, but undermine the efficiency with which that chain is operated and managed.

Currently, there is no clear mechanism allowing an ‘efficiency override’ for applications for declaration of export related facilities under Part IIIA or its associated regimes.³³

Pricing Principles

In the case of a determination, the ACCC will be required to arbitrate on the price that access seekers must pay for access to a service and in relation to an access undertaking, approve the pricing arrangements set out in the access undertaking. Currently the legislation contains only very broad principles that the ACCC must consider when determining conditions of access including price (section 44X and subsection 44ZZA(3)). These criteria are very general in nature and do not relate specifically to the issue of price. Therefore access seekers, service providers and the ACCC have very little guidance on what the access price should or may be.

In its submission to the Productivity Commission inquiry, the NCC argued that:

This has far reaching effects:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- It makes it difficult, in the context of a declaration decision, to determine the consequences of declaration, as so much latitude exists as to the terms and conditions of access;
- It likely reduces the willingness of the parties to achieve commercial settlement, as they have little basis for determining the likely outcomes of arbitration; and
- It hinders the task of arbitrators and encourages appeals from arbitral decisions.³⁴

The Productivity Commission considered that pricing principles were warranted and argued that they would provide better guidance on how the broad objectives of access regime should be applied, providing certainty and help to address concerns that a regulator's own values will unduly influence decisions relating to the terms and conditions of access.³⁵

Accordingly the Bill proposes to amend the TPA to provide that the ACCC will be required to consider pricing principles when arbitrating access disputes and considering access undertakings. The pricing principles will operate as a legislative instrument³⁶ and hence will be subject to disallowance by Parliament. It is expected that they will be the same as the pricing principles set out in the Government's response to the Productivity Commission Report and which are as follows:

'The Australian Competition and Consumer Commission (ACCC) must have regard to the following principles:

(a) that regulated access prices should:

- (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
- (ii) include a return on investment commensurate with the regulatory and commercial risks involved.

(b) that the access price structures should:

- (i) allow multi-part pricing and price discrimination when it aids efficiency; and
- (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity.³⁷

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Exemption for Commonwealth facilities

Commonwealth facilities that have been constructed and operated by private enterprise as a result of a competitive tendering process will be exempt from being declared (**proposed subsection 44H(3)**). The ACCC will determine whether a Commonwealth facility is exempt and can only make the determination if it concludes that reasonable terms and conditions of access to the services provided by the facility will be the result of the competitive tender process. (**proposed section 44PA**).

Procedural matters

Timeframes

The Bill imposes timeframes on the National Competition Council, the Minister, the Competition Tribunal and the ACCC when making access decisions. The time frames range from 60 days up to 6 months and they may be extended subject to specific conditions set out in the Bill (**proposed section 44GA, 44JA, 44NC, 44ND, 44PD, 44XA and 44ZZO**). It would appear that these amendments, will be greatly welcomed, particularly considering the Export Infrastructure Report's criticism of the lack of timeliness in access decision making.³⁸

Public comment

The Bill proposes that the NCC can seek public comment before making a recommendation regarding a declaration and the ACCC can seek public comment in regard to access undertakings, access codes and deeming a Commonwealth tendering process to be a competitive tender process.

Publishing decisions

The Bill increases scrutiny of the decision making process by requiring that all decisions be published - **proposed section 44GC, 44HA, 44NG, 44PF and 44ZZBE**. The Bill also requires that the Commission make publicly available a written report on the final determination it makes on a declared service (**proposed section 44ZNB**).

Appealing a decision

Avenues of appeal are increased in the Bill so that decisions regarding an effective access regime (**proposed subsection 44O(1)**), access undertakings and access codes can be subject to merit review by the Australian Competition Tribunal (**proposed section 44ZZOA**).

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Determinations for declaration of services

The Bill also improves decision making processes by giving the Commission powers to make interim determinations for declared services (**item 68**).

Access undertakings

The Bill makes some changes to the regulatory arrangements for access undertakings. In particular, service providers will be able to lodge an access undertaking even if a service has been declared (**item 107**) and the ACCC will have the power to extend access undertakings and access codes (**item 108**).

Concluding Comments

Broadly speaking, it would appear that the Bill will improve the operation of the national access regime. Whilst many of the amendments are procedural in nature they have scope to make the decision making process more efficient and effective. Many of the procedures will bring greater certainty to both access seekers and access providers, especially those initiatives dealing with the determination of access prices. Opportunities for delaying access through regulatory gaming (for example, by using stalling techniques) will also be curtailed by, for instance, the imposition of time limits on certain decisions.

Whilst the Bill does put in place pricing principles, it is not clear whether these principles will adequately address the difficult question of achieving a balance in pricing. There is no doubt that a failure to get the price to access to facilities correct may be a major deterrent to investment. Low access prices may have damaging effects on investment in infrastructure by infrastructure owners who may not be able to attract sufficient investment funds. Furthermore, low access prices may discourage investment by other market participants for whom accessing existing facilities may be a lower cost alternative to investment in new facilities. On the other hand, high access prices may discourage or prevent access seekers' entry into downstream markets or, at least, make it difficult for them to build businesses profitable enough to justify investment in alternative infrastructure. Access prices that are too high may also discourage access seekers from using the facility which may impact on the profitability of facilities owners and hence their capacity and incentive to invest in infrastructure.

In relation to regulators there has been a suggestion that regulators appear to favour users rather than facility providers in their access decision making.³⁹

The Export Infrastructure Report noted that:

There are conflicting views on how well regulators have performed their role. The regulators, and the firms that have benefited from lower price access to infrastructure,

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

have strongly defended the regulatory system's performance to date. The regulated firms, on the other hand, have put the view that Australian regulators have focused too heavily on the quest to eliminate monopoly rents, in practice giving inadequate weight to the importance of ensuring that needed infrastructure will be available.⁴⁰

Arguably this is an area that needs to be monitored and explored further.

Closely linked to this issue is the fact that there have been suggestions that under the national access regime, competition may be being promoted over efficiency and investment and that the Productivity Commission Report and the Bill do not address this issue.⁴¹

In relation to an appropriate policy response to some of these issues, Henry Ergas suggested possible steps to solving these problems when he wrote that:

It is finally being recognised that substantial parts of our infrastructure industries face serious capacity constraints. The factors behind this are complex. There are no magical solutions to which the Commonwealth and State governments can turn. But 'first do no harm' seems a reasonable starting point. Australian governments can at least ensure that serious obstacles to infrastructure development created by regulation are addressed.'....

A good place to start would be for the government to implement in full the recommendations of the Productivity Commission's review of the National Access Regime and of the Gas Code.

Additionally the Government, together with COAG counterparts, needs to act to more clearly separate regulatory policy from the administration of regulation.....

The time has now come for policy responsibility, and the substantial resources used by regulators for policy development, to be shifted back to government. Investors in and users of regulated infrastructure are entitled to clear, transparent and unambiguous formulations of policy in key areas such as the valuation of infrastructure assets and the setting of allowed rates of return.⁴²

In a recent article in the Australian newspaper the Federal Member of the Australian Labor Party, Mr Lindsay Tanner, MP also commented on regulatory and policy arrangements where he wrote that there:

....is a general lack of data and objective analysis, which clouds debate about infrastructure. Governments dabble in fast-train projects, canals and unviable rail lines without comprehensive independent scrutiny.

The recent experience of the West Australian canal proposal shows that it is wise to constrain the ability of governments to borrow. The way to do this while facilitating borrowing for infrastructure investment is to create an infrastructure commission to scrutinise projects and financing proposal, publish comprehensive data on infrastructure needs and performance and develop regulatory codes. Rather than an

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

advisory council, which may be dominated by sectoral interests, an independent commission would profoundly influence public debate.⁴³

Despite these criticisms, the proposed Bill does appear to put in place sensible measures to enhance the operational aspects of the national access regime and has been supported by industry groups.

Endnotes

- 1 Productivity Commission, Inquiry Report: Review of the National Access Regime; Report No. 17, 28 September 2001 (PC Report).
- 2 Independent Committee of Inquiry into National Competition Policy, *National Competition Policy – Report by the Independent Committee of Inquiry*, Australian Government Publishing Service, Canberra, 1993, pp. 240-241.
- 3 *ibid.*, p. 241.
- 4 *ibid.* p. 266.
- 5 Division 3 of Part IIIA of the TPA.
- 6 Division 6 of Part IIIA of the TPA.
- 7 Sub-section 44F(4) of the TPA.
- 8 Sub-section 44G(2) of the TPA.
- 9 Sub-section 44H(2) and 44H(4) of the TPA.
- 10 Sub-section 44H(9) of the TPA.
- 11 Sub-section 44H(7) of the TPA.
- 12 Section 44K of the TPA.
- 13 Sub-section 44K(4).
- 14 PC report, page 18.
- 15 Division 3, Subdivision C of Part IIIA of the TPA.
- 16 Sub-section 44V(2) of the TPA.
- 17 Section 44X of the TPA.
- 18 Section 44ZP of the TPA.
- 19 Sub-section 44ZP(3) of the TPA.
- 20 Section 44ZR of the TPA.
- 21 Section 44ZZD of the TPA.
- 22 Sub-section 44ZW(2) of the TPA.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- 23 Sub-section 44ZY of the TPA.
- 24 Division 2, Sub-division C, Part III of the TPA.
- 25 Section 44(O) of the TPA.
- 26 National Competition Council, *The National Access Regime: A Guide to Part IIIA of the Trade Practices Act Part C Certification of Access Regimes*, December 2002, p. 6.
- 27 Sub-section 44ZZA(3) of the TPA.
- 28 Sub-section 44ZZA(4A) and section 44ZZAA.
- 29 [<http://www.neca.com.au/>], [accessed 21 June 2005].
- 30 PC Report.
- 31 Explanatory Memorandum Trade Practices Amendment (National Access Regime) Bill 2005, p.25.
- 32 Sydney International Airport [2000] *ACompT* 1 (1 March 2000), Duke Easter Gas Pipeline Pty Ltd [2001 *ACompT* 2 (4 May 2001).
- 33 Australia's Export Infrastructure Report to the Prime Minister by the Exports and Infrastructure Taskforce, May 2005, p. 39.
- 34 Productivity Commission, *Inquiry Report: Review of the National Access Regime*, Report No. 17 28 September 2001, p. 138.
- 35 Productivity Commission, *Inquiry Report: Review of the National Access Regime*, Report No. 17 28 September 2001, p. 143.
- 36 And hence subject to the *Legislative Instruments Act 2003*.
- 37 Government Response to the Productivity Commission Review of the National Access Regime
- 38 Australia's Export Infrastructure Report to the Prime Minister by the Exports and Infrastructure Taskforce, May 2005, p. 37.
- 39 Louis Thomson and Simon Writer, 'Access to Services', *Trade Practices Law Journal*, volume 11 2003, p. 97.
- 40 Australia's Export Infrastructure Report to the Prime Minister by the Exports and Infrastructure Taskforce, May 2005, p. 41.
- 41 Louis Thomson and Simon Writer, 'Access to Services', *Trade Practices Law Journal*, volume 11 2003, p. 97.
- 42 Henry Ergas, 'ACCC takes nation to point of no return', *Australian Financial Review*, 8 March 2005.
- 43 Mr Lindsay Tanner, MP. 'We must invest in renewal' *Australian*, 22 March 2005, p. 13.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

© Copyright Commonwealth of Australia 2005

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Information and Research Service, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2784.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.