

Chapter 1

Introduction

"Justice delayed is justice denied."

- attributed to William Gladstone (19th century British statesman)

1.1 There are provisions in trade practices legislation that promote competition by allowing access to significant infrastructure on fair terms. There are concerns, however, that the intent of the legislation is being frustrated by legal processes which are proving unduly protracted. This bill seeks to expedite proceedings.

Background

1.2 A 'national access regime' was inserted into the *Trade Practices Act* in 1995 to establish a legislative framework for third party access to nationally significant infrastructure (sometimes formerly provided by public enterprises, such as electricity, gas, water and railways) which it would not be economically feasible to duplicate. (The operation of the regime is described in Chapter 2.)

1.3 Treasury explain the importance of infrastructure access in the following terms:

Fair and reasonable access for third parties to essential infrastructure facilities such as electricity grids, gas pipelines, rail tracks, airports and communications networks is important for effective competition.

Many infrastructure facilities exhibit natural monopoly characteristics that inhibit competition in related industries. For example, restrictions on access to rail track may prevent competition between different companies seeking to provide rail freight services. Similarly, where a gas producer cannot make use of an existing gas distribution network to reach potential clients, it may be difficult to compete in or even enter the wholesale and retail gas supply markets.

It is generally not economically feasible to duplicate such infrastructure, and given the historic likelihood of vertically integrated owners, it can be difficult for actual and potential competitors in downstream and upstream industries to gain access to these often vital infrastructure services. Even if access is technically available, there may be an imbalance in bargaining power between the infrastructure owner and potential third party users, influencing the terms and cost of access and making entry potentially prohibitive for competitors.

The outputs of these industries are significant inputs to a wide range of economic activities. Where restricted, access arrangements result in higher

prices or lower service quality, and whether through reduced competition and/or limited supply, the impact is felt by businesses and consumers alike.

As a result, governments have given increasing attention to establishing a right of access to these facilities, under established terms and conditions, where privately negotiated access is not expected to be a viable option.¹

1.4 The Productivity Commission, after a 2001 review of the National Access Regime, recommended that a number of changes be made to the legislation. That same year, the Council of Australian Governments (COAG) agreed to the Competition and Infrastructure Reform Agreement, which set out the proposal to have binding time limits. In April 2009 the then Assistant Treasurer, the Hon Chris Bowen MP, stated that:

While the Regime appears to be operating effectively, there are concerns it is generating regulatory risks that are hindering investment in essential infrastructure.

Some infrastructure owners and access seekers have argued that processes under the Regime are too lengthy and costly.²

Referral of the bill

1.5 On 29 October 2009, the Trade Practices Amendment (Infrastructure Access) Bill 2009 was introduced into the parliament.

1.6 On 19 November 2009 the Senate, by adopting a report from the Selection of Bills Committee, referred the provisions of the bill to the Economics Legislation Committee for inquiry and report by 9 March.

Purpose of the bill

1.7 The amendments to the *Trade Practices Act* (TPA) proposed in the bill relate to the National Access Regime. The bill seeks to streamline the administrative process involved with the regulation of third party access to nationally significant infrastructure.

1.8 The administrative process will be restructured to provide further clarity, transparency and certainty through technical amendments. The main amendment, proposed as Schedule 1, seeks to tighten binding time limits and introduce limited merits reviews. This amendment seeks to lessen delays in the decision-making process, which have proven to be costly and concerning for access seekers. The minister will have 60 days to make a decision after receiving a recommendation from the National Competition Council (NCC), or will otherwise be deemed to have accepted the NCC's recommendation.

1 *Australian Government National Competition Policy Report, 2005-07, 2007, Chapter 4.*

2 C Bowen MP, *Reforms to Streamline the National Access Regime*, media release, 7 April 2009, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/GT8T6/upload_binary/gt8t60.pdf;fileType=application%2Fpdf#search=%22media/pressrel/GT8T6%22.

1.9 Schedule 2 of the bill seeks to amend the TPA to allow a new infrastructure facility to be determined as ineligible to be declared under the Regime.

1.10 Schedule 3 will allow the Australian Competition and Consumer Commission (ACCC) to accept access undertakings with fixed principles.

1.11 Under Schedule 4 of the bill, the ACCC will be able to issue an amendment notice, which will lessen delays in the process.

1.12 Further minor administrative amendments are proposed in Schedule 5, which addresses the abilities of the regulators, namely the NCC, ACCC and the Tribunal.

1.13 The date of effect for the amendments is the day after Royal Assent, and matters begun under the National Access Regime before the commencement will only be subject to the amendments relating to the Australian Competition Tribunal process and no others.

Conduct of the inquiry

1.14 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website inviting written submissions by 18 December 2009. Stakeholders, industry groups and regulators were also invited to make a submission to the inquiry. Ten submissions were received, which are listed at Appendix 1.

1.15 A public hearing into the bill was held in Canberra on 5 February 2010. The witnesses who appeared are listed at Appendix 2.

1.16 The committee thanks all those who participated in the inquiry.

Structure of the report

1.17 Chapter 2 looks at Schedules 1 and 5 of the bill, particularly the aspects which deal with streamlining administrative processes. The impact of limited merits reviews on the administrative process is addressed in Chapter 3. Schedule 2 of the bill is addressed in Chapter 4. Chapter 5 examines the role of the regulators and the designated minister under the amendments.

