



Trade Practices Amendment (Infrastructure Access) Bill 2009

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Law and Bills Digest Section

Contents

Purpose	3
Background	3
Productivity Commission Review	4
COAG agreement	5
Committee consideration	6
Position of significant interest groups	6
Financial implications	7
Key Issues	7
Timeliness	7
The Fortescue Metals Group applications	7
Matters before the Federal Court	8
Further appeals	9
Progress of the FMG applications	10
Comment	11
Disincentive to investment	11

Main provisions	12
Schedule 1—binding time limits	12
Changes to Division 2.	13
Changes to Division 2A	14
Changes to Division 2B	16
Changes to Division 3.	17
Changes to Division 6.	17
Schedule 2—services that are not eligible for declaration	19
Schedule 3—fixed principles in access undertakings	21
Schedule 4—amending access undertakings.	22
Schedule 5—other amendments.	23
Concluding comments.	25

Trade Practices Amendment (Infrastructure Access) Bill 2009

Date introduced: 29 October 2009

House: House of Representatives

Portfolio: Treasury

Commencement: Sections 1–3 on the day of Royal Assent; Schedules 1–4, items 1–11 and 13–25 of Schedule 5 on the day after Royal Assent; and item 12 of Schedule 5 immediately after the commencement of items 1–11 of Schedule 5.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The purpose of the Bill is to amend Part IIIA of the *Trade Practices Act 1974* (TPA) to streamline administrative processes associated with the application of the National Access Regime.

Background

According to the Independent Committee of Inquiry into National Competition (the Committee of Inquiry):

As a general rule, the law imposes no duty on one firm to do business with another. The efficient operation of a market economy relies on the general freedom of an owner of property and/or supplier of services to choose when and with whom to conduct business dealings and on what terms and conditions. This is an important and fundamental principle based on notions of private property and freedom to contract, and one not to be disturbed lightly.¹

Despite this acknowledgement, the Committee of Inquiry report of August 1993 (known as the Hilmer Report after the Chairman, Fred Hilmer) recommended the implementation

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1. The Independent Committee of Inquiry, *National Competition Policy*, Australian Government Publishing Service, Canberra, August 1993, p. 242, viewed 2 November 2009, <http://www.ncc.gov.au/images/uploads/Hilmer-001.pdf>

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of a national competition policy for Australia to improve productivity, increase international competitiveness and to maintain and improve living conditions.² Australia's commitment to national competition principles was subsequently enshrined in the Competition Principles Agreement and the Agreement to Implement the National Policy and Related Reforms entered into between the Commonwealth, State and Territory Governments in April 1995.³

Amendments to the TPA⁴ which came into effect in 1995 established 'a new legal regime under which firms could be given a right of access to "essential facilities"⁵ owned by another firm, when the provision of such a right meets certain public interest criteria'.⁶ That legal regime is the National Access Regime which is contained in Part IIIA of the TPA. Section 44DA of Part IIIA requires decisions about access regimes to be consistent with the principles set out in the Competition Principles Agreement.

Productivity Commission Review

In 2001 the Productivity Commission reviewed the National Access Regime.⁷ It considered that (emphasis added):

Given the in principle case for some curbs on the exercise of monopoly power in the provision of essential infrastructure services, the limited experience in Australia with access regimes, and ongoing structural change in a number of infrastructure sectors, **abandoning access regulation at this stage would be inappropriate.**⁸

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2. 'National competition policy: towards a new order', *Business Council Bulletin*, No. 101, September 1993, p. 6.
 3. N O'Bryan SC, 'An Excess of Access? The Uses and Abuses of Part IIIA of the Trade Practices Act in the Resources Sector', *AMPLA Yearbook*, 2004, pp. 181-199.
 4. Made by the enactment of the *Competition Policy Reform Act 1995*.
 5. The Independent Committee of Inquiry defined an '**essential facility**' as 'a monopoly, permitting the owner to reduce output and/or service and charge monopoly prices, to the detriment of users and the economy as a whole. In addition, where the owner of the facility is also competing in markets that are dependent on access to the facility, the owner can restrict access to the facility to eliminate or reduce competition in the dependent markets'. The Independent Committee of Inquiry, *op. cit.*, p. 239.
 6. The Independent Committee of Inquiry, *op. cit.*, p. 239.
 7. Productivity Commission, 'Review of the National Access Regime', *Inquiry Report No. 17*, AusInfo, Canberra, 28 September 2001, viewed 2 November 2009, http://www.pc.gov.au/_data/assets/pdf_file/0020/18173/access.pdf
 8. *Ibid.*, p. xxxi.

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The Productivity Commission did, however, recommend a number of changes. The government response to the recommendations was largely positive.⁹ The *Trade Practices Amendment (National Access Regime) Act 2006* made the necessary amendments to the TPA. In particular, the amending Act inserted statutory pricing principles to provide guidance for pricing decisions and to contribute to consistent and transparent regulatory outcomes over time as well as certainty for investors and access seekers.¹⁰

COAG agreement

In the same year, the Council of Australian Governments (COAG) agreed to the Competition and Infrastructure Reform Agreement¹¹ in which all the parties agreed, amongst other things, to ‘introduce requirements that regulators will be bound to make regulatory decisions under an access regime within six months, provided that the regulator has been given sufficient information’.¹²

As a further step in November 2008, COAG agreed to the National Partnership Agreement to Deliver a Seamless National Economy.¹³

The Hon Chris Bowen MP (the Assistant Treasurer) outlined the further reforms to the National Access Regime arising from that Agreement stating that:

The reforms aim to improve the efficiency, timeliness and effectiveness of regulatory decision-making under the Regime in Part IIIA of the [TPA].

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

9. P Costello, (Treasurer in the Howard Government) *Government Response to Productivity Commission Report on the Review of the National Access Regime*, undated, viewed 2 November 2009, <http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=publications/nationalaccessregime.htm&min=phc>
10. Explanatory Memorandum, Trade Practices Amendment (National Access Regime) Bill 2005, p. 5. The Bill’s Homepage can be accessed at: <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr2349%22> viewed 2 November 2009.
11. The Competition and Infrastructure Reform Agreement can be accessed at: [http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/CompetitionandInfrastructureReformAgreement/\\$File/Competition%20and%20Infrastructure%20Reform%20Agreement.pdf](http://www.dtf.vic.gov.au/CA25713E0002EF43/WebObj/CompetitionandInfrastructureReformAgreement/$File/Competition%20and%20Infrastructure%20Reform%20Agreement.pdf) viewed 2 November 2009.
12. The Competition and Infrastructure Reform Agreement, clause 2.6.
13. The National Partnership Agreement to Deliver a Seamless National Economy can be accessed at: http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/seamless_national_economy_np.pdf viewed 2 November 2009.

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

Currently, processes under the National Access Regime can go on for years. The National Access Regime needs to be improved to make decisions and arbitration faster.¹⁴

Committee consideration

The Bill has been referred to the Economics Legislation Committee for inquiry and report by 9 March 2010.¹⁵

Position of significant interest groups

A spokesman for Fortescue Metals Group Limited (FMG) applauded the Government's efforts stating:

Despite favourable rulings from the National Competition Council, the Federal Court, the Full Bench of the Federal Court and the Full Bench of the High Court over five years, Fortescue is still waiting to gain the right to negotiate for access.¹⁶

On the other hand, Minerals Council of Australia chief executive Mitch Hooke is reported to have said the planned amendments did not go far enough and there was still 'confusion and uncertainty', adding that:

... changes to the [Trade Practices Act] should ensure the use of infrastructure was mandated only in circumstances where the economic benefits of doing so unambiguously outweighed the costs. Otherwise, future investment in critical infrastructure could be significantly stymied.¹⁷

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14. C Bowen MP, (the Assistant Treasurer), *Reforms to Streamline the National Access Regime*, media release, 7 April 2009, viewed 2 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FGT8T6%22>
 15. Details of the inquiry, including copies of submissions received, are at: http://www.aph.gov.au/Senate/committee/economics_ctte/infrastructure_access_09/index.htm viewed 2 November 2009.
 16. S Tasker, 'Fortescue backs push for access reforms', *The Australian*, 8 April 2009, p. 21.
 17. M Ludlow, 'Reforms set six-month limit for access disputes', *Australian Financial Review*, 8 April 2009, p. 4.

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Financial implications

According to the Explanatory Memorandum, the Bill has ‘no significant financial impact on Commonwealth expenditure or revenue’.¹⁸

Key Issues

Timeliness

The key complaint about the National Access Regime is that it takes too long. This is evident in the applications by Fortescue Metals Group Limited (FMG) for declarations of access to infrastructure owned by BHP Billiton Iron Ore Pty Ltd (BHP).

The Fortescue Metals Group applications

BHP carries on the business of the mining, blending and other processing of various types of iron ore in the Pilbara region of Western Australia for the purpose of producing bulk iron ore products for sale. The ore is transported from mine to port via two distinct rail lines in the Pilbara region being the Mt Newman rail line and the Goldsworthy rail line.¹⁹

Subsection 44F(1) of the TPA provides that a person can request that the National Competition Council (NCC) recommend to the designated Minister that a particular ‘service’ be declared.²⁰ On 15 June 2004, FMG made an application to the NCC under section 44F of the TPA for declaration of a service so that it could gain access to part of the Mt Newman rail line and part of the Goldsworthy rail line.²¹

‘Service’ is defined in section 44B of the TPA as a service provided by means of a facility and includes:

- (a) the use of an infrastructure facility such as a road or rail line

18. Explanatory Memorandum, p. 3.

19. [BHP Billiton Iron Ore Pty Ltd v The National Competition Council](#) [2006] FCA 1764, (18 December 2006), paragraph 3.

20. The National Competition Council has published a guide to declaration of services: National Competition Council, *Declaration of Services: a guide to declaration under Part IIIA of the Trade Practices Act 1974*, Commonwealth of Australia, Canberra, 3 August 2009, viewed 4 November 2009, http://www.ncc.gov.au/images/uploads/Declaration_Guide.pdf

21. Fortescue Metals Group Limited, Application under Part IIIA of the Trade Practices Act 1974 for declaration of the service provided by BHP Billiton Iron Ore Pty Ltd, 11 June 2004, viewed 4 November 2009, <http://www.ncc.gov.au/images/uploads/DeRaFoAp-001.pdf>

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- (b) handling or transporting things such as goods or people
- (c) a communications service or similar service

but does **not** include:

- (d) the supply of goods
- (e) the use of intellectual property
- (f) the **use of a production process**

except to the extent that it is an integral but subsidiary part of the service. (Emphasis added.)

The NCC advised that, as a preliminary matter:

- the Mt Newman rail line service would be considered further for declaration, but
- the Goldsworthy rail line service would not, because it was part of a ‘production process’ and therefore exempt from the provisions of Part IIIA of the TPA.

In response, both BHP and FMG made applications to the Federal Court under section 39B of the *Judiciary Act 1903*. In essence, the action taken by BHP sought to prevent the NCC from proceeding any further in its consideration of the application about the Mt Newman rail line. The action taken by FMG sought to have the NCC include the Goldsworthy line in its recommendations to the Minister.

The NCC’s final recommendation—that the Mt Newman line should be declared to be a ‘service’ for a period of 20 years—was provided to the relevant Minister for a decision on 24 March 2006. As the Minister did not publish a decision within the 60 day time limit, under subsection 44H(9) of the TPA he was deemed to have made a decision not to declare the ‘service’.

Matters before the Federal Court

Even though BHP and FMG had issued proceedings in the Federal Court in December 2004 and February 2005 respectively, the Federal Court did not publish its decision on the matters until October 2006.²²

The issue for the single judge of the Federal Court, Justice Middleton, was the meaning of the terms ‘*service*’ and ‘*use of a production process*’. These issues had been comprehensively considered in the earlier case of *Hamersley Iron Pty Ltd v National*

22. [BHP Billiton Iron Ore Pty Limited v National Competition Council](#) [2006] FCA 1764 (18 December 2006).

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Competition Council (Hamersley) which provides valuable context to the FMG applications and BHP's response.²³ In *Hamersley* the issue to be determined was whether a rail track 'service' and associated infrastructure operated by Hamersley Iron Pty Ltd, involved the use of a 'production process'. Justice Kenny considered that the term 'production process' acted as an **exclusionary criterion** within the definition of 'service'. Fortifying her conclusions by reference to the Hilmer Report,²⁴ Justice Kenny determined that the purpose of the exclusion was to **strike a balance**, that is, to permit appropriate utilisation of certain infrastructure by third parties and, at the same time, protect the viability of investments made by those who had invested in, for example, the processes of production.²⁵

The application by Robe River Iron Associates to declare the rail line operated by Hamersley a 'service' which Robe could access, was refused. For those in the resources sector, the *Hamersley* decision acted as a disincentive to potential applicants for access and provided some certainty to service owners/operators about the prospects of success of any future applications.²⁶

It is likely that BHP would have commenced the relevant proceedings feeling quite confident of the outcome, given the decision in *Hamersley*. However the judge considering the BHP and FMG proceedings determined that the *Hamersley* decision was 'plainly wrong'.²⁷ That being the case:

- the application by BHP in relation to the Mt Newman rail line was dismissed, and
- the application by FMG in relation to the Goldsworthy rail line was successful.

Further appeals

BHP lodged an appeal against that decision.²⁸ However, the majority decision of the Full Court of the Federal Court, made in 2007, confirmed the original decision that the bulk iron ore rail track transport services provided by the Goldsworthy rail facility was a

23. [Hamersley Iron Pty Ltd v National Competition Council](#) [1999] FCA 867 (28 June 1999).

24. N O'Bryan SC, op. cit., p. 190.

25. *Hamersley Iron Pty Ltd v National Competition Council* [1999] FCA 867, paragraph 46.

26. FMG made a submission to the Productivity Commission review in 2005 that the definition of the term 'production process' should be clarified because it was being used in a way that was not intended by the Parliament when the provisions were enacted. See Senate Economics Legislation Committee, Provisions of the Trade Practices Amendment (National Access Regime) Bill 2005, the Senate, Canberra, September 2005, p. 17.

27. *BHP Billiton Iron Ore Pty Limited v National Competition Council* [2006] FCA 1764, paragraph 116.

28. [BHP Billiton Iron Ore v The National Competition Council](#) [2007] FCAFC 157 (5 October 2007).

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‘service’ under Part IIIA of the TPA and could, therefore, be the subject of a declaration of access.

The Productivity Commission had recognised the need for clarification of the term ‘production process’ in its 2001 report, stating:

While the current exclusions from the coverage of Part IIIA should be retained, developments in relation to the ‘production facility’ exemption should be monitored by the National Competition Council. Should judicial interpretation of that exemption lead to outcomes that detract from efficiency, it may be necessary to remove the provision or clarify its intent.²⁹

BHP lodged an appeal to the High Court against the decision of the Full Court of the Federal Court. However, the High Court’s decision in 2008 affirmed the decision so that the judicial interpretation of the term ‘production process’ is now clear.³⁰

Progress of the FMG applications

FMG’s initial applications were submitted to the NCC in June 2004. The Federal Court decisions merely considered preliminary matters under the *Judiciary Act 1903*. They were not decisions about whether access should be granted under Part IIIA of the TPA.

In relation to the **Mt Newman rail line**, a decision is deemed to have been made under subsection 44H(9) of the TPA that the rail line not be declared a service. FMG has sought a review of this decision by the Australian Competition Tribunal in accordance with section 44K of the TPA. The matter is still before the Australian Competition Tribunal and no hearing date has been set.³¹

In relation to the **Goldsworthy rail line**, FMG made a new application to the NCC on 16 November 2007 under the name of its wholly owned subsidiary, The Pilbara Infrastructure Pty Ltd. The NCC recommended that the application be approved on 28 August 2008. The Treasurer decided on 27 October 2008 that the application was

29. Productivity Commission, op. cit., recommendation 6.4.

30. [BHP Billiton Iron Ore v The National Competition Council](#) [2008] HCA 45 (24 September 2008).

31. See National Competition Council website, viewed 4 November 2009, http://www.ncc.gov.au/index.php/application/mount_newman

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approved.³² BHP lodged an appeal against the Treasurer's decision with the Australian Competition Tribunal on 14 November 2008.³³

Comment

Twenty-one months elapsed between the FMG applications and the NCC recommendation to the Minister. Whilst it is acknowledged that the FMG applications took significantly longer than most others, the recommendation process by the NCC commonly takes months rather than weeks. A further two months may elapse while the relevant Minister considers the recommendation. There follows a right of appeal to the Australian Competition Tribunal. Whilst this process is underway, significant financial resources and personal energies may be diverted away from the facility owner's core business, to its ultimate detriment.

The proposed amendments in Schedule 1 of the Bill are intended to create tighter time limits for the making of recommendations by the NCC and decisions by the Australian Competition and Consumer Commission (ACCC) and the Australian Competition Tribunal.

The proposed amendments in Schedule 4 of the Bill will also streamline the process for amending access undertakings.

Disincentive to investment

Five separate Federal Court judges have now turned their minds to the meaning of the phrase 'the use of a production process'. Each formed a view, apparently, by considering the Hilmer Report and its intention. In effect though, the differing approaches to decision making by the individual judges and the varied outcomes of that process have highlighted the very difficulties faced by the Committee of Inquiry which stated that:

... the Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment.³⁴

These concerns were echoed by Qantas Chairman, Leigh Clifford, who is reported as saying:

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32. D Crowe and A Burrell, 'FMG wins Pilbara rail rights', *Australian Financial Review*, 28 October 2008, p. 5, viewed 4 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F42YR6%22>
 33. See National Competition Council website, viewed 4 November 2009, http://www.ncc.gov.au/index.php/application/goldsworthy_railway
 34. The Independent Committee of Inquiry, op. cit., p. 248.

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The bottleneck at the ports ... the reality is governments aren't going to be able to afford that. Therefore, there has to be an incentive for the private investor to invest in infrastructure. The problem with infrastructure is the cash flow goes out forever and a day, and it comes back in years out ... We've got to think about how we can encourage private equity into infrastructure, and that applies across the board - be it roads, rail, ports.³⁵

The proposed amendments in Schedule 2 of the Bill will address this. Schedule 2 will allow a person with a material interest in a new infrastructure facility to apply for a decision that a service to be provided by that facility is ineligible to be a declared service. This is based on a recommendation by the Productivity Commission.³⁶ In its 2001 report the Productivity Commission, in considering different approaches to the problem, stated:

... some form of access holiday arrangement could be used. Most participants favoured an approach which would exempt a new project from exposure to an access regime until it had returned the cost of capital agreed in advance with the regulator. Once a project had become 'NPV positive', any additional profits would be shared by the facility owner and the regulator (on behalf of service users).

The approach, which has parallels with a resource rent tax, would have important advantages. For example, it would provide certainty to investors ...³⁷

Main provisions

Schedule 1—binding time limits

The existing provisions of Part IIIA of the TPA contain 'target' time limits for the making of recommendations by the National Competition Council and for making of decisions by the Australian Competition and Consumer Commission (ACCC) and the Australian Competition Tribunal. In each case it is expected that the responsible body will use their 'best endeavours' to meet those targets.³⁸

Items 2, 17, 25, 37, 49, 58 and 60 of Schedule 1 repeal existing references to 'target' time limits. Instead, Schedule 1 introduces the concept of an '*expected period*' within which recommendations or decisions are to be made.

35. A Hepworth, A Burrell and J Clarke, 'Business warns on bottlenecks', *Australian Financial Review*, 26 October 2009, p. 1, viewed 6 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22media%2Fpressclp%2FUX0V6%22>

36. Productivity Commission, op. cit., recommendation 11.1.

37. Ibid., p. xxvii.

38. For example, existing section 44GA of the *Trade Practices Act 1974*.

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The pattern of the proposed amendments is repeated in a number of Divisions of Part IIIA of the TPA which are set out below. It should be noted that Schedule 2 inserts a **new Division 2AA** and that Division contains time limits which are in the same terms as those set out in Schedule 1 as outlined below.

Changes to Division 2

Items 1–16 of Schedule 1 amend Division 2 of Part IIIA of the TPA which relates to ‘declared services’. It is the Division on which the FMG applications were based. Existing section 44F of the TPA provides for the making of a written application to the NCC asking that it recommend that a particular service be declared. **Item 4** inserts **proposed section 44FA** which will empower the NCC to give a written notice to a person requesting specified information within a specified period. Any information which is received within that period **must** be taken into account by the NCC in making its recommendation.

Item 5 repeals existing section 44GA and inserts **proposed section 44GA** which will impose time limits on the NCC in the making of its recommendation. In particular, **proposed subsection 44GA(2)** provides that the *expected period* for consideration is 180 days. However **proposed subsection 44GA(3)** does allow for stopping the clock in which case the days which elapse are disregarded for the purpose of calculating the consideration period. This will occur where:

- the NCC, the applicant and the service provider make an agreement to that effect in writing, or
- a notice is given to a person by the NCC under proposed section 44FA requesting information, in which case the days that elapse are disregarded.

Nevertheless **proposed subsection 44GA(4)** provides that the number of days disregarded must not be more than 60 days in total.

Where the NCC is not able to make its recommendation within the expected period it must notify the designated Minister in writing. That notice must specify how long the consideration period is to be extended: **proposed subsection 44GA(7)**.

Existing subsection 44H(1) provides that on receiving a declaration recommendation, the designated Minister must either declare the service or decide not to declare it. Existing subsection 44H(9) provides that if the designated Minister does not publish a decision on the declaration recommendation within 60 days after receiving it, then he or she is taken, at the end of that period, to have decided not to declare the service and to have published that decision not to declare the service.

Item 7 repeals existing subsection 44H(9) and inserts **proposed subsection 44H(9)**. The effect of the change is that, if the designated Minister does not publish a decision on the declaration recommendation within 60 days after receiving it, then he or she is taken, at

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the end of that period, to have made and published a decision in accordance with the recommendation of the NCC. **Proposed subsection 44H(10)** provides an exception, so that if the designated Minister is prevented from declaring the service, for example, because it is a service that is the subject of an access undertaking in operation under Division 6, then at the end of the 60 day period the designated Minister is taken to have made and published a decision not to declare the service.

Existing section 44J provides that the NCC may recommend to the designated Minister that a declaration be revoked. **Item 9** inserts **proposed subsection 44J(9)** which provides that where the designated Minister has not made a decision on the revocation within 60 days, he or she is taken to have made and published a decision that the declaration is revoked.

Existing section 44K allows a provider to apply in writing to the Australian Competition Tribunal for a review of a declaration by the designated Minister. Similarly there is a right of review to the Australian Competition Tribunal by the applicant for the declaration where the designated Minister has decided not to declare a service. **Item 13** repeals existing subsection 44K(6) and inserts **proposed subsections 44K(6)–(6B)** which specify that the Australian Competition Tribunal may seek assistance or information from the NCC for the purposes of a review. **Item 16** makes similar changes to section 44L in relation to the assistance which the Australian Competition Tribunal may seek from the NCC in relation to a review of a revocation decision.

Changes to Division 2A

States and territories are entitled to proclaim their own access regimes for essential facilities if they wish to do so. Section 44M of the TPA sets out the process by which states and territories can ascertain whether or not an access regime they introduce is an *‘effective access regime’* for the purposes of the TPA.

The practical consequence of a state or territory regime being regarded as an effective access regime is that the NCC cannot make a recommendation that a service be ‘declared’ under Part IIIA if that service is already the subject of an effective access regime.

In practical terms the process is as follows:

- the state or territory prepares an access regime which will normally be given effect by specific legislation
- the regime is submitted to the NCC by the responsible state or territory Minister
- the NCC reviews the regime in a public process by which it seeks and considers submissions made by the state or territory as well as by interested members of the public
- the NCC publishes a draft report and invites and considers submissions on it

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- the NCC forwards a final report to the federal Treasurer with a recommendation on whether or not, in its opinion, the regime is an effective one, and
- the federal Treasurer then makes a decision on the recommendation and publishes that decision.³⁹

The existing target time frame for the recommendation by the NCC is six months from the date of the original submission.⁴⁰ The target time frame for the decision by the Treasurer is 60 days.⁴¹

The NCC has made a number of access declarations in respect of state gas, electricity and rail access regimes.⁴²

Items 17–36 of Schedule 1 amend Division 2A of Part IIIA of the TPA. Under section 44M, where a state or territory that is a party to the Competition Principles Agreement has established a regime for access to a service, the responsible Minister for the state or territory may make a written application to the NCC asking it to recommend that the Commonwealth Minister decide that the regime for access to the service is an ‘*effective access regime*’.

The Bill contains a number of amendments which are in similar terms as the amendments to Division 2 as follows:

- **item 17** inserts **proposed section 44MA** which empowers the NCC to request a person to provide information of a specified nature and within a specified time to assist it to make its recommendation. Any information which is received in response to such a notice and within the specified time frame, **must** be taken into account by the NCC
- **item 27** empowers the NCC in the same terms to request information in relation to extending a decision by the Commonwealth Minister that a regime is an ‘effective access regime’
- **item 22** inserts **proposed subsection 44N(4)** so that where the Commonwealth Minister does not publish a decision on the recommendation within 60 days, he or she is taken to have made and published a decision in accordance with the NCC’s

39. R Miller, *Annotated Trade Practices Act: Australian Competition and Consumer Law*, 30th edition, Lawbook Co., Sydney, 2009, p. 228.

40. Section 44NC *Trade Practices Act 1974*.

41. Section 44ND *Trade Practices Act 1974*.

42. For example Dawson Valley Pipeline:

http://www.ncc.gov.au/index.php/application/dawson_valley_pipeline/ Western Australian Electricity network services access regime:

http://www.ncc.gov.au/index.php/application/western_australian_electricity_network_services_access_regime/ and Moomba to Adelaide Gas Pipeline System:

http://www.ncc.gov.au/index.php/application/moomba_to_adelaide_gas_pipeline_system/

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recommendation. Where the recommendation of the NCC was that the access regime is an *‘effective access regime’* then the duration of deemed decision is the same period as that recommended by the NCC

- **item 30** applies in the same terms in relation to a decision by the Commonwealth Minister to extend the period that a regime is an ‘effective access regime’
- **item 31** provides that the NCC must make a recommendation within the *expected period* for consideration, being 180 days. However **proposed subsection 44NC(3)** does allow for stopping the clock in similar terms to those detailed in item 5 above. Where the NCC is not able to make its recommendation within the expected period it must notify the designated Minister in writing. That notice must specify how long the consideration period is to be extended: **proposed subsection 44NC(7)**
- existing section 44NE empowers the NCC to invite public submissions on an application under Division 2A. **Item 33** repeals and substitutes **proposed subsection 44NE(3)** so that the NCC must take into account any information provided in public submissions within the specified time limit in making their recommendation, and
- existing section 44O provides a right of review to the Australian Competition Tribunal by the state or territory Minister who made the original application or who applied to extend the period of the effective access regime. **Item 36** inserts **proposed subsections 44O(5)–(5B)** in the same terms as item 13 set out above in relation to the assistance which the Australian Competition Tribunal is able to request from the NCC.

Changes to Division 2B

Division 2B sets out the processes that apply to the ACCC in making a decision to approve, or refuse to approve, a tender process for the construction and operation of a facility that is to be owned by the Commonwealth, or a state or territory, as a competitive tender process. If the ACCC makes such a decision, the NCC cannot recommend declaration of any service provided by means of the facility and specified in the application, and the designated Minister cannot declare any such service.

Items 37–48 of Schedule 1 amend Division 2B in the following manner:

- the ACCC may request a person to provide information of a specified nature and within a specified time to assist it to make its decision about the tender process. Any information which is received in response to such a notice and within the specified time frame, **must** be taken into account by the ACCC in making the decision: **item 39**
- the ACCC must make a decision within the *expected period*—being 90 days. However **proposed subsection 44PD(2)** does allow for stopping the clock in which case the days which elapse are disregarded for the purpose of calculating the consideration period. This will occur where:
 - the ACCC and the applicant make an agreement to that effect in writing or

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- a notice is given to a person by the ACCC under **proposed section 44PAA** requesting information or
- a notice seeking public submissions is given by the ACCC under **proposed section 44PEA**
- unlike the proposed amendments to Division 2 and 2A, the proposed amendments to Division 2B do not set a limit on the number of days which can be disregarded
- if the ACCC has not published its decision at the end of the expected period (as extended by clock stoppers) it is taken to have approved the tender process as a competitive tender process and published a decision to that effect: **item 40**, and
- existing section 44PG allows for a right of review by the Australian Competition Tribunal in respect of the ACCC's decision. **Item 45** repeals existing subsection 44PG(5) and inserts **proposed subsections 44PG(5)–(5B)** in the same terms as item 13 set out above in relation to the assistance which the Australian Competition Tribunal is able to request from the ACCC. **Item 48** makes similar changes to section 44PH in relation to the assistance which the Australian Competition Tribunal may seek from the ACCC in relation to a review of a revocation decision.

Changes to Division 3

Where a person seeks access to an essential service but is unable to reach agreement on the terms and conditions of that access with the owner or provider, he or she may apply to the ACCC under Division 3 of Part IIIA of the TPA to have the dispute determined by arbitration. **Items 49–54** of Schedule 1 amend Division 3 as follows:

- the ACCC must make a final determination within the *expected period*—being 180 days. However **proposed subsection 44XA(2)** does allow for stopping the clock in certain circumstances in which case the days which elapse are disregarded for the purpose of calculating the determination period. However if the ACCC has not published its final determination at the end of the expected period (as extended by clock stoppers) it is taken to have made and published a final determination that does not impose any obligations on the parties or alter any obligations that exist at that time between the parties: **item 50**, and
- existing section 44ZP allows for a right of review by the Australian Competition Tribunal in respect of the ACCC's final determination. **Item 54** repeals existing subsection 44ZP(5) and inserts **proposed subsections 44ZP(5)–(5B)** in the same terms as item 13 set out above in relation to the assistance which the Australian Competition Tribunal is able to request from the ACCC for the purposes of a review.

Changes to Division 6

Section 44ZZA of the TPA enables the ACCC to accept '*access undertakings*' from any person who owns infrastructure to which a third party might seek access. The advantage

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of using this method is that the facility owner makes the actual undertaking about access and so has ownership of it. Once an access undertaking has been accepted, then the facility owner is quarantined from any attempt by a third party to seek a declaration under Division 2.

The process to be followed by the ACCC in assessing proposed access undertakings is essentially a public process:

- on receipt of an application the ACCC publishes the application and seeks submissions on it
- once the submissions have been assessed the ACCC will prepare and publish a draft decision. The ACCC often retains experts in the particular area to assist it in its consideration of the matter. Any one affected by the matter is entitled to make a submission on the draft decision, and
- the ACCC considers all the submissions and makes a final decision.⁴³

The existing target time frame for the ACCC to make a decision on an access undertaking is six months.⁴⁴

Items 58–69 amend Division 6 as follows:

- the ACCC must make a decision on an access undertaking within the *expected period*—being 180 days. However **proposed subsection 44ZZBC(2)** does allow for stopping the clock in certain circumstances set out in the relevant table. Where the clock is stopped, the days which elapse are disregarded for the purpose of calculating the decision making period. However if the ACCC has not published its decision at the end of the expected period it is taken to have made and published a decision not to accept the application: **item 64**
- the ACCC may request a person to provide information of a specified nature and within a specified time to assist it to make its decision. Any information which is received in response to such a notice and within the specified time frame, **must** be taken into account by the ACCC: **proposed section 44ZZBCA**, and
- existing section 44ZZBF allows for a right of review by the Australian Competition Tribunal in respect of the ACCC's decision. **Item 69** repeals existing subsection 44ZZBF(5) and inserts **proposed subsections 44ZZBF(5)–(5B)** to clarify the assistance which the Australian Competition Tribunal may seek from the ACCC for the purposes of a review.

Item 70 inserts **proposed section 44ZZOAA** which limits the information to which the Australian Competition Tribunal may have regard on review to those documents which

43. R Miller, op. cit., p. 262.

44. Section 44ZZBC *Trade Practices Act 1974*.

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were taken into account by the decision maker or those documents which were used by the NCC in forming its recommendation.

Schedule 2—services that are not eligible for declaration

Item 2 of Schedule 2 inserts into section 44B of the TPA the definition of *‘proposed facility’* which is ‘a facility that is proposed to be constructed (but the construction of which has not started) that will be structurally separate from any existing facility, or a major extension of an existing facility’.

Item 7 of Schedule 2 inserts **proposed Division 2AA** into Part IIIA of the TPA. It introduces a process by which the NCC can recommend to the *‘designated Minister’*⁴⁵ that a *‘proposed facility’* is ineligible to be a declared service.

The process will operate as follows:

- a person with a material interest in the service which the proposed facility will provide may apply to the NCC asking for an *‘ineligibility recommendation’* in respect of the service. That application must be in writing and must be made before construction of the proposed facility commences: **proposed subsection 44LB(1)**
- the NCC must then either recommend that the designated Minister decide that:
 - the service is ineligible to be a declared service—and for how long: **proposed paragraph 44LB(2)(a)**
 - the service is not ineligible to be a declared service: **proposed paragraph 44LB(2)(b)**
- there are limits on the power of the NCC so that it can only make an *‘ineligibility recommendation’* if at least one of the matters listed in subsection 44G(2) is not satisfied: **proposed subsection 44LB(3)**
- the NCC can request that a person provide further information which is relevant to making its recommendation. The request must be in writing and specify the time within which the information is to be provided. Where the NCC makes such a request, any information which is provided in compliance with the request in the time specified must be taken into account: **proposed section 44LC**
- the NCC may also publish a notice inviting public submissions on the application: **proposed subsection 44LE**
- the NCC must make its recommendation within the *‘expected period’*, that is, 180 days starting on the day the application is received: **proposed subsections 44LD(1) and (2)**. However, **proposed subsection 44LD(3)** provides for stopping, and subsequently restarting, the clock in certain circumstances

45. Section 44D provides the meaning of the term *‘designated Minister’*.

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- where the NCC is unable to make its recommendation within the relevant period it must notify the designated Minister in writing of the relevant reasons and specify the time within which it will make its recommendation: **proposed subsections 44LD(7) and (8)**, and
- the NCC must publish its recommendation and the reasons for the recommendation on the day the designated Minister publishes their decision on the recommendation, or as soon as possible after that day: **proposed section 44LF**.

Once the NCC has made its recommendation, the designated Minister must, having regard to the objects of Part IIIA of the TPA, decide:

- whether the service is ineligible to be a declared service and specify the period of ineligibility, being no less than 20 years: **proposed paragraph 44LG(1)(a)**, or
- the service is not ineligible to be a declared service: **proposed paragraph 44LG(1)(b)**.

In addition:

- the decision of the designated Minister must be published, along with the reasons for the decision: **proposed subsection 44LH(1)**
- where the designated Minister does not publish his or her decision within 60 days from the day the recommendation is received, the designated Minister is taken to have made a decision in accordance with the ineligibility recommendation of the NCC: **proposed subsection 44LG(6)**. This means that if the NCC recommended that the service be ineligible to be a declared service for a specified period, the effect will be that the designated Minister is deemed to have made a decision in the same terms⁴⁶
- **proposed section 44LI** provides a similar process of recommendation by the NCC, and subsequent decision by the designated Minister, to allow for revocation of the decision that a service is ineligible to be a declared service. This could occur where the facility used to provide the service is materially different from the proposed facility described in the application or upon request from the person who is the provider of the service, and
- **proposed sections 44LJ and 44LK** provide the mechanism for the review of ineligibility decisions and revocation decisions respectively. The right of review is to the Australian Competition Tribunal. Application for review must be made within 21 days after publication of the designated Minister's decision. The Australian Competition Tribunal is empowered to affirm, vary or set aside a decision that a

46. For the avoidance of doubt **proposed subsection 44LG(7)** provides that the decision of the designated Minister is not a legislative instrument under the *Legislative Instruments Act 2003*. Therefore, the decision is not one which is subject to disallowance by the Parliament.

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service is ineligible to be a declared service: **proposed subsection 44LJ(8)**. The Australian Competition Tribunal may affirm or set aside a decision that:

- a service is not ineligible to be a declared service: **proposed subsection 44LJ(9)**
- an ineligibility decision is revoked: **proposed subsection 44LK(8)**, or
- an ineligibility decision is not to be revoked: **proposed subsection 44LK(9)**.

Schedule 3—fixed principles in access undertakings

An *‘access undertaking’* is a document which establishes the terms and conditions under which a service provider is willing to offer or negotiate access to a service provided by an essential facility to an access seeker. The TPA does not prescribe the information that should be provided in an access undertaking, although they generally deal with matters such as the terms and conditions of access to the service; and various obligations on the part of the provider, for example, not to hinder access to the service, to implement a particular business structure, to provide information to the ACCC or to comply with decisions of the ACCC in relation to matters specified in the undertaking.⁴⁷

Schedule 3 amends the TPA to allow for the ACCC to accept access undertakings with *‘fixed principles’* that will apply to any subsequent undertaking relating to that service. The amendments do not prescribe the nature of fixed principles although the Explanatory Memorandum provides the following examples:

- a parameter such as an asset value
- a formula or methodology such as an efficiency benefit sharing formula (where the service provider’s net efficiency gains in expenditure under the current access undertaking are shared between the access provider and access seekers in any subsequent access undertaking)
- an obligation such as the standard at which the service is to be provided, or
- a process such as a procedure that the service provider will follow before undertaking new investment in the relevant facility.⁴⁸

Item 5 of Schedule 3 inserts **proposed section 44ZZAAB** into the TPA which will:

- allow for terms which are *‘fixed principles’* to be included in an access undertaking
- the fixed principles apply for a *‘fixed period’* which will commence when the access undertaking comes into operation (or some later time) and extend beyond the expiry

47. See the note to subsection 44ZZA(1) of the *Trade Practices Act 1974*.

48. Explanatory Memorandum, p. 56.

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date of the undertaking so that it can be applied to any later undertaking in respect of the same service

- empower the ACCC to reject an undertaking where it considers that the undertaking:
 - contains a term which should be a ‘fixed principle’ but is not
 - contains a term which is a ‘fixed principle’ but should not be, or
 - contains a fixed principle and the ‘fixed period’ should be different, and
- empower the ACCC to consent to the variation or revocation of a fixed principle if there is no undertaking in operation.

Items 7 and 8 insert **proposed paragraphs 44ZZBF(6)(ba) and 44ZZBF(7)(ba)** so that a decision to vary or revoke a fixed principle by the ACCC is subject to review by the Australian Competition Tribunal. **Item 6** inserts **proposed subsections 44ZZBA(6) and (7)** which set out the date of effect of the ACCC’s decision to vary or revoke a fixed principle:

- if no person applies to the Australian Competition Tribunal for review, then the decision takes effect 21 days after the making of the decision, or
- if a person applies to the Australian Competition Tribunal for review within 21 days, the decision comes into effect at the time of the Australian Competition Tribunal’s decision.

Items 1 and 2 of Schedule 3 are consequential amendments to the definitions of ‘*access undertaking application*’ and ‘*access undertaking decision*’ in section 44B of the TPA.

Schedule 4—amending access undertakings

Currently, any amendment to an access undertaking requires the proposed undertaking to be withdrawn or rejected in accordance with existing subsection 44ZZA(7) of the TPA. The service provider must start a new decision-making process by submitting a new access undertaking containing the amendments. This causes delays and increased costs to the infrastructure provider.

Item 3 of Schedule 4 inserts **proposed section 44ZZAAA** which will allow the ACCC to issue an ‘*amendment notice*’ in respect of an undertaking which has been submitted to it. That amendment notice must be in writing and specify the following:

- the nature of the amendment or amendments which the ACCC proposes to be made
- the reasons for the proposed amendments and
- the period within which the person is to respond to the amendment notice.

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Item 2 of Schedule 4 repeals existing subsection 44ZZA(7) and substitutes a **new subsection 44ZZA(7)**. This will allow an infrastructure provider to provide a revised undertaking to the ACCC in accordance with the amendment notice rather than having to withdraw the access undertaking and start the process again.

The ACCC must not accept the revised undertaking if the amendments made are not the same as those proposed in the amendment notice and do not address the reasons for those proposed amendments. In that case it must be returned to the person within 21 days of the ACCC receiving it: **proposed subsection 44ZZAAA(6)**. In addition, **item 1** inserts **proposed subsection 44ZZA(3B)** to empower the ACCC to reject the undertaking if it incorporates amendments of a kind, made at a time, or made in a manner that:

- unduly prejudices a person who, in the opinion of the ACCC has a material interest in the undertaking, or
- unduly delays the process for considering the undertaking.

Where a person gives a revised undertaking in accordance with the amendment notice, the revised undertaking is taken to be the undertaking given for the purposes of Part IIIA of the TPA: **proposed subsection 44ZZAAA(7)**.

Schedule 5—other amendments

Item 1 of Schedule 5 inserts **proposed section 29LA** into the TPA to allow for the members of the NCC to make decisions via the circulation of papers rather than at a meeting.

Existing section 44F of the TPA provides that a person may make a written application to the NCC asking that the NCC recommend that a particular service be declared. **Item 4** inserts **proposed subsections 44F(6)–(9)** allow a person to also request the NCC to vary the application at any time before the NCC makes its decision. Under **proposed subsection 44F(9)** the NCC may reject the variation if it is of a kind, or the request is made at a time, or made in a manner that:

- unduly prejudices a person who, in the opinion of the NCC has a material interest in the application, or
- unduly delays the process for considering the application.

Items 5–7 amend existing section 44G which limits the power of the NCC to recommend declaration of a service. The effect of the amendments is that the NCC cannot recommend the declaration of a service if a state or territory access regime has already been certified under Division 2A of Part IIIA of the TPA. **Items 8–10** amend existing section 44H which governs the making of a declaration by the designated Minister, in the same terms.

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Item 13 inserts **proposed sections 44KA** and **44KB**. In its Annual Report 2007–08 the NCC expressed its belief that ‘service providers would have less incentive to commence a review as a means of delaying the negotiation process if decisions were not automatically stayed by the commencement of a review’.⁴⁹ **Proposed section 44KA** gives effect to this recommendation.

As a further incentive to minimise delays in the declaration process the NCC stated:

Unlike most court proceedings ... there are no provisions for costs to be paid or awarded in relation to a review of a declaration decision by the Tribunal. (By contrast the [National Gas Law] contains provisions for the Tribunal to award costs in a review.) Costs provisions similar to those in the NGL could usefully be applied for reviews of declaration decisions. This would discourage conduct designed to waste time and provide an additional incentive to ensure parties comply with Tribunal directions. The Council notes that under the NGL the Tribunal must not make an order requiring the original decision maker (including the Council and the relevant Minister) to pay costs unless they cause delays or otherwise act inappropriately.⁵⁰

Proposed section 44KB will empower the Australian Competition Tribunal to order that a person who has been made a party to proceedings for a review of a declaration pay all or part of the costs of another person who has been made party to the proceedings. The designated Minister will be exempt from such an order unless the Australian Competition Tribunal considers the designated Minister’s conduct was engaged in without regard to the matters enumerated in **proposed paragraphs 44KB(2)(a)–(d)**.

Under existing section 44S, once a service has been declared the access provider and the access seeker must negotiate the terms of the access. If the parties are not able to come to an agreement, either party may notify the ACCC that an access dispute exists. The access dispute is then arbitrated by the ACCC under section 44U. **Item 16** inserts **proposed section 44YA** which requires the ACCC to terminate an arbitration in relation to a declared service in the event that the Australian Competition Tribunal sets aside or varies the declaration on review.

Item 19 inserts **proposed section 44ZZCBA** so that the ACCC **may** defer arbitration of an access dispute where the Australian Competition Tribunal receives an application for review of the declaration of the service but does not make an order to stay the operation of the declaration. However, the ACCC **must** defer arbitration of an access dispute where the Australian Competition Tribunal receives an application for review and makes a stay order.

49. National Competition Council, *Annual Report 2007–08*, Commonwealth of Australia, Melbourne, 2008, p. 20, viewed 6 November 2009, http://www.ncc.gov.au/images/uploads/NCC_Annual_Report_2007-08.pdf

50. National Competition Council, *Annual Report 2007–08*, op. cit., p. 19.

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Concluding comments

It is often the case that a market is dominated by a single piece of infrastructure and some form of monopolistic power is conferred on the firm owning the infrastructure, both in the existing, as well as related, markets. This can occur to the extent that the firm exhibits quite marked pricing power or where it is uneconomic for other firms to duplicate the infrastructure.

To balance the rights of consumers with the infrastructure owner in such cases, Australia has developed a national system for third party access to key economic infrastructures. This system allows potential competitors to seek access to infrastructure as a means to introduce competition into affected markets.⁵¹

Whilst the National Access Regime, which is established by Part IIIA of the TPA, has not been universally embraced—especially by those who have been called upon to provide access to their infrastructure—it is a fact of the Australian economic landscape.⁵² The Bill aims, amongst other things, to improve the efficiency and the timeliness of the decision making processes which underpin the National Access Regime. The amendments are based on the recommendations of the Productivity Commission and, to some extent, on the experiences of FMG arising from their applications for access which have been so strenuously resisted by the infrastructure owner.

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51. P Koshy and P Kenyon, 'Third-party access to infrastructure: the case of the Mt Newman rail line in the Pilbara', *Economic Papers*, Vol. 26, No. 4, December 2007, pp. 321–341 at p. 321, viewed 2 November 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FX0ZQ6%22>
 52. M Collins, 'Miners off the rails in access battle', *The Australian*, 19 November 2009, p. 32, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2FTP8V6%22>

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