CHAPTER 2

The Bill

Introduction

2.1 The Bill amends Part IIIA of the Trade Practices Act. Many of the amendments are procedural in nature and aimed at streamlining processes and increasing transparency in the Part IIIA regime. According to the Parliamentary Secretary's second reading speech:[1]

> The key changes contained in the Bill aim to clarify the Regime's objectives and scope, encourage efficient investment in new infrastructure, strengthen incentives for commercial negotiation and improve the certainty, transparency and accountability of regulatory processes.

2.2 Generally, submissions to the Committee's inquiry were supportive of the Bill. However, concerns were raised by some about the method by which the legislation proposes to introduce pricing principles into the regime.

Pricing principles

2.3 Division 6A, inserted by item 110 of the Bill, requires the Commonwealth Minister to determine pricing principles relevant to the price of access to a service.[2]

2.4 Pricing principles are principles to which the ACCC must have regard when arbitrating access disputes, and considering access undertakings and access codes. On review, the Australian Competition Tribunal will also be required to take the pricing principles into account when it reviews a decision of the ACCC.

2.5 The Productivity Commission considered that introducing pricing principles into the regime would have a number of benefits, including:[3]

- providing better guidance on how the broad objectives of access regimes should be applied in setting more detailed terms and conditions;
- providing a measure of certainty to regulated firms and access seekers, in turn improving the operation of the negotiation-arbitration framework;

---

1 Parliamentary Secretary to the Treasurer (the Hon. Chris Pearce, MP), second reading speech, 2 June 2005.

2 Additionally, the Government will seek to include a principle in the Competition Principles Agreement that the pricing principles determined under section 44ZZCA of the Trade Practices Act must be taken into account when decisions about the effectiveness of access regimes are being made (Explanatory Memorandum, pp 64–65).

3 Productivity Commission, *Review of the National Access Regime*, Inquiry Report No. 17, 28 September 2001, p. 143.

- providing some guidance for the pricing principles and/or approaches employed in industry regimes; and
- helping to address concerns that a regulator's own values will unduly influence decisions relating to the terms and conditions of access.

2.6 While the Government endorsed the Productivity Commission's recommendation to introduce pricing principles, it adopted a modified version of the wording originally proposed by the Commission:[4]

> 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.

2.7 Most submissions were satisfied with the wording of the pricing principles and were keen to have them included in the regime.[5] One suggestion for amendment was put forward by the Tourism and Transport Forum[6] which advocated that where essential infrastructure providers are operating under significant capacity constraints they should be able to apply demand management pricing practices that may generate revenues that exceed production costs:

---

4 Recommendation 6.3, Government Response to Productivity Commission Report on the Review of the National Access Regime, viewed on 18 July 2005, at: http://www.pc.gov.au/inquiry/access/index.html.

5 The Economic Regulation Authority of Western Australia was an exception. This body was critical of certain aspects of the proposal, seeing the phrase 'generate revenue that is *at least* sufficient' as not providing greater predictability or clarity; and reference to 'regulatory risk' as problematic (*see* Submission 4, p. 3). Concerns about these concepts are examined subsequently in this chapter.

6 Tourism and Transport Forum (TTF Australia Ltd), Submission 11, pp 2-3.

> Overbearing pricing regulation might have little regard to market forces demanding use of a service, meaning high demand for a service (due to an artificially low price) might result in no expansion to that service if prices are set below costs of new investment.[7]

2.8 The Sydney Airport Corporation Limited (SACL) sought an amendment to the Bill to clarify aspects of the pricing principles that it considered would reduce the potential for the access regime to be used as a means of regulatory gaming rather than to address genuine concerns over pricing as a barrier to access.[8]

2.9 While the pricing principles were broadly supported by all witnesses, the majority of submissions expressed concern at the Government's method of introducing pricing principles into Part IIIA by the use of a legislative instrument, rather than by enactment in the Bill itself.

> One of the difficulties we have…is that the government, in receiving the recommendations from the Productivity Commission and responding to them formally…accepted the principles that the commission put forward. Yet when the bill came to the parliament, those principles…were not to be found in the bill and there was no explanation in the explanatory memorandum or the second reading speech to explain why the government had changed the position which it had accepted.[9]

2.10 Objections to the use of a legislative instrument for this purpose include the fact that legislative instruments can be disallowed by Parliament. Additionally, while they may offer greater administrative flexibility than bills, submissions argued that in this case it is neither appropriate nor necessary. Some submissions advocated that as an integral part of the proposed amendments to Part IIIA, the pricing principles should appropriately be developed and considered at the same time as the other provisions of the Bill.[10]

2.11 The Energy Networks Association contended that infrastructure investment could be threatened because the principles are not in the Act:

> We think it could potentially have a chilling effect on new infrastructure development because, if you put yourself in the case of being a hypothetical offshore investor about to make a one-off investment in a large capital asset which might be subject to part IIIA, one of the first questions you would ask yourself would be: what rules of the road are going to be applied? If those rules were in statute, you would obviously take a fair degree of comfort in the fact that those rules were not going to be changed arbitrarily

---

7 Tourism and Transport Forum (TTF Australia Ltd), Submission 11, p. 3.

8 Sydney Airport Corporation Limited, Submission 12, p. 3.

9 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 12. [Mundy, Australian Council for Infrastructure Development]

10 *See, for example:* The Independent Competition and Regulatory Commission, Submission 7, p. 3.

> without some form of public consultation process and potentially without quite a long lead time. Those same protections may not be available under a ministerial determination, so you may make a different sort of risk-reward assessment investment decision on the basis of whether or not these pricing principles are within ministerial determination or the statute.[11]

2.12 A significant concern about using a legislative instrument is the possibility that the pricing principles, when they are released, could be worded differently from those agreed to by the Commonwealth. The Committee was told that the original Productivity Commission wording was arrived at after significant consideration:

> The Productivity Commission has been inquiring into these sorts of matters generally for the last 2½, maybe three, years. It started with their inquiry into what is now the defunct Prices Surveillance Act and has continued. The pricing principles that they recommended to the government in their report, which the government accepted, are pretty uncontentious in the minds of many, and they are transparent.[12]

2.13 The Australian Gas Light Company (AGL) contended that the wording agreed to in the Government's response was achieved after further consultation between the Commonwealth, the States, Territories and industry and should therefore not be changed.[13]

2.14 Submissions expressed concern that future alterations to the principles by legislative instrument will be subject to the influence of ministerial discretion[14] and there is a possibility that Governments may alter the principles in response to short run pressures.[15] If this were to occur, it would be detrimental to infrastructure investors for whom it is critical to know with certainty that regulators dealing with pricing issues are obliged to comply with well defined pricing principles.

2.15 Several submissions assert that the need for certainty outweighs the benefit of flexibility and certainty is best achieved via the incorporation of the principles in the Bill. According to the Australian Pipeline Industry Association Ltd:[16]

> Using a Ministerially determined legislative instrument to establish the pricing principles will result in significant concerns for investors about the potential to vary the Government's agreed pricing principles unilaterally, both upon their introduction and at some future stage. This concern would not exist if the agreed pricing principles were reincorporated into the Bill.

---

11 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 23. [Crawford]

12 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 18. [Mundy]

13 The Australian Gas Light Company (AGL), Submission 6, p. 3.

14 Energy Supply Association of Australia (ESAA), Submission 5.

15 Australian Council for Infrastructure Development (AusCID), Submission 2, p. 10.

16 Australian Pipeline Industry Association Ltd (APIA), Submission 1, p. 2.

2.16 In summary, the consensus in submissions is that the pricing principles should be placed in the Act and not in delegated legislation.

2.17 The Committee notes that the Sydney Airport Corporation Limited (SACL) was the only submission that recommended that the pricing principles should be given effect through a subordinate instrument to the Trade Practices Act.[17] It did so on the grounds of the greater flexibility of legislative instruments to fine tune the principles as regulatory practice develops. However, in line with other submissions, the SACL wanted the Bill amended to enshrine consultation provisions on the pricing principles (with infrastructure providers and the Productivity Commission, in this case) in the primary legislation.

Regulatory risk

2.18 The importance of regulatory risk was highlighted in the inquiry as a factor which influenced the views of certain witnesses in relation to the pricing principles as proposed by the Government.

2.19 According to the Productivity Commission, potential exposure to access regulation is likely to increase the general level of risk attaching to investment in essential facilities.[18] The inevitable regulatory discretion involved in the implementation of such regulation, and perceptions that regulatory decisions are likely to be biased in favour of service users, are among the factors that contribute to regulatory risk. These sorts of risks attach to investment in any regulated activity. However, the scale of investment in essential infrastructure, and the fact that, once in place, the assets are 'sunk' with few alternative uses, mean that regulatory risk can be a more critical factor in the investment decision and may sometimes deter projects.

2.20 The pricing principles specify that regulated access prices should include a return on investment commensurate with both the regulatory and commercial risks involved.

2.21 As one would expect, submitters were divided in their views about regulatory risk. On the one hand, regulated organisations and their representatives contend that regulatory risk can be a significant obstacle for infrastructure investment. The Australian Council for Infrastructure Development (AusCID) holds the view that regulators have been primarily motivated by removing rents from regulated firms and to a lesser extent by looking after the perceived (short run) interests of users and consumers.[19] The effect of this is to present infrastructure operators with a set of prices that are below those needed for them to cover their long run costs. This becomes problematic in the long run as investment is not forthcoming and in many

---

17 Sydney Airport Corporation Limited, Submission 12, p. 2.

18 Productivity Commission, *Review of the National Access Regime*, Inquiry Report No. 17, 28 September 2001, p. XIX.

19 Australian Council for Infrastructure Development (AusCID), Submission 2, p. 7.

cases there is a diminution of competition in related markets. Furthermore, by holding down prices, regulators run the risk of stifling innovation and skewing investment to less risky projects.

2.22 Dr Mundy from AusCID made the point in relation to regulatory risk that:

> One of the great problems with risk is that it exists. The mere fact that we cannot point to it turning up and ultimately being manifested does not mean that it does not exist. Risks are mitigated. We never know what a risk is.[20]

2.23 According to AusCID, the timeframes considered when making major infrastructure investments are best measured in decades.[21] Certainty about the regulatory treatment of investment is of critical importance not just today but in five, ten or twenty years. For this reason regulatory frameworks that are robust, transparent and predictable will inspire investor confidence, thus encouraging investment.

2.24 AusCID considers that certainty about pricing outcomes is the most important issue in the national access regime with perhaps the exception of the declaration criteria.[22] It submits that the absence of clear, appropriate and enforceable pricing principles has been at the core of the tension between infrastructure providers and regulators. These tensions have led to significant legal action.

2.25 On the other hand, regulatory organisations do not so readily accept that regulatory risk exists and are concerned about provision being made for such risk in the pricing principles.

2.26 Mr Rowe from the Economic Regulation Authority Western Australia referred to three issues that are often raised as constituting regulatory risk: firstly, the consistency and predictability of regulatory decisions; secondly, time delays in decision making; and thirdly, pricing decisions that do not reflect a commercial rate of return.[23]

2.27 In contrast to the claims that regulators make inconsistent and unpredictable decisions, Mr Rowe cited research showing that there is a consistency of approach to decision making by regulatory authorities around Australia.[24] Secondly, he suggested that time delays could be due to regulatory gaming, ambit claims and also because the

---

20 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 15.

21 Australian Council for Infrastructure Development (AusCID), Submission 2, p. 7.

22 Australian Council for Infrastructure Development (AusCID), Submission 2, p. 8.

23 *Proof Committee Hansard*, Canberra, 11 August 2005, pp 2-3.

24 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 2; and Economic Regulation Authority Western Australia, Submission 4, Attachments 1 to 6 of follow-up submission to the Exports and Infrastructure Taskforce discussion paper.

system is maturing. He considers that there will be a significant speeding up in the process as both regulators and providers learn from the process.[25]

2.28 Thirdly, in relation to the charge that regulators do not provide commercial rates of return for infrastructure providers Mr Rowe told the Committee that he could not find evidence to suggest that this is the case:[26]

> We regularly have people, such as financiers, banks, investment funds, share analysts, come to see us and there is no shortage of investment funds looking for investment in regulated monopoly infrastructure. I have a great deal of difficulty seeing why the issue of concern is about the rate of return.

2.29 The Economic Regulation Authority Western Australia acknowledges that it is reasonable for the relevant decision maker to have regard to pricing principles that are made by the Minister in an endeavour to promote consistent and transparent regulatory outcomes over time and therefore to provide increased certainty for industry participants.[27] However, it considers that the principles must not allow inconsistent interpretation. The Authority is particularly concerned that the actual principles currently proposed may fail to achieve the intended objective of promoting greater clarity or certainty in the operation of the national access regime.

2.30 Mr Rowe said:[28]

> Our concern is with the pricing principles themselves, whether they are in the bill or not. There is nothing wrong with having pricing principles, if they are good pricing principles. The concern we have with the particular one I highlighted is that there seems to be a view that you need to make some additional allowance for regulatory risk. Implicit in that is that the current rate of return is not commercial and is not sufficient to encourage the investment that is needed. We are disputing that. Not only is there an argument which says that the allowance for regulatory risk is unnecessary—I do not think the risk is great; in fact, a lot of super funds are now looking at investment in monopoly infrastructure almost as debt investment: it is long-term, with secure returns and it is very low-risk investment—but also what does 'an allowance for regulatory risk' mean? It again introduces a degree of uncertainty about what a reasonable degree of risk is into the process—a process which, if I am right, is maturing and settling down. That will go through a series of appeal processes and so on.

2.31 The Independent Competition and Regulatory Commission ACT is also concerned that the wording in the pricing principles may imply that an additional

---

25 *Proof Committee Hansard*, Canberra, 11 August 2005, pp 2-3.

26 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 3.

27 Economic Regulation Authority Western Australia, Submission 4, pp 2-3.

28 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 4.

margin above efficient costs should be allowed, rather than a return that is proportionate to the risk incurred.[29]

2.32 Both regulatory organisations consider that the pricing principles potentially add more uncertainty through the use of imprecise terms such as 'regulatory risk', as well as by loosely worded direction:

> …the Commonwealth Government's proposal that regulated access prices should be set in order to 'generate revenue that is *at least* sufficient' does not provide greater clarity or predictability. Instead, such a loosely worded direction increases ambiguity and lessens certainty…[30]

2.33 According to these organisations, the potential consequence of the pricing principles as currently worded is greater scope for aggrieved parties to pursue avenues of review.[31]

Treasury response

2.34 Mr Bradford Archer, Senior Adviser, Competition Policy Framework Unit, Department of the Treasury, informed the Committee that the Government has no intention to change the wording of the principles from that agreed in the Government response. Also, the reason for using a legislative instrument is to retain flexibility should the principles require amendment in the future:[32]

> The decision to provide for the making of a legislative instrument to establish the pricing principles was one simply made to balance the objectives of providing certainty to industry but retaining a degree of flexibility should a future need be identified to amend those pricing principles once we have experience with their operation in practice. The government has made no indication that it intends to implement pricing principles that are different to those principles announced in its final response to the Productivity Commission review. The intention is to implement those principles that were announced but it was felt that it would be appropriate to retain a certain degree of flexibility greater than what would be provided for if the principles were legislated directly by inclusion in part IIIA.

2.35 According to Mr Archer, the requirement for flexibility stems from the fact that the pricing principles are untested. While Treasury anticipates how they might operate, it does not know for certain:

> If we find after a couple of years, for example, of administration of the regime with the new principles that they are not working or they are

---

29 Independent Competition and Regulatory Commission ACT, Submission 7, p. 3.

30 Economic Regulation Authority Western Australia, Submission 4, p. 3.

31 Economic Regulation Authority Western Australia, Submission 4, p. 3; *and* Independent Competition and Regulatory Commission ACT, Submission 7, p. 4.

32 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 37.

creating more uncertainty than is anticipated, once appropriate amendments are identified, they can be implemented quite readily.[33]

Committee view

2.36 The Committee accepts that pricing principles are untested because the Australian Competition and Consumer Commission has never undertaken an arbitration under Part IIIA, and for this reason some flexibility is required for altering the principles in the future if necessary.

2.37 Nevertheless, the Committee is not persuaded that the need for flexibility outweighs, in this case, the imperatives of transparency and appropriate Parliamentary scrutiny. In this case, since the language of the pricing principles is itself generic, the Committee considers that they are already sufficiently flexible. As well, proper principles of legislative drafting would dictate that general provisions be contained in the Statute itself, not in legislative instruments made under it. That is *a fortiori* the case here, where one of the principal objects of the Bill is to enact the pricing principles. Nor are the pricing principles controversial.

Timeframe

2.38 The Committee is also concerned that there is no timeframe specified in the Bill within which the Minister must make the determination. As there does not seem to be any functional or mechanical reason for the provision to be open-ended in this way,[34] the Committee considers that if the legislative instrument approach of introducing the pricing principles is retained, the Bill should be amended to specify a set period within which the Minister's determination must be made.

Recommendation 1

2.39 **The Committee recommends that the Bill be amended so that the pricing principles are included in the Bill itself, rather than introducing them through a subordinate legislative instrument.**

Objects clause

2.40 The Bill inserts an objects clause in Part IIIA (item 4).

2.41 The Productivity Commission considered that the insertion of an objects clause, by drawing attention to efficient use and efficient investment, should help to

33 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 38. [Archer]

34 For discussion about this at the hearing, *see*: *Proof Committee Hansard*, Canberra, 11 August 2005, p. 39.

redress the potential for regulatory interpretations which discourage efficient investment in essential infrastructure.[35]

2.42 The objects of the Part are to:

(a) 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

(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

2.43 The objects must be taken into account by the National Competition Council, the Minister, the Australian Competition and Consumer Commission and the Australian Competition Tribunal in regard to declaring a service, certifying that a regime is effective, registering a contract under Division 4, and accepting access undertakings and access codes.

2.44 The implementation of an objects clause is intended to promote consistency and provide guidance in the decision-making process and in the application of Part IIIA, which in turn will enhance regulatory accountability.[36]

2.45 Submissions were generally supportive of the addition of an objects clause to the national access regime:

> AusCID has long advocated the insertion of an object clause for Part IIIA. In a number of regimes (such as the old airports regime or the gas code), the objectives are unclear, unstated or lack internal consistency. The Bill contains amendments requiring all decision makers to have primary regard to economic efficiency rather than more woolly notions such as industry development or protecting users and seek to encourage a consistent approach.[37]

2.46 AusCID advocates that all governments should include this objects clause in the various general and industry specific regimes they administer.

2.47 However, the Independent Competition and Regulatory Commission ACT (ICRC) qualified its support by noting that the new clause, in conjunction with the new pricing principles, adds to the existing lists of considerations that apply to decisions under Part IIIA:[38]

---

35 Productivity Commission, *Review of the National Access Regime*, Inquiry Report No. 17, 28 September 2001, p. 131.

36 Parliamentary Secretary to the Treasurer (the Hon. Chris Pearce, MP), second reading speech, 2 June 2005.

37 Australian Council for Infrastructure Development (AusCID), Submission 2, p. 8.

38 Independent Competition and Regulatory Commission ACT (ICRC), Submission 7, p. 2.

> Unless priorities are clear, and care is taken to ensure consistency and compatibility, decision makers under Part IIIA could wind up having the same problems State and Territory regulators have faced when trying to juggle the numerous sets of requirements and objectives in the Gas Code.

2.48 The ICRC further noted that the pricing principles and the objects clause are matters to which decision makers must 'have regard' rather than criteria that must be satisfied.[39] It considers that this goes some way towards alleviating conflict between different objectives.

2.49 While the Tourism and Transport Forum (TTF Australia Ltd) supports the insertion of an objects clause in Part IIIA, it recommends that the clause be amended to include a provision that clarifies the circumstances under which Part IIIA should apply.[40] TTF Australia considers that for industries where the Government considers that essential infrastructure operators do not have an incentive to deny access and that access will be provided on open terms, Part IIIA should only be considered as a last resort. That is, where a breakdown in commercial negotiation has occurred and access to an essential facility has been denied, should reliance on the access provisions of Part IIIA be used.

Declaration criteria

2.50 The Bill amends the criteria against which the National Competition Council assesses whether or not to recommend that a service be declared (item 16); and against which the designated Minister declares a service (item 23). In addition to existing criteria, the Council and Minister must now be satisfied that access (or increased access) to the service would promote **a material increase in** competition in at least one market (whether or not in Australia), other than the market for the service (paragraph 44G(2)(a)).

2.51 According to the Explanatory Memorandum the change will ensure access declarations are only sought where increases in competition are not trivial.[41] However, the Bills Digest suggests that these amendments are not a shift in policy as they reflect how the Australian Competition Tribunal has interpreted the current requirement in the legislation.[42]

2.52 Most submissions were supportive of this amendment. For example, AusCID notes that:

> …the primary purpose of Part IIIA is to deliver benefits to consumers through the promotion of competition in upstream markets rather than simply act to restrict the use of market power in the market for the service

---

39 Independent Competition and Regulatory Commission ACT (ICRC), Submission 7, p. 3.

40 Tourism and Transport Forum (TTF Australia Ltd), Submission 11, pp 1-2.

41 Explanatory Memorandum, p. 21.

42 Parliamentary Library, Bills Digest, no. 186, 21 June 2005, pp 9-10.

> concerned. The amendments to the promote competition test will ensure that tangible competition benefits will need to be demonstrated rather than the current situation where trivial improvements in competition are sufficient to meet this criteria.[43]

2.53 However, in line with its concerns about introducing uncertainty into the regime, the Independent Competition and Regulatory Commission ACT suggested that materiality is a subjective measure, and one that is difficult to define:

> The absence of an accepted materiality threshold, or criteria against which materiality might be assessed, is of particular concern when one considers the availability of review, on merits, of the Minister's decision to declare or not declare a service by the ACT.[44]

2.54 Virgin Blue Airlines Pty Ltd supports the view that services should not be declared where the promotion of competition would be immaterial. However, it is worried that the onus will be placed on access seekers to demonstrate that access would positively result in a material, and quantifiable, increase in competition. This could lead to the bar for declaration being raised too high; as well as requiring access seekers to undertake expensive and detailed market analysis in order to support their case.[45] Virgin Blue proposes amendments to the Bill.

Other issues raised in submissions

2.55 A number of other issues were raised in submissions, not all of which directly related to the contents of the Bill. The Committee considers these matters briefly below.

Definition of production process

2.56 Access may only be sought under Part IIIA to a service that is provided by means of a facility. Section 44B of the Trade Practices Act defines the meaning of 'service'. The definition contains a number of exclusions, one of which (paragraph (f) of the definition) is that 'service' does not include the use of a production process, except to the extent that it is an integral but subsidiary part of the service.

2.57 There is legal precedent[46] for this 'production process' exclusion to be successfully used to prevent third party access to a railway used to transport iron ore because the railway is integral and essential to the integrated series of operations that constitute a company's production process.

---

43 Australian Council for Infrastructure Development (AusCID), Submission 2, p. 10.

44 Independent Competition and Regulatory Commission, ACT Submission 7, p. 2.

45 Virgin Blue Airlines Pty Ltd, Submission 14, pp 1-2.

46 Hamersley Iron Pty Ltd v National Competition Council (1999) 164 ALR 203; (1999) ATPR 41–705.

2.58 Fortescue Metals Group Ltd (Fortescue) considers that this definition should be clarified because the provision is being relied upon by infrastructure owners to prevent a service from being declared. If the service includes the use of a production process the National Competition Council does not have jurisdiction to consider an application for declaration of the service. Fortescue contends that the definition is being used in a way that was not intended by the Parliament when the provisions were enacted.

> It is clear that the intention was to exclude things that were internal to a factory such as a conveyor inside a plant. It was never intended to apply to a railway that runs 400 kilometres across the Pilbara.[47]

2.59 The essence of Fortescue's allegations is that the existing Act allows for a legal stratagem to defy the intention of the Bill, which is to improve competition, infrastructure development and access to infrastructure.

2.60 Fortescue recommends that an unambiguous definition of 'production process' be inserted into the Trade Practices Act. This amendment should define the 'production process' to exclude railways, ports, roads, power transmission grids or any other facility where the function involves transportation, distribution or reticulation.[48]

Productivity Commission consideration

2.61 The Productivity Commission considered the production process exclusion in its review.[49] It concluded that the current exclusions in the Trade Practices Act should be retained, but the National Competition Council should specifically monitor developments in relation to the 'production facility' exemption (recommendation 6.4). In its response to the review, the Government agreed with the Productivity Commission:[50]

> The scope of these exclusions is a matter for the Courts to decide on a case by case basis and the caselaw is still evolving. These exclusions ensure that the Regime is not too broad in its application. Hence, they protect the legitimate interests of owners of essential infrastructure facilities and preserve incentives for investment in such facilities.

2.62 The Government may care to consider the matter further.

---

47 *Proof Committee Hansard*, Canberra, 11 August 2005, p. 31. [Tapp]

48 Fortescue Metals Group Limited, Submission 10, p. 3.

49 Productivity Commission, *Review of the National Access Regime*, Inquiry Report No. 17, 28 September 2001, pp 151 to 154.

50 Recommendation 6.4, Government Response to Productivity Commission Report on the Review of the National Access Regime, viewed on 18 July 2005, at: http://www.pc.gov.au/inquiry/access/index.html.

Telecommunications Access Regime

2.63 Telstra made a detailed submission to the inquiry.[51] Although access in the telecommunications industry is separately regulated in Part XIC of the Trade Practices Act, Telstra provided the Committee with insight into its experience with Part XIC. Telstra supports many of the amendments in the Bill for Part IIIA and advocates that they be mirrored in the telecommunications access regime.

2.64 Telstra is concerned that Parts IIIA and XIC are diverging rather than converging over time, which it considers is contrary to the apparent intent of policy makers. Furthermore, Telstra advocates that a couple of recommendations of the Productivity Commission that have not been included in this Bill should be implemented, although not necessarily in the form of the Commission's recommendation. These include 'investment safe harbour' provisions, and the need to ensure that commercial negotiations and agreements retain primacy in access arrangements.[52]

2.65 The Committee notes that in its response to Productivity Commission recommendations 11.1 and 11.3 that relate to 'investment safe harbour' provisions,[53] the Government proposes to consider the practicality of these recommendations in the context of industry-specific regimes. It specifically referred to the Productivity Commission review of the gas access regime which reported in June 2004. The Ministerial Council on Energy (MCE) is developing a government response to this review. Consideration and implementation of any changes to certified access regimes would involve consultation with the relevant State and Territory governments.

2.66 Telstra asserts that the first part of Productivity Commission recommendation 8.2 has not been adopted in the Bill. The recommendation reads as follows:

> The Australian Competition and Consumer Commission, in arbitrating terms and conditions for declared services, should generally limit its involvement to matters in dispute between the parties. Where matters agreed between the parties are subjected to re-assessment, the Commission should be required to explain its reasons for doing so in the post-arbitration report (see recommendation 15.6).[54]

2.67 The Committee notes that the Productivity Commission proposal did not involve placing agreed matters completely off limits to the ACCC.[55] Rather, the

---

51 Telstra, Submission 9.

52 Telstra, Submission 9, pp 14-16.

53 Government Response to Productivity Commission Report on the Review of the National Access Regime, viewed on 18 July 2005 at: http://www.pc.gov.au/inquiry/access/index.html.

54 Productivity Commission, *Review of the National Access Regime*, Inquiry Report No. 17, 28 September 2001, p. 220.

55 Productivity Commission, *Review of the National Access Regime*, Inquiry Report No. 17, 28 September 2001, pp 219-220.

intention was to discourage the unwarranted re-opening of matters that had been previously agreed to by the parties to the dispute. Moreover, the Commission's proposal did not seek to bar the ACCC from arbitrating on any matter; rather, it would simply place an onus on the ACCC to explain its reasons for examining those matters previously agreed between the parties.

2.68 The Government agreed to the Productivity Commission recommendations 8.2 and 15.6 and these are implemented in the Bill by item 72 which creates a new subdivision in the Trade Practices Act requiring the ACCC to prepare a written arbitration report about a final determination it makes.

2.69 Telstra also advocated that the Committee recommend amendments to the Bill to implement certain outcomes from the Exports and Infrastructure Taskforce.[56] The Committee understands that the recommendations of the Exports and Infrastructure Taskforce were considered at the Council of Australian Governments (COAG) meeting on 3 June 2005. COAG will be advised by the end of August 2005 on the implementation of the agreed measures and the Committee does not intend to anticipate that process.

Recommendation 2

2.70 **The Committee recommends that subject to the Government introducing the amendment outlined in Recommendation 1, the Senate pass the Bill.**

Senator George Brandis
Chair

56 Report to the Prime Minister by the Exports and Infrastructure Taskforce, *Australia's Export Infrastructure*, May 2005.