



**Submission by the Australian Pipeline Industry Association to the Senate
Economics Legislation Committee Inquiry:
Trade Practices Amendment (National Access Regime) Bill 2005**

1. Introduction

The Australian Pipeline Industry Association (APIA) is the peak body representing the Australian gas transmission pipeline industry. For the reasons explained below, the Bill being investigated by the Senate Committee is of great significance to all regulated infrastructure industries, including gas pipelines.

The National Access Regime is embodied in Part IIIA of the Trade Practices Act, and together with the Competition Principles Agreement, it provides the framework for regulation of essential infrastructure. Importantly, the National Access Regime provides the principles upon which industry-specific regimes, such as the Gas Access Regime, are modelled.

APIA participated in the Productivity Commission's review of the National Access Regime in 2001 and subsequently supported the Commonwealth's response to the Commission's recommendations. APIA is confident that full implementation of the Commonwealth's response will contribute to the objectives noted in the Treasurer's Second Reading Speech, including:

- encouraging efficient investment in new infrastructure;
- improving the certainty, transparency and accountability of regulatory processes.

2. Omission of Pricing Principles in the Bill

The Bill appears to include all of the amendments in the Government's response to the Productivity Commission (PC) with one significant exception. One of the key elements of the response was that certain pricing principles (recommended by the PC with minor amendments by the Government) would be included in legislation mending Part IIIA. There is a general expectation that these principles would enhance certainty, transparency and accountability of national regulatory processes for access pricing and provide an important model for pricing principles that are included in industry specific regimes (including the gas regime).

It is important to recall the steps by which these principles were agreed:

- the Australian Government indicated in its interim response of September 2002 that it would accept the Productivity Commission's pricing principles (with minor amendments);
- the Government then consulted with the States and Territories on its interim response to all the Commission's recommendations;

- In its final response of February 2004 the Government confirmed that it accepted the amended pricing principles and that they would be included in legislation amending to Part IIIA.

APIA is therefore extremely concerned that the Bill before the Parliament does not include the Government's agreed pricing principles. Instead Section 44ZZCA of the Bill delegates to the Commonwealth Minister the discretion to determine pricing principles by legislative instrument at a future time. There is no timeframe in which the Minister must do this, or an indication as to whether these principles will be the same as those agreed in the Government's responses.

3. Basis for APIA's concern

APIA is concerned with any approach that does not include the pricing principles in the legislation for three reasons:

- it is vital that the pricing principles as agreed by the Government be included in the legislation, in order to ensure the appropriate level of regulatory certainty needed for continued investment in essential infrastructure;
- omission of the principles is likely to diminish the benefits that the Part IIIA amendments as a whole were designed to deliver; and
- the fact that the Government's agreed pricing principles are not included in the legislation suggests that they are intended to be changed.

Infrastructure investors had fully expected that the Productivity Commission's pricing recommendations (as amended by the Government) would be established within the legislation. This would have had the immediate benefit of signalling to existing and potential investors the principles that will be applied to determine prices as part of an access determination. It is imperative to finalise the process that started in 2001 with the PC's recommendation, was confirmed by the Government in its response to the PC in 2003 and the PC reinforced in the Gas Access Regime review in 2004.

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.

It is also very significant that the Productivity Commission has recently confirmed its support for the Government's agreed pricing principles in its 2004 review of the Gas Access Regime. APIA notes that the Commission has recommended the same pricing principles for the gas regime that the Government has agreed to for the national regime. This reinforces the point made in section 2 above, that the Part IIIA principles provide a firm model for similar principles in other access regimes. Leaving one of the major elements of this model out of the Part IIIA legislation only serves to heighten concerns among a wide range of infrastructure investors about whether the Government's agreed pricing principles will be included in Part IIIA at all.

In summary, APIA's major concerns are:

- That the pricing principles introduced by a Ministerially determined legislative instrument will not be those agreed to by the Commonwealth in its responses to the Productivity Commission (after consultation with the States). Further, if the principles are different, they are less likely to achieve the objectives specified by the Treasurer for the Part IIIA amendments as a whole;
- Even if the pricing principles are those agreed by the Commonwealth, the mechanism for changing the pricing principles is uncertain, and there is a significant possibility changes could be made without appropriate consultation with the States and Territories and industry; and
- It is contrary to the principle of separation of powers that such a significant matter should be made by a Minister without the scrutiny of Parliament.

4. APIA recommendations

For the reasons identified above, APIA is strongly of the view that the pricing principles set out in the Government's response to the review of the National Access Regime should be included in the amendments to Part IIIA (and ultimately extended to the Competition Principles Agreement). This would of course require the current Bill to be amended.

It may be considered that legislating pricing principles in the proposed manner, whereby they can be changed in the future without requiring Parliament's scrutiny and approval, enhances administrative flexibility. APIA submits that for the following reasons, such flexibility is not desirable or required:

- the Productivity Commission has supported the same pricing principles in two access regime reviews, after considerable consultation and debate, confirming their soundness from an economic and policy viewpoint;
- the Government in consultation with the States and Territories has reviewed and supported them;
- there is no foreseeable reason why these principles would need to be changed in the future; and
- there is a trade-off between certainty and flexibility. In issues relating to ongoing long term investment the need for investment certainty outweighs the need for administrative flexibility. Consequently the flexibility that is created by the approach in the current Bill will result in uncertainty that will be economically detrimental, and can be easily avoided.

If the Committee is nevertheless persuaded that flexibility to amend the pricing principles, without Parliament's full review is appropriate, then APIA considers that the following essential provisions must be included in the amending legislation:

- The Government's agreed pricing principles must be included now;

- Before a redetermination of the pricing principles is made the Minister must consult with the States and Territories and with industry on any proposed changes to the pricing principles;
- Any proposed changes to the pricing principles must be consistent with the objectives clause in the Part IIIA national regime (which has also been agreed by the Government); and
- The Minister must be satisfied that the operation of Part IIIA will be enhanced consistent with its objectives and give reasons as to why the principles should change.