



**Submission to the Senate Economics Legislation
Committee**

***Trade Practices Amendment (National
Access Regime) Bill 2005***

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Overview

The Energy Networks Association (ENA) welcomes the commencement of the Senate Economics Legislation Committee's – *Inquiry into the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005* (the Bill).

According to the term of reference provided by the Committee, the Bill aims to achieve four outcomes:

- 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.

The ENA strongly supports all of the above aims.

The February 2004 Australian Government response to the Productivity Commission *Review of the National Access Regime* proposed pricing principles are designed to provide guidance on how the aims of the Bill will be achieved in establishing fair and reasonable charges for third party access to nationally significant infrastructure.

The ENA and its members were significant participants in the consultation process of the *Review of the National Access Regime*. The ENA considers there to be a significant risk that the legislative implementation of the report, and in particular the proposed section 44ZZCA of the Bill, may unintentionally undermine the aims of the Bill as set out within the terms of reference and the second reading speech.

Specifically, the ENA considers the absence of statutory pricing principles from the Bill which instead are to be determined by the Commonwealth Minister within a Ministerial determination under section 44ZZCA will potentially result in the aims of the Bill not being adequately met.

The pricing principles are a key focus for energy network businesses as part of the national access regime established by Part IIIA of the *Trade Practices Act 1974*. Energy networks have direct and substantial interest in the implementation of improvements to the national access regime as these businesses are currently regulated at the State and Territory level by industry-specific access regimes established under Part IIIA of the *Trade Practices Act 1974*. Regulated businesses have been active participants in the public policy debate on reforms to the Part IIIA since the commencement of the Productivity Commission review in 2000. Given this, regulated energy networks believe they are well-placed to provide some guidance to the Senate Economics Legislation Committee's inquiry into the issues relating to the amendments of the Part IIIA of the *Trade Practices Act 1974*.

The proposal to have the pricing principles included within a legislative instrument has several potentially detrimental implications for the aims of the Bill, including:

- if the Commonwealth Minister chooses to amend the pricing principles, then there is no requirement for consultation prior to the amendments being made

- the legislative instrument is subject to disallowance which can result in a delay of the introduction of the pricing principles
- the Commonwealth Minister is not subject to any time limits in preparing the pricing principles which may also result in a further time delay of the introduction of the pricing principles

The ENA considers that the pricing principles should be inserted directly into the Bill to ensure that the aims of the Bill are met. This is consistent with the Australian Government's response to the Productivity Commission's recent review of the national access regime where the Government agreed that statutory pricing principles should be established in relation to the NAR. This approach is also consistent with the recent Export Infrastructure Report delivered to the Prime Minister by the Exports and Infrastructure Taskforce where the Taskforce highlighted the need for more transparent and predictable regulatory settings to encourage efficient commercial investment.

The ENA would be happy to discuss its views on these issues with the Senate Economics Legislation Committee at any public hearings that will be held.

Background

This submission responds to the Senate Economics Legislation Committee's *Inquiry into the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005*.

The Energy Networks Association is the national representative body for gas and electricity distribution network businesses. Energy network businesses deliver electricity and gas to over 12 million customer connections across Australia through approximately 800 000 kilometers of electricity lines and 75 000 kilometers of gas distribution pipelines. These distribution networks are valued at more than \$34 billion, and each year energy network businesses undertake capital investment of more than \$5 billion in network reinforcement, expansions and greenfield extensions.

Australian energy networks are currently regulated at the State and Territory level by industry-specific access regimes established under Part IIIA of the *Trade Practices Act 1974*.

Consistency with the aims of the proposed Bill and the objectives of the pricing principles

The Government in its final response to the Productivity Commission *Review of the National Access Regime* provided for statutory pricing principles to be established in relation to Part IIIA of the TPA.¹ According to the response, the pricing principles are designed to provide guidance for pricing decisions and to:

¹ Australian Government, *Government response to Productivity Commission report on the review of the National Access Regime*, 20 February, 2004, at <http://www.treasurer.gov.au> at p.4.

...contribute to consistent and transparent regulatory outcomes over time. They will also help to provide certainty for investors and access seekers alike and facilitate commercial negotiations between parties.

This statement is also consistent with the second reading speech to the Bill.

The ENA supports implementation of the pricing principles and supports the key undertakings that the statutory pricing principles should provide certainty and consistency to investors and access seekers over time. The principles should provide improved guidance on how the broad objectives of the regime are to be applied to the detailed terms and conditions of access pricing for regulated businesses. This purpose of the principles demonstrates the inter-linkage of the aims of the Bill with the principles. If subsequently the principles were amended, but the aims of the Bill were not, then a potential discrepancy may arise between the aims of the Bill and the principles. The principles should therefore be inserted directly into the Bill to ensure that the principles maintain its interconnected purpose with the aims of the Bill.

The ENA points out that the principles are based on sound principles aimed to ensure certainty to regulated firms and access seekers. The principles do *not* contain a level of detail that will require them to be updated or amended due to economic changes or any other relevant external events. The principles should be treated in a manner consistent with the other provisions of the Bill.

Regulated businesses, access seekers and investors should be in a position to place reliance on the principles when likely pricing outcomes across a range of existing and future infrastructure investments. In particular, the principles should be in a form able to allow potential investors to reach informed decisions about likely regulatory pricing outcomes over the economic life of infrastructure assets (typically 20-30 years).

The large scale and long-term nature of investment in regulated energy businesses demands principles that adequately reflect this time horizon. Pricing principles that are subject to unnecessary and non-publicly consulted amendment will greatly reduce the significance and purpose of the principles to provide certainty and consistency to investors and access seekers. If the principles are not in a form that maximises long-term certainty that they will not be altered, the risk is that investors and access seekers will be forced to interpret the principles as only a loose guide to the approach taken by the relevant regulators, open to *ad hoc* amendment without any mandated opportunity for consultation. This outcome will not contribute to a more pro-competitive legislative framework.

Proposed inclusion of the pricing principles within a legislative instrument

In light of the above aims of the principles, the Government now proposes under section 44ZZCA of the Bill to empower the Commonwealth Minister to determine the principles by a legislative instrument (Ministerial determination) instead of inclusion of the principles directly within Part IIIA of the TPA.

This approach has the potential to undermine the Bill's key objectives, for the three reasons detailed below.

No requirement for consultation prior to any amendments to the principles

The operation of the principles within a legislative instrument such as a Ministerial determination will make the principles subject to Clause 19 of the *Legislative Instruments Act 2003* which stipulates that even though the Act does encourage appropriate consultation, it is clear that the validity or enforceability of the Ministerial determination would not be affected if there was a failure to consult on the legislative instrument. This is not necessary an issue in the initial phase of establishing the principles set out in the Australian Government response, since significant consultation has occurred through the *Review of the National Access Regime*.

Where the issue becomes problematic is if subsequent to the introduction of the principles the Commonwealth Minister chooses to amend the principles. In these circumstances the *Legislative Instruments Act 2003* does not formally require any consultation to occur.

The lack of a requirement for the Commonwealth Minister to engage in consultation when empowered to draft the principles in the form of a legislative instrument has serious and negative ramifications for the *Trade Practices Amendment (National Access Regime) Bill 2005*. The current formulation of the principles is a result of public consultation lead by the Productivity Commission since 2000. Under the current proposed Bill, the Commonwealth Minister is not obliged to have regard to the principles proposed by the Australian Government that have evolved over a significant period of public consultation. This has the potential to result in principles that are not consistent with the Government's proposed objects clause for Part IIIA and, in future, for amended principles which have not been subject to adequate public consultation.

Legislative instrument is subject to disallowance

The proposed legislative instrument will be subject to disallowance by Parliament. Clause 42 of the *Legislative Instruments Act 2003* empowers the House of the Parliament to disallow the legislative instrument by passing a resolution, in pursuance of a motion to disallow the instrument. If the legislative instrument is disallowed in the House, then another subsequent instrument which is the same in substance must not be made within 6 months of the original instrument being disallowed. The only way to consequently have the instrument passed within the 6 month period is if the resolution to disallow is rescinded by the House.

The possibility of disallowance of the principles in the form of a legislative instrument creates the potential for further delay of the inclusion of the principles within the Part IIIA framework which has been delayed for nearly 4 years since the finalisation of the Productivity Commission's report.

Commonwealth Minister is not subject to any time limits in preparing the principles

Under the proposed section 44ZZCA of the Bill, the Minister is required to, by legislative instrument to determine principles relating to a price of access to a service.

No time limit has been provided within the Bill for the Minister to draft the legislative instrument. This lack of a timing limitation is another detrimental element not consistent with the aims of the Bill.

The potential delay between passage of the legislation and establishment of the principles for investors and access seekers will further reduce certainty.

Consistency with the recent Exports Infrastructure Report

The inclusion of the principles directly within the Bill is also broadly consistent with the recommendations and outcomes of the Prime Minister's Export Infrastructure Taskforce report which was released in June 2005. The Taskforce recognised that inappropriate policy settings will delay or even deter commercial investment, and that the regulatory framework should be more transparent and predictable.

By subjecting the principles to be included within a legislative instrument, the principles will be susceptible to being introduced in a form that has not been publicly consulted and that can be amended in the same manner.

This process is not adequately transparent or predictable to encourage confidence in investors and access seekers that they can rely on the principles when considering making long-term, large-scale investments in businesses governed by Part IIIA of the TPA.

ENA Recommendation

The ENA considers that the Australian Government should amend the Trade Practices Amendment (National Access Regime) Bill 2005 to directly include the Pricing Principles proposed by the Australian Government in its final response to the PC review of the national access regime (February 2004) within the Bill instead of the current proposed position under section 44ZZCA of the Bill to require the Commonwealth Minister to determine the Pricing Principles by legislative instrument at a future point in time in light of the aims of the Bill and corresponding aims of the Pricing Principles.

The Energy Networks Association
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