Our Ref:
Your Ref:

Mr Peter Hallahan
Secretary
Senate Economics Legislation Committee
Suite SG.64
Parliament House
Canberra ACT 2600

Dear Mr Hallahan

The Independent Competition and Regulatory Commission thanks you for the opportunity to comment on the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005.

As noted in the Committee's Terms of Reference, the Bill aims 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.

While the Commission supports these goals in principle, it is concerned that the provisions of the Bill have the potential to undermine the progress evident in the Government's response to the Productivity Commission's Inquiry Report No. 17, *Review of the National Access Regime*. The Commission's concerns in relation to particular aspects of the Bill are discussed below.

Objects clause

The Bill provides a new objects clause specific to Part IIIA of the TPA. Decision makers under Part IIIA will be required to have regard to the two objectives specified when making their decisions.

ICRC
independent competition and regulatory commission
Eclipse House Level 7, 197 London Circuit Civic
PO Box 975 Civic Square ACT 2608
Phone 02 6205 0799 Fax 02 6207 5887
www.icrc.act.gov.au icrc@act.gov.au
ABN 88 647 913 351

The intention in introducing this clause is to provide greater certainty for infrastructure owners, access seekers, investors and other interested parties, by promoting consistency and providing guidance in the decision-making process and in the application of Part IIIA, in turn enhancing regulatory accountability. It will serve to aid interpretation and facilitate consistency in application.

The only qualification we would raise to this is that the new clause, coupled with the new pricing principles to be determined by the Minister, adds to the existing lists of considerations that apply to decisions under Part IIIA. 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.

Declaration criteria

The Bill proposes to amend Part IIIA so that a service can only be declared if access will result in a "material" increase in competition. While the Commission recognises that the national competition reforms were not intended to promote competition for competition's sake, it is important when implementing the reforms set out in the Competition Principles Agreement to note that the tests for application of individual reforms vary in onus and degree. Clause 6 of the Agreement provides that third party access to significant infrastructure facilities should be provided where, among other things, "access to the services is necessary in order to permit effective competition in a downstream or upstream market". Any materiality test introduced in this context should be applied in a way that remains consistent with the objectives of the reforms.

The Commission recognises that the proposed amendment is intended in part to reinforce the practice adopted by the ACCC, and to provide clarity and regulatory certainty in this respect. Materiality, however, is a subjective measure, and one that is difficult to define. In that sense, the proposed amendment may serve to create uncertainty rather than reduce it. 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.

Pricing principles

Under the proposed amendments the Commonwealth Minister must determine, by 'legislative instrument', pricing principles relating to the price of access to a service.

The Commission is concerned that such a key component of the proposed reforms is to be developed in isolation from the Bill, and that proposed pricing principles have not been circulated for comment together with the amendments proposed to the Act.

The benefits of legislative guidance specific to pricing are the same as those flowing from the new objects clause. So are the risks. In determining the pricing principles, the Minister should be careful to ensure that they do not create conflict with the objects of Part IIIA and of the Act, or with the other considerations identified in Part

IIIA (see for example section 44ZZA(3), which already contains 6 considerations for acceptance of access undertakings). Too many sets of objectives can actually create confusion, rather than clarity. Priority in application needs to be clear. The Commission notes that the pricing principles and new objects clause are matters to which decision makers must "have regard", rather that criteria that must be satisfied. This goes some way towards alleviating conflict between different objectives.

As a legislative instrument, the principles will be subject to disallowance by Parliament, but there is no further requirement for consultation in their development, or indeed in any amendment to the principles in the future. This is a significant departure from the consultative process through which the proposed amendments have been developed, and ignores the invaluable contributions to be made by industry and regulatory stakeholders in developing the pricing principles to which they will be subject.

In the digest of the Bill prepared by the Law and Bills Digest Section of the Department of Parliamentary Services in June 2005, it was suggested that the pricing principles determined are expected be the same as those set out in the Government's response to the Productivity Commission Report. Recognising that this comment is necessarily speculative at this stage, the Commission notes that the current wording of paragraph (a)(i) of the Government's proposed principles requires regulated asset prices to be set to allow the regulated entity to recover "at least" the efficient costs of providing the service. As drafted, this suggests that this is a floor value, and that some amount above the efficient cost should be allowed. In determining pricing principles under the proposed section 44ZZCA, care will need to be taken to correct such suggestions.

The Commission also understands that the draft pricing principles currently in circulation vary in significant respects to those proposed by the Government in its response to the Productivity Commission Report. Whereas the response to the report required regulated access prices to "include a return on investment *commensurate with* the regulatory and commercial risks involved", it is our understanding that the latest draft of the pricing principles requires instead that prices include a return *for* commercial and regulatory risk. The Commission is concerned that this implies that an additional margin is to be allowed for commercial and regulatory risk, rather than a return that is proportionate to the risk incurred.

The Commission is also concerned that the determination of pricing principles will occur separately to the consideration and approval of the Bill. As an integral part of the proposed amendments to Part IIIA, it is appropriate that the pricing principles be developed and considered together with the provisions of the Bill. It is possible that, even with the best of intentions, the determination of the initial pricing principles will occur some considerable time after the commencement of the remaining provisions of the Bill. Any passage of time between the commencement of the proposed amendments and the Minister’s determination of the pricing principles will only serve to add uncertainty to the application of Part IIIA and the impact of the new provisions. The provisions of the *Legislative Instruments Act 2003* in relation to disallowance of legislative instruments by resolution only serve to increase that uncertainty. In particular, the Committee’s attention is drawn to section 48 of that Act, which provides that, if an instrument is disallowed, another instrument the same in

substance must not be made within 6 months after the day on which the first-mentioned instrument or provision was disallowed or was taken to have been disallowed, unless the disallowance is rescinded or resolution made to approve submission of the second instrument.

Merits review

On the whole, the procedural amendments proposed are useful and sensibly cast. Published timeframes enhance regulatory process and accountability, and produce a level of certainty in terms of impact and application of decisions. The new provisions for public consultation and publication of reasons for decisions are in keeping with the general principles of openness and transparency in administrative decision-making that have been encouraged in regulatory practice to date.

In relation to the proposed new avenues for appeal, allowing review on merit by the ACT of decisions regarding an effective access regime, access undertakings and access codes, the Commission would again note its concern that the introduction of new objectives and principles to which regard must be had by decision makers has the potential, if not properly considered, to provide fertile ground for challenges to administrative decisions.

The Commission is also concerned that the extension of the current provisions for merits review to cover access undertakings is, even with the target time limits to be provided in the proposed section 44ZZOA, inconsistent with the broader objective of the amendments to streamline the regulatory approval process. By introducing an additional avenue of appeal the proposed amendments have the potential to prolong the decision-making process, by opening the way for strategic behaviour by service providers.

The Commission welcomes further discussion of these issues, and will continue to observe the progression of the Bill with interest. Should you have any queries in relation to this submission, please contact Ian Primrose, Chief Executive Officer, on 02 6205 0779.

Yours sincerely,

Paul Baxter
Senior Commissioner
1 August 2005