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2 August 2005

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

Dear Mr Hallahan

Inquiry into the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005

TTF Australia (TTF) appreciates the opportunity to make a submission to the Senate Committee's inquiry into the provisions of the Trade Practices Amendment (National Access Regime) Bill 2005.

By way of background, TTF is a national, member-funded CEO forum, advocating the public policy interests of the 200 most prestigious corporations and institutions in the Australian transport, property, tourism and infrastructure sectors. TTF's membership embraces significant owners, builders, financiers and operators of infrastructure in Australia.

The main provisions contained in the Trade Practices Amendment Bill 2005 include a small number of amendments that implement new policy, with the majority of amendments being procedural in nature.

The procedural matters proposed are about the imposition of timeframes on access decisions, increased public consultation processes, the publication of decisions and increased avenues of appeal. These amendments will improve transparency and accountability in the access decision making process and are supported by TTF.

The main provisions of the Bill which have policy implications and warrant further consideration include the insertion of an objects clause, changes to the declaration criteria and the introduction of pricing principles.

TTF supports the proposal to insert an objects clause that promotes the economically efficient operation, use of and investment in infrastructure, and that the proposed clause must be taken into account in the access decision making process.

However, TTF recommends that the objects clause be amended to include a provision that clarifies the circumstances under which Part IIIA should apply. 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 be only considered as a last resort. This is consistent with the

goal of the national access regime which is designed to supplement the process of commercial negotiation. 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.

Reliance on regulatory mechanisms should therefore be applied where a market failure has resulted and requires correction. This is also consistent with the approach of the National Competition Council which operates under the presumption that access regulation is intrusive[1]. By clarifying the circumstances in which an access declaration may be sought, TTF considers that such a provision would provide greater certainty to both access providers and access seekers, and encourage commercial negotiation. It would be inappropriate for access seekers to go straight to Part IIIA when there are strong incentives for access providers to agree to a commercially negotiated outcome (because of the threat of price regulation).

This recommendation is also consistent with the proposal that declaration of a service cannot be made unless access to the service results in a 'material increase in competition'. TTF supports this amendment.

TTF notes the proposal that the ACCC must consider a set of pricing principles when arbitrating access disputes and considering access undertakings. The Bill suggests that the proposed pricing principles would be the same as those contained in the Government's response to the Productivity Commission's Review of the National Access Regime. As such,

> '…regulated access prices should 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'.

TTF recommends that the proposed pricing principles be amended so as to account for circumstances where essential infrastructure providers, operating under significant capacity constraints, may apply demand management pricing practices that may generate revenues that exceed production costs.

It is considered appropriate that infrastructure providers may derive competitive returns on the investment of their capital and should be allowed to operate their facilities accordingly. 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.

An older facility, whose value has been depreciated by a pricing regulator, might never have the incentive to expand to meet current demand or accommodate new market entrants. This ultimately inhibits competition and appeared to be at the root of difficulties with the Dalrymple Bay Coal Loader.

Abilities for market driven pricing or for pricing to be used as a demand management tool must be provided, and 'pricing regulation' should be viewed in ways other than 'price setting' (which has been the Australian experience to date).

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[1] National Competition Council (2002) The National Access Regime: A Guide to Part IIIA of the Trade Practices Act 1974, Part A Overview, p. 6, para 2.12.

We wish the Senate Committee well in its work. TTF Australia is more than willing to discuss further its concerns with the Committee should this be sought. Please do not hesitate to contact either myself or Peter Staveley, National Manager Infrastructure and Investment (02 9240 2014) if we can assist you further.

Yours sincerely

CHRISTOPHER BROWN
Managing Director & CEO