

1996

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TRADE PRACTICES AMENDMENT
(INDUSTRY ACCESS CODES) BILL 1996

EXPLANATORY MEMORANDUM

(Circulated by authority of the Treasurer, the Honourable Peter Costello, MP)



TRADE PRACTICES AMENDMENT (INDUSTRY ACCESS CODES) BILL 1996

Outline

The primary purpose of the Bill is to simplify and streamline the procedures for approving access arrangements to infrastructure services in network industries. The Bill will amend the *Trade Practices Act 1974* (the Principal Act) to incorporate a general industry access code approval process as a basis for access undertakings in network industries.

The Principal Act currently includes provisions whereby third parties can seek access to services provided by essential infrastructure facilities of national significance. These provisions are an important feature of Australia's national competition policy reforms. They promote competitive markets, in order to improve efficiency and service delivery in infrastructure industries such as electricity and gas.

Under the Principal Act a service provider can volunteer to give the Australian Competition and Consumer Commission (the Commission) an access 'undertaking' which sets out the terms and conditions on which the service provider will offer access to any third party. The Commission must publish the proposed undertaking and go through a public consultation process before accepting each undertaking.

In network industries, such as electricity, the emerging pattern is for an industry code to be developed governing access arrangements within the industry which will form the basis of undertakings to the Commission by individual service providers. Under this approach, the Principal Act currently requires the Commission to undertake multiple public consultation processes - one in relation to the access code, if it is necessary to authorise the code, and others in relation to the access undertakings of individual service providers.

The absence of a single access code approval process for network industries in the Principal Act leads to two principal shortcomings. Firstly, the unnecessary duplication of the public consultation process is an inefficient way of processing access undertakings in network industries and runs the risk of unduly delaying progress towards more competitive infrastructure industries. Secondly, it may be difficult for the Commission to assess whether separate access undertakings will achieve coherent industry-wide access arrangements.

The Bill will address these shortcomings by allowing acceptance of an industry-wide access code with a single public consultation process. Industry participants will be able to develop an access code for their industry. The access code would set out details about access for the industry and be approved by the Commission after public consultation. Undertakings from individual access providers which conform with the access code could then be approved by the Commission without a further public consultation process, thereby reducing the burden on industry and the Commission. Moreover, the Commission will be able to consider whether an undertaking is in accordance with the industry access code, which should enhance the coherence of the industry-wide access arrangements. Access codes can be prepared by an industry body which, in each case, will be prescribed in regulations made for this purpose.

The amendments also include a provision to preserve the integrity of the competitive conduct rules and authorisation provisions of the Principal Act. The Bill provides that the access provisions in the Principal Act will not affect liability of the relevant parties for contraventions of the competitive conduct rules in the Principal Act.

Financial Implications

The cost to revenue of the proposed amendments is expected to be nil.

Notes on clauses and items

Part 1 - Preliminary

1. This part sets out the preliminary framework for the operation of the Bill.

Clause 1: Short Title

2. This clause specifies the short title of the *Trade Practices Amendment (Industry Access Codes) Act 1996* (the Act).

Clause 2: Commencement

3. This clause provides that the Act is to commence on the date it receives the Royal Assent.

Clause 3: Amendments

4. This clause amends the Principal Act in accordance with the applicable items in Schedule 1.

Part 2 - Schedule 1 - Amendments to the Principal Act

Item 1: Definitions (Amendment to section 44B)

5. This item amends section 44B of the Principal Act to include a definition for 'access code'.

Item 2: Access undertakings by providers (New paragraph 44ZZA(3)(da))

6. Sub-section 44ZZA(3) of the Principal Act lists a range of factors that the Commission must consider before exercising its discretion to accept an access undertaking. This item amends sub-section 44ZZA(3) to provide that, in addition to the existing factors that the Commission must consider, the Commission must also have regard to whether the undertaking is in accordance with any relevant access code - new paragraph 44ZZA(3)(da). In light of the interdependence of facilities in network industries, new paragraph 44ZZA(3)(da) will allow the Commission, where appropriate, to reject an access undertaking which is inconsistent with coherent industry-wide access arrangements.

Item 3: Obligations on Commission (New sub-section 44ZZA(4A))

7. This item amends section 44ZZA of the Principal Act to provide that the Commission may accept an undertaking without first publishing the proposed undertaking and going through a public consultation process, if the undertaking is in accordance with an operational access code. An undertaking would be in accordance with an access code where it applies to services covered by the relevant code and is in accordance with the relevant rules for those services set out in the code.

Item 4: Access codes prepared by industry bodies (New section 44ZZAA)

8. This item amends Division 6 of Part IIIA of the Principal Act to set out a process whereby an industry body (i.e. a body or association, whether incorporated or unincorporated, prescribed by the regulations) may submit an access code to the Commission setting out rules for the provision of access to the services of infrastructure facilities; these rules may, or may not, bind the relevant service providers. If the Commission accepts the code, individual service providers may provide undertakings to the Commission in accordance with the access code, and the Commission may accept those undertakings without the need for further consultation.

9. An access code may contain rules for access to one or many services. Further, there may be different rules for different classes of service. These rules may be general (for example, principles) or detailed.

10. An access code must also include an expiry date. The expiry date will enable the Commission and the industry participants to periodically review the access arrangements to ensure that they remain appropriate.

11. The Commission may accept the access code if it thinks appropriate having regard to:

- (a) the legitimate business interests of service providers who might give undertakings in accordance with the code;
- (b) the public interest;
- (c) the interests of all persons who might want access to the service (or services) covered by the code;
- (d) whether access is already the subject of an access regime;
- (e) any other matters specified in regulations; and
- (f) any other matters that the Commission thinks are relevant.

12. Before accepting the access code, the Commission must publish the access code and invite people to make submissions within a specified time. The Commission must consider all submissions which it receives within that time.

13. There is no obligation on the Commission to accept the access code. If the Commission does so, the access code comes into operation at the time the Commission accepts it. The industry body may, with the Commission's consent, withdraw or vary the access code at any time. (A code may itself contain mechanisms providing for variation with the consent of the Commission.) If the industry body that gave the access code has ceased to exist (for example, due to amalgamation), the replacement body prescribed by the regulations may, with the Commission's consent, withdraw or vary the access code at any time.

Item 5: Register of access undertakings and access codes (Amendment to section 44ZZC)

14. This item amends section 44ZZC of the Principal Act to provide that the Commission is required to maintain a public register of all access undertakings and access codes accepted by the Commission, and variations to them.

Item 6: Operation of Parts IV and VII not affected by Part IIIA (New section 44ZZNA)

15. This item amends Division 8 of Part IIIA of the Principal Act to provide that the access provisions under Part IIIA of the Principal Act do not affect the operation of Parts IV (competitive conduct rules) and VII (authorisation provisions) of the Principal Act. If an access arrangement set out in a code or undertaking contains anti-competitive terms, it will still be subject to the operation of Part IV and Part VII of the Principal Act. Similarly, the operations of industry bodies in formulating access codes will be subject to the competitive conduct rules unless authorised or otherwise specifically excepted from the competitive conduct rules.

