

1997

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

TRADE PRACTICES AMENDMENT
(INDUSTRY ACCESS CODES) BILL 1996

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and New Clauses to be Moved on Behalf of the Government

(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 facilitate reforms in network industries where a co-regulatory approach, as an alternative to direct regulation, is being used to implement pro-competitive market structures.

This approach, which is being pursued in the electricity industry, involves the development of a code of conduct by industry participants and governments setting out market rules, including rules about access to network infrastructure. It is envisaged that network operators will offer access undertakings to the Australian Competition and Consumer Commission (the Commission) setting out obligations in relation to network access. These undertakings will provide for the application of the access rules set out in the code to network services provided by network operators.

The Bill, and these amendments to the Bill, will amend the *Trade Practices Act 1974* (the Principal Act) to provide a legal framework for this approach to access regulation. In particular, the Bill sets out a process whereby the Commission can accept access codes, following public consultation. In order to streamline the establishment of access arrangements, the Bill also provides that once the Commission has accepted an access code, it can accept access undertakings in accordance with the code without the need for further public consultation.

Since the Bill was introduced, it has become apparent that there are some shortcomings with the Principal Act which would prevent implementation of this approach to access regulation. Firstly, the Principal Act requires an undertaking to set out a high level of detail about the terms and conditions of access. Accordingly, an undertaking cannot include a maximum price or a formula with factors which are re-set from time to time. Inclusion of highly detailed terms and conditions about access may be undesirable and impractical in certain network industries, such as the electricity industry, where an industry wide approach to access is to be adopted. Secondly, the Principal Act does not enable an access provider to confer power on the Commission to make decisions about access issues pursuant to an undertaking. For example, in the case of access to the national electricity grid, it is envisaged that undertakings will provide for the Commission to make decisions which will affect the price for access in accordance with criteria set out in the undertakings.

The amendments to the Bill will address these shortcomings by relaxing the level of detail required in an access undertaking; the appropriate level of detail will be determined by the Commission and access provider on a case-by-case basis. Further, the amendments will enable access providers to confer power on the Commission to make decisions in connection with access. The undertaking would set out how the Commission is to make its decisions, along with other relevant ancillary matters. In this regard, an undertaking could confer on the Commission a role that is similar to its role under Part IIIA of the Principal Act in relation to 'declared' services, should an access provider choose to give the Commission such a role.

Financial Implications

These amendments will remove a legislative obstacle to implementation of the electricity reforms which, together with the gas reforms agreed by the Council of Australian Governments in February 1994, have been estimated by the (former) Industry Commission to lead to an increase in annual Gross Domestic Product of \$5.8 billion.

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

NOTES ON AMENDMENTS

Amendment 1: Access undertakings by providers (New subsection 44ZZA(1))

1. This amends subsection 44ZZA(1) of the Principal Act to substitute a new provision. The amendment removes the requirement for an undertaking to include 'details' about the terms and conditions of access, thus introducing greater flexibility. The amendment does not mean that the undertaking cannot contain highly detailed terms and conditions; rather, it means that the Commission can accept less detailed undertakings when it thinks it appropriate to do so. The level of detail is a matter for determination by the Commission and access providers on a case-by-case basis.

2. For example, some undertakings might set out specific access terms and conditions (including a set price or menu of prices) whereas others might set out a process for the establishment of individual access contracts (including parameters such as a maximum price set by reference to a formula containing factors which are re-set from time to time). Where the undertaking does not set out all the terms and conditions of access, individual contracts can be used to spell out the access arrangements between providers and third parties (for example, the specific price for access).

3. Although the level of detail required in an access undertaking would be a matter for determination by the Commission and the access provider on a case-by-case basis, the undertaking must set out obligations which can be enforced against the provider. In this regard, the undertaking should be drafted to make it certain what the provider must do or is prohibited from doing.

4. The note to new subsection 44ZZA(1) provides examples of the types of obligations which may be included in an undertaking. This list is not exhaustive, but included by way of illustration. It provides that the undertaking may deal with:

- (a) terms and conditions of access to the service (in general terms or detailed terms);
- (b) procedures for determining the terms and conditions of access to the service;
- (c) an obligation on the provider not to hinder access to the service;
- (d) an obligation on the provider to implement a particular business structure (for example, 'ring fencing' arrangements);
- (e) an obligation on the provider to provide information to the Commission or another person (for example, information to assist in price setting or in conducting arbitrations);
- (f) an obligation on the provider to comply with decisions of the Commission or another person in relation to matters specified in the undertaking (for example, decisions about the access price); and
- (g) an obligation on the provider to seek a variation of the undertaking in specified circumstances (for example, where an access code is varied).

Amendment 2: (New subsection 44ZZA(6A))

5. This amends section 44ZZA of the Principal Act by inserting new subsection 44ZZA(6A), which states that where an access undertaking provides for the Commission to make decisions in connection with access, the Commission must make its decisions in accordance with the undertaking. The undertaking may set out the criteria and procedures by which these decisions are to be made, along with other relevant ancillary matters.
6. For example, in cases where an undertaking sets out procedures for establishing access arrangements, rather than detailed terms and conditions of access, it may be desirable for the undertaking to confer power on an institution or person to resolve disputes and make decisions about access. Similarly, if an undertaking sets out parameters for determining terms and conditions of access (for example, a maximum price), it may be also desirable to confer power on an institution or person to up-date these parameters. Should providers wish to confer certain powers on the Commission, it is necessary for the Principal Act to authorise the Commission to exercise these powers - new subsection 44ZZA(6A) does this, complementing existing subsection 44ZZA(6).
7. The Principal Act does not set out a special regime for enforcement of decisions made pursuant to undertakings. Rather, the general enforcement machinery (section 44ZZJ) will be used. Accordingly, where an undertaking confers certain decision making powers on the Commission or another institution or person, the undertaking should also include an obligation on the part of the provider to comply with those decisions. That way, failure by the provider to comply with a decision would be a breach of the undertaking which could be enforced through section 44ZZJ of the Principal Act.

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