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The Secretary  
Review of the Trade Practices Act  
Department of the Treasury  
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PARKES ACT 2600

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## **Independent Review of Competition Provisions of the Trade Practices Act**

The Australian Pipeline Industry Association (APIA) welcomes this opportunity to contribute to the Review of the Competition Provisions of the Trade Practices Act 1974 (“the Review”). APIA is the peak national body representing the natural gas transmission industry including owners, operators, contractors, engineering and design companies and suppliers of products and services to the pipeline industry.

APIA acknowledges that the Review will not examine Part IIIA of the Trade Practices Act as this was the subject of a Productivity Commission review forwarded to government (including the ACCC and NCC) in early October 2001. However, we understand that administrative arrangements relating to the activities of the ACCC in respect of the various laws under which it has jurisdiction are within the province of the Review.

### **1. Conflict of Interest**

In September 2001 The House of Representatives Standing Committee on Economics, Finance and Public Administration released a report on its review of the ACCC’s Annual Report 1999-2000 (“*Competing Interests: Is there Balance?*”).

This report noted the central role played by the ACCC on competition policy, regulation and consumer protection issues and concluded that the Commission has shown itself to be an effective regulatory body. The Standing Committee was, however, concerned that the ACCC has been subject to considerable criticism for its tactics and has “...*exhibited a dismissive attitude towards criticisms of its actions.*”

It appears to APIA that there is an inbuilt and systemic conflict of interest in the role of the ACCC as the regulator of access to covered (regulated) gas transmission pipelines, given the wider, public role of the ACCC as an end-consumer advocacy body. The APIA is very supportive of the existence of a body to represent the community on consumer issues. However, APIA does not accept that the ACCC can also be an effective access regulator given the requirement under the Gas Code (the specific instrument used to guide regulation of covered transmission pipelines) and Part IIIA of the Trade Practices Act (in the case of assessment of access undertakings for non-declared services [see

section 44ZZA]) for the regulator to achieve a fair balance between (among other considerations) the legitimate business interests of access providers and the interests of customers/potential customers.

The bias in the ACCC's attitude is clear from the pronouncements made by officers of the Commission in their very public judgements on the gas transmission sector. Australia's gas transmission industry has less than one-hundred customers in total, all of whom are significant, well informed corporations. This is a materially different situation to the 3.2 million domestic customers who purchase gas from retailers. Over recent years, the ACCC has continued to deliberately confuse the two in its judgements, pronouncements and attitudes to the commercial enterprises it regulates.

From the perspective of a gas transmission company regulated by the ACCC, this bias is most evident (and can be damaging) from the media management techniques adopted on a regular basis by the Commission. The following examples serve to illustrate these concerns:

- Draft determinations of pipeline access arrangements are issued with strongly worded media releases which have the effect of aggrandisement of the ACCC and denigration of the company concerned; this occurs despite the fact that the Draft Determination is but a step in the process; and
- The Commission, particularly the Chairman, have widely asserted in public presentations (and no doubt in their private briefings to government) that regulators permit the pipeline industry to make "...returns on equity between 12 and 13 percent", and that "... the regulated returns that investors in the transmission pipelines are receiving are the equivalent to those received on average from investment in the ASX top 200." These statements are untrue: in order for them to become true, serious balance-sheet adjustment by way of write-down will be required. The Commission is perceived to deliberately ignore the realities of the transition from public to private ownership, and continues to misinform politicians and the public on this issue.

Over recent weeks the ACCC has proposed a defensive position regarding its continuing, highly intrusive role in regulation of so called "Greenfield" pipelines, with the release of a draft greenfield pipelines guideline. Against the background of the Productivity Commission's review of the National Access Regime (seen by the ACCC but not APIA) we are not at all surprised by the timing of the ACCC in its actions. However, APIA's underlying concerns on impediments to efficient investment have not been addressed and the ACCC's approach has simply crystallised our concerns regarding their motives and attitudes towards the gas transmission sector.

## **2. ACCC Role is to Apply, not Develop, Policy**

Over recent years the ACCC has sought to take a proactive, well resourced and very self-serving role in the development and modification of government settings relating to

energy and competition policy, notwithstanding the fact that they have been entrusted through legislation to implement that policy in an unbiased fashion.

The policy development and policy justification role that the ACCC has adopted in respect of the Productivity Commission's Review of the National Access Regime, the CoAG Energy Market Review and other less publicised, but equally important processes, is inappropriate given the primary role of the ACCC in implementing current competition legislation.

APIA believes that the objectives and process for regulations should be specified by government, not the ACCC, and that the regulator should focus on applying these policy decisions.

### **3. Transparency and Accountability**

In order to improve the transparency and accountability of regulation, and to restore industry faith in the process, APIA believes there is scope and merit in moving towards:

1. ensuring that the consumer advocacy role rests in a body other than the economic regulatory agency;
2. a Tribunal Based regulatory model; and
3. Terms of Reference for the regulatory function which ensure:
  - A business focus in regulatory performance, including adherence to business principles and behaviours;
  - A genuine regulatory balance between the competing interests of regulated business and their customers;
  - Regulatory attitudes that are broad, flexible, practical and thinking;
  - A broader focus on national interest issues such as infrastructure investment and re-investment;
  - Reasonable behaviour, eg in relation to media particularly in the timing of draft decisions;
  - An open and accessible panel based process (eg including legal, economic and independent industry expertise);
  - An effective ability to appeal on both law and merit; and
  - An open and non-dismissive approach in responding to issues raised, eg in relation to consultancy papers relied on the regulator in framing detailed approaches to regulation.

### **4. Funding**

A number of years ago there was a Budget measure for the ACCC to secure part of its funding for regulation activities from the industry it regulated. This measure was subsequently withdrawn and, entirely appropriately, the ACCC's costs in performing its various functions are borne from consolidated revenue.

APIA notes that ACCC costs to the Budget continue to rise and it is therefore possible that government may seek to reintroduce some form of “user pays” for selected ACCC functions.

APIA notes that “user pays” funding arrangements have been implemented in respect of gas regulation in Western Australia. Under this “model” arrangement (which may be seen by some as having merit by reducing Budget impacts at the same timing allowing regulatory costs to escalate) the experience of pipeline companies regulated in Western Australia has been that costs can neither be understood nor challenged, there is no appropriate mechanism to justify regulatory costs and there is no guaranteed ability to pass on such costs to the beneficiaries of regulation (ie customers).

APIA contends that such a system is untenable in Western Australia or elsewhere and the Review should recommend that the ACCC’s costs continue to be borne from consolidated revenue.

## **5. Conclusion**

APIA has made submissions to various reviews regarding the adverse implications of current regulatory attitudes to pipeline development in this country. Whilst some of these concerns can be directed at the regulatory framework itself, it is the interpretation and application of these frameworks, including by the ACCC, that has become a dominant concern. It is therefore critical not only that appropriate regulatory frameworks are developed, but also that the appropriate process and bodies are established to ensure that the regulator applies the framework correctly and in an unbiased, non-dismissive manner.

APIA would be pleased to elaborate on any aspect of this submission.

Yours sincerely

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