NATIONAL
COMPETITION
COUNCIL

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2009-2010

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The National Competition Council

The National Competition Council was established on 6 November 1995 by the *Competition Policy Reform Act 1995* following agreement by the Australian Government and state and territory governments. It is a federal statutory authority which functions as an independent advisory body for all governments on third party access regulation. The Council's aim is to 'improve the well being of all Australians through growth, innovation and rising productivity, and by promoting competition that is in the public interest'. Information on the National Competition Council, its publications and its current work program can be found on the internet at www.ncc.gov.au or by contacting NCC Communications on (03) 9285 7474.

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Office of Council President

27 August 2010

The Honourable Wayne Swan MP
Treasurer
House of Representatives
Parliament House
Canberra ACT 2600

Dear Treasurer

In accordance with section 29O of the *Trade Practices Act 1974* the National Competition Council is pleased to present you with its fifteenth annual report covering the Council's operations for the year 2009-10.

Yours sincerely

David Crawford
President

Doug McTaggart
Councillor

Rod Sims
Councillor

Virginia Nickey
Councillor

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Abbreviations

AASB	Australian Accounting Standards Board
ACCC	Australian Competition and Consumer Commission
ANAO	Australian National Audit Office
APT	APT Pipelines (NSW) Limited
ARM Committee	Audit and Risk Management Committee
ATSI	Aboriginal or Torres Strait Islander
CIRA	Competition and Infrastructure Reform Agreement of 10 February 2006
COAG	Council of Australian Governments
coal rail network	The rail network comprising the Blackwater, Goonyella, Moura and Newlands railway facilities in Queensland
Council	National Competition Council (see also NCC)
CPA	Competition Principles Agreement
CSS	Commonwealth Superannuation Scheme
FMA Act	*Financial Management and Accountability Act 1997*
FMOs	Finance Minister's Orders
Full Court	Full Court of the Federal Court of Australia
GST	Goods and Services Tax
Hilmer Committee	Independent Committee of Inquiry into a National Competition Policy (Chairman: Professor F. Hilmer)
ICT	information and communications technology
National Access Regime	The generic access regime in Part IIIA of the *Trade Practices Act 1974*
NCC	National Competition Council
NCP	National Competition Policy
NGL	National Gas Law
NGL criterion (a), NGL criterion (b), NGL criterion (c) and NGL criterion (d)	The pipeline coverage criteria (section 15 of the National Gas Law)
NGR	National Gas Rules
NQBE	North Queensland Bio-Energy Corporation
Pacific National	Pacific National Pty Limited
Part IIIA	Part IIIA of the *Trade Practices Act 1974*
Pilbara railway reviews	Australian Competition Tribunal reviews of the Treasurer's decisions (including a deemed decision) on applications for the declaration of railway services in the Pilbara region of Western Australia provided by the Goldsworthy Railway, Mt Newman Railway, Robe Railway and Hamersley Rail Network

PC	Productivity Commission
PSS	Public Sector Superannuation Scheme
PSSap	PSS accumulation plan
QCA	Queensland Competition Authority
QCLNG	QCLNG Pipelines Pty Ltd (a subsidiary of BG Group / QGC Limited)
QR	QR Limited
Queensland Rail Access Regime	The third party access regime established under Part 5 of the *Queensland Competition Authority Act 1997* and the *Queensland Competition Authority Regulation 2007*
SES	Senior Executive Service
Sydney Airport (No 1)	*Re Virgin Blue Airlines Pty Limited* [2005] ACompT 5
Sydney Airport (No 2)	*Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146)
TPA	*Trade Practices Act 1974*
TPA Amendment Act	*Trade Practices Amendment (Infrastructure Access) Act 2010*
Tribunal	Australian Competition Tribunal
Western Australian Rail Access Regime	The third party access regime established under the *Railways (Access) Act 1998* (WA) and the R*ailways (Access) Code 2000*
WICA Access Regime	New South Wales access regime for water industry infrastructure services established under the *Water Industry Competition Act 2006* (NSW)

About this report

The role of the National Competition Council (**Council**) is to make recommendations concerning access to infrastructure services under the National Access Regime prescribed in Part IIIA of the *Trade Practices Act 1974* (Cth) (**TPA**) and recommendations and decisions under the National Gas Law (**NGL**) contained in the Schedule to the *National Gas (South Australia) Act 2008*.

In the Treasury Portfolio Budget Statements 2009-10 the Council provided information on its strategic direction, outcome and measures for assessing its performance. The Council's outcome is below.

> Outcome
>
> Competition in markets that are dependent on access to nationally significant monopoly infrastructure, through recommendations and decisions promoting the efficient operation of, use of and investment in infrastructure

Section 29O of the TPA requires the Council to report annually on its operations within 60 days of the end of each financial year. The report must also address:

- the time taken by the Council to make a recommendation on any application under section 44F (applications for a recommendation on the declaration of a service), 44M (applications for a recommendation on the certification of a state or territory access regime as an effective access regime) or 44 NA (applications for extension of a decision that a state or territory regime is an effective access regime) of the TPA
- any court or Tribunal decision interpreting the definition of 'service' (an exclusion from declaration to do with production processes) or any of the criteria for declaration in section 44H(4) of the TPA
- any matter the Council considers has impeded the operation of Part IIIA from delivering efficient access outcomes
- any evidence of the benefits arising from the access (arbitration) determinations of the Australian Competition and Consumer Commission
- any evidence of the costs of, or disincentives for, investment in the infrastructure providing declared services
- any implications for the operation of Part IIIA in the future.

This annual report addresses the Council's operations during 2009-10 and the matters required by section 29O of the TPA.

- Chapter 1 provides the President's review of significant events and actions relevant to the Council during 2009-10.

- Chapter 2 reports on the work undertaken by the Council during 2009-10 in its role of making recommendations to Ministers on applications for declaration and certification and on matters pursuant to the NGL. The chapter also reports on the National Access Regime as required by section 29O(2) of the TPA, and summarises the Council's performance against the key performance measures set out in the Portfolio Budget Statements.
- Chapter 3 provides an overview of the Council's governance arrangements.
- Chapter 4 contains the Council's audited financial statements for 2009-10.

Summary resources for the 2009-10 outcome are tabulated on page 46.

Compliance with the Department of the Prime Minister and Cabinet requirements for annual reports is shown on pages 65-66.

1 President's review

Australia's third party access arrangements

In Australia third party access to monopoly infrastructure services is regulated through the National Access Regime in Part IIIA of the *Trade Practices Act 1974* (Cth) (**TPA**) and through state or territory access regimes. Provisions within the TPA determine which regulatory regime applies in any situation, thus largely avoiding conflicting regulatory requirements.

The National Access Regime applies generally across all of the country.[1] Under the regime, an infrastructure owner may choose to submit an access arrangement to the Australian Competition and Consumer Commission (**ACCC**) for approval. Where the ACCC approves the arrangement, the terms of that arrangement set the basis for access to the relevant services.

Where there is no ACCC-approved access arrangement, a person seeking access to an infrastructure service may apply to the National Competition Council (**Council**) for a recommendation that the designated Minister declare the service. The Council considers such applications against the declaration criteria in the TPA. It must make a recommendation to a designated Minister who decides the application after considering a parallel set of criteria. If the Minister 'declares' a service, then the service is brought within Part IIIA's negotiate-arbitrate arrangements. Under these arrangements service providers and access seekers negotiate access terms with recourse to arbitration by the ACCC where there are disputes.

A state or territory government may enact its own access regimes that govern access to infrastructure services in the relevant jurisdiction. Where a regime is certified as effective (following an application to the Council and recommendation to and decision by a Minister), then the regime governs access to the relevant service and declaration of the service is not available.

Third party access to natural gas transmission and distribution pipeline systems is regulated under the National Gas Law (**NGL**) and National Gas Rules (**NGR)**.[2] Under the NGL the Council makes recommendations on whether particular natural gas pipeline systems should be subject to access regulation (covered), recommendations on whether 'greenfield' pipelines should have an exemption from coverage, determinations on whether covered pipelines should be subject to full or light regulation and decisions on the classification of pipelines.

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1 Except access to telecommunications infrastructure which is regulated at a national level under Part XIC of the TPA.

2 The NGL and NGR involve cooperative legislative arrangements under which South Australia enacted a state access regime for natural gas pipelines which is mirrored in other states and territories. The state access regimes which make up the NGL have not however been submitted for certification.

This review provides a summary of the Council's work during 2009-10 and outlines key issues arising from that work. More detail is provided in chapter 2 of this report and on the Council's website at www.nccc.gov.au.

Declaration of infrastructure services

During 2009-10 the Council received new applications for the declaration of five infrastructure services. The Council's consideration of all of these applications was ongoing at 30 June 2010.

On 22 March 2010 the Council received an application for the declaration of the below rail service provided by means of the narrow gauge cane railway in the Herbert River district of northern Queensland. On 1 June 2010 the Council issued a draft recommendation that the service not be declared.

On 19 May 2010 the Council received applications for the declaration of services provided by Queensland Rail's Blackwater, Goonyella, Moura and Newlands railway facilities (coal rail network) in central Queensland. Relevant to the Queensland Rail matters, the Council received on 17 June 2010 an application from the Premier of Queensland for a recommendation that the Queensland Rail Access Regime be certified as an effective regime. Issues relevant to the applications for the declaration of the four services provided by Queensland Rail coal rail network are also relevant to the consideration of the certification application, and the Council is considering all applications in conjunction to the extent possible.

On 8 September 2009 the Council recommended revocation of the declaration made by the Australian Competition Tribunal (**Tribunal**) in *Re Services Sydney Pty Limited* [2005] ACompT 7. The Council's recommendation followed the certification as effective of the New South Wales regime providing for access to the state's water industry infrastructure services. On 1 October 2009, acting on the Council's recommendation, the then Premier of New South Wales revoked the declaration.

On 30 June 2010 the Tribunal made determinations on four applications for review of the Treasurer's decisions (including a deemed decision) on applications for the declaration of various railway services in the Pilbara region of Western Australia (**Pilbara railway reviews**). These decisions had been the subject of past Council recommendations. The Tribunal determined that:

- the Commonwealth Treasurer's deemed decision (of 23 May 2006) not to declare the service provided by the Mt Newman Railway be affirmed
- the Commonwealth Treasurer's decision (of 27 October 2008) to declare the service provided by the Robe Railway for a period of 20 years be varied so that the declaration expires on 19 November 2018

- the Commonwealth Treasurer's decision (of 27 October 2008) to declare the service provided by the Hamersley Rail Network for a period of 20 years be set aside, and
- the Commonwealth Treasurer's decision (of 27 October 2008) to declare the service provided by the Goldsworthy Railway for a period of 20 years be affirmed.

The Tribunal's Pilbara railway determinations raise several matters regarding the application of the National Access Regime. These are discussed later in this annual report.

Most significantly the time that the Tribunal took to decide the Pilbara rail reviews and the range of evidence considered meant that the Tribunal considered essentially different facts than had been before the Council in making recommendations and the Minister in making decisions. The Tribunal itself noted this, stating that although it set aside two Ministerial decisions it did not follow that it disagreed with the decisions, and that the nature of the iron ore industry when the Minister's decisions were taken was significantly different from the industry now.

The Council has previously raised concerns about the time taken to determine declaration applications (NCC 2008, NCC 2009), advocating potential remedies including greater adherence to target time frames and limitations on the scope of merits review of declaration decisions. The Council's concerns and suggested remedies were considered, and implemented to some extent, through the process of enacting the *Trade Practices Amendment (Infrastructure Access) Act 2010)* (**TPA Amendment Act**) (see below). The TPA Amendment Act, enacted in June 2010, imposed binding six month timeframes for recommendations by the Council and determinations by the Tribunal and imposed some restrictions, albeit limited, on new material being introduced at the Tribunal review stage.

While the changes introduced by the TPA Amendment Act may help to redress timing pressures there is some risk they will prove not to be sufficient. In its Pilbara railway determinations, for example, the Tribunal predicted that a complex case, even if it were to run in the fast lane, would take at the earliest four to five years to complete. The Tribunal's prediction were it to eventuate would suggest a need for more fundamental change—either to enhance the Tribunal's capacity to restrict the time available for reviews or the information provided, or to remove access to *de novo* reviews of declaration decisions—if access issues are to be resolved in commercially meaningful timeframes. In the absence of a *de novo* review, judicial review of declaration decisions would discipline the decision making process without requiring a full reconsideration of matters already properly considered by the Council and Minister.

Aside from this, the Tribunal outlined its approach on several matters governing the mechanics of declaration, including: the assessment of criteria (a), (b) and (f); an incumbent operator's entitlement to use its own facility; the ACCC's capacity to compel an expansion of a facility (the Tribunal considered an expansion to be synonymous with an extension) and the responsibility for paying for such expansions; the scope to review a decision to declare a

service where the service is different from what it was at the time of the declaration; and the protection of contractual rights. The Tribunal also canvassed several issues relating to the mechanics of Part IIIA, some of which it considered warrant further investigation. These matters included: whether the test of whether access is essential or necessary to promote competition might encourage inefficient investment (because a highly inefficient duplication of a facility would have the same competition effect as sharing a facility); the desirability (and mechanics) of a power to compel expansion of a facility; and whether access on a first come first served basis is inequitable.

Matters arising from the Tribunal's Pilbara railway reviews that are relevant to the interpretation or operation of Part IIIA are discussed in chapter 2 of this report.

Part IIIA arose from the recommendation of the Hilmer Independent Inquiry into a National Competition Policy (**Hilmer Committee**) that Australia introduce a legislated right of access to ensure efficient competitive activity where there is strong public interest in ensuring competition without the need to establish any anti-competitive intent on the part of the owner of an essential facility. The Hilmer Committee recommended that Australia introduce a legal framework providing for access that is national in scope and operation (Hilmer Committee 1993).

The Hilmer Committee considered and rejected reliance on the general competitive conduct rules governing the misuse of market power as an alternative to a national access regime. Noting decisions of both the High Court of Australia and the Federal Court of Australia, it considered that unless Australia's competitive conduct rules (in section 46 of the TPA) were amended in some way access would only be available where a firm is able to prove that it has been denied access, or access on reasonable terms, because of a proscribed purpose. The Hilmer Committee saw difficulties in demonstrating a proscribed purpose. It also saw difficulties in the courts determining the terms and conditions, particularly the price, at which access should occur. In this context it recognised that Australian courts have been slow to impose upon parties a regime that could not represent a bargain they would have struck between them (Hilmer Committee 1993, pp 243-4).

Similarly the Hilmer Committee was not convinced of the value of legislating and administering industry-specific access regimes, finding that there are important similarities between access and related issues across the key infrastructure industries. The Hilmer Committee noted that a common legal framework (as Part IIIA is) would offer the benefit of promoting consistent approaches to access issues across the country and would permit expertise and insights gained on access issues to be more readily applied to analogous issues in other sectors.

Notwithstanding that aspects of Part IIIA may warrant investigation and/or ongoing scrutiny (which the Council has discussed later in this report), the Council considers that Part IIIA remains the most effective option for providing for access to the services of certain monopoly facilities on fair and reasonable terms and conditions while minimising uncertainty and delay over access issues. Consistent with the recommendation of the Hilmer Committee, Australia's

experience with Part IIIA is that declaration has occurred only in those few cases where the service is provided by bottleneck infrastructure the use of which is necessary to compete in a related market(s). Necessarily, all such services could not have been identified in 1995 when Part IIIA was enacted (such that those services could have been 'deemed' to be declared). If Part IIIA is repealed then Australia would necessarily rely on options that the Hilmer Committee considered were unlikely to be sufficient.

Certification of state access regimes

Under the TPA state and territory governments may apply to the Council to have their access regimes certified as effective. The certification process involves the Council assessing (and making a recommendation to the Commonwealth Minister on) whether the access regime has an appropriate framework, consistent with the objects of Part IIIA of the TPA, to promote competitive and efficient outcomes. In considering whether to recommend that a regime be certified, the Council must apply as a guide the relevant principles in the Competition Principles Agreement (**CPA**) and have regard to the objects of Part IIIA of the TPA. State and territory regimes take precedence over the National Access Regime where they are certified as effective. The certification process provides certainty as to which access regime will apply in any particular case.

During 2009-10 the Council received two applications for certification. In each case the Council's consideration of the application was ongoing at 30 June 2010.

- On 12 May 2010 the Council received an application from the Premier of Western Australia for a recommendation to the Commonwealth Minister to certify the Western Australian Rail Access Regime established under the *Railways (Access) Act 1998* and the *Railways (Access) Code 2000* as an effective regime.
- On 17 June 2010 the Council received an application from the Premier of Queensland for a recommendation to the Commonwealth Minister to certify the Queensland Rail Access Regime as an effective regime. As noted above, there are parallels between this application and the applications for the declaration of services provided by Queensland Rail's coal rail network.

These two applications arose from commitments under the Competition and Infrastructure Reform Agreement (**CIRA**) of 10 February 2006 (under which Australian governments agreed to submit their access regimes for certification by the end of 2010). There has been considerable recent progress against the CIRA certification timetable (which commits governments to make applications for the certification of existing access regimes by the end of 2010) since the Council's 2008-09 annual report. In that report, the Council noted a need for governments to make greater progress towards the certification of their access regimes. In addition to the two applications before the Council at 30 June 2010, Victoria has discontinued two of its three access regimes following reviews by the state's Essential Services Commission and South Australia has reviewed its ports and rail regimes and is developing applications for certification. The Council is however yet to receive state and

territory applications for the certification of the coordinated access regimes that apply to energy infrastructure and understands that they may not proceed. In a sector where regulatory certainty has received considerable emphasis, it would be unfortunate if governments do not seek certification of their energy access regimes. Gaining certification would put beyond doubt that declaration under Part IIIA would not be available.

On 13 August 2009 the Commonwealth Minister for Competition Policy and Consumer Affairs decided to certify the New South Wales access regime for water industry infrastructure services as effective for 10 years. The Minister's decision followed a Council recommendation (made on 11 May 2009) that he make such a decision. As noted above, following the Minister's decision the Council made a recommendation to the then Premier of New South Wales that he revoke the declaration pursuant to the decision of the Tribunal in *Re Services Sydney*, a recommendation that the then Premier took up on 1 October 2009.

Amendments to the *Trade Practices Act 1974* to streamline the declaration process

The Council in previous annual reports expressed concern that delays in the process for considering applications of access to monopoly infrastructure were impeding the operation of the National Access Regime and recommended consideration of a series of measures to address these concerns. The Government announced on 7 April 2009 proposed amendments to the TPA, including several in response to the Council's suggestions.

The Government introduced the Trade Practices Amendment (Infrastructure Access) Bill 2009 into the Federal Parliament on 29 October 2009. The Bill gave effect to provisions of the CIRA and introduced other measures to increase regulatory certainty and streamline administrative processes associated with the National Access Regime. After consideration by the Senate Economics Committee and subsequent amendment, the TPA Amendment Act was enacted on 24 June 2010. The TPA Amendment Act came into force on 14 July 2010.

Key changes introduced by the TPA Amendment Act relevant to the Council's work include:

- the imposition of binding time limits on regulatory processes—generally of 180 days—to apply for the delivery of recommendations by the Council and for decisions by the ACCC and the Tribunal
- provision that if a designated Minister fails to make a decision within the required period of 60 days on an application for certification, then the Minister will be deemed to have made a decision in accord with the Council's recommendation
- limiting the information that may be put before the Tribunal to information that was before the original decision maker, although the Tribunal has the ability to seek additional information where it sees fit
- provision for binding 'no coverage' rulings for new infrastructure where the infrastructure would not meet one or more of the declaration criteria in the TPA

- streamlining of the criteria for declaration by removing the health and safety declaration criterion (sections 44G(2)(d) and 44H(4)(d) of the TPA) and clarifying that the criterion regarding effective access regimes (criterion (e) in sections 44G(2)(e) and 44H(4)(e) of the TPA) relates only to regimes that have been certified as effective under Part IIIA, and
- reform of the administrative processes of the Council, the ACCC and the Tribunal to improve timeliness, including to enable the Council to take decisions by circulation of papers.

A proposal that deemed decisions in relation to declaration applications (where a designated Minister fails to make a decision within the required period of 60 days on an application for declaration) follow the Council's recommendation did not proceed. As a result declaration applications are deemed to have been declined in all cases where a Minister fails to make a decision within the 60 day period.

Several of the 2010 amendments—in particular the introduction of binding time limits on regulatory processes and limits on the information that may be put to the Tribunal—are aimed at achieving decisions on applications for declaration within commercially meaningful timeframes, which the Council considers key to Part IIIA achieving its intended objectives. The Council will scrutinise future declaration matters to gauge the effectiveness of these changes. As noted above, should the changes prove insufficient there would be a need for more fundamental change, potentially including removing access to *de novo* review of Ministers' access decisions.

Access regulation under the National Gas Law

The Council considered three applications in 2009-10 relating to the regulation of access to natural gas pipelines under the NGL and NGR. All matters were dealt with within the timeframes specified in the NGL.

- On 2 October 2009 APT Pipelines (NSW) Pty Limited made an application for a decision to apply light regulation to the covered Central West Pipeline, which transports gas from Marsden on the Moomba Sydney Pipeline mainline to Forbes, Parkes, Narromine and Dubbo in the central west of New South Wales. On 19 January 2010, the Council made a decision in favour of the application.
- On 19 January 2010 QCLNG Pipeline Pty Ltd made an application for a 15 year no-coverage determination for its proposed 'QCLNG Pipeline', to run from the Surat Basin to Curtis Island in Queensland. On 5 May 2010 the Council provided its final recommendation to the Commonwealth Minister for Resources and Energy recommending that the Minister grant a 15 year no coverage determination, which the Minister granted on 15 June 2010.

- On 22 April 2010 Southern Cross Pipelines Australia Pty Ltd made an application for a decision to apply light regulation to the covered Kalgoorlie to Kambalda Pipeline in Western Australia. On 29 June 2010 the Council made a decision in favour of the application.

David Crawford
President

2 The National Access Regime and the National Gas Law

The National Access Regime, established by Part IIIA of the *Trade Practices Act 1974* (**TPA**), provides a legal avenue through which an access seeker can gain access to the services provided by an infrastructure facility on commercial terms and conditions. It is a mechanism that is available when attempts at commercially negotiated access are unsuccessful.

The regime provides an important means of promoting competition in markets where the ability to compete effectively is dependent on being able to use particular monopoly infrastructure. At the same time the regime ensures that infrastructure owners receive a commercial return and incentives for efficient investment are not affected.

Part IIIA of the TPA provides three alternative pathways for providing third parties with access to infrastructure services. These are:

- declaration, which provides access seekers with a legal right to negotiate terms and conditions for access with the service provider of a declared service
- an access regime established by a state or territory that is certified as effective, or
- an access undertaking made by a service provider and accepted by the Australian Competition and Consumer Commission (**ACCC**).

Declaration is not available where the relevant service is subject to a state/territory access regime that has been certified as effective or an access undertaking accepted by the ACCC.

Applications for declaration and certification are made to the Council, which assesses the application using a public consultation process and makes a recommendation to a decision-making Minister. The public consultation process involves the Council publishing applications for public comment, making a draft recommendation on the basis of its own research and public submissions and releasing that recommendation for public comment, before making a final recommendation to the Minister. The Council also meets as necessary with applicants and interested parties. The Council must use its best endeavours to make a recommendation on applications for declaration and certification applications within six months[3] from the date it receives the application.

The Council must consider an application for declaration of a service against the declaration criteria (set out in section 44G(2) of the TPA) and other prescribed factors in Part IIIA of the TPA. Based on its assessment the Council must make a recommendation to the designated Minister who decides using parallel criteria whether to declare or not declare the service to which access is sought. If the designated Minister makes a decision to declare the service,

[3] Prior to the *Trade Practices Amendment (Infrastructure Access) Act 2010* the Council was required to use its best endeavours to make recommendations on declaration applications within four months.

then access seekers acquire a legal right to negotiate access with the service provider. If necessary, the ACCC, through arbitration, will determine disputes over the terms and conditions of access.

Applications for the certification of a state or territory access regime are made by the responsible Minister of a state or territory. The Council must consider an application against the guiding principles in clauses 6(2) to 6(5) of the Competition Principles Agreement (**CPA)** and also the objects of Part IIIA, making a recommendation on the application to the Commonwealth Minister. The 'clause 6' principles are designed to assess whether a regime has an appropriate framework to promote competitive and efficient outcomes and address broadly:

- the scope of an access regime
- any interstate issues concerned with an access regime
- a negotiation framework for determining access
- dispute resolution, and
- promotion of efficiency.

The Council has a similar third party access role under the National Gas Law (**NGL**) and National Gas Rules (**NGR**), whereby it makes recommendations to the relevant Minister(s) on the coverage (regulation) of natural gas pipeline systems. Under the NGL, the Council also has the tasks of:

- deciding the form of regulation of natural gas pipeline systems (light or full regulation)
- classifying pipelines (as transmission or distribution), and
- recommending in relation to various exemptions for greenfields gas pipelines.

The Council's work on declaration, certification and National Gas Law matters during 2009-10[4]

At the commencement of 2009-10, the Council had no declaration, certification or NGL matters on hand. However the Council was continuing to be involved in the Tribunal's reviews of four decisions on the declaration for third party access of the services of various iron ore railways in the Pilbara region of Western Australia. The Tribunal made determinations on these review applications on 30 June 2010.

During 2009-10 the Council received new applications for the declaration of five infrastructure services and new applications for the certification of two state access regimes.

[4] Detailed information on all access matters considered by the Council is available on the Council's website at www.ncc.gov.au.

The Council's consideration of these matters was ongoing at 30 June 2010. The Council also recommended the revocation of a declaration during 2009-10.

In relation to its work under the NGL, the Council received new applications for two determinations that a gas pipeline be subject to light regulation and one application for a 15 year no-coverage determination for a proposed pipeline. These matters were finalised in 2009-10.

Legislative change and case law developments during 2009-10 have changed the way that the Council must assess applications for declaration against the declaration criteria. On 24 June 2010 the Parliament enacted the *Trade Practices Amendment (Infrastructure Access) Act 2010* (**TPA Amendment Act**). Among other things the TPA Amendment Act removed the requirement that an application for declaration be assessed against the criterion that access to the relevant service can be provided without undue risk to human health and safety (criterion (d))[5] and amended the requirement that an application be assessed against the condition that access is not already the subject of an effective access regime (criterion (e)), by requiring that the test of effectiveness be that the regime is certified.

In addition, the Tribunal's determinations on the applications for review of the Pilbara rail matters have clarified the application of some of the declaration criteria and concepts within Part IIIA. These matters are discussed in the Council's report under section 29O of the TPA.

Declaration matters

Herbert River cane railway

On 22 March 2010, the Council received an application from North Queensland Bio-Energy Corporation Limited (**NQBE**) for declaration of the below rail service provided by means of the narrow gauge cane railway owned by Sucrogen (Herbert) Pty Ltd (formally CSR (Herbert) Pty Ltd) in the Herbert River district of northern Queensland. NQBE sought declaration to enable it to operate its own trains and rolling stock to transport sugarcane (and potentially other feedstock) to its proposed new processing factory/mill to be constructed near Ingham.

On 1 June 2010 the Council issued a draft recommendation for public consultation, recommending that the service not be declared. While accepting that the cane railway is important to cane growers and processors in the Herbert River district the Council's preliminary view was that the cane railway does not meet the national significance criterion (section 44G(2)(c) of the TPA). The Council noted for example that although the cane railway comprises over 500 kilometres of track in total, the actual reach of any stretch of track is significantly less (approximately 60 kilometres) and that while the railway carries virtually all

[5] Issues relating to health and safety are of course important but these are more appropriately addressed in the negotiation or determination of appropriate access terms and conditions than in relation to a declaration application.

the cane produced in the Herbert River district, this amounts to only about 13 per cent of Australian sugar production (or 0.09 per cent of Australian merchandise exports).

The Council was also not satisfied that access would not be contrary to the public interest (section 44G(2)(f) of the TPA). In relation to the public interest, the Council considered that access to the cane railway would lead to additional operating costs and regulatory costs. While in most cases such costs are outweighed by the gains from increased competition in dependent markets, in this case all parties accepted that, at least in the short term, output of cane in the Herbert River district would likely not increase if the service is declared (although a greater proportion of the proceeds from processed cane might accrue to growers at the expense of processors). In such circumstances the Council found in its draft recommendation that access may be contrary to the public interest, with the likely ongoing costs from access regulation exceeding the likely benefits from increased output.

At 30 June 2010 the Council's consideration of this matter was ongoing.

Queensland Rail's coal rail network

On 19 May 2010, the Council received applications from Pacific National Pty Limited (**Pacific National**), a wholly owned subsidiary of Asciano Limited for the declaration of four services provided by the Blackwater, Goonyella, Moura and Newlands railway facilities (**coal rail network**) in central Queensland. These railways are all owned by QR Limited (**QR**). Pacific National sought declaration of the services for the purpose of hauling coal from mines in the vicinity of the four railway facilities to ports and coal fired power stations.

Pacific National made its applications in the context of the Queensland Government's announcement in December 2009 that QR's existing business was to be separated such that QR's coal and above rail freight business would be publicly listed as a vertically integrated company to trade as 'QR National'. QR Network (a wholly owned subsidiary of QR) is to hold a long-term lease over the central Queensland coal rail network, which includes the infrastructure that provides the services the subject of the declaration applications.

The coal rail network is subject to the third party access regime established under Part 5 of the *Queensland Competition Authority Act 1997* and the *Queensland Competition Authority Regulation 2007* (**Queensland Rail Access Regime**). The Queensland Competition Authority (**QCA**) is the regulatory body responsible for administering the Queensland Rail Access Regime.

On 21 May 2010, the Queensland Government announced its intention to amend the legislation establishing the Queensland Rail Access Regime to strengthen the protections available to access seekers and to give new powers of investigation to the QCA. The proposed amendments, when implemented, will have an impact on the regulation of the services that are the subject of Pacific National's declaration applications. The amendments are intended to remove uncertainty that the public listing of QR Network will remove the coal rail network from the reach of the Queensland Rail Access Regime. The coal rail network is also the

subject of an approved access undertaking which had been due to expire on 31 May 2010 but was extended while the QCA considered a new access undertaking submitted by QR Network. The Council understands that the QCA will make its final determination regarding QR Network's access undertaking in August 2010.

Relevant to this matter, the Council also received an application from the Premier of Queensland for a recommendation to certify as effective the Queensland Rail Access Regime (see discussion under 'Certification matters' below). In the Council's view, issues arising in relation to the declaration applications (in particular as they relate to declaration criterion (e) concerning the existence of an effective access regime) will be relevant to the consideration of the certification application. Accordingly, the Council is considering, to the extent possible, the declaration applications and the Queensland Rail Access Regime certification application in conjunction.

At 30 June 2010 the Council's consideration of these matters was ongoing.

Pilbara railways

At 1 July 2009 the Tribunal had before it four applications for the review of Ministerial declaration decisions. These applications were the:

- application by Fortescue Metals Group Limited for review of the 23 May 2006 deemed decision of the Commonwealth Treasurer to decline the application for access to the service provided by the Mt Newman railway: application for review dated 9 June 2006
- application by Rio Tinto Limited and associated parties for review of the 27 October 2008 decision of the Commonwealth Treasurer to declare the services provided by the Hamersley railway network: application for review dated 13 November 2008
- application by Rio Tinto Limited and associated parties for review of the 27 October 2008 decision of the Commonwealth Treasurer to declare the services provided by the Robe railway: application for review dated 13 November 2008
- application by BHP Billiton Iron Ore Pty Ltd and related parties for review of the 27 October 2008 decision of the Commonwealth Treasurer to declare the services provided by the Goldsworthy railway: application for review dated 14 November 2008 (together **Pilbara railway reviews**).

The Council had made recommendations to the Treasurer and former Treasurer on each of these matters. On 24 March 2006 the Council had recommended that the Mt Newman railway service be declared for 20 years. The then Treasurer (Hon Peter Costello) failed to make a decision on this recommendation within the required 60 days and on 23 May 2006 the application was deemed to have been declined. An application for review of this deemed decision was then lodged by the applicant for declaration. On 29 August 2008 the Council had

recommended to the Treasurer that he declare the services provided by the Hamersley, Goldsworthy and Robe railways each for 20 years. These recommendations were accepted by the Treasurer and the relevant services declared on 27 October 2008. The effect of these decisions was however stayed when applications for review were lodged shortly thereafter.

The Tribunal decided in December 2008 that it would hear and determine all four review applications together. It commenced hearing these matters on 28 September 2009, concluding its hearing of the applications on 26 February 2010 (at that time reserving its decisions). On 9 February 2010 the Tribunal extended the standard period for its decision making to 30 June 2010, announcing on that date it had determined that:

- the Commonwealth Treasurer's deemed decision not to declare the service provided by the Mt Newman Railway be affirmed
- the Commonwealth Treasurer's decision to declare the service provided by the Robe Railway for a period of 20 years commencing on 19 November 2008 be varied so that the declaration expires on 19 November 2018
- the Commonwealth Treasurer's decision to declare the service provided by the Hamersley Rail Network for a period of 20 years commencing on 19 November 2008 be set aside, and
- the Commonwealth Treasurer's decision to declare the service provided by the Goldsworthy Railway for a period of 20 years commencing on 19 November 2008 be affirmed.

The Tribunal stated that although it had set aside two Ministerial decisions, it did not follow that it disagreed with the decisions. It observed that the iron ore industry is a dynamic industry whose operations change rapidly and dramatically, and that the nature of the industry that was before the Minister when the decisions were taken was significantly different from the industry at the time of the review decisions.

While the Pilbara railway declaration matters may be to some degree a 'special case' (the Tribunal's ability to bring on the hearing of the Mt Newman matter was delayed by court challenges) and the recent changes to the TPA (particularly the introduction of binding time limits) may help redress timing concerns, the Council remains concerned about the capacity for complex decisions to be finalised within commercially meaningful timeframes. The Tribunal considered that 'the imposition of time limits on administrative decision-makers will reduce the time a little, but will not address the core problem' and predicted that '[if] a complex case was run in the fast lane the earliest it will still take is 4 to 5 years'.[6] These comments suggest that more fundamental structural change to Part IIIA may be necessary for access issues to be resolved within commercially meaningful timeframes. The Council has addressed this question later in this report under the discussion on impediments to the operation of Part IIIA of the TPA.

[6] In the matter of Fortescue Metals Group Limited [2010] ACompT 2 (30 June 2010) at [1350].

Revocation of the Services Sydney declaration

On 1 October 2009, the then Premier of New South Wales revoked the declaration made by the Tribunal in *Re Services Sydney Pty Ltd* [2005] ACompT 7. This declaration applied to certain services provided by Sydney Water's sewage reticulation network. The Premier's decision was in accord with the Council's recommendation that the declaration be revoked, which the Council had made following the certification of New South Wales's access regime for water industry infrastructure services (**WICA Access Regime**) as an effective access regime (see below in the section on certification matters). The certification of the WICA Access Regime meant that the declaration criterion relating to the existence of an effective access regime was no longer satisfied in relation to the declaration in *Re Services Sydney*.

Certification matters

New South Wales water industry infrastructure services access regime

On 19 December 2008, the Council received an application from the New South Wales Government for a recommendation that its WICA Access Regime (in Part 3 of the *Water Industry Competition Act 2006* (NSW)), applying to certain water and wastewater infrastructure services, is an effective access regime. The Council provided its final recommendation to the Commonwealth Minister on 11 May 2009, recommending that the Commonwealth Minister certify the regime for a period of 10 years. Following an extension to the decision-making period by the Commonwealth Minister for Competition Policy and Consumer Affairs, the Minister on 13 August 2009 decided to certify the regime as effective for 10 years.

Upon establishment, the WICA Access Regime applied to the areas of operation of Sydney Water Corporation and Hunter Water Corporation.[7] At the time of the regime's commencement, the NSW Government deemed certain sewage services—also the subject of the declaration by the Tribunal in *Re Services Sydney*—to be the subject of a coverage declaration under the WICA Access Regime (see above for discussion of the subsequent revocation of the *Re Services Sydney* declaration).

Western Australian Rail Access Regime

On 12 May 2010 the Council received an application from the Premier of Western Australia for a recommendation that the Western Australian Rail Access Regime established under the *Railways (Access) Act 1998* (WA) and the R*ailways (Access) Code 2000* is an effective access regime.

The regime covers the railway network consisting of 5000 kilometres of rail track in the south-west of Western Australia, including the urban (predominantly passenger) network and the non-urban freight network. This generally comprises all standard and narrow gauge track and

[7] The geographic areas subject to the Act can be expanded by regulation.

associated infrastructure west of Kalgoorlie. The regime also covers 280 kilometres of railway owned and operated by The Pilbara Infrastructure Pty Ltd (a subsidiary of Fortescue Metals Group Limited) in the eastern Pilbara. The regime does not cover any other railways located in the Pilbara, or the railway east of Kalgoorlie that is operated by the Australian Rail Track Corporation.

The Council has received five submissions on the application which it is considering in the preparation of its draft recommendation. There will be a further opportunity for public comment following the release of the draft recommendation. The Council will consider all submissions and other information available to it before providing its final recommendation to the Commonwealth Treasurer.

At 30 June 2010 the Council's consideration of this matter was ongoing.

Queensland Rail Access Regime

On 17 June 2010 the Council received an application from the Premier of Queensland for a recommendation that the Queensland Rail Access Regime is an effective access regime. The regime comprises the:

- *Queensland Competition Authority Act 1997* (including the proposed amendments to be made by the Queensland Competition Authority and Other Legislation Amendment Bill 2010)
- *Queensland Competition Authority Regulation 2007* (as amended by the Queensland Competition Authority Amendment Regulation 2010)
- QR Network's Access Undertaking as accepted by the QCA under the provisions of the QCA Act as amended from time to time
- provisions of the *Transport Infrastructure Act 1994* which deal with the organisational governance arrangements for QR Limited (including the proposed amendments to be made by the Queensland Competition Authority and Other Legislation Amendment Bill 2010), and
- the rail safety regime established by the *Transport Infrastructure Act 1994* which will transition to the regime to be established by the *Transport (Rail Safety Act) 2010* when proclaimed later in 2010.

As noted above, because of the parallels between this application and the applications made by Pacific National for the declaration of services provided by QR's coal rail network the Council is as far as possible considering the declaration applications and the certification application in parallel. It has sought public submissions on the certification application, after which it will prepare a draft recommendation for public comment. The Council will then consider any submissions and other information available to it before providing a final recommendation to the Commonwealth Treasurer.

At 30 June 2010 the Council's consideration of the certification application was ongoing.

National Gas Law matters

Access to natural gas transmission and distribution pipeline systems is regulated under the NGL[8] and NGR. Under the NGL the Council makes:

- recommendations to a Minister on whether particular natural gas pipeline systems should be subject to access regulation (covered)
- recommendations to a Minister on the price regulation and greenfield exemptions available under the NGL
- determinations on whether covered pipelines should be subject to full regulation or light regulation and
- decisions on the classification and reclassification of pipelines as transmission or distribution pipelines.

The Council had no applications under the NGL at hand on 1 July 2009. It received three new applications during 2009-10. These sought the application of light regulation to two existing covered pipelines (which are matters on which the Council makes a decision) and a determination providing an exemption from coverage for 15 years for a proposed (greenfield) pipeline (on which the Council makes a recommendation to the relevant Minister).

Light regulation of the Central West pipeline

On 2 October 2009 the Council received an application from APT Pipelines (NSW) Limited (**APT**). APT sought light regulation of the services provided by the Central West Pipeline which transports gas from Marsden on the Moomba to Sydney pipeline to the towns of Forbes, Parkes, Narromine and Dubbo in New South Wales.

The Council followed the standard consultative procedure in the NGR. This included two opportunities for submissions from interested parties: first in response to APT's application and, second, in response to a draft decision of the Council that set out its preliminary views and indicative decision.

The determination of whether or not light regulation should be applied to a pipeline depends in essence on a comparison of the effectiveness and costs of full regulation (which requires an access arrangement to be approved by the Australian Energy Regulator) and light regulation. In this case the Council considered that the light regulation regime is likely to be similarly effective as full regulation in protecting users and other parties that depend on access to the Central West Pipeline. This is because available information on pipeline costs will continue to be relevant. Further the Council considered that the reporting requirements and legislative protections (including the availability of arbitration for disputes) existing within the light regulation regime meant that it would be similar in effect to full regulation. It was also noted that a shift to light regulation is likely to involve material cost savings, at least

[8] Schedule to the *National Gas (South Australia) Act 2008* and Application Acts in all other states and territories.

for the service provider. The Council's view therefore was that light regulation of the Central West Pipeline is consistent with the promotion of the national gas objective.

On 19 January 2010 the Council made a determination in favour of the application the effect of which is that the services provided by the Central West Pipeline remain covered but pursuant to the light regulation regime. This determination came into force 60 business days after 19 January 2010.

Light regulation of the Kalgoorlie to Kambalda pipeline

On 22 April 2010 the Council received an application from Southern Cross Pipelines Australia Pty Ltd for light regulation of the services provided by the Kalgoorlie to Kambalda Pipeline in Western Australia.

The Council released its draft determination on this matter on 1 June 2010 outlining its preliminary view that the pipeline should be subject to light regulation. After an opportunity for public submissions on the draft determination the Council made a final recommendation on 29 June 2010 that the pipeline should be subject to light regulation. This determination will come into force 60 business days after 29 June 2010.

QGC Pipeline 15-year no-coverage determination

On 19 January 2010 the Council received the first application made under the NGL's provisions for greenfields pipelines.[9] The application by QCLNG Pipeline Pty Ltd (**QCLNG**) sought a 15 year no-coverage determination for the proposed QCLNG Pipeline in Queensland, to run from the Surat Basin to Curtis Island.

The NGL allows the proponent of a proposed greenfields gas pipeline to apply for a 15 year no-coverage determination or, in the case of a proposed international transmission pipeline that will bring gas from a source outside of Australia, to apply for a 15 year price regulation exemption. These provisions (known as the 'greenfields pipeline incentives') are intended to promote regulatory certainty for investors and to encourage efficient investment. As the name suggests, a 15 year no-coverage determination for a greenfields pipeline exempts that pipeline from coverage, so preventing the pipeline from being regulated under the NGL for a period of 15 years from the date of commissioning of the pipeline.

A 15 year no-coverage determination may be available for a proposed new pipeline where the Council is satisfied that the pipeline would not meet one or more of the NGL's four 'coverage criteria'. Set out in s 15 of the NGL, the coverage criteria are that:

- access (or increased access) to the pipeline services provided by means of the pipeline would promote a material increase in competition in at least one

[9] These provisions were first enacted in June 2006 under the then *Gas Pipelines Access Law* and were replicated in the NGL when it became law in 2008.

market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline (**NGL criterion (a)**)

- it would be uneconomical for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline (**NGL criterion (b)**)
- access (or increased access) to the pipeline services provided by means of the pipeline can be provided without undue risk to human health or safety (**NGL criterion (c)**)
- access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest (**NGL criterion (d)**).

To obtain a recommendation from the Council in favour of a 15 year no-coverage determination, an applicant must satisfy the Council that one or more of the coverage criteria will not be met. In considering this, the Council must have regard to the national gas objective in the NGL. The national gas objective is to promote efficient investment in, and efficient operation and use of, natural gas services for the long term interests of consumers of natural gas with respect to price, quality, safety, reliability and security of supply of natural gas.

As part of its consideration of an application for no coverage of a proposed pipeline, the Council is required to consider and determine the classification of the pipeline. A pipeline is classified according to whether its primary function is to convey gas to a market (a transmission pipeline) or to reticulate gas within a market (a distribution pipeline). In this matter the Council determined that the proposed QCLNG Pipeline is a transmission pipeline.

In considering this application, the Council followed the standard consultative procedure in the NGR, providing opportunities for submissions from interested parties (on the application and again on the Council's draft recommendation), before making a final recommendation to the Commonwealth Minister for Resources, Energy and Tourism. This recommendation (provided to the Minister on 5 May 2010) was that the Minister make a 15 year no-coverage determination for the pipeline. On 15 June 2010 the Minister granted a 15 year no-coverage determination for the QCLNG Pipeline. The determination, which took effect immediately, continues for a period of 15 years from the commissioning of the pipeline.

In the statement of reasons for his decision the Minister differed with the Council's approach to and conclusion on NGL criterion (b). This criterion involves consideration of whether a pipeline is uneconomic to duplicate. The Council's view in past recommendations has been that the assessment of this criterion largely turns on whether a facility exhibits natural monopoly characteristics and whether it is more efficient from Australia's national interest for the service to be delivered by a single pipeline rather than more than one pipeline. The Council considers that the national gas objective requires that the term 'uneconomic' should be given a broad social (national interest) construction. In this regard it is possible that a single pipeline might be optimal from a social perspective but that for commercial reasons more than one pipeline is built.

In a coverage matter (where the subject of an application is an existing pipeline) the accepted approach[10] is to consider whether the pipeline can meet all foreseeable demand and if it cannot then compare the economics of expanding the pipeline (for example through compression and looping) with constructing an additional pipeline. However, unlike an existing pipeline where the pipeline diameter is necessarily fixed, the diameter of a greenfields (proposed) pipeline is not necessarily a given. Given this, the Council took the view that while a business is free to decide what size and specification of pipeline it chooses to construct, criterion (b) should be evaluated on the basis of whether a single optimally sized pipeline could meet all likely demand. In the case of the QCLNG Pipeline, the Council found evidence that it would be feasible to construct a single larger diameter pipeline (than the pipeline proposed by the applicant) and that such a pipeline would likely accommodate peak demand for the pipeline services at lower cost than two or more pipelines. Accordingly the Council concluded that it would be uneconomic to develop another (optimally sized) pipeline and that therefore criterion (b) was met.

The Council considered that this approach would avoid the (at least theoretical) risk that a proposed pipeline with less capacity than a larger pipeline that might be constructed obtains a no coverage determination (because NGL criterion (b) is not met) whereas a larger optimally sized pipeline does not obtain a no coverage determination because it would be found to be uneconomic to duplicate (NGL criterion (b) is met). The Council considers that such an outcome could create a perverse incentive to undersize pipelines, which would be contrary to the national gas objective.

In the QCLNG matter, the Minister stated that in the context of the national gas objective he had weighed the competing considerations between commercial decisions and the optimal economic scenario that arise when assessing NGL criterion (b). He also stated that in relation to the QCLNG proposal, balancing the commercial considerations and the national interest, he had assessed NGL criterion (b) against the proposed capacity provided by QCLNG. Further the Minister noted that there are a number of other pipelines proposed along similar routes to the QCLNG Pipeline. He concluded that he was not satisfied that it is uneconomic to develop another pipeline to provide the services provided by means of the QCLNG Pipeline.

Although not expressly stated, the Council's recommendation took care not to give credence to an argument that it is not uneconomic to develop another pipeline because other pipelines providing the same or similar services are being developed. The Council has consistently held that criterion (b) (both in the NGL and the TPA) is a test of whether it is uneconomic to develop another pipeline (or facility) from the perspective of Australia as a whole, not from the perspective of an individual firm. In the end however the QCLNG application did not turn on the result of considering NGL criterion (b), as the Council recommended, and the Minister agreed, that NGL criteria (a) and (d) were not met. A failure to meet one criterion is sufficient to allow a no coverage application.

10 *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2, especially at [137].

Relevant legislative and case law developments

Trade Practices Amendment (Infrastructure Access) Act 2010

In previous annual reports the Council indicated a number of areas where the operation of Part IIIA might be improved to enhance the National Access Regime and improve the timeliness, certainty and commerciality of the operation of Part IIIA. After considering this advice and advice from other parties, the Government on 29 October 2009 introduced the Trade Practices Amendment (Infrastructure Access) Bill 2009 into the Federal Parliament.

The Bill contained among other things several reforms to Part IIIA relevant to the operation of the Council, including measures to:

- impose binding time limits on regulatory processes—in general, a period of 180 days to apply for the delivery of recommendations by the Council and for decisions by the ACCC and the Tribunal
- provide that if a designated Minister fails to make a decision within the required period of 60 days, then the Minister will be deemed to have made a decision in accord with the Council's recommendation
- limit merits review to the information submitted to the original decision-maker
- provide for binding 'no coverage' rulings for new infrastructure where the infrastructure would not meet one or more of the declaration criteria in the TPA
- remove the health and safety declaration criterion (sections 44G(2)(d) and 44H(4)(d) of the TPA) and clarify that the criterion regarding effective access regimes (criterion (e) in sections 44G(2)(e) and 44H(4)(e) of the TPA) relates only to regimes that have been certified as effective under Part IIIA, and
- reform the administrative processes of the Council, the ACCC and the Tribunal to improve the timeliness of outcomes.

The Bill was referred to the Senate Economics Committee on 19 November 2009 for inquiry and report. After calling for and considering submissions on the Bill (including from the Council) and conducting a public hearing, the Senate Economics Committee provided a report (on 9 March 2010) supporting the Bill and recommending that it be enacted. However, some Senators made additional comments concerning the ability of the Tribunal upon review to seek and accept new material to supplement that provided to the original decision maker and the proposal to amend the existing arrangement where if the designated Minister fails to make a decision on a declaration recommendation within the statutory time period of 60 days, then a decision is deemed to have been made not to declare the service.

On 15 June 2010, the Government released proposed amendments to the Bill. These provided that the proposed changes to deemed declaration decisions would not proceed (although in relation to certification decisions the amendments did proceed as proposed) and

that the Tribunal would be permitted to request further information by notice where the Tribunal considers such information to be reasonable and appropriate for the purposes of makings its decision on a review under Part IIIA. The TPA Amendment Act containing all other proposed reforms relevant to the Council's work noted above was enacted on 24 June 2010 and came into force on 14 July 2010.

The TPA Amendment Act also introduced a new provision for a person with a material interest in a proposed new infrastructure facility to make an application to the Council for a service provided by the proposed facility to be ineligible to be a declared service. (The ineligible service provision is similar to the 15 year no coverage 'greenfields' incentive available under the NGL to proposed gas pipelines.) For a proposed service to be ineligible, it must be provided by the proposed facility when constructed and must not satisfy at least one of the criteria for declaration. For example if access to a proposed service would not promote a material increase in competition then the service would not satisfy a criterion for declaration (criterion (a)) and the Council would recommend that the service be ineligible to be a declared service. When making a recommendation on an application that a service is ineligible to be a declared service the Council must also recommend how long the decision is to remain in force, which must be a period of at least 20 years.

Assistance to the Council's stakeholders

Guides to declaration and certification

The Council publishes guides to declaration and certification on its website (www.ncc.gov.au). The Council provides a printed copy of the guides upon request.

Guide to the National Gas Law

The Council publishes a guide to its roles and functions under the NGL in four parts:

- Part A – Overview
- Part B – Coverage (including pipeline classification)
- Part C – Light regulation
- Part D – Greenfields incentives

Parts A, B and C of the guide to the NGL were first published in May 2009 and Part D in September 2009.

In February 2010 the Council updated all parts of the guide following the commencement of the National Gas Access (WA) Act 2009 (WA) and the National Gas (South Australia (National Gas Law—Australian Energy Market Operator) Amendment Act 2009 (SA).

Guidance on making applications and submissions

The Council publishes a template for use by parties making an application for the declaration of a service and a guide for making an application for certification of a state or territory access regime.

In January 2010 the Council published a new guide to making a submission on a 15 year no-coverage application.

Bi-monthly newsletter

In June 2009, the Council launched its new bi-monthly newsletter, *Accessible*. It published six editions of the newsletter during 2009-10, in August 2009, October 2009, December 2009, February 2010, April 2010 and June 2010. The newsletter is emailed to interested parties who subscribe and may be downloaded from the Council's website.

Websites

The Council's website contains information on the Council's responsibilities and roles concerning third party access to infrastructure under both the TPA and the NGL. The website aims to provide ready access to:

- information on current applications, including copies of the application and submissions and timing matters
- information on past applications
- Council guides, templates and other publications and resources, and
- details of the Council's operations.

The Council has a second website that incorporates the material from its previous role and work on the National Competition Policy (**NCP**) reform program (www.ncp.ncc.gov.au). This website provides an historic record of governments' development of, agreement to and implementation and outcomes of the (now concluded) NCP reform program, the reforms included in the program and the outcomes of the Council's regular assessments of progress. [11]

Reporting under section 29O(2) of the Trade Practices Act

Council performance in meeting legislative timeframes

As required by section 29O(2)(a) of the TPA the Council reports on the time it has taken to make recommendations under Part IIIA of the TPA. The Council's practice is also to report the time it has taken to make recommendations and decisions under the NGL.

[11] The Council delivered its final NCP report in 2005 (see NCC 2005).

During 2009-10 there were no declaration or certification matters on which the Council made a final recommendation. At 30 June 2010 there were no Part IIIA matters before the Council for which the Council had exceeded the legislative time requirement.

The Council made final decisions and/or recommendations on three NGL matters during 2009-10. Each was completed within the legislative timeframe. At 30 June 2010 there were no NGL matters before the Council.

The Council's performance in meeting legislative timeframes is summarised in Table 2-1.

Table 2-1: The Council's performance in meeting timeframes: completed matters 2009-10

Matter	Time target	Time taken
Central West Pipeline light regulation	4 months	3 months 15 days
Kalgoorlie to Kambalda Pipeline light regulation	4 months	2 months 7 days
QCLNG Pipeline 15 year no coverage determination	4 months	3 months 16 days

Court or Tribunal decisions interpreting the definition of 'service' or the declaration criteria

During 2009-10 there were no court or Tribunal decisions interpreting the definition of 'service' in section 44B of the TPA. However, the Tribunal's Pilbara railway reviews included detailed comment on the Tribunal's interpretation of declaration criteria (a), (b) and (f) and outlined its views on various other aspects of Part IIIA of the TPA.

Criterion (a): promotion of competition

The Tribunal's Pilbara railway reviews commenced the consideration of criterion (a) by addressing the definition of dependent markets, taking a conventional approach to market definition. The Tribunal stated however that it was concerned not with a business person's understanding of a market but with analytical definitions developed by economists. This approach contrasts with a variety of Federal Court decisions on trade practices matters where the evidence of market participants has been preferred to that of economists. In the Council's view, in these matters any difference in approach is unlikely to have affected the ultimate decisions of the Tribunal.

The Tribunal considered whether the various dependent markets are separate markets from the market for the service the subject of the declaration application (in this case the market for below rail services). It referred to past decisions where it had held that there is no functional split (no separate markets) when vertical integration is 'inevitable' or 'overwhelmingly efficient'. It adopted a test that asked whether the complementarities of vertical integration are such as to dictate vertical integration, and noted that this is consistent with the approach that the Council had taken in making its recommendation, whereby for separate markets to exist, vertical integration must not be inevitable.

The Tribunal then looked at what would be required to bring about a material increase in competition. It accepted (following the decision of the Federal Court in *Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146* (**Sydney Airport (No 2)**) that access meant access *simpliciter*: that is the right or ability to use a service rather than the right or ability to do so under Part IIIA. It considered that factors such as whether access would be taken up, the terms and conditions of access, the number of firms that will take up access and the extent to which firms will use access were relevant to the satisfaction of criterion (a). The Tribunal did not adhere to the view that mere access of itself will promote a material increase in competition—what mattered were the likelihood, sufficiency and likely timing of access.

In assessing whether criterion (a) was satisfied, the Tribunal considered whether access must be 'essential' or 'necessary' to permit effective competition. It took the view that if the state of competition is the same with access as without, then access is not 'essential' for promoting competition. In addition, the Tribunal held that where a market is already effectively competitive criterion (a) has no application, which is the approach that the Council has taken for some time.

Criterion (b): uneconomical to develop another facility

The major point of debate in relation to criterion (b) identified by the Tribunal was the nature of the test of the criterion—whether it should be a privately profitable test (that is, whether it is profitable to mine iron ore after building a railway) or a net benefit or a natural monopoly test.

The Tribunal did not consider that criterion (b) should be interpreted as a privately profitable test, noting such a test is inconsistent with the history of enactment of Part IIIA and does not adequately meet Part IIIA's objectives. It then considered whether a natural monopoly or a net benefit test is appropriate, noting that in the past it had adopted a net benefit test—where the test is whether for a likely range of foreseeable demand for the services provided by the facility it would be more efficient, in terms of the costs and benefits to the community as a whole, for one facility to provide the services rather than more than one. The Tribunal held, despite this past approach that a natural monopoly test is appropriate. It stated:

> ... we consider that a natural monopoly approach is preferable to a net social benefit approach adopted in previous Tribunal decisions for several reasons. First, the background material to criterion (b) consistently links the term "uneconomic" to the notion of a facility exhibiting natural monopoly characteristics. Natural monopoly rests upon a production cost function which does not take into account social benefits or net social benefits. Second, natural monopoly characteristics are concerned with the costs of production based on the available technology. Third, a net social benefit test gives criterion (b) a role which overlaps substantially, and perhaps usurps, the role of criterion (f). *In the matter of Fortescue Metals Group Limited [2010] ACompT 2 (30 June 2010)* at [838]

Regarding the application of the natural monopoly test, the Tribunal held that to determine whether a facility is a natural monopoly it is necessary, first, to determine the reasonably foreseeable potential demand for the service provided by the facility and then compare the capital and operating costs of a shared facility to the sum of the capital and operating costs of an existing facility (or an expanded existing facility) and a new facility. This approach reflects that taken by the Council for some time.

In its Pilbara railway reviews the Tribunal held that all the railways with the exception of the Mt Newman railway service, were natural monopolies and so satisfied criterion (b). The Tribunal considered that an alternative facility to the Mt Newman Railway could be developed comparatively cheaply by extending the Fortescue Metal's Group Chichester railway line. At the time of the Council's Mt Newman recommendation and the Minister's (deemed) decision the Chichester railway line was mooted but construction had not commenced. In assessing the Mt Newman application against the declaration criteria the Council considered the potential effect of the Chichester railway line. At the time however there was considerable uncertainty as to whether the Chichester railway line would be built. Even if it were it was not clear to the Council that it would constrain the service provider's market power because the Chichester railway line as planned would provide a service only to the northern most parts of the Pilbara.

Criterion (f): access not contrary to the public interest and discretion

The Tribunal took a conventional approach to assessing criterion (f), stating that the criterion requires that access or increased access be not contrary to the public interest (rather than in the public interest). It considered that the criterion should not be used to call into question the results of the earlier criteria, though those results should not be ignored. It held that if an application for declaration satisfies criteria (a) and (b) then there are benefits from access, which together with other benefits not considered under the earlier criteria and the costs of access must be taken into account under criterion (f).

Following the approach in the Full Court's Sydney Airport (No 2) (which judicially reviewed the Tribunal's decision in *Re Virgin Blue Airlines Pty Ltd* [2005] ACompT 5 (Sydney Airport (No 1), the Tribunal determined that both it and the Minister have a broad discretion not to declare a service even where all of the declaration criteria (section 44H(4) of the TPA) may be satisfied.[12] While the Tribunal noted that mere access may have some consequences (albeit measurement is impossible), it accepted also that many consequences will arise only if access is taken up, and that the extent of the consequences depends on the extent of take up. The Tribunal explained its thinking as follows: although access *simpliciter* might be not contrary to the public interest, assessment of the overall effect of declaration and subsequent access might lead to a different conclusion such that declaration is not in the community's best interests.

[12] The Full Court said that the discretion may be affected by a wide range of considerations 'not squarely raised by, nor falling within, the necessary preconditions in s44H(4)' ([2006] FCAFC 146 at [39].

The Tribunal went on to examine the matters that might properly be considered at the declaration stage (first stage of Part IIIA) and those which might be considered at the negotiation/arbitration stage (second stage of Part IIIA). On this the Council had argued that in considering criterion (f) it is necessary to distinguish between the costs of access per se (first stage) and the costs caused by the type of access (second stage) and that many of the costs identified should be accounted for at the second stage rather than at the first stage. The factual basis of an incumbent's concerns becomes apparent only at the second stage (because the effect of access on the incumbent's operations will depend on the nature and extent of access actually sought). Moreover, Part IIIA has provision for protection of an incumbent's business interests (so these interests may not be prejudiced and costs may not arise). The Council's view was that to account for many of the costs claimed by the Pilbara railway service providers at the first (declaration) stage required speculation on issues of access that would be necessarily set out with far greater certainty in the context of an access dispute at the second (access) stage.

However, the Tribunal considered that this approach left too limited a role for the decision maker at the first (declaration) stage. While it acknowledged that nothing is certain regarding the type of access at the declaration stage, the Tribunal considered that assessment of the consequences of declaration necessarily involves some speculation and that some consequences, while not certain, are likely to arise—and so warrant a weight in deciding on declaration that pays regard to their likelihood.

The Council maintains its view that it is likely that most costs are more appropriately considered at the second (access) stage. Nonetheless, it accepts that, given the volume of material that the Tribunal chose to admit in the Pilbara railway reviews, the Tribunal may have been able to reach reasonable conclusions on matters that in the Council's view are better left to stage two.

While the Council has long recognised that satisfaction of all of the declaration criteria gives the Minister a discretion to declare a service (rather than requires the Minister to declare a service), the Council considers that the existence of a 'very broad' discretion additional to the declaration criteria (which consistent with Sydney Airport (No 2) the Tribunal found to exist) warrants further policy examination. The Council has however some doubt as to the need or desirability of a broad additional discretion given that the scope of the declaration criteria already allows wide-ranging inquiry. In such circumstances the broad discretion described by the Tribunal has the potential to create uncertainty as to the matters that are relevant to the decision to declare and to overcomplicate the declaration process.

Interpretation by the Tribunal of other aspects of Part IIIA

The Tribunal made a number of comments regarding other (non-declaration criteria) aspects of Part IIIA including: an incumbent operator's entitlement to use its own facility (and relevant safeguards): the meaning of an 'expansion' of a facility; its own capacity to review a decision to declare a service where the service is different from what was applied for; and the (service providers') argument that the protection of contractual rights precludes declaration.

Section 44W of the TPA provides a safeguard to an incumbent operator's entitlement to use its own facility. This safeguard obliges the ACCC in arbitrating an access dispute to protect the incumbent operator's entitlement to use the facility. In the Pilbara railway matters the Council considered that the existence of the safeguard provided the basis for dismissing some of the adverse effects that the railway service providers attributed to access. In essence, the safeguard means that the service providers' entitlement to use their railways is prioritised over the entitlement of any third party.

The Tribunal considered that the safeguard protects the reasonably anticipated requirements of an incumbent measured at the time of an access dispute but does not work well in some situations. One such situation it identified is where an incumbent service provider and a third party are existing users and another third party seeks access or where a new dispute arises between the incumbent and an existing third party user. The Tribunal concluded that in such situations the (unavoidable) result is that the incumbent service provider loses priority, although it accepted nonetheless that even if the safeguard is lost 'there will generally be powerful discretionary factors for favouring the owner in any arbitration.'[13] The Tribunal proceeded therefore on the basis that the incumbent railway service providers will generally have priority of use over third parties (while noting the limitations).

The Council considers that the Tribunal's approach on the effect of the safeguard is a reasonable one. The Council agrees that issues regarding the practical operation of the safeguards in the TPA should be examined further though there is a question as to the extent to which the situation described by the Tribunal will arise in practice (see also the discussion in the later section on impediments to the operation of Part IIIA).

The Tribunal confirmed that the ACCC has the power to order that a facility providing a declared service be expanded to provide further capacity.[14] This had been disputed by the Pilbara rail service providers, who argued that the ACCC's power to order an 'extension' to a facility did not encompass capacity 'expansions'. The Tribunal's finding is consistent with the Council's interpretation of the ACCC's powers regarding extensions. The approach means that capacity expansions are subject to the protections in section 44W of the TPA and elsewhere. In particular a service provider cannot be made to pay for an expansion, although the value of an expansion to an operator can be considered in setting access prices.

The Tribunal also clarified several matters that it described as miscellaneous legal issues, as follows.

- First, noting that several of the Pilbara railway lines had undergone significant expansion, it asked whether the application for a declaration covered a service provided by a facility which, at the time of review, is, in many respects, different from what it was at the time of application. The Tribunal's answer was that although the infrastructure that provides the service may

[13] In the matter of Fortescue Metals Group Limited [2010] ACompT 2 (30 June 2010) at [606].

[14] Ibid. at [730].

have changed the service that is the subject of the declaration application had not.[15]

- Second, arising from the application for declaration of the Mt Newman railway service, the Tribunal rejected the claim by the service provider that the service actually sought is materially different from the service applied for. In so doing the Tribunal noted the finding of the Full Federal Court in *Rio Tinto Limited v The Australian Competition Tribunal.* In that decision the court said (at [59]) that there need not be a 'slavish attachment to the words of an application'. A 'literal or pedantic adherence' to the description of the service is not required, provided that the substance and essential natural of the service is not altered.[16]
- Third, the Tribunal considered the argument by the Pilbara railway service providers that were access to be granted each would be deprived of protected contractual rights which had been created pursuant to relevant State agreements, special leases of the rail corridors granted by the Western Australian Government and several joint venture agreements. The Tribunal did not enter upon this issue, considering it a matter appropriately addressed when a particular request for access is considered.[17]
- Finally, the Tribunal also provided comment on the 'essential facilities problem' that Part IIIA is intended to deal with. It noted that the problem arises when a firm is vertically integrated (that is, it occupies successive levels in the supply chain from raw materials to the final consumer) and stated that although integration can bring efficiencies, 'it has great potential for adverse effects on competition and therefore the allocation of resources'.[18] The Tribunal outlined responses to the essential facilities problem in Australia prior to the 1990s and in the United States, and looked at the legislative history of Part IIIA. The Tribunal's comments provide useful background and are helpful in describing the genesis and purpose of Part IIIA.

Impediments to the operation of Part IIIA of the TPA

In previous annual reports the Council identified matters that it considered to impede the operation of Part IIIA and suggested rectifying action. As discussed above, several of the Council's suggestions were implemented by the TPA Amendment Act. One proposal—that a deemed declaration decision follow the recommendation of the Council (rather than be a refusal to declare a service for third party access in every case)—did not proceed. The time taken to decide the Pilbara railway declaration applications, particularly the applications for review of the Ministers' decisions, were it to be representative of future declaration matters,

15 Ibid. at [1339-40].

16 Ibid. at [1342].

17 Ibid. at [1345].

18 Ibid. at [520].

would in the Council's view be a significant impediment. The Tribunal in its Pilbara railway determinations also identified areas where improvements to Part IIIA might be considered. These matters are discussed below.

A deemed declaration decision is a refusal of access in every case

In the event that a designated Minister does not make a decision on a declaration application within 60 days of the date of receiving the Council's recommendation, the decision on the recommendation is deemed to be a refusal of the application in every case.

Where the Council recommends that a service be declared but the Minister fails to make a decision (so there is a deemed refusal of the application) the current approach means that the decision that may be the subject of a review application to the Tribunal is a decision for which there is no published statement of reasons: the Council's recommendation that the service be declared is not followed and the deemed decision to refuse declaration has no attached statement of reasons. There have been two such situations since the commencement of Part IIIA: in both cases the deemed decisions were taken on review to the Tribunal.

While accepting that the Parliament has considered this matter in the context of the TPA Amendment Act, the Council's view remains that there are advantages in a deemed declaration decision following the recommendation of the Council (which is published) rather than be an automatic refusal of declaration. Such an approach would deal more effectively with the situation where there is a deemed decision to refuse declaration in response to a Council recommendation that a service be declared, overcoming the difficulty under the current arrangements there is no statement of reasons for a deemed decision to refuse access. The Council will continue to scrutinise future deemed declaration decisions with a view to providing further advice to the Parliament on this matter. Of course this issue is moot where the designated Minister makes a decision within the required time frame.

Following the passage of the TPA Amendment Act, in relation to applications for the revocation of a declaration, if the designated Minister does not make a decision within 60 days of receiving the Council's recommendation then the deemed decision is to revoke the declaration and the recommendation is published. For applications that a service is an ineligible service, where the designated Minister does not make a decision within 60 days then the deemed decision is in accord with the Council's ineligibility recommendation, which is published. Similarly, for applications for certifications and extensions to certifications, if the Commonwealth Minister does not make a decision within 60 days of receiving the Council's recommendation then the deemed decision follows the Council's recommendation.

Time taken for Part IIIA processes

Under the current process for declaration applications, when an interested party seeks review of a decision made under the National Access Regime the Tribunal repeats the consideration of the declaration criteria undertaken by the Minister on the advice of the

Council. Because there are few limits on the scope of the evidence that a party can adduce, Tribunal proceedings are typically conducted much like court proceedings, and a majority of the time taken to conduct merits reviews is taken up by the parties preparing and submitting sworn evidence to establish each aspect of their case and then preparing further evidence in reply to the evidence of the other parties.

In the Council's experience the process for adducing evidence to support each party's case from scratch before any hearing or substantive argument can commence is a major contributor to the long time periods taken to complete Part IIIA processes. This is despite the fact that the Tribunal's review of decisions under the National Access Regime was always intended to be a flexible administrative process rather than a court-like judicial process. (The TPA at section 103 provides that the Tribunal must conduct its proceedings with as little formality and as much expedition as it can, and is not bound by the rules of evidence.)

A move to strictly limit merits review to the information before the decision maker was proposed but did not proceed under the 2010 amendments to the TPA. Instead, although the Tribunal's review is generally to be conducted on the basis of the information available to the initial decision maker, there is now provision for the Tribunal to request additional information by notice where it considers such information to be reasonable and appropriate for the purpose of making its decision on a review under Part IIIA.

The effectiveness of these amendments in reducing the time and resources required for a Tribunal review is yet to be seen. While the amendments offer considerable scope for improving the timeliness of the declaration process and particularly to streamline reviews of Ministerial declaration decisions (such that declaration applications are finalised within commercially meaningful timeframes), if they prove to be ineffective then it will be necessary to consider further change.

One option would be to provide additional powers to the Tribunal to more closely manage reviews so that it can, where appropriate, limit the information able to be presented to it and the parties who appear before it. However, it is difficult to see given the process undertaken for the Pilbara railway reviews (which took place at the time of the bill to amend the TPA when concern about timelines was evident) how the Tribunal might reduce the time it takes for more complex matters. The Council notes particularly the Tribunal's comment that a complex case even if 'run in the fast lane' would take four to five years to complete. As a consequence, the Council's preference, should the 2010 reforms prove insufficient, is to introduce more fundamental change. An option which the Council thinks has considerable merit would be to alter the nature of the review of declaration decisions to provide instead for judicial review by the Federal Court. In such circumstances, judicial review would continue to discipline the decision making process and would allow for unreasonable decisions to be set aside, but would not allow for full reconsideration of matters already properly addressed by the Council and the Minister.

Also relating to the matter of timing, the Tribunal questioned whether the Part IIIA process is too complicated and time consuming, and whether the number of steps in Part IIIA should be

collapsed. One option by which this might be done (suggested by a previous President of the Tribunal) is for declaration applications to be made directly to the Tribunal, with the Council perhaps having a role akin to an *amicus*. Such a change would necessarily remove Ministers from the declaration process. Another option would be to combine the declaration and dispute arbitration stages. Under this option, the ACCC and/or Tribunal presumably would consider an application against the declaration criteria as a preamble to or in conjunction with arbitrating a dispute over the terms of access.

The Council does not support either approach. The first converts what is appropriately an administrative process in which Ministers are properly involved into a quasi-judicial proceeding. Such a process would be dominated by the particular access seeker and service provider and even with the Council performing an *amicus* role the broader public interest would be unlikely to receive sufficient recognition. The second approach would combine the role of advising/determining the scope of application of Part IIIA and the regulatory function of determining access disputes. This could encourage a greater level of regulation than is desirable and reduce incentives for access to be provided though commercial negotiation.

As discussed above, the Council's preferred approach (should the 2010 amendments to the TPA prove inadequate in encouraging outcomes within commercially meaningful timeframes) is to limit the review of Ministerial declaration decisions to judicial review. The Council will monitor future declaration matters to assess the effect of the 2010 amendments relating to Tribunal requests for additional information with a view to providing further advice to the Parliament.

Potential improvements identified by the Tribunal's Pilbara railway reviews

The Tribunal considered Part IIIA to be an important means of achieving community welfare. It noted however a need for reform, identifying for investigation:

- the possibility of compelling inefficient investment
- the desirability and mechanics of an expansion power, and
- whether access on a first come first served basis is inequitable (and the related matter of safeguards on an incumbent's entitlement to use its own facility).

The scenario behind the Tribunal's concern about compelling inefficient investment involves a facility that is a natural monopoly but not a bottleneck, where the facility could be profitably duplicated (though that would be inefficient) and access to the services of the natural monopoly facility or the construction of a substitute facility would equally promote competition. The Tribunal considered that in this scenario criterion (a) (material promotion of competition) would not be satisfied and a perverse outcome would result (which could not be avoided) whereby declaration must be denied because access to the natural monopoly service and the service of the inefficiently duplicated facility would have the same competition outcomes.

It is unclear to the Council why declaration should be available where a facility is not a bottleneck. Leaving that aside (that is, where a facility is a bottleneck and there is an inefficient duplication) it is not clear to the Council that the perverse outcome foreseen by the Tribunal is inevitable. Given that the objects of Part IIIA include the promotion of economically efficient operation of, use of, and investment in infrastructure by which services are provided, it would appear open to the Council and Minister (in the first instance) and the Tribunal to reach an appropriate outcome.

As noted above the Tribunal also addressed the power in Part IIIA for the ACCC to compel expansion of a facility (which the Tribunal found to be synonymous with the concept of extension in the TPA). Under this approach expansions are subject to the protections in section 44W of the TPA and elsewhere. In particular, a facility operator cannot be made to pay for an expansion, although the value of an expansion to an operator may be considered in setting access prices.

In relation to access entitlements, the Tribunal asked whether it is equitable to determine access on a first come first served basis. The Tribunal also addressed the related matter of safeguards on an incumbent's entitlement to use its own facility noting a potential difficulty (discussed above) where both the incumbent owner of a facility and third party are existing users and another third party notifies an access dispute. Where the existing third party user originally applied for access the safeguard gives priority to the owner's use. However, when a new access seeker raises a dispute the safeguard applies to both users—the owner and existing third party user. The Tribunal considered that the practical effect, adopting a strict reading of the TPA, is that the owner and existing third party user have equal priority. However it considered that even if the owner's requirements safeguard is lost the owner will generally have priority of use over third parties.

While the Tribunal identified potential problems in applying the expansion power and resolving access entitlements where there are multiple access seekers, if these issues are considered at the time of determining an application for declaration then this must be done on a hypothetical basis. The issues will not arise in practice until the second stage of the declaration process where an access dispute is arbitrated and then only if there are multiple competing access seekers. Since the enactment of Part IIIA there have been only two dispute arbitrations (one of which was withdrawn following commercial settlement between the parties), neither of which required these issues to be considered. While the Council agrees that the safeguards requirement warrants examination, it is not clear that either it or the expansion power raise questions of practical consequence, or if they do that they are not better addressed by the ACCC in making an access determination.

Evidence of benefits from Australian Competition and Consumer Commission arbitration determinations

There were no matters notified to the ACCC for arbitration under Part IIIA of the TPA during 2009-10.

Since the enactment of Part IIIA in 1995 there have been only two matters notified to the ACCC for an arbitration determination, both in 2006-07. In one case the notification was withdrawn following an independent commercial settlement between the parties (Virgin Blue/Sydney Airport). In the other matter (Services Sydney Pty Ltd/Sydney Water Corporation) the ACCC determined the dispute (ACCC 2007). Services Sydney then applied to the Tribunal for a review of the ACCC determination but subsequently withdrew its application. Since 2009, the services that were the subject of the declaration in *Re Services Sydney* have been subject to the WICA Access Regime (governing third party access to certain water and wastewater services). The declaration in *Re Sydney Services* has been revoked.

Evidence on the costs of, or disincentives for, investment in infrastructure

Access regulation seeks to encourage the shared use of spare capacity in (typically capital-intensive long-lived) infrastructure that is uneconomic to duplicate (where this can be achieved on commercial terms and conditions, while maintaining an owner's usage rights). It also aims to encourage investment in such infrastructure to accommodate additional demand where this can be done at lower net social cost rather than to require businesses to invest in high cost duplicate infrastructure.

The purpose of access regulation is to maintain appropriate incentives for investment, both in the infrastructure areas that provide declared services and in related upstream and downstream markets that depend on access to declared services. Nonetheless service providers commonly argue that the requirement to share the use of their infrastructure with competitors (albeit on commercial terms and conditions) results in inefficiencies and that the costs of regulated access outweigh the benefits, increasing the risk of deterring future investment.

The parties opposed to the declaration of the services provided by the Pilbara iron ore railways identified a range of categories of costs in their submissions to the Council and to the Tribunal's reviews, arguing that because of these costs access would significantly disrupt their businesses and cause them either to delay investment now and into the future (due to the need to negotiate with third parties) or invest in sub-optimal expansions, including to avoid creating spare capacity that might become available to a competitor. The Tribunal gave little weight to these arguments, coming to a view that:

- in most if not all expansions a rational incumbent will negotiate with third parties, and time limits, early engagement or the use of master plans are unlikely to reduce delays associated with engaging with third parties
- faced with the respective risks of proceeding or nor proceeding with a desirable expansion, an incumbent is more likely to proceed but will nevertheless seek to reach agreement with third parties potentially leading to delay (as noted above)

- claims about sub-optimal expansions aimed at stymieing competitors should not be taken 'too seriously': in any case the Tribunal was 'far from satisfied that this is a legitimate interest that should be taken into account'.

QGC Pipeline Pty Ltd in its application to the Council for a no coverage determination (under the NGL) claimed that access regulation would have a chilling effect on investment both in its own project and in the coal seam gas and liquefied natural gas sector. Nonetheless, its parent QGC Limited had advanced the development of its coal seam interests and planning for a liquefied natural gas processing facility and pipeline prior to the date that a no-coverage determination was granted. Other companies also appear to be proceeding with the development of coal seam gas production and liquefaction projects without having a no-coverage determination is in place.

Any decision to declare a service requires a broad consideration of the public interest (declaration criterion (f)) that allows consideration of the effects of a declaration on investment activity when assessing an application for declaration. Declaration itself is light-handed intervention designed to address limited situations—where access to a service provided by means of a facility which cannot be economically duplicated is necessary to enable third parties to compete effectively in a dependent market. Declaration is designed to maximise opportunities for commercial resolution of access issues, minimise regulatory intervention and protect the legitimate interests of service providers to ensure that incentives for efficient investment are maintained.

There is recourse to arbitration where the parties are unable to agree. However, declaration does not necessarily lead to regulated access through application of an ACCC arbitration determination and it cannot result in any change in ownership or control of a facility. The ACCC's arbitration role is governed by statutory requirements that explicitly recognise the relevant interests of the various parties affected, including the legitimate interest of service providers in preserving their use of a service and making a commercial return on investment in infrastructure and other facilities.[19]

As noted above amendments to Part IIIA in 2010 have introduced provision for a person with a material interest in a proposed new infrastructure facility to make application to the Council for recommendation that a service provided by the proposed facility be ineligible to be a declared service. This ability to seek an upfront ruling on whether a service would satisfy the test for declaration is designed to enhance regulatory certainty for potential investors in major new infrastructure facilities. Where there is a decision that the services of a proposed facility are ineligible then the service is exempt from access regulation for 20 years or longer (provided the ineligibility declaration remains in force). This amendment to the National Access Regime arose from a recommendation by the Productivity Commission in its 2001

[19] The Tribunal, in reviewing the Pilbara rail declaration decisions, noted aspects of Part IIIA that affect the interests of relevant parties (including the incumbent service provider) that warrant investigation. The Council has considered these matters in the section above on impediments to the operation of Part IIIA of the TPA.

review of the National Access Regime (PC 2001). A similar provision (though for a shorter period) is available in relation to the access regulation of gas pipelines under the NGL (which provides for proponents of greenfields pipelines to seek a 15 year no coverage ruling).

Implications for the future operation of Part IIIA

During 2009-10 there were two categories of issues that have implications for the future operation of Part IIIA of the TPA.

- The Tribunal's reviews of decisions on the applications for declaration of the services provided by four Pilbara iron ore railways raised matters concerning the consideration of the criteria for declaration and other matters relating to the decision to declare, and matters relating to the review of declaration decisions.
- In relation to the program of certification of state and territory access regimes agreed under the CIRA it appears that some regimes, particularly those covering the energy sector, might not be submitted for certification by the end of 2010.

Matters arising in the Tribunal's reviews of the Pilbara rail decisions

Recognising that Part IIIA is an important means of achieving community welfare, the Tribunal in its Pilbara railway reviews identified elements that it considered warranted investigation. In addition, the Council considers that the Pilbara railway reviews raise a key structural concern: the prospect that the National Access Regime does not deliver outcomes on declaration applications within meaningful commercial timeframes. These matters are discussed above in the section on impediments to the operation of Part IIIA of the TPA.

Certification of state and territory access regimes

Under the CIRA states and territories committed to seek certification under section 44M of the TPA for all state and territory access regimes. Governments agreed that all new third party access regimes will be submitted for certification as soon as practicable, and all existing third party access regimes will be submitted for certification by no later than the end of 2010.[20] In addition governments agreed to seek certification of their revised energy (electricity and gas) access arrangements.

The Council has consulted with jurisdictions regarding their progress towards lodging applications for certification of the regimes the subject of the CIRA. Subsequently Victoria advised that it will repeal legislation providing for its grain handling and storage access regime and its shipping channels access regime.[21] Western Australia and Queensland have submitted applications for the certification as effective of their intrastate rail access regimes.

[20] Clause 2.9 of the CIRA.

[21] In each case though the legislation is yet to be repealed the regimes do not operate.

The New South Wales access regime covering water and wastewater services was certified as effective on 13 August 2009.

In the other cases where applications for certification are yet to be submitted (other than state and territory energy access arrangements), state regulators have reviewed relevant regimes and governments are considering review outcomes. Regarding the energy regimes, the Council understands that the Ministerial Council on Energy is giving consideration to whether the certification of state and territory electricity and gas access regimes proceeds. In a sector where the need for regulatory certainty has received considerable emphasis, the Council considers that it would be unfortunate if certification of these regimes is not sought. While there may be limited risk that access applications will be made outside the NGL or National Electricity Law, if this were to occur significant confusion might result and a number of parties would face unnecessary costs.

In its previous annual report, the Council communicated its concern that governments contemplating new access regimes were likely to achieve little benefit if they enact regimes that essentially replicate the declaration and negotiate/arbitrate approach already available under the general provisions of the National Access Regime. The Council reiterates this concern. The CPA envisages that states and territories will implement jurisdictional access regimes, and where, in particular, the nature of access issues arising in an industry or sector within one or more jurisdictions call for a specific regulatory arrangement, the implementation of sector or industry specific jurisdictional access arrangements may be warranted. However, a state or territory access regime that merely replicates the general provisions of Part IIIA of the TPA would appear to offer little benefit while arguably adding to cost and uncertainty.

A list of state and territory access regimes, their underlying legislative bases and their certification status at 30 June 2010 is set out in Table 2-2.

Table 2-2: State and territory infrastructure access regimes and status at 30 June 2010

Jurisdiction	Scope of access regulation	Status of access regime at 30 June 2010
New South Wales	Gas pipelines (National Gas (New South Wales) Act 2008)	Not certified: no application for certification
	Electricity networks (National Electricity (New South Wales) Act 1997)	Not certified: no application for certification
	Water and wastewater infrastructure (*Water Industry Competition Act 2006*)	Certified on 13 August 2009
Victoria	Gas pipelines (National Gas (Victoria) Act 2008)	Not certified: no application for certification
	Electricity networks (National Electricity (Victoria) Act 2005)	Not certified: no application for certification
	Railways (Rail Corporations Act 1990)	Not certified: no application for certification
	Grain handling and storage (Grain Handling and Storage Act 1995)	Repeal of the Act announced. Minister determined that the grain handling and storage facilities at the Port of Melbourne, the Port of Geelong and the Port of Portland ceased to be significant infrastructure facilities on 1 October 2009.
	Shipping channels (Port Services Act 1995)	Repeal of the Act announced. Facilities are not declared so regime is inoperative.
Queensland	Gas pipelines (Gas Pipelines Access Act 1998 /Queensland Competition Authority Act 1997)	Not certified: no application for certification
	Electricity networks (Electricity-National Scheme (Queensland) Act 1997)	Not certified: no application for certification
	Intrastate rail (Queensland Competition Authority Act 1997)	Application for certification to the Council on 17 June 2010
	Dalrymple Bay Coal Terminal (Queensland Competition Authority Act 1997)	Not certified: no application for certification

Table 2-2: continued

Jurisdiction	Scope of access regulation	Status of access regime at 30 June 2010
South Australia	Gas pipelines (National Gas (South Australia) Act 2008)	Not certified: no application for certification
	Electricity networks (National Electricity (South Australia) Act 1996)	Not certified: no application for certification
	Railways (Railways (Operations and Access) Act 1997)	Not certified: no application for certification
	Ports (Essential Services Commission Act 2002 /Maritime Services (Access) Act 2000)	Not certified: no application for certification
Western Australia	Gas pipelines (National Gas Access (WA) Act 2009	Not certified: no application for certification
	Electricity networks (Electricity Industry Act 2004)	Not certified: no application for certification
	Railways (Railways (Access) Act 1998)	Application for certification to the Council on 12 May 2010
Tasmania	Gas pipelines (National Gas (Tasmania) Act 2008)	Not certified: no application for certification
	Electricity networks (Electricity National Scheme (Tasmania) Act 1999)	Not certified: no application for certification
Northern Territory	Gas pipelines (National Gas (Northern Territory) Act 2008)	Not certified: no application for certification
	Electricity networks (Electricity Networks (Third party Access) Act 2003)	Not certified: no application for certification
ACT	Gas pipelines (National Gas (ACT) Act 2008)	Not certified: no application for certification
	Electricity networks (Electricity (National Scheme) Act 1997)	Not certified: no application for certification

Note: The regulation of access to energy infrastructure (gas pipelines and electricity networks) is achieved through a coordinated set of state and territory access regimes implemented by way of legislation enacted first in South Australia and then adopted in legislation in the other states and territories.

Summary of Council performance in 2009-10 against key performance indicators

The Council's performance in 2009-10 in meeting its key performance indicators (set out in the Treasury Portfolio Budget Statements) is summarised in Table 2.3 below.

Table 2-3 Summary of National Competition Council output performance indicators, targets and performance 2009-10

Key performance indicator	2009-10 target	Outcome
Recommendations on applications for the declaration of services provided by monopoly facilities made within statutory time guidelines (including target of four months) and meet advice requirements of Ministers.	Recommendations on applications are provided within four months. Recommendations meet the advice requirements of decision making Ministers. (Following TPA Amendment Act which came into effect on 14 July recommendations on applications are provided within six months.)	At 1 July 2009 there were no declaration matters before the Council. The Council received new declaration applications on 22 March 2010 (for services of the Herbert River cane tramway) and 19 May 2010 (for various services of Queensland Rail's coal rail network). The Council's consideration of these applications was ongoing at 30 June 2010. Applications for reviews of the Commonwealth Treasurer's decisions on three declaration applications (and a deemed decision on a fourth application) relating to the services of Pilbara iron ore railways were before the Tribunal at 1 July 2009. On 30 June 2010 the Tribunal made determinations as follows: affirm deemed decision not to declare service provided by the Mt Newman Railway; affirm decision to declare services provided by the Goldsworthy Railway; vary decision to declare services provided by the Robe Railway (declaration to expire on 19 November 2018); set aside decision to declare the services provided by the Hamersley Rail Network. In each case the Council had made a recommendation to the Commonwealth Treasurer that he declare the relevant services. While the Tribunal set aside two decisions, it noted that it did not disagree with those decisions. Following the certification of New South Wales' access regime for water industry infrastructure services as an effective access regime the Council on 8 September 2009 recommended the

Table 2-3 continued

Key performance indicator	2009-10 target	Outcome
		revocation of the declaration made by the Tribunal in *Re Services Sydney Pty Limited*. On 1 October 2009 the then New South Wales Premier revoked the declaration consistent with the NCC's recommendation.
Recommendations on applications for the certification of state and territory access regimes made within statutory time guidelines (including target of six months) and meet advice requirements of Ministers.	Recommendations on applications are made within six months. Recommendations meet the advice requirements of decision making Ministers.	At 1 July 2009 there were no certification matters before the Council. The Council received new applications for the certification of the WA Rail Access Regime and the Queensland Rail Access Regime on 12 May 2010 and 17 June 2010 respectively. The Council's consideration of these applications was ongoing at 30 June 2010. On 13 August 2009 the Minister for Competition Policy and Consumer Affairs made a decision to certify the NSW access regime for water industry infrastructure services as effective for a period of 10 years, consistent with the Council's recommendation of 11 May 2009.
Recommendations and decisions under the NGL are made within specified time limits and recommendations under the NGL meet the advice requirements of Ministers.	Recommendations and decisions are made within statutory time limits. Recommendations meet the advice requirements of decision making Ministers.	At 1 July 2009 there were no applications under the NGL before the Council. The Council received and finalised three new applications under the NGL in 2009-10 as follows. Application by APT Pipelines (NSW) Limited for light regulation of the services provided by the Central West Pipeline in New South Wales made on 2 October 2009. Determination made by the Council on 19 January 2010 that the pipeline be subject to light regulation. Application by Southern Cross Pipelines Australia Pty Ltd for light regulation of the services provided by the Kalgoorlie to Kambalda pipeline in Western Australia made on 22 April 2010. Determination made by the Council on 29 June 2010 that the pipeline be subject to light regulation.

Table 2-3 continued

Key performance indicator	2009-10 target	Outcome
		Application by QCLNG Pipeline Pty Ltd for a 15 year no-coverage determination for the proposed QCLNG Pipeline in Queensland made on 19 January 2010. Final recommendation provided to the Commonwealth Minister for Resources and Energy on 5 May 2010 recommending that a 15 year no-coverage determination be granted. Minister granted the determination on 15 June 2010. In each matter the Council considered the application within the statutory time limit.
Council website provides accessible information on all access regulation matters for which the NCC is responsible.	Council website holds all documents relevant to the Council's functions.	Guides to declaration and certification and all Council functions under the NGL maintained on the Council's website. Guidance on making applications and submissions maintained on the Council's website. Electronic newsletter 'Accessible' providing information on the Council's activities published every two months, forwarded to parties who have indicated interest and published on the Council's website.
Up to date and informative guidelines on all of the Council's areas of responsibility maintained on the Council's website.	Guides to all aspects of the National Access Regime and the Council's responsibilities under the NGL are available. Guides are updated within 30 days of relevant decisions or developments in case law.	New part D of guide to the NGL on applications for greenfields incentives published in September 2009. All parts of the guide to the NGL reviewed and updated in February 2010 following the passage of the *National Gas Access (WA) Act 2009* (WA) and the *National Gas (South Australia) (National Gas Law – Australian Energy Market Operator) Amendment Act 2009* (SA). New guide to making a submission on a no-coverage application published in January 2010.

Table 2-3 continued

Key performance indicator	2009-10 target	Outcome
Case law developments, legislative amendments and developments in the Council's processes or policies are reflected in the Council's information resources within 30 days.	Case law developments, legislative amendments and developments in Council processes or policies are reflected in Council information resources within 30 days.	All parts of the guide to the NGL reviewed and updated in February 2010 following the passage of the *National Gas Access (WA) Act 2009* (WA) and the *National Gas (South Australia) (National Gas Law – Australian Energy Market Operator) Amendment Act 2009* (SA).
The Council's annual report to the Parliament includes a comprehensive report that meets the requirements of s29O(2) and is provided within 60 days of the end of the financial year.	The Council annual report provides comprehensive information on the National Access Regime and NGL, addresses all matters required under section 29O(2) of the TPA and is provided by 31 August 2010.	The Council will provide its 2009-10 annual report to the Treasurer by 31 August 2010. The Council's annual report will include a report on the National Access Regime as required by the TPA.

3 Governance and organisation

Agency overview

Role and functions

The National Competition Council (**Council**), established in 1995 by agreement of the Council of Australian Governments (**COAG**), is an independent research and advisory body for all Australian governments. Its functions and powers are set out in section 29B of the *Trade Practices Act 1974* (**TPA**).

The Council's functions include carrying out research into and providing advice on matters referred to it by the Minister. The Council makes recommendations on the regulation of third party access to services provided by monopoly infrastructure under the National Access Regime in Part IIIA of the TPA (declaration and certification) and recommendations and decisions under the National Gas Law (**NGL**).[22]

Vision and mission

The Council's vision is to help achieve outcomes that benefit the community as a whole by providing objective and constructive advice to governments. This incorporates building community understanding of, and support for, national access regulation.

Appropriate application of the National Access Regime and access regulation of gas pipelines encourages competition in markets that depend on the use of monopoly infrastructure. This facilitates economic growth, employment growth, optimal resource use and improved social outcomes for all Australians.

The Council's vision is embodied in its mission: 'To improve the wellbeing of all Australians through growth, innovation and rising productivity, by promoting competition that is in the public interest'.

Outcome and program

The Council has a single outcome with one contributing program. The Council's outcome is competition in markets that are dependent on access to nationally significant monopoly infrastructure, through recommendations and decision promoting the efficient operation of, use of and investment in infrastructure.

The Council's program objective is to provide advice to governments on the design and coverage of infrastructure access regimes and to make decisions on the form of regulation of gas pipelines. The Council develops the advice it provides to governments and makes decisions using a public process. When it receives an application for declaration or

[22] The Council's third party access work is discussed in chapter 2.

certification under the National Access Regime or an application on the regulation of gas pipelines under the NGL the Council publishes the application and then consults with stakeholders by inviting submissions and providing public reports. The Council supports its access regulation function by way of publicly available third party access guidelines and application templates, all available on the Council's website.

The indicators for assessing the Council's performance along with the targets and summary information on the Council's work in 2009-10 against those targets are set out in chapter 2 of this annual report (see Table 2.3). Chapter 2 also contains the Council's report to the Australian Parliament on the operation of the National Access Regime, which is required under section 29O of the TPA.

Resources used in performing the National Competition Council outcome

The Council received revenue from the Government in 2009-10 of $2.806 million. The Council received other revenue totalling $758 485, primarily from court costs awards and from application fees relating to its NGL work. The Council's expenses in 2009-10 were $3.638 million. The Council recorded a deficit of $49 629.

The Finance Minister provided approval for the Council to budget for an operating deficit of $950 000 in 2009-10. The Council anticipated this loss due to its likely legal and expert witness costs in relation to the Australian Competition Tribunal's review of the Mt Newman, Goldsworthy, Hamersley and Robe rail service declaration decisions under Part IIIA of the TPA and other work on third party access. The court costs award received for an earlier related matter meant that the Council recorded a smaller than anticipated deficit.

Table 3-1 summarises the financial resources used by the Council[23] in 2009-10.

Table 3-1 National Competition Council resourcing 2009-10

	Actual available appropriations ($'000)	Payments made ($'000)	Balance remaining ($'000)
Agency appropriations			
Prior year appropriation	4559	191	4368
Appropriations reduced	(134)	(134)	(134)
Actual current year appropriation	2806	2806	0
Other agency revenue	976	976	0
Total appropriation available	8207	3973	4234

Source: Portfolio Budget Statements 2009-10 and Financial Statements 2009-10.

[23] See also the audited Financial Statements for 2009-10.

Table 3-2 provides a summary of the resources used by the Council in performing its outcome in 2009-10 showing the variation against budget. The variation against the budget in 2009-2010 was approximately 4 per cent.

At 30 June 2010 the Council's staffing level (including secretariat staff and councillors) was 12.3 full time equivalent persons.

Table 3-2 Resourcing for the National Competition Council program, 2009-10

	Budget 2009-10 $'000	Actual expenses 2009-10 $'000	Variation $'000
Program 1.1—National Competition Council			
Departmental outputs funded by appropriations	3775	3638	137
Average staffing level	12	12.3	

Source: Portfolio Budget Statements 2009-10 and Financial Statements 2009-10.

Corporate governance

The Council's governance framework establishes accountability and decision-making processes to effectively and efficiently manage its resources and allocate those resources to its statutory priorities. The Council has embraced the management, accountability, financial and employment reforms applicable to government agencies.

The Council's outcome is agreed with the Department of Finance and Deregulation and reported in the Treasury Portfolio Budget Statements. The Australian Government funds the Council through budget appropriations.

Parties making applications under the NGL must pay a fee for applications regarding the access regulation (coverage) of natural gas pipelines and decisions on the classification of pipelines. The fee is $7500 per access application and $2000 per reclassification application.

The Council is responsible for its activities, consistent with the requirements of the TPA. Decisions during 2009-10 were made at Council meetings (see Table 3-3) with day to day management undertaken by an executive team in the Council secretariat. The Council is accountable for its decisions through the courts, tribunals, the Parliament and the Commonwealth Ombudsman.

National Competition Council structure

The Council comprises the President and up to four other councillors appointed by the Governor-General, with appointments—generally for three-year periods—supported by a majority of state and territory governments. Part IIA of the TPA specifies the processes for appointing councillors, conducting Council meetings and disclosing interests by councillors.

The Council is supported by a secretariat located in Melbourne. At 30 June 2010 the secretariat comprised 9 staff (8.3 full time equivalent), including one non-ongoing appointment.

The President and councillors

At 30 June 2010, the Council comprised four councillors, including a President. The councillors were David Crawford (President) (first appointed December 1998), Doug McTaggart (first appointed December 2000), Rod Sims (first appointed December 2003) and Virginia Hickey (first appointed December 2003) (see Box 3-1). The councillors are drawn from across Australia and different industry and community sectors to provide a range of skills and experience. The councillors, including the President, were reappointed for a further three year term from 18 December 2009.

The councillors endorse the operating policies of the Council, and consider, review and approve all of the Council's recommendations and major publications before release. The councillors also consider governance issues, including performance against budget.

Box 3-1 Councillor profiles

David Crawford - President

David Crawford was reappointed as the President of the National Competition Council for a period of three years in December 2009, having been President since December 2006 and a councillor for eight years before that (including two years as acting Council President). Mr Crawford lives in Perth, Western Australia. He is also Chairman of the Airstralia Development Group Pty Ltd, Westralia Airports Corporation Pty Ltd, PAPT Holdings Pty Ltd, PAPT Nominees Pty Ltd, HRZ Wheats Pty Ltd, and Canola Breeders Western Australia Pty Ltd.

Mr Crawford is a director of Grain Foods CRC Ltd, Grain Foods Solutions Pty Ltd, Canola Breeders International Pty Ltd, and Pinnacle Corporate Pty Ltd. He is also Chair of the Board of Advisors of Curtin University Graduate School of Business. Mr Crawford was previously the corporate affairs director of Wesfarmers Limited, managing director of Western Collieries Ltd, chief operating officer of Ranger Minerals NL and managing director of Abosso Goldfields Limited. Mr Crawford has also been a member and/or chair of a number of government and non-government committees in the agriculture and mining industries and a management committee member of both educational and service organisations.

Mr Crawford has an Honours degree in Economics from the University of Queensland and a Master of Arts (Political Science) from the University of Toronto. He is also a Fellow of the Australian Institute of Company Directors.

Doug McTaggart

Doug McTaggart was first appointed as a councillor in December 2000. He was reappointed in December 2003, December 2006 and again in December 2009 for a further three year term.

Dr McTaggart lives in Brisbane, Queensland. Dr McTaggart is the Chief Executive of QIC. He is also a member of the Council of Australian Governments Reform Council (COAG Reform Council) and a board member of Committee for Economic Development of Australia (CEDA).

Dr McTaggart has held various positions as an academic economist, most recently Professor of Economics and Associate Dean at Bond University. He was previously the Under Treasurer of the Queensland Department of Treasury. He has been president of the Economic Society of Australia, a member of the Australian Accounting Standards Board and a member of the Queensland University of Technology Council.

Dr McTaggart holds an Honours degree in Economics from the Australian National University and a Masters degree and PhD from the University of Chicago.

Rod Sims

Rod Sims was appointed as a councillor in December 2003. He was reappointed in December 2006 and again in December 2009 for a further three year term. Mr Sims is also a director of Port Jackson Partners Limited, the chair of InfraCo Asia based in Singapore, and a director of Ingeus Limited. From July 2010 Mr Sims is also the Chairman of the NSW Independent Pricing and Regulatory Tribunal.

From 1996 to 2003, Mr Sims was the chair of the NSW Rail Infrastructure Corporation and later chair of the State Rail Authority. He was a member of the panel that undertook the review of Australia's energy policy for the Council of Australian Governments in 2002.

Mr Sims previously worked for the Australian Government for over eight years, including as the Deputy Secretary in the Department of Prime Minister and Cabinet and Deputy Secretary responsible for Transport in the Department of Transport and Communications. From 1988 to 1990, Mr Sims was the economic advisor to the Prime Minister.

Mr Sims holds a first class honours degree in Commerce from the University of Melbourne and a Master of Economics from the Australian National University.

Virginia Hickey

Virginia Hickey was appointed as a councillor in December 2003. She was reappointed in December 2006 and again in December 2009 for a further three year term.

Ms Hickey is director of @ the Board Table, a corporate governance consulting business. She is also the Chair of the Telecommunications Industry Ombudsman Council, Chair of TransAdelaide, and board member of Flinders Ports, Medical Insurance Group Australia and SafeCom. She was formerly a Commissioner of the National Transport Commission through which role she was involved in the Council of Australian Governments National Reform Agenda. Her other previous board positions include member of the Council of the University of South Australia, Vice President Australian Institute of Company Directors SA & NT Division and board member of Playford Capital and the Art Gallery of South Australia.

Ms Hickey was formerly a partner of Finlaysons Lawyers in Adelaide with particular expertise in corporate governance, directors' accountants' liability and general commercial litigation including actions under the Corporations Law and the Trade Practices Act.

Ms Hickey has a Bachelor of Arts from Monash University and a Bachelor of Laws from Melbourne University and is a Fellow of the Australian Institute of Company Directors.

National Competition Council meetings

During 2009-10 councillors met on eight occasions, including six times by teleconference. In-face meetings were held in the Council's Melbourne office.

The number and timing of meetings in 2009-10 were determined largely on the basis of the Council's work priorities. Table 3-3 lists the dates of the meetings in 2009-10 and councillors' attendance. Councillors received and considered (at meetings or out of session) a monthly financial statement of the Council's performance against budget.

The *Trade Practices Amendment (Infrastructure Access) Act 2010*, enacted on 24 June 2010, altered some of the Council's administrative processes with the objective of improving the efficiency of its operations. Section 29LA of the Act introduced the capacity to resolve matters upon the circulation of papers where all councillors indicate in writing that they support a resolution.

As a general principle the Council has determined that it will seek to take decisions during a face to face meeting and/or a teleconference, these being environments in which Councillors can communicate as a group and make decisions collectively. The Council will adopt decisions by circulation of papers where this enables timely decision making and where unanimous agreement is anticipated, or where a matter has been the subject of previous consideration in a face-to-face meeting and/or teleconference. Councillors remain free to request a meeting or teleconference.

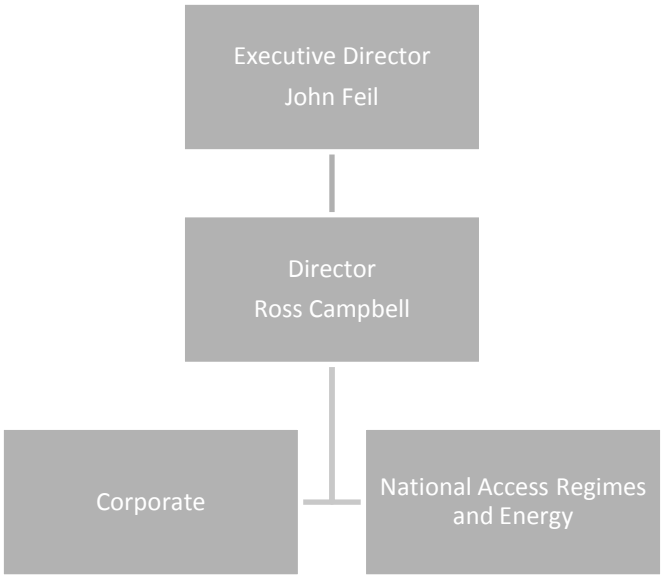
Table 3-3 National Competition Council meetings, 2009-10

Meeting date	Attendance
24 August 2009	all councillors
26 November 2009	all councillors
18 January 2010	all councillors
22 February 2010	all councillors
22 March 2010	all councillors
4 May 2010	all councillors
18 May 2010	all councillors
29 June 2010	all councillors, except D McTaggart (unavoidable competing commitment)

The secretariat

The secretariat provides advice and analysis at the councillors' direction on competition matters, primarily matters related to Part IIIA of the TPA and the regulation of natural gas pipelines under the NGL. The secretariat represents the Council in dealings with officials from the Australian, state and territory governments and with other parties that have relevant interests in the services provided by monopoly infrastructure. Figure 3-1 depicts the structure of the secretariat at 30 June 2010.

Figure 3-1 National Competition Council secretariat organisation chart, 30 June 2010



Day-to-day management of the secretariat is the responsibility of the Executive Director and Director, who comprise the executive team. The executive team is also responsible for forward planning and for policy and expenditure decisions. The executive team met regularly, generally weekly, with secretariat staff during 2009-10 to consider work and organisational issues.

Internal and external scrutiny

Internal scrutiny is undertaken via regular meetings of councillors (see above) and through the Council's Audit and Risk Management Committee (**ARM Committee)**.

Mechanisms for external scrutiny include: formal reviews of the National Access Regime and the NGL, and the role of the Council; legal mechanisms (courts and tribunals) for reviewing Ministers' decisions arising from Council recommendations; and the Commonwealth Ombudsman. The Council is subject to external scrutiny more generally through its published recommendations to governments on matters relating to access determinations and through its processes for engaging with stakeholders.

Audit and Risk Management Committee

The Council's ARM Committee oversees the organisation's financial statements, audit functions, risk management, fraud control and business continuity planning. At 30 June 2010 the Audit and Risk Management Committee comprised councillors Doug McTaggart (Chair) and Virginia Hickey.

On 22 February 2010 the Council considered appointments to the ARM Committee and reappointed both Ms Hickey and Dr McTaggart.

The ARM Committee met twice during 2009-10. On 28 August 2009 the committee considered and agreed that the Council adopt the audited financial statements for 2008-09. The committee received a report from the Australian National Audit Office (**ANAO**) in relation to its audit of these financial statements. On 22 February 2010 the committee reviewed the Council's ARM Committee Charter and reviewed and updated the Council's policies governing risk management and fraud control, including business continuity planning.

Formal reviews

The *Trade Practices Amendment (Infrastructure Access) Act 2010* was passed on 24 June 2010 and came into effect on 14 July 2010. The Act and its implications for the Council's work are discussed in chapter 2 of this annual report.

There were no reviews of access arrangements under the NGL and the National Electricity Law.

Legal mechanisms for reviewing National Competition Council decisions

Under both Part IIIA of the TPA and the NGL, an applicant or service provider may seek review of decisions (made in response to a recommendation from the Council) by the designated Commonwealth Minister or a state premier or a territory chief minister. The Australian Competition Tribunal (**Tribunal**) is the review body for decisions on declaration, certification and coverage/revocation of coverage except that under the NGL, the review body in Western Australia is the Western Australian Gas Review Board.

Chapter 2 reports on the Council's work relating to Part IIIA and the NGL, including where parties sought review of Ministers' decisions and, where available, the outcomes of those reviews.

Other reviews

There were no reports or comments during 2009-10 by the Australian Government Ombudsman or by a parliamentary committee, and no decisions by administrative tribunals involved the Council.

Engagement with stakeholders

The Council's third party access work requires it to engage with interested parties. All matters require the Council to seek and consider written public submissions before making recommendations or decisions. The Council also meets as required with interested parties.

The Council maintains two websites. The Council website located at www.ncc.gov.au contains information and documents relating to the Council's role under Part IIIA of the TPA and the NGL, including information for parties wishing to participate in the Council's public

processes. The site also contains current corporate information including annual reports to Parliament and required Australian Public Service reporting. All guides and templates developed by the Council are available on this site.

The second website, located at www.ncp.ncc.gov.au, holds historical documents regarding the Council's work on the former National Competition Policy (**NCP**).

The Council produced its bi-monthly newsletter, *Accessible*. *Accessible* provides updates of the Council's activities under Part IIIA of the TPA and the NGL. The newsletter is available on the Council's website, and interested parties are invited to subscribe to the distribution list.

Financial management

The financial management of the Council was undertaken on a sound basis involving budget setting, variance analysis and reporting for the organisation as a whole. Financial monitoring and reporting against budget occurred on a monthly basis, and involved all councillors considering a financial report.

The Council continued to work with the Treasury, the Department of Finance and Deregulation, the Australian Competition and Consumer Commission (**ACCC**) (as the outsourced provider of financial services) and the ANAO as key stakeholders to ensure that financial performance aligns with expectations.

The Council received audit clearance of its financial statements from the ANAO on 23 August 2010. The ANAO issued an unqualified audit report.

Outsourced services

The Council undertakes purchasing in accord with the *Commonwealth Procurement Guidelines* and *Good Procurement Practice Guidance*. The key elements of these guidelines are value for money, efficiency and effectiveness, accountability and transparency, ethics and industry development.

The Council has assurance and reporting processes in place to ensure compliance with requirements. These include publishing an annual procurement plan and significant procurements on AusTender, and listing contracts that exceed $100 000 on the Council website in accord with the Senate Order on departmental and agency contracts.

Information on expenditure on contracts and consultancies is also available on the AusTender website www.tenders.gov.au.

During 2009-10, the Council purchased the following services (see the discussion under Use of consultants):

- legal advice (and associated economic advice)
- communications advice

- specialised human resources
- employee assistance program
- information and communications technology (**ICT**)
- finance and accounting
- printing of Council annual report
- payroll and human resource management
- website and information technology support
- document management and storage software
- document storage
- supply and maintenance of indoor plants, and
- internal office maintenance.

The ACCC is contracted to provide all financial and personnel services to the Council, and processed the Council's accounts during 2009-10.

As an Australian Government body, the Council is required by the Department of Finance and Deregulation to reconcile its Goods and Services Tax (**GST**) components on a monthly basis.

Risk management and fraud control

The Council has in place a risk management framework, including a business continuity plan and a fraud control policy. These frameworks have been developed taking account of relevant legislation and standards including the *Australian Government Information Technology Security Manual*, the *Protective Security Manual* and the *Commonwealth Fraud Control Guidelines*.

The Council conducted its annual review of its risk management plan including business continuity and fraud control policy the outcome of which was endorsed by the Audit and Risk Management Committee at its meeting on 22 February 2010.

There were no instances of fraud or allegations of fraud in 2009-10.

Certificate of Fraud Measures

I certify that, as at 30 June 2010, the National Competition Council (**NCC**) had completed its fraud risk assessments and fraud control plan. I also certify that the NCC has in place appropriate fraud detection, prevention, investigation, reporting and data collection procedures and processes that meet the specific needs of the organisation and comply with the *Commonwealth fraud control guidelines - May 2002*.

John Feil
Executive Director

Managing our people

Staffing

At 30 June 2010 the Council's staffing level was 12.3. This comprised 8.3 full time equivalent secretariat staff and four councillors (including the Council President). All secretariat staff were located at the Council's office at level 9, 128 Exhibition Street, Melbourne Victoria.

The secretariat staff comprised the Executive Director, one director, 4 legal counsel (Executive, levels 1-2) and 3 administrative staff (Administrative Service Officer, grades 3-6). These staff comprised eight ongoing and one non-ongoing personnel (see Table 3-4). One staff member left the Council during 2009-10 while one other joined.

Table 3-4 Secretariat staff by gender and employment status, as at 30 June 2009 and 30 June 20010

Employment status	2009	2010
Female		
Full-time ongoing	1	2
Full-time non-ongoing	-	-
Part-time ongoing	3	3
Part-time non-ongoing	1	-
Male		
Full-time ongoing	4	3
Full-time non-ongoing	-	1
Part-time ongoing	-	-
Total	9	9

Collective agreement

Non Senior Executive Service (**SES**) staff are employed under an employee collective agreement. The Council developed the agreement via a consultative process involving all staff, who endorsed the agreement. The Council's employee collective agreement was approved by the Workplace Authority on 30 June 2009, with effect from 7 July 2009. The Council's Employee Collective Agreement 2009-2012 is available on the Council's website.

Remuneration (including leave entitlements and superannuation contributions) paid to Council staff in 2009-10 totalled $1.13 million, comprising $541 000 for SES staff and $591 000 for non SES staff. Remuneration to councillors was approximately $163 000. The range of the salaries paid in 2009-10 to staff in the Council secretariat is shown in Table 3-5.

The Council supports maximum possible flexibility in conditions and working arrangements, with the objective of encouraging the recruitment and retention of staff with appropriate skills. The Council makes salary sacrifice arrangements available. It does not operate performance pay arrangements.

No secretariat staff member opted for a Commonwealth funded vehicle as part of their remuneration package.

Table 3-5 Staff profile, Council secretariat, 30 June 2010

Level	Salary range ($'000)	Female	Male	Total
Senior Executive Service, band 2	Up to 247		1	1
Senior Executive Service, band 1	Up to 181		1	1
Executive, levels 1 -2	87 - 122	2[a]	2	4
Administrative Service Officer, grades 3-6	48 - 87	3[b]	-	3
Total		5	4	9

[a] Two staff members worked part time.

[b] One staff member worked part time

Learning and development

Study assistance in the form of study leave and reimbursement of tuition fees for approved courses of study are available for all Council secretariat staff. Fee assistance (upon successful completion of a course of study) is provided where the study or training undertaken is directly relevant to the work of the Council or relevant more generally to the Australian Public Service. Staff may also participate in training for skill and professional development, including executive and leadership development, and attend conferences and seminars on issues associated with access and competition law.

Excluding the salary costs of staff undertaking training, the Council devoted a total of $19 151 to staff training and development in 2009-10.

Industrial democracy

The Council's *Industrial Democracy Plan* was the basis of its industrial democracy practices during the year. The Executive Director has formal responsibility for the implementation of industrial democracy principles and practices.

Being a co-located small agency, all Council staff met regularly during the year to consider work program and other organisational issues. These meetings were the principal means for staff to consider and discuss issues facing the Council, including the Council's employee collective agreement, changes to work and agency priorities, staffing arrangements, accommodation, office policies, occupational health and safety, information technology and training. Project teams also met to discuss specific work priorities and progress. All staff are invited to attend meetings with Councillors and have access to the minutes of Council meetings. They also have access to the Council's policy documentation and its *Office Procedures* document.

Equity matters

Social justice

Within its work program, the Council addressed social justice issues when conducting its functions related to the National Access Regime and the access regulation of gas pipelines. The Council may consider public interest issues, including:

- policies concerning occupational health and safety, industrial relations, access to justice and other government services, and equity in the treatment of different persons
- economic and regional development, including employment and investment growth, and
- the interests of consumers generally or of a class of consumers.

Application of the Australian Government disability strategy

The Australian Government disability strategy recognises that many programs, services and facilities have an impact on the lives of people with disabilities. The strategy is about enabling the full participation of people with disabilities. It obliges Australian Government organisations to remove barriers that prevent people with disabilities from having access to these programs, services and facilities.

As noted, the Council's mission is to improve the wellbeing of all Australians through growth, innovation and rising productivity, by promoting competition that is in the public interest. The Council's third party access recommendations affect the broad community because they have a positive economic benefit. The Council's policies do not discriminate against any group within the community. The Council thus met the performance criterion for the year, because its policies did not isolate people in the community with disabilities.

Further, the Council's consultation process does not discriminate against any group within the community, satisfying that performance criterion in 2009-10. Similarly, the Council's recruitment policy does not discriminate on the basis of race, disability, colour, gender or religion. (Recruitment information is available in electronic and hard copy formats.)

The Council's publications are available electronically, and are provided in hard copy form upon request.

The Council developed its workplace, including office facilities and workstations, with the aim of reducing barriers to access by people with disabilities.

Workplace diversity

The Council continued to apply its *Workplace Diversity Plan* in 2009-10. No workplace harassment was reported during 2009-10.

A number of secretariat staff identified themselves as members of an equal employment opportunity group (see Table 3-6).

Table 3-6 Staff by equal employment opportunity group at 30 June 2010

Level	Female	NESB 1[a]	NESB 2[b]	ATSI[c]	Persons with disabilities
Senior Executive Service	-	-	-	-	-
Executive, levels 1–2	2	-	-	-	-
Administrative Service Officer, grades 1–6	3	-	-	-	-
Total	5	-	-	-	-

[a] Non-English speaking background, first generation.

[b] Non-English speaking background, second generation.

[c] Aboriginal or Torres Strait Islander (ATSI).

Other matters

Occupational health and safety

During 2009-10, the Council continued to place significant weight on providing a safe and healthy work environment for its staff.

The Council offered all staff access to screen based eyesight testing, the review by an ergonomist of work stations and the flu vaccine. Staff members also continued to have access annually to the confidential health appraisal and advisory program and an employee assistance program.

Reports on monthly testing of cooling towers for legionella and other bacteria were considered by the Occupational Health and Safety Committee. Fire extinguishers and emergency exit lights were checked every six months. Fire wardens participated in regular briefing and training sessions and all staff participated in fire evacuation exercises.

The Occupational Health and Safety Committee met on a quarterly basis during the year, inviting staff to contribute to its agenda and circulating its minutes to all staff.

The Council received no injury or incident reports during 2009-10. No notices were lodged under section 68 and no directions were given to the Council under sections 29, 46 or 47 of the *Occupational Health and Safety Act 1991* during the year.

Freedom of information

The Council did not receive any requests for the release of documents under the *Freedom of Information Act 1982* during 2009-10.

Categories of documents held by the National Competition Council

The secretariat holds three classes of document. First, it holds representations to the Council's President, Executive Director and staff. The Council receives correspondence covering aspects of government microeconomic policy and administration, primarily matters relating to the now concluded NCP reform program and to third party access regulation. Second, it holds files relevant to the Council's operations. The documents on these files include correspondence, analysis and policy advice prepared by secretariat officers. Four main categories of file are relevant to the Council's operations being:

- Council views on the progress of the Australian, state and territory governments in implementing the now concluded NCP program.
- Council recommendations on applications for declaration of services for third party access and the certification of access regimes. The designated Ministers are required to publish their decisions on these applications. The Council makes its recommendations and reasons publicly available after the designated decision maker has published a decision. In the case of a declaration application, if the decision maker does not determine the matter within 60 days of receiving the Council's recommendation, then the decision is deemed to be not to grant access, and the Council publishes its recommendation.
- Council recommendations on coverage or revocation of coverage under the NGL, which are made public when sent to the relevant decision maker.
- material relating to other work assigned to the Council.

Third, the Council holds documents on internal office administration. They include personal details of staff, organisation and staffing records, financial and expenditure records, and internal operating documentation such as office procedures and instructions.

Documents open to public access

The following categories of document are publicly available:

- the Council's annual reports to Parliament
- speeches by councillors and secretariat staff
- research papers and guides on specific competition policy and access issues
- submissions by the Council
- the Council's strategic plan
- applications received for declaration or certification, or the regulation of gas pipelines
- submissions by interested parties on access declaration or certification applications, applications relating to access regulation of gas pipelines, and other reviews and matters considered in the Council's assessments of governments' compliance with the NCP and related reforms where information contained is not commercial-in-confidence (for the period from 1996 to 2005, when the program concluded)
- the Council's issues papers and recommendations on applications for declaration, certification and the access regulation of gas pipelines
- assessments and recommendations to the Australian Government Treasurer on governments' progress in implementing the concluded NCP
- media releases, and
- issues papers, draft reports and final reports on other reviews referred to the Council.

These documents are usually available in both hard copy and electronic form. The Council places as much material as possible on its website (www.ncc.gov.au). Documents, publications and speeches can be obtained directly from the Council. Documents relevant to the Council's former NCP role are available on the new legacy website (www.ncp.ncc.gov.au).

Facilities for access to National Competition Council documents

Applicants seeking access under the Freedom of Information Act to documents in the possession of the Council should apply in writing to:

Director (Freedom of Information Request)
National Competition Council
GPO Box 250
Melbourne VIC 3001
Attention: Freedom of Information Coordinator

Telephone enquiries should be directed to the Freedom of Information Coordinator on 03 9285 7474 between 9.00 am and 5.00 pm, Monday to Friday.

The Director (Freedom of Information Request) is authorised under section 23 of the Act to grant or refuse requests for access to documents. In accordance with section 54 of the Act, an applicant may apply to the Executive Director seeking an internal review of a decision to refuse a request.

If access under the Act is granted, then the Council will provide copies of documents after receiving payment of any relevant charges. Alternatively, applicants may arrange to inspect documents at the Council's office at level 9, 128 Exhibition Street, Melbourne, between 9.00 am and 5.00 pm, Monday to Friday.

Advertising and market research

The Council made no payments during 2009-10 to advertising agencies, market research organisations, polling organisations, direct mail organisations or advertising agencies that place government advertising in the media.

Expenditure on advertising during 2009-10 totalled $10 456. This expenditure was for the purpose of public consultation regarding the Council's consideration of third party access matters in line with the Council's statutory obligations under the TPA and NGL and staff recruitment.

Ecologically sustainable development and environmental performance

The Council aims to operate in an ecologically sustainable manner and to provide an environmentally sound workplace. The Council has adopted practices designed to minimise adverse effects on the environment subject to assessment of the financial costs or savings involved. To minimise its environmental impact, the Council:

- procures and uses office equipment with low energy use and power saving modes
- recycles paper and cardboard products including pulping of classified waste
- uses tap flow restrictors to reduce water use
- uses LCD computer screens
- disposes of cartridges through a recycling outlet
- encourages staff to minimise their use of energy and paper (printing is defaulted to duplex, and incoming faxes are received and distributed electronically), use natural light whenever possible and to use water wisely
- disposes of mobile phones and batteries through a recycling outlet

- when replacing its computing and other equipment, makes available to not for profit organisations the replaced equipment
- relies primarily on electronic publication of documents via its website (providing hard copy documents on request), and
- implements measures to reduce its reliance on paper files.

The Council buys goods and services in accord with the environmental purchasing guide promoted by the Department of the Environment, Water, Heritage and the Arts.

In 2009-10 the Council reduced its energy consumption by 13.8 per cent compared to the previous financial year.

Grant programs

The Council does not administer grants.

Use of consultants

The Council purchased the services of consultants for specialist advice when the required expertise was not available within the Council, and when it was efficient and cost-effective to do so.

The Council has a panel of five legal services providers, comprising Allens Arthur Robinson, the Australian Government Solicitor, Clayton Utz, Gilbert + Tobin and DLA Phillips Fox selected using an open tender process (notified on AusTender). Where the Council requires specialist legal services, it draws from the firms on its panel. The choice of panel firm is frequently constrained by the need to avoid conflicts of interest.

The Council also purchases other non-legal consultancy services (in particular economic advice) generally using a select tendering process. Economic experts are generally required to have specialist expertise. There is also a need to avoid conflicts of interest. The Council engages consultants directly where the choice of required specialist expertise is extremely limited.

During 2009-10, the Council commenced five new consultancy contracts involving total expenditure during the year of $35 062. In addition, five ongoing consultancy contracts were active in 2009-10, involving total expenditure of $1.77 million. The major components of the Council's consultancy expenses comprised expenditure on legal services and associated economic advice services directed to the Council's third party access work.

Table 3-7 provides expenditure information on all of the Council's ongoing and new contracts in 2009-10, providing a comparison with the preceding two financial years. Annual reports contain information about actual expenditure on contracts for consultancies. Information on the value of contracts and consultancies is available on the AusTender website www.tenders.gov.au.

Table 3-7 Summary of expenditure on all consultancy contracts in 2007-08, 2008-09 and 2009-10 ($) (includes GST)

	2007-08	2008-09	2009-10
Legal (new)	253 749	20 843	12 842
Legal (ongoing)	445 691	521 704	1 708 867[1]
Economic (new)	10 499	128 972	5 720
Economic (ongoing)	-	-	-
Communications (new)	-	-	-
Communications (ongoing)	18 027	14 194	15 069
ICT (new)	75 990	-	-
ICT (ongoing)	-	63 895	46 475
Human resources services (new)	46 088	47 513	16 500
Human resources services (ongoing)	-	-	-
Total	850 044	797 121	1 805 473

[1] Includes economic and expert witness costs associated with legal services contracts.

Of the five new contracts let in 2009-10, one had expenditure exceeding $10 000 (see Table 3-8).

Table 3-8 Consultancy contract services of $10 000 or more let during 2009-10 (includes GST)

Consultant name	Description of service	Contract price ($)	Selection process	Justification
Hudson Global Resources	Human resources services (legal officer recruitment)	16 500	Direct sourcing	Skills unavailable within agency

Annual reporting requirements and aids to access

Information contained in this annual report is provided in accordance with:

- section 74 of the *Occupational Health and Safety Act 1991*
- the *Public Service Act 1999*
- section 8 of the *Freedom of Information Act 1982*
- section 29(O) of the *Trade Practices Act 1974*
- the guidelines issued by the Department of the Prime Minister and Cabinet.

For inquiries or comments concerning this report or any other Council publications, please contact:

Executive Director
National Competition Council
GPO Box 250
Melbourne VIC 3001
Telephone (03) 9285 7474
Facsimile (03) 9285 7477

Email: info@ncc.gov.au.

Information on the National Competition Council can be found on the internet at www.ncc.gov.au.

This annual report is available at www.ncc.gov.au.

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4 Financial statements

Financial statements for the period ended 30 June 2010

Australian National
Audit Office

INDEPENDENT AUDITOR'S REPORT

To the Treasurer

Scope

I have audited the accompanying financial statements of the National Competition Council (the Council) for the year ended 30 June 2010, which comprise: the Statement by the Council President and Executive Director; Statement of Comprehensive Income; Balance Sheet; Statement of Changes in Equity; Cash Flow Statement; Schedule of Commitments; Schedule of Asset Additions; and Notes to and Forming Part of the Financial Statements, including a Summary of Significant Accounting Policies.

The Responsibility of the Council's President for the Financial Statements

The Council's President is responsible for the preparation and fair presentation of the financial statements in accordance with the Finance Minister's Orders made under the *Financial Management and Accountability Act 1997*, including the Australian Accounting Standards (which include the Australian Accounting Interpretations). This responsibility includes establishing and maintaining internal controls relevant to the preparation and fair presentation of the financial statements that are free from material misstatement, whether due to fraud or error; selecting and applying appropriate accounting policies; and making accounting estimates that are reasonable in the circumstances.

Auditor's Responsibility

My responsibility is to express an opinion on the financial statements based on my audit. I have conducted my audit in accordance with the Australian National Audit Office Auditing Standards, which incorporate the Australian Auditing Standards. These auditing standards require that I comply with relevant ethical requirements relating to audit engagements and plan and perform the audit to obtain reasonable assurance whether the financial statements are free from material misstatement.

An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the financial statements. The procedures selected depend on the auditor's judgement, including the assessment of the risks of material misstatement of the financial statements, whether due to fraud or error. In making those risk assessments, the auditor considers internal control relevant to the Council's preparation and fair presentation of the financial statements in order to design audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Council's internal control. An audit also includes evaluating the appropriateness of accounting policies used and the reasonableness of accounting

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estimates made by the Council's President, as well as evaluating the overall presentation of the financial statements.

I believe that the audit evidence I have obtained is sufficient and appropriate to provide a basis for my audit opinion.

Independence

In conducting the audit, I have followed the independence requirements of the Australian National Audit Office, which incorporate the requirements of the Australian accounting profession.

Auditor's Opinion

In my opinion, the financial statements of the Council:

(a) have been prepared in accordance with the Finance Minister's Orders made under the *Financial Management and Accountability Act 1997,* including the Australian Accounting Standards; and

(b) give a true and fair view of the matters required by the Finance Minister's Orders including the Council's financial position as at 30 June 2010 and its financial performance and cash flows for the year then ended.

Australian National Audit Office

John Jones
Executive Director

Delegate of the Auditor-General

Canberra
27 August 2010

National Competition Council
Level 9, 128 Exhibition Street Melbourne 3000 Australia
GPO Box 2508 Melbourne 3001 Australia
Telephone 03 9285 7474 Facsimile 03 9285 7477

Office of
Council President

NATIONAL COMPETITION COUNCIL
STATEMENT BY THE COUNCIL PRESIDENT AND
THE EXECUTIVE DIRECTOR

In our opinion, the attached financial statements for the year ended 30 June 2010 are based on properly maintained financial records and give a true and fair view of the matters required by the Finance Minister's Orders made under the *Financial Management and Accountability Act 1997*, as amended.

David Crawford
President

Dated: 27/8/2010

John Feil
Executive Director

Dated: 27 August 2010

NATIONAL COMPETITION COUNCIL
STATEMENT OF COMPREHENSIVE INCOME
for the period ended 30 June 2010

	Notes	2010 $	2009 $
EXPENSES			
Employee benefits	3A	**1,295,148**	1,266,549
Supplier expenses	3B	**2,272,221**	1,422,787
Depreciation and amortisation	3C	**56,173**	35,748
Finance costs	3D	**2,281**	-
Write-down and impairment of assets	3E	**3,881**	1,170
Other	3F	**7,910**	-
Total expenses		**3,637,614**	2,726,254
LESS:			
OWN-SOURCE INCOME			
Own-source revenue			
Fees and fines	4A	**7,500**	2,000
Other	4B	**750,985**	205,523
Total own-source revenue		**758,485**	207,523
Gains			
Other	4C	**23,500**	22,280
Total gains		**23,500**	22,280
Total own-source income		**781,985**	229,803
Net cost of (contribution by) services		**2,855,629**	2,496,451
Revenue from Government	4D	**2,806,000**	2,781,000
Surplus (Deficit) on continuing operations		**(49,629)**	284,549
Surplus (Deficit) attributable to the Australian Government		**(49,629)**	284,549
OTHER COMPREHENSIVE INCOME			
Changes in asset revaluation reserves		**13,683**	29,743
Total other comprehensive income		**13,683**	29,743
Total comprehensive income (loss)		**(35,946)**	314,292
Total comprehensive income (loss) attributable to the Australian Government		**(35,946)**	314,292

The above statement should be read in conjunction with the accompanying notes.

NATIONAL COMPETITION COUNCIL
BALANCE SHEET
as at 30 June 2010

	Notes	2010 $	2009 $
ASSETS			
Financial Assets			
Cash and cash equivalents	5A	**33,638**	55,785
Trade and other receivables	5B	**4,200,137**	4,505,697
Total financial assets		**4,233,775**	4,561,482
Non-Financial Assets			
Land and buildings	6A	**65,643**	69,837
Property, plant and equipment	6B,C	**37,029**	63,541
Intangibles	6D,E	**3,450**	5,591
Other	6F	**8,673**	14,985
Total non-financial assets		**114,795**	153,954
Total Assets		**4,348,570**	4,715,436
LIABILITIES			
Payables			
Suppliers	7A	**46,545**	270,475
Other	7B	**23,772**	18,957
Total payables		**70,317**	289,432
Provisions			
Employee provisions	8A	**271,554**	262,737
Other	8B	**43,121**	29,743
Total provisions		**314,675**	292,480
Total Liabilities		**384,992**	581,912
Net Assets		**3,963,578**	4,133,524
EQUITY			
Parent Entity Interest			
Reserves		**222,433**	208,750
Retained surplus (accumulated deficit)		**3,741,145**	3,924,774
Total parent entity interest		**3,963,578**	4,133,524
Total Equity		**3,963,578**	4,133,524

The above statement should be read in conjunction with the accompanying notes.

NATIONAL COMPETITION COUNCIL
STATEMENT OF CHANGES IN EQUITY
for the period ended 30 June 2010

	Retained earnings		Asset revaluation reserve		Total equity	
	2010	2009	**2010**	2009	**2010**	2009
	$	$	**$**	$	**$**	$
Opening balance						
Balance carried forward from previous period	**3,924,774**	3,640,225	**208,750**	179,007	**4,133,524**	3,819,232
Adjustment for errors	**-**	-	**-**	-	**-**	-
Adjustment for changes in accounting policies	**-**	-	**-**	-	**-**	-
Adjusted opening balance	**3,924,774**	3,640,225	**208,750**	179,007	**4,133,524**	3,819,232
Comprehensive income						
Other comprehensive income - Changes in asset revaluation reserves	**-**	-	**13,683**	29,743	**13,683**	29,743
Surplus (Deficit) for the period	**(49,629)**	284,549			**(49,629)**	284,549
Total comprehensive income	**(49,629)**	284,549	**13,683**	29,743	**(35,946)**	314,292
of which:						
Attributable to the Australian Government	(49,629)	284,549	13,683	29,743	(35,946)	314,292
Transactions with owners						
Distributions to owners						
Returns of capital:						
Reduction in prior year appropriations	**(134,000)**	-	**-**	-	**(134,000)**	-
Sub-total transactions with owners	**(134,000)**	-	**-**	-	**(134,000)**	-
Closing balance as at 30 June	**3,741,145**	3,924,774	**222,433**	208,750	**3,963,578**	4,133,524
Closing balance attributable to the Australian Government	**3,741,145**	3,924,774	**222,433**	208,750	**3,963,578**	4,133,524

The above statement should be read in conjunction with the accompanying notes.

NATIONAL COMPETITION COUNCIL
CASH FLOW STATEMENT
for the period ended 30 June 2010

	Notes	**2010** $	2009 $
OPERATING ACTIVITIES			
Cash received			
Appropriations		**3,707,950**	2,340,000
Net GST received		**240,228**	132,062
Other		**758,543**	207,523
Total cash received		**4,706,721**	2,679,585
Cash used			
Employees		**1,281,516**	1,229,119
Suppliers		**2,687,015**	1,445,780
Other		**757,910**	-
Total cash used		**4,726,441**	2,674,899
Net cash from (used by) operating activities	9	**(19,720)**	4,686
INVESTING ACTIVITIES			
Cash used			
Purchase of property, plant and equipment		**2,427**	40,948
Total cash used		**2,427**	40,948
Net cash from (used by) investing activities		**(2,427)**	(40,948)
Net increase (decrease) in cash held		**(22,147)**	(36,262)
Cash and cash equivalents at the beginning of the reporting period		**55,785**	92,047
Cash and cash equivalents at the end of the reporting period	5A	**33,638**	55,785

The above statement should be read in conjunction with the accompanying notes.

NATIONAL COMPETITION COUNCIL
SCHEDULE OF COMMITMENTS
as at 30 June 2010

	2010	2009
BY TYPE	**$**	$
Commitments receivable		
GST recoverable on commitments	**36,530**	69,159
Total commitments receivable	**36,530**	69,159
Commitments payable		
Other commitments		
Operating leases [1]	**162,087**	341,372
Contracts for IT Services [2]	**25,958**	-
Other [3]	**213,800**	419,380
Total other commitments	**401,845**	760,752
Net commitments by type	**365,315**	691,593
BY MATURITY		
Commitments receivable		
Other commitments receivable		
One year or less	**36,530**	35,088
From one to five years	**-**	34,071
Over five years	**-**	-
Total other commitments receivable	**36,530**	69,159
Commitments payable		
Operating lease commitments		
One year or less	**162,087**	180,376
From one to five years	**-**	160,996
Over five years	**-**	-
Total operating lease commitments	**162,087**	341,372
Other Commitments		
One year or less	**239,758**	205,580
From one to five years	**-**	213,800
Over five years	**-**	-
Total other commitments	**239,758**	419,380
Net commitments by maturity	**365,315**	691,593

NB: Commitments are GST inclusive where relevant.

[1] Operating leases included are effectively non-cancellable.

[2] Various contracts of the provision of IT services

[3] Agreement for the provision of financial processing and accounting services. The agreement is for the period 1/7/09 to 30/6/11.

Lease for office accommodation.
The current lease expires on 9 May 2011. There is no option to renew for a further term. Lease payments are subject to annual increases of 5% per annum.

The above schedule should be read in conjunction with the accompanying notes.

NATIONAL COMPETITION COUNCIL
SCHEDULE OF ASSET ADDITIONS
for the period ended 30 June 2010

The following non-financial non-current assets were added in 2009-10:

	Buildings	**Other property, plant & equipment**	**Intangibles**	**Total**
	$	**$**	**$**	**$**
By purchase - appropriation equity	**-**	**-**	**-**	**-**
By purchase - appropriation ordinary annual services	**-**	**2,427**	**-**	**2,427**
By purchase - donated funds	**-**	**-**	**-**	**-**
By purchase - other	**-**	**-**	**-**	**-**
By finance lease	**-**	**-**	**-**	**-**
Assets received as gifts/donations	**-**	**-**	**-**	**-**
From acquisition of entities or operations (including restructuring)	**-**	**-**	**-**	**-**
Total additions	**-**	**2,427**	**-**	**2,427**

The following non-financial non-current assets were added in 2008-09:

	Buildings	Other property, plant & equipment	Intangibles	Total
	$	$	$	$
By purchase - appropriation equity	-	-	-	-
By purchase - appropriation ordinary annual services	-	34,524	6,424	40,948
By purchase - donated funds	-	-	-	-
By purchase - other	-	-	-	-
By finance lease	-	-	-	-
Assets received as gifts/donations	-	-	-	-
From acquisition of entities or operations (including restructuring)	-	-	-	-
Total additions	-	34,524	6,424	40,948

Note 1: Summary of Significant Accounting Policies

1.1 Objectives of the National Competition Council

The National Competition Council is an Australian Government controlled entity. The objective of National Competition Council is to provide advice to Governments and make decisions on infrastructure access and issues that accord with statutory requirements (including time limits) and good regulatory practice, and ensuring that advice meets the advice requirements of decision making Ministers, such that Australia achieves a consistent approach to access regulation that promotes the efficient operation of, use of and investment in infrastructure thereby promoting effective competition.

The Council is structured to meet one outcome:

Outcome 1: Competition in markets that are dependent on access to nationally significant monopoly infrastructure, through recommendations and decisions promoting the efficient operation of, use of and investment in infrastructure.

The continued existence of the Council in its present form and with its present programs is dependent on Government policy and on continuing appropriations by Parliament for the Council's administration and programs.

The Council's activities contributing toward this outcome are classified as Departmental. Departmental activities involve the use of assets, liabilities, revenues and expenses controlled or incurred by the Council in its own right.

The Council does not conduct any administered activities.

1.2 Basis of Preparation of the Financial Statements

The financial statements are required by section 49 of the *Financial Management and Accountability Act 1997* and are general purpose financial statements.

The Financial Statements have been prepared in accordance with:

- Finance Minister's Orders (or FMO) for reporting periods ending on or after 1 July 2009; and
- Australian Accounting Standards and Interpretations issued by the Australian Accounting Standards Board (AASB) that apply for the reporting period.

The financial statements have been prepared on an accrual basis and in accordance with the historical cost convention, except for certain assets and liabilities at fair value. Except where stated, no allowance is made for the effect of changing prices on the results or the financial position.

The financial statements are presented in Australian dollars and values are rounded to the nearest dollar unless otherwise specified.

Unless an alternative treatment is specifically required by an accounting standard or the FMO, assets and liabilities are recognised in the balance sheet when and only when it is probable that future economic benefits will flow to the entity or a future sacrifice of economic benefits will be required and the amounts of the assets or liabilities can be reliably measured. However, assets and liabilities arising under Agreements Equally Proportionately Unperformed are not recognised unless required by an accounting standard. Liabilities and assets that are unrecognised are reported in the schedule of commitments or the schedule of contingencies.

Unless alternative treatment is specifically required by an accounting standard, income and expenses are recognised in the statement of comprehensive income when and only when the flow, consumption or loss of economic benefits has occurred and can be reliably measured.

1.3 Significant Accounting Judgements and Estimates

In the process of applying the accounting policies listed in this note, the Council has made the following judgements that have the most significant impact on the amounts recorded in the financial statements:

- The fair value of Leasehold Improvements has been taken to be the market value of similar properties as determined by an independent valuer.

No accounting assumptions and estimates have been identified that have a significant risk of causing a material adjustment to carrying amounts of assets and liabilities within the next accounting period.

1.4 New Australian Accounting Standards

Adoption of New Australian Accounting Standard Requirements

No accounting standard has been adopted earlier than the application date as stated in the standard.

The following new standards/revised standards/Interpretations/amending standards were issued prior to the signing of the statement by the president and executive officer, were applicable to the current reporting period and had a financial impact on the entity:

AASB 7 Financial Instruments: Disclosures - June 2009 (Compilation)

AASB 101 Presentation of Financial Statements - June 2009 (Compilation)

AASB 107 Statement of Cash Flows - June 2009 (Compilation)

AASB 116 Property, Plant and Equipment - June 2009 (Compilation)

AASB 119 Employee Benefits - June 2009 (Compilation)

AASB 132 Financial Instruments: Presentation - June 2009 (Compilation)

AASB 136 Impairment of Assets - June 2009 (Compilation)

AASB 138 Intangible Assets - June 2009 (Compilation)

AASB 139 Financial Instruments: Recognition and Measurement - October 2009 (Compilation)

Interp. 1 Changes in Existing Decommissioning, Restoration and Similar Liabilities - June 2009 (Compilation)

Other new standards/revised standards/interpretations/amending standards that were issued prior to the signing of the statement by the president and executive officer and are applicable to the current reporting period did not have a financial impact, and are not expected to have a future financial impact on the entity.

Future Australian Accounting Standard Requirements

The following new standards/revised standards/interpretations/amending standards were issued by the Australian Accounting Standards Board prior to the signing of the statement by the president and executive officer, are expected to have a financial impact on the entity for future reporting periods:

AASB 9 Financial Instruments

AASB 124 Related Party Disclosures

AASB 2009-11 Amendments to Australian Accounting Standards arising from AASB 9

AASB 2010-4 Further Amendments to Australian Accounting Standards arising from the Annual Improvements Project

Other new standards/revised standards/interpretations/amending standards that were issued prior to the signing of the statement by the president and executive officer and are applicable to the future reporting period are not expected to have a future financial impact on the entity.

1.5 Revenue

Revenue from Government

Amounts appropriated for departmental outputs for the year (adjusted for any formal additions and reductions) are recognised as revenue when the Council gains control of the appropriation, except for certain amounts that relate to activities that are reciprocal in nature, in which case revenue is recognised only when it has been earned.

Appropriations receivable are recognised at their nominal amounts.

Resources Received Free of Charge

Resources received free of charge are recognised as revenue when, and only when, a fair value can be reliably determined and the services would have been purchased if they had not been donated. Use of those resources is recognised as an expense.

Contributions of assets at no cost of acquisition or for nominal consideration are recognised as gains at their fair value when the asset qualifies for recognition, unless received from another Government Agency or Authority as a consequence of a restructuring of administrative arrangements (Refer Note 1.7).

Resources received free of charge are recorded as either revenue or gains depending on their nature.

Other Types of Revenue

Revenue from the sale of goods is recognised when:

- the risks and rewards of ownership have been transferred to the buyer;
- the agency retains no managerial involvement or effective control over the goods;
- the revenue and transaction costs incurred can be reliably measured; and
- it is probable that the economic benefits associated with the transaction will flow to the entity.

Revenue from rendering of services is recognised by reference to the stage of completion of contracts at the reporting date. The revenue is recognised when:

- the amount of revenue, stage of completion and transaction costs incurred can be reliably measured; and
- the probable economic benefits associated with the transaction will flow to the entity.

The stage of completion of contracts at the reporting date is determined by reference to the proportion that costs incurred to date bear to the estimated total costs of the transaction.

Receivables for goods and services, which have 30 day terms, are recognised at the nominal amounts due less any impairment allowance account. Collectability of debts is reviewed at end of reporting period. Allowances are made when collectability of the debt is no longer probable.

Interest revenue is recognised using the effective interest method as set out in AASB 139 *Financial Instruments: Recognition and Measurement.*

1.6 Gains

Resources Received Free of Charge

Resources received free of charge are recognised as gains when, and only when, a fair value can be reliably determined and the services would have been purchased if they had not been donated. Use of those resources is recognised as an expense.

Resources received free of charge are recorded as either revenue or gains depending on their nature.

Contributions of assets at no cost of acquisition or for nominal consideration are recognised as gains at their fair value when the asset qualifies for recognition, unless received from another Government agency or authority as a consequence of a restructuring of administrative arrangements (Refer to Note 1.7).

Sale of Assets

Gains from disposal of assets are recognised when control of the asset has passed to the buyer.

1.7 Transactions with the Government as Owner

Equity Injections

Amounts appropriated which are designated as 'equity injections' for a year (less any formal reductions) are recognised directly in contributed equity in that year.

Restructuring of Administrative Arrangements

Net assets received from or relinquished to another Australian Government agency or authority under a restructuring of administrative arrangements are adjusted at their book value directly against contributed equity.

Other Distributions to Owners

The FMO require that distributions to owners be debited to contributed equity unless in the nature of a dividend. On the 13th May 2010, the Finance Minister issued a determination to reduce Departmental Output Appropriations by $134,000.

1.8 Employee Benefits

Liabilities for 'short-term employee benefits' (as defined in AASB 119 *Employee Benefits*) and termination benefits due within twelve months of end of reporting period are measured at their nominal amounts.

The nominal amount is calculated with regard to the rates expected to be paid on settlement of the liability.

Other long-term employee benefits are measured as net total of the present value of the defined benefit obligation at the end of the reporting period minus the fair value at the end of the reporting period of plan assets (if any) out of which the obligations are to be settled directly.

Leave

The liability for employee benefits includes provision for annual leave and long service leave. No provision has been made for sick leave as all sick leave is non-vesting and the average sick leave taken in future years by employees of the Council is estimated to be less than the annual entitlement for sick leave.

The leave liabilities are calculated on the basis of employees' remuneration at the estimated salary rates that will applied at the time the leave is taken, including the Council's employer superannuation contribution rates to the extent that the leave is likely to be taken during service rather than paid out on termination.

The liability for long service leave has been calculated using the Australian Government short hand method. The estimate of the present value of the liability takes into account attrition rates and pay increases through promotion and inflation.

Separation and Redundancy

Provision is made for separation and redundancy benefit payments. The Council recognises a provision for termination when it has developed a detailed formal plan for the terminations and has informed those employees affected that it will carry out the terminations.

Superannuation

Staff of the Council are members of the Commonwealth Superannuation Scheme (CSS), the Public Sector Superannuation Scheme (PSS) or the PSS accumulation plan (PSSap).

The CSS and PSS are defined benefit schemes for the Australian Government. The PSSap is a defined contribution scheme.

The liability for defined benefits is recognised in the financial statements of the Australian Government and is settled by the Australian Government in due course. This liability is reported by the Department of Finance and Deregulation as an administered item.

The Council makes employer contributions to the employee superannuation scheme at rates determined by an actuary to be sufficient to meet the current cost to the Government of the superannuation entitlements of the Council's employees. The Council accounts for the contributions as if they were contributions to defined contribution plans.

The liability for superannuation recognised as at 30 June represents outstanding contributions for the final fortnight of the year.

1.9 Leases

A distinction is made between finance leases and operating leases. Finance leases effectively transfer from the lessor to the lessee substantially all the risks and rewards incidental to ownership of leased assets. An operating lease is a lease that is not a finance lease. In operating leases, the lessor effectively retains substantially all such risks and benefits.

Where an asset is acquired by means of a finance lease, the asset is capitalised at either the fair value of the lease property or, if lower, the present value of minimum lease payments at the inception of the contract and a liability is recognised at the same time and for the same amount.

The discount rate used is the interest rate implicit in the lease. Leased assets are amortised over the period of the lease. Lease payments are allocated between the principal component and the interest expense.

Operating lease payments are expensed on a straight-line basis which is representative of the pattern of benefits derived from the leased assets.

1.10 Borrowing Costs

All borrowing costs are expensed as incurred.

1.11 Cash

Cash and cash equivalents includes cash on hand, cash held with outsiders, demand deposits in bank accounts with an original maturity of 3 months or less that are readily convertible to known amounts of cash and subject to insignificant risk of changes in value. Cash is recognised at its nominal amount.

1.12 Financial Assets

The Council classifies its financial assets in the following categories:

- financial assets at fair value through profit or loss;
- held-to-maturity investments;
- available-for-sale financial assets; and
- loans and receivables.

The classification depends on the nature and purpose of the financial assets and is determined at the time of initial recognition.

Financial assets are recognised and derecognised upon trade date.

Effective Interest Method

The effective interest method is a method of calculating the amortised cost of a financial asset and of allocating interest income over the relevant period. The effective interest rate is the rate that exactly discounts estimated future cash receipts through the expected life of the financial asset, or, where appropriate, a shorter period.

Income is recognised on an effective interest rate basis except for financial assets that are recognised at fair value through profit or loss.

Financial Assets at Fair Value Through Profit or Loss

Financial assets are classified as financial assets at fair value through profit or loss where the financial assets:

- have been acquired principally for the purpose of selling in the near future;
- are a part of an identified portfolio of financial instruments that the Council manages together and has a recent actual pattern of short-term profit-taking; or
- are derivatives that are not designated and effective as a hedging instrument.

Assets in this category are classified as current assets.

Financial assets at fair value through profit or loss are stated at fair value, with any resultant gain or loss recognised in profit or loss. The net gain or loss recognised in profit or loss incorporates any interest earned on the financial asset.

Available-for-Sale Financial Assets

Available-for-sale financial assets are non-derivatives that are either designated in this category or not classified in any of the other categories.

Available-for-sale financial assets are recorded at fair value. Gains and losses arising from changes in fair value are recognised directly in reserves (equity) with the exception of impairment losses. Interest is calculated using the effective interest method and foreign exchange gains and losses on monetary assets are recognised directly in profit or loss. Where the asset is disposed of or is determined to be impaired, part (or all) of the cumulative gain or loss previously recognised in the reserve is included in profit and loss for the period.

Where a reliable fair value cannot be established for unlisted investments in equity instruments cost is used. The Council has no such instruments.

Held-to-Maturity Investments

Non-derivative financial assets with fixed or determinable payments and fixed maturity dates that the group has the positive intent and ability to hold to maturity are classified as held-to-maturity investments. Held-to-maturity investments are recorded at amortised cost using the effective interest method less impairment, with revenue recognised on an effective yield basis.

Loans and Receivables

Trade receivables, loans and other receivables that have fixed or determinable payments that are not quoted in an active market are classified as 'loans and receivables'. Loans and receivables are measured at amortised cost using the effective interest method less impairment. Interest is recognised by applying the effective interest rate.

Impairment of Financial Assets

Financial assets are assessed for impairment at the end of each reporting periods.

- *Financial assets held at amortised cost* - if there is objective evidence that an impairment loss has been incurred for loans and receivables or held to maturity investments held at amortised cost, the amount of the loss is measured as the difference between the asset's carrying amount and the present value of estimated future cash flows discounted at the asset's original effective interest rate. The carrying amount is reduced by way of an allowance account. The loss is recognised in the statement of comprehensive income.
- *Available for sale financial assets* - if there is objective evidence that an impairment loss on an available-for-sale financial asset has been incurred, the amount of the difference between its cost, less principal repayments and amortisation, and its current fair value, less any impairment loss previously recognised in expenses, is transferred from equity to the statement of comprehensive income.
- *Financial assets held at cost* - If there is objective evidence that an impairment loss has been incurred the amount of the impairment loss is the difference between the carrying amount of the asset and the present value of the estimated future cash flows discounted at the current market rate for similar assets.

1.13 Financial Liabilities

Financial liabilities are classified as either financial liabilities 'at fair value through profit or loss' or other financial liabilities.

Financial liabilities are recognised and derecognised upon 'trade date'.

Financial Liabilities at Fair Value Through Profit or Loss

Financial liabilities at fair value through profit or loss are initially measured at fair value. Subsequent fair value adjustments are recognised in profit or loss. The net gain or loss recognised in profit or loss incorporates any interest paid on the financial liability.

Other Financial Liabilities

Other financial liabilities, including borrowings, are initially measured at fair value, net of transaction costs.

Other financial liabilities are subsequently measured at amortised cost using the effective interest method, with interest expense recognised on an effective yield basis.

The effective interest method is a method of calculating the amortised cost of a financial liability and of allocating interest expense over the relevant period. The effective interest rate is the rate that exactly discounts estimated future cash payments through the expected life of the financial liability, or, where appropriate, a shorter period.

Supplier and other payables are recognised at amortised cost. Liabilities are recognised to the extent that the goods or services have been received (and irrespective of having been invoiced).

1.14 Contingent Liabilities and Contingent Assets

Contingent liabilities and contingent assets are not recognised in the balance sheet but are reported in the relevant schedules and notes. They may arise from uncertainty as to the existence of a liability or asset or represent an asset or liability in respect of which the amount cannot be reliably measured. Contingent assets are disclosed when settlement is probable but not virtually certain and contingent liabilities are disclosed when settlement is greater than remote.

1.15 Financial Guarantee Contracts

Financial guarantee contracts are accounted for in accordance with AASB 139 *Financial Instruments: Recognition and Measurement*. They are not treated as a contingent liability, as they are regarded as financial instruments outside the scope of AASB 137 *Provisions, Contingent Liabilities and Contingent Assets*.

1.16 Acquisition of Assets

Assets are recorded at cost on acquisition except as stated below. The cost of acquisition includes the fair value of assets transferred in exchange and liabilities undertaken. Financial assets are initially measured at their fair value plus transaction costs where appropriate.

Assets acquired at no cost, or for nominal consideration, are initially recognised as assets and income at their fair value at the date of acquisition, unless acquired as a consequence of restructuring of administrative arrangements. In the latter case, assets are initially recognised as contributions by owners

at the amounts at which they were recognised in the transferor agency's accounts immediately prior to the restructuring.

1.17 Property, Plant and Equipment

Asset Recognition Threshold

Purchases of property, plant and equipment are recognised initially at cost in the balance sheet, except for purchases costing less than $2,000, which are expensed in the year of acquisition (other than where they form part of a group of similar items which are significant in total).

The initial cost of an asset includes an estimate of the cost of dismantling and removing the item and restoring the site on which it is located. This is particularly relevant to 'make good' provisions in property leases taken up by the Council where there exists an obligation to restore the property to its original condition. These costs are included in the value of the Council's leasehold improvements with a corresponding provision for the 'make good' recognised.

Revaluations

Fair values for each class of asset are determined as shown below:

Asset Class	Fair value measured at
Leasehold Improvements	Depreciated replacement cost
Plant and equipment	Market selling price

Following initial recognition at cost, property plant and equipment are carried at fair value less subsequent accumulated depreciation and accumulated impairment losses. Valuations are conducted with sufficient frequency to ensure that the carrying amounts of assets do not differ materially from the assets' fair values as at the reporting date. The regularity of independent valuations depends upon the volatility of movements in market values for the relevant assets.

Revaluation adjustments are made on a class basis. Any revaluation increment is credited to equity under the heading of asset revaluation reserve except to the extent that it reverses a previous revaluation decrement of the same asset class that was previously recognised in the surplus/deficit. Revaluation decrements for a class of assets are recognised directly in the surplus/deficit except to the extent that they reverse a previous revaluation increment for that class.

Any accumulated depreciation as at the revaluation date is eliminated against the gross carrying amount of the asset and the asset restated to the revalued amount.

Depreciation

Depreciable property, plant and equipment assets are written-off to their estimated residual values over their estimated useful lives to the Council using, in all cases, the straight-line method of depreciation.

Depreciation rates (useful lives), residual values and methods are reviewed at each reporting date and necessary adjustments are recognised in the current, or current and future reporting periods, as appropriate.

Depreciation rates applying to each class of depreciable asset are based on the following useful lives:

	2010	2009
Leasehold improvements	**Lease term**	Lease term
Plant and Equipment	**3 to 7 years**	3 to 7 years

Impairment

All assets were assessed for impairment at 30 June 2010. Where indications of impairment exist, the asset's recoverable amount is estimated and an impairment adjustment made if the asset's recoverable amount is less than its carrying amount.

The recoverable amount of an asset is the higher of its fair value less costs to sell and its value in use. Value in use is the present value of the future cash flows expected to be derived from the asset. Where the future economic benefit of an asset is not primarily dependent on the asset's ability to generate future cash flows, and the asset would be replaced if the Council were deprived of the asset, its value in use is taken to be its depreciated replacement cost.

Derecognition

An item of property, plant and equipment is derecognised upon disposal or when no further future economic benefits are expected from its use or disposal.

1.18 Intangibles

The Council's intangibles comprise purchased software for internal use. These assets are carried at cost less accumulated amortisation and accumulated impairment losses.

Software is amortised on a straight-line basis over its anticipated useful life. The useful lives of the Council's software are 3 years (2008-09: 3 years).

All software assets were assessed for indications of impairment as at 30 June 2010.

1.19 Inventories

The Council provides the bulk of its publications free of charge which means the publications do not have a realisable value. As a result of this, the Council expenses the cost of publications as incurred.

1.20 Taxation / Competitive Neutrality

The Council is exempt from all forms of taxation except Fringe Benefits Tax (FBT) and the Goods and Services Tax (GST).

Revenues, expenses and assets are recognised net of GST except:

- where the amount of GST incurred is not recoverable from the Australian Taxation Office; and
- for receivables and payables.

Competitive Neutrality

The Council provides services on a not-for-profit basis which are not subject to Competitive Neutrality arrangements.

Note 2: Events After the Reporting Period

No events have occurred after the balance date that would have an impact on the financial position of the Council.

Note 3: Expenses

	2010	2009
	$	$
Note 3A: Employee Benefits		
Wages and salaries	**1,048,595**	998,955
Superannuation:		
Defined contribution plans	**46,452**	39,463
Defined benefit plans	**108,593**	120,668
Leave and other entitlements	**91,295**	107,463
Other employee expenses	**213**	-
Total employee benefits	**1,295,148**	1,266,549
Note 3B: Suppliers		
Goods and services		
Consultants	**20,499**	12,904
Contractors	**191,031**	180,976
Legal Expenses	**1,564,200**	624,700
Other	**337,084**	443,668
Total goods and services	**2,112,814**	1,262,248
Goods and services are made up of:		
Provision of goods – related entities	**1,536**	545
Provision of goods – external parties	**23,886**	26,868
Rendering of services – related entities	**233,080**	253,170
Rendering of services – external parties	**1,854,312**	981,665
Total goods and services	**2,112,814**	1,262,248
Other supplier expenses		
Operating lease rentals – external parties:		
Minimum lease payments	**156,358**	156,617
Workers compensation expenses	**3,049**	3,922
Total other supplier expenses	**159,407**	160,539
Total supplier expenses	**2,272,221**	1,422,787

	2010	2009
	$	$
Note 3C: Depreciation and Amortisation		
Depreciation:		
Property, plant and equipment	**15,889**	12,763
Leasehold improvements	**38,143**	22,152
Total depreciation	**54,032**	34,915
Amortisation:		
Intangibles:		
Computer Software	**2,141**	833
Total amortisation	**2,141**	833
Total depreciation and amortisation	**56,173**	35,748
Note 3D: Finance Costs		
Unwinding of discount	**2,281**	-
	2,281	-
Note 3E: Write-Down and Impairment of Assets		
Asset write-downs and impairments from:		
Impairment of property, plant and equipment	**3,881**	1,170
Total write-down and impairment of assets	**3,881**	1,170
Note 3F: Other Expenses		
Transfers to the OPA	**7,910**	-
Total other expenses	**7,910**	-

Note 4: Income

	2010	2009
REVENUE	**$**	$
Note 4A: Fees and Fines		
Fees	**7,500**	2,000
Total fees and fines	**7,500**	2,000

	2010	2009
Note 4B: Other Revenue		
Court costs recovered	**750,000**	205,420
Other revenue	**985**	103
Total other revenue	**750,985**	205,523

	2010	2009
GAINS	**$**	$
Note 4C: Other Gains		
Resources received free of charge	**23,500**	22,280
Total other gains	**23,500**	22,280

	2010	2009
REVENUE FROM GOVERNMENT	**$**	$
Note 4D: Revenue from Government		
Appropriations:		
Departmental outputs	**2,806,000**	2,781,000
Total revenue from Government	**2,806,000**	2,781,000

Note 5: Financial Assets

	2010	2009
	$	$
Note 5A: Cash and Cash Equivalents		
Cash on hand or on deposit	**33,638**	55,785
Total cash and cash equivalents	**33,638**	55,785
Note 5B: Trade and Other Receivables		
Appropriations receivable:		
For existing outputs	**4,178,050**	4,464,000
Total appropriations receivable	**4,178,050**	4,464,000
Other receivables:		
GST receivable from the Australian Taxation Office	**22,087**	39,298
Other	**-**	2,399
Total other receivables	**22,087**	41,697
Total trade and other receivables (gross)	**4,200,137**	4,505,697
Less impairment allowance account:		
Goods and services	**-**	-
Other	**-**	-
Total impairment allowance account	**-**	-
Total trade and other receivables (net)	**4,200,137**	4,505,697
Receivables are expected to be recovered in:		
No more than 12 months	**4,200,137**	4,505,697
More than 12 months	**-**	-
Total trade and other receivables (net)	**4,200,137**	4,505,697
Receivables are aged as follows:		
Not overdue	**4,200,137**	4,505,697
Overdue by:		
0 to 30 days	**-**	-
31 to 60 days	**-**	-
61 to 90 days	**-**	-
More than 90 days	**-**	-
Total receivables (gross)	**4,200,137**	4,505,697

	2010	2009
	$	$
The impairment allowance account is aged as follows:		
Not overdue	**-**	-
Overdue by:		
0 to 30 days	**-**	-
31 to 60 days	**-**	-
61 to 90 days	**-**	-
More than 90 days	**-**	-
Total impairment allowance account	**-**	-

Reconciliation of the Impairment Allowance Account:

Movements in relation to 2010

	Goods and services	**Other receivables**	**Total**
	$	**$**	**$**
Opening balance	**-**	**-**	**-**
Amounts written off	**-**	**-**	**-**
Amounts recovered and reversed	**-**	**-**	**-**
Increase/decrease recognised in net surplus	**-**	**-**	**-**
Closing balance	**-**	**-**	**-**

Movements in relation to 2009

	Goods and services	Other receivables	Total
	$	$	$
Opening balance	-	-	-
Amounts written off	-	-	-
Amounts recovered and reversed	-	-	-
Increase/decrease recognised in net surplus	-	-	-
Closing balance	-	-	-

Note 6: Non-Financial Assets

	2010	2009
	$	$
Note 6A: Land and Buildings		
Leasehold improvements:		
Fair value	**65,643**	95,092
Accumulated depreciation	**-**	(25,255)
Total leasehold improvements	**65,643**	69,837
Total land and buildings	**65,643**	69,837

No indicators of impairment were found for land and buildings.

Note 6B: Property, Plant and Equipment		
Other property, plant and equipment:		
Fair value	**37,080**	76,818
Accumulated depreciation	**(51)**	(13,277)
Total other property, plant and equipment	**37,029**	63,541
Total property, plant and equipment	**37,029**	63,541

All revaluations were conducted in accordance with the revaluation policy stated at Note 1. On 30 June 2010, an independent valuer conducted the revaluations.

A revaluation increment of $33,949 for leasehold improvements (2009: increment of $29,743) and a decrement of $9,170 (2009: $0) for plant and equipment were credited to the asset revaluation reserve by asset class and included in the equity section of the balance sheet. No decrements were expensed (2009: $0 expensed).

No indicators of impairment were found for property, plant and equipment.

No property, plant or equipment is expected to be sold or disposed of within the next 12 months.

Note 6C: Reconciliation of the Opening and Closing Balances of Property, Property, Plant and Equipment (2009-10)

	Leasehold Improvements	Other property, plant & equipment	Total
	$	$	$
As at 1 July 2009			
Gross book value	**95,092**	**76,818**	**171,910**
Accumulated depreciation and impairment	**(25,255)**	**(13,277)**	**(38,532)**
Net book value 1 July 2009	**69,837**	**63,541**	**133,378**
Additions:			
By purchase	**-**	**2,427**	**2,427**
Revaluations and impairments recognised in other comprehensive income	**33,949**	**(9,169)**	**24,780**
Depreciation expense	**(38,143)**	**(15,889)**	**(54,032)**
Disposals:			
Other	**-**	**(3,881)**	**(3,881)**
Net book value 30 June 2010	**65,643**	**37,029**	**102,672**
Net book value as of 30 June 2010 represented by:			
Gross book value	**65,643**	**37,080**	**102,723**
Accumulated depreciation	**-**	**(51)**	**(51)**
	65,643	**37,029**	**102,672**

Note 6C (Cont'd): Reconciliation of the Opening and Closing Balances of Property, Property, Plant and Equipment (2008-09)

	Leasehold Improvements $	Other property, plant & equipment $	Total $
As at 1 July 2008			
Gross book value	74,527	43,794	118,321
Accumulated depreciation and impairment	(12,281)	(844)	(13,125)
Net book value 1 July 2008	62,246	42,950	105,196
Additions:			
By purchase	-	34,524	34,524
Revaluations and impairments recognised in other comprehensive income	29,743	-	29,743
Depreciation expense	(22,152)	(12,763)	(34,915)
Disposals:			
Other	-	(1,170)	(1,170)
Net book value 30 June 2009	69,837	63,541	133,378
Net book value as of 30 June 2009 represented by:			
Gross book value	95,092	76,818	171,910
Accumulated depreciation	(25,255)	(13,277)	(38,532)
	69,837	63,541	133,378

	2010 **$**	2009 $
Note 6D: Intangibles		
Computer software:		
Purchased	**6,424**	6,424
Total computer software (gross)	**6,424**	6,424
Accumulated amortisation	**(2,974)**	(833)
Total computer software (net)	**3,450**	5,591
Total intangibles	**3,450**	5,591

No indicators of impairment were found for intangible assets.

No intangibles are expected to be sold or disposed of within the next 12 months.

Note 6E: Reconciliation of the Opening and Closing Balances of Intangibles (2009-10)

	Computer software purchased $	Total $
As at 1 July 2009		
Gross book value	**6,424**	**6,424**
Accumulated amortisation and impairment	**(833)**	**(833)**
Net book value 1 July 2009	**5,591**	**5,591**
Additions:		
By purchase	**-**	**-**
Amortisation	**(2,141)**	**(2,141)**
Net book value 30 June 2010	**3,450**	**3,450**
Net book value as of 30 June 2010 represented by:		
Gross book value	**6,424**	**6,424**
Accumulated amortisation and impairment	**(2,974)**	**(2,974)**
	3,450	**3,450**

Note 6E (Cont'd): Reconciliation of the Opening and Closing Balances of Intangibles (2008-09)

	Computer software purchased $	Total $
As at 1 July 2008		
Gross book value	-	-
Accumulated amortisation and impairment	-	-
Net book value 1 July 2008	-	-
Additions:		
By purchase	6,424	6,424
Amortisation	(833)	(833)
Net book value 30 June 2009	5,591	5,591
Net book value as of 30 June 2009 represented by:		
Gross book value	6,424	6,424
Accumulated amortisation and impairment	(833)	(833)
	5,591	5,591

	2010	2009
	$	$
Note 6F: Other Non-Financial Assets		
Prepayments	**8,673**	14,985
Total other non-financial assets	**8,673**	14,985

No indicators of impairment were found for other non-financial assets.

Total other non-financial assets - are expected to be recovered in:

No more than 12 months	**8,673**	14,985
More than 12 months	**-**	-
Total other non-financial assets	**8,673**	14,985

Note 7: Payables

	2010	2009
	$	$
Note 7A: Suppliers		
Trade creditors and accruals	**39,953**	262,895
Operating lease rentals	**6,592**	7,580
Total supplier payables	**46,545**	270,475

Supplier payables expected to be settled within 12 months:

Related entities	**17,132**	1,208
External parties	**29,413**	262,675
Total	**46,545**	263,883

Supplier payables expected to be settled in greater than 12 months:

Related entities	**-**	-
External parties	**-**	6,592
Total	**-**	6,592
Total supplier payables	**46,545**	270,475

Settlement is usually made within 30 days.

	2010	2009
	$	$
Note 7B: Other Payables		
Salaries and wages	**20,603**	16,357
Superannuation	**3,169**	2,600
Total other payables	**23,772**	18,957
Total other payables are expected to be settled in:		
No more than 12 months	**23,772**	18,957
More than 12 months	**-**	-
Total other payables	**23,772**	18,957

Note 8: Provisions

	2010	2009
	$	$
Note 8A: Employee Provisions		
Leave	**271,554**	262,737
Total employee provisions	**271,554**	262,737
Employee provisions are expected to be settled in:		
No more than 12 months	**193,182**	196,435
More than 12 months	**78,372**	66,302
Total employee provisions	**271,554**	262,737
Note 8B: Other Provisions		
Provision for restoration obligations	**43,121**	29,743
Total other provisions	**43,121**	29,743
Other provisions are expected to be settled in:		
No more than 12 months	**43,121**	-
More than 12 months	**-**	29,743
Total other provisions	**43,121**	29,743

	Provision for restoration	Total
	$	$
Carrying amount 1 July 2009	**29,743**	**29,743**
Additional provisions made	**11,097**	**11,097**
Amounts used	-	-
Amounts reversed	-	-
Unwinding of discount or change in discount rate	**2,281**	**2,281**
Closing balance 2010	**43,121**	**43,121**

The Council currently has an agreement for the leasing of premises which has provisions requiring the Council to restore the premises to the original condition at the conclusion of the lease. The Council has made a provision to reflect the present value of this obligation.

Note 9: Cash Flow Reconciliation

	2010	2009
	$	$
Reconciliation of cash and cash equivalents as per Balance Sheet to Cash Flow Statement		
Cash and cash equivalents as per:		
Cash flow statement	**33,638**	55,785
Balance sheet	**33,638**	55,785
Difference	**-**	-
Reconciliation of net cost of services to net cash from operating activities:		
Net cost of services	**2,855,629**	2,496,451
Add revenue from Government	**2,806,000**	2,781,000
Adjustments for non-cash items		
Depreciation / amortisation	**56,173**	35,748
Net write down of non-financial assets	**3,881**	1,170
Unwinding of discount	**2,281**	-
Changes in assets / liabilities		
(Increase) / decrease in net receivables	**171,560**	(447,170)
(Increase) / decrease in prepayments	**6,312**	(9,648)
Increase / (decrease) in employee provisions	**8,817**	37,430
Increase / (decrease) in supplier payables	**(223,930)**	92,864
Increase / (decrease) in other payable	**4,815**	-
Increase / (decrease) in other provisions	**-**	9,743
Net cash from (used by) operating activities	**(19,720)**	4,686

Note 10: Contingent Liabilities and Assets

Quantifiable Contingencies

There were no quantifiable contingent liabilities as at 30 June 2010 (2009: $nil).

There were no quantifiable contingent assets as at 30 June 2010 (2009: $nil).

Unquantifiable Contingencies

At 30 June 2010, the Council had no matters before the courts (2009: nil matters). During 2008-09 the Council was awarded costs in respect of a matter. The costs were unquantifiable at 30 June 2009. During 2009-10 the Council received $750,000 in settlement of these costs.

Significant Remote Contingencies

The Council has no significant remote contingencies.

Note 11: Senior Executive Remuneration

Note 11A: Actual Remuneration Paid to Senior Executives

Executive Remuneration	**2010**	2009
The number of senior executives who received:		
$205,000 to $219,999	**1**	-
$220,000 to $234,999	**-**	1
$280,000 to $294,999	**1**	1
Total	**2**	2

* Excluding acting arrangements and part-year service.

For the purpose of this note disclosure remuneration includes:

(a) salary (including payment for leave taken)

(b) movement in annual leave and long service leave provisions

(c) superannuation

(d) fringe benefits

Total expense recognised in relation to Senior Executive employment

	$	$
Short-term employee benefits:		
Salary (including annual leave taken)	**425,078**	405,297
Annual leave expense	**29,377**	40,330
Other[1]	**136**	285
Total Short-term employee benefits	**454,591**	445,912
Superannuation (post-employment benefits)	**72,406**	76,902
Long service leave expense	**13,702**	29,808
Total	**540,699**	552,622

During the year the entity paid $nil in termination benefits to senior executives (2008-09 $nil).

Notes

1. Includes fringe benefits.

Note 11B: Salary Packages for Senior Executives as at 30 June

Average annualised remuneration packages for substantive Senior Executives

	As at 30 June 2010			As at 30 June 2009		
	No. SES	**Base salary (including annual leave)**	**Total remuneration package[1]**	No. SES	Base salary (including annual leave)	Total remuneration package[1]
Total remuneration*:						
$205,000 to $219,999	**1**	**180,440**	**217,250**	1	173,500	208,894
$265,000 to $279,999	**-**	**-**	**-**	1	231,613	267,050
$280,000 to $284,999	**1**	**246,031**	**283,674**	-	-	-
Total	**2**			2		

* Excluding acting arrangements.

Notes

1. The total remuneration package includes:

(a) agreed base salary

(b) superannuation (post -employment benefits)

(c) allowances

Note 12: Councillors Remuneration

The Councillors during the year were:

President:	David Crawford
Councillors:	Virginia Hickey
	Doug McTaggart
	Rod Sims

The number of councillors who received or were due to receive remuneration are shown in the following bands:

	2010	2009
	Number	Number
$30,000 to $44,999	**3**	3
$60,000 to $74,999	**1**	1
	4	**4**

	$	$
The aggregate amounts of total remuneration of Councillors shown above.	**162,844**	159,006

Note 13: Remuneration of Auditors

	2010	2009
	$	$
Financial statement audit services were provided free of charge to the Council.		
The fair value of the services provided was:	**23,500**	22,280
	23,500	22,280

No other services were provided by the Auditor-General.

Note14: Financial Instruments

	2010	2009
	$	$
Note 14A: Categories of Financial Instruments		
Financial Assets		
Loans and receivables:		
Cash and cash equivalents	**33,638**	55,785
Trade and other receivables	**-**	2,399
Carrying amount of financial assets	**33,638**	58,184
Financial Liabilities		
At amortised cost:		
Trade creditors	**39,953**	262,895
Carrying amount of financial liabilities	**39,953**	262,895

Note 14B: Net Income and Expense from Financial Assets

The Council received $nil (2009:$nil) net income/expense from financial assets.

Note 14C: Net Income and Expense from Financial Liabilities

The Council received $nil (2009:$nil) net income/expense from financial liabilities.

Note 14D: Fair Value of Financial Instruments

	Carrying amount 2010	Fair value 2010	Carrying amount 2009	Fair value 2009
	$	**$**	$	$
Financial Assets				
Cash and cash equivalents	**33,638**	**33,638**	55,785	55,785
Trade and other receivables	**-**	**-**	2,399	2,399
Total	**33,638**	**33,638**	58,184	58,184
Financial Liabilities				
Trade creditors	**39,953**	**39,953**	262,895	262,895
Total	**39,953**	**39,953**	262,895	262,895

Note 14E: Credit Risk

The Council is exposed to minimal credit risk as loans and receivables are cash and trade receivables. The maximum exposure to credit risk is the risk that arises from potential default of a debtor. This amount is equal to the total amount of trade receivables (2010: $0 and 2009: $2,399).

The Council holds no collateral to mitigate against credit risk.

Credit quality of financial instruments not past due or individually determined as impaired

	Not past due nor impaired	Not past due nor impaired	**Past due or impaired**	Past due or impaired
	2010	2009	**2010**	2009
	$	$	**$**	$
Loans and receivables:				
Cash and cash equivalents	**33,638**	55,785	**-**	-
Trade and other receivables	**-**	2,399	**-**	-
Total	**33,638**	58,184	**-**	-

Ageing of financial assets that were past due but not impaired for 2010

	0 to 30 days $	**31 to 60 days $**	**61 to 90 days $**	**90+ days $**	**Total $**
Loans and receivables:					
Trade and other receivables	**-**	**-**	**-**	**-**	**-**
Total	**-**	**-**	**-**	**-**	**-**

Ageing of financial assets that were past due but not impaired for 2009

	0 to 30 days $	31 to 60 days $	61 to 90 days $	90+ days $	Total $
Loans and receivables:					
Trade and other receivables	-	-	-	-	-
Total	-	-	-	-	-

Note 14F: Liquidity Risk

The Council's financial liabilities are payables. The exposure to liquidity risk is based on the notion that the Council will encounter difficulty in meeting its obligations associated with financial liabilities. This is highly unlikely due to appropriation funding and internal policies and procedures put in place to ensure there are appropriate resources to meet its financial obligations.

Maturities for non-derivative financial liabilities 2010

	On demand $	**within 1 year**	**1 to 2 years $**	**2 to 5 years $**	**> 5 years $**	**Total $**
Other Liabilities						
Trade creditors	**-**	**39,953**	**-**	**-**	**-**	**39,953**
Total	**-**	**39,953**	**-**	**-**	**-**	**39,953**

Maturities for non-derivative financial liabilities 2009

	On demand $	within 1 year	1 to 2 years $	2 to 5 years $	> 5 years $	Total $
Other Liabilities						
Trade creditors	-	262,895	-	-	-	262,895
Total	-	262,895	-	-	-	262,895

The Council has no derivative financial liabilities in both the current and prior year.

Note 14G: Market Risk

The Council holds basic financial instruments that do not expose the Council to certain market risks. The Council is not exposed to 'Currency risk', 'Interest rate risk' or 'Other price risk'.

Note 15: Appropriations

Table A1: Acquittal of Authority to Draw Cash from the Consolidated Revenue Fund for Ordinary Annual Services Appropriations

Particulars	Departmental outputs	
	2010 **$**	2009 $
Balance brought forward from previous period *(Appropriation Acts)*	**4,559,083**	4,143,920
Appropriation Act:		
Appropriation Act (No. 1, 3&5) 2009-2010 as passed	**2,825,000**	2,781,000
Appropriations reduced *(Appropriation Act* sections 10, 11&12)	**(153,000)**	-
Advance to the Finance Minister *(Appropriation Act* section 13)	**-**	-
FMA Act:		
Repayments to the Commonwealth *(FMA Act* section 30)	**2,874**	5,381
*Appropriations to take account of recoverable GST *(FMA Act* section 30A)[1]	**223,017**	142,487
Relevant agency receipts *(FMA Act* s 31)	**750,000**	207,523
Transfer of agency functions *(FMA Act* s 32)	**-**	-
Total appropriation available for payments	**8,206,974**	7,280,311
Cash payments made during the year (GST inclusive)	**(3,973,199)**	(2,721,228)
Appropriations credited to special accounts (GST exclusive)	**-**	-
Balance of authority to draw cash from the Consolidated Revenue Fund for ordinary annual services appropriations and as represented by:	**4,233,775**	4,559,083
Cash at bank and on hand	**33,638**	55,785
*Departmental appropriations receivable	**4,178,050**	4,464,000
*Net GST payable (to)/from ATO	**22,087**	39,298
*Adjustments under s 101.13 of the Finance Minister's Orders not reflected above	-	-
Total as at 30 June	**4,233,775**	4,559,083

[1] The amounts in this line item are calculated on an accrual basis to the extent that an expense may have been incurred that includes GST but has not been paid by year end.

Note 16: Special Accounts

Services for other Governments & Non-Agency Bodies Account - Abolished with effect from 11 September 2009

The Council has a Services for other Government & Non-Agency Bodies Account. This account was established under section 20 of the Financial Management and Accountability Act 1997 (FMA Act).

The purpose of the Services for other Government & Non-Agency Bodies Special Account is for expenditure in connection with services performed on behalf of other Governments and bodies that are not Agencies under the FMA Act.

The account was abolished by Financial Management and Accountability Determination 2009/28 with effect from 11 September 2009.

For the years ended 30 June 2010 and 2009 the account had a nil balance and there were no transactions debited or credited to it.

Other Trust Monies Account

The Council has an Other Trust Monies Account. This account was established under section 20 of the *Financial Management and Accountability Act 1997*.

The purpose of the Other Trust Monies Special Account is for the receipt of monies temporarily held on trust or otherwise for the benefit of a person other than the Australian Government.

For the years ended 30 June 2010 and 2009 the account had a nil balance and there were no transactions debited or credited to the account.

Note 17: Compensation and Debt Relief

No Acts of Grace payments were made during the reporting period (2009: No payments made).

No waivers of amounts owing to the Commonwealth were made pursuant to subsection 34(1) of the *Financial Management Accountability Act 1997* (2009: No waivers made).

No ex-gratia payments were made during the reporting period (2009: No payments made).

No payments were made under the 'Defective Administration Scheme' during the reporting period (2009: No payments made).

No payments were made under s73 of the *Public Service Act 1999* during the reporting period (2009: No payments made).

Note 18: Reporting of Outcomes

Note 18A: Net Cost of Outcome Delivery

	Outcome 1		Total	
	2010	2009	**2010**	2009
	$	$	**$**	$
Expenses				
Departmental	**3,637,614**	2,726,254	**3,637,614**	2,726,254
Total	**3,637,614**	2,726,254	**3,637,614**	2,726,254
Income from non-government sector				
Departmental				
Activities subject to cost recovery	**-**	-	**-**	-
Other	**-**	-	**-**	-
Total departmental	**-**	-	**-**	-
Total	**-**	-	**-**	-
Other own-source income				
Departmental	**781,985**	229,803	**781,985**	229,803
Total	**781,985**	229,803	**781,985**	229,803
Net cost/(contribution) of outcome delivery	**2,855,629**	2,496,451	**2,855,629**	2,496,451

Outcome 1 is described in Note 1.1. Net costs shown include intra-government costs that are eliminated in calculating the actual Budget Outcome.

Note 18B: Major Classes of Departmental Expenses, Income, Assets and Liabilities by Outcomes

Outcome 1	Outcome 1		Total	
	2010 $	2009 $	**2010 $**	2009 $
Departmental expenses				
Employees	**1,295,148**	1,266,549	**1,295,148**	1,266,549
Suppliers	**2,272,221**	1,422,787	**2,272,221**	1,422,787
Depreciation & amortisation	**56,173**	35,748	**56,173**	35,748
Finance costs	**2,281**	-	**2,281**	-
Write-down and impairment of assets	**3,881**	1,170	**3,881**	1,170
Other expenses	**7,910**	-	**7,910**	-
Total	**3,637,614**	2,726,254	**3,637,614**	2,726,254
Departmental income				
Revenue from government	**2,806,000**	2,781,000	**2,806,000**	2,781,000
Other income	**758,485**	207,523	**758,485**	207,523
Gains	**23,500**	22,280	**23,500**	22,280
Total	**3,587,985**	3,010,803	**3,587,985**	3,010,803
Departmental assets				
Cash and cash equivalents	**33,638**	55,785	**33,638**	55,785
Trade and other receivables	**4,200,137**	4,505,697	**4,200,137**	4,505,697
Land and Buildings	**65,643**	69,837	**65,643**	69,837
Property, plant and equipment	**37,029**	63,541	**37,029**	63,541
Intangibles	**3,450**	5,591	**3,450**	5,591
Other non-financial assets	**8,673**	14,985	**8,673**	14,985
Total	**4,348,570**	4,715,436	**4,348,570**	4,715,436
Departmental liabilities				
Suppliers	**46,545**	270,475	**46,545**	270,475
Other payables	**23,772**	18,957	**23,772**	18,957
Employee provisions	**271,554**	262,737	**271,554**	262,737
Other provisions	**43,121**	29,743	**43,121**	29,743
Total	**384,992**	581,912	**384,992**	581,912

Outcome 1 is described in Note 1.1. Net costs shown include intra-government costs that are eliminated in calculating the actual Budget outcome.

References

ACCC (Australian Competition and Consumer Commission) 2007, *Access dispute between Services Sydney Pty Ltd and Sydney Water Corporation*, *Arbitration report*, Melbourne.

Hilmer Committee (Independent Committee of Inquiry into a National Competition Policy (Chairman: Professor F. Hilmer)) 1993, *National Competition Policy: Report by the Independent Committee of Inquiry*, AGPS, Canberra.

NCC (National Competition Council) 2005, *Assessment of government's progress in implementing the National Competition Policy and related reforms*, Melbourne.

—— 2008, *Annual report 2007-08*, Melbourne.

—— 2009, *Annual report 2008-09*, Melbourne.

PC (Productivity Commission) 2001, *Review of the National Access Regime*, Report no. 17, AusInfo, Canberra.

Tribunals and court decisions

In the matter of Fortescue Metals Group Limited [2010] ACompT 2

Re Duke Eastern Gas Pipeline Pty Ltd [2001] ACompT 2

Re Services Sydney Pty Limited [2005] ACompT 7

Re Virgin Blue Airlines Pty Limited [2005] ACompT 5

Rio Tinto Limited v The Australian Competition Tribunal [2008] FCAFC 6

Sydney Airport Corporation Limited v Australian Competition Tribunal [2006] FCAFC 146

Acts and other instruments

Gas Pipelines Access (South Australia) Act 1997

Gas Pipelines Access (South Australia) (Greenfields Pipeline Incentives) Amendment Act 2006

National Gas (South Australia) Act 2008 and Application Acts in all other states and territories

National Gas Access (WA) Act 2009 (WA)

National Gas Rules 2008

National Gas (South Australia (National Gas Law—Australian Energy Market Operator) Amendment Act 2009 (SA)

Queensland Competition Authority Act 1997 (Qld)

Queensland Competition Authority Regulation 2007 (Qld)

Railways (Access) Act 1998 (WA)

Railways (Access) Code 2000 (WA)

Trade Practices Act 1974 (Cth)

Trade Practices Amendment (Infrastructure Access) Act 2010 (Cth)

Transport Infrastructure Act 1994 (Qld)

Transport (Rail Safety Act) 2010 (Qld)

Water Industry Competition Act 2006 (NSW)

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