Accessible

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National Competition Council
growth, innovation, productivity

About *Accessible*

Accessible is the National Competition Council's bi-monthly newsletter providing updates on the Council's activities, including applications made to the Council under Part IIIA of the *Trade Practices Act 1974* (Cth) (**TPA**) and the National Gas Law, case law and legislative developments.

The *Accessible* newsletter is part of the Council's strategy to provide clear and accessible public information on competition policy. Please feel free to forward a copy of *Accessible* to others who may be interested in the Council's activities.

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Jemena application and decision

On 22 April 2009, the Council received an application from Jemena Gas Networks (NSW) Limited (**Jemena**) for reclassification of the Northern Trunk pipeline (Wilton to Newcastle) and the Southern Trunk pipeline (Wilton to Wollongong) as distribution pipelines. Under the National Gas Law (**NGL**) and National Gas Rules (**NGR**) natural gas pipelines are classified as either transmission pipelines or distribution pipelines. Section 128 of the NGL permits a service provider to apply to the Council for a pipeline to be reclassified.

At the time of Jemena's application, the pipelines were classified as transmission pipelines under the NGL. The pipelines had also been classified as transmission pipelines under the former National Third Party Access Code for Natural Gas Pipeline Systems (**Gas Code**), however a derogation by the NSW Government had allowed for the pipelines to be treated as distribution pipelines for regulatory purposes under the former Gas Code. In effect, Jemena's application sought to maintain the regulatory treatment of the Northern Trunk and Southern Trunk pipelines as distribution pipelines.

In making its decision, the Council was required to consider the pipeline classification criteria in s13 of the NGL and the National Gas Objective. 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.

In its application, Jemena argued that reclassification would reduce administrative burdens associated with the implementation of the Short Term Trading Market in New South Wales, avoid unnecessary operational costs, provide equivalent treatment for the Northern Trunk and Southern Trunk pipelines with other pipelines that are also classified as distribution pipelines, and remove the risk of inconsistent economic regulation. Jemena also submitted that the Northern Trunk and Southern Trunk pipelines met the criteria for reclassification as distribution pipelines under the NGL and that reclassification would be consistent with the National Gas Objective.

The Council released its final determination (which came into force immediately) in favour of the reclassification on 29 June 2009. The Council concluded that with the development of the Short Term Trading Market in New South Wales, the role of the Northern Trunk and Southern Trunk pipelines was more akin to that of distribution pipelines. The Council also found that the previous classification was likely to give rise to a range of inefficiencies, including the imposition of unnecessary costs and complexity.

New Minister for Competition Policy and Consumer Affairs

On 9 June 2009 the Hon Dr Craig Emerson MP was appointed Minister for Competition Policy and Consumer Affairs and Senator the Hon Nick Sherry was appointed Assistant Treasurer. These portfolio responsibilities were formerly held by the Hon Chris Bowen MP, who is now Minister for Financial Services, Superannuation and Corporate Law.

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Minister extends period for considering NSW water access regime

In the previous issue of *Accessible* the Council advised of the application from the New South Wales Government for a recommendation that the state's access regime for water industry infrastructure services is an effective access regime.

On 11 May 2009 the Council provided its final recommendation to the decision-making Commonwealth Minister (the Minister for Competition Policy and Consumer Affairs), who at the time was the Assistant Treasurer, the Hon Chris Bowen MP. The Minister had a standard 'best endeavours' period of 60 days to make his decision after receiving the recommendation (although this period was subject to extension).

A new Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP, was appointed on 9 June 2009. Due to the change in Treasury portfolio Ministerial responsibilities, on 10 July 2009 the Minister gave notice pursuant to section 44ND of the TPA extending the standard period for making a decision on the Council's final recommendation by 60 days.

The Minister will use his best endeavours to make a decision on or before 9 September 2009. The Council will publish its final recommendation when the Minister publishes his decision or as soon as practicable thereafter. The next issue of *Accessible* will provide information about the Minister's decision.

A copy of the Minister's notice is available on the Council's website (www.ncc.gov.au) under 'Certification of NSW Water Industry Access Regime'

Update on Tribunal's review of Pilbara railway decisions

The Australian Competition Tribunal's (**Tribunal**) review of declaration decisions made in relation to iron ore railways in the Pilbara continues.

The Tribunal held a case management conference on 17 July 2009 to consider the future conduct of the proceedings and the hearing, which is set to commence on 28 September 2009.

To recap, there are four decisions relating to applications for access to Pilbara iron ore railways by Fortescue Metals Group Limited and its subsidiary The Pilbara Infrastructure Pty Ltd (together, **FMG**), which are currently under review. FMG made applications under Part IIIA of the TPA seeking declaration of rail track services provided by:

- the Mt Newman railway and the Goldsworthy railway, which are owned and operated by BHP Billiton Ltd and associates (**BHP**) (initial applications made June 2004 and November 2007, respectively), and
- the Hamersley railway network and the Robe River railway, which are owned and operated by Rio Tinto Ltd and associates (**Rio Tinto**) (initial applications made November 2007 and January 2008, respectively).

Declaration would allow any person to use the negotiate/arbitrate regime in Part IIIA of the TPA to seek access to the railways in order to provide rail services on them.

In October 2008 the Treasurer followed the Council's recommendations and declared each of the Goldsworthy, Hamersley and Robe River railway services for 20 years. BHP and Rio Tinto applied to the Tribunal to review those declaration decisions. The Mt Newman railway service was deemed not to have been declared in May 2006 when the Treasurer did not publish a decision within 60 days of the Council's recommendation to declare it. FMG applied to the Tribunal to review that deemed decision.

So far, the parties have filed 102 affidavits on which they intend to rely, from 70 witnesses, and there is further evidence to come.

Each of the parties made submissions to the Tribunal (the Tribunal members are Finkelstein J (President), Mr G. Latta and Prof D. Round) on 17 July 2009 regarding the best way for the Tribunal to proceed. On 20 July 2009 Justice Finkelstein gave indications of the directions the Tribunal intended to make. In summary:

- by 14 August 2009 the parties must file a notice identifying the main issues in dispute

in the matters and the key parts of their evidence which are relevant to those issues

- by 31 August 2009 each party must file a notice specifying which witnesses they want to cross-examine and on what topics, and the reasons why. The Tribunal will then determine which witnesses may be cross-examined on what topics, and the time allowed for such cross-examination
- in relation to expert evidence, the Tribunal intends to separate the experts into appropriate groups relevant to their expertise and evidence. The Tribunal will then meet and question each group of experts. The parties will then conduct any approved cross-examination
- the Tribunal will visit the Pilbara to view the relevant facilities at a date before the hearing, and
- a further case management conference will be conducted during the first week of September.

The Council will continue to provide updates on these important proceedings in future editions of *Accessible.*

The Tribunals' review of the Pilbara railway decisions is set to commence on **28 September 2009**

The National Access Regime explained

The National Access Regime is established by Part IIIA of the TPA. Introduced in 1995, the regime's purpose is to provide a mechanism for resolving disputes over access to infrastructure services where it is in Australia's national interest that such disputes be resolved.

Regulation under the National Access Regime is a two stage process:

- **declaration stage** – which determines whether the criteria for applying access regulation are met and if so allows a service to be declared, and
- **negotiate/arbitrate stage** – where a service provider and access seeker(s) negotiate the terms and conditions of access to the declared service and the Australian Competition and Consumer Commission (**ACCC**) can be called on to arbitrate access disputes the parties are unable to resolve.

Stage 1 – Declaration

An access seeker may apply to the Council to have an infrastructure service 'declared'. The Council may only recommend declaration (and the Minister may only declare a service) where the six declaration criteria are all satisfied (ss 44G(2) and 44H(4) of the TPA). The Council makes a recommendation to the designated Minister who makes the final decision whether or not to declare a service. The Minister's decision may, upon application, be reconsidered by the Australian Competition Tribunal.

Once a service is declared a service provider must enter into access negotiations with access seekers. This is not limited to the party who applied for declaration as other access seekers can also seek to use the declared service.

Stage 2 – Negotiate/arbitrate

The negotiate/arbitrate process that results from the declaration of a service is a light handed intervention designed to maximise opportunities for the commercial resolution of access issues, minimise regulatory intervention and protect the legitimate interests of service providers so as to ensure that incentives for efficient investment and operation are maintained.

If access negotiations reach an impasse an access dispute may be notified to the ACCC for arbitration. As arbitrator the ACCC has broad scope to make orders to resolve an access dispute, within the framework and safeguards prescribed in the TPA. In particular, the ACCC is bound by a series of safeguard provisions that ensure the interests of access seekers and service providers are balanced with the national interest.

Importantly, the ACCC is prohibited from making an access determination that would prevent an existing user(s) from having sufficient capacity to meet its reasonably anticipated requirements and no determination can result in a transfer of ownership of any part of a facility. Where expansion or enhancement of a facility is needed to accommodate access seekers, a service provider can be required to undertake such expansion, but the costs will be met by the access seekers along with interconnection costs.

If the ACCC is unable to arrive at access terms that appropriately recognise the interests of an infrastructure owner, then it does not have to require the provision of access to a declared service. ACCC arbitration determinations are subject to review by the Tribunal.

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