Accessible

Issue Three October 2009

National Competition Council
growth, innovation, productivity

NSW WICA Access Regime certified

On 13 August 2009, the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson, made his decision to certify as effective for 10 years New South Wales's third party access regime for water industry infrastructure services (**WICA Access Regime**). The decision reflects the Council's final recommendation.

In making his decision, the Minister gave weight to the NSW Government's stated objective of promoting greater efficiency in the water industry through facilitating competitive service provision, and its support for appropriate access arrangements as a means of achieving this objective.

The WICA Access Regime provides two pathways for access to water industry infrastructure services – by coverage declarations made by the NSW Premier, and by voluntary access undertakings by a service provider. Under both pathways, an access seeker acquires the right to negotiate access to the services, with binding arbitration available for disputes. The WICA Access Regime currently applies to the areas of operation of Sydney Water Corporation and Hunter Water Corporation. Certain sewerage services were deemed to be the subject of a coverage declaration upon the commencement of the WICA Access Regime.

Certification involves ensuring that an access regime satisfactorily addresses the principles set out in Clause 6 of the Competition Principles Agreement reached by all Australian governments in 1995. The requirements for certification recognise that a range of regulatory approaches are capable of incorporating those principles.

Whilst the Council recommended the certification of the WICA Access Regime in its final recommendation, it identified several aspects of the WICA Access Regime which it considered warrant further consideration, both by the NSW Government and by other governments developing third party access arrangements. These aspects were:

- The absence of merits review for coverage decisions. Whilst merits review is not a requirement under the Clause 6 principles, the Council considered it desirable for an access regime to include procedures for limited merits review at least of coverage decisions.
- The implications of the Premier's ability to add geographic areas, thereby expanding the services that are subject to the regime. The Council's view was that a better approach would be to provide greater certainty regarding the services covered by delineating the scope of the access regime's application at the outset.
- The requirement that an applicant for a licence obtain sufficient quantities of water from a source other than a public water utility, which might have the effect of unduly limiting the use that might be made of the WICA Access Regime.

Whilst not a factor relevant to assessing the effectiveness of the WICA Access Regime, the Council also noted that a state or territory access regime that merely replicates the negotiate/arbitrate approach already available under the general provisions of the National Access Regime appears to offer little benefit while arguably adding cost and uncertainty.

In the Council's view, access to water industry infrastructure services is an area where a regulatory approach tailored to the likely nature of access issues in the water industry is highly desirable. Further, the Council considers there would be value in a coordinated jurisdictional approach to access to water infrastructure services, similar to the approach taken in the regulation of access in the energy sector.

Copies of the Council's final recommendation and the Minister's decision and statement of reasons are available on the Council's website at www.ncc.gov.au

Stop Press

The Council has received an application from APT Pipelines (NSW) Pty Ltd for a light regulation determination for its covered Central West Pipeline. A copy of the application and further information is available on the Council's website.

Inside this issue

State access regimes and the CIRA

Under the Competition and Infrastructure Reform Agreement (**CIRA**) reached on 10 February 2006, Australian state and territory governments agreed to submit their access regimes for certification by the end of 2010.

In a number of cases this is to be preceded by reviews of the regimes by state regulators to ensure they remain relevant and effective. As at 1 October 2009, the Council has not received any applications in respect of the regimes covered by the CIRA. The Council is also yet to receive applications for the certification of the coordinated access regimes that apply to energy infrastructure as established under the National Gas Law and Gas Code, and the National Electricity Law.

Whilst it is appropriate for certification applications to await the outcomes of reviews of access regimes where these are being undertaken, time is running out and state and territory governments need to commence the process for obtaining certification well in advance of the December 2010 deadline.

The table below provides a list of each of the non-energy access regimes covered by the CIRA and describes the steps taken towards certification.

Jurisdiction	Scope of access regulation	Progress
Victoria	Railways (*Rail Corporations Act 1990*) Grain handling and storage (*Grain Handling and Storage Act 1995*) Shipping channels (*Port Services Act 1995*)	The Essential Services Commission of Victoria has begun its reviews into each of the three Victorian access regimes. Railways: An issues paper seeking submissions was released in July 2009. Grain: The final report, released May 2009, recommends repealing the access regime with effect from 1 October 2009 and leaving access to Victorian bulk terminals to the Commonwealth regime. Ports: The draft report, released April 2009, recommends retaining the regime and seeking certification by 2010.
Queensland	Intrastate rail (*Queensland Competition Authority Act 1997*) Dalrymple Bay Coal Terminal (*Queensland Competition Authority Act 1997*)	No plans for review have been announced.
South Australia	Railways (*Railways (Operations and Access) Act 1997*) Ports (*Essential Services Commission Act 2002 /Maritime Services (Access) Act 2000*)	Railways: In July 2009 the Essential Services Commission of South Australia (ESCOSA) released its draft report into its review of the South Australian railway access regime. ESCOSA recommended that the South Australian Government commence the certification process at the earliest opportunity following necessary amendments to the ROA Act. Ports: ESCOSA has indicated that it will commence a review of the industries subject to the Ports access regime in late 2009.
Western Australia	Railways *(Railways (Access) Act 1998) (Railways (Access) Code 2000)*	No plans for review have been announced, however, the *Railways (Access) Code 2000* requires reviews of the Code every five years. The next review is expected to commence in late 2009.

Annual Report 2008-09

The Council's annual report was provided to the Treasurer at the end of August 2009. Once the report has been tabled in Parliament it will be available on the Council's website.

Stop Press

The access regime established by Victoria's *Grain Handling and Storage Act 1995* for the export grain handling terminals at the Ports of Melbourne, Geelong and Portland ceased to apply to these facilities from 1 October 2009. An access undertaking approved by the ACCC now applies to the Geelong and Portland export grain terminals.

Council's roles and responsibilities – declaration and certification

In this article we outline the Council's role in relation to declaration and certification matters and the timeframes that apply to its processes. The next edition of *Accessible* will outline the Council's role under the National Gas Law.

Part IIIA of *Trade Practices Act 1974*—National Access Regime

Declaration

In the August 2009 edition of *Accessible*, we explained the general process for seeking access to natural monopoly infrastructure services under the National Access Regime, which is established under Part IIIA of the TPA. Regulation under the National Access Regime is a two stage process which involves a declaration stage followed by a negotiate/arbitrate stage. Here we consider the Council's role in the declaration process in more detail.

The Council is the body designated to receive applications for the declaration of services under the National Access Regime (as well as applications for the revocation of services already declared).

The Council's role is to consider whether the services specified in a declaration application meet the legislative requirements for declaration, and in particular, the six declaration criteria in section 44G(2) of the TPA. The Council makes a recommendation to the designated Minister as to whether or not the declaration criteria are satisfied. If the Council's view is that all the declaration are satisfied such that the service should be declared, the Council will also make a recommendation regarding the period of declaration.

The designated Minister (for both declaration and certification decisions) is usually the minister designated by the Commonwealth Government to administer Part IIIA of the TPA. Historically this has been the Treasurer, Assistant Treasurer or another minister within Treasury. At present, the designated Ministers are the Treasurer, the Hon Wayne Swan MP, and the Minister for Competition Policy and Consumer Affairs, the Hon Dr Craig Emerson MP. For declaration decisions where the service provider is a state or territory body, and the state or territory is a party to the Competition Principles Agreement, the designated Minister is the Premier in the case of a state, or the Chief Minister in the case of a territory.

In considering an application for declaration, the Council undertakes the following public consultation process:

- Initial consideration of the application to ensure the required information has been supplied
- Public consultation to allow interested parties to make written submissions on the application
- Preparation and release of the Council's draft recommendation
- A further period of public consultation to allow interested parties to make written submissions on the draft recommendation, and
- Preparation of the Council's final recommendation and provision of it to the designated Minister. The Council's final recommendation only becomes public once the designated Minister has published his or her decision.

In the case of declaration and revocation of declaration applications, the Council is required to use its best endeavours to complete the above process within *four months* from the date of receiving the application. It should be noted that the Commonwealth Government has proposed to introduce a binding time limit of six months, subject to limited extensions, for decision-makers (see 'Reforms to Part IIIA').

Certification

The Council is also designated under the National Access Regime to receive applications for the certification of the effectiveness of State or Territory access regimes. Services subject to a certified state-based access regime are immune from declaration under the National Access Regime.

The Council's role in relation to certification applications is to consider whether the relevant access regime is an "effective access regime". An "effective access regime" is one which satisfactorily incorporates the principles set out in Clause 6 of the Competition Principles Agreement and has regard to the objects of Part IIIA of the TPA. The Council provides a recommendation to the Commonwealth Minister as to whether or not the access regime should be certified, and the period of certification if certification is recommended.

The Australian Competition Tribunal's review of the Pilbara Railway decisions commenced on 28 September 2009.

The Tribunal commenced its review of the declaration decisions relating to applications for access to Pilbara iron ore railways by Fortescue Metals Group Ltd and The Pilbara Infrastructure Pty Ltd. The Tribunal has estimated that the hearing will last for 12 to 13 weeks.

In considering an application for certification, the Council follows the same public consultation process as for declaration applications. The Council is required to use its best endeavours to provide its final certification recommendation to the Commonwealth Minister within *six months* from the date of receiving the application.

Assisting the Competition Tribunal

Declaration, certification and related decisions under Part IIIA of the TPA may be subject to review by the Australian Competition Tribunal. Under the TPA, the Council has a role in assisting the Tribunal to review decisions, as requested by the Tribunal.

Part IIA of the TPA—Reporting to Parliament

The Council is established by Part IIA of the TPA. Under that Part, the Council is required to report annually to Parliament on a number of specified matters relating to the Council's functions and activities, as well as matters relevant to the operation of the National Access Regime generally. The Council must provide its annual report to the Australian Parliament *60 days* after the end of each financial year.

Reforms to Part IIIA

As discussed in the June 2009 edition of *Accessible*, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs announced in April 2009 that the Government intends to introduce reforms to the National Access Regime. The reforms include amended timeframes for decision-makers of generally six months for declaration and certification matters, a move from best endeavours time targets to binding time limits (subject to limited extensions), and reforming the Council's administrative processes to improve the timeliness of outcomes. It is anticipated that the legislation will be introduced into Parliament before the end of the year.

Release of Part D of the Gas Guide

The Council has released the final part to its guide to the National Gas Law (**NGL**) – Part D, which concerns the greenfields pipeline project incentives contained in Chapter 5 of the Schedule to the NGL. The concept of greenfields pipeline projects captures a broad range of new pipeline investment but does not include 'brownfields' expansions (that is, minor extensions to covered pipelines).

The release of this part of the Gas Guide is timely given recent amendments to the NGL (and its subordinate legislation) and the passing in Western Australia of the *National Gas Access (WA) Act* 2009.

Part D of the Gas Guide explores the Council's function in making 15-year no-coverage recommendations to the relevant Minister, and in making price regulation exemption recommendations to the Commonwealth Minister, in respect of greenfields pipelines. Applications for 15-year no-coverage determinations may be made in relation to all greenfields pipeline projects, whilst price regulation exemptions are only available to international pipeline projects which will bring foreign gas to Australia.

The Gas Guide will be of relevance to parties interested in dealing with the Council under the NGL. The Gas Guide's respective parts clearly point to the different roles and functions of the Council under the NGL.

As with all of the Council's guides, the respective parts of the Gas Guide will be updated from time to time as significant developments occur. All of the parts of the Gas Guide are available on the Council's website.

Who's who in regulation – the ACCC

The Australian Competition and Consumer Commission (**ACCC**) is an independent statutory authority. It was formed in 1995 to administer the *Trade Practices Act 1974* and other acts.

The ACCC promotes competition in fair trade in the market place to benefit consumers, business and the community. It also regulates national infrastructure industries. Its primary responsibility is to ensure that individuals and business comply with the competition, fair trading and consumer protection laws.

In fair trading and consumer protection its role complements that of the state and territory consumer affairs agencies which administer the mirror legislation of their jurisdictions.

It is in relation to its regulation of national infrastructure industries that the ACCC's role intersects with the Council's, with the ACCC determining through arbitration requests for access to infrastructure that have been the subject of a declaration decision under Part IIIA of the TPA.

NATIONAL COMPETITION COUNCIL

Level 9
128 Exhibition Street
Melbourne
Victoria 3000

GPO Box 250
Melbourne
Victoria 3001

Phone:
(03) 9285 7474
Fax:
(03) 9285 7477

Email:
info@ncc.gov.au

Website:
www.ncc.gov.au