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growth, innovation, productivity

Certification of the South Australian Ports Access Regime

On 15 October 2010 the Council received an application from the Premier of South Australia under s44M of the *Trade Practices Act 1974* (Cth) (**TPA**) for the certification of the South Australian Ports Access Regime established under the *Maritime Services (Access) Act 2000* (SA) (**MSA Act**). The South Australian Government has requested the Council to make a recommendation to the Commonwealth Minister that the regime be certified as effective for a minimum period of ten years.

The South Australian Ports Access Regime applies to those persons (regulated operators) who carry on a business of providing maritime services at a proclaimed port that are declared by proclamation to be regulated services. The ports that are currently proclaimed to be subject to the Regime are Port Adelaide, Port Giles, Wallaroo, Port Pirie, Port Lincoln and Thevenard. These ports are currently operated by Flinders Ports Pty Ltd.

The MSA Act defines three categories of services:

- 'maritime services' are services provided on a commercial basis at a proclaimed port including providing or allowing for access of vessels, pilotage services, providing berths, providing port facilities for loading and unloading of vessels, storage of goods, and providing access to land in connection with the provision of any of these services. It does not include services for towage, bunkering, provisioning of vessels or waste removal.
- 'essential maritime services' are maritime services provided at a proclaimed port which consist of providing or allowing for access of vessels, providing port facilities for loading and unloading of vessels, or providing berths for vessels.
- 'regulated services' are services declared by proclamation to be regulated services and currently include channels, common user berths, bulk handling facilities as defined in the *South Australian Ports (Bulk Handling Facilities) Act 1996* (but only in relation to conveyer belts), berths adjacent to bulk handling facilities; land providing access to maritime services, and the outer harbor bulk loader.

Only essential maritime services and regulated services are subject to the Regime. The Essential Services Commission of South Australia (**ESCOSA**) is responsible for monitoring and enforcing compliance with the MSA Act and for conducting regular reviews of maritime industries to determine whether regulation (or further regulation) is required. There is provision for essential maritime services to be subject to price regulation by ESCOSA.

According to the South Australian Government, the South Australian Ports Access Regime aims to ensure that access to regulated services is provided on fair commercial terms through a negotiate/conciliate/arbitrate access regime. This light-handed form of access regulation is intended to strike an appropriate balance between promoting competition and facilitating timely investment in port facilities.

If the South Australian Ports Access Regime is certified as effective it will exclusively regulate access to the services covered by the Regime. This means that the services cannot be declared under Part IIIA of the TPA or be subject to an access undertaking approved by the Australian Competition and Consumer Commission.

The Council commenced its public consultation process on 20 October 2010 and submissions closed on 22 November 2010. The Council received a total of four submissions. The Council will consider the submissions in preparing its draft recommendation.

A copy of the certification application is available on the Council's website at www.ncc.gov.au

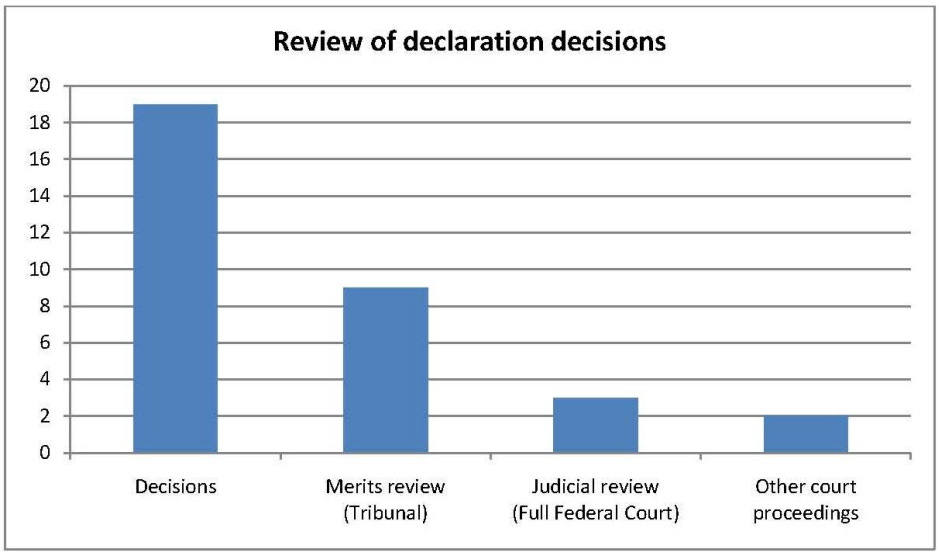
Pacific National withdraws applications for declaration of the Central Queensland Coal Rail Network

On 13 October 2010 Pacific National withdrew its applications for declaration of the services provided by the Central Queensland Coal Rail Network. Consequently, the Council will not be making a recommendation to the designated Minister in relation to this matter.

Inside this issue

Merits review and judicial review of third party access decisions

The chart below sets out the extent of merits review and judicial review of Ministerial declaration decisions:



Looking back over the 15-year history of access regulation under Part IIIA of the TPA and the National Gas Law, relatively few of the decisions made by Ministers acting on the Council's recommendation have been subject to review by the Australian Competition Tribunal (**Tribunal**) and the Federal Court.

Fewer than half of all declaration decisions have been reviewed by the Tribunal, with a third of those decisions being subject to further review by the Federal Court. The Tribunal has reviewed only one gas pipeline coverage decision and it has not reviewed any certification decisions.

Declaration and certification decisions are made by designated Ministers after receiving a recommendation from the Council. Decisions are subject to merits review by the Tribunal. Recent amendments to Part IIIA implemented by the *Trade Practices Amendment (Infrastructure Access) Act 2010*, which took effect on 14 July 2010, imposed some limits on the information to be considered by the Tribunal in conducting a review of a declaration or certification decision. Previously, the ability of parties to present new evidence to the Tribunal was not restricted. Now evidence in addition to what was before the Minister (or the Council in the case of deemed decisions) may only be submitted if the Tribunal requests it.

Tribunal decisions cannot be appealed, but are subject to judicial review (ie a person can apply to the Federal Court to determine whether the Tribunal made its decision in accordance with the law).

Declaration decisions

Nineteen applications for declaration have resulted in decisions being made (including deemed decisions). Of those, nine were the subject of merits review by the Tribunal. Five reviews resulted in the Ministerial decision being varied or set aside and four resulted in the decision being affirmed. The Tribunal's decision to declare the airside services at Sydney Airport was subject to judicial review in *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146. The Full Federal Court upheld the declaration of the services.

Judicial review proceedings of the Tribunal's decisions regarding the Robe and Hamersley railway services in the Pilbara were commenced on 13 August 2010 and are due to be heard by the Federal Court in early 2011. In addition, the threshold jurisdictional question of whether the use of a railway facility owned and operated by a vertically integrated mining company was the use of a production process (and therefore not subject to Part IIIA) has been litigated twice (see *Hamersley Iron Pty Ltd v National Competition Council* [1999] FCA 867; and *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45).

Council provides its final recommendation on the application for certification of the Queensland Rail Access Regime

On 22 November 2010 the Council provided its final recommendation on the application for certification of the Queensland Rail Access Regime to the designated Commonwealth Minister, the Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP.

The TPA requires the Commonwealth Minister to use his best endeavors to make a decision within 60 days beginning on the day he receives the Council's final recommendation, subject to any necessary extensions. The Council's recommendation only becomes public once the Commonwealth Minister's decision is published.

Interested parties should check the Council's website for updates.

Certification decisions

There have been 15 certification decisions, with three more certification applications currently under consideration. No certification decisions have been subject to review by the Tribunal.

National Gas Law decisions

The Council has also considered 38 applications under the National Gas Law (and its predecessor) relating to coverage, light regulation or classification of gas pipelines. The decision to cover the Longford to Sydney gas pipeline under the Gas Pipelines Access Law is the only gas decision to have been reviewed by the Tribunal. The Tribunal determined that the pipeline not be covered (see *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2).

The complexity of access decisions

The issues arising in access matters are complex and decisions can have significant consequences for applicants and access seekers, service providers and the broader economy. Addressing this complexity in a way that is fair to all parties and minimises the risk of error can take some time.

Following the recent amendments to Part IIIA, the Council has 180 days (with provision to stop the clock on this period in certain circumstances) within which to make its recommendation to the designated Minister, who has 60 days to make his or her decision.

Parties with standing to seek merits review of Ministerial decisions have 21 days after publication of the decision in which to do so.

The Tribunal then has 180 days to make its decision (with provision to stop the clock and extend this period in certain circumstances). Accordingly, if merits review of a decision is sought, up to 441 days may pass between an application for declaration or certification being made and the delivery of a Tribunal decision, even if all of the time limits in the TPA are met.

As noted above, the time limits imposed on the Council and Tribunal can be extended in certain circumstances. Given the complexity of the issues that arise in relation to access decisions and the economic ramifications of outcomes, occasions may arise when extensions will be necessary.

The recent Pilbara railway matters illustrate the task the Tribunal may face in addressing access issues (note that these matters were heard prior to the recent amendments to Part IIIA, which introduced both the 180 day time limit for Tribunal decisions and the limitation on the evidence considered by the Tribunal). The Tribunal sat for 42 days, received approximately 70 volumes of evidence and its reasons ran to some 350 pages (see *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2). Not surprisingly, almost nine months passed between the Tribunal's first sitting day and the delivery of its decisions.

Fortunately, the number and length of Tribunal and Federal Court proceedings in relation to the Pilbara railway matters is not typical of third party access matters.

Who's who in regulation – the ERA

The Economic Regulation Authority (**ERA**) is the independent economic regulator for Western Australia and was established in January 2004.

The ERA has two main roles which are designed to maintain an efficient, competitive and fair commercial environment, particularly where businesses operate as natural monopolies, for the benefit of Western Australian consumers.

In its regulatory role, the ERA evaluates the access terms and conditions (including prices) offered by the providers of monopoly infrastructure services to third parties in the electricity, gas and rail industries. The ERA also licenses the providers of electricity, gas and water services and is responsible for monitoring and enforcing compliance with licence conditions. In addition, the ERA has a range of responsibilities in the retailing of gas and surveillance of the wholesale electricity market in Western Australia.

In its advisory role, the ERA inquires into and reports on matters referred to it by the Western Australian Government. The ERA is currently conducting inquiries into the funding arrangements for Horizon Power, the costs and benefits of undergrounding the overhead electricity distribution network, and water resource management and planning charges.

The ERA endeavours to promote fair prices, quality services and choice when making its decisions.

MERRY CHRISTMAS FROM ALL AT THE NCC

Our office will close at 12 noon on Friday 24 December and re-open on Tuesday 4 January 2011

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