Accessible

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National Competition Council
growth, innovation, productivity

First application for 15 year no-coverage determination

On 19 January 2010 the Council received an application under the National Gas Law (**NGL**) for a 15 year no-coverage determination for the proposed QCLNG Pipeline in Queensland. This is the first no-coverage application under the NGL that the Council has received.

Once constructed, the QCLNG Pipeline will run from coal seam gas deposits in the Surat Basin to a port facility at Curtis Island, near Gladstone.

Greenfields pipeline incentives

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 to bring gas from a source outside Australia, to apply for a 15 year price regulation exemption. Together, these provisions are known as 'greenfields pipeline incentives'. 'Greenfields' investment refers to investment in new infrastructure where there was none before, whereas 'brownfield' investment refers to investment in pre-existing infrastructure.

The greenfields pipeline incentives were established in June 2006 under the then Gas Pipelines Access Law. These incentives were replicated in the NGL which replaced the Gas Pipelines Access Law (including the Gas Code) in 2008.

Like the Gas Pipelines Access Law before it, the NGL and National Gas Rules (**NGR**) only apply economic regulation and third party access to 'covered' pipelines. As the name suggests, a 15 year no-coverage determination for a proposed greenfields pipeline exempts that pipeline from coverage, and therefore prevents the pipeline from being subject to regulation under the NGL for a period of 15 years from its commissioning.

No-coverage determinations are intended to promote regulatory certainty for investors in new pipeline projects and to encourage efficient investment in new pipeline infrastructure.

Requirements for a no-coverage determination

A 15 year no-coverage determination may be available for a proposed new gas pipeline where the Council is *not* satisfied that the pipeline would meet all of the NGL's four 'coverage criteria'. The four coverage criteria are set out in section 15 of the NGL as follows:

- that access (or increased access) to pipeline services provided by means of the pipeline would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the pipeline services provided by means of the pipeline
- that it would be uneconomic for anyone to develop another pipeline to provide the pipeline services provided by means of the pipeline
- that 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
- that access (or increased access) to the pipeline services provided by means of the pipeline would not be contrary to the public interest.

An applicant for a no-coverage determination seeks to persuade the Council that one or more of the coverage criteria will not be met. In considering whether or not the coverage criteria are met, the Council must have regard to the 'national gas objective' in s23 of the NGL:

A copy of the no-coverage application is available on the Council's website at www.ncc.gov.au

Interested parties have until 5pm on 15 February 2010 to make written submissions on the application.

Councillors reappointed for a further term

On 18 December 2009 the President, Mr David Crawford, and Council members Dr Doug McTaggart, Mr Rod Sims and Ms Virginia Hickey were all appointed for a further three year term.

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> "The objective of this Law 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."

Classification of the pipeline/relevant Minister

The Council makes a recommendation on the no-coverage application to the relevant Minister, who decides the application. The identity of the relevant Minister is determined by the classification of the pipeline under the NGL.

A pipeline is classified on the basis of whether its primary function is to convey gas to a market (transmission) or to reticulate gas within a market (distribution). When classifying a pipeline, the Council must also determine whether the pipeline is a cross-boundary pipeline, and if so, which state or territory it is most closely connected with.

The Council makes an initial classification decision of the pipeline at the time of releasing its draft recommendation.

The Council's process

In considering the no-coverage application, the Council undertakes the 'standard consultative procedure' under the NGR. Interested parties have until 5pm on 15 February 2010 to make submissions on the application. After considering the application and submissions, the Council will publish its draft recommendation and its initial classification decision. There will then be an opportunity for submissions on the draft recommendation. Following consideration of the submissions on the draft recommendation, the Council will finalise its recommendation and provide it to the relevant Minister.

The NGL and NGR provide that the Council must provide its final recommendation to the relevant Minister within four months from the date of receiving an application, although that period may be extended in exceptional circumstances.

At this stage the Council anticipates making its final recommendation within the four month period.

Victorian Government responds to ESC 'Victorian Ports Regulation Review 2009'

The Victorian Government has supported the Essential Services Commission's recommendation that the ports of Geelong, Portland and Hastings no longer be regulated. However, the Government has not supported the ESC's recommendation that the 'channel access regime' be retained. More information on the Victorian Government's response is available at www.transport.vic.gov.au

Further update on Tribunal's review of Pilbara railway decisions

In the August 2009 issue of *Accessible* we provided an update of the Australian Competition Tribunal's (**Tribunal**) review under Part IIIA of the Trade Practices Act 1974(**TPA**) of the declaration decisions made regarding the iron ore railways owned by BHP Billiton Ltd and associates (**BHP**) and Rio Tinto and associates (**Rio Tinto**) in the Pilbara.

In all cases, Fortescue Metals Group Limited, or its subsidiary The Pilbara Infrastructure Pty Ltd, (together, **FMG**) sought declaration of rail track services provided by:

- the Mt Newman railway and the Goldsworthy railway, which are owned and operated by 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 (initial applications made November 2007 and January 2008 respectively).

Declaration of a railway would allow any person seeking access to that railway to use the negotiate/arbitrate regime in Part IIIA of the TPA to provide rail services on them.

In the interests of efficiency, all four matters were consolidated and are being heard together by the Tribunal.

The hearing commenced on 28 September 2009 with the Tribunal members being Justice Ray Finkelstein (the President), Professor David Round and Mr Grant Latta.

The last hearing day in 2009 was 18 December 2009, at the conclusion of which all parties had presented their closing or final submissions. However, despite the fact that all parties have delivered their final address, the hearing has been adjourned until 23 February 2010. The extension of the hearing into 2010 is a consequence of the Tribunal requesting that additional rail modelling be undertaken.

The evidence presented to the Tribunal by BHP, Rio Tinto and FMG included rail modelling evidence, broadly looking at the capacity of BHP and Rio Tinto's railways. Following the presentation of the evidence by the rail modelling experts for the parties, the Tribunal requested that the BHP and Rio Tinto experts undertake further modelling for the Tribunal. The modelling from BHP's expert was provided to the Tribunal on 17 December 2009. Rio

Tinto's expert provided modelling to the Tribunal on 15 January 2010.

The Tribunal will reconvene on 23 February 2010 for up to 4-5 days to consider and examine this modelling and associated issues relating to the capacity of the BHP and Rio Tinto railways. The hearing is expected to conclude at the end of this period, with the decisions to follow in due course.

Central West Pipeline light regulation determination

In the December 2009 issue of *Accessible* we advised that on 2 October 2009 the Council received an application from APT Pipelines (NSW) Pty Limited under the NGL for the light regulation of the covered Central West Pipeline (**CWP**). The CWP transports gas from Marsden on the Moomba Sydney Pipeline mainline to Forbes, Parkes, Narromine and Dubbo in the central west of New South Wales.

After considering the application and submissions, the Council considered that the light regulation regime is likely to be similarly as effective as full regulation in protecting users and other parties that are dependent on access to the CWP. This is due to the availability of pipeline costs information, which will retain much of its relevance despite the move to a two-tiered pricing regime, as well as the reporting requirements and legislative protections (including the availability of arbitration for disputes) contained within the light regulation regime. The Council also noted that a shift to light regulation is likely to involve material cost savings, at least for the service provider, and that for these reasons light regulation of the CWP is consistent with the promotion of the national gas objective.

Accordingly, on 19 January 2010, pursuant to s114 of the NGL and in accordance with the National Gas Rules, the Council made a determination in favour of the application. The determination comes into force 60 business days from 19 January 2010.

Who's who in regulation – AEMC

The Australian Energy Market Commission (**AEMC**) was established in July 2005 by the Council of Australian Governments, through the Ministerial Council on Energy (**MCE**), to be the rule maker for national energy markets.

As an independent national body, the AEMC makes and amends the detailed rules for the National Electricity Market (**NEM**) and elements of natural gas markets. The AEMC also provides strategic and operational advice to the MCE.

The MCE's reform agenda is focused on the objective of an efficient, reliable and secure energy market which serves the long-term interests of the community. Accordingly, all aspects of the AEMC's work reflects the view that effective competition at wholesale and retail levels, together with the right regulation for transmission and distribution, is the best way to deliver efficient, reliable and safe energy for electricity and gas consumers.

Since its inception in 2005 the AEMC has seen as substantial increase in its role. When it was established the AEMC was responsible for rule-making in regard to electricity wholesale and transmission regulation in the NEM. It was also responsible for market development and providing advice to the MCE in relation to the NEM.

In January 2008 the AEMC's role expanded to include the power to make rules in relation to the economic regulation of electricity distribution network services. In July 2008 the AEMC's role further expanded to include rule making in relation to the economic regulation of gas transmission and distribution services, access to natural gas pipeline services and other elements of broader natural gas markets.

Western Australia became a participating jurisdiction in the NGL on 1 January 2010. This has increased the AEMC's role to include the power to make rules in relation to elements of the natural gas markets in Western Australia such as the economic regulation of natural gas pipeline services.

The NCC will be hosting the annual Utility Regulator's Forum in Melbourne on 19 March 2010

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