

National Competition Council  
growth, innovation, productivity



# STRATEGIC PLAN



2007 - 2010



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# National Competition Council

## Strategic Plan 2007-2010

### Introduction

On 13 April 2007 the Council of Australian Governments (COAG) determined that, under the new National Reform Agenda, the National Competition Council (NCC) will focus on its functions relating to third-party access to monopoly infrastructure.

This strategic plan outlines the NCC's approach to ensuring that it is able to carry out this role effectively. The plan also sets out steps to ensure the knowledge and experience gained during the period of the National Competition Policy (NCP) is available to support future microeconomic reform activity in Australia.

### Establishment and Role

The NCC is an independent statutory agency established under Part IIA of the Trade Practices Act 1974 (TPA). The NCC's functions and powers are set out in s29B of the TPA (refer Appendix I).

The NCC's role in relation to access regulation is to make recommendations<sup>1</sup> under Part IIIA of the TPA (declaration and certification) relating to access to services provided by monopoly infrastructure and to undertake similar functions under the National Third Party Access Code for Natural Gas Pipeline Systems (the Gas Code).

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<sup>1</sup> Recommendations are made to the Australian Government Treasurer or other ministers, or to state or territory ministers depending on the particular subject matter.

Under the NCP the NCC assessed the performance of Australia's governments (Australian and state/territory) in meeting the reform commitments agreed under that policy. With the end of the NCP reform agenda in 2006 the NCC's assessment role has ended and the NCC is focussing its activities on access regulation matters.

### Governance and Organisation

The NCC comprises a president and up to four councillors, appointed on a part-time basis, supported by a staff secretariat located in Melbourne.

### Council

The NCC President is David Crawford. Councillors (as at 30 June 2007) are: Virginia Hickey, Rod Sims and Dr Doug McTaggart.<sup>2</sup>

Councillors are appointed by the Governor-General for their expertise or experience in industry, commerce, economics, law, consumer protection or public administration. Appointments must be supported by a majority of the states and territories.

### Secretariat

The day to day operations of the NCC are undertaken by the staff secretariat in accord with policies and plans established by the Council.<sup>3</sup>

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<sup>2</sup> The councillors' biographical details are available at [www.ncc.gov.au](http://www.ncc.gov.au).

<sup>3</sup> Additional information on the organisation of the secretariat can be found at [www.ncc.gov.au](http://www.ncc.gov.au).



## NCC Functions

### Access Regulation

Part IIIA of the TPA establishes the national access regime — principles and legal rights to facilitate competition in markets that rely on monopoly infrastructure.

The objects of Part IIIA are to:

*(a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and*

*(b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.*

While access to infrastructure services is generally a matter for commercial agreement between the service provider and access seeker, in certain limited situations regulated access is necessary to ensure competition in markets that depend on infrastructure that cannot be economically duplicated.

Under Part IIIA, where the criteria established in the TPA are met, the services provided by monopoly infrastructure facilities can be subject to regulation in the form of a mandatory ‘negotiate-arbitrate’ regime with the Australian Competition and Consumer Commission arbitrating access disputes where required.

Before recommending that the services provided by a facility are ‘declared’, and thus subject to regulated access, the NCC must be affirmatively satisfied

that the declaration criteria set out in the TPA are met. These criteria require that:

- the facility cannot be economically duplicated
- the facility is nationally significant
- access will materially increase competition in one or more dependent markets
- access can be provided safely
- access is not available under an effective state/territory access regime
- access is not contrary to the public interest.

Access regulation seeks to promote competition in dependent markets and avoid inefficient duplication of costly facilities while ensuring owners receive appropriate payment for the use of their facilities. These payments include a commercial return on investment, but not any monopoly profits from a lack of competition in dependent markets.

As well as advising on declaration, the NCC is also responsible for recommending whether a state or territory access regime is ‘effective’ and therefore should apply to the exclusion of the national access regime.

In addition the NCC has a number of functions relating to access to gas pipelines under the Gas Code.<sup>4</sup>

The NCC is also responsible for reporting on the effectiveness of the national access regime.

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<sup>4</sup> As noted elsewhere in this plan, the Gas Code is expected to be replaced by a new National Gas Law in the near future. The Council is expected to have similar roles under that law.



Appendix 2 sets out in more detail the scope of the NCC's access related activities and the statutory or other authority for those activities.

## **Compliance**

As an agency within the Australian Public Service and subject to the Financial Management and Accountability Act (FMA Act), the NCC must comply with a range of statutory and administrative requirements. These are summarised in Appendix 3.

## **Strategies 2007-2010**

### **Strategic challenges, objectives and responses**

This section sets out the initiatives that the NCC intends to implement to ensure it carries out its role and functions.

Here the NCC has sought to identify the strategic challenges it faces over the period to 2010, the objectives it needs to achieve to meet those challenges and properly carry out its functions and the specific responses and initiatives it will put in place to meet those objectives.

## **Access Regulation**

### **Objectives**

The NCC will need to respond to a range of legislative changes that have recently come into force or have been foreshadowed by the Australian Government. Relevant legislative amendments and proposals are set out in Appendix 4. In broad terms these amendments place increased emphasis and priority on the timeliness of access processes and fine tune criteria and procedures.

State and territory governments have also committed to the certification as effective of all their access regimes by 2010.<sup>5</sup>

In addition, the Ministerial Council on Energy has commenced a progressive reform of regulation in the energy

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<sup>5</sup> COAG Competition and Infrastructure Reform Agreement, 10 February 2006. See Appendix 5 for a list of state/territory access regimes.



sector. As a part of this, revised regimes for regulating third party access to gas and electricity transmission and distribution infrastructure will need to be certified as effective.

The NCC will seek to:

- maintain the quality of its recommendations
- maintain the capacity to respond to applications in a timely fashion and generally within indicative time limits
- maintain the transparency and objectivity of decision making.

### **Initiatives**

The NCC will:

- revise published guidelines to reflect legislative amendments and case law developments and to set out processes to meet specific time limits
- review and release policy statements/guidelines relating to:
  - treatment of commercially confidential information
  - content of applications (templates)
- standardise the process for considering access applications
- review the structure and form of recommendation reports provided to decision making ministers to ensure they are clear and accessible
- develop a comprehensive internal procedures manual for access applications
- revise NCC meeting arrangements to reflect statutory time limits

- develop and maintain a web site to support timely, transparent and consultative consideration of access regulation matters
- liaise with prospective applicants for certification to maximise opportunities for certification of proposed state and territory access regimes, including those proposed in the energy sector
- implement arrangements set out in a Memorandum of Understanding with the Australian Energy Market Commission to enhance regulatory certainty in the energy sector
- where practical, seek to agree with jurisdictions a timetable for certification of state/territory access regimes that balances the NCC's workload.

Commencing with the access guidelines and its approach to making recommendations on applications, the NCC will implement these initiatives progressively over the period of this plan.

## **National Competition Policy**

### **Objectives**

The NCC considers that the knowledge and experience gained during the NCP process should be available to inform ongoing reform activity.

The NCC will seek to preserve and make available the intellectual legacy from the NCP.



## Initiatives

The NCC will:

- establish and promote a legacy website relating to the NCP
- prepare a final *Legislation Review Compendium* and incorporate this into the NCP website
- work with the COAG Reform Council and other national, state or territory reform bodies to make available NCP related information that may assist their activities.

The NCC will implement the first two of these initiatives during 2007, and the third as required. The NCC will not maintain specific capabilities relating to its past assessment role under the NCP.

## HR and Organisation Capability

### Objectives

The sporadic and relatively unpredictable nature of access applications presents a particular challenge for the NCC.

The NCC will seek to ensure that it has access to personnel with the knowledge, skills and experience necessary to carry out its statutory and other functions.

### Initiatives

The NCC will:

- further enhance flexible staffing arrangements to ensure that the NCC is an attractive place to work

- explore and, as appropriate, develop arrangements with other organisations to assist in ensuring NCC staff are meaningfully engaged and to ensure that the NCC has access to external staff whose skills augment those of directly engaged staff
- develop and implement a training plan for NCC staff
- review information resources, subscriptions and “intelligence” links
- continue to subscribe to library services from the Productivity Commission library
- explore complementary activities and functions that it might undertake and make representations to governments where appropriate
- determine an optimal staffing complement and structure, and consider accommodation requirements, once workload and other relevant matters are clearer.

The NCC will implement these initiatives progressively over the period of this plan.

## Communications

### Objectives

The NCC will seek to:

- ensure policy makers, the business community and the broader community are accurately informed about access regulation
- ensure its recommendations and the basis for these are clearly communicated.



## Initiatives

The NCC will:

- maintain an effective working relationship with external communications advisers
- develop, implement and maintain an effective communications plan
- develop and maintain an accessible and informative website relating to access regulation and the NCC's activities
- move to electronic publication of guides, templates and other informational material to enable it to ensure these documents remain current.

The NCC will implement these initiatives progressively over the period of this plan.

## Finance and Administration

### Objectives

The NCC will:

- meet statutory and other obligations
- maintain appropriate financial controls.

### Initiatives

The NCC will continue to outsource its accounting and HR administration services for the period of this plan.

## Technology

### Objectives

The NCC will seek to ensure it has access to technology that supports quality assurance, timeliness of work and the productivity of staff.

### Initiatives

The NCC will implement document management, workflow and related IT systems.

The NCC will continue to outsource IT support for its operations.



## Appendix I: Trade Practices Act 1974 - Sect 29B

### Functions and powers of Council

(1) The Council's functions include:

- (a) carrying out research into matters referred to the Council by the Minister; and
- (b) providing advice on matters referred to the Council by the Minister.

(2) The Council may:

- (a) perform any function conferred on it by a law of the Commonwealth, or of a State or Territory; and
- (b) exercise any power:
  - (i) conferred by that law to facilitate the performance of that function; or
  - (ii) necessary or convenient to permit the performance of that function

(2A) The Council must not, under subsection (2):

- (a) perform a function conferred on it by a law of a State or Territory; or
- (b) exercise a power that is so conferred;

unless the conferral of the function or power is in accordance with the Competition Principles Agreement.

(2B) Subsection (2) does not apply to a State/Territory gas law.

Note: Section 29BA provides that a State/Territory gas law may confer functions or powers, or impose duties, on the Council.

(3) In performing its functions, the Council may co-operate with a department, body or authority of the Commonwealth, of a State or of a Territory.



## Appendix 2: Principal access regulation activities

Access regulation activity	Authority
Provide recommendations on applications relating to declaration of services	s44F TPA
Provide recommendations on applications relating to revocation of declaration	s44J TPA
Provide recommendations relating to the effectiveness of state and territory access regimes	s44M(3) TPA
Provide a recommendation as to whether an effective access regime should continue to apply for an extended period	s44NA(2) TPA
The NCC must provide its annual report to the Treasurer within 60 days of the end of the financial year	s29O TPA
Provide recommendations on applications for coverage of a gas pipeline	s1.7 Gas Code
Provide recommendations on applications for revocation of coverage of a gas pipeline	s1.29 Gas Code
Provide recommendations on applications for a binding no coverage determination	s13J Gas Pipelines Access (South Australia) Greenfields Pipeline Incentives Amendment Act 2006
Provide recommendations on applications for a price regulation exemption (in respect of an international gas pipeline)	s13R Gas Pipelines Access (South Australia) Greenfields Pipeline Incentives Amendment Act 2006



### Appendix 3: Statutory and administrative obligations

<b>Act/instrument</b>	<b>Obligation/policy</b>
Archives Act 1983	Government online standards & e-Government Information & administrative security
Australian Government protective security policy	Protective, information, information technology, personnel and physical security
Copyright Act 1968	Publications and website
Equal Employment Opportunity (Commonwealth Authorities) Act 1987	Australian Government Disability Strategy Anti-discrimination policy Workplace Diversity Plan
Financial Management & Accountability Act 1997	The proper use and management of public money, public property and other Commonwealth resources
Freedom of Information Act 1982	Freedom of Information obligations and policy
Occupational Health & Safety Act 1991	Occupational health & safety obligations and policy
Privacy Act 1988	
Public Service Act & Regulations 1999	Effective and fair employment, management and leadership of employees; agency powers, functions and responsibilities; and the rights and obligations of staff
Safety, Rehabilitation Compensation and other Legislation Amendment Act 2007	Comcare Policy
Trade Practices Act 1974	Annual Report
Workplace Relations Act 1996	Cooperative workplace relations to promote the economic prosperity and welfare of Australia
Legal Services Directions (issued pursuant to section 55ZF of the Judiciary Act 1903)	Requirements for the management and reporting of legal services arrangements
Procurement Policy Framework	Framework for the acquisition of property and services based on the principles of value for money, efficient and effective resource use and accountability and transparency
Senate Orders	Government contracts Continuing Order no. 6



## **Appendix 4: Recent legislative amendments, agreements and government policy announcements that have an impact on the NCC**

### **Recent legislative amendments**

#### **Trade Practices Amendment (National Access Regime) Act 2006**

This Act came into force on 1 October 2006. Of particular relevance to the NCC it:

- inserts an objects clause in Part IIIA of the Trade Practices Act as follows
  - (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry
- amends declaration criterion (a) such that declaration must result in a 'material increase' in competition in another market
  - the Explanatory Memorandum states that declaration should be granted only where the expected increase in competition in an upstream or downstream market is 'not trivial'
- exempts from declaration government owned infrastructure developed by way of a competitive tender approved by the Australian Competition and Consumer Commission
- imposes target time limits (the 'standard period') for Council recommendations under Part IIIA under which the Council must make its 'best endeavours' to complete a recommendation on an application
  - four months for a declaration recommendation from the date of receipt of the application
  - six months for a certification recommendation from the date of receipt of an application
  - if the Council is unable to make a recommendation within the standard period, it may extend the time (more than once) by a specified period, by notice in writing, with publication in a national newspaper
- requires public input on declaration and certification applications where it is 'reasonable and practical' for the Council to undertake consultation
- requires the Council to publish reasons for its recommendations (on the day that the designated Minister publishes his or her decision or as soon as practicable thereafter)
- requires the designated Minister to publish reasons for his/her decision
- requires the Council to report annually on the operation and effects of the regime and time taken to make recommendations.



## Recent agreements

### The Competition and Infrastructure Reform Agreement

At its meeting on 10 February 2006, COAG signed the Competition and Infrastructure Reform Agreement with the intention of achieving a simpler and consistent national approach to the economic regulation of significant infrastructure. Among other things this agreement provides that:

- the certification process and administrative arrangements be streamlined
- all third-party access regimes include objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure (thereby promoting effective competition in upstream or downstream markets)
- all third party access regimes include consistent principles for determining access prices
- all third party access regimes that provide for merits review of regulatory decisions require such reviews to be undertaken on the basis of the information submitted to the regulator
- all state/territory access regimes be submitted for certification by the end of 2010
  - access regimes for electricity and gas developed and certified in accord with the Australian Energy Market Agreement and the regime for the Tarcoola to Darwin Railway will be taken to satisfy the agreement
  - all new access regimes will be submitted for certification as soon as practicable
  - existing access regimes, including state rail regimes governing other significant export related rail infrastructure, will be submitted for certification as soon as practicable or as they are reviewed but no later than the end of 2010 (see Appendix 5).

The government parties agreed to introduce a requirement that regulators be bound to make regulatory decisions under an access regime within six months, provided the regulator has been given sufficient information, with regulators having the discretion to determine when the six month time limit may be suspended, including determining when sufficient information is provided to commence the process and to enable requests for further information from infrastructure service providers (where the request is reasonable) and to allow consultation periods during which the regulator seeks submissions from third parties or the community.

The Competition and Infrastructure Reform Agreement will be reviewed after it has operated for five years.

These decisions will be implemented via amendment of the Competition Principles Agreement (amended 13 April 2007) and the Trade Practices Act.



## Recent policy announcements

### Energy market economic regulation

COAG recognised in June 2001 that the effective operation of an open and competitive national energy (gas and electricity) market will deliver benefits to Australia. The approach to regulation under the Australian Energy Market Agreement is national consistency within the gas access regime and within the National Electricity Market (NEM) access regime, and where feasible and to the extent that effective regulation is not impeded, between the regimes.

Consistent with the agreement, the Ministerial Council on Energy (MCE) is modifying the legal framework for economic regulation. The key legislative components are the introduction of a new National Gas Law and National Gas Rules, and amendments to the National Electricity Law and National Electricity Rules.

The government parties to the Australian Energy Market Agreement have undertaken to make coordinated and concurrent applications for the certification of the current NEM access regimes and the gas access regimes. The MCE has agreed that this be done by 31 March 2008.

The government parties have agreed there will be consultation with the NCC where there is substantial modification to the regimes. In addition, the MCE will consider and endorse a memorandum of understanding between the NCC and the Australian Energy Market Commission (which is responsible for rule making and energy market development at a national level) that addresses consultation on rules relevant to certification.

With regard to the existing gas laws, relevant to the work of the NCC, the MCE has agreed to:

- replace the existing Gas Code with a National Gas Law and accompanying rules
- introduce a new objects clause to clarify the National Gas Law's objectives
- align the scope of the National Gas Law with the national access regime in Part IIIA of the Trade Practices Act
- introduce a light handed regulatory option for covered pipelines based on ring fencing and information disclosure, and
- implement new incentives to investment in new pipeline infrastructure.

Arising from the MCE agreement, legislation providing upfront exemptions from access regulation was enacted in 2006 as follows.

- A greenfields pipeline developer can obtain an upfront ruling on whether or not full regulation under the gas access regime should apply to a new pipeline. If the relevant Minister is satisfied that a pipeline project does not meet the pipeline coverage criteria, then the project will be granted a full exemption from gas access regulation for 15 years ('a binding no-coverage ruling').



- New transmission pipelines bringing foreign natural gas to Australian markets are able to be exempted from price regulation for 15 years. Under such an exemption, the pipeline would be subject to a number of other obligations including non-discriminatory pricing, prohibitions on preventing or hindering access, dispute resolution on non-price matters and transparency obligations.

The MCE advocates a limited merits review in both the gas and electricity sectors. The proposed grounds for review would provide for correction of errors: (1) that the decision maker made an error of fact and that fact was material to the decision (2) that the exercise of the decision maker's discretion was incorrect having regard to all the circumstances and (3) that the decision maker's decision was unreasonable having regard to all the circumstances. The Australian Competition Tribunal would have the powers of the original decision maker and be able to substitute the correct or preferable decision.

The MCE's position is that the Tribunal would consider only the material that the original decision maker had before it at the time of the decision (an applicant would not be able to introduce new evidence to establish the grounds of review). However once the grounds are established, the Tribunal would have the discretion to allow new evidence where the Tribunal would be assisted by such evidence, provided that the material was not unreasonably withheld from the original decision maker.

The MCE proposes that Ministers will be directly represented at Tribunal proceedings relating to gas coverage decisions (including binding no coverage determinations) with the power to raise new grounds of review. The NCC would be limited to responding to requests for information and other assistance from the Tribunal.

A revised merits review regime is scheduled to be implemented in 2007.



## Appendix 5: State/Territory Access Regimes

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Victoria	Channel Access Regime  Rail Access Regime  Grain Handling and Storage Access Regime
Queensland	Queensland Access Regime: comprising the <i>Queensland Competition Authority Act 1997</i> and the declarations of the services provided by Queensland's intrastate rail network and the Dalrymple Bay Coal Terminal
South Australia	Rail Access Regime  Ports Access Regime
Western Australia	Rail Access Regime

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### Notes:

- 1 State/territory access regimes for gas and electricity are subject to the MCE process (see Appendix 4).
- 2 Access arrangements for ports are to be reviewed.





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