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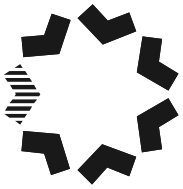

Submission to the Senate Economics Committee Inquiry

Trade Practices Amendment (Infrastructure Access) Bill 2009

22 December 2009

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1 Introduction

1.1 The National Competition Council (**Council**) is pleased to provide this submission in relation to the Trade Practices Amendment (Infrastructure Access) Bill 2009 (**the Bill**).

1.2 The Council strongly supports the amendments proposed in relation to the declaration process in Part IIIA of the *Trade Practices Act 1974* (Cth) (**TPA**) and to the administrative provisions concerning the Council's operations.

1.3 In the Council's opinion the proposed amendments will streamline the operation of Part IIIA and further the objectives of this part of the TPA: namely, promoting 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 providing a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

1.4 Following this brief introduction, this submission is divided into two further parts:

- Part 2 outlines the operation of Part IIIA – this is intended to provide the Committee with background information in relation to the operation of Part IIIA, in particular the declaration and subsequent access processes, and
- Part 3 addresses those sections of the proposed amendments that relate to the Council's functions and operations and sets out the basis on which the Council supports these.

1.5 The Council would appreciate an opportunity to discuss this submission with the Committee.

1.6 The Contact people at the Council in respect of this submission are:

- John Feil, Executive Director, telephone 03 9285 7499, email john.feil@ncc.gov.au or
- Natalie Naylor, Legal Counsel, telephone 03 9285 7474, email natalie.naylor@ncc.gov.au

2 The Operation of Part IIIA

Objectives of access regulation

2.1 Competition in a market is the preferred way to determine the prices and other terms and conditions of access to services provided by infrastructure or other facilities. Where such services are provided in competitive markets, access is most likely to be provided efficiently and at an appropriate competitive price. Where this is the situation regulation is generally unnecessary.

2.2 However, in some circumstances the underlying economics associated with the provision of specific infrastructure services are such that one facility can meet current and reasonably anticipated foreseeable demand at a lower cost than two or more facilities—i.e. the facility can be described as a natural monopoly as it is uneconomic to duplicate. Where participation in related markets that would otherwise be effectively competitive depends on access to such services, competition is likely to be significantly constrained in those markets. The result is losses in efficiency and innovation. Unless there is a mechanism to ensure that access is available on appropriate terms, efficiency and innovation losses will continue. Alternatively access seekers will be forced to build additional facilities to obtain the required services and the Australian economy will be burdened with wasteful duplication of expensive, capital intensive facilities.

2.3 Access regulation aims to promote effective competition in markets that depend on using the services of facilities that cannot be economically duplicated by ensuring that access is available on appropriate terms. Access regulation seeks to ensure that facilities that are uneconomic to duplicate are shared on terms that allow efficient access to dependent markets by third parties, while maintaining both a facility owner's usage rights and providing an appropriate commercial return on investment.

2.4 Arbitrate/negotiate is a form of light handed regulation that provides incentives for commercial agreement on access terms and conditions.

The National Access Regime

2.5 The National Access Regime, established by Part IIIA of the TPA and enacted in 1995,[1] provides a legal mechanism through which an access seeker can gain access to the services provided by an infrastructure facility—such as a railway, port, or other handling, transport or communications facility—on commercial terms and conditions. It is a mechanism that is available when attempts at commercially negotiated access are unsuccessful.

[1] Part IIIA was inserted into the TPA by the *Competition Policy Reform Act 1995* (Cth) (No 88 of 1995)

2.6 The regime provides an important means of promoting competition in markets where the ability to compete effectively is dependent on being able to use monopoly infrastructure. At the same time the regime ensures that infrastructure owners receive a commercial return and incentives for efficient investment are not affected.

2.7 Part IIIA of the TPA provides three alternative pathways for providing third parties with access to infrastructure services. These are:

- **declaration**—which provides access seekers with a legal right to negotiate terms and conditions for access with the service provider of a declared service
- **certification**—an effective access regime established by a state or territory (a service that is subject to an effective regime certified under Part IIIA is immune from declaration), or
- **voluntary undertakings**—a voluntary access undertaking made by a service provider and accepted by the Australian Competition and Consumer Commission (**ACCC**). The Council is not involved in the voluntary access undertaking process and does not address proposed amendments to that process in this submission.

2.8 Since its enactment in 1995, the National Access Regime has been the subject of ongoing review and reform. In October 2000, the Australian Government referred Part IIIA of the TPA to the Productivity Commission to review, in broad terms, those parts of the legislation that restrict competition, or that impose costs or confer benefits on business.[2] The Productivity Commission reported its findings and recommendations on 28 September 2001.[3] In response to the Productivity Commission report, Part IIIA was amended in 2006 following the passing of the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth), No. 92, 2006. Further review was undertaken in 2006 as part of the Council of Australian Governments' (**COAG**) commitment to further National Competition Policy reforms, as documented in the Competition and Infrastructure Agreement (10 February 2006) (**CIRA**). In April 2007 COAG further considered competition reforms, including adopting an implementation plan for the CIRA and amending the Competition Principles Agreement on 13 April 2007.

2.9 The amendments contained in the Trade Practices Amendment (Infrastructure Access) Bill 2009 are generally focused on the operation and administrative processes of Part IIIA. In the Council's view this procedural focus is appropriate.

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2 The Productivity Commission's review also focused on clause 6 of the Competition Principles Agreement

3 Productivity Commission 2001, *Review of the National Access Regime*, Report no. 17, AusInfo, Canberra

The declaration pathway

2.10 In the declaration pathway, an application for declaration of a service[4] provided by means of a facility is the first step in a process by which access seekers can obtain a legal right to negotiate for use of a service and gain recourse to arbitration by the ACCC, in the event of an access dispute that cannot be resolved by commercial negotiation.

2.11 Declaration provides a mechanism for determining whether the service or services provided by a particular facility should be subject to access regulation.

2.12 The declaration pathway involves a two stage process, a **declaration stage**—which determines whether the criteria for applying access regulation are met and if so allows a service to be declared—and a **negotiate/arbitrate stage**—where a service provider and access seeker(s) enter into negotiations and where the ACCC can be called upon to arbitrate access disputes in situations where the commercial parties cannot resolve it themselves.

2.13 The High Court discussed the two stage nature of the National Access Regime in *BHP Billiton Iron Ore Pty Ltd v National Competition Council* (2008) HCA 45 at [17]-[18]:

> [17] The consequence of a declaration of a service is that the "third party" ... is given what may be described as an enforceable right to negotiate access to the service. The right may be considered "enforceable because, subject to the constitutional limits (stated in s 44R), if a third party and a provider are unable to agree upon an arrangement for the third party to have access to the declared service, the third party may notify the ACCC of the dispute (s44S). The ACCC then has the power to arbitrate such an access dispute and, in general, "must make a written determination on access by the third party to the service" (s44(V)(1)).
>
> [18] Access to the declared service is, however, not a necessary or ultimate result of the arbitration (s44V(3)). Further, s44W provides that the ACCC must not make a determination that would have any of the prescribed effects. These include the effect of "preventing an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements, measured at the time when the dispute was notified" (s44W(1)(a)).

[4] For the purpose of the National Access Regime, a service does not include the supply of goods or the use of intellectual property or the use of a production process, except to the extent that these are an integral but subsidiary part of a service. Services already subject to an 'effective' access regime or an access undertaking accepted by the ACCC are excluded from declaration.

Stage 1 – declaration

2.14 An access seeker may apply to the Council for a recommendation that a service provided by an infrastructure facility be 'declared'. The Council conducts a public consultation process and then makes a recommendation to a designated Minister who makes the decision whether or not to declare a service.

2.15 The Council may only recommend declaration (and the Minister may only decide to declare a service) where all six declaration criteria (a-f) (see Box 2-1) are satisfied. The Council must also consider whether it would be economical for anyone to develop another facility that could provide part of the service (s 44F(4)) and the duration of any declaration (s 44H(8)).

Box 2-1: The declaration criteria – ss 44G(2) and 44H(4) of the TPA

(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service (**criterion (a)**)

(b) that it would be uneconomical for anyone to develop another facility to provide the service (**criterion (b)**)

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy (**criterion (c)**)

(d) that access to the service can be provided without undue risk to human health or safety (**criterion (d)**)

(e) that access to the service is not already the subject of an effective access regime (**criterion (e)**)

(f) that access (or increased access)to the service would not be contrary to the public interest (**criterion (f)**)

Sections 44G(2) and 44H(4) of the TPA.

2.16 Pursuant to the current law the Council must use its best endeavours to make its declaration recommendation within four months. The designated Minister then has 60 days after receiving the recommendation to make a decision. If the Minister fails to make a decision within the 60 day decision period, the application for declaration is deemed to be declined.

2.17 A party that is dissatisfied with the Minister's decision may seek reconsideration of the decision by the Australian Competition Tribunal (**Tribunal**). Such application must be made within 21 days.

2.18 A decision to declare a service comes into effect after 21 days unless an application for reconsideration is lodged with the Tribunal in which case the declaration is automatically stayed until the Tribunal makes its decision.

2.19 If a service is declared, an access seeker has an enforceable right pursuant to which a service provider is required to enter into access negotiations with an access seeker(s). This requirement is not limited to the particular access seeker which made the application for declaration, other access seekers can also seek to negotiate with the service provider for access to the declared service.

2.20 A Minister's decision to declare a service does not provide access seekers with an automatic right to use a declared service or determine the terms and conditions of any use. It does, however, provide a basis for negotiation and recourse to arbitration by the ACCC where commercial negotiation fails.

2.21 Declaration of a service does not have the inevitable consequence that the applicant for declaration, or any other third party access seeker, will be granted access to the service. The objects of Part IIIA and the provisions governing both declaration recommendations and decisions and the arbitration of access disputes explicitly recognise the relevant interests of the various parties affected, including the legitimate interest of service providers in preserving their use of a service and making a commercial return on their investment in infrastructure and other facilities. Part IIIA also allows for a broad consideration of the public interest that permits consideration of the effects of access on investment activity.

2.22 Declaration is only available in limited situations and even if a service is declared, subsequent commercial negotiation over access terms and prices is expected to occur. Recourse to regulation through the mechanism of ACCC arbitration is only available in the event of an access dispute that the parties cannot resolve through commercial negotiation. Even if a service is declared and an access request proceeds to arbitration by the ACCC an arbitration may result in a determination of no access for an access seeker.

2.23 Further details on applications for the declaration of services from 1996-2009 is contained in Appendix A.

Stage 2 – access negotiation/arbitration

2.24 The negotiate/arbitrate process that results from the declaration of a service is a light handed intervention designed to maximise opportunities for 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 are maintained.

2.25 The right to negotiate access to a declared service and the terms of any access is enforceable because if the access seeker and the service provider cannot agree on one or more terms of access then Subdivision C of Division 3 of Part IIIA provides that disputes about the contested terms of access can be arbitrated by the ACCC. The ACCC has broad scope to make orders to resolve an access dispute—although it must do so within the terms set out in Part IIIA including, in particular, the factors set out in s 44X and the safeguards in relation to the rights of service providers and existing users.

2.26 In the Council's view, it is important to distinguish the character of regulation that might occur as a consequence of declaration from light-handed "price control", "rate of return regulation" and other broader, more intrusive, industry regulation—where access issues are likely to be only one of a range of issues and a primary focus is likely to be on restraining monopoly prices or promoting "fair and reasonable" prices.

2.27 The contrast between the forms of regulation which result from the declaration of a service under Part IIIA and more intrusive approaches to regulation is illustrated in the recently enacted regime for the regulation of natural gas pipelines[5] where two forms of regulation are available—light regulation (involving a negotiate/arbitrate regime for settling access disputes) and full regulation (under which pipeline owners are obliged to submit comprehensive access arrangements for approval by the Australian Energy Regulator). The consequence of declaration under Part IIIA is to impose a light-handed regulatory regime similar to that under the light regulation alternative for gas pipelines, rather than the greater regulatory control of full regulation.

2.28 Declaration does not necessarily lead to regulated access through application of an ACCC arbitration determination. The declaration of a service does not result in the blanket regulation of the relevant service provider's activities. Providers of declared services to which an access seeker has rights under an ACCC arbitration determination are subject to a prohibition against preventing or hindering access to those services, but they are not required to seek approval from a regulator in relation to their day to day business decisions or their technology or investment choices, nor do access seekers have a veto in relation to such matters.

2.29 Declaration cannot result in any change in ownership or control of a facility, nor does it allow for regulatory intervention except in the event that access seekers and service providers are unable to reach commercial agreement and an access dispute is notified. Any arbitration conducted by the ACCC under Part IIIA is subject to various

[5] National Gas Law contained in the *National Gas (South Australia) Act 2008* and subordinate legislation

safeguards. The safeguard provisions include that in arbitrating an access dispute, the ACCC is required to take into account:

(a) the objects of the National Access Regime (which include efficient use of and investment in infrastructure and promoting effective competition in dependent markets)

(b) the legitimate business interests of the provider, and the provider's investment in the facility

(c) the public interest, including the public interest in having competition in markets

(d) the interests of all persons who have rights to use the service

(e) the direct costs of providing access to the service

(f) the value to the provider of extensions (to a facility) whose cost is borne by someone else

(g) the value to the provider of interconnections to the facility whose cost is borne by someone else

(h) the operational and technical requirements necessary for the safe and reliable operation of the facility

(i) the economically efficient operation of the facility.[6]

2.30 The ACCC is required to apply pricing principles[7] which provide that access prices should:

(a) be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access

(b) include a return on investment commensurate with the regulatory and commercial risks involved

(c) allow for multi part pricing and price discrimination when this aids efficiency, but not where a vertically integrated access provider seeks to favour its own operations

(d) provide incentives to reduce costs and improve productivity.[8]

2.31 Furthermore, the ACCC is specifically prohibited from making an access arbitration determination that would prevent an existing user 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

6 Section 44X(1) of the TPA

7 The pricing principles were inserted into Part IIIA as part of the 2006 amendments pursuant to the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth), No. 92, 2006

8 Section 44AACA of the TPA

needed to accommodate access seekers, a service provider can be required to undertake such expansion, but the costs of this are to be met by the access seekers along with interconnection costs.

2.32 Ultimately 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. The ACCC also has powers to deal with vexatious access disputes, or disputes not pursued in good faith, by terminating arbitrations.

2.33 ACCC arbitration determinations are subject to review by the Tribunal.[9]

Maintaining incentives for investment

2.34 Access regulation seeks to encourage the shared use of (typically capital-intensive, long-lived) infrastructure that is uneconomic to duplicate (where this can be achieved on commercial terms and conditions, while maintaining an owner's usage rights). It also aims to encourage investment in such infrastructure to accommodate additional demand where this can be done at lower net social cost rather than to require businesses to invest in high cost duplicate infrastructure. Access regulation seeks to maintain appropriate incentives for infrastructure investment and also investment in the related upstream and downstream markets that depend on access to the service.

2.35 Some service providers argue that the requirement to share the use of their infrastructure with competitors and the potential threat of such sharing (albeit on commercial terms and conditions) results in inefficiencies and that the costs of regulated access outweigh the benefits. They argue that this increases the risk of deterring future infrastructure investment.

2.36 The provisions of Part IIIA mean that such disruptions to investment are unlikely to eventuate. Declaration, in Stage 1 of the National Access Regime, is designed to address the small number of situations where access to a service provided by means of a facility which cannot be economically duplicated is necessary to enable third parties to compete effectively in a dependent market. The negotiate/arbitrate process that results from declaration (Stage 2) is designed to maximise opportunities for 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 are maintained.

2.37 Moreover, declaration does not necessarily lead to regulated access through the application of an ACCC arbitration determination and cannot result in any change in ownership or control of a facility. The ACCC's arbitration role is governed by a range of specific statutory requirements that explicitly recognise the relevant interests of the various parties affected, including the legitimate interest of service providers in

[9] Section 44ZP of the TPA

preserving their use of a service and making a commercial return on investment in infrastructure and other facilities. Further, Part IIIA also requires a broad consideration of the public interest that includes consideration of the effects of a declaration on investment activity.

2.38 The Council therefore sees little basis for concluding that access regulation is a significant cause of delay in investment activity. The Council is not aware of any data that support an argument that third party access regulation is leading to adverse investment outcomes.

2.39 The Council considers that other broader factors, including the prevailing economic conditions, are likely to have a far greater effect on Australia's infrastructure investment performance than access regulation.

2.40 In addition to the allegations of investment disincentives from declaration, Part IIIA has also attracted calls for the inclusion of an 'efficiency override' in the declaration process to ensure declaration is not available where the efficiency of a service provider's operations would be impaired by access.

2.41 The Council considers that the evidence from its declaration work does not support the need for an efficiency override in Part IIIA of the TPA. Declaration criterion (f) requires the Council to recommend against declaration unless it is satisfied that access or increased access to a service would be contrary to the public interest. Such an assessment can include consideration of the impact of access (or increased access) on the efficiency of a service provider's operations and the potential for access to affect investment activity more generally. Where the Council was satisfied that the costs of providing access were large and the benefits from additional competition were expected to be small, the Council would be in a position to recommend against declaration.

2.42 The requirements for declaration under Part IIIA of the TPA provide for a weighing up or balancing of all costs and benefits. By contrast an efficiency override would likely give primacy to the interests of service providers over those of access seekers in ways that would be contrary to the national interest and the objects of the National Access Regime.

3 Provisions of the Trade Practices (Infrastructure Access) Bill 2009 relevant to the Council's role

3.1 Each of the proposed amendments that are relevant to the Council's role is examined below. As noted earlier we have not sought to address other aspects of the Bill which are unrelated the Council's functions and operations.

Proposed reforms under the Bill

Time limits for Council recommendations (Refer the Bill at Schedule 1, Part 1, Items 4, 5, 6, 19, 27, 31)

3.2 The 2006 amendments to the TPA[10] introduced a requirement that the Council—and others involved in applying Part IIIA—meet best endeavours timeframes. The Council supports the further consideration of the timing of processes under Part IIIA and considers that the introduction of a period of 180 days for the making of Council recommendations on declaration, certification and ineligibility recommendation applications to be reasonable and capable of satisfaction in all but the most unusual of circumstances. In such a situation, the Council has the capacity to extend the consideration period. This step, including the introduction of binding timeframes for decision making on review of a declaration application by the Tribunal, is necessary to ensure these processes are undertaken within commercially meaningful timeframes.

3.3 In the Council's view the proposed 180 day period represents a reasonable balancing of the relevant interests in relation to a declaration application. It will enable the Council to undertake its analysis and conduct its usual public consultation processes—which allow for two rounds of submissions; one in response to the application and a second in response to the Council's draft recommendation.

3.4 The opportunity to "stop the clock" will assist the Council in performing its functions as it provides a means to address unforeseen events that may otherwise have an adverse impact on the time limit. Further, the ability for the Council to disregard any submissions received after the closing date or information received late by the Council in response to a specific information request are expected to provide a disincentive for parties to delay the provision of information and will assist the Council in making timely recommendations.

Information requests from the Council (Refer the Bill at Schedule 5, Part 1, Items 4, 19 and Schedule 2, Item 7, new Division 2AAA, Subdivision B, s 44LC)

3.5 With the introduction of binding time limits it is necessary to specify an ability for the Council to seek information within a specified time frame in order to trigger the stop

[10] *Trade Practices Amendment (National Access Regime) Act 2006* (Cth), No. 92, 2006

the clock provisions. This ability does not allow the Council to compel the provision of information, merely to request it. The Council's view at this time is that a power to compel provision of information is unnecessary and would complicate the declaration process.

3.6 In the Council's view the proposed amendment will assist it in completing its consideration of applications within the proposed binding time limits. It will also limit the opportunities for gaming the provision of information to the Council because the Council may disregard information provided out of time. In failing to provide information requested by the Council, a service provider can frustrate consideration of a declaration application. While the Council's experience to date has been that information requested is generally provided, sometimes the timeliness of the provision of information has been unsatisfactory.

3.7 Having a legislative ability to seek information will also assist the Council in completing the application picture. In the Council's experience, applications while meeting the general requirements for lodging an application can nevertheless contain insufficient information and detail for the Council to both assess the application and conduct its public consultation.

Amendments to declaration applications submitted to the Council (Refer the Bill at Schedule 5, Part 1, Item 4)

3.8 In many cases access seekers making a declaration application face an asymmetry of information making it difficult for them to precisely define the service to which they seek access, the facility used to provide the service or the entities that own and/or operate the facility. While an applicant must describe the service for which declaration is sought with sufficient precision to enable the Council and other parties to assess its application, it is not uncommon for matters of detail to be difficult to determine in advance of an application. On occasion an applicant for declaration has sought to amend or supplement its application with new or additional information after it has been submitted to the Council. In some cases a service provider has then claimed that the application is invalid on the basis that Part IIIA of the TPA does not provide for an applicant to amend its application.

3.9 Should the Council accept such arguments an applicant would need to withdraw its application or the Council reject the application, forcing the applicant to resubmit and start the declaration process afresh. This could have the effect of unnecessarily delaying the consideration of a declaration application. In addition, uncertainty regarding applicants' rights in this regard and the Council's power to accept amendments to applications creates an avenue for potential legal challenge to a declaration decision, which can act to delay the outcomes.

3.10 In practice the Council has allowed amendments and additions to applications at a relatively early stage of the process, in circumstances where no party would be

unreasonably prejudiced. The proposed amendment confirms the validity of this approach. The Council believes that it should be explicitly empowered to accept amendments to an application for declaration. As the proposed amendments provide, this power should be subject to the amendments being made at a time and in a manner that does not prejudice other parties or unduly delay the process for considering an application.

Simplifying the declaration criteria (Refer the Bill at Schedule 5, Part 1, Items 5, 6, 8 & 9)

Removing criterion (d)

3.11 In the Council's experience criterion (d) (ss 44G(2)(d) and 44H(4)(d)), which requires consideration of whether access to the service sought to be declared can be provided without undue risk to human health or safety, is almost always met. Clearly, health and safety is an important factor in most industries, particularly in infrastructure industries such as transport, energy, communications and water and sewage. As a result a range of health and safety regulations usually apply to infrastructure businesses, which ensure health and safety issues are, or can be, properly managed irrespective of whether access is available for third parties. In effect the existence of such regulation makes it highly unlikely that this criterion will not be met when the Council is considering a declaration application.

3.12 In the Council's view any health and safety issues are usually specific to a particular access proposal and the Council considers such matters are more appropriately dealt with in relation to a specific access request rather than when considering the possibility of access at the more generic level associated with declaration decisions. Health and safety questions are therefore better dealt with as part of negotiating or arbitrating the specific terms and conditions of access. Thus the Council considers that criterion (d) should be removed as the proposed amendments provide.

Amending criterion (e)

3.13 Criterion (e) is intended to ensure that where a state or territory access regime is in place, and meets the guiding principles for effectiveness set out in the Competition Principles Agreement, that regime has precedence over declaration under the National Access Regime. Where a state or territory access regime is certified as being effective a service that is subject to the regime is immune from declaration unless, since certification, the regime has been substantially modified and/or the effectiveness principles changed such that the regime would no longer be considered effective.

3.14 Where a service for which declaration is sought is subject to a state or territory regime, but that regime is not certified, the Council is obliged to consider whether the regime might be effective. In effect, the Council must consider whether the regime might have been certified if an application had been made. Further it has

been argued that even state or territory regimes that have only a tangential connection may give rise to issues that should be considered under this criterion.

3.15 In the Council's view criterion (e) should be confined to the consideration of state or territory access regimes that have been certified. Where a service is subject to an uncertified state or territory access regime it is available to the Council to consider the effect of the uncertified regime under declaration criterion (a) (in relation to the promotion of a material increase in competition) or under declaration criterion (f) (in relation to the public interest). The Council anticipates that the need to consider the effect of uncertified regimes will diminish over time given that governments have agreed under the Competition and Infrastructure Reform Agreement[11] to submit existing uncertified access regimes for certification by the end of 2010.

Deemed decisions (Refer the Bill at Schedule 1, Part 1, Items 9 & 22)

3.16 The Council strongly supports the amendment of the current provisions concerning deemed decisions. The proposed changes mean that in the event the designated Minister fails to make a decision within the required 60-day period, the deemed decision will follow the Council's recommendation to the Minister. This is preferable to the deemed decision being an automatic refusal in all cases as is the current situation. Where there is a deemed decision, there is no statement of reasons by the decision maker. If the Council's recommendation was for declaration the decision which may be appealed to the Tribunal is a decision without any reasons because the Council's recommendation has not been followed and the Minister has failed to make a decision and publish a statement of reasons. Such a situation occurred with Fortescue Metals Group Limited's application for the declaration of a service provided by the Mt Newman railway line and Services Sydney Pty Ltd's application for the declaration of sewage transportation services provided by the Sydney Water Corporation. Both deemed decisions were subsequently appealed to the Tribunal.

Review of decisions

Review on the evidence before the original decision maker (Refer the Bill at Schedule 5, Part 1, Item 70)

3.17 In the Council's experience the most significant delays in the declaration process are associated with reviews by the Tribunal. In the Council's view these delays mainly arise from the underlying provisions that limit the scope for the Tribunal to progress matters when one or more party to a review has an incentive to delay. Moves to limit the Tribunal's merit review process to material before the decision maker (and the Council) will assist in this regard and should avoid the delay occasioned by fresh evidence gathering and discovery processes before a Tribunal hearing can commence. The Council expects that this will assist the efficiency of Part IIIA processes overall as

[11] 10 February 2006

it should discourage any party from withholding or delaying the provision of information until the matter is reviewed by the Tribunal or for the purpose of gaining some other advantage. Furthermore, there is greater prospect that a review on this basis can be undertaken within the prescribed new time limit (see below).

3.18 These reforms will also bring consistency between the review provisions in Part IIIA and the Competition Principles Agreement. Following commitments made by all governments in the Competition and Infrastructure Reform Agreement of 10 February 2006, the Council of Australian Governments amended the Competition Principles Agreement on 13 April 2007 to provide that where merits review of regulatory decisions is available the review is to be limited to the information submitted to the original decision maker except that the review body may request new information where it considers this would assist it, and may allow new information where it considers that the information could not have reasonably been made available to the original decision maker.

Time limit (Refer the Bill at Schedule 5, Part 1, Item 71)

3.19 As noted above, the 2006 amendments to the TPA[12] introduced a target time limit for the Tribunal to use its best endeavours to make a decision on a review under Part IIIA within 4 months. The Council welcomes the further consideration of the timing of review processes and the proposed introduction of binding time limits. It considers that the amendments requiring the Tribunal to make a decision on a review under Part IIIA within an expected period of 180 days, along with the other proposed reforms to the Tribunal's processes, will address recurrent difficulties with protracted review processes.

3.20 As with the time limits on the Council, the opportunity for the Tribunal to "stop the clock" will assist the Tribunal in performing its functions as it provides a means to address unforeseen events that may otherwise have an adverse impact on the time limit. Further, the ability for the Tribunal to disregard information received after a date specified by the Tribunal is expected to limit the moves by parties to delay the provision of information and the conduct of the review proceedings and will assist the Tribunal in making a timely decision on review.

Costs (Refer the Bill at Schedule 5, Part 1, Item 13)

3.21 Unlike most court proceedings and some other matters arising in the Tribunal,[13] there are at present no provisions for costs to be paid or awarded in relation to a review of declaration, certification or ineligibility decisions by the Tribunal. The proposed new costs provisions, which will apply at the Tribunal's discretion, could usefully be

12 *Trade Practices Amendment (National Access Regime) Act 2006* (Cth), No. 92, 2006

13 For example, the National Gas Law contains provisions for the Tribunal to award costs in a review

applied for reviews of such decisions. The Council anticipates that they will discourage conduct designed to waste time or prolong proceedings and provide an additional incentive to ensure parties comply with Tribunal directions and meet specified timeframes and deadlines. The ability to award costs will also provide the Tribunal with an ability to impose a sanction on parties that fail to comply with its orders.

No automatic stay of declaration decisions (Refer the Bill at Schedule 5, Part 1, Items 11 & 13)

3.22 The Council believes that service providers will have less incentive to commence a review as a means of delaying the negotiate/arbitrate process if declaration decisions are not automatically stayed by the commencement of a review and the Tribunal has the power to determine whether or not to stay a decision to declare when applications for review are lodged. Under such an approach the Tribunal could continue to impose a stay where it considers that it would expose a service provider to undue cost or other prejudice, but in other cases access seekers could seek to negotiate with the service provider and it would be open to either party to notify an access dispute to the ACCC. The proposed amendments also include provision for the ACCC not to make an arbitration determination until the Tribunal has made its decision on the review and to terminate an arbitration in the situation where the Tribunal sets aside or varies the declaration. These proposed amendments remove the risk of an access dispute being determined by the ACCC in advance of a Tribunal decision or upon a declaration which is subsequently varied.

Services that are ineligible to be declared services (Refer the Bill at Schedule 2)

3.23 The new provisions enabling a person with a material interest in a proposed infrastructure facility to apply for a decision that a service to be provided by that facility is ineligible to be a declared service will provide certainty to infrastructure investors that is not currently available. The amendments provide that an ineligibility decision will apply for 20 years and will exempt a service provided by the infrastructure—once constructed—from declaration under Part IIIA during that time.

3.24 The Council considers that the introduction of these new provisions may increase certainty for investors and/or providers.

3.25 These provisions respond to a recommendation of the Productivity Commission in its 2001 *Review of the National Access Regime*[14], which has already been incorporated into the National Gas Law in respect of greenfields projects. 'No coverage rulings' are available for greenfields pipeline projects for a period of 15 years under the National Gas Law.

[14] Productivity Commission 2001, *Review of the National Access Regime*, Report no. 17, AusInfo, Canberra.

3.26 The new provisions have been drafted to mirror the process of the declaration regime—requiring an application to the Council, followed by a recommendation from the Council to the designated Minister who is the decision maker. Appeals to the Tribunal are available and all of these processes are subject to the same binding time limits as will apply (pursuant to the Bill) in the case of an application for declaration. The consistency in the drafting further promotes regulatory certainty.

Other amendments (Refer the Bill at Schedule 5, Part 1, Item 1)

3.27 The proposed amendments also include provision to streamline the Council's administrative processes by permitting the Council to make decisions via circulation of papers. Where a resolution is conducted by this means it will require the unanimous approval of all the councillors (unless excluded for reasons of conflict). This will mean that the Council can make decisions without the need to call a meeting which it is expected will have both cost and time savings. It will assist the Council in undertaking its work which particularly, in respect of applications under the TPA and the National Gas Law, tends to be sporadic and unpredictable in nature. More complex matters will still be dealt with by meeting to enable the Council to consider in appropriate detail all of the issues.

3.28 These provisions will also bring the administrative capabilities of the Council in line with another TPA statutory agency, the Australian Energy Regulator.

Appendix A Summary of declaration applications

A.1 Since Part IIIA commenced in 1996 until 22 December 2009, applications for the declaration of 41 services have been received by the Council under the National Access Regime. Of these, eight applications were withdrawn, two applications could not be considered by the Council for lack of jurisdiction, 13 applications were unsuccessful, and 18 applications were successful resulting in the declaration of 14 services.

A.2 As at 22 December 2009, two services are presently declared and the four applications concerning access to services provided by railways in the Pilbara remain under review by the Tribunal.[15]

[15] The review proceedings are expected to conclude by the end of February 2010 with decisions to be delivered sometime in 2010.

Table A-1: Summary of applications for declaration of services, 1996-2009

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Australian Union of Students	April 1996	Austudy payroll deduction service	Not to declare (June 1996)	Not to declare (August 1996)	Not to declare. On review the Tribunal affirmed the Minister's decision not to declare the service (July 1997)	
Futuris Corporation	August 1996	Western Australian gas distribution service	n/a	n/a	The application was withdrawn.	
Australian Cargo Terminal Operators	November 1996	Qantas ramp and cargo terminal services at Melbourne and Sydney international airports (two services applied for)	n/a	n/a	The applications were withdrawn.	
Australian Cargo Terminal Operators	November 1996	Ansett ramp and cargo terminal services at Melbourne and Sydney international airports (two services applied for)	n/a	n/a	The applications were withdrawn.	

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Australian Cargo Terminal Operators	November 1996	Particular airport services at Sydney International Airport (three services applied for)	To declare (May 1997)	To declare (July 1997)	Declared. On review the Tribunal determined to declare the services for five years from 1 March 2000.	
Australian Cargo Terminal Operators	November 1996	Particular airport services at Melbourne International Airport (three applications)	To declare (May 1997)	To declare for 12 months (July 1997)	Declared (from August 1997 until 9 June 1998).	
Carpentaria Transport	December 1996	Queensland rail services, including above rail services	Not to declare (June 1997)	Not to declare (August 1997)	Not declared. Application to the Tribunal for review was withdrawn.	

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Specialized Container Transport	February 1997	New South Wales rail track services (Sydney to Broken Hill)	To declare (June 1997)	Not to declare (Deemed) (August 1997)	Not declared (Deemed). Access achieved via commercial negotiation and application for review by the Tribunal was subsequently withdrawn.	
New South Wales Minerals Council	April 1997	New South Wales rail track services in the Hunter Valley	To declare (September 1997)	Not to declare (Deemed) (November 1997)	Not declared (Deemed). Application to the Tribunal for review was withdrawn.	The New South Wales Minerals Council applied to the Tribunal for a review of the Minister's deemed decision. It then withdrew the application for review following the certification of the New South Wales Rail Access Regime.

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Specialized Container Transport	July 1997	Five different services provided by Western Australia's rail track services (Westrail) (five services applied for)	To declare (November 1997)	Not to declare (January 1998)	Not declared. Application to the Tribunal for review was withdrawn following successful commercial access negotiations.	
Robe River	August 1998	Hamersley rail track services	n/a	n/a	In June 1999 the Federal Court declared that the service was not within the jurisdiction of Part IIIA of the TPA (because it fell within the production process exemption).	The Federal Court decided that the service was not within Part IIIA of the TPA (June 1999). The Federal Court decision was appealed. Robe River withdrew the application for declaration before the Full Federal Court hearing. The appeal was stayed.

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Normandy Power Pty Ltd, NP Kalgoorlie Pty Ltd and Normandy Golden Grove Operations Pty Ltd (Normandy)	January 2001	Electricity services provided through Western Power's south west electricity networks	n/a	n/a	Application withdrawn. Access achieved via commercial negotiation.	Western Power and Normandy settled the broader commercial dispute between them and agreed to discontinue court proceedings seeking to prevent the Council from considering Normandy's application for declaration. Normandy withdrew its application for declaration.
Freight Australia	May 2001	Rail track services provided through Victoria's intrastate rail network	Not to declare (December 2001)	Not to declare (February 2002)	Not declared. Application to the Tribunal for review was withdrawn.	
Portman Iron Ore Limited	August 2001	Rail track services provided through the Koolyanobbing–Esperance rail track	n/a	n/a	The application was withdrawn.	

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
AuIron Energy Limited	November 2001	Rail track services provided through the Wirrida–Tarcoola rail track	To declare (July 2002)	To declare (September 2002)	Not declared. Minister's decision overturned on review by the Tribunal (March 2003).	In October 2002, APT (operator of the rail track) applied to the Tribunal for a review of the Minister's decision. In March 2003, the Tribunal set aside the Minister's decision on the procedural basis that there was no probative material before it that could affirmatively satisfy the matters in s 44H(4) of the TPA
Virgin Blue Airlines Pty Ltd	October 2002	The use of domestic passenger terminals and related facilities for the purposes of processing arriving and departing domestic airline passengers and their baggage at Sydney Airport			Application withdrawn (December 2002) after commercial settlement achieved.	

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Virgin Blue Airlines Pty Ltd	October 2002	The use of runways, taxiways, parking aprons and other associated facilities necessary to allow aircraft carrying domestic passengers to: (1) take off and land using the runways at Sydney Airport; and (2) move between the runways (airside service)	Not to declare (November 2003)	Not to declare (January 2004)	Declared. Minister's decision overturned on review by the Tribunal (12 December 2005).	On 18 January 2004 Virgin Blue applied to the Tribunal for a review of the Minister's decision. On 12 December 2005 the Tribunal determined that the airside service be declared for five years expiring on 8 December 2010. On The service provider (Sydney Airport Corporation Limited) subsequently filed proceedings in the Full Federal Court challenging the Tribunal's determination. The Full Federal Court rejected the appeal and a subsequent application for special leave to the High Court by Sydney Airport Corporation Limited was also denied.

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Services Sydney Pty Ltd	March 2004	Services for the transmission of sewage via Sydney Water's sewage reticulation network from the customer collection points to the interconnection points (transmission services). Services for the connection of new trunk main sewers owned and operated by Services Sydney to the existing Sydney sewage reticulation network at the interconnection points (interconnection services) (six services applied for)	To declare sewage transmission and sewer connection services (December 2004)	Not to declare (Deemed) (April 2005)	Declared. Minister's deemed decision overturned on review by the Tribunal (21 December 2005).	Declaration revoked following certification of the NSW Water Industry Access Regime (October 2009)

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Fortescue Metals Group Ltd	June 2004	The use of that part of the Goldsworthy railway line that runs from where it crosses the Mt Newman railway line to port facilities at Finucane Island in Port Hedland	n/a	n/a	In December 2004, the Council decided that the Goldsworthy service was not capable of being considered further for declaration because it is part of a production process. A service that constitutes the use of a production process is exempt from declaration under Part IIIA of the TPA (s44(2)).	On 15 December 2004, the Council released a decision that the Mt Newman railway service was capable of being considered further for declaration, while the Goldsworthy railway service was not because it is part of a production process. Appeals of these decisions to the Federal Court, Full Federal Court and High Court determined that the services concerned are not part of a production process and therefore may be the subject of an application for declaration under Part IIIA of the TPA.

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
Fortescue Metals Group Ltd	13 June 2004	The use of the facility, being that part of the Mt Newman railway line that runs from a rail siding to be constructed near Mindy Mindy in the Pilbara to port facilities at Port Hedland	To declare (March 2006)	Not to declare (Deemed) (May 2006)	Minister's deemed decision is currently before the Tribunal for review.	
Lakes R Us Pty Ltd	October 2004	A water storage and transport service provided by Snowy Hydro Limited and State Water Corporation	Not to declare (November 2005)	Not to declare (January 2006)	Not to declare. Application to the Tribunal for review was withdrawn.	
Department of Infrastructure, Energy and Resources (Tasmania)	May 2007	A rail track service using sections of the Tasmanian Rail Network Infrastructure	To declare (August 2007)	To declare (October 2007)	Declared	
The Pilbara Infrastructure Pty Ltd	16 Nov 2007	A rail track service using the Robe Railway	To declare (August 2008)	To declare (October 2008)	Declaration stayed. Currently before the Tribunal for review.	
The Pilbara Infrastructure Pty Ltd	16 Nov 2007	A rail track service using the Goldsworthy Railway	To declare (August 2008)	To declare (October 2008)	Declaration stayed. Currently before the Tribunal for review.	

Application/Applicant	Application date	Relevant service	Council recommendation & date	Minister's decision & date	Outcome	Current status / comments
The Pilbara Infrastructure Pty Ltd	16 Nov 2007	A rail track service using the Hamersley Railway network	To declare (August 2008)	To declare (October 2008)	Declaration stayed. Currently before the Tribunal for review.	