

Chapter 2

Expediting access:

Schedules 1 and 5 of the bill

Part IIIA of the *Trade Practices Act 1974*

2.1 Part IIIA of the TPA establishes the legislative framework for access to services, provides consistency for access regulation and encourages economic efficiency and promotes competition. The National Access Regime provides an avenue for access seekers when an attempt at a commercial negotiation has failed.¹ Section 44DA of Part IIIA 'requires decisions about access regimes to be consistent with the principles set out in the Competition Principles Agreement'.²

2.2 Access seekers currently have three means by which they can make their claim:

- (a) Application through the National Competition Council (NCC) to have the service provided by the infrastructure *declared* by the designated minister and then access *negotiated* on a commercial basis;
- (b) If agreement cannot be reached, the ACCC can make a legally binding *arbitration*.
- (c) A minister's declaration or ACCC arbitration can be *reviewed* by the Australian Competition Tribunal.

2.3 The role and powers of the three regulators, the NCC, ACCC and Tribunal, under the amendments, will be explored in Chapter 5.

2.4 Seeking third party access is acknowledged to be a time-consuming process, and delays to the decision-making process are recognised as being a 'significant concern to infrastructure owners, access seekers and regulators alike'.³ In the interest of fostering competition in the Australian infrastructure industry, the bill seeks to expedite decision making while maintaining the thoroughness of the process.

1 National Competition Council, *Submission 5*, p. 4.

2 Bills Digest, no. 66, 2009-10, 24 Nov 2009, p. 4.

3 Explanatory Memorandum, p. 5.

Declaration of services

2.5 Through the declaration of a service, access seekers are provided with the means by which they have a legal right to negotiate commercial terms and conditions of access with the provider of the service.

2.6 The NCC may only recommend, and the minister implement, declaration when the six criteria specified in the Act (Table 1) are all satisfied. In deciding whether to recommend a declaration to the minister, the NCC conducts a public consultation process, usually including a second round after release of a draft recommendation. In addition to the declaration criteria, the NCC considers the economic viability of development of a similar facility that could 'provide part of the service... and the duration of any declaration'.⁴

Table 1: The six declaration criteria

<p>(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)</p> <p>(b) that it would be uneconomical for anyone to develop another facility to provide the service)</p> <p>(c) that the facility is of national significance, having regard to:</p> <ul style="list-style-type: none">(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 <p>(d) that access to the service can be provided without undue risk to human health or safety</p> <p>(e) that access to the service is not already the subject of an effective access regime</p> <p>(f) that access (or increased access) to the service would not be contrary to the public interest</p> <p>Sections 44G(2) and 44H(4) of the TPA</p>

Source: National Competition Council, *Submission 5*, p. 7.

4 NCC, *Submission 5*, p. 7.

2.7 Section 2.2 of the Explanatory Memorandum emphasises the meaning of 'declaration':

A person may apply for a service to be declared. Declaration does not provide an automatic right for a third party to access that service. Rather, it provides access seekers with a right to binding arbitration if commercial negotiations cannot be successfully concluded.⁵

2.8 The NCC also makes clear in its submission to the inquiry that declaration does not directly mean that access will be granted, and that the function of Part IIIA is to consider the public interest in whether a service should be declared.⁶ Declaration is also subject to commercial negotiations over the terms of access. If the negotiations fail, the ACCC may provide arbitration.⁷

2.9 The decision by the NCC must be made within four months. The amendments to time limits are discussed below.

2.10 The ACCC's arbitration is characterised by the NCC as 'light-handed' and 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'.⁸ This is to aid in opportunities for commercial resolution of access disputes, although the ACCC can make orders to resolve a dispute under the terms set out in section 44X of the TPA.

2.11 As part of the arbitration process, s 44X1a states that the Commission must take into account 'the legitimate business interests of the provider, and the provider's investment in the facility.'⁹

2.12 Specific access regimes have been established for particular facilities such as airports and natural gas pipelines. There may be certification of an access regime established by a state or territory.

Binding Time Limits, Schedule 1

2.13 Schedule 1 of the bill seeks to increase efficiency through the streamlining of administrative processes, the delay of which could hinder potential infrastructure investment or deter potential access seekers from making their claim.

5 Explanatory Memorandum, p. 35.

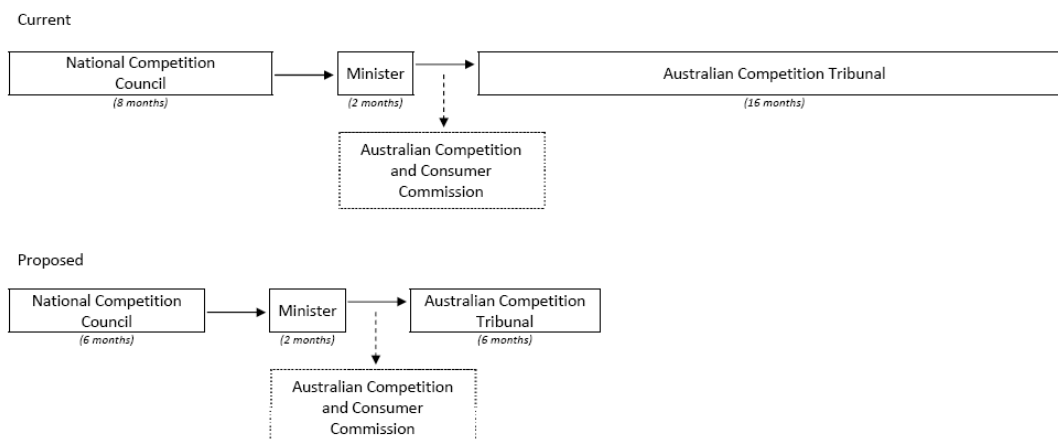
6 NCC, *Submission 5*, p. 8.

7 NCC, *Submission 5*, p. 8.

8 NCC, *Submission 5*, pp 9-10.

9 TPA s 44X1a.

2.14 As illustrated in the upper panel of the following chart, and detailed in Table 2, the experience with the processes has been that they can prove very time-consuming, particularly at the Tribunal stage. Even excluding the epic Fortescue case as an outlier, the NCC has taken between 2 and 13 months, the minister has taken two months and the Tribunal between 6 and 32 months to reach decisions. The average total period for completed applications is 26 months.



2.15 The bill will require the NCC, ACCC and Tribunal to take decisions within specified periods, generally 180 days. Under the amendments, the NCC and Tribunal may extend the period for making decisions, while the Minister can no longer extend the period.

2.16 The minister will have 60 days to make a decision after receiving a recommendation from the NCC, or will otherwise be deemed to have accepted the NCC's recommendation.

2.17 The specified periods may be extended by 'clock stoppers'. The main clock stoppers would occur when the regulator and the parties to the decision agree to stop the clock, or when the regulator requests information or invites public submissions.

2.18 Proposed section 44FA allows the NCC to request information within a specified time period. Information received in that specified period must be taken into account during the decision-making process.

Table 2: Time taken for decisions on declaration applications under Part IIIA

Application	NCC Recommendation			Ministerial decision		Tribunal Decision	
	Date	Date	months taken	Date	months taken	Date	months taken
Australian Union of Students	April 1996	June 1996	2	August 1996	2	July 1997	11
Australian Cargo Terminal Operators (Sydney)	Nov. 1996	May 1997	6	July 1997	2	Mar. 2000	32
Australian Cargo Terminal Operators (Melbourne)	Nov. 1996	May 1997	6	July 1997	2	not appealed	n.a.
Carpentaria Transport	Dec. 1996	June 1997	6	Aug. 1997	2	appeal withdrawn	n.a.
Specialized Container Transport	Feb. 1997	June 1997	4	Aug. 1997	deemed decision	appeal withdrawn	n.a.
NSW Minerals Council	April 1997	Sept. 1997	5	Nov. 1997	deemed decision	appeal withdrawn	n.a.
Specialized Container Transport	July 1997	Nov. 1997	4	Jan. 1998	2	appeal withdrawn	n.a.
Freight Australia	May 2001	Dec. 2001	7	Feb. 2002	2	appeal withdrawn	n.a.
Aulron Energy	Nov. 2001	July 2002	8	Sept. 2002	2	March 2003	6
Virgin Blue Airlines Pty Ltd	Oct. 2002	Nov. 2003	13	Jan. 2004	2	Dec. 2005	23
Services Sydney Pty Ltd	Mar. 2004	Dec. 2004	9	Feb. 2005	deemed decision	Dec. 2005	10
Fortescue Metals Group	June 2004	March 2006	21	May 2006	deemed decision	pending	44* [#]
Lakes R Us Pty Ltd	Oct. 2004	Nov. 2005	13	Jan. 2005	2	appeal withdrawn	n.a.
Tasmanian Department of Infrastructure, Energy and Resources Rail Unit	May 2007	Aug. 2007	3	Oct. 2007	7	not appealed	n.a.
Pilbara Infrastructure Pty Ltd	Nov. 2007	Aug. 2008	9	Oct. 2008	2	pending	15*
Pilbara Infrastructure Pty Ltd	Nov. 2007	Aug. 2008	9	Oct. 2008	2	pending	15*
Pilbara Infrastructure Pty Ltd	Jan. 2008	Aug. 2008	7	Oct. 2008	2	pending	15*
Average			8		2		16*

*Where a Tribunal decision remains pending, the figure indicates the time taken as at February 2010. These figures are not included in the average. [#]The time taken for the Tribunal review of the decision relating to the FMG application also includes time taken for the Federal Court to consider an appeal on the NCC jurisdictional decision. Source: Treasury, Answer to Questions on Notice, 5 February 2010.

Binding time limits for the NCC

2.19 The expected period for the decision to be delivered is 180 days of consideration. As stated above in paragraph 2.17, clock stoppers generally occur when an agreement between the regulators and parties is reached on it. A full list of clock stoppers can be found at Appendix 3. The NCC clock stoppers apply to agreement between the regulator and parties, and requests for information.

2.20 Additionally, the NCC may apply for an extension for their decision, in which case it must, by notice in writing to the Minister, apply for the extension and justify its application.

Binding time limits for the ACCC and deemed decisions

2.21 The ACCC's expected period for access undertakings, industry codes and arbitrations of access disputes is 180 days. Competitive tender processes are subject to a 90 day binding time limit.

2.22 Clock stoppers apply in the following cases:

- An agreement is made between the ACCC and the relevant parties to the application or dispute;
- The ACCC requests information from a person via a written notice or direction under section 44ZG;
- The ACCC invites public submissions on an application;
- The ACCC defers an arbitration or an access dispute under subsection 44ZZCB(4); or
- The ACCC defers arbitrating a dispute while a declaration is under review by the Tribunal.¹⁰

2.23 If the ACCC does not make a decision on a competitive tender process within the expected period it is deemed to have approved it for a period of 20 years after a 21 day lapse. The lapse allows for an application for review to be made to the Tribunal.

2.24 In the instance of failure to make an arbitration determination, the decision is deemed to be in favour of maintaining the status quo.¹¹

2.25 With regard to decisions on access undertaking, if the ACCC does not reach a decision it will be deemed not to have accepted the access undertaking.

10 Explanatory Memorandum, p. 18.

11 Explanatory Memorandum, p. 20.

Binding time limits for the Tribunal

2.26 The expected period for the Tribunal to make a decision is 180 days. Clock stoppers apply in the case of an agreement between regulators and parties, requests for information from a person or from a regulator.

2.27 To obtain an extension the Tribunal must write to the designated Minister and publish a notice in a national newspaper. It should be noted that under proposed section 44ZZOA(11) failure on the part of the Tribunal to reach a decision within the time limit or extend the consideration period 'does not affect the validity of a decision made by the Tribunal...'¹²

Attitudes towards Schedule 1

Views of larger miners

2.28 The Minerals Council of Australia (MCA) is opposed to the whole idea of an access regime, which they argue is a 'chill' or deterrent to firms investing in infrastructure.¹³ They characterise the bill as 'tinkering' which will make matters worse.¹⁴ In particular they oppose restricting the scope of the merit reviews.

2.29 At the 5 February hearing the Minerals Council expressed the view that the entirety of Part IIIA be reviewed, and in particular pointed to the 'uncertainty and confusion'¹⁵ around it, which could be made worse by the reforms proposed in the bill.

The climate of uncertainty and confusion around this section of the act will not be remedied by the administrative reforms proposed in the bill. Indeed, they stand to exacerbate the situation in proposing to expedite the access regime by imposing mandatory and arbitrary time limits on the Competition Council...¹⁶

2.30 One of the MCA's largest members, Rio Tinto, also strongly opposes Schedule 1 of the bill and shares the concern that time limits will have a negative effect on the decision.

Speeding up decision making is not the answer if doing so increases the risk of a wrong decision and further investment in vital infrastructure is thereby discouraged.¹⁷

12 TP Act, 44ZZOA(11), p33, and Explanatory Memorandum p. 26.

13 Minerals Council of Australia, *Submission 8*, p. 3.

14 Minerals Council of Australia, *Submission 8*, pp 3-4.

15 Mr Mitchell Hooke, *Proof Committee Hansard*, 5 February 2010, p. 4.

16 Mr Mitchell Hooke, *Proof Committee Hansard*, 5 February 2010, p. 4.

17 Mr Mark O'Neill, *Proof Committee Hansard*, 5 February 2010, p. 64.

2.31 In regards to the efficacy of streamlining the administrative system, Rio Tinto expressed the view that:

... it must hurt if you are worried that it is going to increase the chances of a bad decision. That is the thrust of the submission, and that is we do not like part IIIA.¹⁸

2.32 Rio Tinto's submission to the inquiry summarised their opinion on Schedule 1, stating that they are opposed to it and believe:

that it will further dampen enthusiasm to invest in facilities, beyond the disincentives provided by the current provisions of Part IIIA.¹⁹

2.33 At the hearing, Rio Tinto opined that the complexity of a case might be overlooked in order to make a quick decision.

I think we would always prefer a process that is efficient... but we would also always prefer a process where material was properly considered and tested. We would think that would be more important, in a sense, than a strict time limit. In general, we would also suggest that the total time that this has taken seems an inordinate amount of time, but a huge amount of that time has actually been taken up with definitional debates in courts, rather than in the set processes that are set down.²⁰

2.34 Fortescue Metals Group (FMG) applied for a declaration in June 2004 of services by BHP-Billiton's Mount Newman and Goldsworthy railway lines. The NCC decided that the Goldsworthy line was part of a production process and therefore could not be declared but that the Mount Newman line could be declared. BHP appealed to the Federal Court against the latter decision.

2.35 In December 2009 the case was reported as being with the Tribunal with a decision not expected until mid-2010, and then possibly appealed to the Federal Court and even the High Court, taking the case into 2011.²¹

2.36 Fortescue Metals highlighted a number of concerns with the existing access regime and the timescales in which it operates. At the hearing Mr. Tapp acknowledged that the Fortescue and BHP Billiton case was an exceptional case having taken six years to reach its final stages. Mr. Tapp referred to their Robe application which will have taken approximately two and a half years to complete which Fortescue felt better reflected an average case. However he noted that 'that is still too long' and that Fortescue 'welcomes anything that compresses the timescales'.²²

18 Mr Philip Ward, Special Projects Adviser, *Proof Committee Hansard*, 5 February 2010, p. 67.

19 Rio Tinto, *Submission 6*, p. 5.

20 Mr Mark O'Neill, Chief Adviser on Government Relations, Rio Tinto, *Proof Committee Hansard*, 5 February 2010, p. 69.

21 'Miner may escalate access case', *Australian Financial Review*, 18 December 2009, p. 39.

22 Mr Julian Tapp, FMG, *Proof Committee Hansard*, 5 February 2010, p. 89.

2.37 Fortescue also raised the difficulties for an applicant in what they deemed to be 'double jeopardy'. This refers to the fact that under the current arrangements an applicant can proceed through the National Competition Council, receive a declaration by the Minister and then still have to re-argue the case in its entirety before the Tribunal. Mr Tapp explained:

I just think it is wrong that you go through the entire National Competition Council process to arrive at a declaration and then the whole lot is just thrown away and you start again with the Tribunal. By the way, the Tribunal is a much more expensive process. In terms of going to the National Competition Council, the cost to Fortescue would be measured in tens or potentially hundreds of thousands of dollars. Most of the work was done in house. As soon as we go to the tribunal it starts being measured in millions of dollars, with massive expensive legal fees, which is simply not necessary. Keep as much in the National Competition Council as you can so that small access seekers who do not have the sort of bankroll that Fortescue was able to put to this have a chance of getting access to infrastructure. Otherwise you are just switching it off for any small applicant who simply cannot afford the legal costs involved in trying to get access to infrastructure.²³

Schedule 5 – Administrative Amendments

2.38 Schedule 5 of the bill proposes minor administrative amendments which seek to streamline the process from the point of the regulators, the NCC, ACCC and the Tribunal. Through these amendments the decision-making process will be accelerated through the improving of efficiency frameworks.

2.39 The NCC will be able to make decisions via the circulation of papers to the part-time councillors. The NCC will also be given the power to approve variations to an application for declaration rather than requiring the application be resubmitted. The repealing of criterion (d), seen in Table 1, and the need to consider non-certified state access regimes is also intended to aid in improving efficiency.²⁴

2.40 The Tribunal will be given discretionary power over the staying of the operation of a declaration decision during the review process, and ordering costs in the review of declaration decisions.²⁵

Committee view

2.41 In the consideration of access given to third parties, expediting decision-making would promote competition and encourage smaller industry groups to use the legislation as it was intended. The proposed amendments in Schedules 1

23 Mr Julian Tapp, FMG, *Proof Committee Hansard*, 5 February 2010, p. 89.

24 Explanatory Memorandum, p. 73.

25 Explanatory Memorandum, p. 71.

and 5 would aid in achieving this, although the complexity of the cases should continue to be acknowledged.