NATIONAL
COMPETITION
COUNCIL

Access to Monopoly Infrastructure in Australia

National Third Party Access Regime

(Competition and Consumer Act 2010, Part IIIA)

December 2017

1 The National Third Party Access Regime

Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) establishes the National Third Party Access Regime for services provided by significant monopoly infrastructure.

The Regime sets out several pathways by which third parties can gain a legally enforceable right to access services provided by publicly and privately owned facilities in order to enable them to compete (or compete more effectively) in markets where competition is dependent on such access, and access is not contrary to the public interest.

At different times various elements of the Regime has been applied to services provided by facilities such as: rail tracks, airports, grain handling facilities at ports, water and waste water reticulation pipes, port terminals and shipping lanes and natural gas pipelines.

This document provides a summary introduction to the National Third Party Access Regime and in particular the role and responsibilities of the National Competition Council (Council) in relation to declaration of services which may then become subject to regulated access terms.

2 Why does the National Third Party Access Regime exist?

Commercial negotiation is the preferred means to determine the prices and other terms and conditions of access to services provided by infrastructure or other facilities. Where services are available in a competitive market environment, access to those services can be expected to be provided efficiently and at an appropriate competitive price. In this situation, access regulation is generally unnecessary.

However, in some circumstances there may only be one facility that provides necessary infrastructure services and it may be uneconomical to duplicate such a facility. Where competition in related markets depends on access to such services, competition in those markets is likely to be significantly constrained with consequential losses in efficiency and innovation.

The National Third Party Access Regime in Part IIIA of the CCA seeks to ensure that nationally significant natural monopoly facilities are shared on reasonable terms and conditions where this would materially promote competition and would promote the public interest. In so doing, this enables 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.

The National Third Party Access Regime provides for three approaches to facilitate third party access to nationally significant monopoly infrastructure.

3 Three Alternative Approaches to Access

Access Undertakings - Providers of infrastructure services may voluntarily submit access undertakings to the Australian Competition and Consumer Commission (ACCC).

An undertaking may concern existing or proposed infrastructure and it should set out the terms and conditions on which a provider will provide access to relevant services.

Where an access undertaking is accepted by the ACCC, that undertaking then provides for the terms and conditions of access and an application for declaration under s 44F(1) of the CCA cannot be made.

Section 44ZZA(3) of the CCA sets out the criteria that the ACCC applies in determining whether to accept an undertaking. Further information on what is required in an access undertaking and a register of access undertakings is available on the ACCC's website (www.accc.gov.au).

Effective Access Regimes – State and Territory governments may also create and implement access regimes for particular infrastructure services within their jurisdiction. A State or Territory government can apply to the Council to have such an access regime certified.

Applications for certification are assessed against clauses 6(2)-6(4) of the Competition Principles Agreement which set out the types of infrastructure services that may be subject to an access regime and also the broad requirements and framework for regulated access under the National Third Party Access Regime.

Once certified, a State or Territory access regime applies exclusively for access to the designated service(s) and both the declaration and access undertaking pathways are no longer available.

Declaration and Negotiation/Arbitration – A party may apply to the Council to have the service(s) provided by a facility regulated. This is the first step in a two stage process.

In stage 1, **declaration**, an application is made to the Council to consider and make a recommendation to the decision making Minister on whether the criteria for applying access regulation are met such that the service(s) should be declared.

In stage 2, **negotiation/arbitration**, a service provider and access seeker can negotiate terms and conditions of access to a declared service, and failing agreement the ACCC can be called upon to arbitrate and make an access determination.

4 Declaration and Access

The Council is responsible for considering applications for declaration and recommending to a designated Minister (see Box 1) whether a declaration should be made.

Box 1: Identifying the designated Minister

Applications for declaration / ineligibility decisions	
For services that are provided by a facility that is owned by a state or territory body	Premier or Chief Minister of the relevant state or territory
All other services / facilities	Commonwealth Treasurer (or his or her assistant Minister or Parliamentary Secretary within the Treasury portfolio)
Applications for certification	
Application for certification of a state or territory access regime	Commonwealth Treasurer (or his or her assistant Minister or Parliamentary Secretary within the Treasury portfolio)

The Council may only recommend to the designated Minister that a service be declared where all declaration criteria are satisfied (see Box 2).

Box 2: The declaration criteria – ss 44CA(1) and 44H(4) of the CCA

(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of 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 (

(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

  (i) over the period for which the service would be declared; and

  (ii) at the least cost compared to any 2 or more facilities (which could include the first‑mentioned facility

(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

(d) that access (or increased access) to the service , on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

Similarly in making a decision in respect of the Council's recommendation, the Minister can only declare a service if the declaration criteria are met.

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 access/use. It does however, provide third parties with an enforceable right requiring a service provider to enter into access negotiations. Should commercial negotiation fail, recourse may be had to the ACCC for arbitration of issues in dispute.

Council process and timing

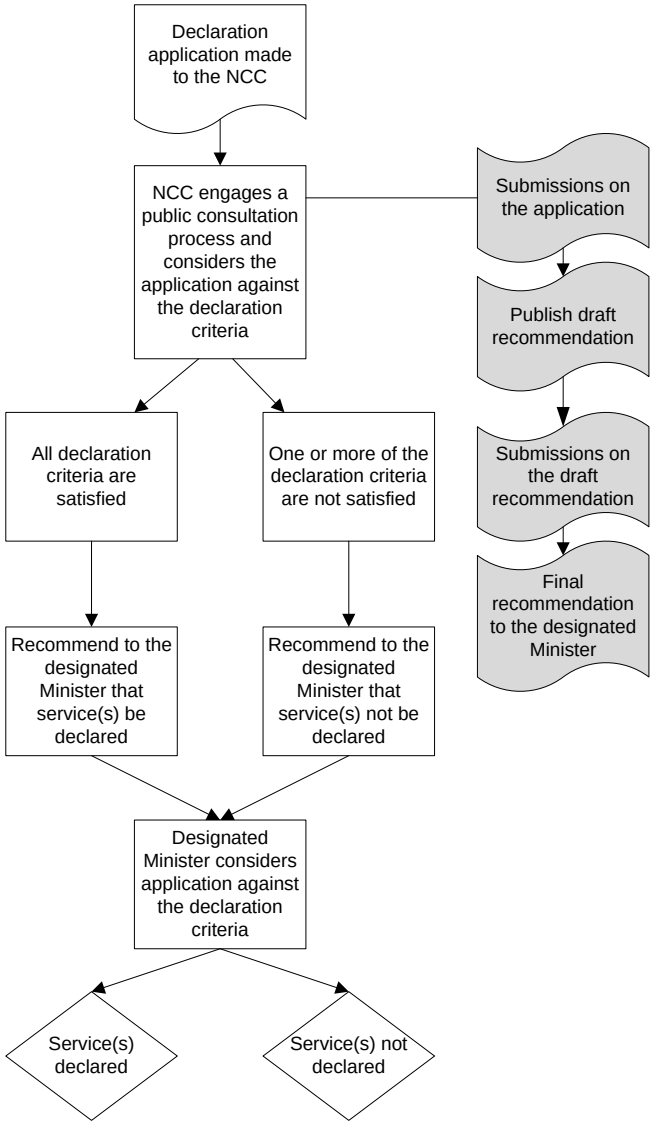
The Council considers declaration applications through a transparent public process. The Council usually has up to six months to make its recommendation.

On receiving an application the Council will advise the owner of the facility and other parties it considers may have an interest in the application. The Council will also publish a public notice of the application in *The Australian* newspaper and make the application (excluding any confidential material) available on the Council's website.

The Council will seek submissions on the application as well as undertaking its own inquiries and research. The Council will then publish a draft recommendation setting out its initial conclusions. A further opportunity will then be available for interested parties to provide submissions on the draft recommendation. After these have been considered the Council will provide its final recommendation to the designated Minister (the Minister has 60 days from receipt of the Council's recommendation to make his or her decision). The Council's recommendation will be published at the time a decision is made.

The process for considering an application for declaration is summarised in Box 3.

Box 3: Summary of the declaration process



5 Determining the terms and conditions of access

Stage 2 of the National Third Party Access Regime adopts a negotiate/arbitrate model. The commercial negotiation of the terms and conditions of access is encouraged. It is expected that an access seeker will seek to negotiate the terms and conditions of access directly with the service provider.

Declaration does not necessarily lead to regulated access through the application of an ACCC arbitration determination. Regulatory intervention only occurs in the event that an access seeker and service provider is unable to reach commercial agreement and an access dispute is notified (by either party) to the ACCC.

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 or safeguards set out in s 44X of the CCA in relation to the rights of service providers and existing users (see Box 4). Furthermore the ACCC is required to apply pricing principles (s 44ZZCA) which provide that access prices should:

- be set so as to generate expected revenue that is at least sufficient to meet the efficient costs of providing access
- include a return on investment commensurate with the regulatory and commercial risks involved
- 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
- provide incentives to reduce costs and improve productivity.

Box 4: Section 44X – Matters that the ACCC must take into account

(aa)	the objects of Part IIIA (which include the efficient use of and investment in infrastructure and promoting effective competition in dependent markets)
(a)	the legitimate business interests of the provider, and the provider's investment in the facility
(b)	the public interest, including the public interest in having competition in markets
(c)	the interest of all persons who have rights to use the service
(d)	the direct costs of providing access to the service
(e)	the value to the provider of extensions (including expansions of capacity and expansions of geographical reach) whose cost is borne by someone else
(ea)	the value to the provider of interconnections to the facility whose cost is borne by someone else
(f)	the operational and technical requirements necessary for the safe and reliable operation of the facility
(g)	the economically efficient operation of the facility
(h)	the pricing principles specified in s 44ZZCA.

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 extension or enhancement of a facility is needed to accommodate access seeker(s), a service provider can be required to undertake such expansion, but the costs of this are to be met by the access seeker(s) along with interconnection costs.

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.

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.

6 Other elements of the National Third Party Access Regime – ineligibility for services provided by greenfields infrastructure

Part IIIA also provides for exemptions for services to be provided by greenfields infrastructure. A person with a material interest in a proposed new infrastructure facility can apply to the Council for a service to be provided by that new facility to be ineligible for declaration. For the proposed service to be ineligible, and for the Council to recommend to the designated Minister that the service be found to be ineligible, one or more of the declaration criteria (see Box 2) must not be satisfied. An ineligibility decision will apply for a period of at least 20 years.

7 Further information

The Council has prepared a suite of guides to its roles under both the CCA and the National Gas Law. Also available are guidelines on various matters, including making a submission to the Council and templates to assist in making an application. Further information on these and other relevant information can be found on the Council's website – www.ncc.gov.au.

The ACCC has a guide to the arbitration of access disputes under Part IIIA which may be found at www.accc.gov.au.

8 Contact

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