



Welcome to *Accessible*

Welcome to the first issue of *Accessible* – the bi-monthly newsletter of the National Competition Council. *Accessible* will provide updates on happenings at the Council, including applications made to the Council under Part IIIA of the *Trade Practices Act 1974* (Cth) and the National Gas Law, case law and legislative developments. The

Council intends to publish *Accessible* around the first of February, April, June, August, October and December and it will be available for download from the Council's website (www.ncc.gov.au). You may also subscribe to receive *Accessible* directly into your inbox by providing your details via the Council's website.

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Certification of the NSW water industry access regime

On 19 December 2008 the New South Wales Government applied to the Council for a recommendation pursuant to s 44M(2) of the *Trade Practices Act 1974* (Cth) (TPA) that the state's access regime for water industry infrastructure services (**WICA Access Regime**) is an effective access regime.

The WICA Access Regime applies to the areas of operation of Sydney Water Corporation and Hunter Water Corporation. Certain services were deemed to be the subject of a coverage declaration upon the commencement of the legislation enacting the WICA Access Regime. These services are also the subject of a current declaration under Part IIIA of the TPA pursuant to the decision of the Australian Competition Tribunal in [Re Services Sydney Pty Limited](#).

The Council conducted a public consultation process as part of its assessment of whether the WICA Access Regime is an effective regime, and received five submissions on the application and three submissions on the Council's draft recommendation. In considering the application for certification, the Council was required to apply the principles in clauses 6(2) to 6(5) of the Competition Principles Agreement as guidelines and have regard to the objects of Part IIIA of the TPA. The Council provided its final

recommendation to the Assistant Treasurer, the Hon Chris Bowen MP, on 11 May 2009. The Assistant Treasurer has 60 days to make his decision after receiving the recommendation (this period may be extended). If the WICA Access Regime is certified as effective, then the services subject to the regime are exempt from declaration under Part IIIA of the TPA.

Whilst the Council is not permitted to publish its final recommendation until the Assistant Treasurer publishes his decision, the Council may refer to the content of its draft recommendation. The Council's preliminary view was that the WICA Access Regime meets the requirements for certification, and that it should be certified for a period of 10 years. However, the Council identified several aspects of the WICA Access Regime which it considered warrant further consideration by the NSW Government, and by other governments developing similar third party access arrangements. These aspects include the absence of a procedure for merits review of coverage decisions, the implications of the NSW Premier's ability to add to the areas of land that are subject to the WICA Access Regime, and the impact of the licensing requirements.

The next issue of *Accessible* will provide information about the Assistant Treasurer's decision.

Latest news

- New application from Jemena Gas Networks (NSW) Limited for reclassification of natural gas pipelines from transmission to distribution pipelines
- Mr David Crawford, Council President, presents to the Economic Society of Australia (Canberra branch) – *Recent Developments in Competition Policy*

For more information on these matters visit the Council's website at www.ncc.gov.au

Stop Press

On 1 June, the Council released its draft decision on the application for reclassification of gas pipelines made by Jemena Gas Networks (NSW) Limited

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Light regulation of gas pipelines

On Monday 8 September 2008, the Council received an application under s 112 of the National Gas Law (NGL) from East Australian Pipeline Pty Limited to apply light regulation to the services of the covered portion of its Moomba to Sydney pipeline (MSP).

In essence, the determination of whether or not to apply light regulation to a pipeline turns on a comparison of the effectiveness and costs of full (or access arrangement) regulation and light regulation.

As covered pipelines have a level of market power, both forms of regulation have provisions to protect users and other parties that are dependent on access to a covered pipeline. Many of the obligations on covered pipelines under the NGL apply to both full and light regulation pipelines. The key difference between the two forms relates to the

requirement to submit an access arrangement for approval by the Australian Energy Regulator (AER) under full regulation. An access arrangement provides for up-front price regulation in that it must specify a reference tariff which requires approval from the AER.

After evaluating the application and submissions, the Council considered that in relation to the MSP, the light regulation regime would be as effective as full regulation in protecting users and other parties that are dependent on access to the pipeline. This is due to the availability of relevant pipeline costs information, as well as the legislative protections contained within the light regulation regime.

On 19 November 2008, pursuant to s 114 of the NGL, and in accordance with the National Gas Rules, the Council made a determination in favour of the application.

Access to railways in the Pilbara

Railways are not a production process

In September 2008, the High Court delivered its [decision](#) on applications made by BHP Billiton Iron Ore Pty Ltd (BHP) seeking declarations that its Goldsworthy and Mt Newman railways in the Pilbara region of Western Australia were each a production process and therefore exempt from an application for declaration under Part IIIA of the TPA pursuant to the definition of *service* in s 44B of the *Trade Practices Act 1974* (Cth) (TPA).

By unanimous decision, the High Court dismissed BHP's applications, finding that neither the Goldsworthy nor the Mt Newman railways is a production process and therefore services provided by those railways are capable of being the subject of an application for declaration under s 44F of the TPA.

In reaching its decision, the High Court found that its construction of paragraph (f) in s 44B of the TPA was consistent with the "large national and economic objectives of Part IIIA".

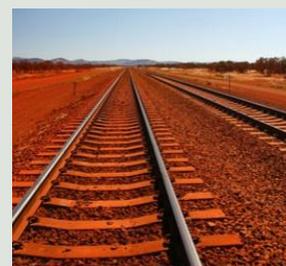
Declaration of railways in the Pilbara

Four decisions relating to applications for access to Pilbara iron ore railways by Fortescue Metals Group Limited (FMG) or its subsidiary, The Pilbara Infrastructure Pty Ltd (TPI), are currently subject to review by the Australian Competition

Tribunal (Tribunal). The decisions under review are:

- the 2006 deemed decision of the Treasurer to decline the application by FMG for access to the service provided by the Mt Newman railway (owned and operated by BHP and related parties)
- the 2008 decision of the Treasurer to declare the services provided by the Goldsworthy railway (owned and operated by BHP and related parties)
- the 2008 decision of the Treasurer to declare the services provided by the Hamersley railway network (owned and operated by Rio Tinto Limited and related parties), and
- the 2008 decision of the Treasurer to declare the services provided by the Robe River railway (owned and operated by Rio Tinto Limited and related parties).

The Tribunal has decided to hear and determine all four reviews together, with the hearing set to commence on 28 September 2009. The hearing is estimated to run for 10-13 weeks. Based on the hearing commencement date and duration, a decision on the four matters can reasonably be expected in 2010.



Proposed reform of Part IIIA

The Council is pleased to note that on 7 April 2009, the Assistant Treasurer and Minister for Competition Policy & Consumer Affairs, the Hon Chris Bowen MP, [announced](#) that he has commenced consultation with the states and territories on a package of reforms to Part IIIA of the *Trade Practices Act 1974* (Cth) to enhance the National Access Regime.

The Minister said while the National Access Regime appeared to be operating effectively, there are concerns about the length and cost of the process at present. "Currently, processes under the National Access Regime can go on for years. The National Access Regime needs to be improved to make decisions and arbitration faster" Mr Bowen said.

The Council agrees with the Minister that legislative reform is required to speed up processes under Part IIIA and provide all parties with greater certainty as to the timeframes involved in such matters. The overly lengthy times that have taken (and are taking) to resolve matters, particularly declaration applications, create uncertainty while preventing the benefits of the National Access Regime from being available within commercially relevant timeframes.

New websites and guides

National Competition Council,
www.ncc.gov.au

The Council has launched its redesigned website, www.ncc.gov.au. The website focuses on the Council's responsibilities and roles concerning third party access to infrastructure under both the *Trade Practices Act (1974)* (Cth) and the National Gas Law. The website aims to provide ready access to:

- information on current applications
- information on past applications
- Council guides, templates and other publications and resources, and
- details of the Council's operations.

National Competition Policy,
www.ncc.gov.au

The Council has also developed a new website incorporating materials from its previous role and work on the National Competition Policy reform program (www.ncc.gov.au). The Council trusts that this website will prove a

The Council also considers that some reform of the provisions that govern the Part IIIA decision-making criteria and related administrative procedures is necessary to streamline them, remove uncertainties and ensure that the National Access Regime works as intended and achieves its objectives efficiently.

The proposed reforms would:

- create binding time limits for decision-makers, and generally limit merits review to information submitted to the regulator
- provide scope for binding "no-coverage" rulings and fixed principles in access undertakings,
- concerning the criteria for declaration, remove the health and safety criterion and clarify that the criterion concerning effective access regimes relates to regimes certified as effective under Part IIIA, and
- reform Council and ACCC administrative processes, and Tribunal processes, to improve the timeliness of outcomes.

The Government anticipates that legislation implementing the reforms will be introduced into the Parliament in mid-2009, following the Minister's consultation.

useful resource for those interested in the NCP reform program.

Guides

New to the Council's website are the following updated guides to the Council's role and work under Part IIIA:

- Declaration Guide
- Certification Guide

Also in production is a new guide to the National Gas Law. The guide will be in four parts. The following parts are already available from the Council's website:

- Gas Guide – Part A, Overview
- Gas Guide – Part B, Coverage, revocation and reclassification
- Gas Guide – Part C, Light regulation

The fourth part of the Gas Guide (Part D – Greenfields pipeline incentives) is still in production.

**NATIONAL
COMPETITION
COUNCIL**



Level 9
128 Exhibition Street
Melbourne
Victoria 3000

GPO Box 250
Melbourne
Victoria 3001

Phone:
(03) 9285 7474
Fax:
(03) 9285 7477

Email:
info@ncc.gov.au

Website:
www.ncc.gov.au