Accessible

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National Competition Council
growth, innovation, productivity

Draft recommendation on 15 year no-coverage determination

As reported in the last issue of *Accessible*, the Council received its first application for a 15 year no-coverage determination under the National Gas Law (**NGL**) on 19 January 2010. The application, by QCLNG Pipeline Pty Ltd, relates to the proposed 'QCLNG Pipeline' which will transport coal seam gas from the Surat Basin to Curtis Island, near Gladstone in Queensland.

On 22 March the Council published its draft recommendation and pipeline classification decision. The Council's draft recommendation is that the pipeline meets the requirements for a no-coverage determination and therefore that the determination be granted. The Council's draft recommendation is available on its website at www.ncc.gov.au.

The Council classified the QCLNG Pipeline as a transmission pipeline. The relevant Minister (who will determine the application) is the Commonwealth Minister for Resources, Energy and Tourism, the Hon Martin Ferguson.

Unless the Council is satisfied that a pipeline meets each of the four coverage criteria (a) to (d) in section 15 of the NGL, it must recommend to the relevant Minister that a no-coverage determination be granted. The Council's preliminary finding is that coverage criterion (a) is not met and that, relatedly, coverage criterion (d) is not met.

Criterion (a) considers whether access to pipeline services would promote a material increase in competition in a dependent market. The Council identified three dependent markets in which it considered competition may be most likely to be promoted: a gas production market upstream of the pipeline; and two downstream markets, one an international market for LNG and the other a domestic gas sales market.

In relation to the downstream domestic gas sales market and the upstream gas production market, the Council found that the network of existing and proposed gas pipelines over the potential 15 year no-coverage period meant it is likely that potential users would have options to bypass the QCLNG Pipeline such that the pipeline operator is likely to have little ability and incentive to exercise market power. The Council found that the international LNG market is already competitive. The Council's preliminary view therefore was it is not satisfied that access would promote a material increase in competition in any likely dependent market.

Relatedly, the Council was not satisfied that access would not be contrary to the public interest (so coverage criterion (d) is not satisfied). Having found that access would not materially promote competition, the Council was unable to identify benefits from access that would outweigh the costs of regulation.

Criterion (b) involves a consideration of whether it would be uneconomic to develop another pipeline to provide the same services. Consistent with the national gas objective the Council gives the term 'uneconomic' a broad social (national interest) construction. In the case of a greenfields pipeline an issue is whether to take the specification of the pipeline as proposed as given. While companies are free to determine the pipeline specification that best meets their commercial requirements, the outcome of their consideration may not equate with what is best from a national interest perspective. The question is whether one (optimally configured) pipeline could meet all foreseeable demand at less cost than more than one pipeline (rather than confining this consideration to whether the pipeline as proposed could meet all foreseeable demand). If this is the case then criterion (b) would be met even if for commercial reasons more than one pipeline is likely to be constructed.

Application for declaration of services provided by Herbert River tram network

On 22 March 2010 the Council received an application from North Queensland Bio-Energy Corporation Ltd for declaration of the service provided by the tram network owned by CSR Sugar (Herbert) Pty Ltd in the Herbert River district, North Queensland.

The Council now invites written submissions from interested parties. Submissions close on **27 April 2010**.

Further information about the application is available on the Council's website at www.ncc.gov.au

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Recommending in favour of a no-coverage determination where a proposed pipeline has less capacity than a larger pipeline that might be constructed runs a risk that the proposed lower capacity pipeline might be economic to duplicate (so criterion (b) is not satisfied) whereas a larger pipeline that is preferable from a national interest perspective would be uneconomic to duplicate (so criterion (b) is satisfied).

The Council's preliminary view in relation to the QCLNG Pipeline, having regard to the national gas objective, is that criterion (b) is satisfied.

Criterion (c), which seeks to ensure that access can be provided without undue risk to addresses human health and safety, was not at issue in this application.

The Council is now conducting a public consultation on its draft recommendation. The closing date for written submissions on the draft recommendation is **15 April 2010**. The Council will then prepare a final recommendation for the relevant Minister.

Amendments to Part IIIA of the TPA

In the June 2009 issue of *Accessible* the Council reported on the proposed reforms to Part IIIA of the *Trade Practices Act 1974* (Cth). The reforms are designed to increase regulatory certainty and to streamline the administrative processes associated with the National Access Regime. To recap, the proposed reforms would:

- Impose binding time limits of generally 180 days for recommendations by the Council and for decisions by the ACCC and the Tribunal
- provide that if a designated Minister fails to make a decision within the required period of 60 days, the Minister will be deemed to have made a decision in accordance with the Council's recommendation
- limit merits review to the information submitted to the original decision-maker
- provide for binding 'no-coverage' rulings and fixed principles in access undertakings
- remove the 'health and safety' declaration criterion and clarify that the criterion regarding effective access regimes relates to regimes certified as effective under Part IIIA, and
- reform the processes of the Council, the ACCC and the Tribunal to improve the timeliness of outcomes.

To implement these reforms, the *Trade Practices Amendment (Infrastructure Access) Bill 2009* was introduced into Federal Parliament on 29 October 2009. The Bill was subsequently referred to the Senate Economics Committee (**Committee**) on 19 November 2009 for inquiry and report. The Committee called for and received 10 submissions on the Bill, which included a submission from the Council. The Committee also conducted a public hearing on 5 February 2010 before releasing its report on 9 March 2010 (**Report**).

In its Report the Committee was supportive of the Bill and recommended that it be passed.

However, additional comments (which are attached to the Report) were made by two Coalition Senators on perceived problems with the Bill in its current form. These comments concern the process for merits review and the ability of the Tribunal to seek and accept new material in addition to the material that was before the original decision maker.

A further area of concern for the Coalition Senators is the provisions in the Bill to amend the situation where the designated Minister fails to make a decision within the required time. In such a situation, the Coalition Senators favour the maintenance of the status quo – namely, that where a decision is not made by the Minister there will be no declaration of the service or services applied for.

The Shadow Minister for Competition Policy, the Hon Bruce Billson MP, has announced the Coalition's intention to work with the Government to seek to amend the Bill to address these concerns. He stated:

> *While not opposing the introduction of time limits on the access application and review process, the Coalition believes that the Tribunal should be in a position to examine any material its (sic) considers to be relevant. Parties to a merits review process should be free to advance the materials it feels best advances its case and to test evidence and arguments advanced by other parties...*
>
> *The Coalition is seeking to retain the current 'default' setting where a failure by the responsible Minister to make a decision on an access recommendation amounts to a non-acceptance of the recommendation.*
>
> (see http://www.liberal.org.au/Latest-News/2010/03/09/Coalition-to-seek-amendments-to-infrastructure-access-regime-changes.aspx)

A copy of the Senate Economics Committee report is available at http://www.aph.gov.au/Senate/committee/economics_ctte/infrastructure_access_09/report/

More information about the Bill and any amendments to it will be provided in future issues of *Accessible.*

National Significance Criterion

Section 44G(2)(c) of the *Trade Practices Act 1974* (Cth) provides that the Council cannot recommend that a service be declared unless it is satisfied that the facility 'is of national significance' having regard to the size of the facility, its importance to interstate or overseas trade or commerce, or its importance to the national economy.

The following presents a brief summary of some of the Council's more notable examinations of the meaning of 'national significance'.

Computers (June 1996*):* The Council concluded that the government computer system used to provide AUSTUDY to approximately 485,000 secondary and tertiary students was not of national significance having regard to its size, nil impact on constitutional trade and commerce, and limited importance to the national economy. The Council's reasoning was upheld by the Australian Competition Tribunal (**Tribunal**).

Airport Terminals (May 1997): After noting the significant value of imports and exports handled by the facilities, the Council concluded that the freight handling facilities at both Sydney and Melbourne international airports were of national significance. The Tribunal confirmed this view regarding Sydney International Airport.

Rail Track (June 1997)*:* The Council decided that the approximately 1,500 kilometre railway between Sydney and Broken Hill was nationally significant on the basis of its significant tonnage revenue and importance to commerce between the States.

Rail Track (November 1997): The Council decided that the 665 kilometre railway line between Kalgoorlie and Perth was of national significance because it is the only railway linking Western Australia and the eastern states and would cost between $1 million and $1.5 million per kilometre to duplicate. The Council also decided that the associated facilities were nationally significant due to their importance to the national economy.

Sydney Water sewage transmission and interconnection services (December 2004)*:* The Council was satisfied that on the basis of its size and importance to the national economy in particular, each of the North Head, Bondi and Malabar Reticulation Networks, which service upwards of 5 million people, were nationally significant. The Council's view was confirmed by the Tribunal..

Who's who in regulation – IPART

The Independent Pricing and Regulatory Tribunal (**IPART**) is the regulatory body in New South Wales for the state's water, gas, electricity and public transport industries.

IPART was established in 1992 with the primary function of regulating the maximum prices charged for monopoly services by government utilities and other monopoly businesses. Its purpose is to 'provide independent regulatory decisions and advice to enhance the economic, social and environmental well being of the people and state of NSW'.

In addition to price regulation, IPART is also responsible for administering the licensing and authorisation of water, electricity and gas businesses, monitoring compliance with licence obligations; maintaining the register of access undertakings and arbitrating access disputes; investigating complaints about competitive neutrality referred by to it by the NSW Government; and administering the Greenhouse Gas Reduction Scheme and Energy Savings Scheme.

Since its establishment, IPART's role has expanded to become a key economic think-tank and source of high-level advice to the NSW Government. For example, IPART may now be asked by the NSW Government to provide advice on matters such as pricing, efficiency, service provision, industry structure and competition, and to provide assistance to other Australian regulators.

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