

Making an application for certification

These Guidelines set out the information that should be included in an application to the National Competition Council (the Council) for a recommendation to the Commonwealth Minister that a state-based access regime be certified as effective under Part IIIA of the *Trade Practices Act 1974(Cth)* (TPA). A more detailed discussion of the Council's process and of the requirements for certification is available in the Council's *Guide to Certification of State and Territory Access Regimes* (Certification Guide) which is available on the Council's website (www.ncc.gov.au).

An application which follows these Guidelines and provides all of the relevant information needed by the Council to assess the application and undertake consultations with other interested parties will assist the Council in providing its final recommendation to the Commonwealth Minister within the statutory 'best endeavours' timeframe of six months.

Legislative requirements

- 1.1 The requirements for certification applications are prescribed in regulation 6B of the *Trade Practices Regulations 1974*. An application must set out the matters required by regulation 6B including the applicant's contact details, a description of the access regime (including a copy of the relevant legislation) and a description of the service(s) subject to the regime.

An application must also address each of the clause 6 principles of the Competition Principles Agreement (CPA)¹ and have regard to the objects of Part IIIA of the TPA in s44AA.

The Council's assessment of an application

While the Council does not prescribe the structure of an application, it notes that in assessing an application for certification, the Council's preferred approach is to use categories to organise its consideration of the access regime against the clause 6 principles and the objects of Part IIIA of the TPA. The Certification Guide explains in detail the categorisation and Council's approach. In brief, the five categories are as follows:

- the scope of the access regime – clauses 6(3)(a) and 6(4)(d)
- the treatment of interstate issues – clauses 6(2) and 6(4)(p)
- the negotiation framework – clauses 6(4)(a),(b),(c), (e), (f), (g),(h),(i), (m), (n), (o)
- dispute resolution – clauses 6(4)(a),(b),(c), (g), (h), (i), (j), (k), (l), (o) and 6(5)(c)
- efficiency promoting terms and conditions of access – clauses 6(4)(a),(b),(c), (e), (f), (i), (k), (n) and 6(5)(a) and (b)

¹ Sections 44M(4) and 44N(2) of the TPA.

The Council considers that these categories provide a logical framework for analysis, and help to clarify how a regime addresses the necessary elements for certification of an effective access regime. These categories do not replace the clause 6 principles as the basis for assessing a regime’s effectiveness and the Council reiterates that it must also have regard to the objects of Part IIIA of the TPA in its assessment.

Accordingly, the Council encourages certification applications to be structured in a way which addresses the above categories and has regard to the objects of Part IIIA of the TPA. In following this approach applicants must ensure that all of the relevant clause 6 principles are addressed, even where this may necessitate one or more of the principles being addressed under more than one category.

In setting out how the access regime addresses the various categories and the clause 6 principles, the Council encourages applicants to draw the relevant provisions out of the subject legislation and to provide supporting explanations, commentary and evidence. Such evidence may include explanatory memoranda or parliamentary speeches or papers that assist in interpreting the relevant legislation, and any guidelines or similar information that is provided to the public in relation to the regime.

Analysis

In addition to providing the above information, the Council encourages applicants to include with their application an analysis that references each of the clause 6 principles to the relevant section(s) of the legislation establishing the access regime. An example of such analysis might consist of a table as depicted (in relation to the first two categories) below:

Category	Clause 6 principles	Relevant sections of the access regime	Explanation and/or comments
Scope	6(3)(a)		
	6(4)(d)		
Interstate issues	6(2)		
	6(4)(p)		

As the purpose of this analysis is to draw the access regime out of its embodying legislation it is not necessary for it to also have regard to the objects of Part IIIA.

Duration of certification

Applications should also include the applicant's assessment (with supporting rationale) of the appropriate period of certification.

Structure

To assist in referencing the application in both submissions and the Council's recommendation, applications should feature numbered paragraphs and numbered pages.

Procedural notes

The Council commences its assessment of an application for certification once it receives a complete application. To be complete an application should address the legislative requirements of the TPA and its regulations, matters outlined in these Guidelines and have regard to the matters discussed in the Council's Certification Guide.

The Council strongly encourages applicants and their advisors to discuss their applications with the Council prior to lodgement to ensure that all relevant matters are addressed.

Applications should be provided to the Council in identical electronic and print form. Electronic form is required so that the application can be published on the Council's website. Electronic documents should be in pdf format, or another format that can be read by MS Word 2007 – where this poses particular difficulties, this should be discussed with Council staff prior to submitting the application.

Confidential information

The Council uses open public processes to consider applications. It treats applications that it accepts as complete as public documents, unless confidentiality is agreed. It publishes applications on its website and makes them available to interested parties.

Whilst the Council considers it unlikely that confidential material would be contained in an application for certification, if an applicant wants to submit confidential material this should be discussed with Council staff prior to submitting the application. If the Council agrees to accept confidential material, an applicant should provide separate copies of their application, one with the confidential material clearly marked as 'confidential' and the other copy without the confidential material so that it is suitable for public release.

Each of these versions should be provided in electronic and hard copy form.

The electronic copy of the application should be sent to:

info@ncc.gov.au

The hard copy should be sent by courier or delivered to:

Executive Director
National Competition Council
Level 9
128 Exhibition Street
Melbourne Vic 3000

or mailed to:

Executive Director
National Competition Council
GPO Box 250
Melbourne Vic 3001

Any queries can be directed to the Council Secretariat on (03) 9285 7474.

National Competition Council
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