

# National Competition Council

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**MEDIA RELEASE**

**20 June 2008**

## **National Competition Council Releases draft recommendations on declaration of Robe, Hamersley and Goldsworthy Railways**

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The National Competition Council (the Council) today released draft recommendations that the services provided by Rio Tinto's Hamersley and Robe railway lines, and BHP Billiton's Goldsworthy railway line, be declared under Part IIIA of the *Trade Practices Act 1974*.

Today's draft recommendations are in response to three separate applications received from The Pilbara Infrastructure Pty Ltd (TPI) (a wholly owned subsidiary of Fortescue Metals Group) for the declaration of the:

- Robe Service (application received 18 January 2008)
- Hamersley Service (application received 16 November 2007)
- Goldsworthy Service (application received 16 November 2007)

A summary of the Council's draft recommendations and the complete draft recommendations, and the applications and submissions from interested parties are available at [www.ncc.gov.au](http://www.ncc.gov.au)

Following the draft recommendations there will be a further public submissions period after which the Council will make its final recommendations to the designated Minister, the Hon. Wayne Swan, MP, Treasurer. The Minister will decide whether or not to declare the services and has 60 days in which to do so.

A final decision to declare the services would provide TPI, and other third parties with a legally enforceable right to negotiate access to the railway lines.

**A decision to declare the Robe, Hamersley and Goldsworthy services will not automatically result in TPI gaining access.**

A decision by the Minister to declare one or more of the services will entitle TPI to seek access either through an agreement negotiated with BHP Billiton and/or Rio Tinto or, in the absence of an agreement, through arbitration by the Australian Competition and Consumer Commission (ACCC). The ACCC has the power to impose access terms, or refuse access if it finds that BHP Billiton and/or Rio Tinto cannot be appropriately compensated for the costs associated with providing access to the facilities in a specific situation.

TPI has sought declaration of *all points* services, to offer a rail haulage service to mining companies seeking to move bulk materials between any two points on the railways, including interconnection points with other rail networks and railway lines.

The Council has reached a preliminary view that each of the services for which access is sought satisfies the declaration criteria set out in Part IIIA of the *Trade Practices Act 1974*.

BHP Billiton, as the provider of the Goldsworthy Service, and Rio Tinto, as provider of the Robe and Hamersley services, opposed TPI's applications.

Where access to essential infrastructure is necessary to compete in markets that depend on the infrastructure, and it is uneconomical to duplicate the infrastructure, an organisation may apply to the Council to declare the service under Part IIIA of the *Trade Practices Act 1974*.

Part IIIA of the *Trade Practices Act 1974* recognises that failure to enable a third party to access privately or government owned essential infrastructure can pose a bottleneck that impacts adversely on competition in other markets.

### **The Draft Recommendations**

In making draft recommendations to declare the railway lines, the Council must be satisfied that the services meet all of the following criteria outlined in the *Trade Practices Act 1974*:

- a) That access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service
- b) That it would be uneconomical for anyone to develop another facility to provide the service
- 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 to the service can be provided without undue risk to human health or safety
- e) That access to the service is not already the subject of an effective access regime
- f) That access (or increased access) to the service would not be contrary to the public interest

In formulating its draft recommendations that the Robe, Hamersley and Goldsworthy services be declared, the Council reached the following conclusions on each of the criteria.

- a) That access (or increased access) to the service would promote competition in at least one market (whether or not in Australia) other than the market for the service**

The Council is satisfied that access to each service for which declaration is sought would promote a material increase in competition in both the market for haulage services for iron ore on the particular railway and the market for iron ore tenements in the Pilbara.

- b) That it would be uneconomical for anyone to develop another facility to provide the service**

The Council is satisfied that this criterion is met, as the duplication of the facilities would increase costs, waste economic resources and generally be contrary to Australia's national interest.

**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

No parties argued that these railways are not of national significance. This, along with the railways' size and critical role in a major export industry, satisfies the Council that criterion (c) is met.

**d) That access to the service can be provided without undue risk to human health or safety**

The Council is unaware of any evidence to suggest that regulation of rail safety would be made less effective as a result of access.

**e) That access to the service is not already the subject of an effective access regime**

The Western Australian Rail Access Regime does not apply to any of the railways covered in these applications. The various State Agreement Acts have not been certified as effective access regimes under Part IIIA and in any event these Acts do not deal with access to rail track services.

The Council also considered the proposed Pilbara Rail Haulage Regime but again this relates to haulage, not rail track access, and the form and timing of any regime remains uncertain.

The Council therefore accepts that the services are not already the subject of an effective access regime.

**f) That access (or increased access) to the service would not be contrary to the public interest**

The Council considers the benefits of declaration include the promotion of competition in the Pilbara rail haulage and tenements markets and the economic and environmental benefits of avoiding unnecessary duplication of rail infrastructure.

The Council has considered the arguments put forward by BHP Billiton and Rio Tinto which suggest that declaration would be contrary to the public interest. The Council considers that these arguments are based on improbable scenarios and overly pessimistic assumptions. The Council also notes that the BHP Billiton and Rio Tinto submissions did not take into account the provisions within Part IIIA governing arbitration of access disputes and specific limitations on arbitration determinations by the ACCC. The Council believes these provisions, and the powers of the ACCC, are directly aimed at avoiding the outcomes that Rio Tinto and BHP Billiton claim will result from the declaration of their Pilbara railways.

The Council is therefore satisfied that declaration would not be contrary to the public interest.

All interested parties are invited to make submissions pertaining to the Council's draft recommendations to declare the Robe, Hamersley and Goldsworthy services. Submissions close on Monday 21 July 2008, and should be directed to: The Executive Director, National Competition Council, GPO Box 250 Melbourne 3001.

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**See also:**

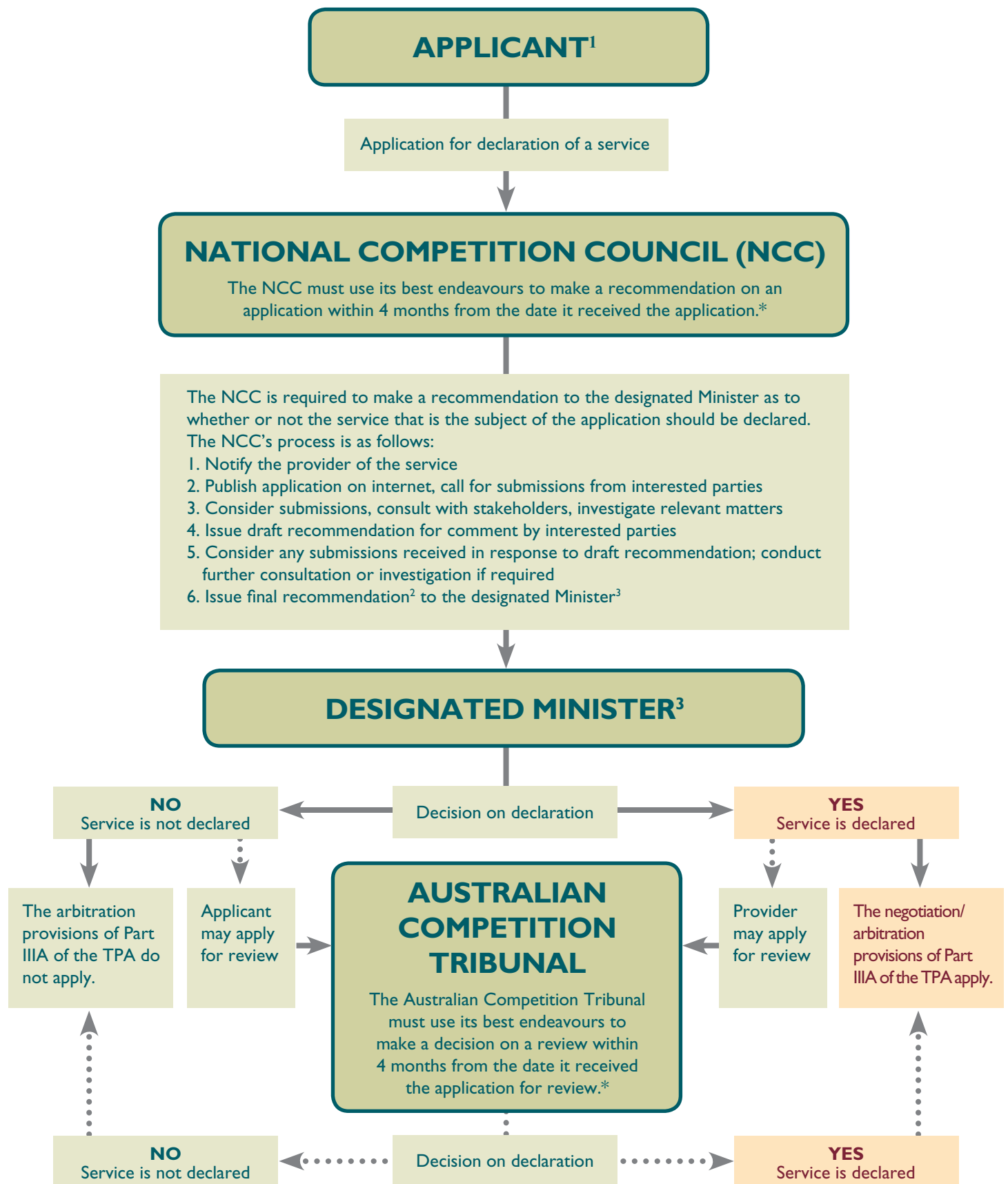
- Attached diagram: Process for declaration of a service.
- Attached diagram: Process for arbitration of an access dispute in relation to a declared service.
- A summary of the Council's draft recommendations and the complete draft recommendations, and the applications and submissions from interested parties are available at [www.ncc.gov.au](http://www.ncc.gov.au)

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# Process for Declaration of a Service



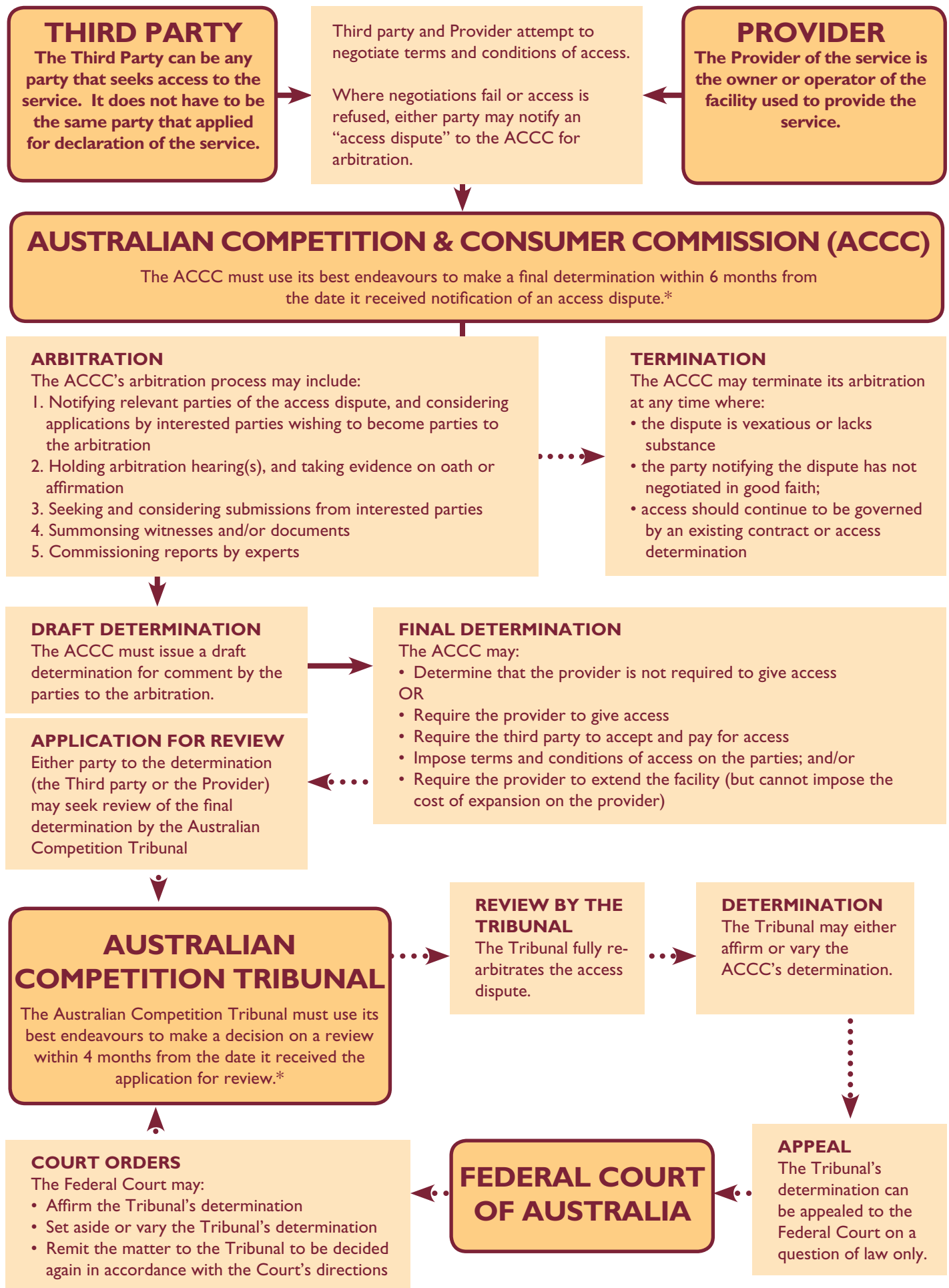
1. The applicant may be the designated Minister or any other person.

2. The final recommendation is made public when the designated Minister issues the decision on declaration

3. Where the provider of the service is a State or Territory government body, the "designated Minister" will be the responsible State or Territory minister. In all other cases, the "designated Minister" will be the Federal Treasurer (or a delegate).

\* In each case the standard time periods may be extended.

# Process for arbitration of an access dispute in relation to a declared service



\* In each case the standard time periods may be extended.