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Gas and Governance Branch
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Via email - gas@environment.gov.au

Consultation RIS – Gas Pipeline Regulation Reform

The NCC welcomes the opportunity to make a submission to the COAG Consultation RIS.

The submission will cover some of the questions found in chapter 7 of your submission template. Where appropriate, we will cross-reference some of the points in this letter to the questions in chapter 7 of your submission template.

Given time constraints, the NCC intends to provide to CAOG Energy Council a more substantive submission covering the broader design of the gas regulation regime in mid to late January 2020.

If you would like to discuss this submission, please contact me on 03 9290 1993 or Richard.york@accc.gov.au

Yours sincerely,

Richard York
NCC Executive Director

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NCC submission to COAG Consultation RIS – Gas Pipeline Regulation Reform

December 2019

Introduction

1. The National Competition Council (NCC) appreciates the opportunity to respond to the Council of Australian Governments (COAG) Consultation Regulatory Impact Statement (Consultation RIS) on options to improve gas pipeline regulation.

2. The Consultation RIS considers important issues relating to the design of the National Gas Law (NGL) and provides a comprehensive analysis of many significant matters – including how Australia's gas pipeline regulatory regime differs to those in other overseas jurisdictions. Retail gas represents an essential service for many households and businesses; and appropriate access to gas pipeline services has the potential to unlock a number of competition and economic efficiency benefits. At the same time, ensuring regulation does not adversely affect efficient investment incentives is also crucial to the long-term interests of end-users of gas services. The design of an appropriate access regime (including the set of governance arrangements associated with it) that balances all of these considerations is a difficult task, and warrants the careful consideration being shown in the Consultation RIS.

3. In the time available to it, the Council has focused its consideration in this submission to matters relating to governance arrangements under the NGL. This corresponds to the questions set out in Chapter 7 of the stakeholder feedback template.

4. The Council notes, however, that it has a number of substantial points it would like to raise in relation to the broader design of the gas regulatory regime, and it intends to provide a further submission in mid-to-late January that relates to issues raised in other sections of the Consultation RIS.

5. This submission cuts across a number of questions contained in Chapter 7 of the stakeholder feedback template. It is structured so that it:

    - provides a detailed response (immediately below) on five key issues relevant to the questions raised in Chapter 7 of the stakeholder feedback template
    - reproduces, at Attachment A, the Chapter 7 stakeholder feedback template, with cross-references to the paragraphs immediately below that address specific questions raised in the template.

The Minister's role in deciding what services should be regulated

6. The Consultation RIS states:

> … the involvement of both the NCC and the relevant Minister in this decision making process has, in effect, meant that two separate assessments are conducted using the same criteria when an application is made for the coverage status of a pipeline to change, or for a greenfield exemption to be granted. The duplication of effort involved in

> this process can give rise to unnecessary costs and delays in decision making'[1]

7. The Council believes this statement mischaracterises the nature of the existing governance arrangements. This is because the current two-step process:
    - does not involve duplication of effort – the NCC and the relevant Minister serve different functions under existing governance arrangements
    - provides an important safeguard against pressures from private interest groups seeking to use regulation of gas pipelines to advance private interests.

8. Further, and as discussed in paragraphs 27 to 42 below, the Council does not believe the existing two-step process involves excessive costs and delays.

9. As context, the Council notes that the current two-step NCC recommendation/Ministerial decision-making arrangements contained in the NGL mirror those set out in Part IIIA of the Competition and Consumer Act (CCA). The genesis for these arrangements can be found in the report of the National Competition Policy Review, which is often referred to as the "Hilmer Report".[2]

10. When considering when a legislated right of access should be created, the Hilmer Report raised two issues that led to the governance structure ultimately adopted for Part IIIA of the CCA and, subsequently (in 2008), the NGL.

11. First, the Hilmer Report justified the involvement of the Minister as the ultimate decision maker of what services should be the subject of access regulation due to the broad public interest considerations that attach to a decision as to whether services should be regulated. In this respect, the Hilmer Report states:

> As the decision to provide a right of access rests on an evaluation of important public interest considerations, the ultimate decision on this issue should be one for Government, rather than a court, tribunal or other unelected body. A legislated right of access should be created by Ministerial declaration under legislation.[3]

12. Where public interest considerations remain relevant to the question of whether services should be regulated (as they continue to be under the coverage test set out in the NGL), the rationale for the Minister's role remains strong. This view is reinforced by the comments of the High Court in the Pilbara case under Part IIIA of the CCA:

> It is well established that, when used in a statute, the expression 'public interest' imports a discretionary value judgment to be made by reference to undefined factual matters. It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access)

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1 COAG Energy Council, *Options to improve gas pipeline regulation*, October 2019 at p. 57.

2 *National Competition Policy Review*, 25 August 1993.

3 *Ibid.,* p. 250

> would not be contrary to the public interest is very wide indeed. And conferring the power to decide on the Minister (as distinct from giving to the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office. [4]

13. Second, in circumstances where the Minister is the decision-maker, the involvement of an independent expert body to advise the Minister is designed to address concerns that Ministers might be subject to pressure/influence from stakeholders seeking to advance their own private interests. As the Hilmer Report states:

> At the same time, the existence of a broad discretionary regime may create pressures on the Minister to declare an essential facility to advance private interests. Accordingly, the Committee proposes that the Minister's discretion be limited by three explicit legislative criteria, and by a requirement that the creation of such a right has been recommended by an independent and expert body – the proposed National Competition Council (NCC).[5]

14. The Council believes these concerns are equally valid under the NGL as they are under Part IIIA of the CCA.

15. Overall, the Council believes a Minister should make decisions regarding what gas pipeline services should be regulated where decision-making criteria involve considerations of regulation on the public interest. However, given the potential risk identified in the Hilmer Report that Ministers can be subject to pressures advanced by private interests, the Council believes that the discretion of the Minister to create a right of access to gas pipelines should only be enlivened following recommendation from an independent and expert body.

16. To characterise this process as duplicative is incorrect – under the NGL, the Minister and the NCC serve different functions. One (the NCC) provides an independent recommendation having considered a number of technical matters; the other (the Minister) makes a decision having regard to this recommendation. The nature of this process reflects both the need to balance public interest criteria with other important considerations; and an attempt to reduce pressures that might be brought to bear on the Minister by those seeking to advance private interests.

Should regulators determine the services they regulate?

17. Decisions regarding whether to regulate access to infrastructure services should not be taken lightly. The effect of regulation is to impose obligations on firms that have made private investments. Excessive regulation has the potential to undermine investment incentives, which in turn can do long-term harm to the interests of consumers wishing

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4 *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*; [2012] HCA 36 at [42].

5 *National Competition Policy Review*, p. 250.

to acquire services using such infrastructure. This is equally the case with respect to gas pipeline services as it is with other infrastructure services.

18. At the same time, it is well understood that providers of infrastructure services can have considerable market power that, if exercised, could lead to inefficient levels of consumption of these services.

19. Deciding when – and how – to regulate such services is a difficult task that requires balancing a number of potentially conflicting considerations. It also requires having an objective view of the benefits and costs that can be created by the imposition of regulation on a particular service; and recognition that regulation involves risks of its own (including that regulators may inadvertently err in the setting of terms and conditions of access to gas pipeline service).

20. While recognising this is not the case in all industries in Australia[6], the Council believes it is better that decisions regarding what should be regulated are not made by the agency that actually conducts the regulation.

21. There are two key reasons for this. First, having a separation of powers between the agency that undertakes regulation and the agency that decides what services should be regulated assists in addressing concerns (real or perceived) that regulators themselves have an unconscious pre-disposition toward regulation. In this context, stakeholders often hold concerns that regulators have a bias toward over-estimating the benefits of regulation; and under-estimating the costs and risks associated with it. Conversely, other stakeholders are concerned that the perception of such bias may lead to pressures for individual regulators to take actions to over-compensate towards under-estimating the benefits of regulation when undertaking assessments of what should be regulated.[7]

22. The Council considers it is hard to demonstrate with certainty whether any such pro-regulatory bias actually exists in a given instance. It also does not wish to suggest that any particular regulator referred to in the Consultation RIS suffers from any such bias. However, to the extent any pro-regulatory bias is *perceived* by industry participants to be held by regulators, allowing regulators themselves to decide what services should be

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6 The Council notes, for instance, that the ACCC has dual roles deciding what telecommunications access services should be regulated (i.e. declared) and regulating access prices under Part XIC of the CCA.

7 In the context of considering the merits of regulatory impact assessments (RIAs) prior to deciding to regulate activities, the OECD has previously noted arguments made by some stakeholders that regulators may – either consciously or unconsciously – have a "pro-regulatory bias". In this respect, it notes some parties argue regulators may have a tendency to over-estimate the benefits of regulation; and under-estimate its costs. Proponents of these arguments suggest a higher discount rate than might otherwise be chosen should be adopted in undertaking RIAs of future benefits and costs of regulation in order to counteract the risk of pro-regulatory bias. See OECD, *Reviews of Regulatory Reform – Regulatory impact Analysis,* 2009, p. 91.

regulated could have an adverse effect on investors' perceptions of regulatory risk, and therefore on investment incentives.

23. The Council considers having bodies other than the regulator itself considering and making decisions on what should be regulated can better attend to concerns about pro-regulatory bias.

24. Second, the Council considers there is the potential for industry participants to perceive that regulators have a vested interest in decisions regarding what should be the subject of regulation. This issue has previously been considered by the Productivity Commission (PC) when it conducted its review of the access regime set out in Part IIIA of the CCA. In this respect, the PC observed that:

> As noted in previous chapters, the Commission recognises that decision making as part of the Regime requires considerable judgment. This alone might reasonably be seen as justification for retaining an independent organisation to conduct analysis and provide advice to the Minister. In addition, the 'at large' nature of the Regime and its application to infrastructure of national significance create a need for particular caution in guarding against any potential for unwarranted extension of the scope of the Regime. By separating the advisory functions of the NCC and the regulatory functions of the ACCC, legislators have sought to provide an important safeguard.
>
> Suggested alternative structures would compromise the separation between responsibility for advising on the scope of the Regime and responsibility for regulation of covered services. In particular, making the ACCC the sole administrator for Part IIIA, as well as the decision maker in some cases, would prompt concerns from stakeholders, and particular concern on the part of many service providers. Irrespective of the validity of such apprehensions, even the perception of heightened regulatory risk is likely to have an adverse impact on investment.[8]

25. The Council considers these issues are equally relevant to considerations of what services should be regulated under gas pipeline access regimes as they are to considerations of what services to regulate under Part IIIA of the CCA.

26. Whilst recognising this concern is not universally held,[9] the Council considers that undertaking a transparent and public assessment of declaration applications and similar matters, and providing designated Ministers with independent expert advice in relation to these, are critical roles that should not be subsumed within any agency that is also a dispute arbitrator of access to gas pipeline services given the prospect of real or perceived regulatory conflicts.

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8 PC, *National Access Regime Inquiry Report*, 25 October 2013, at p. 291 – 292.

9 For instance, the Harper Review Panel observed that it did not "… foresee any conflict in a single regulator performing both functions and anticipates that there may be benefits" (p. 81)

Timeframes for making decisions regarding what services should be regulated

27. The stakeholder's feedback template asks:

> Do you think the governance arrangements associated with third party access and greenfield exemption decisions are giving rise to unnecessary costs and delays, or do you think the current arrangements should be maintained?[10]

28. The Council believes that excessive delays in decisions regarding what infrastructure services should be regulated are undesirable. It also accepts that, over the years, legitimate concerns have been raised about the time and delay associated with decisions regarding whether some infrastructure services should be subject to access regulation.

29. However, the Council considers concerns expressed in the Consultation RIS:

- are not supported by the timeframes taken by the NCC to undertake its functions under the NGL
- often relate to matters considered *prior* to the introduction of legislative time limits for NCC recommendations and Ministerial decisions
- are likely to erroneously confuse delays caused by NCC/Ministerial processes with those caused by appeals of Ministerial decisions to the Australian Competition Tribunal (Tribunal) and the courts.

Decision-making under the NGL

30. Under the NGL, the NCC is required to make a recommendation for gas coverage (or revocation of coverage) to the Minister within four months.[11] These time limits cannot be extended by more than a further two months by the NCC.[12]

31. Once the Minister receives a recommendation from the NCC, the Minister must make a decision on whether services should covered within 20 days of receiving a recommendation.[13] If the Minister is unable to make a decision within 20 days, the Minister must make the decision as soon as reasonably practicable after the end of the specified period.[14]

32. Since the introduction of the NGL and NGR on 1 July 2008, the NCC and the Minister have dealt with most coverage and revocation of coverage matters within the legislative time limits. In this respect:

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10 COAG Energy Council, *op. cit.,* at p. 66.

11 See section 16(2) of the National Gas Rules (NGR).

12 See section 16(3) of the NGR.

13 See section 99 of the NGR.

14 *Ibid.*

- The NCC has considered 13 matters with respect to the coverage of gas pipelines. On average, the NCC has taken approximately 88 days to make recommendations/decisions
- The Minister has made seven decisions based on NCC recommendations, with an average timeframe of approximately 86 days.

33. The Council considers timeframes of this length are not excessive – especially having regard to the scale of infrastructure investment by private parties that can be effected by the introduction of access regimes; and the long-lived nature of these investments. Such a point has previously been made by the PC (with reference to the views of Professor Allan Fels) in the context of consideration of access regimes under Part IIIA of the CCA:

> Decisions as to whether (and on what terms) third party access should be granted to nationally significant infrastructure requires judgments to be made on complex and technical issues. It is necessary to have a rigorous process for making such judgments, even though such rigour may increase the time taken to reach decisions. In this context, Allan Fels highlighted the complexity and long-term consequences of Regime decisions:
>
> Applying the National Access Regime (and declaration decisions in particular) involves regulatory decisions of quite exceptional complexity that require lengthy economic, technical and commercial analysis and considerable information. The process is complicated and time-consuming and entails a significant degree of discretion by regulators … the length of time required for decisions … must be viewed in the context of decisions that can be for twenty years or more. [15]

34. The Council also notes that the length of time taken to make decisions under the two-stage process set out in the NGL does not appear, on average, to be any longer than that under alternative one-stage regimes (such as the telecommunications Part XIC access regime set out under Part XIC of the CCA). As shown in Figure 1 below, timeframes under the two-stage NGL regime are, on average, considerably lower (at approximately 174 days per matter) than the time taken by the ACCC under a one-stage regime to consider a number of key declaration considerations under Part XIC of the CCA (at approximately 284 days per matter) since 2013. This is not to suggest the ACCC has taken too long with its decisions – as indicated above, considerations of whether to regulate access to services are complex matters and should not be taken lightly. Further, every matter is different – and every regime is different. However, the Council does not believe the history of timeframes for considerations under the NGL suggests there are excessive delays in the timing of decisions under the regime; or that having a two-stage process is introducing excessive delays into decision-making processes.

[15] PC 2013, *op. cit.,* p.285.

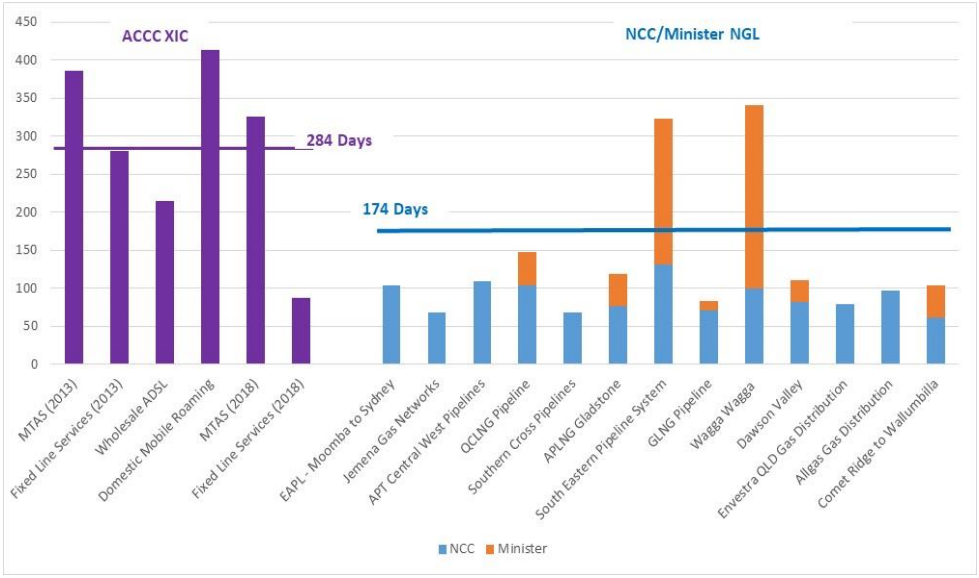

Figure 1 - Comparison of timeframes (in days) under one-stage ACCC XIC CCA and two-stage NCC/Minister NGL decisions

Decision making under Part IIIA of the CCA

35. The Council acknowledges that legitimate concerns were raised by a number of parties regarding the timing of decisions under Part IIIA of the CCA during the previous decade – especially with respect to a number of Pilbara railway access matters.

36. The Council notes, however, that amendments made to the CCA in 2010[16] following these cases have significantly improved the timeliness and effectiveness of regulatory decision-making under Part IIIA. Specifically, the NCC now has only 180 days to make recommendations to the Minister under Part IIIA of the CCA (although there is scope to 'stop the clock' which can lengthen the overall time). Subsequent to this, the Minister has 60 days to make a decision based on the NCC's recommendation. If the designated Minister does not publish a decision within this time limit, then a deemed decision applies.

37. Since the introduction of these time limits, the NCC has largely adhered to the required timeframes to make its recommendations to the Minister. For instance, in the case of Glencore's application for declaration of a shipping channel service at the Port of Newcastle:

    - the NCC took 181 days to assess Glencore's application and make a recommendation to the Minister on declaration, only needing to stop the clock once (for 14 days) when it requested further information[17]

16 See *Trade Practices Amendment (Infrastructure Access) Act* 2010 (Cth),

17 The application was received on 13 May 2015 and the NCC made its recommendation to the Minister on 10 November 2015.

- The Minister's decision not to declare the service was made 59 days after receiving the NCC's recommendation.

38. While the Minister's decision was subsequently the subject of appeal to the Tribunal (and its decision was subject to further appeal to the Full Federal Court and the High Court of Australia), these additional delays cannot rightly be considered the consequence of an initial two-stage decision-making process involving the NCC and the Minister.

39. In this respect, the Council notes that much of the delay associated with resolution of what services should be declared under Part IIIA of the CCA relates to Tribunal and court appeal processes made *after* the NCC recommendation/Ministerial decision two-step process. This is demonstrated in Figure 2 below, which charts the numbers of days associated with declaration/coverage decisions since 2005 under Part IIIA of the CCA.

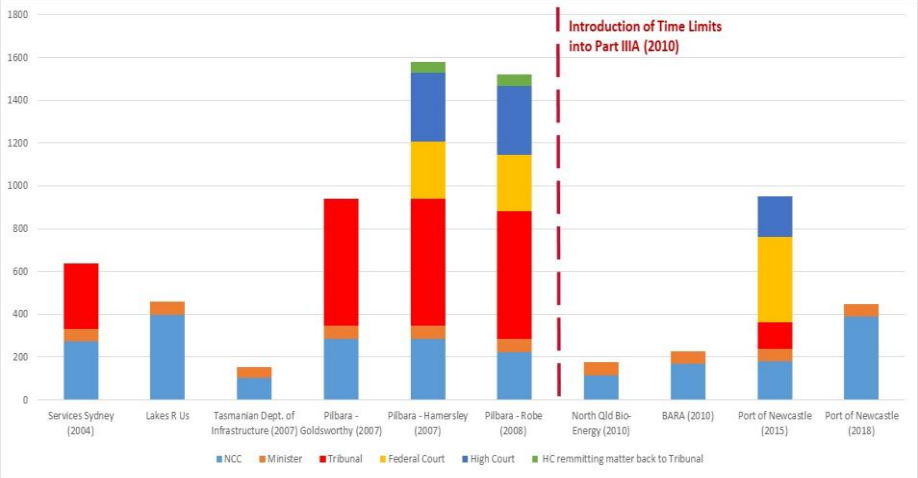

Figure 2 – Timeframes (in days) for declaration decisions under Part IIIA of the CCA

40. The chart illustrates two key points:

- Timeframes for decisions regarding what services to declare under Part IIIA of the CCA have been considerably lower since the introduction of legislative time limits in 2010[18]
- Where there have been significant delays in decision-making under Part IIIA of the CCA (such as the Pilbara matters; Services Sydney and the Port of Newcastle), this has tended to be driven by the length of time associated with Tribunal/court appeals of Ministerial decisions rather than the two-stage NCC recommendation/Ministerial decision process itself.

[18] The Council notes that its recent decision to recommend revocation of the shipping channel service at the Port of Newcastle was not the subject of the legislative time limits introduced in 2010.

Conclusion

41. The Council considers that, when viewed in a proper factual context, any delay caused by having a relevant minister making a decision based on a recommendation made by the NCC is neither excessive nor unreasonable (given that regulation involves imposing obligations on parties that have made substantial private investments in infrastructure, and hence has significant consequences for the returns parties can make on these investments).

42. The two-stage process contained in the NGL does not appear to add considerable delay to decisions regarding the appropriate regulation of gas pipelines under the NGL – especially when compared to decision-making periods under other regimes such as the Part XIC telecommunications access regime administered by the ACCC under the CCA. Previous concerns regarding excessive timeframes for decision-making processes under Part IIIA of the CCA either relate to matters considered prior to the introduction of legislative time limits in 2010; or are driven more by the length of time taken to consider appeals of Ministerial decisions (rather than the time taken in the two-step Ministerial decision-making process).

The NCC's expertise/experience

43. In considering whether a single regulator (i.e. NCC/ACCC/AER) should be given responsibility for making decisions on when a pipeline should be regulated and when a greenfield exemption should be granted, the Consultation RIS states:

> one potential issue with the first of these options is that the NCC, which has a more limited set of functions than it did in the past, may not have the scale of activities that enables it to acquire and retain the expertise and experience it would require to carry out this function.[19]

44. The Consultation RIS further considers that the ACCC and the AER are unlikely to face the same resource problems as the NCC.

45. The Council accepts it does have a more limited number of responsibilities than the ACCC or the AER. It also recognises that concerns about its ability to acquire and retain expertise and experience when undertaking its functions were previously raised by the PC as a potential limitation of the agency.[20]

46. The Council considers, however, that re-iteration of these concerns does not appreciate changes that have been made to the resourcing of the agency in recent years. Since July 2014, the NCC has operated under a Memorandum of Understanding (MOU) with the ACCC, whereby the ACCC provides secretariat services to the NCC. These services include the provision of staffing resources to provide advice and support in relation to NCC recommendations, decisions and reports.

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19 COAG Energy Council, *op. cit.,* at p. 63.

20 See, for instance, PC review of Part IIIA of the CCA at section 9.2.

47. The consequence of this is that the NCC has ready access to the same staffing resources to undertake its functions as the ACCC. It is therefore no less able to undertake its functions than the ACCC would be if the NCC's powers were transferred to the ACCC. Such an outcome is broadly consistent with the findings of the PC in its 2013 review of the Part IIIA access regime, where it noted that:

> One possible means of overcoming such concerns would be for the NCC to be located within, but operate independently of, the ACCC, potentially in a similar manner to the current structure of the Australian Energy Regulator (AER). The AER is established under the CCA and has an independent board, but its staff, resources and facilities are provided by the ACCC …[21]

48. Further, staff assisting the NCC in its considerations are subject to strict confidentiality protocols that ensure the NCC is able to make decisions independently of the ACCC (and remain an independent entity from it). This has recently been demonstrated in the NCC's consideration of whether to revoke declaration of the shipping channel service at the Port of Newcastle, where the NCC and the ACCC have differed in their views regarding whether the service at the Port of Newcastle should be revoked.[22]

49. The Council considers the current arrangements whereby the ACCC provides staffing resources to the NCC under a MOU between the two agencies strikes an appropriate balance between ensuring the NCC is adequately resourced to undertake its functions; while ensuring an appropriate level of independence is maintained between the regulator and the agency making recommendations on what services should be subject to regulation.

Information gathering powers

50. The Consultation RIS observes that the NCC does not have the same information gathering powers to assist in its decision-making processes as industry regulators such as the ACCC or the AER. It contemplates whether the ACCC or AER would be better placed to make decisions on what services should be regulated under Options 2 and 3 in the Consultation RIS. It considers whether this might improve the quality of decisions on what services should be regulated as these bodies will have access to better information-gathering powers (and information they have previously collected via regulation of the gas industry).

51. The Council acknowledges that information-gathering powers can be a useful tool to assist agencies in their decision-making responsibilities. The Council does not, however, consider the absence of explicit information gathering powers is hindering its ability to effectively carrying out its functions under the NGL. This is because when an applicant

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21 PC 2013, *op. cit.,* p. 291.

22 In this respect, the Council made a decision to recommend revocation of the shipping channel service at the Port of Newcastle in July 2019 despite the ACCC strongly holding a view that the declaration should not be revoked.

submits an application to the NCC, the onus is on it to provide adequate evidence in support of its application. If the NCC does not have adequate information to process an application, it will request additional information from the applicant (without resorting to formal information-gathering powers). Similarly, those that oppose an application are motivated to provide the NCC with information in support of their contentions.

52. In the Council's experience, stakeholders are motivated to provide information in support of their interests and are heavily engaged in NCC processes such that additional formal information gathering powers are not necessary for its decisions. Further, the Council notes that the use of information gathering powers often introduces considerable delays into decision-making timeframes, which could work against measures taken to increase the timeliness of decisions (as discussed in paragraphs 30 and 31 above).

53. Similarly, the ACCC does not have information gathering powers to assist in its decisions regarding merger authorisations; rather, it relies on the applicant to provide adequate information to ensure a prompt decision (within 90 days). On its website, the ACCC states:

> merger parties should provide all relevant information and evidence, including any expert reports intended to be relied on. The ACCC may give less weight to a statement or submission that is not supported with corroborating evidence.[23]

54. In the event COAG is persuaded that agencies considering gas pipeline coverage matters need additional formal information gathering powers, however, the Council considers that this concern could readily be resolved by either:

    - giving greater information gathering powers to the NCC, similar to those presently afforded to the ACCC/AER
    - enabling the NCC to obtain access to the information that the ACCC/AER acquires when it undertakes its work.

[23] ACCC, *Merger Authorisation website*

Pipeline Regulation Consultation Regulation Impact Statement – Stakeholder feedback template

Submission from the National Competition Council.

This template is to assist you to provide feedback on the COAG Consultation RIS titled *Options to improve gas pipeline regulation*. The template focuses on the questions asked through the RIS, which seek your views on issues which are central to the identified problems and proposed options. You may not wish to answer each question and there is no obligation to do so. If you wish to provide additional feedback outside the template, wherever possible please reference the relevant question to which your feedback relates. Thank you for your feedback.

Chapter 7: When a pipeline should be subject to regulation and how decisions should be made

No.	Questions	Feedback
7	Do you think that the current threshold for regulation (i.e. all pipelines providing third party access are subject to regulation) is giving rise to over-regulation (see sections 7.2.1 and 7.3.1), or do you think the current threshold should be maintained?	
	(A) If you think it is giving rise to over-regulation:	
	(a) How significant do you think this issue is and what are the consequences likely to be?	
	(b) Do you think the risk of over-regulation should be addressed by: (i) including an exemption mechanism in the regulatory framework to enable pipelines that do not have substantial market power to obtain an exemption from regulation? (ii) limiting the application of regulation to those cases where it is established that the pipeline has substantial market power? (iii) another means?	
	(B) If you think that (i) or (ii) should be implemented, do you think the test for establishing whether a pipeline has substantial market power should be based on the combined market power-NGO test proposed by the ACCC (see Box 7.6)?	
	(a) If so, do you think the onus of demonstrating this test is met (or not met) should sit with the decision-maker or the service provider?	
	(b) If not, please explain why and what test you think should be employed.	
8	Do you think the application of Part 23 to pipelines providing third party access that have obtained a greenfield exemption is distorting investment incentives for greenfield pipelines (see sections 7.2.2 and 7.3.2), or do you think the current approach should be maintained?	
	If you think it is distorting investment incentives: (a) How significant do you think this issue is and what are the consequences likely to be?	

	(b) Do you think this issue should be addressed by: (i) providing these pipelines with a full exemption from regulation? (ii) providing these pipelines with an exemption from the Part 23 arbitration mechanism, but not from the disclosure and negotiation elements of Part 23? (iii) another means?	
9	Why do you think:	
	(a) the greenfield exemptions in the NGL have not been used by a greater number of service providers?	
	(b) the CTP provisions in the NGR have not been used by a greater number of shippers or governments?	
10	Do you think the greenfield exemptions and CTP provisions should be retained in the regulatory framework, or do you think:	
	(a) changes to the greenfield exemptions and/or CTP provisions are required?	
	(b) the greenfield exemptions and/or CTP provisions should be replaced with another mechanism that would provide potential developers with greater certainty as to how new pipelines will be treated from a regulatory perspective, while also protecting potential users of these pipelines from exercises of market power?	
11	Do you think the current approach to seeking access to pipelines that are not providing third party access should be maintained (i.e. a decision must be made by the relevant Minister having regard to the NCC's recommendations and the coverage test), or do you think it should be mandatory for all pipelines to offer third party access on a non-discriminatory basis, as it is in the US and Canada (see sections 7.2.3 and 7.3.3)? Please explain your response to this question and set out what you think the costs, benefits and risks are likely to be of mandating third party access.	
12	If the current threshold for economic regulation is maintained and a test for regulation is only required for third party access and greenfield exemption decisions, which of the following tests do you think should be employed (see section 7.3.4) and why: (a) the coverage test;	

	(b) an equivalent test to the recently amended Part IIIA test; (c) an NGO-style test; or (d) a combined market power-NGO test?		
	Do you think the onus of demonstrating the test is met (or not met) should sit with the decision-maker or service provider?		
13	Do you think the governance arrangements associated with third party access and greenfield exemption decisions are giving rise to unnecessary costs and delays, or do you think the current arrangements should be maintained (see sections 7.2.4 and 7.3.5)?		Paras 6-16
	If you think the current arrangements could give rise to unnecessary costs and delays: (a) How significant do you think this issue is and what are the consequences likely to be?		Paras 27-42
	(b) Do you think this issue should be addressed by according a single organisation responsibility for making this decision? If not, please explain why not.		Paras 17-26
	If so:	(i) What expertise do you think this organisation should have?	Paras 43-49
		(ii) Which of the following organisations do you think should be responsible for making this decision: - the ACCC? - the relevant regulator (i.e. the AER or the ERA in Western Australia)?the NCC? - another organisation?	Paras 50-52
14	If a change is made to the governance arrangements, do you think the same organisation should also be responsible for making form of regulation decisions (see Chapter 8)?		
15	Are there any other problems with this aspect of the regulatory framework that have not been identified in this chapter? If so, please outline what they are and how you think they should be addressed.		