



Council recommendations under the Competition and Consumer Act and the National Gas Law

Provision of information to decision-making Ministers

Introduction

- 1.1 This note sets out the practice the Council proposes to adopt in providing information to decision-making Ministers in relation to the recommendations it makes as a result of various applications to it under Part IIIA of the Competition and Consumer Act 2010 (CCA) and the National Gas Law (NGL).
- 1.2 The information provided to Ministers is an important element in determining the material that is then available to be considered by the Australian Competition Tribunal in the event the Tribunal is called on to review a Minister's decision.

Background

- 1.3 The High Court in its Pilbara appeal decision narrowed the scope of review of declaration decisions under Part IIIA of the CCA by construing 'reconsideration' (in s 44K(4)) as precluding a rehearing of the matter on fresh evidence.¹ Further, the amendments made to the CCA in 2010 inserted new provisions relating to the information that the Tribunal must and may have regard to and limiting the scope of the Tribunal to consider other information.² Under the amended provisions, the Tribunal is to consider only material that was taken into account by the decision-making minister, unless it exercises a discretion to request additional information.³ The Tribunal now has more control over the material it will consider but remains constrained by the High Court's view of the Tribunal's task in reconsidering a decision.
- 1.4 Merits review under the NGL is not expressed to be a 'reconsideration' but is (and has been since the law commenced) limited: it is available only on specified grounds; parties (other than the decision-making minister) may not raise any matter not raised in submissions; and only

¹ *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; (2012) 290 ALR 750 (*Pilbara HCA*), [48] and [65]. The High Court's decision on this point is likely to apply equally to review of a decision not to certify a state or territory access regime as effective since such a review is also expressed (in s 44O) to be a 'reconsideration' on the material and information referred to in s 44ZZOAA.

² These provisions apply to the full range of reviews undertaken by the Tribunal under the CCA, not just reconsideration of decisions relating to declaration.

³ In *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2, the Tribunal declined a request that it seek additional information from the Council for consideration in the review of the Pilbara rail declarations on remittal from the High Court (in *Pilbara HCA*). The approach taken by the Tribunal in applying the High Court's decision suggests that the Tribunal will exercise this discretion sparingly.

information falling within the definition of ‘review related matter’ is to be considered by the Tribunal. The High Court’s constraint of the Tribunal’s task in Part IIIA matters may also be expected to influence the scope of limited merits review under the NGL.

- 1.5 Both the CCA and the NGL specify the material to be provided to the Tribunal for the purposes of reviewing declaration, coverage and related decisions.⁴

CCA

- 1.6 Under the CCA, when an application is made for a review of a decision taken by the Minister, the Minister must provide the Tribunal with:

all of the information [the Minister] took into account in connection with the making of the decision to which the review relates (s 44ZZOAAA(3)(c)).

- 1.7 Where a decision period expires without an affirmative decision and a deemed decision results, the Minister must provide the Tribunal with:

all of the information the Council took into account in connection with making the recommendation to which the decision under review relates (s 44ZZOAAA(3)(a)).⁵

- 1.8 In practice the Council, rather than a Minister, provides the relevant information to the Tribunal and takes an active role in such review proceedings. The Council liaises with the Minister’s office in relation to any material produced in the course of the Minister’s consideration of a recommendation which should be provided to the Tribunal. We envisage that this practice will continue.

NGL

- 1.9 The NGL is more prescriptive. In conducting reviews of coverage decisions the Tribunal may consider only a ‘review related matter’ (NGL, s 261).⁶ This is defined (relevantly) as:

- the application for review and supporting submissions
- the decision under review and the written reasons
- any written submissions made to the relevant Minister or Council before the decision or recommendation was made

⁴ Decisions under the CCA relating to ineligibility, revocation or certification are subject to reconsideration by the Tribunal subject to the same limitations as apply to reviews of declaration decisions. NGL decisions relating to revocation, light regulation or revocation are subject to merits review by the Tribunal having regard to information limited by the same provisions as apply to coverage decisions.

⁵ Paradoxically, the Tribunal would be provided with more information where a deemed decision resulted from the expiry of a statutory decision period than when a Minister makes an affirmative decision. Although in the case of a declaration where the Council recommended in favour of declaration yet the deemed outcome results in the application being rejected, there may be only limited material supporting the decision deemed to have been made. This problem does not arise in relation to other deemed decisions where the Council’s recommendation is deemed to have been adopted.

⁶ Unlike under Part IIIA of the CCA, reviews under Part 5 of the NGL are only available with leave of the Tribunal (ss 245 and 248). Leave may not be granted unless the Tribunal considers there to be a serious issue to be heard and that one of the grounds of review (in s 246) exists.

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- any reports and materials relied on by the relevant Minister or Council in making the decision or recommendation
 - any draft decision or recommendation, and
 - any submissions on the draft or final decision or recommendation considered by the relevant Minister or Council.
- 1.10 The Tribunal must have regard to any document prepared, used and made public by the relevant Minister (or the Council, for light regulation decisions). The Tribunal may allow new information to be submitted if the information would assist any aspect of the determination to be made and if it was not unreasonably withheld from the relevant Minister or the Council.
- 1.11 There is no analogous requirement in the NGL to s 44ZZOAAA(3) requiring the decision maker or Council to provide information to the Tribunal but, as the Tribunal has power to do all things necessary or convenient for the performance of its functions under the NGL (s 91(2)), it is able to request the production of review related matters. As with decisions under the CCA, the Council has generally dealt with provision of the required information to the Tribunal on behalf of the relevant Minister.

Approach to provision of information to the Tribunal

- 1.12 The Council believes the scope of the information to be provided to the Tribunal under the NGL is clear and appropriate. However, issues arise in relation to reviews of decisions under the CCA. Unlike the NGL, determination of the information that should be provided to the Tribunal is somewhat subjective and depends in part on what material is provided to the Minister and the Minister's actions.
- 1.13 For applications under the CCA, the Council's practice has been to provide decision-making Ministers with the application (at the time it is received), its draft recommendation (when it is issued), and of course its final recommendation. While the Council's recommendations summarise the submissions it receives and set out the Council's views on the issues raised in them, the Council has not always provided the submissions themselves to the Minister (public versions of all submissions are available on the Council's website and this is noted in the recommendation).
- 1.14 Where the Minister has not received the submissions, s 44ZZOAAA(3)(c) would only provide for the Tribunal to receive the application, the Council's (draft and final) recommendations and any departmental brief or similar material produced by the Minister's officials or advisors. As the Minister would not have received the various submissions made to the Council, it is likely that they cannot be provided to the Tribunal under s 44ZZOAAA(3)(c).
- 1.15 The Tribunal may request additional information that it considers reasonable and appropriate for making its decision, and may request assistance and reports from the Council. However, the Tribunal's discretion is limited by the nature of the Tribunal's task, as construed by the High Court.
- 1.16 The constraints on the parties' ability to introduce new material into Tribunal proceedings, particularly in Part IIIA matters, raises the prospect of disputes arising as to what was and was not considered by the Minister or Council and therefore what can be considered by the Tribunal on review.

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- 1.17 In the Council's view it is important that the Tribunal is able to consider the same range of material the Council did in making its recommendation to the Minister, as well as other material considered by the Minister. The Council therefore intends on all occasions to provide decision-making Ministers with the submissions it has considered in making a recommendation at the time it provides its final recommendation on applications made under Part IIIA and the NGL. In practice this will comprise all submissions (provided they were made within time and not returned due to unresolved confidentiality issues).⁷ The Council also considers that the Tribunal ought to be provided with any references and information obtained by Council secretariat staff, where material to the recommendation. These will be appended to the Council's recommendation or provided these to the relevant Minister along with the submissions, as appropriate. The intention is to put Ministers in a position to be able to provide all the material necessary to enable the Tribunal to make an informed decision on review.
- 1.18 A table summarising the Council's intended approach is **Appendix A** to this document.
- 1.19 This approach will also provide for consistency in the information available to the Tribunal when reviewing declaration and similar decisions under the CCA and coverage and similar decisions under the NGL. The Council also considers that this approach best meets the need for it to provide procedural fairness to all parties.
- 1.20 By being provided with all submissions and other information material to the Council's recommendation, the Minister is able to take account of that material. Some subjectivity will remain as it is for the Minister to identify what information he or she has 'taken into account in connection with' a decision.
- 1.21 There is not a clear test for when information has been 'taken into account in connection with' the making of a decision. For a Minister to have taken information into account, the Minister is likely to be required to have been aware of the content of the information or to have had his or her attention is drawn to it. The taking into account should not be token or nominal and the Minister should have given the information some weight (although the weight to be given is a matter of discretion).⁸
- 1.22 Generally, where a Minister indicates (if only by passing the information to the Tribunal) that he or she has taken information into account that will be sufficient to enable the information to be used by the Tribunal, unless there is evidence to the contrary.
- 1.23 The meaning of 'in connection with' is dependent upon the statutory context but it seems clear that information will be taken into account by the Minister 'in connection with' the making of a

⁷ In some cases this may involve a considerable volume of material. For example: in the Herbert River tramway declaration recommendation, the application and the four submissions received totaled 583 pages. In relation to the BARA application for declaration of various aircraft fuel services at Sydney Airport the Council received two applications and 24 submissions totaling some 874 pages, provided in two large lever-arch files.

⁸ See discussion of the meaning of 'have regard to' in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (7th ed), [12.15] and cases there cited. See also *Tickner v Chapman* [1995] FCA 1726; (1995) 57 FCR 451, where Kiefel J (at [40] of her judgment) discussed a statutory requirement that a Minister 'consider' representations prior to making a protection declaration.

decision as long as there is some relationship between the information and the decision; it need not be a causal relationship.⁹

Other related issues

Other material taken into account by Ministers

- 1.24 The Council anticipates that departmental officials and advisors may provide briefs to ministers in relation to Council recommendations. These would need to be included in the material provided to the Tribunal under s 44ZZOAAA(3)(c).
- 1.25 In addition, where the Minister takes any other information into account in connection with making a declaration, certification or similar decision, this information should also be provided to the Tribunal. This could include notes of discussions with officials or other Ministers, although information provided to other ministers advising of a decision that had been taken is unlikely to fall within s 44ZZOAAA(3)(c).

Submissions made directly to the Minister

- 1.26 Neither the CCA nor the NGL obliges the Minister to seek or accept submissions directly from interested parties in addition to the submissions made to the Council in its public consultation process. Seeking (or accepting) additional submissions is discretionary and it is up to the Minister to determine whether to do so and the weight to be given any submissions accepted.
- 1.27 The desirability of a Minister accepting additional submissions must be viewed in light of the process the Council undertakes in making its recommendation and the decision timeframes contained in the CCA and NGL.¹⁰ By the time a Minister receives a Council recommendation, interested parties will have had at least two opportunities to make submissions. The salient elements of these submissions will be noted and discussed in the recommendation. It is only when new facts and issues that are relevant to the criteria for the decision to be made emerge that could not have been raised and considered in the process leading to the Council's recommendation, that it may be either necessary or desirable for a Minister to consider additional submissions.
- 1.28 The ability to maintain the integrity of the public consultation process and afford all parties procedural fairness may be undermined if parties are able (or perceive that they are able) to bypass the Council and make submissions directly to a Minister. If a Minister accepts submissions from or meets with interested parties, procedural fairness is likely to require that the same opportunities be offered to all interested parties. This may be impractical given the time limits on ministerial decisions under the NGL and especially under the CCA, which imposes binding time limits.
- 1.29 Further, both the CCA and the NGL provide for the Council to not have regard to certain submissions if made out of time or if confidentiality issues cannot be resolved. This power

⁹ See Pearce and Geddes, above n 8, [12.8] and cases there cited.

¹⁰ The Council has four months under the NGL and 6 months under the CCA within which to conduct its public consultation. The Minister is given 20 or 30 business days under the NGL and 60 days under the CCA to make his or her decision on the recommendation.

enables the Council to afford procedural fairness to all interested parties and reduce gaming of the Council's processes. The integrity of this process may be undermined if parties are able to make rejected or returned submissions directly to a Minister.

Confidential information

1.30 Some submissions may contain confidential information. This information will be included in the material provided to Ministers, clearly identified as confidential and with advice to Ministers as to the need to protect such material from disclosure.

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Appendix A Provision of information to decision-making Ministers

Recommendations under Part IIIA (CCA)	Recommendations under the NGL
<ul style="list-style-type: none"> • Declaration of services • Services ineligible to be declared • Certification of effective access regimes 	<ul style="list-style-type: none"> • Pipeline coverage • 15-year no coverage determinations

Material considered by NCC provided to Minister ⁱ	
<ul style="list-style-type: none"> • Application • Draft and final recommendations • All submissions (incl confidential material) • Material references and information obtained by Council secretariat 	<ul style="list-style-type: none"> • Application • Draft and final recommendations • All submissions (incl confidential material) • Any reports and materials relied on by the Council in making its recommendation

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Additional material obtained and considered by Minister provided to Tribunal ⁱⁱ	
<ul style="list-style-type: none"> • Decision • Statement of reasons • Any further submissions/correspondence with applicant or other interested parties • Departmental brief or advice • File notes of meetings with applicant or interested parties • File notes of discussions and copies of any other materials “taken into account” in Minister’s decisions 	<ul style="list-style-type: none"> • Decision (including any draft decision) • Statement of reasons • Any further submissions/correspondence with applicant or other interested parties • Departmental brief or advice • File notes of meetings with applicant or interested parties • File notes of discussions and copies of any other materials “taken into account” in Minister’s decisions • Any reports and materials relied on by the Minister in making his or her decision

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Material provided to the Competition Tribunal as basis for review	
<ul style="list-style-type: none"> • All of the information taken into account by the Council and Minister in connection with making the recommendation and the decision to which the review relates. 	<ul style="list-style-type: none"> • “Review related material”

ⁱ Applications will be provided to the Minister at the time they are made and draft recommendations are provided to the Minister at the time they are published by the Council.

ⁱⁱ Usually if this material is supplied to the NCC, the Council will arrange for it to be provided to the Competition Tribunal