



Guidelines for submissions from Government sources

(October 2011)

1 Background

- 1.1 The National Competition Council is responsible for considering a variety of applications under Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA) and under the National Gas Law (NGL).
- 1.2 As part of the process for considering the relevant issues, the Council seeks information from a range of interested parties and by inviting public submissions wherever appropriate and practicable.
- 1.3 In the Council's view, Government sources (including departments, agencies and on some occasions Governments or Ministers) may well have information that is relevant to the Council's consideration of the various applications it receives and may wish to make submissions on some applications.
- 1.4 The Council has received submissions from Commonwealth and State Ministers and departments in relation to a number of past applications. On occasion submissions have also been made on behalf of State Governments and Local Governments.
- 1.5 Like all submissions, submissions from Government sources are of greatest value when they:
 - address the specific factors or criteria on which the Council is required to make its recommendation or decision
 - provide factual information and analysis to support the opinions or conclusions reached, and
 - support assertions with relevant data, sources and transparent reasoning.
- 1.6 Submissions from Government sources must also be provided within the deadlines specified by the Council. As with other submissions, those from Government sources will generally be made public and confidentiality claims should be avoided where possible.
- 1.7 Additional information on making submissions on matters under consideration by the Council is contained in the Council's 'Guide to Making a Submission'.

2 Procedural considerations for submissions from Government sources

- 2.1 In the Council's view, generally the provision of submissions from Government sources does not raise any particular concerns. However, Government sources should be aware of potential procedural issues when making submissions.
- 2.2 Firstly, where the Council is responsible for providing a recommendation to a decision-making Minister ¹, regard should be had to procedural fairness considerations where the decision making Minister or their department intends to make a submission on the matter under consideration.
- 2.3 A submission from a decision-making Minister, particularly one which addresses the overall merits of an application, may give rise to a perception that the Minister has predetermined his or her subsequent decision. This could give rise to administrative law issues and could result in an aggrieved party seeking judicial review of the decision. A similar issue might arise where a department with responsibility for advising a decision-making Minister on his or her decision makes a submission. For this reason, it may be prudent for the decision-making Minister (and/or their department) to refrain from making a submission in relation to matters in which the Minister will make the final decision or to confine any submission to factual issues, avoiding comment on the merits of an application. Of course, the Council recognises that ultimately it will be up to the decision-making Minister to determine whether or not it is appropriate to make a submission.
- 2.4 Secondly, submissions from Government sources should be careful to avoid creating a perception that the Council is being directed as to the recommendation or decision it should make. As an independent statutory body the Council cannot allow itself to be subject to the direction of any one particular party (whether a Government source or otherwise). The Council does not expect that a submission from a Government source would attempt to direct the Council to reach a particular recommendation or decision. However, to alleviate the risk of such perceptions, care should be taken by Government sources when drafting submissions.

¹ Under Part IIIA of the CCA this will be the Commonwealth Treasurer or his Parliamentary Secretary, or in the case of applications for declaration of services provided by a State or Territory entity, the relevant Premier or Chief Minister. Under the NGL the decision-making Minister is the Commonwealth Minister for Resources, Energy and Tourism.