

National Competition Council

Level 17 Casselden, 2 Lonsdale Street Melbourne 3000 Australia

GPO Box 250 Melbourne 3001 Australia

Telephone 1800 099 470

Website: www.ncc.gov.au



19 April 2021

Competition Unit
Market Conduct Division
The Treasury
Langton Crescent
PARKES ACT 2600

Via email - NARconsultation@treasury.gov.au

Timeliness of processes under the National Access Regime

The National Competition Council (the Council) welcomes the opportunity to make a submission to the Treasury's consultation on the timeliness of processes under the National Access Regime.

The Council believes concerns regarding the timeliness of past declaration processes are legitimate and has set out its views, as to how the process might be streamlined, in the enclosed submission.

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

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Richard York', is written over a light grey circular watermark.

Richard York
NCC Executive Director

NATIONAL
COMPETITION
COUNCIL



Timeliness of processes under the National Access Regime – NCC Submission

April 2021

Introduction

1. The National Competition Council (NCC) appreciates the opportunity to respond to the Treasury's consultation on the timeliness of processes under the National Access Regime.
2. The Council notes the consultation focuses on the timeliness of decision making processes *following* the initial recommendation of the NCC and subsequent decision of the designated Minister. The Council believes this is the correct area of focus. As demonstrated further below, the Council observes that it and the designated Minister have both kept to tight timeframes for making decisions on declaration matters under Part IIIA of the *Competition and Consumer Act 2010* (CCA) – especially since the introduction of statutory time limits for these decision making processes in 2010.
3. Where there has been extended delays in decision making under Part IIIA of the CCA, such as with respect to declaration considerations of railway lines in the Pilbara and services at the Port of Newcastle, this has largely been driven by the length of time associated with Tribunal and court appeals of Ministerial decisions rather than the NCC recommendation and Ministerial decision process.
4. To assist the Treasury in its examination of the length of time that processes under the National Access Regime take, the first part of this submission provides background information (largely drawn from the Council's 2019 submission to the COAG consultation RIS¹) on decision making timeframes for declaration applications considered by the NCC.
5. With regard to the specific reform options set out in the consultation paper, the Council supports:
 - removing the ability for parties to seek merits review by the Australian Competition Tribunal (the Tribunal) of a designated Minister's decision on a declaration matter
 - limiting the ability for parties to seek declaration of services under Part IIIA of the CCA where declaration of the same (or similar) service has previously been refused – or where a previous declaration of the same (or similar) service has been revoked
 - limiting the ability for parties to make requests for revocation of an existing declaration of a service to instances.
6. The Council's reasoning for supporting these reforms is set out in the second half of this submission. The Council also comments on issues related to certain reform options discussed in the Treasury's consultation paper in this part of the submission.

Timeframes for decision making under Part IIIA of the CCA

7. The Council acknowledges that some past declaration applications, particularly in relation to services provided at Sydney Airport, on Pilbara railways and at the Port of Newcastle, resulted in lengthy proceedings that have taken a number of years to resolve. This is clearly shown in Figure 1 below, which sets out the time taken for considering a number of processes under Part IIIA of the CCA since 2004.

¹ [Consultation RIS for Options to Improve Gas Pipeline Regulation – NCC Submission.](#)

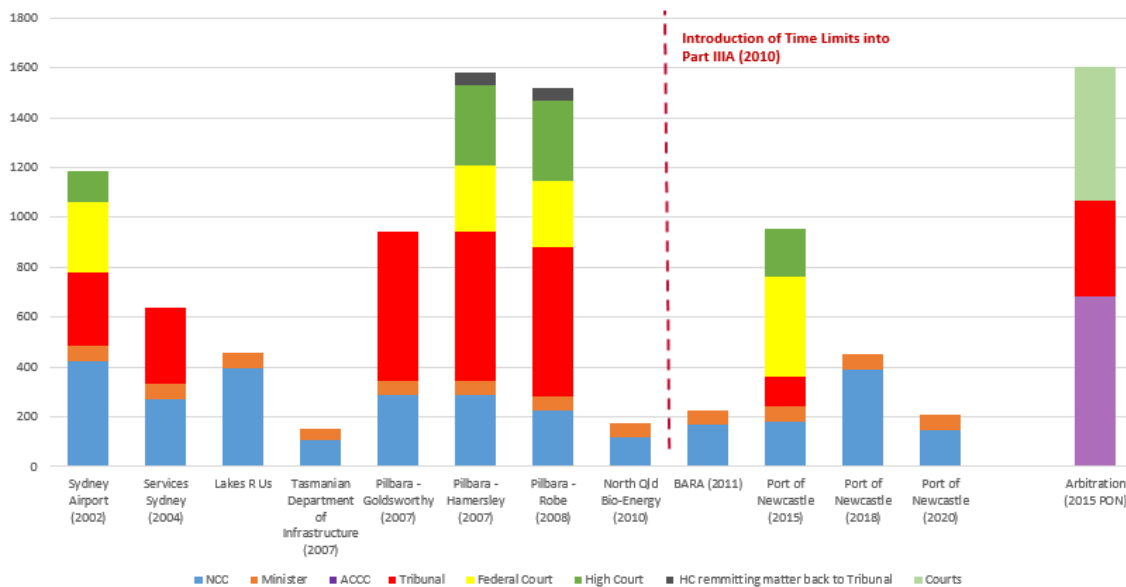


Figure 1 – Timeframes for considerations of various applications for declaration under Part IIIA of the CCA

8. Figure 1 shows that:

- the ultimate determination of whether services provided on the Hamersley and Robe railway lines in the Pilbara took over 1,500 days of decision-making processes
- the first application for declaration of a shipping channel service at the Port of Newcastle took over 900 days of decision-making processes – and has been the subject of two further processes to consider whether to declare such a service (the latest of which is still ongoing and now subject to merit review before the Tribunal)
- arbitration of an access dispute notified by Glencore in relation to the previous declaration of service at the Port of Newcastle has been ongoing for over 1,600 days; with almost 1,000 days having passed since the ACCC made its initial determination in this matter.

9. Close inspection of Figure 1 provides additional insight into a number of factors relevant to the timeliness of processes under the National Access Regime. First, 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 process. For instance, with respect to:

- the Hamersley and Robe Pilbara matters, more than 1,200 days were spent by the Tribunal and the courts considering appeals of declaration decisions in respect of these matters
- the initial Port of Newcastle matter, the Council and the designated Minister spent a combined 240 days considering Glencore’s declaration application, with the Tribunal and courts spending an additional 713 days considering appeals in this matter.

10. Second, the Council notes that the timeliness of declaration decision making processes has improved significantly following amendments to the CCA in 2010 to introduce time limits. In this respect:
 - the NCC is required to make a declaration recommendation to the designated Minister within 180 days²
 - once the Minister receives a recommendation from the NCC, the Minister must make a decision on whether services should be declared within 60 days of receiving a recommendation. If the Minister does not publish their decision within 60 days, they are taken to have made a decision in accordance with the Council's recommendation.
11. Since the introduction of these time limits, the NCC has consistently met its statutory time limits for making recommendations to the designated Minister following receipt of an application for declaration. Most recently, the NCC completed its consideration of an application by the New South Wales Minerals Council for declaration of a service at the Port of Newcastle within 148 days, with the designated Minister completing his consideration within a further 60 days.
12. Third, much of the ongoing disputation regarding whether a service at the Port of Newcastle should be declared has been the result of the ability of parties to seek revocation of existing declarations; and to seek additional considerations of whether a service should be declared a short time after a decision had been made to revoke declaration of the service. Multiple considerations of whether to declare the same service over a long period of time is undesirable as it involves considerable additional resource costs and uncertainty for industry participants related to a matter.
13. The Council considers there is scope to further improve the timeliness of decision making under Part IIIA of the CCA by implementing many of the reform options proposed in the Treasury's consultation paper, as discussed below.

Merits Review

14. The Council submits that the ability for parties to seek merits reviews by the Tribunal of a designated Minister's decision to declare or not declare a service should be removed. The Council has advocated this view in a number of previous submissions³ and its position remains the same.
15. Merits review of declaration decisions increases uncertainty for industry participants and adds unnecessary delay to considerations of whether these services should be declared under Part IIIA of the CCA. The Council considers it is not a necessary or efficient use of resources to provide two levels of inquiry and fact finding in declaration matters.

² The Council notes that are provisions enabling it to to 'stop the clock' in certain circumstances which can lengthen the overall time for its consideration of a matter.

³ [NCC Submission – Review of the Limited Merits Review Regime in the National Electricity Law and National Gas Law](#), [NCC Submission - Inquiry into the National Access Regime](#), [NCC Submission - National Access Regime - Productivity Commission Inquiry](#).

16. It was the position of the National Competition Policy Review⁴ (Hilmer Report), from which the current NCC recommendation/Ministerial decision arrangements arose, that:

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.

17. Where public interest considerations remain relevant to the question of whether services should be regulated, 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) 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 office⁵.

18. Secondly, 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).

19. A rehearing by the Tribunal of a decision made by a designated Minister (following a recommendation from the Council) undermines the basis, as envisioned by the Hilmer Committee, for having declaration decisions made by an elected member of the Government acting on independent expert advice.

⁴ [National Competition Policy Review Report \(Hilmer Report\)](#).

⁵ *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*; [2012] HCA 36 at [42].

20. A party seeking review by the Tribunal does not need to demonstrate any error on the part of the Minister in making their decision or on the part of the Council in making its recommendation. This encourages parties, who find a decision disagreeable, to seek a review in the hope they will get a different result. Further, despite the availability of merits review, parties still tend to appeal decisions by the Tribunal to the courts.
21. The Council considers that merits review by the Tribunal adds to uncertainty and creates unnecessary delays and increased costs in the resolution of matters. In the Council's opinion, a single layer of detailed fact finding and consideration of declaration against specified legislative criteria, with judicial review available to ensure declaration decisions are made fairly and in accordance with the law, is a more appropriate decision making model.
22. Judicial review allows for the merits of a declaration decision to be reviewed where the decision making Minister took into account matters that should not have been considered, or failed to take into account matters that should have been addressed and where the decision falls outside what might be concluded by a reasonable decision maker. The Council considers judicial review provides a more than adequate means of oversight.
23. The Council notes the rationale for removing merits reviews of Ministerial decisions on declarations is weaker in the case of ACCC arbitration determinations which are not made by an electorally accountable Minister. While section 44 X (1) (b) does require the ACCC to take into account the public interest when making a final determination in an arbitration, the regime does not contemplate a Minister being the ultimate arbitrator of an access dispute.

Repeat applications for declaration

24. The Council notes the National Access Regime currently allows parties to submit declaration applications or revocation requests in the absence of any test to determine whether circumstances have changed since the matter was last considered.
25. The Council is of the view that this can encourage applications that have the effect of continually reconsidering declaration of essentially the same service. This is highly undesirable as it involves an inefficient use of resources and contributes to lengthy processes and ongoing uncertainty for infrastructure owners and users.
26. One option for preventing inefficient repeat considerations of the same matter would be to have a "hard" time period (e.g. five or ten years) following a declaration decision within which declaration of essentially the same service cannot be reconsidered – either via a repeat application for declaration or via an application for revocation of a declaration. Setting a fixed time period within which declaration of a given service cannot be reconsidered is, however, a blunt legislative instrument and would prevent reconsideration of a declaration where there has been a material change of circumstances that might legitimately warrant a different declaration decision being made.

27. Were the Treasury minded to prioritise preventing the risk of inefficient reconsiderations of declaration of essentially the same service, it may wish to consider an option that would involve a requirement that the Council may only consider an application where:
- at least five years has passed since any previous decision with respect to declaration of the service the subject of an application; and, after this period of time
 - the applicant can demonstrate there has been a material change of circumstances.
28. Alternatively, if the Treasury were concerned to balance the inefficiency of repeat considerations of declaration of the same service with the need to provide safeguards against a material change in circumstances, it may wish to consider an option whereby the Council may only consider an application where:
- at least five years has passed since any previous decision with respect to the service the subject of an application; or
 - the applicant can demonstrate there has been a material change of circumstances.

Arbitration when a service is no longer declared

29. The Council notes the ongoing disputation of the arbitration decision by the ACCC in relation to an access dispute for services at the Port of Newcastle that were declared by the Tribunal in 2016 following an application by Glencore. Glencore subsequently notified the ACCC of an access dispute and the ACCC made a determination in 2018. That determination was reviewed by the Tribunal in 2019 and the Tribunal's decision subject to judicial review by the Full Federal Court in 2020. The High Court has granted special leave to appeal and will consider an appeal of the Full Court's decision. As the declaration of the Port of Newcastle was revoked in 2019, the arbitration determination remains in place for a service that is no longer declared.
30. The Council submits it is arguably inconsistent for a service to be subject to regulation despite the Minister having found (or, as in the case of the Port of Newcastle, deemed by section 44J(7) of the CCA) that it is no longer appropriate for that service to be declared. In this regard, the Council notes that, unlike access determinations under Part IIIA, telecommunications access determinations under Part XIC of the CCA are taken to be revoked at the time a relevant declaration is revoked.^[1] The Council considers, however, that the possibility that an ongoing arbitration determination made when a service was previously declared could be terminated prior to the end of the determination's period has the potential to raise the risk (and therefore effective cost) to parties seeking to make investments in reliance of determinations made under the Part IIIA access regime. The ability to terminate an arbitration determination before it was initially intended to end could generate regulatory uncertainty and negatively impact on efficient investment incentives.

^[1] CCA, section 152BCF(9).

31. The Council notes this potential uncertainty (and consequent risk of a party being “held up” following the making of investment and business decisions in reliance of an arbitration determination) is less relevant in the case of an ongoing arbitration proceeding where a determination has not yet been made.
32. The foregoing analysis suggests a different approach might be warranted for the termination of arbitration determinations and arbitration processes in the event a service declaration is revoked. However, the Council notes that subjecting arbitration proceedings and determinations to different treatments will lead to opposing incentives, in respect of timing, for the relevant parties. For instance, if a determination isn’t terminated upon revocation of declaration of a service but an arbitration process is, then access seekers may rush to have a determination made if they sense revocation is possible while access providers may try to draw out the determination process as long as possible to increase the prospect of not falling subject to access regulation before a declaration is terminated. In the event a different approach is taken to these two different scenarios, the Council would recommend the Treasury consider ways to ensure the timing of arbitration dispute processes is not “gamed”; such as by having strict time limits for the conduct of arbitration processes.

Conclusion

33. Current arrangements whereby the Tribunal reconsiders a Minister's decision introduces unnecessary delay and uncertainty into the declaration process.
34. The Council submits that it is appropriate that declaration decisions are made by the designated Minister acting on independent expert advice. Merits review of Ministerial decisions by the Tribunal undermines the principle of responsible government that lies behind this process. The Council considers that judicial review of Ministerial decisions by the Federal Court is sufficient to ensure decisions are made fairly and in accordance with the law.
35. The Council notes that, should the ability to seek merits review of Ministerial decisions be removed, lengthy declaration proceedings associated with court appeals will likely still occur.