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# Timeliness of processes under the National Access Regime

Consultation paper

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# Contents

# Consultation Process

## Request for feedback and comments

Interested parties are invited to comment on the issues raised in this consultation paper.

While submissions may be lodged electronically or by post, electronic lodgement is preferred.

All information (including name and address details) contained in formal submissions will be made available to the public on the Australian Treasury website, unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails do not suffice for this purpose. Respondents who would like part of their submission to remain in confidence should provide this information marked as such in a separate attachment.

Legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect confidentiality of your submission.

View Treasury's Submission Guidelines for further information.

### Closing date for submissions: 19 April 2021

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The principles outlined in this paper have not received Government approval and are not yet law. As a consequence, this paper is merely a guide as to how the principles might operate.

# Timeliness of processes under the National Access Regime

## Introduction

The National Access Regime exists to promote the economically efficient operation of and investment in infrastructure.

Prominent examples of lengthy processes under the National Access Regime (NAR) include those relating to a number of Pilbara railways, Sydney Airport and the Port of Newcastle.

Unnecessarily prolonged processes, or a lack of timeliness in regulatory decision making, may increase regulatory uncertainty and diminish or delay business investment. It may also impose a range of costs, both directly on parties involved, and on government in administering the regime.

This consultation paper seeks views on potential options to streamline and add greater certainty to decisions under the NAR, including:

- reforms to the timeframe for, or availability of, merits review of Ministerial decisions on declaration or ACCC decisions on arbitration;
- the scope for parties to lodge repeat applications for declaration or revocation; and
- whether arbitration proceedings and determinations should cease if declaration is revoked.

### National Access Regime

Part IIIA of the *Competition and Consumer Act 2010* (Cth) (the CCA) establishes the NAR to facilitate third party access to services provided by means of infrastructure facilities which meet certain legislative criteria.

Among other things, the NAR enables:

- the designated Minister to 'declare' infrastructure services, and to revoke declarations, following a recommendation by the National Competition Council (NCC), (Division 2);
- access by infrastructure users to declared services (Division 3);
  - if a service is declared and an infrastructure user is unable to agree terms of access with the infrastructure owner/operator, they can request that the Australian Competition and Consumer Commission (ACCC) arbitrate the dispute.

Declaration and arbitration decisions, and decisions not to revoke declaration, may be subject to merits review by the Australian Competition Tribunal (Tribunal). A party may also seek judicial review by the Federal Court of decisions made under the NAR.

Designated Ministers must make decisions on recommendations of the NCC within 60 days of receipt or else they are deemed to have decided in accordance with the NCC's recommendation.

The NCC, ACCC and Tribunal are generally required to make decisions or recommendations within a specified period, generally 180 days, unless extended by 'clockstoppers'. If the NCC or Tribunal are unable to make a decision within the relevant period, they are able extend the period by notice to the Minister, and must publish notice of having done so. If the ACCC does not make an arbitration determination within the relevant period, it is deemed to have preserved the status quo between the parties.

# Consultation Objectives

Consultation with interested parties will assist the Government to:

- determine whether the length of time processes under the NAR can take is appropriate and consistent with the NAR's efficiency objective, and
- identify potential reform options for improving the timeliness of declaration and arbitration processes under Divisions 2 and 3 of the NAR.

This examination is limited to NAR processes and does not extend to the substance of how decisions are taken under the NAR, including:

- the declaration criteria in section 44CA, which were reformed in 2017 to ensure they were consistent with the intent of the NAR; and
- the factors and principles underpinning how arbitration determinations are made.

The examination only extends to Divisions 1 (Definitions) and 8 (Miscellaneous) of Part IIIA of the CCA to the extent they are relevant to Divisions 2 and 3. It does not extend to Divisions 2AA, 2A, 2B, 2C, 4, 5, 6, 6A, 6B and 7.

# Timeliness of declaration processes

An examination of past declaration processes indicates that declaration applications can take a number of years to be resolved.

Parties have tended to seek review of the Minister's decision (or deemed decision) on declaration in the Tribunal. It has frequently been the case that a party will then seek judicial review of the Tribunal's decision by the Federal Court of Australia (Federal Court).

Some examples are discussed below.

## Pilbara Railway Decisions

The Pilbara Railways applications are an example of lengthy declaration proceedings. Between June 2004 and January 2008, parties applied for declaration of services provided by means of four railways located in the Pilbara region of Western Australia, in order to facilitate the export of iron ore:

- The Mt Newman Railway application commenced in June 2004 and was finalised in June 2010, around six years later.
- The Goldsworthy Railway application commenced in November 2007 and was finalised in June 2010, over 2.5 years later.
- The Hamersley and Robe Railway applications commenced in November 2007 and January 2008 respectively, and were finalised in February 2013, over 5 years later.

In each case, the Minister's decision or deemed decision was the subject of an application to the Tribunal for review. In respect of some of the railways, findings of the NCC and decisions of the Tribunal, were also challenged in the courts. In the case of the Mt Newman and Goldsworthy railways, the Minister's decision (or deemed decision, in the case of Mt Newman railway) was ultimately affirmed by the Tribunal, while the Minister's decisions in the case of Hamersley and Robe railways were ultimately set aside by the Tribunal following High Court appeals.

### Sydney Airport

The October 2002 application by Virgin Blue Airlines Pty Ltd (Virgin) for declaration of airside services at Sydney Airport[1] took almost 4.5 years to resolve, involving review by the Tribunal, an application to the Federal Court for judicial review of the Tribunal's decision, and an application for special leave to appeal to the High Court of Australia (High Court). While the Tribunal decided in December 2005 to set aside the Minister's decision and declare the services for 5 years, declaration was not finally resolved until March 2007, when the High Court dismissed Sydney Airport Corporation Limited's application for special leave to appeal the Federal Court's decision in the matter.

### Port of Newcastle

Whether services at the Port of Newcastle should be declared has been the subject of recommendations by the NCC to the designated Minister three times in recent years.

In May 2015, Glencore Coal Pty Ltd (Glencore) applied to the NCC for declaration of certain services provided by Port of Newcastle Operations Pty Ltd (PNO). In January 2016, the then Acting Treasurer, the Hon. Mathias Cormann, decided not to declare the service. In May 2016 the Tribunal decided that the service should be declared. PNO applied to the Federal Court for judicial review of the Tribunal's decision, and subsequently sought special leave to appeal the Federal Court's decision not to set aside the Tribunal's decision in the High Court. That application was dismissed in March 2018, almost 3 years after Glencore's declaration application.

Following 2017 reforms to the declaration criteria which sought to clarify the intent of the regime, PNO applied in July 2018 to the NCC for a recommendation that the declaration be revoked. The Minister was deemed to have decided to revoke the declaration, in accordance with the NCC's recommendation, in September 2019.

Subsequently in July 2020, New South Wales Minerals Council applied for declaration of certain shipping channel services at the Port of Newcastle. The NCC recommended in December 2020 that the Treasurer not declare the services. The Treasurer announced his decision not to declare those services in February 2021.

## Potential reforms

### Merits review

Under the NAR, merits review enables parties to seek review of the substance of declaration and arbitration decisions with which they disagree. This imposes a discipline on original decision-makers to ensure their decisions are reasonable, and based on sound economic principles and an accurate understanding of the relevant facts.

However, under the NAR, parties have historically displayed a strong desire to take matters to the courts, that is, the existence of merits review has typically not provided a resolution of matters.

Given this, a question arises as to whether, on balance, merits review is warranted. Removing merits review would eliminate a six-month step in the process and also result in decisions that are overturned by a court on judicial review grounds being returned to the original decision maker rather than the Tribunal, which may be more appropriate.

Alternatively, the timeframe for merits review could be shortened.

[1] Virgin initially applied for declaration of both airside services and domestic terminal services at Sydney Airport, but subsequently withdrew its application in respect of domestic terminal services after reaching agreement with Sydney Airport Corporation Limited.

Interested parties' views are sought on the following options:

Option 1: Remove the ability for parties to seek merits review of the Minister's decision on declaration by the Australian Competition Tribunal.

Option 2: Remove the ability for parties to seek merits review of ACCC arbitration determinations by the Australian Competition Tribunal.

Option 3: Impose shorter time limits on merits review processes for declaration and arbitration decisions.

## Repeat applications for declaration

The NAR permits infrastructure users to initiate a new declaration process for infrastructure that has previously been subject to a decision to refuse declaration or where a declaration has been revoked, where there has been no change in the facts or law. An issue arises as to whether this unnecessarily contributes to the length of NAR processes in relation to the same infrastructure.

Limiting the ability to bring new applications in these circumstances would increase certainty for infrastructure owners/operators that they would not be subjected to the cost and time of engaging with potentially unnecessary regulatory processes.

It would also require the introduction of a new test to the declaration process, potentially to be applied by the NCC upon receiving an application.

One option would be to allow declaration applications where there has been a previous decision in respect of the infrastructure in question only where there has been a material change in circumstances since that previous decision. Another option would be that a period of time could be specified – for example, ten years – before a further application could be made with respect to that infrastructure facility.

Both options have potential advantages and disadvantages. A test such as a material change of circumstances would itself be general in nature and therefore potentially prone to result in litigation about whether it has been satisfied or not. Preventing applications for declaration for a specified period of time may mean that an application for declaration could not be considered before that period expired, notwithstanding that there had been a material change of circumstances with the potential to change whether the declaration criteria would be satisfied.

Requests for revocation of declaration may also commence without a material change in circumstances. Similar issues arise to those outlined above for declaration applications – for example, infrastructure users may be subject to the time, cost and uncertainty of potentially unnecessary regulatory processes.

Interested parties' views are sought on the following options:

Option 4: Limit new applications for declaration for infrastructure for which declaration has previously been refused, or where a declaration has been revoked, unless there has been a material change of circumstances, or a specified period of time has passed.

Option 5: Limit requests for revocation to where there has been a material change of circumstances since the decision to declare the services, or a specified period of time has passed.

## Arbitration when service is no longer declared

Currently if a declaration is revoked, any arbitration process that has begun, or arbitration determination that has been made, prior to the revocation will continue (section 44I(4) of the CCA).

It is arguably inappropriate for infrastructure to be subject to an arbitration determination under the NAR after the infrastructure has been found to no longer meet the declaration criteria set out in the regime. This concern is exacerbated by the potential for this situation to extend for several years.

On the other hand, establishing a process under which an arbitration decision would terminate upon revocation of the declaration could create uncertainty for infrastructure users. This is because whether and when a revocation decision might be made in the future would be unknown at the time of declaration. This risk of revocation may reduce investment incentives for infrastructure users, to the extent that those incentives rely on an arbitration determination. This risk may be reduced somewhat if revocation processes could only be commenced after a material change in circumstances or a specified period of time had passed.

Interested parties' views are sought on the following option:

Option 6: Provide for arbitration proceedings and arbitration determinations under the NAR to terminate if the declaration of the relevant infrastructure service is revoked.

# Attachment A – Declaration process

## Outline of the declaration process