

# Chapter 4

## Services Ineligible to be Declared

### Schedule 2

4.1 The bill proposes amendments to the TPA to allow new infrastructure facilities to be classed as ineligible to be declared for a period of at least twenty years.

4.2 The designated Minister would be able to provide a ruling, and would receive advice from the National Competition Council regarding the decision. The minister's decision is subject to merit review by the Tribunal and can be revisited if there is a material change in arrangements.

4.3 This proposal came from the 2001 review by the Productivity Commission, *Review of the National Access Regime*, which recommended that the designated Minister determine that a facility would not meet the criteria, and then be given exemption from declaration.

4.4 This would be similar to the 'no-coverage rulings' available for new gas pipelines under the *National Gas Law*. The NCC, in its submission, stated that the consistency between the existing 'no-coverage rulings' legislation and that proposed in the amendment would also work to promote regulatory certainty.<sup>1</sup>

### *Purpose*

4.5 The amendment is intended to provide greater regulatory certainty, clarity and transparency by stating whether a new service could be declared or not, and so stimulate potential investment.<sup>2</sup>

4.6 The NCC agrees that the amendment regarding ineligibility:

...will provide certainty to infrastructure investors that is not currently available... the Council considers that the introduction of these new provisions may increase certainty for investors and/or providers.<sup>3</sup>

4.7 The application for an ineligible service declaration may be made by 'any person with a material interest in a service to be provided by a proposed facility' and the Commonwealth, states or territories may apply for the decision for services they provide.<sup>4</sup> 'New facilities' subject to this amendment include extensions to existing facilities.

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1 National Competition Council, *Submission 5*, p. 19.

2 Explanatory Memorandum, p. 35.

3 National Competition Council, *Submission 5*, p. 18.

4 Explanatory Memorandum, p. 37.

### ***National Competition Council Recommendation***

4.8 Any person with a material interest in a service being declared ineligible must apply in writing to the NCC for a recommendation to go to the designated Minister.

4.9 The service must be found by the NCC not to satisfy at least one of the criteria in section 44G of the TPA (listed in Table 1, paragraph 2.6 above).

4.10 The NCC may request information in order to make their recommendation. The NCC, in its submission, opposed the amendment relating to the request for information, although conceded information may sometimes not be provided in a timely fashion:

The Council's view at this time is that a power to compel provision of information is unnecessary and would complicate the declaration process...In failing to provide information requested by the Council, a service provided can frustrate consideration of a declaration application. While the Council's experience to date has been that information requested is generally provided, sometimes the timeliness of the provision of information has been unsatisfactory.<sup>5</sup>

4.11 The expected period for the recommendation is 180 days, and is subject to clock-stoppers.

### ***Decision by the designated Minister***

4.12 The Minister must make a decision within 60 days of receiving the recommendation by the NCC. If the decision is not made, is it deemed to have been in accordance with the NCC recommendation.

### ***Review by the Tribunal***

4.13 The Tribunal may review any decision by the designated Minister if a person with a material interest in the case makes an application for this within 21 days of the published decision.

### **Committee view**

4.14 Stronger time limits are needed for the decision-making process in relation to the NCC recommendation. Requests for further information should not slow down the process, nor should time limits impinge on the complexity of the case. A balance is required in order to make the correct decision in a timely manner after considering the relevant information.

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5 National Competition Council, *Submission 5*, p. 14.