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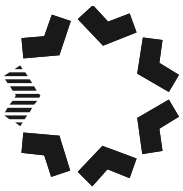

The National Access Regime

Submission to Productivity Commission inquiry

8 February 2013

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1 Introduction

1.1 This is the National Competition Council's (**Council**) submission in response to the Issues Paper released by the Productivity Commission (**Commission**) as part of its inquiry into the National Access Regime in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and clause 6 of the Competition Principles Agreement (**CPA**),[1] and the operation and terms of the Competition and Infrastructure Reform Agreement.

1.2 This submission considers both the policy issues that arise in relation to the National Access Regime (and on which the Commission's Issues Paper generally focuses) and a range of interpretative and operational issues that have arisen. The Council considers that the certainty and effectiveness of the regime would be enhanced if these interpretational and operational issues are addressed.

[1] *Competition Principles Agreement* made on 11 April 1995 (as amended 13 April 2007) between the Commonwealth, New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory.

2 Background to Part IIIA

2.1 The National Access Regime embodied in Part IIIA of the CCA is a legislative scheme providing a range of pathways to gaining access to the services of monopoly infrastructure implemented as part of Australia's response to the recommendations of the Hilmer Committee (1993) (see 2.11 below). Within the regime, the pathways to access are:

- declaration (CCA, Part IIIA, Division 2),
- access undertakings or access codes (Division 6),
- state or territory access regimes (Division 2A) and
- competitive tendering for government owned facilities (Division 2B).[2]

2.2 These four pathways are complementary mechanisms that together make up the National Access Regime.

2.3 The declaration, undertaking/access codes and competitive tendering pathways have Australia wide application and engage the same regulator and regulatory rules. Although there is scope for state and territory specific access regimes to be certified (and thus supplant national regulation) such regimes must reflect the same underlying principles as the rest of the National Access Regime. The National Access Regime thus provides a basis for broadly consistent national treatment of access issues, avoiding distorting investment incentives and providing a similar regulatory experience irrespective of jurisdiction.

2.4 In the case of declaration, the weighing of the public interest is exercised through the application of the declaration criteria in ss 44G(2) and 44H(4) by the Council and the designated Minister respectively. The satisfaction of criteria (a), (b) and (c) requires that access (or increased access) to a service provided by means of a nationally significant facility that cannot be economically duplicated promotes a material increase in competition in a dependent market. Unless of the view that the costs of regulation of a service and externalities resulting from access are such that access would be contrary to the public interest (considered under criterion (f)), the Council should recommend and the Minister should decide to declare the service. If, however, any of the declaration criteria are not satisfied the Council may not recommend a service be declared and the Minister cannot decide to declare a service.

2.5 The declaration pathway involves a two stage process under which a service may be declared by the designated Minister on the advice of the Council. Once a service is declared, access seekers and the provider of the declared service may negotiate arrangements for access but where they are unable to agree on the terms and conditions for access, one of these parties can take an access dispute to the Australian Competition and Consumer Commission (**ACCC**) for arbitration.

[2] To the Council's knowledge the competitive tendering pathway has never been used.

2.6 The decision making structure for the declaration of services, involving an independent advisory body and a Ministerial decision maker reflects the approach advocated by the Hilmer Committee that decisions about the creation of access rights, which rest on evaluation of important public interest considerations, should be made by a Minister exercising a discretion limited by explicit legislative criteria and acting on advice by an independent expert body (Hilmer Committee 1993, p 250). The High Court recently reiterated the essentially 'political' nature of the decision to declare a service (see *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 (***Pilbara Appeal decision***) at [42] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); and at [135] (Heydon J)).

2.7 There are some differences from the Hilmer Committee's recommended approach (see, for example: *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 (***Re Fortescue***),[567], *Pilbara Appeal decision at* [93] and [94]). However the third party access regime implemented in Part IIIA of what is now the CCA reflects to a substantial degree the Hilmer Committee recommendations and the Hilmer Committee's report remains a key source of insight into the purpose and intended operation of Part IIIA.

2.8 The objectives of Part IIIA were made explicit in the CCA in 2006 following a recommendation made by the Commission in its 2001 inquiry report on the Review of the National Access Regime (**2001 Review Report**) that an objects clause be inserted into Part IIIA. That clause, s 44AA, provides:

> The objects of this Part are to:
>
> (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
>
> (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

2.9 By incorporating this affirmation that the National Access Regime is directed toward promoting efficiency, encouraging appropriate investment and fostering effective competition, Part IIIA explicitly reflects the balance that the Hilmer Committee identified should be struck between, on the one hand, property rights, freedom of contract and investment incentives and, on the other hand, the promotion of competition in markets upstream or downstream of bottleneck infrastructure. This same balancing is incorporated in other elements of the National Access Regime in references to the long term interests of consumers. The differences in terminology are unimportant.

2.10 The value of an objects clause is to assist in interpreting other provisions in an act, particularly where ambiguity arises. Provisions of a statute are to be construed in light of the objects of the statute.[3] Objects clauses do not however override or

[3] See Pilbara Appeal Decision at [97].

change other provisions of a statute that are clear on their face and cannot impose requirements that are not reflected in relevant criteria or other operative clauses.

Response to the Hilmer Committee: the National Access Regime and the National Competition Policy

2.11 The National Access Regime was implemented as part of the broader National Competition Policy (**NCP)** following the report of the Hilmer Committee, which Australia's governments had established to advise on a national competition policy for Australia.[4] The Hilmer Committee made wide ranging recommendations aimed at improving Australia's competitiveness and productivity, including the establishment of a regime that provides a legislated right of access to certain 'essential facilities' that cannot be duplicated on fair and reasonable terms, where access is necessary to introduce competition. While accepting this would affect the prerogatives of infrastructure owners, the committee considered such a regime would be in the public interest in certain cases. In this regard the Hilmer Committee stated:

> The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. … Nevertheless there are some industries where there is a strong public interest in ensuring that effective competition can take place, without the need to establish any anti-competitive intent on the part of the owner for the purposes of the general conduct rules. … Where such a clear public interest exists, but not otherwise, the establishment of a legislated right of access, coupled with other provisions to ensure that efficient competitive activity can occur with minimal uncertainty and delay arising from concern over access issues (Hilmer Committee 1993, p 248).

2.12 The NCP encompassed the:

- implementation of the Competition Code to extend the anticompetitive conduct provisions in Part IV of the CCA to unincorporated persons
- consideration by governments of issues associated with government business enterprises including the establishment of independent sources of price oversight
- introduction of arrangements to ensure competitive neutrality between significant government and private businesses
- removal of regulatory functions from government businesses and review of the merits of separating monopoly elements before privatisation of public monopolies or introducing competition
- review of all existing legislation that restricts competition to remove restrictions unless it could be demonstrated that the benefits of the

[4] The NCP ran from 1995-2005. Many elements of the NCP are ongoing and are reflected in the succeeding National Reform Agenda.

restriction to the community outweigh the costs and that the objectives of the legislation can only be achieved by restricting competition

- assurance (based on evidence) that any restrictions on competition in new legislation are necessary to achieve the objectives of the legislation and achieve a net benefit to the community
- implementation of a national regime to facilitate third party access, on reasonable terms and conditions, to the services of essential infrastructure with natural monopoly characteristics
- application of structural, governance, regulatory and pricing reforms to promote competition in electricity generation and retailing
- removal of legislative and regulatory barriers to the free trade of gas within and across state and territory boundaries and the provision of third party access to pipelines, and
- establishment of an efficient and sustainable water industry and the introduction of measures to arrest natural resource degradation arising from water use[5] (see NCC 2005, pp ix–xvi).

2.13 The NCP reforms are multifaceted and in many cases interrelated. For example policies relating to structural reform and the separation of monopoly and competitive activities into separate businesses reduce the need for access regulation in some sectors.

[5] COAG agreed to a strategic water reform framework in 1994 and incorporated this into the 1995 NCP agreements.

3 Performance of the National Access Regime

Activity under the National Access Regime

Declaration

3.1 There have been Ministerial declaration decisions in relation to 34 services (see Appendix 1 to the Council's 1 November 2012 submission to this inquiry). The current declarations are:

- the Tasmanian rail network; declared until 2017
- the Goldsworthy railway; declared until 2028
- the Hamersley railway; declared until 2028, and
- the Robe railway; declared until 2028.[6]

3.2 There have been no applications for ineligibility recommendations.

Certification

3.3 There have been 24 certification applications resulting in 20 decisions. The Council has only twice recommended against certification of a state access regime: the August 1998 application in relation to the Queensland Third Party Access Regime for Natural Gas Pipelines and the May 2010 application in relation to the Western Australian Rail Access Regime. In relation to the Queensland Gas Access Regime the Council was concerned at the extensive derogations from the national approach to gas pipeline regulation that the Queensland Government had made. In the case of the Western Australian Rail Access Regime the Council considered that the number of different access regimes applying to the various railway systems within Western Australia was inconsistent with the objects of Part IIIA. The designated Minister did not certify the Queensland gas access regime but did certify the Western Australian rail access regime. The Minister did not consider that it was open to refuse certification of the rail access regime for the reason the Council expressed. In all other cases the designated Minister certified the regime in accord with the Council's recommendation.

Access undertakings

3.4 The ACCC website lists 31 access undertakings made under s 44ZZA of the CCA. All but the six undertakings listed in table 1 have expired.

[6] The declarations of the Hamersley and Robe railways are subject to review by the Tribunal following remittal by the High Court in the *Pilbara Appeal decision*. The effect of these declarations is stayed pending completion of these reviews.

Table 1: Current s 44ZZA undertakings

Provider	Service	Term	Comments
Australian Rail Track Corporation Limited	Hunter Valley coal rail network	2011-16	Given to satisfy requirement in lease agreement between ARTC and the NSW Government
Australian Rail Track Corporation Limited	Interstate rail network	2008-18	Given voluntarily 'in pursuance of [ARTC's] charter objectives' (varied 2012)
Australian Bulk Alliance Pty Ltd	Port Terminal Services (Vic)	2011-13	Given to satisfy 'interim' requirements for accreditation of wheat exporters in ss 13 and 24 of the *Wheat Export Marketing Act 2008*
Co-Operative Bulk Handling Limited	Port Terminal Services (WA)	2011-14	As above
Grain Corp Operations Limited	Port Terminal Services (certain ports in Qld, NSW, Vic)	2011-14	As above
Viterra Operations Limited	Port Terminal Services(SA)	2011-14	As above (varied 2012)

Recourse to Part IIIA and effects on investment

3.5 The number of applications made or the number that result in declaration (or the number of undertakings accepted by the ACCC) is a very limited indicator of the effectiveness of Part IIIA. From the outset it was acknowledged that declaration might apply in only a 'limited category of cases' (Hilmer Committee 1993, p xxxii). The potential for declaration under Part IIIA operates as a disincentive for service providers to refuse access and an incentive for parties to agree on terms of access through commercial negotiation. It is difficult to quantify these effects but the Council believes that the potential for declaration remains a significant incentive for commercial parties to arrive at access terms and conditions without direct regulatory intervention. It may be that the delays evident in relation to the Pilbara Rail applications have blunted this incentive to some degree. However, demonstration that the delay which occurred in the Pilbara Rail matters has been addressed, and other changes suggested in this submission, if adopted, will in time sharpen the incentive. These matters were discussed in detail in the Council's preliminary submission (1 November 2012) and are considered again later in this submission.

3.6 The obverse of the disincentive for service providers to refuse access is the potential disincentive for investment in infrastructure.

3.7 In the Pilbara Rail matters extensive claims were made to the effect that investment would be curtailed by declaration of the relevant services. Except for the possibility that a requirement to negotiate with access seekers when expanding a facility that provided a declared service might give rise to some delay in investment, none of these claims was accepted by any of the Council, Minister, Tribunal or Courts.

3.8 The Council cautions against placing too much weight on arguments that access regulation or the prospect of such regulation discourages efficient investment and consequently threatens benefits from investment that might flow to Australia. Despite such concerns being raised, the Council is not aware of any evidence that

bears directly on this issue. Further, the CCA has been amended to provide for additional certainty for developers of new facilities by making available ineligibility determinations in relation to greenfield infrastructure investments.

3.9 For its part, in considering applications for declaration, the Council is concerned to apply the declaration criteria to avoid overreach and to do so in a timely and consistent manner so as to reduce any effects that delay or uncertainty might have on investment. Further, Part IIIA ensures that an access arrangement or arbitration will provide an infrastructure owner with a risk-adjusted commercial return on its investment, will protect the owner's legitimate interests and will prioritise its reasonably anticipated use of the infrastructure. Rather than deterring efficient investment, the Council considers that the consistent application of the declaration criteria and the making of declaration recommendations and decisions within the new statutory timeframes provide investors with a degree of certainty of the circumstances in which a service will be subject to the National Access Regime.

Timeliness of decisions under Part IIIA

3.10 Under the current statutory timetable, an application for declaration should be determined within eight months (180 days for the Council's recommendation[7] and 60 days for the Minister's decision). Any review proceeding should not extend this period by more than six months except in exceptional circumstances.

3.11 The Council considers that this time frame is commercially realistic, bearing in mind the lifespan of nationally significant infrastructure and the scale of investment involved for both access seekers and service providers. The declaration process—at least under the current statutory timelines[8]—should not be assumed to be a cause of substantial delay for nationally significant projects that may raise access issues. Such projects generally involve very substantial investment and have long lead times within which an access seeker is likely to be simultaneously addressing other issues such as financing, procurement, licensing and environmental approval.

3.12 As access decisions have significant implications not only for interested parties but also for the broader economy and raise issues of considerable economic and legal complexity, it would be counterproductive to further reduce the statutory timelines. The Council considers that there is no basis for proposals to bypass the declaration process for reasons of expedience by subjecting services to access regulation on an ad hoc basis—without consideration of the relevant declaration criteria in the context

[7] This period may be extended by the Council "stopping the clock" in some circumstances, such as when additional information is sought from an applicant.

[8] The only declaration matter considered under the new timeline concerned two applications made on 27 September 2011 by the Board of Airline Representatives of Australia Inc for the declaration of services provided by jet fuel supply infrastructure at Sydney airport. The Council's recommendation was made within the 180 day timeframe and the designated Minister made his decision within 60 days of receiving the recommendation. No interested party sought review of the Minister's decision by the Tribunal.

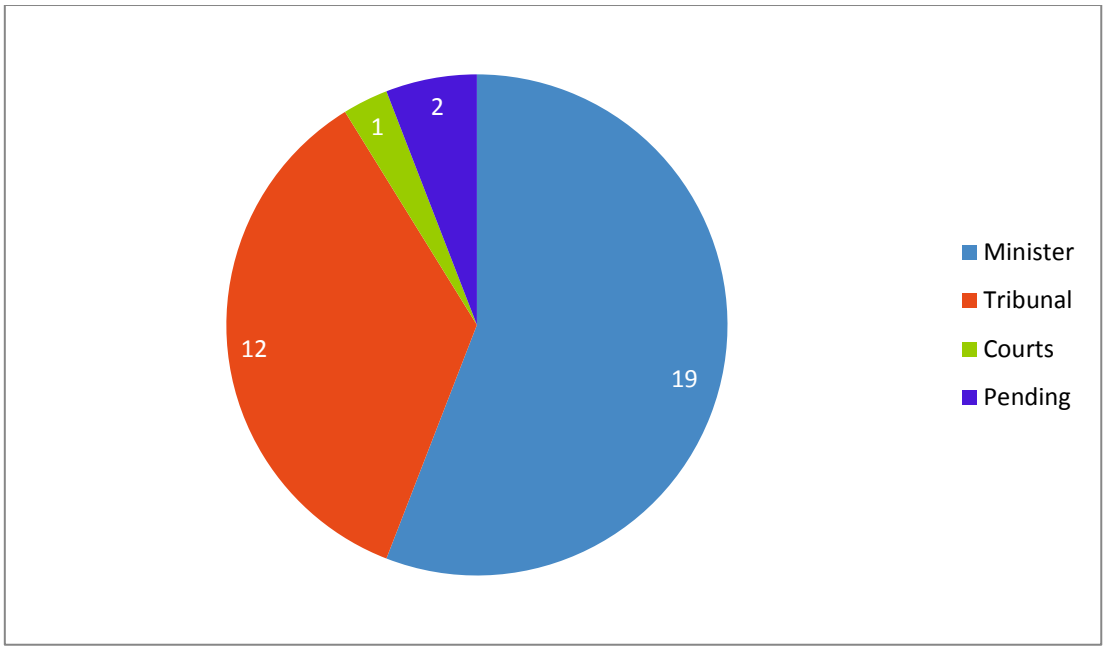
of a transparent and independent process. Indeed, such bypass would likely increase the uncertainty faced by investors as there would not be a clear and transparent declaration process. This could have the effect of discouraging investment.

3.13 The timeline for the making of certification recommendations and decisions is similar to that for declaration. The Council must make its certification recommendation to the Commonwealth Minister within 180 days of receiving the application. The Commonwealth Minister must decide whether or not the regime is an effective access regime and if so, the certification period. The Minister is required to publish his or her reasons for the decision within 60 days of receiving the Council's recommendation. Unlike deemed declaration decisions (which are always decisions not to declare), if he or she has not published a decision within the 60-day period, the Minister is taken to have made a decision in accord with the recommendation of the Council and to have published that decision.

Reviews of Part IIIA Ministerial decisions

3.14 There have been no applications for the review of certification decisions and reviews of declaration decisions have been sought in fewer than half of the cases considered. In the majority of cases (most notably those decisions where declaration did not result), the decision of the Minister stands without having been reviewed. Figure 1 below shows the number of final decisions made by each body in respect of the 34 services subject to declaration decisions.

Figure 1: Final declaration decision makers (by number of services)



Source: NCC

3.15 The Tribunal has reviewed decisions in relation to 15 services: fewer than half of the 34 ministerial declaration decisions (including 10 deemed decisions).[9] (Applications for review in respect of seven services were withdrawn.) In respect of 10 services the Ministerial decision was varied or set aside and in respect of the other five the decision was affirmed.[10] The Tribunal's merits review decisions have been judicially reviewed by the Full Federal Court on two occasions, in relation to three services:

- In *Sydney Airport Corporation Ltd v Australian Competition Tribunal* [2006] FCAFC 146 (***Sydney Airport No 2***), the Full Federal Court upheld the Tribunal's decision to declare the airside services at Sydney airport.
- In *Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* [2011] FCAFC 58 (***Pilbara Full Court decision***), the Full Federal Court overturned the Tribunal's declaration of the Robe railway and upheld the Tribunal's decision not to declare the Hamersley railway.

3.16 The *Pilbara Full Court decision* was appealed to the High Court (*Pilbara Appeal decision*), which set aside the orders of the Full Court, quashed the decision of the Tribunal and remitted the Hamersley and Robe matters back to the Tribunal for determination according to law. The Tribunal is in the process of reconsidering these matters following the High Court's remittal.

3.17 In addition, the threshold jurisdictional question of whether the use of a railway facility owned and operated by a vertically integrated mining company was the use of a production process (and therefore not subject to Part IIIA) has been litigated twice (see *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2006] FCA 1764, *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2007] FCAFC 157, and *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45). In these decisions the Federal Court, Full Federal Court and the High Court held that use of such a railway was not the use of a production process and the services provided by the railway were amenable to declaration (if the declaration criteria were met). These decisions overturned a contrary previous Federal Court decision (see *Hamersley Iron Pty Ltd v National Competition Council* [1999] FCA 867). The Council considers that the most recent cases have satisfactorily settled the application of the production process exception.

3.18 Despite the relative scarcity of reviews of declaration decisions, the perception persists that 'the tools [in Part IIIA] are not working and there is a need to streamline

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9 The Council has considered 39 applications under the National Gas Law (and its predecessor) relating to coverage, light regulation or classification of gas pipelines. Of these, the decision to cover the Longford to Sydney gas pipeline under the Gas Pipelines Access Law is the only one to have been reviewed by the Tribunal. The Tribunal determined that the pipeline not be covered (see *Re Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2).

10 The decision of the Tribunal in *Re Virgin Blue Pty Limited* [2005] ACompT 5 is treated for present purposes as an affirmation of the Ministerial decision. In that case, the Minister had decided to declare airside services at Sydney International Airport for five years until 31 July 2001 and the Tribunal declared the services for five years from 1 March 2000.

the approach' (Sims 2011, p 4) and that 'the threat of declaration [as a constraint on] market power is limited by the considerable costs, time and uncertainty associated with seeking declaration' (ACCC 2011, p 20).[11] This is, in the Council's view, attributable to the exceptional and high-profile examples of the Pilbara Rail matters and to a lesser degree the Virgin Blue/Sydney Airport matter. However, as the Council has shown at paragraphs 3.14-3.15 above, these are the only instances of review beyond merits review by the Tribunal and only in respect of the Pilbara Rail matters have parties pursued additional litigation. Further, the National Access Regime was significantly 'streamlined' in 2010 by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (**Amendment Act**). It cannot be deduced from the delays experienced in matters that commenced in 2002 (Virgin Blue/Sydney Airport) and in 2004-2008 (Fortescue/Pilbara railways) that outcomes under the National Access Regime since commencement of the Amendment Act are or will be uncertain or untimely.

Is there still a need for Part IIIA?

3.19 In its 2001 Review Report, the Commission said that 'the option of no access regulation cannot be dismissed completely' (at p 93). For the Commission, this was so, given:

- the uncertainty in identifying the extent and significance of problems of monopoly power
- the limited evidence of significant costs that can be unequivocally attributed to access regulation, and
- the dependence of the benefit-cost trade-off of access regulation on the purview of the access regime and its detailed requirements and the competence and behaviour of the regulators and parties to access disputes.

3.20 The Commission ultimately found that abandoning access regulation at that time would have been inappropriate (PC 2001, Finding 4.1, p 94). The Commission in its Issues Paper to this inquiry notes that circumstances have changed since it last reported in 2001 (PC 2012, pp 4–5). It observes that there is greater coverage of infrastructure facilities by industry-specific regimes (in some cases following sale of public facilities to the private sector), specifically the (co-operative) state and territory gas and electricity regimes and the regimes in some states for rail, urban water and ports and the Commonwealth telecommunications and postal services regimes.

3.21 The Council accepts that circumstances have changed since 2001 (and even more so since 1993). However, the underlying issues remain. First, it is no easier for an

[11] The ACCC quoted the Tribunal from *Re Fortescue* that there may be as many as 9 steps in the Part IIIA declaration process, meaning a complex case would take at least 4-5 years. The ACCC then gave the example of the Virgin Blue/Sydney Airport matter, which took 5 years to proceed from application to the rejection of the application for special leave to appeal to the High Court.

applicant relying on s 46 of the CCA to satisfy a court that a refusal to provide access was for a prescribed purpose (and constituted a misuse of market power) and, even if a claim were to succeed, the courts would still face considerable difficulty in fashioning a suitable remedy. In the Council's view s 46 cannot provide an effective alternative to the National Access Regime. Second, some services are provided by facilities that have natural monopoly characteristics, where developing alternative facilities would be wasteful,[12] and for which access is essential for competition in dependent markets. The scope for gaining access to services provided by such facilities under Part IIIA is more limited than was the case when the Hilmer Committee conducted its review, and there are regulatory costs. However, given the limited scope of the regime and the safeguard provisions[13] it is no more the case today than in 2001 that the nature and significance of these costs exceed the benefits of enhanced competition in dependent markets and the avoidance of the costs of inefficient or unnecessary duplication of infrastructure.

3.22 In the absence of an access regime, and where successful claims under s 46 of the CCA remain elusive, remedying the 'essential facilities problem' would fall back on ad hoc responses such as deemed declarations, industry-specific regimes and mandatory undertakings. As the Council has previously stated to the Commission in the context of aeronautical services, if a service would not satisfy the declaration criteria, then it is hard to see how imposing regulation by other means 'would not amount to the promotion of particular interests rather than the promotion of effective competition.' (NCC 2011, p 16.)

12 While the High Court's interpretation of criterion (b) has shifted the scope of declaration from facilities with natural monopoly characteristics, the Council considers this to be wrong as a matter of good economics and policy. See the discussion in Part 4 of this submission and in the Council's earlier preliminary submission.

13 Sections 44V(2), 44V(3), 44W(1), 44X(1) and 44ZZCA(1).

4 Improving access regulation

High Court's construction of criterion (b)

4.1 The Council set out its concerns at the effect of the High Court's *Pilbara Appeal decision* in its preliminary submission to the Commission's inquiry. As the Council noted the High Court (and the Full Federal Court before it) overturned over a decade's established jurisprudence where satisfaction of criterion (b) was considered by identifying the presence of natural monopoly characteristics in the supply of the service for which declaration was applied. Such natural monopoly characteristics made it uneconomic from the perspective of the Australian economy for the facility providing the service to be duplicated. The High Court has now determined the proper legal construction of the words of criterion (b) requires a test of economic feasibility (profitability), such that:

> If the Minister is satisfied that it would be uneconomical (in the sense of not profitable) for anyone to develop an alternative facility, criterion (b) is met. (at [107])

4.2 The High Court's construction is binding not only in respect of declaration, but also to any revocation of a declaration, ineligible service determinations, applications for certification, existing certified access regimes that contain a threshold criteria similar to criterion (b) and in the National Gas Law (**NGL**) for coverage, revocation and greenfield pipeline exemptions.

4.3 The Council addressed the consequences of the High Court's construction of criterion (b) in some detail in its preliminary submission to the Commission's inquiry. There is some degree of overlap between facilities that will be commercially unprofitable for anyone to duplicate and those facilities the duplication of which would impose unnecessary costs on the Australian economy because underlying natural monopoly characteristics mean that demand for services from such facilities can be met at least cost by one facility. However, a commercial profitability approach to criterion (b) and an approach which seeks to avoid duplication of facilities with natural monopoly characteristics due to the cost to the economy are fundamentally different. Unlike the presence of natural monopoly characteristics, the profitability or otherwise of an investment is not reflective of any market failure that might potentially give rise to a need for regulatory intervention.

4.4 As the High Court and Full Federal Court acknowledge the unprofitable construction may lead to wasteful duplication of infrastructure facilities when an existing facility (perhaps with some expansion) could have met total demand, whereas avoiding such waste is central to a natural monopoly approach to criterion (b).

4.5 As well as the interpretation of the text of criterion (b), the Council believes that the High Court (and the Full Federal Court) were drawn towards the unprofitable construction of criterion (b) because the courts considered that such an approach involves fewer hypothetical issues and is more straightforward to apply. The courts

also appear to have viewed a natural monopoly approach to this criterion as somehow excluding dynamic efficiency considerations. In the Council's view, neither of these contentions is correct.

4.6 At its core a natural monopoly approach to criterion (b) requires an estimation of the likely demand for the services for which declaration is sought and estimates of the capital and operating costs of supplying this from one facility (expanded if necessary) compared to that demand being met from multiple facilities. Examination of criterion (b) under this approach involves no greater reliance on hypotheticals than does estimating the profitability of a new facility (perhaps within a broader project context) with the inevitable forecasting of demand, prices, costs, and estimation of risk and required rates of return to equity and debt. Similarly, unless profitability is to be assessed on a simplistic basis, a profitability approach to criterion (b) is likely to involve significant disputed evidential issues which will make a detailed assessment at least as complicated as any consideration of the presence of natural monopoly characteristics, if not more so. Finally, in the Council's view there is no reason why a natural monopoly framework cannot take account of good information relating to dynamic efficiency considerations. For example, where it can be shown that operating a facility to serve more than one customer will increase operating costs, or slow (or hasten) the adoption of new technology, this can be included in the relevant cost assessments.

4.7 The Council respectfully suggests that the High Court's construction of criterion (b) gives rise to an inappropriate policy outcome and considers the CCA should be amended to remedy the deficiencies resulting from that construction. Amending criterion (b) needs to be undertaken on the basis of a clear articulation of the intent of criterion (b). Ongoing debate on the meaning of words such as "uneconomic" and "anyone" and the discrepancy in language across the CCA and the CPA and NGL (for example) is not constructive.

4.8 While the Council is not expert in legislative drafting, it considers it appropriate to put forward an illustrative suggestion based on its experience and understanding of Part IIIA. In the Council's view an appropriate amendment to criterion (b) would likely involve drafting along the following lines:

> (b) That it would be economically inefficient for another facility to be developed to provide the service because one facility (including an expanded facility) can provide the reasonably foreseeable demand for the service at a lower total cost than two or more facilities.

4.9 In amending criterion (b), ss 44F(4) and 44H(2) need to be considered also.

Timeliness

4.10 The criticism levied upon Part IIIA because of a perceived lack of timeliness in delivering outcomes has been discussed earlier in this submission and attributed in part to a misunderstanding of the protracted and unusual nature of the high profile declaration matters, Virgin Blue/Sydney Airport and Pilbara Rail. These are the only

cases where the Tribunal's determinations have been further appealed. Despite this unique character these matters are misrepresented as typical declaration matters.

4.11 The timing reforms introduced into Part IIIA in 2010 by the Amendment Act are yet to be tested beyond the recommendation and decision making roles of the Council and the designated Minister. As the reforms have not been tested in respect of a re-consideration by the Tribunal it is not possible to comment on their effectiveness. However, the role of the Tribunal and the time it takes to complete a review of a declaration decision is one to be explored in any event and the Council considers this further below in respect of review processes.

Review processes

4.12 In its preliminary submission to this inquiry the Council submitted that merits review of declaration (and similar decisions) is inappropriate given these decisions are akin to policy determinations by Ministers.

4.13 The Council remains of the view that judicial review provides an appropriate level of oversight for such decisions and that merits review, which in effect allows for the judgement of the Tribunal to override that of elected, politically accountable officers acting upon (but not bound by) the advice of an independent expert body, is inappropriate. The political nature of the declaration decision and the breadth of the issues that may be canvassed in the making of such a decision were recognised by the High Court in the *Pilbara Appeal decision*.

4.14 The Tribunal's role and the scope of its powers in re-considering a declaration matter appear no more settled following the High Court's findings in the *Pilbara Appeal decision.* In remitting the declarations of the Hamersley and Robe railways back to the Tribunal for "redetermination according to law", the High Court decision creates uncertainty as to how the Tribunal may exercise its powers in 're-considering' the matters. This has already resulted in a preliminary hearing being conducted before the Tribunal in late December 2012 to determine whether the Tribunal has the power to request information under s 44K(6) to enable it to consider the High Court's private profitability test as that test did not form part of the enquiry of the Minister in making his decisions to declare. And it is those decisions to declare that the Tribunal must now 're-consider'.

4.15 The Council considers that ongoing controversy and uncertainty in relation to the task the Tribunal is empowered/required to undertake on review of a declaration decision and the scope of its powers in doing so is unsatisfactory. In the Council's opinion such controversy in the conduct and availability of merits review reduces the effectiveness of the National Access Regime and adds to concerns about the value and contribution of merits review within the regime.

4.16 In the Council's view, rather than attempting to redraw specific arrangements for review of declaration decisions, it is preferable to rely on judicial review.

4.17 The High Court's criticism of the Tribunal and the reforms of the Amendment Act aside, the Council considers that the operation of the merits review regime has increased uncertainty and extended delays in the declaration process. The Council reported in its 2010-11 Annual Report that confining the review of declaration decisions to judicial review would provide a more streamlined and appropriate mechanism. In the Council's view judicial review ensures that decisions on declaration applications are made fairly and in accord with law without putting the Tribunal in a position where its opinions on a range of public interest and other issues arising in the declaration process potentially override those of a politically accountable ministerial decision maker.

4.18 Further, the Council considers that it is neither necessary nor an efficient use of resources to provide two levels of inquiry and fact-finding in declaration matters. The two-level process provides an opportunity for a 'second bite of the cherry' which is a situation that should not be endorsed having regard to the political, regulatory and public interest importance of declaration decisions.

4.19 The need to constitute a Tribunal, sometimes for a lengthy period, to reconsider matters is also a potential impediment to the timeliness of a review by the Tribunal as the lay members of the Tribunal are not readily at the Tribunal's disposal. As professionals appointed to the Tribunal because of their qualifications and experience their availability is constrained by their professional responsibilities. This can make constituting a Tribunal difficult, particularly when compared to listing a matter before an appointed judge or judges on an application for judicial review.

4.20 It appears to the Council that compared to the availability of judicial review, the role of the Tribunal in reviewing Part IIIA decisions is of little benefit while it significantly adds to the cost, uncertainty and delay of the Part IIIA process.

Bypassing Part IIIA

4.21 One of the cornerstones of the National Access Regime is its general application. The regime applies across Australia and to all sectors of the economy, with few exceptions. Subject to satisfaction of certain legislative declaration criteria, regulated access to services provided by infrastructure facilities is available without the need for industry-specific or ad hoc regulation or the application of political or other pressures.

4.22 In its Annual Report 2010-11, the Council noted calls to bypass declaration by the direct regulation of particular services or by deeming services to be declared, thereby bypassing the application and recommendation processes of the Council and the decision by the Minister. While some of these calls may have been a genuine (albeit misguided) response to the perceived timing difficulties with the declaration process, others appeared to be seeking the imposition (or avoidance) of access regulation in pursuit of private objectives, notwithstanding the result that might have arisen from the application of the statutory declaration criteria.

4.23 In its report the Hilmer Committee noted the importance of the scope of access regulation delimited by statutory criteria and the recommendations of an independent expert body as a means of limiting the pressure on Ministers to declare a facility to advance private interests (Hilmer Committee, at p 250).

4.24 The Council considers bypassing the declaration process will generate instances of ad hoc regulation that may or may not address instances of market failure and competition issues. In such circumstances there can be no assurance that access regulation is being applied to services in circumstances where:

- access will materially promote competition in any market
- regulated services are provided by infrastructure that is both nationally significant and cannot be economically duplicated, and
- access regulation is not contrary to the public interest.

4.25 Furthermore successful efforts to bypass the statutory declaration process undermine the incentive for commercial resolution of access issues.

Form of regulation of declared services

4.26 To date only two applications for arbitration of a dispute over access to a declared service have been commenced. Only one progressed to a determination (ACCC 2008), and in that case the access seeker did not pursue its access request. On this basis it is difficult to judge the adequacy of the arbitration process that may follow from declaration of a service. However, it is possible to envisage circumstances in which the present negotiate-arbitrate process that follows from declaration could be insufficient. Because of the inter-partes nature of the negotiate-arbitrate process, multiple arbitrations may be necessary to resolve access disputes in more complex situations or where there are multiple access seekers. A more prescriptive level of access regulation consequent on declaration, similar to 'full regulation' of covered pipelines under the NGL, may reduce the need for multiple and repetitive access arbitrations and thus reduce regulatory costs.

4.27 The Council suggests that the Commission consider the introduction of a fuller form of regulation consequent on the declaration of a service. In the Council's view such a fuller form of regulation should involve a requirement that a service provider (or providers) have an ex-ante access undertaking approved by the ACCC. This is a similar approach to the requirement for mandatory undertakings, except of course it follows a fully considered declaration process. As is the case in relation to the NGL, the Council considers that it should be responsible for determining the form of regulation to be imposed consequent on declaration and that the current negotiate-arbitrate process should be retained as the 'default' option unless relevant form of regulation criteria suggest fuller regulation is likely to be desirable (see paragraph 4.29). The ACCC would be responsible for considering and approving the required undertakings. Depending on the circumstances of a particular matter an undertaking might provide for reference terms and conditions of access and allow negotiation of variations, or provide for comprehensive access terms for most likely access requirements,

flexibility in the design and approval of these undertakings is likely to be desirable. As is the case at present, to the extent an access undertaking deals with relevant access issues, these issues cannot be subject to arbitration as an access dispute. Access issues not addressed by an undertaking would remain open to negotiation and if necessary to arbitration as the result of an access dispute.

4.28 The option of a more prescriptive form of regulation need not add significantly to the complexity or duration of declaration decision making. Under the NGL, the Council is required to determine, simultaneously with its recommendation as to coverage, whether a pipeline is to be subject to light regulation. Adapting this arrangement to declaration, inter-partes negotiation with recourse to arbitration of access disputes would be the norm but, subject to form of regulation criteria and associated decision making procedures, there would be an option for a service to be declared on the basis of a set of fuller arrangements.

4.29 The form of regulation factors for a declared service should be directed towards selecting the form of regulation that is most likely to be effective at least cost in the circumstances of a particular declared service. They should include at least:

- the likely number of access seekers for the declared service
    - where a larger number of access seekers is likely to result in serial arbitrations requiring an access undertaking is likely to significantly reduce regulatory costs and time
- the likely complexity of arrangements necessary for access to occur
    - more complex and access seeker specific requirements likely point to arbitration as an appropriate regulatory mechanism, although where access requirements are multifaceted the requirement for an undertaking may prevent the need for repeated arbitrations
- available capacity and the ability to expand the facility to provide the declared service
    - under the rules governing arbitration of access disputes the ACCC cannot deprive a service provider of its likely future requirements for the declared service whereas no such restriction applies to approval of access undertakings. Undertakings may provide a more flexible means of equitably sharing limited capacity, although care would need to be taken not to reduce incentives for investment in necessary additional capacity.

Access on reasonable terms

4.30 The Council considers that it may be desirable for legislative amendment to criteria (a) and (f) to clarify the nature of the test intended by the word ‘access’ (including in the phrase ‘increased access’).

4.31 The Full Federal Court in *Sydney Airport No 2* determined that ‘access’ in criterion (a) means ‘access’ and not ‘declaration under Part IIIA’ (*Sydney Airport No 2*, [81]–[84]).

It is uncontroversial that the same meaning should be attributed to the use of the word 'access' in criterion (f).

4.32 Prior to this decision the Council and the Tribunal had considered the effect of the application of Part IIIA on competition in dependent markets when considering criterion (a); in effect examining the likely effect of declaration and the negotiate-arbitrate process on competition in dependent markets and on the public interest.

4.33 When considering the application of criterion (a) in *Re Fortescue*, the Tribunal said that

> [w]hat matters is the likelihood of access, the sufficiency of access and the likely timing of access. For the Full Court [in *Sydney Airport No 2*] to hold that it is impermissible to consider whether, when and to what extent, access will be taken up could easily lead to the result that criterion (a) is not satisfied although a close examination of the facts may show otherwise. This result could hardly have been intended. If it was, it is necessary for Parliament to intervene. That said, we accept that in assessing the extent to which access would be taken up, the Tribunal should assume that access is on reasonable terms and conditions, without speculating about any particular terms that might be imposed by arbitration under Part IIIA.

4.34 The Full Federal Court has since said that

> [i]t may be accepted … that "access" in criterion (f) is access on such reasonable terms and conditions as may be determined in the second stage of the Pt IIIA process. (*Pilbara Full Court decision*, [112]).

4.35 As this question was not addressed by the High Court in the *Pilbara Appeal decision*, the judgment of the Full Federal Court is authoritative.

4.36 The Council believes that the interpretation that appears to result from this line of authority is satisfactory, in that it allows for consideration of the effect of access on reasonable terms and conditions in assessing criteria (a) and (f) but does not require the specific terms of access that may result from an arbitration to be predetermined. However, there remains scope for argument about whether the assessment of the effects of access should include consideration of the terms and conditions likely to result from an arbitration or alternatively whether the effect of access unrelated to the application of Part IIIA should be considered in the assessment of the relevant criteria.

4.37 The Council considers that there may be benefit in confirming (in an appropriate statutory amendment) that the approach of the Full Court noted in paragraph 4.34 is the correct one.

Criterion (f) and discretion

4.38 The High Court in the *Pilbara Appeal decision* has confirmed that the assessment of the public interest under criterion (f) allows for consideration of a very wide range of issues and that the nature of the powers conferred on the Minister and the Council recognise that such inquiries 'are best suited to resolution by the holder of a political

office' (at [42]). The High Court also held that there is no 'residual discretion' not to declare a service where the Minister is satisfied in respect of all of the declaration criteria.

4.39 The Council accepts the High Court's judgment that there is no discretion not to declare a service where all the declaration criteria are met and accepts that the breadth of the criterion (f) analysis in any case would leave little scope for a residual discretion. Any change to allow a designated Minister discretion to refuse declaration where all the declaration criteria are satisfied would require an amendment to the CCA. The Council does not believe such an amendment is desirable given the breadth of matters that may be taken into account in criterion (f). Where all the declaration criteria are satisfied the Council believes access seekers are entitled to expect that declaration will follow.

Ineligibility periods

4.40 Ineligibility decisions must be for at least 20 years. In the Council's view greater flexibility in the period for which a proposed service may be ineligible for declaration is desirable. Applicants should be permitted to propose a period and the Council to make a recommendation on this. This could make these recommendations more available and help avoid inappropriately lengthy ineligibility periods.

Criterion (e) as a threshold issue

4.41 Criterion (e) precludes declaration where the service for which declaration is sought is the subject of a certified state or territory regime. The Council sees merit in this criterion being removed from ss 44G(2)/44H(4) and instead forming a separate threshold limitation on the ability of parties to make an application for declaration. As things stand, the Council and Minister may be required to undertake detailed consideration of the other criteria despite there being no prospect of declaration because of the application of a certified regime.

4.42 Criterion (e) is currently drafted as a test of whether a decision under s 44N (or 44NB) is in place in relation to the service. However this is subject to the qualification that there have not been substantial modifications of the regime or the CPA since the certification decision was made This makes the application of criterion (e) uncertain. The Council considers that it is preferable for 'substantial modification' to a certified access regime or the CPA to instead be a ground for revoking certification as a separate step that an applicant would need to take prior to seeking declaration. This would require amending Part IIIA to provide for a means for parties to seek revocation of a certification where it can be shown that the state or territory regime has been substantially modified since it was certified. If this amendment is made, criterion (e) would then act as a certain barrier to declaration. As such the application of a certified state access regime would be better incorporated as a barrier to an application for declaration than as a declaration criterion.

4.43 Should criterion (e) be reformulated as a threshold for making a declaration application, the Council rather than the designated Minister would determine the application of the test. Any such Council decision would be amenable to judicial review.

The 'size' element of criterion (c)

4.44 The Council considers that the 'size' determinant in criterion (c) should be removed. The Council does not consider that a facility can be considered to be nationally significant simply because it is 'big' and in any case this raises the further question of how big is big enough. The importance of a facility to constitutional trade or commerce or to the national economy (which in themselves import an element of redundancy) are sufficient to maintain the constitutional validity of Part IIIA and to ensure that regulatory intervention is confined to circumstances where it is in the national interest.

Significance of dependent markets

4.45 The Council is aware of concerns that criterion (a) may be satisfied where the market in which competition will be materially promoted is of limited size and importance. However, the Council considers that there is minimal risk that a service would be declared where the only promotion of competition is in a trivial market. In such a situation criterion (f) is unlikely to be satisfied because the competitive benefits of access are likely to be outweighed by the costs of regulation. Further, the Council considers that multiple tests of significance are unnecessary: it is sufficient that the declaration criteria stipulate (as they do now) that the promotion of competition must be material and that the facility must be nationally significant.

Deemed declarations

4.46 The Council considers that deemed declaration decisions, like deemed certification decisions, should follow the Council's recommendation.

4.47 In the 2001 Review Report (at pp 407-9), the Commission said that there was some debate in the course of that review about requiring Ministers to give reasons in certification and declaration matters, particularly in relation to deemed decisions not to declare. The NSW Government submitted that a legislative requirement for Ministers to give reasons was unnecessary because those decisions could be reviewed by the Tribunal. The Law Council, on the other hand, submitted that, if Ministers were to retain their decision making roles in declaration matters, a Minister who had not made a decision within time should be deemed to have declared the service. The Commission noted that there was considerable support for the proposition that a failure to make a decision in time would result in a deemed decision in accord with the Council's recommendation. Despite concerns raised by a number of parties it said that

> [a]rguably, a deemed decision based on a balanced assessment of the issues by the NCC is preferable to an automatic presumption in one direction without regard to the facts of the matter.

4.48 The Commission's recommendation 15.5 was as follows.

> Ministers, the National Competition Council and the Australian Competition and Consumer Commission should be required to publish reasons for their decisions or recommendations relating to applications for declarations and certifications and proposed undertakings.
>
> If Ministers fail to make a decision on a declaration or certification recommendation within the 60 day time limit, this should be deemed as acceptance of the National Competition Council's recommendation.

4.49 The Trade Practices Amendment (Infrastructure Access) Bill 2009 (**Amendment Bill**), both as introduced into Parliament on 29 October 2009 and as approved by the Economics Legislation Committee on 9 March 2010, originally included an amendment to this effect. However, the relevant amendment was opposed in the Senate. Although the reason for the late removal of this amendment from the Amendment Bill is unclear, in its response to the 2001 Review Report, the then Government accepted the recommendation to publish reasons but rejected the recommendation that deemed declarations should follow the Council's recommendation because it considered

> that it would be inappropriate for Part IIIA to deem acceptance of a certification or declaration if a Minister had not provided a decision after 60 days of receipt of a NCC recommendation. This would risk compromising the decision-making process, particularly in complex cases. Hence, the Government considers it is more appropriate to rely on Part IIIA's existing processes for merit and judicial review of Ministers' decisions on certifications and declarations. This already allows responsible, informed decision-making for declaration and certifications processes (Costello 2002).

4.50 It is not clear to the Council how a deemed certification or declaration that followed a Council recommendation after the 60-day period has elapsed would compromise decision-making processes. On the contrary, it seems to the Council that a deeming provision confined to a refusal to declare is likely to frustrate the review processes available under the CCA or under judicial review proceedings as there will be no reasons for a decision that does not follow a Council recommendation.

4.51 The absence of reasons in a deemed refusal to declare is obviously of greater importance if declaration decisions are subject only to judicial review. The robustness of judicial review is to a significant extent dependent upon the availability of the decision-maker's reasons: hence the inclusion in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) of the entitlement of a person affected by a decision to obtain reasons.

4.52 The Council considers that the preferable approach is for the Minister to be deemed to have made a decision in accord with the Council's recommendation and to have adopted the Council's reasons where an affirmative decision is not made within the

statutory time limit. Any aggrieved party affected by a declaration decision (and not just the access seeker as is the case for a deemed 'no') would then have a basis upon which to assess whether the decision is in accord with the law and if not so satisfied to seek judicial review (or to assess the 'merits' of the deemed decision should that form of review be retained).

Declaration decisions confined to Commonwealth ministers

4.53 The Council considers that all declaration decisions should be made by the Commonwealth Minister. At present, where the provider of a service for which declaration is sought is a state or territory body, the designated Minister is the responsible Minister of the state or territory. There is an inherent conflict of interest in having the service provider decide whether or not a service provided by a state owned facility should be declared. It would remain open to state and territory governments to implement a state or territory access regime and have it certified or provide an access undertaking to the ACCC as means of excluding declaration.

Safeguards for owners of declared infrastructure assets

4.54 Part IIIA includes 'safeguard' mechanisms, intended to protect a service provider's/facility owner's legitimate interests should a third party secure access to a service, as the result of arbitration by the ACCC, following the service being declared.

4.55 Found in Division 3 of Part IIIA, ss 44V, 44W and 44X set out the matters an access determination may deal with, the restrictions on the effects of a determination and matters that the ACCC must take into account in making a determination on an access dispute.

4.56 Given the small number of access disputes for declared services, these provisions have received limited scrutiny. Two elements of the safeguard provisions are however of possible concern. These are:

- the operation of s 44W(1)(a) relating to an existing user's priority for access to a declared service and
- arrangements for the facility providing a declared service to be extended to meet the needs of access seekers.

Priority for access

4.57 The Tribunal in *Re Fortescue* raised issues about potential anomalous outcomes from a strict application of s 44W(1)(a) with respect to a facility owner's priority for access to a declared service. The Tribunal described s 44W(1)(a) as the 'requirements safeguard': it provides that the ACCC must not make an access determination that prevents an existing user from obtaining a sufficient amount of the service to meet its reasonably anticipated requirements. The Tribunal said that

> the requirements safeguard does not work well … where both the owner and a third party are existing users and another third party notifies the ACCC of an

> access dispute requiring arbitration. When the existing third party user originally applied for access, the requirements safeguard gave priority to the owner's use. When a new access seeker raises a dispute, the requirements safeguard now applies to both existing users. As against the new access seeker, both existing users have priority. As against each other, neither appears to have priority. The practical effect, if one were to adopt a strict reading of the requirements safeguard, is that each existing user has equal priority: ie the owner's initial priority has been lost simply because there are two existing users at the time of the new dispute (*Re Fortescue*, [597]).

4.58 The Council agrees with the Tribunal's observation that '[s]uch an anomalous result cannot … have been intended' (*Re Fortescue*, [598]). However, the Council does not consider that s 44W(1)(a) is intended to operate as a 'requirements safeguard' for the service provider. This is clear, in the Council's view, from para 226(a) of the Explanatory Memorandum for the Competition Policy Reform Bill 1995 and the use in s 44W(1)(a) of 'existing user' as opposed to 'the provider' in ss 44W(1)(e) and (f). Section 44W(1)(a) is, in the Council's view, intended to provide those who have negotiated (or have had arbitrated) access to a service with a degree of confidence that their reasonably foreseeable requirements will not be disrupted by later access seekers. The provider's priority is safeguarded by s 44X(1)(a), read in conjunction with the objects of Part IIIA. However, although it arrives by a somewhat different route, the Council agrees with the conclusion of the Tribunal that it should 'proceed on the basis that an owner will generally have priority of use over third parties' (*Re Fortescue*, [606]).

4.59 To address this apparent anomaly, the protections afforded to the service provider could be improved by amending s 44W to provide that an access determination cannot be made where it prevents the owner/service provider from obtaining a sufficient amount of the service to meet its reasonably anticipated requirements. Singling out the owner/service provider would remove the potential for a priority dispute arising from the service provider being characterised as a "user" in the law as it currently provides.

Facility expansions

4.60 Section 44V(2) of the CCA provides that, in making an access determination, the ACCC may deal with a variety matters, including "requiring the provider to extend the facility" (s 44V(2)(d)). The purpose of such provisions is to provide the ACCC with sufficient power, scope and discretion in its role as arbitrator to make an access determination that works for all parties involved.

4.61 *Re Fortescue* the Tribunal considered the role and powers of the ACCC, finding in this context the word extend had the same meaning as expand and the power in s 44V(2) allows the ACCC to order expansions to a facility to accommodate third party access. In the Council's view this is appropriate as any narrower view would frustrate the objects of Part IIIA and encourage inefficient investment in undersized facilities.

4.62 Once an expansion is required the question of who pays for such an expansion arises. Under s 44W(1)(e) a service provider cannot be required to bear some or all of the costs of extending a facility, that results from an access determination accommodating the access needs of a third party. As a result it is the access seeker(s) that must fund the expansion necessary to meet its needs. In some situations the benefits of such expansions will not be limited to access seekers and the service provider may accrue benefits also. In these situations it is important that the service provider cannot free ride on the extension paid for by the access seeker. Section 44X(1)(e) addresses this issue and provides that the ACCC must take account of the value to the service provider of extensions paid for by another party. The ACCC can do this by way of setting the price for access, having regard to the pricing principles in s 44ZZCA which require the price to include a return on capital commensurate with regulatory and commercial risks involved. Where a facility has been extended and paid for by an access seeker the service provider's return on investment would not reflect the value of the extension and an allowance for this would need to be included in the calculation of the access price.

4.63 Although somewhat convoluted, the Council considers these mechanisms workable in practice.

The Council's standing before the Tribunal and the courts

4.64 The Council's role and right to participate in proceedings relating to declaration matters has been raised in a number of proceedings before the Tribunal and the courts, and parties have attempted to exclude or confine the Council. To date parties have been unsuccessful in efforts to exclude or confine the Council.

4.65 The Tribunal and courts have accepted that the Council has an important role to fulfil in review proceedings and litigation as the independent, statutory authority responsible for the operation of the declaration and certification streams within the National Access Regime. The Council can assist the Tribunal or court by making non-partisan submissions and representing the broader public interest underpinning the operation of the National Access Regime. This was recognised by the Full Federal Court in *National Competition Council v Hamersley Iron Pty Ltd & Ors* [1999] FCA 1370, where, in the context of an application to have an appeal brought by the Council declared incompetent and to be dismissed, the Full Court stated.

> The NCC argues as follows:
>
> > 'Now that the Council has concluded its consideration of the Robe application for declaration, it wishes to take an active role in the proceeding. The principal issue in the proceeding – concerning the definition of "service" in s 44B of the Trade Practices Act – is, in the Council's view, a matter of great public significance. It affects the Council's jurisdiction to consider applications and is fundamental to the implementation of the competition policy on which Pt IIIA of the Trade Practices Act is based. Accordingly, the Council is most desirous of being heard on this question on the appeal in this proceeding.'

> We accept that contention. Part IIIA is a major new area of competition regulation. The body entrusted with it by Parliament should have some say in litigation concerning fundamental principles as to its operation. (at [24])

4.66 While the Council's role in proceedings relating to declaration decisions has been accepted to date, it nonetheless faces ongoing challenges to its involvement in such matters. This results in a significant cost and opportunity for delay. Providing the Council with a statutory role before the Tribunal, and to the extent possible, the courts would address this.

Certification–amendments to the clause 6 principles

4.67 The Council considers that the criteria for certification of state or territory access regimes should be rationalised. At present state and territory regimes are considered against the clause 6 principles in the CPA (see **Appendix B**). The principles are numerous, lengthy, overlap and in some cases appear conflicting. In the Council's view it would be advantageous to reduce and refine the principles to a smaller set of clearer requirements for the certification of the effectiveness of state or territory access regimes.

4.68 In considering an application for certification of an access regime, the Council has approached the clause 6 principles by considering together the principles that have a broadly related purpose. Without such an approach the Council's recommendations would be cumbersome and repetitive because it would be required to repeat its consideration and analysis across several criteria.

4.69 The Council acknowledges that the consideration of certification applications on this basis is not the only way to assess an application for certification. The approach has proved manageable however, and could be a useful starting point for streamlining the clause 6 principles. The five categories of 'related' principles used by the Council are:

- Scope of an access regime – 6(3), 6(4)(d)
- Treatment of interstate issues – 6(2), 6(4)(p)
- Negotiation framework – 6(4)(a)-(c), (e), (f), (g)-(i), (m), (n), (o)
- Dispute resolution – 6(4)(a)-(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)
- Efficiency promoting terms and conditions of access – 6(4)(a)-(c), (e), (f), (i), (k), (n), 6(5)

4.70 Refining the clause 6 principles would be advantageous both for states and territories that develop an access regime and for the Council in considering a regime's effectiveness following an application for certification.

4.71 The Council is of the view that there is benefit in aligning the language of the clause 6 principles with that of the criteria for declaration where there are clear parallels. For example, in the recent litigation concerning criterion (b) in the Pilbara Rail proceedings in the Tribunal, Full Federal Court and the High Court, much has been made of the fact that the wording of criterion (b) differs from that in clause 6(3)(a)(i) of the CPA. This difference appeared pivotal in the Full Federal Court and High Court

finding that criterion (b) is to be determined by reference to a test of economic feasibility/private profitability rather than on principles concerning natural monopoly and social cost.

4.72 The Council considers these wording disparities are merely a reflection of the different authorship of both the CPA and the CCA and are not intended to reflect different intentions as to the purpose, intent and scope of the National Access Regime. Indeed, as a certified state or territory access regime displaces declaration under Part IIIA, the certified regime should apply similar principles to that which it has displaced – ie declaration.

The National Competition Council

4.73 The NCC comprises up to five part time councillors and a secretariat. There are currently three councillors appointed and a fourth councillor is being sought. The secretariat currently has a staff of eight, comprising two executive, four legal counsel and two administrative officers.

4.74 In recent years the Council has faced an unpredictable and fluctuating workload. This has created some difficulties in managing the Council's operations. In particular the Council needs to ensure that it can handle the busier periods while ensuring staff are occupied during the times when workloads are reduced. In the short to medium term this is an issue that can be addressed internally. However in the longer term, and subject to the outcomes from this inquiry, it may be necessary to consider the viability of the Council and examine alternative structures.

4.75 The Council considers that undertaking a transparent and public assessment of declaration applications and similar matters, and providing designated Ministers with independent expert advice in relation to these, are critical roles that should not be subsumed within the ACCC (the dispute arbitrator under the National Access Regime) or other regulatory body given the prospect of real or perceived regulatory conflicts. It is also undesirable for assessment of declaration applications to be undertaken within the Treasury since the Treasurer or a Minister within the Treasury portfolio is commonly the designated Minister for decisions on applications. At this stage the Council does not see a viable alternative to the current arrangements. Accordingly it will continue to operate as it does now, and as appropriate use outsourced services. The Council also expects to develop further secondment arrangements as a means of balancing staff resources and workloads.

4.76 The Council would however appreciate further flexibility in relation to its quorum for decision making. With part time councillors, on occasion a conflict of interest will arise such that a councillor should not be involved in a particular matter. The Council has well established processes for dealing with these occasions. However with a quorum requirement of three it is conceivable that the Council may be unable to form a quorum. This is particularly acute while there are only three appointed councillors, but even when the Council is restored to the more usual four members,

quorum issues can arise. Any inability to form a quorum will of course delay the Council in making any statutory recommendations.

4.77 The Council considers it is desirable that additional flexibility be available in maintaining a quorum. The Council considers that the quorum arrangements that apply for Infrastructure Australia (**IA**) provide an appropriate model which should be adopted for the Council.

4.78 The quorum arrangements for IA are set out in s 21 of the *Infrastructure Australia Act 2008*. These provide that where a member of the IA Board is prevented from participating in deliberations of decisions and without that member there would no longer be a quorum present, the remaining members constitute a quorum in relation to the particular matter.

4.79 The Council considers that a provision similar to this is preferable to appointing additional members to the Council (given the Council's current workload and the comparative infrequency of conflict issues) or to a general reduction in the quorum for Council meetings.

4.80 The Council would appreciate the Commission supporting such a change in its inquiry recommendations.

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Appendix A Clause 6 principles

6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

(a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or

(b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

6(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

(a) apply to services provided by means of significant infrastructure facilities where:

(i) it would not be economically feasible to duplicate the facility;

(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and

(iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and

(b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

(c) There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

6(3A) In assessing whether a State or Territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:

(a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under that access regime;

(b) should recognise that, as provided by ss44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

6(4) A State or Territory access regime should incorporate the following principles:

(a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

(b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.

(c) Any right to negotiate access should provide for an enforcement process.

(d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

(f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.

(g) Where the owner and a person seeking access cannot agree on terms and conditions for access

to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

(h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

(i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:

(i) the owner's legitimate business interests and investment in the facility;

(ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;

(iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;

(iv) the interests of all persons holding contracts for use of the facility;

(v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;

(vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(vii) the economically efficient operation of the facility; and

(viii) the benefit to the public from having competitive markets.

(j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

(i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;

(ii) the owner's legitimate business interests in the facility being protected; and

(iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

(k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

(l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

(m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

(n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

(o) The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

(p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

6(5) A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principles:

(a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream

markets.

(b) Regulated access prices should be set so as to:

(i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;

(ii) allow multi-part pricing and price discrimination when it aids efficiency;

(iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(iv) provide incentives to reduce costs or otherwise improve productivity.

(c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:

(i) may request new information where it considers that it would be assisted by the introduction of such information;

(ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and

(iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.