Australian Government
Productivity Commission

PRODUCTIVITY COMMISSION

DRAFT REPORT ON THE NATIONAL ACCESS REGIME

MS P. SCOTT, Presiding Commissioner
MS A. MacRAE, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON MONDAY, 29 JULY 2013, AT 9.14 AM

Continued from 25/7/13 in Sydney

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MS SCOTT: Good morning, everyone. Thank you for coming today. Welcome to the public hearings of the Productivity Commission's inquiry into the National Access Regime following the release of our draft report in May. My name is Patricia Scott and I am the Presiding Commissioner for this inquiry, and I'm very pleased to have with me my fellow Commissioner Angela MacRae.

The purpose of this round of hearings is to facilitate public scrutiny of the Commission's work and to get comment and feedback on the draft report. This is our final day of hearings for this inquiry, and hearings have been held in Perth and Sydney. Following this hearing, we will be working towards completing the final report to the government in October, having considered all the evidence presented at the hearings and in submissions, as well as informal discussions.

Participants in this inquiry will automatically receive a copy of the final report, once released by the government, which may be up to 25 parliamentary sitting days after completion.

We like to conduct all hearings in a reasonably informal manner, but I do remind participants that a full transcript is being taken. For this reason, comments from the floor are not allowed, but at the end of the proceedings today - probably around 4.00 or 4.30 - I will provide an opportunity for any person wishing to make any brief comments.

Participants are not required to take an oath but should be truthful in their remarks, and they're welcome of course to comment on issues raised in other submissions. The transcript will be available to participants and is available from our web site. Of course, submissions are also available on our website.

To comply with the requirements of the Commonwealth occupational health and safety legislation, you're advised that in the unlikely event of an emergency requiring evacuation of this building, you should follow the green exit signs to the nearest stairwell. Please don't use the lifts, and please follow the instructions of the floor wardens at all times.

I don't think there's anyone from the press here today. Can I just confirm that? No. Thank you. The assembly point for the Commission in terms of an emergency is at Enterprise Park, situated at the end of William Street, on the bank of the Yarra River.

We're very pleased to have the Australian Competition and Consumer Commission here with us today. For the purpose of the transcript would you please each state your name, and would you like to make an opening statement?

MR DIMASI (ACCC): Good morning. A pleasure to be here. Joe Dimasi,

Commissioner, ACCC.

MR SCHRODER (ACCC): Matthew Schroder, general manager of Fuel, Transport and Prices Oversight at the ACCC.

MS SHEPPARD (ACCC): Sarah Sheppard, director of Fuel, Transport and Prices Oversight, ACCC.

MS SCOTT: Thank you. For the purposes of all our people presenting, these things are really just for the transcript, so you may need to project your voice just a little bit more if you want our people in the hearing to hear you, and especially me. Age is coming on me fast, I think. Well, Joe, would you like to make a statement?

MR DIMASI (ACCC): Thank you. Normally I don't have a problem with projecting the voice, but we'll see how we go. I'll make a brief statement on behalf of the Commission.

The ACCC welcomes the Productivity Commission's draft report. We concur with the PC's findings that the Part IIIA access regime is an important part of Australia's regulatory framework which should be retained. The ACCC considers that Part IIIA is important in promoting a consistent approach to access across the economy. We also agree that industry-specific and facility-specific access regimes operating alongside the regime provide greater net benefits than relying solely on either approach.

As we outlined in our earlier submission, it's been the ACCC's experience that the access undertaking provisions of Part IIIA have been helpful in facilitating efficient use of investment in infrastructure, such as in ports and railways, and competition in related markets, such as those for coal and grain exports. We note that the PC has made two recommendations concerning the ACCC's extensions/expansions powers.

We agree with draft recommendation 8.7, which recommends that confirming the prevailing interpretation of the Australian Competition Tribunal when arbitrating an access dispute, the ACCC can require a service provider to expand the capacity of its facility, in addition to being able to require a geographical extension, and we accept draft recommendation 8.8, which recommends that the ACCC, through stakeholder consultation, develop and publish guidelines on how its power to direct facility extensions and expansions would be exercised in practice, and we intend to do that.

We also agree with the proposed changes to re-establish criterion (b) as a natural monopoly test. We think that's helpful. So, with that broad statement, we're happy to answer any questions.

MS SCOTT: Thank you very much. Does the ACCC consider that the combined effects of the Commission's proposals relating to the declaration criteria will provide an appropriate threshold for declaration?

MR DIMASI (ACCC): On balance we do, bearing in mind that we're not involved with the declaration process, but of course the NCC is. We do think that the recommendations for a couple of the other changes which potentially could increase the threshold for declaration may potentially cause some problems down the track. I think it's something we'd keep an eye on. But, on balance, we think that it's probably not a bad balance overall, and I should add that increasing the threshold is not something we see as necessarily bad in itself, but it's a question of how these things work.

MS SCOTT: So it's a case of constant vigilance to see how the process is running, but by and large you're comfortable with where we have got to in the draft report?

MR DIMASI (ACCC): By and large, yes.

MS SCOTT: Okay. We'd welcome your comments in relation to the public interest test because we've had quite a bit of feedback on that. As you know, the Commission has recommended that the public interest test in the regime be reworded so the declaration of a facility must be in the public interest as opposed to "not be contrary to". What are your views on changing it to an affirmative test?

MR DIMASI (ACCC): That's one of the things that we're a touch cautious about. We're always supportive of things being in the public interest, so in a sense we have no problems with the words in their natural usage, and if it's not in the public interest you wouldn't want to do it. So on a plain language reading of it, why would we disagree? But changing to the affirmative I think, in combination with some of the other changes, means that it gets harder to establish the threshold for declaration, so we're just cautious that these things end up being tested through the courts. We've just gone through an enormously long process in the Pilbara.

So our concern is always that well-intended, small wording changes could have unintended consequences and, without in any way wanting to be disparaging to lawyers, who are very clever and very good at earning their money, I'm sure, these things can end up being argued through in the courts and can create barriers to perhaps a simpler process. So, whilst we don't have a problem with the words themselves, we're just cautious about changing too many of these things, or what seems like a good idea and ends up being counterproductive.

MS SCOTT: Would it be the case if you could be satisfied - I mean, this will be long after we have finished the report, but let's pretend the scenario is that we do

recommend that affirmative change and that you were consulted in the normal process of the initial drafting of those words and you could be satisfied that you feel comfortable with it, and it turns out that in the initial years there didn't seem to be any particular mischief. That would mean that you would be relaxed about that process, if you were consulted in that process itself?

MR DIMASI (ACCC): Sure. I guess the point is, if there's mischief then it takes a bit of effort to go and change it and go through that process, so we'd urge the Commission to have a think about the gain from making the change, from the risks associated with the change, not because in principle there's anything wrong with it, but in practice what will it add and what risks will it cause? I think that's the equation we'd urge you to think about.

MS SCOTT: We're going to jump around a little bit, just because there are a lot of different issues.

MR DIMASI (ACCC): That's fine by us.

MS SCOTT: You might be familiar with a proposal from the Office of the National Infrastructure Coordinator, who has proposed to us that defined road networks be subject to an investment access undertaking under Part IIIA, which is very similar to those in place under the Australian Rail Track Corporation. So the Office of the National Infrastructure Coordinator has indicated in its submission that the main purpose of road undertakings would be to promote private investment in that infrastructure that would enable improvements in freight efficiency - the larger trucks on designated roads. They see this as not only just an access issue but a Part IIIA National Access Regime issue. What's your view on that proposal?

MR DIMASI (ACCC): We haven't had a lot to do with roads. These issues have been raised with us from time to time and we've given it a little bit of thought but not an enormous amount of thought. We certainly see in our dealings with rail that the road-rail interface is pretty important and we can certainly see that there are some policy issues there that probably need to be resolved. It may well be that, as part of that policy process, Part IIIA could have a part to play in coming up with the solution to the road-rail challenges, but I think that there are probably a few policy steps that come before we get to that point. I think it would be premature for us to say simply, "Include road in the Part IIIA access regime."

I think the problems need to be spelt out, and what exactly are the challenges? There's the pricing question. Road charging is through fuel levies or registration and other things, which is indirect and not related to the road usage except indirectly. That has an impact on rail pricing. There are quite a number of those things that have to be sorted through and perhaps these are issues that the National Transport Commission and perhaps other bodies need to work their way through before we

jump to the IIIA solution, because I think a IIIA solution at this point is probably a little premature until we actually spell out exactly the problems that we want to solve and how we might then want to solve them.

MS MacRAE: And if it turned out that it was primarily an issue of investment rather than access per se, would you still see that as potentially sitting within the Part IIIA framework?

MR DIMASI (ACCC): It depends. If there's a problem, we would have to see what the problem is. It's a bit hard to answer that as a hypothetical. IIIA is normally to deal with bottleneck facilities, especially where they're vertically integrated bottleneck facilities; that creates particular problems. But even where they're not vertically integrated, there are market power questions for upstream and downstream markets.

If it's a question of investment and if it's a question of privately building roads which might end up being particular key roads which are bottlenecks, then access to those could be important, but that could be dealt with in a number of ways. That could be dealt with through a tendering process. That could be dealt with through IIIA at the end of the day if you need to. There's a number of options that you'd want to test - what's preferable here? - and it depends on the circumstances that you're trying to deal with.

MS MacRAE: Can we just ask a little bit about the mandatory undertakings. We did have CBH appear in our Perth hearing.

MR DIMASI (ACCC): Yes.

MS MacRAE: They expressed some concerns, and I'm sure you're aware of them; for example, the fact that they had this mandatory undertaking with a sanction which was very specific to their case, with the inability to export wheat if they didn't meet the requirements of that undertaking. They did indicate that they felt that there was a good chance they may have used a merits review if they had had an opportunity, but given the nature of that undertaking they missed out on that. How big an issue do you see with that and is that something that would caution against having a mandatory undertaking of that kind for other sorts of situations?

MR DIMASI (ACCC): I guess we're dealing with real-world problems and you've got to come up with real-world solutions sometimes. The mandatory undertakings in the wheat ports was something that the policy-makers decided on and in a sense, whilst it's always desirable to go through a process like the NCC, I can understand the policy-makers' dilemma.

In reforming wheat marketing, there was a risk that in some cases you had

basically potentially vertically integrated monopolies, and CBH is probably the strongest case of that in Australia, who could shut out competitors buying grains upstream and exporting it, because it wouldn't have been feasible to build or to establish alternative facilities in the short term, and it's not clear that it would be economically feasible even in the medium term and the longer term. Who knows? So in the reform of marketing, the reformers obviously needed to have some comfort; it would be pointless trying to get these competitive markets upstream and downstream if the bottleneck is going to stymie that effort. Of course you would go through the process of declaration, but the experience in the Pilbara has shown that that can take quite a number of years. The wheat crop had to be exported within the next year, so clearly a practical solution had to be found, and that was a practical solution.

Would you use that in every case? I suspect you wouldn't, and I wouldn't be encouraging policy-makers to use that in every case, but it's horses for courses and dealing with the practical problems that you have, and I think that overall the outcome hasn't been bad. There have been some problems, and one of the criticisms that there have been is that, contrary to CBH's concerns, the regime may not have gone far enough. We have an open mind on that, but clearly it was a way of dealing with a real problem that faced everyone at that point in time.

MS MacRAE: One of the things that the NCC had talked about was having a deemed declaration rather than a mandatory undertaking. What sort of principles do you think are appropriate in deciding between those sorts of regimes that might be available?

MR DIMASI (ACCC): Deemed declaration could work as well, but in a sense it is a declaration and then you've got an arbitration process. So the parties can sort it out; that's fine. Then they come to the ACCC or whoever the regulator is and have the position arbitrated. Again I think it's a practical problem rather than anything else, because we have done many undertakings in other parts, we've only done two under IIIA, and the experience is that the arbitration process is a formal legal process, so it does take a bit of time. In telecommunications, for example, it's not unusual for an arbitration to take a year or longer.

If the parties can agree, that's great. That's the best solution, but if they can't, then the regulator has to come in and find an arbitrated solution, and that again means - with the harvest having to be exported as a deadline looming for everybody - that it might have been feasible, but it may not have been feasible as well. It depends on the circumstances, and in CBH's case where we went through the Grain Express notification and all the rest of it, my suspicion is that it wouldn't have been feasible to have done it in time for the harvest. So I guess it's not a question of whether one is preferable to the other in theory, because I think going through the process is a good thing to do, by and large, but it's looking at what are the problems that you face

and trying to deal with those problems.

Also, you might want to think about deemed declaration for something which, if you like, is pretty clear, has been declared before, where you minimise the risks. Declaration is a pretty significant step to take. You're dealing with property rights and altering some of those. It's clearly not something to be taken lightly. The Act doesn't take it lightly. I'm sure the NCC, the relevant ministers and the ACCC - none of us take it lightly. So no-one suggests that you should, but there might be some cases where you distinguish it from others where it could be quite contentious.

MS MacRAE: Just to be clear, that question was not just about wheat but more generally.

MR DIMASI (ACCC): Yes.

MS MacRAE: So that's been helpful, to answer that in a more general sense.

MS SCOTT: We've got a question now about one of the boxes in our report, and I thought maybe I could just give you the written question so you could actually see it and have a few seconds to think about it. It would just be easier, I think, but I'll read it into the transcript too.

MR DIMASI (ACCC): Thank you.

MS SCOTT: In our report we drew attention to bulk community exports and used the Pilbara example to advance an economic argument that, where prices are not going to change as a result of the entry or exit of one firm, then there may be no merit in going through the whole access process because at the end of the day all the firms in that sector are price takers; the chance of one firm's entry or exit affecting the long-term price is very small. So that was our argument that we put in the draft report. What's your view on access regulation of export infrastructure? Where infrastructure is used to serve export markets, where Australia is a price taker, do you think that private incentives will be aligned with efficient use of that infrastructure?

MR DIMASI (ACCC): Not necessarily, and let me use the coal chain as an example. Maybe coal is not a great example. Perhaps we might have some market power, who knows? I won't buy into that argument. But assuming that the price is set in the world markets and we're not influencing that, you still have competition upstream, whether it's miners or grain growers, and you still enable the bottleneck. The infrastructure owner - if it meets the other criteria it's potentially declarable because it's a bottleneck - has market power and the rest of it. In theory it can, if you like, take all the rents and could affect investment upstream. For example, the miner would need to know, if prices are going up and he's going to open a new mine, that a substantial chunk of that is not going to simply be captured by someone along the

chain in the bottleneck.

MS SCOTT: Just to clarify, if they're only taking the rents, why would that affect investment upstream?

MR DIMASI (ACCC): Because if you're going to open a new mine - you know, we saw the boom for coal, and so miners were looking to open a new mine, they were looking to export. They were factoring in these sorts of prices. You would need to know that the viability of your mine isn't going to be undermined by the owner of the infrastructure facility, and if the infrastructure owner is not going to be foolish, they won't undermine the mine so it's knocked over; they still want to collect the rents.

Now, they will never have the perfect knowledge to be able to do that exactly, obviously - we understand that - but that affects the incentives for people to - given the uncertainty of the price, how long they will last; you know, everything that goes on. It affects the incentives for people to invest. No miner in his right mind is going to invest and leave that open, so you've got to deal with it in some way. You need a long-term contract, you need regulation, you need something to establish the charges for those facilities. So simply to say, "Well, leave it alone. They will sort it out": well, they might sort it out and it may well be that the big established guys might sort it out, but the new entrant, the new potential mine at the margin, might be shut out. So I'd be very, very cautious in saying that it won't have an effect. I think the potential is there for it to have an effect in the investment and the output in the upstream sector.

MS MacRAE: If a long-term contract could potentially solve that for you, then great. If it doesn't and you've got this problem of this small miner, you're really relying on a regulated outcome that you're going to have confidence will give you a better estimate of what is true rent, and in that situation you've got a player that's entering the market, the regulator that's going to have less information than both of the parties. I'd just like you to expand a little bit on the confidence of a regulated outcome giving you a more successful sharing of the rents in that case that you might get with a market outcome.

MR DIMASI (ACCC): Yes. Well, it's not just a sharing of the rents, but it is partly a sharing of the rents. At the end of the day, our view always has been that if you can get the parties to resolve it themselves, that's always the best outcome. So I don't disagree with you in that, but we have a situation where we have an undertaking from ARTC in the Hunter Valley. We have sophisticated significant miners at the other end. The whole premise of the undertaking is to allow the parties to negotiate first and try to resolve it and for the regulator to play, if you like, a supervisory role, to be called in if needed.

That's the premise. That's how we've tried to couch the undertaking and make it work, but our experience is that nevertheless it takes a lot of work for the parties. The parties aren't completely aligned in their interests, for example, upstream. People are in different parts down the chain, physically in different locations in the chain. There are cost allocation issues. There's a whole bunch of issues that need to be done simultaneously.

All of these things potentially can be done by the parties, but they seem to think that having recourse to a regulator - because the alternative is recourse through the courts, because we talk about "They will reach a solution." Well, they might, but the alternative is: there is a regulator, it's a legal system, and that's how you do it, and part of the whole thinking of IIIA and dealing with these issues is to take some of those complex issues out of the courts and give it to a specific regulator to deal with. As long as the regulator doesn't overreach and as long as we keep in mind that trying to get the best outcome often is that the parties negotiate it themselves, then that's a specialised recourse to deal with those issues rather than dealing with it through the courts, which is potentially what might happen, and who is there to protect the interests of the new entrant? You say that might be small, but it can still be significant, and everything happens at the margin as well - we know that in economics - so you wouldn't want to dismiss that too easily either.

MS SCOTT: And why am I worried about the new entrant again, Joe?

MR DIMASI (ACCC): Because investment at the margin is going to be cut off. The PC makes a great deal about truncation. We don't completely agree. Well, that's what it's about, so either you believe in it or you don't. So if you think that cutting off new investment potentially - which could do a lot of things. It not only brings on new output into the market - you know, if the price is right, we want to get it out there and sell it - it might also sharpen the activities of some of the existing players as well, who might be operating as a comfortable little club in some circumstances. I'm not saying that about any in particular, but you don't want to dismiss competition at the margin, and we certainly don't.

MS SCOTT: So let's see if I can summarise your position, and please correct me if I've got it wrong. When you read box 2, it didn't trouble you so much to think that we fundamentally got the economics wrong?

MR DIMASI (ACCC): Sorry?

MS SCOTT: When you looked at box 2 in our draft report, you basically didn't think we got the economics wrong? There can be an alignment of commercial interests for people who are in price-taker markets, so basically you're not troubled by box 2 in relation to where we arrived at in terms of our assessment, but you don't think there should be a blanket - if it's a commodity export in a price-taking market,

we should leave it to the market to decide?

MR DIMASI (ACCC): Yes.

MS SCOTT: So you're comfortable with box 2, but you're not comfortable with it being sort of a general principle that applies everywhere. You think it should be an assessment on a case-by-case basis. You think one of the roles of Part IIIA should be to ensure - I just want to check I've got this right - - -

MR DIMASI (ACCC): Yes.

MS SCOTT: - - - that the infrastructure provider should not be able to take all the rents?

MR DIMASI (ACCC): I largely agree with that. We're not fussed about distributional issues too much.

MS SCOTT: That's what I thought. We weren't either, but just because you said it today, I just wanted to clarify whether you're really concerned, because I understand why you're concerned because of the truncation issue.

MR DIMASI (ACCC): Yes.

MS SCOTT: As you said, we're quite concerned about that, but you seem to have a more emphatic sense of it today, that there should be some sort of sharing of the rents; they shouldn't be able to take all the rents. I just wanted to make sure whether rent is a big issue for you in terms of justifying - - -

MR DIMASI (ACCC): We've got to be a bit careful here. What does it cost to get a tonne of coal out of the ground when the price hits over $100? You know, a few years ago it might have been $40 or whatever it was. What we might call rent, we've got to be careful. What are rents? What we might call rents might be the $60, $80 difference. Now, are they rents? That's the price in the market and when you have the price rise - miners are expanding - it might be that your marginal cost for coal could be a lot higher.

So this is a little simplistic, if I can put it that way, and clearly no producer in his right mind is going to leave that as an open risk whilst undertaking that investment. So you could put the viability of a firm at risk. It mightn't just be rents, because these things are quite difficult to manage. So we talk about it lightly in the textbooks as if we're dealing with rents, but we've just got to be careful translating that into a dynamic industry where prices are volatile and they're changing, where investments are for a whole portfolio of different things, and I'm sure they wouldn't leave themselves exposed. They'd find some way of covering themselves, which

would incur cost as well. That would put investment and output at risk.

So the question is how do you deal with those challenges, and you can deal with it contractually or you can deal with it through a regulatory mechanism. In a sense you can think of the whole regulatory problem as being trying to resolve some of those contractual issues in a more direct and hopefully simpler way, but we recognise the challenges that are involved with that as well.

MS SCOTT: I'm very interested in this issue, because every weekend I can pick up a paper and find yet another junior miner who thinks maybe it would be nice to have access to someone's railway line, and people seem to in some ways have shifting positions on this issue; I'm not saying your organisation, but other players in the market. So one of the points we make in that box is that typically people, when they think about undertaking a production process, actually think about transport to market. It's one of the key things that we think about.

MR DIMASI (ACCC): Yes, that's right.

MS SCOTT: And certainly it can be the case that there are clearly asymmetries in bargaining power and so on.

MR DIMASI (ACCC): Yes.

MS SCOTT: You mention the viability of a firm, and I can see that that could be relevant. Do you have a general comment about - and maybe you'd wish to leave this to your colleagues, but in that box we sort of said market players in this segment, we anticipate that there will be an alignment of interests, and there can be problems because people haven't thought about transport, and it could be enticing to think, "Well, I can solve my problem because there's something just over there."

MR DIMASI (ACCC): Yes.

MS SCOTT: But maybe this is just a matter for the market to sort out, because at the end of the day, if the entry of that one firm does absolutely nothing to competitiveness in that market, what does it matter?

MR DIMASI (ACCC): I'd always be careful about saying the entry of a firm does nothing for the competitiveness of a market, so I'd start with taking a bit of care on that.

MS SCOTT: All right.

MR DIMASI (ACCC): I will let my colleagues help, but I'll answer it first. Sorry, I can't help myself. In a sense your question is a bit circular because it goes back to

what is IIIA there for in the first place?

MS SCOTT: Yes.

MR DIMASI (ACCC): It's there to deal with bottleneck facilities. So it isn't a question of some new firm covered in somebody else's infrastructure and saying, "Well, I don't have to build something that I should be building," whatever they are, and free-riding off somebody else. So the answer to your question is: have you got the criteria of IIIA right? It's about declaring those bottleneck services that are meant to be covered by IIIA, and if that's the case then you're done; that's what the problem is solving. If that's not the problem that you're solving, then it shouldn't be something that we should be concerned about, it shouldn't be something that's in the IIIA framework. So it just goes back to that point.

MR SCHRODER (ACCC): I'd just say there is always a risk of regulatory rent-seeking and so that's something you've got to be concerned about and, as Joe said, a commercial outcome will almost always be the best outcome. The economics of what you're saying is pretty much right, which is that there's no price impact, that the distribution of those profits isn't really something that should concern us so much, except that when you're talking about the market, I think you need to define the market not just as the market of the particular access strata but the upstream and downstream as well.

I can think of examples where, if the entire rent, as you like to call it, is taken from a prospector, then you're going to be inhibiting investment in those prospecting activities upstream in the future. If I'm investing in a company that's looking for iron ore or looking for coal or whatever it is, and I see that the access provider has taken all the rents of the company that found the coal or found the iron ore or whatever, then I'm not likely to invest in that as much as I would if there was the possibility of having an access regime which would enable me to get my coal or iron ore out of the ground and to market. So I still think that there is an economic case and a case in the public interest for having not certainty, but for having the ability to seek an access regime.

MS SCOTT: We might move to expansions and extensions because a lot of people have commented on that.

MR DIMASI (ACCC): Yes.

MS SCOTT: Some participants have suggested there should be fewer restrictions on the ACCC's power to direct extensions and expansions, while others have suggested there should be more, and we have got quite strong commentary in both directions. Do you think the safeguards in sections 44W and 44X strike the right balance between the interests of infrastructure service providers and access seekers?

MR DIMASI (ACCC): Well, I'd preface that by saying that we haven't used that power, so in a sense this is a bit hypothetical. We think that we would want to use that power sparingly and only in exceptional circumstances and we'd prefer that we'd encourage parties to solve these issues themselves. I would go back to the rail Hunter Valley undertaking. Expansions is an issue in that undertaking and our approach there is to get the parties to come up and resolve it, so we've set up a process for the parties to resolve it and we would come in only if absolutely necessary.

With that qualifier, looking at 44W and X, the things that we'd need to take into account are fairly extensive, it looks like to me, and they look like the right things. I think before you'd want to change them, we need to see how they work, so I think it's just completely premature to be saying that we want to muck around with those or change them or add to them or detract from them.

We think that they look pretty sensible and they are obviously the things that we'll be drawing on in the guidelines as we put them together. So our view is, we understand the sensitivities from both parties. It's something that obviously will need to be done with great care, but what's there I think is a good basis to work from.

MS MacRAE: Just in relation to what's there, there has been a bit of a variation of views in what's been put to us between an extension and an expansion.

MR DIMASI (ACCC): Yes.

MS MacRAE: Do you think it's legally and/or practically possible to distinguish between those things and is it sensible to do so or is it better to bundle them together?

MR DIMASI (ACCC): The legal question I will leave alone and Sarah might want to touch on it, but it may well be that it makes sense to not try to distinguish between them. I think the principles that we have to deal with are pretty similar. It could in practice be possible to deal with them differently. If you're talking about a geographic extension - or is that an expansion? I think it's an extension - where it's a stand-alone operating thing, you could potentially treat that differently. If you're increasing the existing capacity, it's very difficult to treat it separately. There might be practical issues, but I think in practice we'd probably want to treat them fairly similarly, but I don't know, Sarah or Matthew, if you want to - - -

MR SCHRODER (ACCC): Just a couple of points. One is, I think you're talking about magnitude of scope or scale anyway.

MR DIMASI (ACCC): Yes.

MR SCHRODER (ACCC): So I think you probably deal with them the same. The other point that I'd just make is, you may be able to separate and define expansions and extensions maybe in comms or maybe with rail, but what about access to clearance and settlement on the ASX?

MR DIMASI (ACCC): Yes.

MR SCHRODER (ACCC): It doesn't make that much sense, and given that Part IIIA is a general access regime, I don't think it makes sense to have what I see as an artificial separation that may work with some industries but doesn't work with others. That's not a legal opinion.

MS SCOTT: Joe, you refer to principles, and maybe you're going back to the Act as the principles themselves, but maybe you also have in your mind what those principles are. They might be in addition to what's in the Act. Can you just elaborate on that, if that's possible?

MR DIMASI (ACCC): Yes, I was referring to principles in the Act, but broadly speaking, for extensions and expansions the principles that we largely have in mind - these are reflected in the Act - is that basically the parties that get the benefit and cause expansion do need to pay for it. We would need to, obviously, have a look at the impact it has on the viability and the impact on other parts of the network, but our view is that you apply economic efficiency principles fundamentally to resolve the problem. That's our mind-set, that's our approach, in looking at it.

MS SCOTT: Some people in discussions with us have said what an extraordinary power it is, and I think you used that word "extraordinary" yourself, and we've thought about using it in the report ourselves and have said, "What's the limit to it?" Expansion could be 10 per cent of a port, but could it be 50 per cent of a port or 100 per cent of a port? Could it be a duplication of a railway line? And it's suggested to us that there should be some upper ceiling that should apply. Any response to that, Joe?

MR DIMASI (ACCC): Yes. It is an important power, but it's a power that deals with an actual, real problem and that is that if you don't have that power, you need to have a look at IIIA. IIIA is for - what's the term? "Spare and" - I forget the term, but it's basically for access to spare capacity. You don't have open access so that the owner, if it's an integrated owner, has to share it. It's only whatever is spare and developable.

MS SHEPPARD (ACCC): Yes. So the owner is entitled to its reasonably anticipated requirements.

MR DIMASI (ACCC): So, given that, unless you have some sort of power to

expand, there could be a pretty limited regime, not to mention the fact that there's always an incentive, even if it's not integrated, to have it constrained so you can earn monopoly rents off it. So it is an important power, dealing with the problem that you're facing. I think that's the first point, but secondly, you do need constraints on it, but you have got constraints on it. The constraints are in W and X, and one of the most fundamental is that basically the cost has to be worn by those getting the benefit.

We haven't been bowled over in the rush to use that power, and there's a very good reason: people have got to pay for it. So if there was a problem that people were rushing to it, saying, "Expand, expand, expand," then you might look at it, but what's the evidence that there's a problem here? The evidence is that there is no problem. People haven't been rushing to it.

I know that there are some issues in some of the states and that raises a number of questions in there. We understand that, but by and large it isn't a power that people have sought to use extensively, so my argument is that the constraints that are there obviously are constraining people from seeking to use it too often, so if we think that there is a problem then let's have a look at those constraints, but I just don't see that there is at the moment.

MS MacRAE: Just in relation to that constraint for the access seeker or the person seeking the extension, we've also had a range of views about the way that safeguard might work, and it might be something you want to leave to your guidelines, but this idea of this payment, that they must pay for it, do you see that as necessarily being a requirement for an up-front covering of those costs or is it something that could be recouped over time and, if so, how do you see that impacting on, say, the balance sheet and returns for the owner?

MR DIMASI (ACCC): The first point I'd make is, the words in IIIA are slightly different to the words in some of the state regimes, so what we might think applies to ours might be different in other jurisdictions, but having said that, I wouldn't rule anything out. It would depend on the circumstances in front of us.

If you think of a take-or-pay contract where someone provides a facility to a user, they don't pay for it up-front; they have normal commercial arrangements to make sure that the costs are recovered, and they do it over time. Those sorts of principles could be brought to bear in the right circumstances here as well, so we don't rule out the user paying up-front, we don't rule out charges being recovered over time, as long as we meet the requirement that the user pays and it doesn't end up being a cost for the provider. So I think all those options should be on the table and we don't rule any of them out.

MS SCOTT: Joe, BHP Billiton and others have raised a number of practical issues

relating to the power to have directed extensions and expansions, including how the extensions will be designed and extension works contracted, how real-time technical construction decisions will be made and how costs and risks will be allocated. I guess the extreme version of this is that they envision that the ACCC could effectively become the project manager between potentially two warring parties as one, of course, seeks to maximise the commercial opportunities of any extension and expansion, and the other one may well be seeking almost like a work-to-rule - "I'm required to do this but I'm not required to do any more" - and in a worse case, I guess, something that might have happened in other regimes: "I've lost the key to that."

MR DIMASI (ACCC): The loss of the key to the exchange, yes.

MS SCOTT: "Fred's not turning up today."

MR DIMASI (ACCC): Yes.

MS SCOTT: "That might have been the case yesterday but it's not the case now."

MR DIMASI (ACCC): Yes.

MS SCOTT: So that sort of constant warring effort and how deleterious that could be, really, for the whole credibility of the system. So could you comment on that, given your vast experience? And if there is a work-to-rule approach adopted by a firm, does that effectively negate then the power of the extensions and expansions power?

MR DIMASI (ACCC): Yes, these things are very real issues and we've seen some of that activity in various industries, so that's, if you like, part and parcel of the regulatory challenge, which is why this task isn't easy. But having said that, just to go back to the earlier point, the ACCC wouldn't become, and has always avoided becoming, as I think any sound regulator would, the project manager.

Essentially, you've got parties who understand and you try to get them to resolve it, but if you don't and you have to make a choice, you'll make a choice that one or the other of the parties has got to project-manage, do it. The regulator should never, in my view, step in and try to run the project, design it or whatever else. That's advice I'd give to any other regulator as well.

So I don't think we'd get ourselves in that position, but having said that, yes, then you could run into that sort of issue, depending who does it. You might have work-to-rule, lost keys to the exchange, but again there are sanctions for doing that and it just means that the regulator does need to become actively involved in making sure that the key commitments are met and that the sanctions are imposed if those

key commitments aren't met.

Again, first-best is if you get the parties to a mutually reached, even reluctantly mutually reached, position that they will work together. That's fine. We've had experience of both. We've had experiences where - not an expansions power, because that, as I said before, hasn't been tested, but in arbitrations and the like where we had reluctance and lost keys and all the rest of it and we've had to follow that up, including some sanctions from time to time. We've also had the position where people have fought and fought and fought, and once we've made the declaration, bang, they got together and decided that that was the position, best in both interests and had to make it work.

I would hope that you'd get the latter, but you can't guarantee that that's what you will always get, so the regulator has got to have enough teeth, I guess, to also make it work if it doesn't, but avoid becoming the project manager. I think that's a good warning.

MS SCOTT: In your submission you noted, "The ACCC considers it is preferable to provide effective incentives to prompt the infrastructure operator to extend" or expand the facility. What types of incentives did you have in mind?

MR DIMASI (ACCC): Fundamentally, pricing incentives are always there, and the approach to pricing has got to be that people do need to have an incentive to expand. There's got to be a return for them, so this is where - I hesitate to use the word "ransom", to get back to the earlier debate, but you've got to make sure there's something on the table for each of them and I think a sensible regulator will make sure that the returns reflect an incentive for that investment without distorting the usage too much.

MS SCOTT: Unless you've got any comments you want to make about our questions on expansions and extensions, we might move on to the declaration criteria.

MR DIMASI (ACCC): No, I think we're done with that.

MS SCOTT: Okay. Rio Tinto has suggested to us that criterion (a) would be improved by requiring that a material increase in competition in a dependent market under the current test for declaration should result in an overall material improvement in economic efficiency, so they want to add a few more words. People are always interested in "material" and "substantial". I guess they are interested in "affirmative". Everyone is trying to get away from the strictly marginal.

MR DIMASI (ACCC): Marginal, yes.

MS SCOTT: Okay. So, Joe, do you have a view on that? Are we heading in the right direction? I think you've suggested we were, but I guess Rio Tinto is suggesting we haven't gone far enough and that the addition of extra words along the lines of "should result in an overall material improvement in economic efficiency" would improve the quality of that criterion. Any views?

MR DIMASI (ACCC): Yes. My view is to be cautious. We're suggesting that you should be cautious with your marginal - is it material or is it marginal change? - and any more marginal changes to the thing I think are likely to cause more problems than benefits. We all recognise the issue. The issue is, these have got to be meaningful, to throw in another word. We're looking for something that's not just at the margin; it's meaningful, it's worthwhile doing.

So I think we all accept that, but just be careful with mucking around, because we've gone through lengthy legal processes, and again I want to add, the declaration is an NCC issue, not an ACCC one, so I'm sure the NCC will have more and better comments than we have on this, but our advice is let's just be a bit cautious about changing too many words, because the chances are that you will end up having every one of those words tested through the courts to see exactly what they do mean.

That's been the experience in other parts of the Act for us, whether it's substantial, lessening competition in the market or - you know, these things take on an enormous significance in the courts, so don't change them lightly. I understand the problem, but we've just gone through the court system right through to the High Court. We really need to bed this down and give it some certainty, so unless we can establish there's a real, clear problem to fix, leave it alone would be my advice.

MS SCOTT: Okay. I've got that message and I think Angela has got it too, but I'm still going to press on about declaration criteria, notwithstanding that advice to us and your reference to your role in the process, because you come at the end of the day - - -

MR DIMASI (ACCC): Yes.

MS SCOTT: - - - but the process reflects each step along the way. You support our proposal for a natural monopoly test.

MR DIMASI (ACCC): Yes.

MS SCOTT: But we have heard from some participants to this inquiry that the natural monopoly test that we have proposed will be unworkable in practice, so do you have a view about the workability of the test as we have proposed it?

MR DIMASI (ACCC): We've always recognised that the natural monopoly test is

difficult to make work and probably the drafters did too, which is why they came up with the words that they did in the first place. That's why we were talking about a net social benefit test, to try to help the workability of it, but at the end of the day it's not something that I think we can deal with - the specifics of it, at least - in a hearing environment.

I think the thing can be made to work, but I think we've just got to sit down and make it work. I think the principle is right that it's a natural monopoly test, so the question is how best to make that work. Do we broaden it to a net social benefit test so that that can draw in the natural monopoly, or do we try to define what a natural monopoly for the purpose of this is? You've done what the textbooks do, which is talk about demand at least cost.

We understand perfectly what you mean and we concur with your approach, but we do recognise that these things, tested in the courts, can be pretty difficult and so it probably will need a little bit of work, and we'd be happy to sort of contribute to that work. But I think it's important to stick with the principle, not to move away from the principle, because it's hard. I think the private profitability test is equally hard, even harder, and more unstable, so I'd still stick with the principle that you've got.

MS SCOTT: Okay. Still ploughing ahead notwithstanding your comments - and I'm not trying to ignore them. I just want to be precise here, because we've had such feedback that I want to check.

MR DIMASI (ACCC): Yes.

MS SCOTT: I mean, you're a key player in the process; admittedly at a different stage of the process. We've talked about taking into account demand from substitute facilities under criterion (b). Are you comfortable with that?

MR DIMASI (ACCC): I think taking into account substitutes is important, but again I think it's probably something we'd want to think about.

MS SHEPPARD (ACCC): It's perhaps a slightly different test than the one that the ACCC proposes. We proposed the test which was enunciated in the Duke case in the Competition Tribunal, so there the Competition Tribunal said that the test is whether, for a likely range of reasonably foreseeable demands for the services provided by means of the pipeline, it would be more efficient, in terms of costs and benefits to the community as a whole, for one pipeline to provide those services rather than more than one. So that is the test that we originally supported.

MS SCOTT: Well, we might have a bit of a think. I'm not too sure how far we're diverging from Duke. We might take that one up out of session. What about

coordination costs? We were keen to explicitly recognise coordination costs as something that should be considered. Are you comfortable with that suggestion?

MS SHEPPARD (ACCC): I think our view was that coordination costs would either be considered under (b) or (f), so in terms of having them under (b) I don't think we have any particular concerns.

MS SCOTT: And are you worried, Sarah, about our proposals in the draft report - because again we've got to think about these things for the final - in terms of what we suggested be considered under (b) and the costs that we'd suggested might be considered under (f)?

MS SHEPPARD (ACCC): The NCC will probably have more to say about this, but in practice, so long as they are considered under one of the limbs of the test, it wouldn't concern us.

MS SCOTT: Okay.

MS MacRAE: Just on a more specific area of Part IIIA, we have these competitive tender provisions, which again is another little area that hasn't been used much, but do you have a view about what the effect is of referring to government-owned infrastructure rather than government-sponsored infrastructure? We've had a submission or two that's talked about the fact that the competitive tender provisions could apply to facilities that are to be privately owned but awarded through a government-sponsored competitive tender. You might get a different outcome.

MR DIMASI (ACCC): I'm not sure that I've thought about it all that much. Sarah, have you?

MS SHEPPARD (ACCC): I think I know what you're referring to. I'm not sure it was the intention of the legislation to restrict it to simply government-owned facilities, but that does seem to be how it's turned out. It's certainly a policy question for Treasury to consider whether that should be expanded.

MS MacRAE: But you would agree if you wanted it to be broader, we'd need a legislative change to do it?

MS SHEPPARD (ACCC): I wouldn't want to give a definitive legal answer on that, but certainly we have had a look at that - - -

MS MacRAE: It's something to be pursued.

MS SHEPPARD (ACCC): - - - and it does seem as though there could be some concerns.

MS MacRAE: Are you aware of whether the Part IIIA competitive tender provisions will be used to set the terms and conditions of access to the proposed intermodal terminal at Moorebank?

MS SHEPPARD (ACCC): We have not been approached by Moorebank with any suggestion they will use Part IIIA competitive tendering provisions, so as we understand it, not at this stage.

MS SCOTT: Okay. This could well be the last question. Joe, going back to your comment about all these things are very difficult but maybe there's some attraction still in your mind to the net social benefit test, I have to say one of the things that Angela and I considered, and I think the team weighed heavily on, was just how extensive the net social benefit test could be in the eye of the beholder.

MR DIMASI (ACCC): Yes.

MS SCOTT: You know, we can't talk to people without people raising employment or exports or multiplier effects or investment incentives, royalty income, environmental factors, planning, zoning, trucks on roads. People have got this very wide concept of what constitutes the net social benefit test. Could you just make a comment on that, especially when fine judgments are required, it's a multi-stage process subject to review, and where you think the strengths and weaknesses are of something as potentially broad as a net social benefit test rather than maybe a more textbook natural monopoly test.

MR DIMASI (ACCC): Fair question and, I think, fair point. I guess we have some experience in applying effectively a net social benefit test in our adjudication activities where it's the public benefit and public detriments. Those things have been tested in the Tribunal and there's some guidance about the approach. It's not straightforward and it can be contentious, and the issues about do we include employment, unemployment, all these other things, do crop up all the time. We largely take an economic efficiency approach, but it's broader than that.

So, yes, I do understand and share the sort of concerns about the risks of opening this up too much. If we went down that path, I think we'd have to define it and constrain it so we knew what we were trying to do. We have no problem, as we have said, with a test recognising that we're talking about a natural monopoly, and that's what we're dealing with, so it's a question of how best to manage that, rather than arguing that in principle we should broaden the test also to other things. That's where we're coming from.

MS SCOTT: Thank you very much for coming along today. We very much appreciate both of your submissions and your attending today and answering our

questions.

MR DIMASI (ACCC): Thank you.

MS SCOTT: Bob Baxt will be our next person at the table.

MS SCOTT: Good morning. I welcome to the table Bob Baxt. Bob, thank you for coming along today and for making your submissions to us. Would you like to make an opening statement?

PROF BAXT: Yes. This will be a very short appearance, as I indicated to the administrators involved. Having been at the heart of this level of regulation for a number of years - and I'm reminded that shortly we are to celebrate the 10th anniversary of the Hilmer report, which of course is the forerunner to Part IIIA - I just want to make absolutely certain that, as I said jokingly earlier, I won't die wondering. I want to make absolutely clear that the two points - basically two but perhaps a third - that I'm making today are not points that should be dismissed as matters of inconsequence because they didn't receive much treatment in the report. Whilst the draft report I believe has done some excellent work, to my way of thinking one of the great problems of our country is that we're afraid of tackling serious problems properly and adventurously and getting to the heart of an issue.

I speak as a person who handled the very first application under Part IIIA, the major application, when there was an application to Rio to get access to the Pilbara railway line. My firm at the time structured the very unusual argument about production process and won in the Federal Court. But that's beside the point. The important things that I want to say deal with the fact that we do need to get to the heart of the legislation and the way in which it operates because without it, no matter what tinkering that you do - and I was listening to Joe Dimasi answering your questions about how you interpret net social benefit, et cetera - with our court system, the black letter law approach, we're going to constantly have very, very lengthy, costly and completely frustrating applications in this area. I know it because I've been involved in a number of them, and the costs that the lawyers generate in getting the results for their clients in this matter are not insignificant and whilst the lawyers are not unhappy about that situation, I think we've been in the vanguard in leading reform to the legislation.

Let me deal with the first point, which may not be the most important in some people's minds. Why is the minister required to second-guess the detailed investigations, et cetera, that are taken on by the National Competition Council - I see John Feil here of that able organisation - and by the Tribunal? For many years prior to the Hilmer report and the changes to the Act, the minister could direct the Competition Commission or Trade Practices Commission to do certain things. The minister can't direct the courts to do certain things, and natural litigation that goes on there, and very wisely, apart from one or two areas of the legislation, the minister does not have a role in overriding the decisions.

Now, these are difficult decisions. They take a lot of time. A lot of money is spent on it. The evidence is that the minister has very little time to deal with it; doesn't deal with it in an effective way. I've dealt with the minister and the firm and

related bodies in relation to the public interest in terms of foreign acquisitions, et cetera. The minister has an opportunity, according to my submission - and I've been supported by a large number of people who knew that I was making this appearance and have wished me luck. I said, "Well, I'm only going to come to confirm that I think these are important points and I want to make them on the record," and I'll continue to put them on the record.

The minister can make submissions. The minister can argue the case just as well as any other party. The minister has no special role in dealing with access applications. There are absolutely no arguments, in my view. In your report you talk about - and it's in my short submission - the difficult decisions that the minister has to make in relation to weighing up the private rights, property rights, et cetera as against the benefits, et cetera that flow from access. The ACCC, the Tribunal, deal with that all the time and there's no reason why they can't deal with it in this particular context.

So it's a no-brainer, in my view. It's a political decision, sure, but at least we should be honest and state categorically this is a political decision and therefore we're making it on political grounds, not on the basis that the minister somehow adds value to the evaluation of whether access should be granted now that we have this process in place with the detailed legislation. So that's the first point I want to make. These are very short points. I just wanted to make sure that I didn't, as I said, disappear from the scenario without making them. The Law Council is appearing this afternoon and making separate submissions. I've been involved in that process but am not appearing in that regard.

The second question is the question of the application. The people are to be involved in the most costly, lengthy and really quite spectacular application for access under the current regime - that is the dual application by Fortescue to both Rio and BHP Billiton in relation to the railway lines. As I said, I acted for Rio in the very first application made by a company known as North, which was then taken over by CRA, which has become Rio Tinto. The lawyers in that particular matter - and I've discussed this with them - cannot understand why there isn't more support and more discussion in the report for a one-shot access application.

It just seems to me that if you are going into business to get access, you're dealing with a major infrastructure development and you want to get access, you will have a very good idea what you are intending to spend, what the terms and conditions are. It's no good just getting access and then saying, "Well now, how are we going to pay for it and how are we going to deal with all of these things?" These are matters that should be dealt with together and the NCC, together with the ACCC if it's felt that we need to modify the way the scheme operates.

So that is the point I made in relation to that. It just seems to me that we have a

great deal of pleasure in this country in creating regimes where you give rights of appeal and then further appeals and further consideration in dealing with these matters. Lawyers are experts at doing that and I don't resile one moment from the fact that my clients expect me to utilise all of the particulars that are set out in the legislation. When I was instructed in the access application for the Pilbara, my client asked me how long it would take before they would get access. "Will it be three years?" I said, "Oh no, it will take them much longer than three years. It will take them at least five, I can guarantee you that, because of the way the Act is structured."

To me, the regime is set up in a way - it's a very, very important question here. We're dealing with property rights that are being, in a sense, not confiscated, they're being acquired on fair terms but the set-up is such that there is no doubt that the system facilitates the delay and frustration and difficulties that deal with it. Now, the criteria and all of those issues that you discuss in the report, I don't want to go into those. I've got views on them but I haven't got time today to - nor do I want to - make comments and then the Law Council will be making comments on some of them, but to me these two issues are very critical.

The third question that I've covered in my short submission to you is that the review mechanisms, the grounds for appeal, et cetera, should be further considered and further streamlined. We have far too many of these and too many of our pieces of legislation. I wrote an article some years ago, when this regime came into force, that the access regime was a businessman's nightmare and a lawyer's dream, or words to that effect, because it is. It creates opportunities for lawyers to utilise their skills, utilise the provisions in the legislation which are not the product of the Productivity Commission, which regrettably create a monster regime to deal with these particular questions.

As I've said, I think these are absolutely critical issues. I'll be continuing to make them when the final report comes out. I'm sure these matters won't be dealt with in any detail but that doesn't worry me. To me, it is important that the principles are put forward and we continue to think about them because, regrettably, that is the way we're going to have to go if this access regime scenario is to be dealt with effectively or/and efficiently.

So that's really all I want to say. My submissions are very short. They deal with issues I've covered in a number of publications over the years. As I said, there are lots of people that support the views I put forward; not many of them prepared to come forward and speak out or write about them but the views are very, very strong. A very senior competition lawyer who's just returned from practice overseas asked the Law Council, "Why aren't we tackling these very issues, especially the one-step approach, in these submissions to the Productivity Commission?" These are just so critical to a more efficient and effective business regime in an area where we decide, as a matter of policy, that access should be available on appropriate terms. That's

really all I want to say.

MS SCOTT: Thank you, Bob. Would you be comfortable if we asked you a few questions just on those points?

PROF BAXT: Absolutely happy.

MS SCOTT: I thought your presentation was very clear, you know: more radical reform; take braver, stronger steps than what we suggest in the draft report. But a counter to that is - and you heard Joe and the ACCC saying there is a need for caution, small changes can have more material effect than you think, the drafters can - you know, it could ultimately result in changes with unintended consequences. In fact, we received a large number of submissions which have suggested that in some ways we're going too far and people are worried that moving away from the High Court decision on private profitability creates risks for investment and so on. Even our suggestion that coordination costs be considered, people are saying, "Well, how practical is that? How workable is that?"

It seems to me that your suggestion goes well beyond that because it suggests that someone turns up with a complete application about what they really want in terms of access. Our consultations in the west more recently suggest that people struggle with finding an acceptable level of detail. I guess Angela and I and the Commission itself have tried to walk this very careful line between addressing concerns and on the other hand not undermining the system in unintended ways. Your proposal is much more radical. Is everyone else wrong? Are firms themselves being overly cautious?

I mean, some of the businesses are suggesting caution on our part, whereas if it was just the lawyers we could say they're obviously comfortable with the regime as it is, but businesses themselves, the infrastructure providers, are saying maintain the regime in terms of the review arrangements. "We see a role for the minister. We don't think that you should tinker with the system," and certainly they don't think we should go to a broad-ranging reform. So are businesses getting this wrong? Are we being unduly cautious?

PROF BAXT: No, your question is a very valid one but these businesses are being advised by lawyers and they're being instructed to advise them on these grounds, and lawyers will concoct the arguments accordingly. A very major matter that I had when I was working in the competition area - this is not access but nevertheless the issues are the same - we had a merger and we came before a judge of the Federal Court. No, sorry, it wasn't the Federal Court, it was before the Federal Court, and he said, "Look, this is a merger. It's got to be dealt with quickly. This is what business wants. I'm going to set down six weeks for the hearing." Well, that disappeared. It took 11 months.

The lawyers will drag it out and they will drag it out as quickly and as slowly as the client wants them to. I'm not saying that the lawyers are doing anything wrong. If they've got a right in a statute that says you can do this, this and this, of course you'll use it. If you don't use it you may well be negligent. So to me, we've got to get more efficient. These are competition issues. These are decisions that require a speedy resolution. Sure, when you make a major decision in relation to access it's going to take some time, but surely it shouldn't take - well, the Pilbara matter - over seven years and we still don't have a decision. To me it's an absolute damning set of facts pointing to the ability of the legal profession, if you like, to work with their clients in appropriate circumstances to ensure that the regime is tinkered with.

Now, why does the minister have to get involved? Of course, if I was a business I'd want the minister. I'd want the ability to go to the minister and lobby the minister behind the scenes in private, so that people aren't aware of it, in order to get a decision. I've been the subject of ministers lobbying me - and, I assume, the ACCC - by very, very subtly suggesting, "Well, Bob, this matter" - et cetera. These matters should all be out in the open. We've got to have the sunlight on the way in which these decisions are made. If the government feels that a particular access application or a particular asset is something that is in the national interest that shouldn't be out there, then the government can deal with it effectively by enacting legislation to that effect to deal with it. They won't do it and they won't do it in many cases, just like they won't knock back foreign acquisitions except in the very rarest of cases.

MS SCOTT: On the transparency issue though, as you said, sometimes there's background approaches and subtle approaches, so on the surface it looks like an institution is making the decision but other forces are tipped to be brought to bear. With this process the minister is the decision-maker and in some ways it could actually be more transparent than having the NCC or someone else as the decision-maker because the minister, at the end of the day, does have to take responsibility, whereas if you have an arrangement where the NCC or the Tribunal is the decision-maker and phone calls are made, in what way is that more transparent?

PROF BAXT: The minister will put in submissions, one would have thought.

MS SCOTT: But you mentioned the phone calls.

PROF BAXT: The phone calls will occur, whatever system you have in place, absolutely. The point is the minister has got a limited period of time and there are cases, I've been told, where the minister makes no decision and it's a by-default scenario. How satisfactory is that in the context? It must be so frustrating for the people that are involved. Look, I'm sure there is no perfect system. What I'm saying

to you is that the arguments you put forward in your report about the minister having to make these difficult decisions - they're no different to the decisions currently being made by the ACCC and by the Tribunal; no different at all.

MS MacRAE: Can I just ask you about the extent of review, and again we had a wide range of views about what the proper review mechanisms would be in this case, and we've also had some relatively recent changes as a result of High Court decisions about the nature of review under the existing rules, which largely haven't been tested yet. I take it from your comments that you feel that in general Australia is awash with review and there's too much review.

PROF BAXT: Yes.

MS MacRAE: Are there specific principles that you look at to say in this case a sort of merits review is justified and in other cases it's not? Or would you have a general view that merits review just shouldn't apply unless there's a really good exceptional case for it?

PROF BAXT: I believe that there are proper grounds for merits review but we can have a better system whereby this issue is dealt with. I know this is a bad example in the sense that it's never been used, but when the Dawson Committee recommended, at my behest - I was the prime suggester of it - that in the case of authorisations for mergers, rather than go through the process of applying to the ACCC and then go to the Tribunal and thus delay - you know, parties have got rights to intervene, et cetera; the courts and the tribunals are very generous in allowing parties to intervene - that we have a direct application and that the ACCC act as the amicus.

It just seems to me that we can do much more of that in a situation where - look, you're the applicant for access. You know damn well what it is that you want to do. You're not making this decision as sort of blowing into the wind. If you are, then you should be kicked out very quickly and there should be regimes in place to ensure that costs are awarded in that sort of scenario. But things can occur and should occur in a business sense much more effectively than they do at the moment. Merits review would occur on very, very important questions of law, sure.

There have to be important questions of law because, if there aren't, then guilty people will remain in gaol. New South Wales Court of Appeal just recently quashed a conviction for insider trading which looked absolutely open and shut. As soon as the case started in the Court of Appeal it didn't take the court more than an hour to say, "There's something terribly wrong here." So we cannot get rid of that, that would be terribly wrong, but I'm sure we can find some sensible rules to deal with that. I just think we've just got too many rounds. This Act has gone through a number of iterations from the very first draft. There are even more levels of review

than were in the Act before it was amended, and we now have more time limits imposed on the Council and so on.

But more can be done and more should be done, and I think that we haven't been radical enough. Maybe you feel that you haven't been given the licence to become more radical in your review but, to me, I think that's just so important, so that's why I'm frustrated by the fact that, regrettably, some of these matters haven't been addressed in more detail.

MS SCOTT: Bob, I'm conscious that while the legal costs in a number of matters are reported to be potentially in the hundreds of millions, the potential gains that those firms could achieve if they were successful could be very, very significant - you know, the cost of avoiding building a railway line and so on.

PROF BAXT: Sure.

MS SCOTT: So do you think it's the case that this legislation, no matter how well it's crafted, will always provide incentives and opportunities for lawyers and firms to merely test the margins at every juncture.

PROF BAXT: Yes.

MS SCOTT: Whether we had two review processes or one review process or minister involved or minister not involved, basically every bit of the envelope is going to be pushed to the maximum extent possible.

PROF BAXT: Absolutely, and the judges and the presidents have just got to be tougher. French J, now the Chief Justice of the High Court, dealt with the AGL merger in three and a half months. That's the way a merger should be dealt with and they can all be dealt with in that way, in my view. They can all be dealt with in that way. It's up to the judge to just tell the barristers, "Sit down. You're not going to get away with this." The Americans are absolutely appalled at the time-wasting that goes on in Australian courts and I'm told by many, many Americans that they won't bring deals to Australia to be assessed in the competition area because we just take too bloody long - excuse the expression.

MS SCOTT: Okay. A sobering comment. Well, Bob, thank you very much.

PROF BAXT: Thank you for the time, and good luck.

MS SCOTT: I've got permission to say that we can go to morning tea now, so there's some tea and coffee out there. I'm sure there's a range of biscuits. We're going to resume at 11 o'clock with Glencore.

MS SCOTT: Ladies and gentlemen, we might now resume our hearings and I'm pleased to have to the table Glencore. For the purposes of the transcript, Dierdre, can I ask you to give your full name and maybe you even wish to indicate your position, and then would you like to make an opening statement?

MS MIKKELSON (GXC): Sure. Dierdre Jean Mikkelson, to give my full name, and I hold the position of group manager, rail and port, for Glencore, formerly Xstrata Coal.

MS McCARTHY (GXC): Cassandra McCarthy, corporate affairs, for Glencore Australia.

MS SCOTT: Thank you.

MS MIKKELSON (GXC): Good morning, everyone. We welcome the opportunity to appear before the Commission regarding the review of the National Access Regime. The Commission and people in the audience can refer to our submission for more detailed review of our comments, but I'd like to provide a brief summary of the key issues before responding to any questions. Before I launch into some of the specifics that are in the submission, just by way of context to the submission and our views, I guess it wouldn't be a surprise to anyone to know that the Australian coal industry is currently facing a large number of challenges. The industry has shed around 12,000 jobs to date.

MS SCOTT: Over what period, Dierdre?

MS MIKKELSON (GXC): Roughly 12 months.

MS McCARTHY (GXC): It's about 18 months, 12 to 18 months.

MS MIKKELSON (GXC): Glencore is proactively restructuring our business to ensure that the negative impacts can be withstood in the short term and structure the business for long-term viability. This current environment makes investment in new projects very challenging from the point of view of coal price, foreign exchange, various input and capital costs and, not surprisingly, also infrastructure access costs. Also, the level of risk transfer from infrastructure owners to users makes it particularly difficult. A large number of our costs are effectively fixed now through infrastructure charges, whereas we can variabilise a number of our other costs and weather the storm somewhat.

We believe that a critical part of the global competitiveness of the coal industry hinges on efficient and effective access to third-party information. In further context, when you're looking at new mines, particularly in greenfield areas, the coal pit-to-port infrastructure charges we are seeing now are in excess of 50 per cent of

our free-on-board costs. Those costs are typically fairly fixed, so when you have a significant downturn in the coal price and, in this case, the exchange rate, it makes it very difficult for those mines to remain cost competitive and makes the investment decision much, much more challenging.

Another point I'd like to make, because it does colour some of our original submission and some of the comments I'll make later, is that we do believe that there is a significant difference and that the National Access Regime needs to respond to the difference between a single-user vertically integrated infrastructure chain and a multi-user chain such as the ones that we use in New South Wales and Queensland. By way of further context, we think this review is a critical opportunity to address the erosion of the competitiveness of the Australian coal sector. One of the key risks we've identified in our business, in particular in Queensland, is the ability to obtain and maintain access on a cost-effective basis to infrastructure, to the point where if some of the proposals that have been currently proposed by Aurizon get up, we may not be able to invest in new mines.

So in the light of that introductory statement I'll just cover the four key areas that were addressed in our submission. One, we were very pleased to see the Commission's recommendation in respect of re-redefining criterion (b) in the declaration criteria towards a natural monopoly test as opposed to the private profitability test, and we hope that that recommendation is taken up. I think the only caveat to that is a concern that perhaps the total costs that get taken into account in assessing the natural monopoly test are sufficiently broadly described to pick up the costs that would have potentially been in the net social benefit test.

In that context in our original submission we've proposed a practicability to duplicate type test, and I think the Commission had the view that some of those types of costs would ordinarily probably be picked up in criterion (b). I guess we're just concerned to make sure that those costs do get picked up; things like environmental and social costs. That's really probably all I've got to say on criterion (b).

Another key theme in our submission was we're a little disturbed at the number of references throughout the report and we've had it repeated from a number of regulators that economic rent seeking per se is not necessarily a bad thing. Not surprisingly, we hold quite a different view so I'll go through that in a little bit more detail. The other key thing which we were very pleased the Commission has picked up, although there's a lot more work to be done, is around the extension/expansion framework and making sure that there is a robust model that enables future capacity requirements to be delivered on a cost-effective basis.

Finally, just a commentary on the primacy of the negotiate/arbitrate framework. Generally speaking, we would support that as a proposition. However, the concern we have got is that there needs to be a robust, detailed and at times

prescriptive fallback where the negotiate/arbitrate model is used by monopoly infrastructure owners to basically time out negotiations by access seekers. So turning to each of those key things in turn.

I don't think I'll say any more on the natural monopoly test other than what I've said.

On economic rent seeking, from our point of view we do not see that as being okay. As I said, there's a disturbing trend amongst even some senior regulators basically saying they don't see the transfer of profits from miners to infrastructure owners as problematic. That is a fundamental concern to us. The key thing is that, one, it fundamentally risks the global competitiveness of the industry. What if the infrastructure owner gets it wrong? What if they're too greedy? They're not in a position to really know and understand that. The other key thing is it seems to run counter to the pricing principles that are already in the Act. If the infrastructure provider does get it wrong we believe that it is economically inefficient because investment, not in infrastructure but in mines, will be made elsewhere offshore.

So that's probably a key sort of summary of the issues on that point. On the specific issue around extensions or expansions, the Commission has asked for some further information in terms of developing that, and we've put some fairly lengthy detail in our submission. In particular we use the Aurizon Network expansion process as a bit of a case study on why it can all go wrong and how it can all go wrong. The three key concerns that we've got - and all of these are illustrated in the Aurizon expansion process that they've put forward in their current undertaking to the QCA - and we acknowledge that the QCA is not, strictly speaking, in the scope of this review, but because the QCA Act very closely mirrors what's in the National Access Regime then we do think there is a good precedent there.

The three key concerns are that it allows the monopoly infrastructure owner to effectively place barriers to the development of mines. In particular, a concern we've got in Queensland is that the way it's currently structured, Aurizon Network would effectively decide which mines get developed, which miners get to develop their mines, where and when, and which ports. That's a significant amount of power to put on one private sector entity and has potentially significant economic detriment to the state and the national economy.

The other thing is what we call economic hold-ups, and that is essentially the cost of access to extensions being, in our view, usurious and not justified by the risks. From our point of view, the pricing principles that are already in the Act should apply equally to expansions to put a ceiling on the charges that are able to be extracted by monopoly infrastructure owners. Failing that, there must be a prescriptive and robust user-funding framework that facilitates third-party funding. The consequence of not having that is essentially that the infrastructure owner can charge economic rents that are effectively at the level of opportunity cost of capital

for a miner but accept regulated infrastructure risks. So it's a great position for them to be in. Why would you develop a mine when you can sit there and get those returns and not take any of the risks?

The third element around that is investment hold-ups and this partly touches on our concerns around negotiate/arbitrate, and that is the time that's taken to work through these processes. In a worst-case scenario Australia could miss the boat on the next upswing and there is some commentary that suggests that Queensland, for instance, didn't participate in the recent upswing in the commodity cycle because of infrastructure issues. There were protracted delays in negotiating what was called the Goonyella to Abbot Point expansion and very lengthy delays in some of the other expansion negotiations.

Finally, in terms of the negotiate/arbitrate model, the principal concern here comes down to time frames. It's all very well to have the primacy of negotiation but the difficulty you have is in building mines you've got multiple ports, potentially other rail to negotiate. You've got offtake agreements. Time becomes your enemy. So to go through a lengthy negotiation process and then have to rely on a lengthy arbitration process really does afford you no real protection. So there must be, in our view, a robust and prescriptive fallback option.

I think the other fundamental concern we have with this is where a monopolist that has a natural monopoly position has already flagged their intention to push the boundaries. Then in that circumstance we really do need to have a very prescriptive failsafe for access seekers. We don't take much comfort from the rhetoric that infrastructure owners aren't going to destroy their own business model by pushing the boundaries too far. There's too much short-term focus, for instance, for their management on short-term performance incentives. Where they'll be looking to a three to five-year horizon, we look to a 20 to 30-year horizon.

MS SCOTT: Have you got an example of where that has occurred; where an infrastructure provider taking a short-term perspective has basically cut off their nose to spite their face and ruined their long-term economic prospects?

MS MIKKELSON (GXC): Not currently. At this stage particularly my experience in Queensland has mainly been where the miners have assessed the risks and the costs and been prepared to accept, rather reluctantly, what was offered by the infrastructure provider when faced with the opportunity, which was not to invest at all. But that doesn't mean that the boundaries won't keep getting pushed and pushed and pushed by the infrastructure owner to the point of no return. We're pretty much reaching that point, as I say, where you're talking about major new greenfield investments.

MS MacRAE: Can I just come to a couple of things in your opening statement?

MS MIKKELSON (GXC): Yes.

MS MacRAE: You talked about your fixed costs being a large proportion of those. How much of those costs would be regulated costs or as a result of a regulated cost that you're facing?

MS MIKKELSON (GXC): In terms of the pit-to-port costs being largely fixed, which is what I said, in Queensland, depending on which port you go to, it would be 100 per cent of it.

MS MacRAE: Okay. So do you think in your assessment of that situation then, if you think those costs are unreasonable - perhaps I'm putting words in your mouth but my impression was that you felt that they were a high proportion and that they were too high. Are you concerned that the methods used by the regulators to set those things are not appropriate?

MS MIKKELSON (GXC): In terms of the current charges - and my comments are largely influenced by what we see coming down the pipeline in terms of expansions where new capacity is required through an expansion which can be done effectively outside the regulatory regime, or the regulatory regime doesn't adequately respond, which was the circumstance we had in the Wiggins Island expansion and Goonyella. So in terms of if the regulatory pricing that we're paying is a result of a robust regulatory process, which it has been in Queensland to date, then we accept that those prices are the prices.

What we're concerned about is where the risk profile starts to really diminish for the infrastructure owner and increase for us, that at each regulatory reset the pricing goes up and the risks go down. So what we have seen, particularly in Queensland, is that the access charges in real terms have increased, apart from a few little blips where there were large volume increases, but the risk profile for the infrastructure provider and therefore the risk profile for the user have gone in the opposite direction.

MS MacRAE: Okay. So it's the escalation mechanisms within the regulatory framework that you feel aren't working very well? Sorry, I just want to be clear on this.

MS MIKKELSON (GXC): No, not escalation in terms of cost escalation, if that's what you mean. As I say, our principal concern is around the ability for infrastructure owners to extract higher than regulated tariffs. The regulatory framework says you should charge at this WACC, on this building block approach, this price, and they turn around and say, "No, we're not prepared to do that. If you want the capacity you have to pay this amount extra."

MS MacRAE: Right.

MS MIKKELSON (GXC): That's where we have a significant - - -

MS MacRAE: Is that then a lack of sanction from the regulator, that they can't come and say, "Well, we wanted you to" - or is that a guiding - sorry, I don't know enough about the Queensland arrangement. Is that a guidance in terms of the costs then? I guess what I'm saying is what gives the operator the power to be able to say, "Well, we've got this regulated price but you have to give us more"?

MS MIKKELSON (GXC): Because they won't build the expansion without it.

MS MacRAE: So ultimately it's failing in the way you think that the expansion power is - - -

MS MIKKELSON (GXC): Correct.

MS MacRAE: Okay.

MS MIKKELSON (GXC): So there's no ability to direct an investment per se. Even if there were, there's all these carve-outs around legitimate business interest protection, et cetera, not bearing any of the costs and all those sort of things. So you're then faced - and we were faced with this very concern ourselves when we participated in the recent Wiggins Island project and we needed rail. We paid the extra amount or faced the outcome that not only could we not build the mine expansion, industry ran the risk of losing the Wiggins Island port concession.

MS MacRAE: So in relation to a safeguard that says that someone that is not an owner that wants an expansion should bear the cost of that, do you see that as an unreasonable requirement?

MS MIKKELSON (GXC): No, not at all. We've been supportive of a user-funding framework where, for instance, if the owner of the asset can't or won't invest, then there must be a failsafe whereby the user that wants the expansion can fund. The issue that we've got is that at the moment, after two and a half years of negotiation, we still don't have a viable framework in Queensland. There was no framework in that Wiggins Island negotiation that we were talking about.

MS MacRAE: Is that partly due to those safeguards though?

MS MIKKELSON (GXC): There are no safeguards.

MS MacRAE: When I call them safeguards, the safeguards from the point of view of you have to fund it and there's a question about whether or not you have to do that

up-front or whether it can be returned over a period and then let the operator maintain ownership of that extension.

MS MIKKELSON (GXC): Yes.

MS MacRAE: Just coming back to my question, and if I'm going on like a broken record you can tell me to stop, but are those things holding up - is that the heart of the issue about why you can't come to an agreement? What's missing, I suppose, to make that framework work?

MS MIKKELSON (GXC): I'd say the reason why we can't come to an agreement essentially is because there's limited ability for QCA, in the Queensland example, to impose something on the regulated entity. So Aurizon hides behind legitimate business interests, whatever that means, really broadly interpreted.

MS MacRAE: In terms of what it would mean for Part IIIA, do you think the way - the wording is a little bit different and you may not have looked at this.

MS MIKKELSON (GXC): Yes.

MS MacRAE: But if you have, do you think the arrangements and the wording of the Act for Part IIIA is more helpful in that regard?

MS MIKKELSON (GXC): No. If anything, it's potentially a little less robust than what's in the QCA Act.

MS MacRAE: The ACCC is able to direct an expansion.

MS MIKKELSON (GXC): Yes, but - - -

MS MacRAE: They haven't?

MS MIKKELSON (GXC): But they have to take into account a range of factors which include not changing the ownership, protecting the legitimate business interests of the owner, and those are the two key things which are also reflected in the QCA Act that the owner tends to sort of rely on. To date, luckily, in our context ARTC has not pushed the boundaries on that. And yes, there is a user-funding model for ARTC as yet untested and far less prescriptive than what's being in Queensland, because ARTC to date has followed the spirit of the intended regulation, as opposed to Aurizon, which pushes the boundaries right to the limit.

MS MacRAE: The other question to you then is what's the dynamic that's made those two situations so different? Is it something that a change in regulation could deal with, or is it essentially about the attitude of the parties and the willingness or

the desire on both sides to see an expansion proceed, for example?

MS MIKKELSON (GXC): On the last point, from a mine's perspective, if you're looking for capacity you've certainly got the desire for the expansion to go ahead, and I'd argue that the infrastructure also has a desire for the expansion to go ahead, just not at the regulated rate. They want to extract whatever rate they can. I think the reason why potentially there's a difference between what we've seen in ARTC versus Queensland is a couple of things. One, Aurizon has been privatised. It was previously government owned, but even when they were government owned they were seeking higher rates of return. That possibly could have been a mandate from government ahead of the sale.

ARTC has been much more, as I say, willing to adopt the spirit of regulation to date but what we're concerned about is that it becomes a precedent for other regulated entities; that they adopt that sort of pushing the boundaries of the regulatory framework.

MS MacRAE: To come to the heart of the issue, what would you ideally see as a change? I suppose you're always going to have a situation where you might have regulator parties that are happy to abide by spirit of the law and those that aren't. What, in the nature of the way the legislation is framed around extensions and expansions, could be changed, or is there something in the regulatory framework that needs to change, or are we ultimately just seeing a response to that; that that's how it is, the players are always going to have different views and positions? Is there something in the regulation itself that you would see as ideally changing to make all parties play by the - - -

MS MIKKELSON (GXC): Yes, I think so, and in our submission we went through a number of principles which we would like to see articulated in the guidelines that the Commission has recommended the ACCC develop, and we'd like to see therefore that those get picked up by other regulators. I think a situation of, well, it is just what it is and we just have to live with it, would be a massive lost opportunity and it's not too fine a point to say that really does challenge potential viability of the industry going forward, when you add in a whole range of other factors that are making it very difficult to compete.

MS MacRAE: But as a next step then, the suggestion that the ACCC develop these guidelines in consultation with you is a good kind of first step towards potentially resolving some of these issues as you see them. It's the most valuable thing you could be saying about that at this stage, is it?

MS MIKKELSON (GXC): Ideally we'd probably like to see a greater level of prescription in the Act as well as the guidelines; things like what is meant by "legitimate business interest" and how broadly or narrowly that is defined. Does that

mean absolutely no potential risk to the infrastructure owner today or forever into the future, or is it a reasonable sort of prospect? And how do you define the legitimate business interests of the access seeker as well? Do they have any primacy? So, I think some greater level of prescription in the Act, as well as these guidelines. I guess the concern around the development of the guidelines is how long is that going to take, because if we're sitting here in three or four years' time and the coal market has picked up, it could be all over.

MS MacRAE: It's a completely different matter but did you want to talk about extension/expansion a bit more?

MS SCOTT: No, that's fine.

MS MacRAE: There was just something you said in your opening comments about some highly variable factors that really moved the position of the industry, if I can call it that - the relative profitability and those things. This was one of the things that we were taking into account when we were looking at the way that we might frame criterion (b), so I'd just be interested in your views. One of the things we heard is that one of the difficulties about the private profitability test is that it can rely on factors that are highly variable, and you gave some of them in your opening comments. It was one of the things that made us think that - or one of the potential advantages of a natural monopoly test that some of the factors that you're looking at there are more stable. Would you agree, from your industry's point of view, that that might make the natural monopoly test a more stable indicator and/or do you have views around the workability of the natural monopoly test versus the private profitability test?

MS MIKKELSON (GXC): We definitely have strong views of the natural monopoly test versus the private profitability test. The private profitability test, as we put in our original submission, really does run a significant risk of infrastructure that, by all intents and purposes, should definitely be declared becoming revoked, or declaration becoming revoked. It's not too fine a point to put that, for instance, DBCT in Queensland, which is declared, could equally argue there's a port sitting right next door that was privately profitable for someone to build - "Why are we declared, not someone else?" So we definitely have a strong view that the natural monopoly test is the better test. In terms of whether the costs are variable or not, that wasn't a significant factor in our analysis of the issue.

Just on that, to some point it depends on what the commercial risk allocation is between the parties. Yes, those factors affect the customer but they may not necessarily affect the infrastructure owner if they are able to immunise themselves from that through contractual means.

MS MacRAE: You also mentioned in your opening statement that you thought

there was a need for a variation in the way that the regime applies to multi-user supply chain infrastructure and single-owner. Do you think that there's sufficient scope - I mean, effectively there are some differences in the way we've seen the regime play out in those two areas. Do you think there's enough scope within the regime to cope with that variation? We are asked to look at whether a National Access Regime is sensible. Do you see that the regime currently has the flexibility it needs to deal with those variations in structure?

MS MIKKELSON (GXC): Potentially not when you're looking at some of what I'll call more esoteric economic arguments when you apply them to the practical day-to-day environment. This becomes quite apparent in the ability to direct expansion. We have some sympathy for the arguments that have been put by Rio and BHP in respect of the risks posed to their boards, for instance, of being obliged to make investments. That's a quite different scenario, in our mind, than where an investor goes into a multi-user regulated infrastructure. An owner of multi-user infrastructure should, in our view, expect a greater level of intrusion and involvement by a regulator than in that scenario where it is essentially a single-user integrated part of the production process.

MS MacRAE: Do you think the undertakings that have been in place have facilitated those negotiations? Are they a good thing to have in place?

MS MIKKELSON (GXC): The access undertakings?

MS MacRAE: Yes.

MS MIKKELSON (GXC): In the absence of those, all the issues around the negotiate/arbitrate which I've articulated would really come to the fore. So yes, I think undertakings are good. The issue is there are limitations in what can be imposed by the regulator in those undertakings, and we've also seen instances where there are limitations in the regulator actually being able to require those things in a timely fashion, and I guess the example being Aurizon's current undertaking expired on 30 June; they submitted their revised undertaking on 30 April - hardly much time to do a thorough review.

MS SCOTT: Dierdre, I might ask a few questions that might cover ground on extensions and expansions that Angela has already asked you but I'd like to refer to them. I thought the very useful contribution that your submission outlines is principles that are to be considered but, I have to say, reading through these principles, while I could see them being in the interest of your company, you can imagine them causing heart palpitations for infrastructure owners.

You just made the distinction between maybe what should apply with Rio or BHP and what should apply in relation to your own circumstances. I was thinking

about potential or actual developments in Queensland where you are having a vertically integrated coal producer also building infrastructure. Would you see that more as the Rio case or would you see it more as the case that currently applies in your circumstances, where you would like these new powers to apply? For example, I'll give you one: the presumption should not be that the infrastructure service provider is the only party able to design and manage the construction of extension. So if we're talking about the Adani situation, would you see Adani as in the Rio camp or is it in the camp of being, in your world order, subject to your new empowered stronger extensions and expansion power?

MS MIKKELSON (GXC): To answer that in part we need to go back to our original submission where we actually put a proposition forward that for new greenfield infrastructure there needed to be the determination of whether it met the declaration criteria up-front, so I'll leave it to others to determine whether that infrastructure being proposed by Adani would or wouldn't become declared. If it isn't declared then it clearly sits outside of the regime. Assuming it met the declaration criteria, then yes, the same rules should apply.

MS SCOTT: And even if after the event - I mean, in some cases in the Pilbara, we're often talking about things that are 20 years later or 15 years later, projects that would never have been in the mind's eye of people. So your greenfields test you would apply even if circumstances change later and potentially viable mining projects could be stranded because they were given the okay to operate on the basis that they were a vertically integrated non open access provider?

MS MIKKELSON (GXC): Yes, we did address that in our original submission by saying that's where you have to apply the "Is there absolutely no other alternative to the user?" and is the - sorry, to constructing an alternative and, "Is the net benefit greater than the net cost?"

MS SCOTT: I want to come then to this social net benefits test. You don't like the natural monopoly test and you prefer this broader definition, and one of the things we explored with the ACCC - and I appreciate you might not have heard their testimony this morning - was just how broad is the social net benefit test? People have talked to us about social concerns, and concerns about Great Barrier Reef - export income, royalty income, implications for local communities and so on. So it's pretty broad in its scope.

One of the points you make in your submissions is that even if in fact long-run average costs are rising, you don't think that should - so, in other words, it would appear that some of the conditions of natural monopoly don't appear to be holding. That wouldn't necessarily rule out, in your mind, because - you know, it may still be the case that it's only practicable for this firm to extend or expand or duplicate facility. So how do you define social net benefit so that you don't find it becomes so

nebulous as to be all things to all people, and in fact, having sought this, if you actually got it, that you wouldn't find that somewhere there would be a concern that expansion of your mines would have long-term implications for dredging in environmentally sensitive coastal areas?

MS MIKKELSON (GXC): The actual expansion of the mine and the economic benefits and implications of that gets assessed under a whole other regulatory framework. What we were talking about was the cost of the infrastructure, not the mine itself.

MS SCOTT: Just on that, you could well see that it would be assessed in the environmental impact statements or whatever but, if you have a broad social net benefit test, what's to say that in fact the Australian Competition Tribunal doesn't interpret it as taking into account environmental concerns?

MS MIKKELSON (GXC): I don't know why they would or wouldn't.

MS McCARTHY (GXC): Based off existing environment regulatory work that's already been done or introducing something separate?

MS SCOTT: At the end of the day, if you're going to go with a - I think you accept that it's a broader test.

MS McCARTHY (GXC): Yes.

MS SCOTT: Not defined by economic concepts, as the one we have proposed. If it's actually broad and subject to personal interpretation and not tied to economic concepts, aren't you concerned that you could find that people raise issues like environmental concerns or impact on communities, or impact on heritage areas or whatever, and that in fact you become more open to uncertainty?

MS McCARTHY (GXC): I think the area around environmental impact and community issues already receive quite a lot of attention, as you would appreciate, when we're looking at those kinds of projects. We would be concerned if there was the ability to bring in another layer of scrutiny or regulation on top of that. Our preference would be to rely on the existing regulatory frameworks and the findings from that when you're looking at these projects.

MS MIKKELSON (GXC): And constrain the social economic to the effect of the infrastructure more broadly, on the basis that there are frameworks that exist to deal with the mine.

MS SCOTT: You commented on economic rent in your opening statement and we had a discussion about economic rent with the ACCC today, which I would

encourage you to have a look at and see if you are prompted to make a further submission if you do. We have been quite clear in here how we have defined economic rents and I wonder whether you have trouble with this definition or feel there is a better definition we should use:

> Economic rents are payments in excess of normal profits and hence do not affect the willingness of existing producers to supply.

MS MIKKELSON (GXC): It depends what you mean by "producers" in that. If you mean a coal miner, yes, we do have a concern with a per se appropriation of our profits, other than pushing it to the point where we don't invest at all because that's the alternative.

MS SCOTT: Yes. So no-one would be interested in pushing you that far. You're quite reasonable in your comments this morning that, of course, making a judgment about what's normal profits and what's over the top and is economic rent is - and we've gone to length about truncation and risks and so on in the report. You challenged us on the concept that we didn't think the National Access Regime should be directed to evening out bargaining power and should be about sorting out who gets the share of - and I'm going to use the word - economic rent as I define it. You clearly have problems with that. Is this about helping poor old Glencore at the table? Is that the way you see it?

MS MIKKELSON (GXC): I wouldn't necessarily narrow it to just being poor old Glencore. Fundamentally there's an equity issue here. Why should one party be able to extract profit from another simply because that other party has no other choice, or faces a bilateral choice of basically paying the super profits to the other party or not getting an investment at all in this jurisdiction?

MS SCOTT: Okay.

MS MIKKELSON (GXC): The other thing which we pointed out in our submission is it runs fundamentally counter to economic principles around risk and return because what we're currently seeing is that the level of risk borne by infrastructure owners is virtually zero and yet the returns that they're seeking are mining-type returns. We're exposed to a raft of risk such as we are price takers, a raft of other risks that justify the sort of returns that mining companies require. Why should a regulated infrastructure owner be able to obtain those returns without any of those risks?

MS SCOTT: Okay, that would take us down a whole new avenue of questioning, but I want to come back to this idea that in some ways the regime needs to be at the table with you to help you in your bargaining process. I want to talk about the need for the regime to be a credible threat, but we had a credible threat addressed to the

economic problem, as we defined it, which wasn't about bargaining power and sharing economic rents. There must be many, many circumstances in the Australian economy where you would see uneven bargaining power. This principle, as you've articulated to us, could be very broad in its scope, hanging over a vegetable grower and a wholesaler, or a renter and a greedy landlord.

MS MIKKELSON (GXC): There's a number of dimensions to that. One is where there is a limited range of alternatives, but there are alternatives. Here we're talking about a situation where you have no other choice. You can't even construct an alternative avenue for yourself to get to the - - -

MS SCOTT: Well, there's commercial terms in the sense that - I mean to the extent that you had to give up every dollar, up to the last dollar you're prepared to still operate the mine, that's what happens in other commercial settings.

MS MIKKELSON (GXC): But is that in Australia's long-term economic benefit? You've put miners in that situation, keeping in mind the current environment where yesterday or two years ago, when we made that decision, there was a fair bit of fat in the equation. Now there's none and those costs are fixed.

MS SCOTT: Yes, okay. I'm conscious that there has been fat in the system. We've had one participant in the inquiry talk about the fact that this was such a large risk as an infrastructure owner that they were prepared, if push came to shove, to find a couple of billion dollars to assist, to see a duplicate line built, so they just didn't have their own operations interfered with. I guess you're right, there has been padding and there's been a lot of economic rent in different sectors affecting the high price. All right, I just want to clarify the social net benefit test. You could see it defined to be sufficiently clear that it related to economic and certain social principles. You mentioned equity.

MS MIKKELSON (GXC): In terms of the net social benefit test, social costs and economic costs related to the infrastructure, not extending to the mine.

MS SCOTT: Yes, and you mentioned equity.

MS MIKKELSON (GXC): Equity in the context of not being equitable for being able to extract economic rents.

MS SCOTT: So how much of the rents would you like to have versus how much do you think should go to the infrastructure provider?

MS MIKKELSON (GXC): That's where we've said there are principles already articulated in the Act around pricing being reflective of risks being reflective of the efficient costs. If the regulator is able to apply those concepts and that's the price that

gets ultimately determined, then that's a price we're happy to pay. The difficulty with that is it doesn't work in an expansion scenario where the infrastructure owner refuses to invest at that rate. I guess that's the key point. If you're saying it's theoretically not meant to deal with economic rent, why then are there price increase clauses in the Act which actually articulate what the pricing should be?

MS SCOTT: All right. I'm conscious that we've gone a little bit over time but please don't get anxious. There's lunch that can be shortened. Well, Angela encourages me to think that we should wrap up because we could go on forever. I've written down next to two that it's essential that we ask, so I'm just going to make sure that we have covered them one way or another. I think we'll take it that you've answered one of those in your opening statement. So Cassandra and Dierdre, thank you very much, unless there's some clarification you'd like to make?

MS McCARTHY (GXC): No. If you have outstanding questions or issues that you'd like us to address, we'd be more than happy to provide additional material.

MS SCOTT: That's a very nice offer, thank you. We might well take you up on that. Thank you for coming along today.

MS MIKKELSON (GXC): Thank you.

MS McCARTHY (GXC): Thank you.

MS MacRAE: We've got Asciano's case at the table now, with Tim Kuypers.

MR KUYPERS (Asciano): Yes, that's me.

MS MacRAE: If you wouldn't just introducing yourself for the transcript, that would be helpful, so if you'd like to just give your name and your position for the transcript and then if you want to make an opening statement, that would great.

MR KUYPERS (Asciano): Thanks. Tim Kuypers, GM Regulation for Asciano.

MR RONAN (Asciano): Stuart Ronan, Manager Access and Regulation, Asciano.

MR KUYPERS (Asciano): I'd like to make a few brief opening comments. I think probably the previous speaker and the next speaker know who we are, but I might just introduce Asciano to the wider audience and then just explain why access is so important to us. I'll then touch on three key areas of the report that we wanted to explore a little bit more: the national approach to rail regulation, vertical integration and the negotiate/arbitrate framework, building a little bit on some of the comments that Glencore have made.

We are a top 50 ASX. We've got about three and a half billion worth of revenue and around 8,000 employees. We move pretty much anything that doesn't have legs around the country in trains, although we break that rule; we do actually pull the Ghan and the Indian Pacific. We try and minimise the number of legs that we pull. So we move coal, we move grain, we move steel and we move containers pretty much everywhere throughout Australia.

Also as part of Asciano there's the Patrick business, which has the four capital terminals, mainly container ports, and we also have the Autocare business, which is stevedoring for automotives and also a pre-delivery inspection business. We also have a ports and general stevedoring business, where we're the port operator and also we're a general stevedore.

So where access comes into our business is really on the rail side but also increasingly on the general stevedoring side, particularly where there's vertically integrated port operators and we're trying to seek access to provide some services.

We're mostly an access seeker, although that's not completely the case. In the past we've run the network here in Victoria and also in Tasmania, but also our intermodal terminal here in Melbourne is actually regulated under the ESC. So in a sense we are an access provider as well as an access seeker, although no-one has ever sought access from our terminal in the nine years, I think it is, we've had an access undertaking in place.

In terms of why it's important to us, without efficient access we can't actually provide what we provide. We don't own any of the tracks, and within rail it's not just a matter of price. It's also a matter of the terms of access, the way that the network rules are set up and so forth. There's a bunch of things in rail beyond just the price that really determine whether we can actually provide an efficient service or not. Price is obviously important. I think we pay upwards of $400 million a year in access fees to our track providers, and depending on which rail services that's between a quarter and 30 per cent of our costs, so it's a big chunk of our costs that we're talking about here.

The other kind of key point which will probably come up through the conversation today is our concern around vertical integration and what that means for our ability to compete. We have a range of track providers who are either vertically integrated or non vertically integrated across the country.

So that's why it's important to us. I guess why it's important to other people - a little case study of our entry into the Queensland rail business. Prior to our entry QR, as it was then, was a vertically integrated monopolist, I think, and I'm quoting customers rather than just being mean to QR: services poor; reasonably inflexible contracts; and the actual output, both above and below rail, wasn't meeting the demand required from the system. So at the direction of ourselves we introduced a new way of contracting: there was more risk-sharing; some innovations. To us it's exciting, about wagon design and the way that we turn trains around. We've actually put a bit of pressure on Aurizon who now have stepped up their game.

So as well as for us, you know, that's a nice little case study of why it's important that we were allowed access, because we were providing new ways of delivering the service but also brought the quality of the service from the incumbent up as well.

I'll maybe just turn now to the three areas we wanted to talk about. One was the national approach to rail regulation. In the draft report there's a conclusion that the costs of introducing a national approach to rail regulation would outweigh the benefits. I think we have a number of concerns with this conclusion. I guess the overriding concern is, although it's not the main thrust of what you guys are trying to do, we can just see this being quoted to us in future: "Well, the PC said it wasn't a bad idea; off you go," and we won't be able to explore that idea further.

I guess one of our first concerns is around just the depth of analysis, so it's really based on a number of assertions. Also our view of the benefit is probably a bit broader than you've identified. You talked about the administrative cost savings, which I think are there, but we think there's also some benefits around actual quality of regulation.

If you look at the predominantly state based regulators that we deal with, some of them will be dealing with rail issues all year - the QCA, for example, would be - but some of the other regulators wouldn't be. So I guess the level of expertise that those guys are able to maintain in rail is probably a lot lower, and we could see a benefit there from having a national regulator.

Also there are some, I guess, capacity constraints on the state based regulators around, you know, the number of things going on. Glencore were just talking about UT3 and UT4. UT3 is what's in place - the undertaking from Aurizon at the moment - and UT4 is what's on the table. We actually haven't finished UT3. There are a number of areas of UT3 that haven't been completed, and we're already talking about UT4. So there are some kind of capacity issues around the regulators as well. So we can see that there are some benefits to national rail regulation beyond the administrative cost savings.

One of the areas where the Commission felt there was a downside was the lack of flexibility, particularly for state governments, to actually adjust regulation. To us, changing regulation based on state borders doesn't make sense. To us, changing regulation based on the nature of the network would make sense. I don't think we'd ever say that the regulation of Aurizon's coal network should match the regulation of the grain network in Victoria - it doesn't make sense - but we think a national regulator could actually take account of those factors. So you'd probably get grain networks having similar regulation; coal networks having similar regulation.

There are also a few things that again, in the wonderful world of rail, would be consistent; important things for us like network rules, the way that possessions are planned and so forth, which could probably be consistent across the piece. So again we probably think that the cost was overstated.

The last thing was just a reference to: "Well, the cost of implementing this change is going to be huge; look how long it took for the rail safety regulations to be brought in," which is true, but to me the logic of saying, "We're not going to do any reform because the last one was pretty hard," doesn't necessarily get you there. Hopefully we could actually learn from why that took so long rather than just say, "It's all too hard; we're not going to do it." I've been paraphrasing, but I guess you get the point. So I guess what we're saying is, just given those other factors, maybe just the certainty of your conclusions - maybe just have a look at those.

The second point is vertical integration. We see this as really having the potential to undermine some of the benefits of access. It can actually undermine the promoting of competition if not checked. We had - I described it as a little bit of fun, but I'm not sure that John from the NCC agrees - not too long ago where we had a declaration application in and the Queensland Government had a certification application in. At the same time Aurizon was being privatised. So there were a

number of things moving and there were a number of things going on, but there were probably a couple of things that we took from that.

The first one is that it wasn't entirely clear what the hook was to have that vertical integration discussion within the certification application. So around the certification application where is that hook for vertical integration analysis? You could read there in some of the broader ones of course, but I guess arguments were made by the Queensland Government that vertical integration wasn't relevant for certification. To me that indicates that maybe it's not tight enough, so maybe a reference to vertical integration could get in there, just to give that hook to that debate.

The second thing that came out of it was that, when the certification was approved, part of what the NCC looked at was UT3, which I think is appropriate, so they looked at both the law but also the undertaking that Aurizon was putting in place. We're now in UT4 and Aurizon, as is its ability, is trying to pull back some of those controls around vertical integration that were part of UT3. So we get to the situation where we have a certified regime, but I guess part of what was certified has changed. I think that probably just lends a bit of support to your recommendation around having the ability to challenge certifications within the process. Obviously, you know, we're midst the UT4 debate, so I don't know where we'll end up, but it's a potential that we end up in a very different place than UT3.

The final point I just wanted to touch on was the negotiate/arbitrate framework, and this probably builds a little bit on the comments from Glencore earlier on. I think we too support the negotiate and arbitrate framework, but to us on its own it's probably not enough. Where we have reference tariffs and, probably more importantly, a standard access agreement, we find that negotiations are much easier. I know that in the report you talk about the ACCC being able to deal with disputes together. I think one of the benefits that we've found is, where you do have a standard access agreement, where you do have reference tariffs, that gives you a really strong basis for negotiations.

You know, different access providers have different willingness to move away from the standard access agreement. With ARTC we've managed to get a number of changes that reflect our business. Probably with Aurizon you're less likely to get those changes, but we have that baseline standard. Without that I think the negotiations will be protracted, and I'm just talking pure access here, not extension, and some of the things that Glencore were talking about - the delays around extension - would become more important.

We're not necessarily advocating change, because at the moment we do have the benefits of this and the ARTC has those features of its undertaking that it puts into the ACCC, but I guess just a recognition that to us they're important.

They're really just the three areas I wanted to highlight in the report.

MS SCOTT: Thank you very much. I might go to the national approach to rail access regulation.

MR KUYPERS (Asciano): Yes.

MS SCOTT: I think you made a good point, and one that I'd like to consider a bit further, about whether our statements could be used in the future to put the kybosh on potential reform. I guess we were being practical, for a number of good reasons. We're very conscious that of course most of Australia's rail network is already covered by some form of regime. It's not like we don't have coverage; it's the fact that they're not necessarily consistent. So the question has got to arise: what's the gain and the cost from moving to consistency?

The second issue is, is consistency likely relative to long, protracted negotiations? We've recently visited WA and been speaking to people over there about their rail access regime and, as you know I think, it's poor. Four regimes exist. So I guess I'd be interested in your views. How likely, given you're a practical person, I'm sure - that, you know, people who have entered into state agreements, have legislation; very concerned about their sovereign risk - that they're going to feel comfortable about moving to a national regime?

You're right, we do make reference to the 10 years that it took to move to a single national law and regulated rail safety, and that's because we recently examined a whole range of - 17 areas - COAG reform and really were struck by opportunities where it was almost the case that games - as they were more closely studied, were felt to dissipate as people got more and more into the detail and got into more and more negotiation.

Maybe my question goes to two parts: the practicality of the WA situation moving to a national regime and the second thing is, it's not so much the issue that there wouldn't be gains but would the gains be sufficient for the costs associated with it, especially when you could come to issues about compensation costs, for example?

MR KUYPERS (Asciano): One might argue that the safety reforms aren't actually there yet, because a number of the states aren't actually in, and - - -

MS SCOTT: I think that would indicate that, therefore, it's very hard to move to a national regime.

MR KUYPERS (Asciano): I guess what I was going on to say is that I wouldn't underestimate the difficulties around it, and I don't make light of those. I guess

you're focusing a little bit on consistency as being kind of the aim of those reforms. I think that was probably to the rail safety reforms and, in a sense, I am a little bit saying, you know, state based regimes do create inconsistency. But I guess where I would be focusing is more on the improvement of some of those decisions on regulatory expertise and perhaps some of those can be achieved without full-scale reform like you're talking about with rail safety.

MS SCOTT: If that's the case - that they need to have a shot in their arm in terms of expertise and their organisation - that could be more readily done through, I don't know, a discussion at COAG, "Let's lift the game of our players, our regulators," than - - -

MR KUYPERS (Asciano): I think it's more of a - - -

MS SCOTT: - - - protracted negotiations over what could be 10, 15 years to achieve a national regime.

MR KUYPERS (Asciano): It's more about the cycle, I was talking about. So some of those regulators that have been working on rail for a couple of months, every three years or every five years, and that wouldn't change how good the people are; it's kind of knowledge of the industry. I don't think I'm going to persuade you that it's an easy thing. That's fine, I'm not going to try, because I don't agree.

Just going back to the power of your statement, there have been some COAG statements around, consistency would be a good thing. ARTC's undertaking is not a bad thing, so in negotiations we have been having that has been a bit of a basis and that's an argument that we've used. So there are steps to consistency you can make without, I guess, all those changes. You know, a statement from you saying it's not a worthwhile thing just might undermine that.

MS SCOTT: How would your reaction be to: considerable efforts would be required; there could even be issues of compensation for some governments; this will not be for the faint-hearted; it's likely to take a considerable length of time and require exquisite leadership and considerable momentum. How would that rest with you in terms of a fair description of the case?

MR KUYPERS (Asciano): Perhaps okay, except for the compensation. I think with timing - I mean, most of these regimes run over a certain time period, and so you can start to meet consistency over time without any compensation paid.

MS SCOTT: Okay.

MR KUYPERS (Asciano): I'm not suggesting that it wouldn't require a large effort or a large will, but maybe just reflect on what I was saying before about the power of

some of your statements and what's in place at the moment to actually take baby steps, if you like, to some of that consistency.

MS MacRAE: An alternative to talking about the benefits of a national regime might be to say that there are some of the issues you've raised around consistency and expertise and that all options should be considered to look at these and that, while the national reform might be one of those and maybe we wouldn't rule that out in the longer term, we might want to note that at the moment that looks like it would be a very expensive option - - -

MR KUYPERS (Asciano): Yes.

MS MacRAE: - - - but we can see merit in still trying to address the sorts of issues that we've raised, and that might be a better way of handling it in this quarter.

MS SCOTT: Yes, I'm looking at a chapter-writer as I speak. His ears pricked up. All right. Thank you very much. I think that's good clarification on that. You probably should know that I am sympathetic to your point about, you know, one statement can have a powerful retelling later, maybe out of context.

MS MacRAE: I don't think I had a great deal of questions. You had three areas. The second one was in relation to certification. As I understand it, you're saying that you see some value in the way that we've suggested some changes to criterion (e) that might be helpful.

MR KUYPERS (Asciano): Yes.

MS MacRAE: I don't think I was entirely clear. Did you feel there was a regulatory change required in relation to the vertical integration question, or was that something more about the operationalising of the way the certification works?

MR KUYPERS (Asciano): I guess it was that arguments were able to be made that the principles for certification didn't require you to look at vertical integration. I guess I was looking for maybe a hook or a bit of clarity to say, "Yes, vertical integration is important and should be looked at as part of the certification process."

MS MacRAE: Okay, so make it more explicit - - -

MR KUYPERS (Asciano): Yes.

MS MacRAE: - - - in saying the outcomes of vertical integration are sort of affected in the other - - -

MR KUYPERS (Asciano): Yes, so that that debate can be had. I'm not suggesting

that anything too prescriptive goes in there, but just a recognition that that's a relevant factor to take account of.

MS MacRAE: All right. Have you got anything else on that?

MS SCOTT: I was going to go to the transitional issues.

MS MacRAE: Okay.

MS SCOTT: In your submission on the draft report you suggest that there may be some potential transitional issues where changes to the declaration criteria may impact on the operation of the competition principles agreement and various state based access regimes. What types of transitional issues do you think could arise, because we're quite concerned that there could be some unintended consequences if we don't get enough input back from people.

MR RONAN (Asciano): I think that comment was largely around that some of the state based regimes have effectively picked up wording out of the Competition and Consumer Act and, to the extent that you may suggest changes to that Act, you may end up with a situation where you have, say, the Competition and Consumer Act saying one thing and maybe a state based act - which, if you like, copied the words from a couple of years ago - saying something slightly different.

So it's more a case of just making sure something either didn't fall between the cracks or was covered under one and uncovered under another so you get jurisdiction shopping. So it's not sort of an issue that I think we'd see as big-picture critical. It's more a case of making sure that there's sort of sufficient coverage so that there isn't that sort of mismatch or misalignment for a period of months or maybe years.

MS SCOTT: Thank you for that clarification. That's good.

MS MacRAE: I think the last set of issues you raised was in relation to the negotiate/arbitrate framework and the standard access agreement, saying that the ARTC one, I understand, has been beneficial to you. If you were to make these a standard feature of negotiations going forward, who would be responsible for developing that standard agreement? Would it be done through the ACCC and - - -

MR KUYPERS (Asciano): Yes. We find that that's one of the key areas that we're able to influence outcomes, is joining the negotiations around the standard access agreement. A lot of the undertakings themselves are focused on how you actually seek access and negotiation periods and time frames, whereas what we're talking about has been around a while and we're there, if you like. So the access agreement is key to us.

So where it works best is often - maybe take Queensland Rail as an example at the moment. They're putting an undertaking into the QCA, of which there is one standard access agreement. They came to us; had a discussion; we pared it down to - because there have been access agreements around for a while and there are probably only three, four, five areas of dispute, and I think it was a similar case with the ARTC as well, but when we went to the ACCC there were four or five areas of dispute.

So that seemed to work quite well. It was, "Okay, let's sit down; we reckon we've got a good framework now," and we've been operating like this for a number of years, so we know kind of what works and what doesn't. Two, three, four or five areas of dispute: let the regulator decide on those. To me that's probably been quite an efficient way or doing that.

MS MacRAE: What sort of information do you need to get a standard access agreement up and running?

MR KUYPERS (Asciano): Information is less of an issue. I think on the access agreement that's probably more to do with the tariffs.

MS MacRAE: Okay.

MR KUYPERS (Asciano): The access agreement itself: I don't think there's any particular information asymmetry between us and the track provider, so I don't think that's a real issue.

MS MacRAE: Okay.

MR KUYPERS (Asciano): It's more on the tariffs.

MS MacRAE: So it would be something that you could define sort of generically for a generic regime, if we talked about the advantages of having a standard access agreement in place?

MR KUYPERS (Asciano): Yes. I think it's quite industry-specific, so there's a lot of stuff in a rail access agreement which wouldn't make sense for anyone else, but for rail I think you could pretty easily define a standard access agreement, yes.

MS MacRAE: And it would make sense having something more generic - well, it would be of a different nature but having the idea of having a standard access agreement would make sense in other industries, do you think; would be as useful?

MR KUYPERS (Asciano): I think so from an access perspective.

MR RONAN (Asciano): Yes. We aren't speaking for other industries but I think places like electricity and gas probably already have standard access agreements, so I don't think it's a new concept.

MS MacRAE: No.

MS SCOTT: I'm going to return to the idea of a national rail-specific regime. Despite your own firm, can you point to the other beneficiaries that you would see from this regime.

MR KUYPERS (Asciano): I guess a number of our competitors would also benefit. Some of the coal companies have actually started up their own rail company, so there's X-Rail. Aurizon you'll have to ask, but they might benefit in areas that weren't Queensland. They'd maybe lose out in Queensland, I don't know. That's for them to discuss. I don't think rail is ever going to be an industry where there's 15 of us competing, but there will be three or four of us and each of those companies will benefit.

I think also the way that the Hunter Valley regime has changed now so that actually the coal producers themselves are contracting with ARTC, so there are the two agreements in place. So those guys would benefit from that as well, which is in essence what happened. There are standard agreements associated with the undertaking both for them and for us.

MS SCOTT: So potentially three or four national players.

MR KUYPERS (Asciano): Yes.

MS SCOTT: Would you be able to give us even just a broad indication - I won't hold you to the decimal places - of how much it costs Asciano to deal with the different regulatory regimes at present. I just want to get some sense of the cost that - - -

MR KUYPERS (Asciano): In reality there are some administrative costs, which are probably not that huge. It's myself, Stuart and some lawyers who get involved and have that complexity.

MS SCOTT: Yes.

MR KUYPERS (Asciano): I think a lot of the real costs are associated with the operational rules around types of wagons, types of speeds you can run and all those kinds of things that actually prevent some of the efficiencies in design and so forth being incurred, because some of the regulatory regimes we're talking about do touch on those operational areas with network rules and so forth.

MS SCOTT: And they're not covered by a move to the national law, the safety changes and some of those other - you've raised this issue and part of it was about regulatory capacity, and Angela asked if there was another way to address that. You've raised now potential - so there are your admin costs, but they don't sound - I don't want to underestimate them, but it doesn't sound like it's - - -

MR KUYPERS (Asciano): No, they're not enormous.

MS SCOTT: They're not enormous. But then you're saying, well, there are probably spillovers into actual operational issues. Then we could be talking real money.

MR KUYPERS (Asciano): Yes.

MS SCOTT: But I'm thinking, if they're real money, couldn't they be addressed through the other mechanisms that exist for standardisation reform; the national rail law; the fact that, you know, there are people meeting almost on a daily basis to resolve these issues.

MR KUYPERS (Asciano): Potentially there might be a solution there. Let me give you an example around possessions. Possessions is where the track provider takes control of the network and actually stops trains running so that they can repair. So it's always a bit hard for the track provider because we're always whingeing when they do it and we're always whingeing when they don't do it, because the network is not up to scratch. But the issue then becomes around coordination of those possessions.

So in our access agreements we try and have obligations on those guys to not only consult with us - so we're saying, "Well, we have a peak time; we don't really want you doing it then" - but also consult with each other. So they're actually saying, "Okay, we're closing the bit of track from Melbourne to the New South Wales border," and then RailCorp decides next week, "We're going to close New South Wales." So it's that coordination.

To date those kinds of obligations have sat within the access agreement and therefore have sat within the access framework, and to me that's where those big benefits come. I don't think it's the only way that we could make those improvements, but traditionally that's where they sit.

MS SCOTT: I understand. I got that. So there could be other ways to skin a cat.

MR KUYPERS (Asciano): Yes.

MS SCOTT: And skinning that cat could happen potentially faster than maybe moving to a national rail access regime.

MR KUYPERS (Asciano): There will be lots of cats skinned before we get to there.

MS SCOTT: You still favour that. I understand.

MR KUYPERS (Asciano): Yes, but to us it's around the points that we're able to influence the outcome, okay? So when we're sitting down with monopoly providers, who often have other objectives that aren't freight - RailCorp, for example, worry what's going to be on the front of the Daily Telegraph the next day - which are legitimate for them to manage, but the only time that we have influence on that is really at the regulatory (indistinct) - is where we sit down with the regulator and the track provider and we work out what the access agreement is. There will be a bunch of other ways, I guess, but my concern was what influence would we have in those processes, given that the regulatory regime provides us that influence.

MS SCOTT: Okay, that's very clear. Gentlemen, thank you very much for coming along today.

MR KUYPERS (Asciano): Thank you.

MS SCOTT: Good afternoon.

MR SHORT (AN): My name is John Short. I'm senior vice president national policy for Aurizon. My colleague will introduce himself, obviously.

MR McSKIMMING (AN): My name is Sam McSkimming. I'm the regulatory manager for Aurizon.

MS SCOTT: Thank you.

MR SHORT (AN): Since we're running over time, we're happy to stay after lunch if you've got more questions to ask. Our flight is such that we've got that time.

MS SCOTT: Thank you very much for your submission, which I think came in on Saturday, so that was great. To assist us you might want to draw out the three or four areas that you think could be most pertinent to - - -

MR SHORT (AN): Okay. I do have an opening statement.

MS SCOTT: Good. Well, please proceed, John.

MR SHORT (AN): Okay. I have a copy for the person over there, if it makes it easier.

MS SCOTT: Thank you, yes.

MR SHORT (AN): Picking up that first point, let me say that we sincerely apologise for the lateness of our submission to this inquiry. Unfortunately our heavy workload clashed with our best intentions or best endeavours to deliver the submission to your staff last week, so we apologise.

I also wish to note that our submission does not seek to address any specific issues or matters raised during the course of this inquiry concerning the current Aurizon Network draft access undertaking, known as UT4, currently being considered by the Queensland authority.

However, in view of some of the earlier comments, we are happy to take questions of a policy nature around SUFA and UT4, as well as explaining to you the new approach that we are seeking to take with our customers, or Network's customers, in relation to the UT4 process and, quite frankly, seeking to design a better process which hopefully leads to a much better outcome as we go into UT5 so we do deliver an undertaking on time; that there is a decision by the QCA coming into UT5 that in fact starts on time and not 12 months later than it should. So we do acknowledge that, but we are seeking to find a better way with the QCA and noting

that we do have a new QCA chairman, who's also seeking to change the process; facilitate the process; reduce a lot of the complexity.

I also wish to extend an open invitation to the Commission to literally come up and have a look at the network, come and talk to our executives and actually see what we do, and maybe it will contrast somewhat with some of the submissions.

Firstly, just to introduce Aurizon - and I won't go into all the guff that's in the opening statement - we are, quite frankly, the largest rail freight haulage operator in Australia by tonnes hauled. We operate in the key freight sectors and supply chains across the country. We obviously operate in Queensland. The network in Queensland - the dedicated coal network - is over 2600 kilometres. We also operate in New South Wales in terms of the coal operation in the Hunter Valley, obviously WA in terms of iron ore, and in other states.

As Australia's leading freight and logistics business with the broadest national footprint, we're obviously deeply interested in the development of access policy in the Australian railroad and bulk freight sectors. In that respect the group's activities include the management of the coal network in Queensland, covered by the QCA legislation, a haulage business that acquires access from seven different networks under the auspices of five different open-access regimes and the development of multi-user greenfield railroad and port projects in Queensland and WA, which would support the growth of the resources sector.

I stress very much that we have infrastructure that is an enabler for the resources sector. We seek to support the resources sector and we seek to actually work together with other members of the integrated supply chain servicing the resources sector. I think it's best for us to work together, not point fingers at each other.

Under its terms of reference the Commission is required to assess the role and efficacy of the National Access Regime and propose ways of improving its operations, et cetera, as I'm sure you know, but we think that the Commission should give more emphasis to particularly reference 6 to allow the Commission to make recommendations that go beyond the operation of the National Access Regime.

MS SCOTT: John, do you want to elaborate there. Basically you're saying that we should have gone broader in our remit; we should have taken a wider reading of what we were asked to do.

MR SHORT (AN): I'm coming to that in the context of greenfield infrastructure.

MS SCOTT: Okay. If you could say, you know, exactly where you think we fell over on the job, that would be quite good.

MR SHORT (AN): Despite concerns as to the short to medium-term outlook for the prices of Australia's major bulk commodity exports, as well as the continuing fall-out from the global financial crisis, which continues to reverberate through markets, and the higher and more certain returns investors and financial markets are demanding up-front before they will agree to the commitment of literally billions of dollars for new resource projects and associated enabling infrastructure, Aurizon believes it is timely for the Commission to give significantly higher priority to the issue of creating a policy environment that promotes significant investment in greenfields infrastructure.

Before elaborating on that, there are a number of points that we have raised that are in fact in the "key points" section of our submission. I can go through those various points, but probably in the interests of time I'd skip that and say that we support the retention of the existing power of a regulator to direct an expansion. However, that statement is subject to the continuation of the strict protections currently included in the legislation, particularly the prohibition on a regulator requiring an access provider to fund an expansion. We in that context particularly note the recent submission from the Queensland Government in which it states:

> Queensland considers that it is a strong principle that extensions to facilities are commercially negotiated between parties rather than being imposed by the regulator. Queensland considers that any recommended changes must not compromise the legitimate business interests of the service provider or inappropriately interfere with their private property rights.

Obviously we strongly endorse that position of the Queensland Government. There are a number of other points, but we particularly believe that there's a need to distinguish between expansions of the existing system and geographical extensions, which are typically contestable. The power to direct geographical extensions should depend on the extension meeting the declaration criteria before it is included as part of the declared service.

We have a number of other points, as I said, in that key section area that I'm happy to go to, but you'll probably ask us questions on that. I'll then come back to the issue of greenfields infrastructure. Aurizon believes there is a strong case to reform the current framework to better promote investment in greenfields infrastructure by allowing the regulatory arrangements that are to apply to greenfields assets to be determined up-front prior to capital being committed.

Aurizon would ask the Commission to consider whether there is any significant basis for continuing to expose sunk private capital to a substantial risk when there is generally an opportunity to address the relevant policy objectives made before an

investment decision is actually made. The current regulatory situation inevitably increases the risks attached to greenfields infrastructure proposals, which could either result in the investment not proceeding or being wound back. You may recall that that's an issue that the former head of the Productivity Commission, Gary Banks, commented on in a major speech last year, which again we would endorse.

Additionally, investors price for risk and thus this regulatory risk would result in investors demanding higher returns, adding to the overall cost of the relevant project and thus reducing international competitiveness of the project. The effect of such outcomes would be to reduce the future growth outlook of the Australian economy and to reduce future levels of consumer welfare.

Aurizon submits that this is an issue the Commission should address at this point in time, particularly given the following circumstances: (1) the current uncertainty of the outlook for Australia's key commodity exports; (2) the increasing competition from suppliers in other countries and the resultant increased need for Australian producers to deliver low-cost projects to allow them to compete in a far tougher international marketplace; (3) the very high hurdles set by investors and financial markets, which obviously have got higher post the GFC.

Finally, Aurizon notes that the attractiveness of this approach is reflected in the way in which open access is increasingly implemented in the rail sector. As the Commission notes in its draft report, it is the frequent practice of governments to negotiate open-access requirements as part of a project approvals process. These negotiations often recognise that open access can and should be implemented in the context of a genuine commercial framework or multi-user infrastructure rather than through a prescriptive regulatory regime.

In other words, there is an increased awareness that open access can form an integral part of the commercial model for infrastructure investment, and greenfield proponents such as Aurizon have a strong commercial incentive to increase utilisation of sunk assets through negotiating commercial access arrangements to maximise throughput. To put it very bluntly, we make more money with greater output, greater throughout, so we want to facilitate greater throughput.

MS SCOTT: John, thank you very much. I particularly want to cover off this greenfield issue and regulatory regime and come back to your questions about assessments that the Commission has made in its draft report, then go to expansions and extensions.

The Commission in an earlier report on the access regime sought to address the issue, maybe imperfectly, of providing certainty for investors while at the same time protecting the overall regime. You've outlined a number of issues relating to the ineligibility provisions, including that if you end up finding that an ineligibility

ruling is applied and denied, you think it could be a signal for people to suddenly get on the bandwagon for a declaration.

What changes would you propose to the provision for ineligibility and is your answer to greenfields - does it mean that we don't need the ineligibility provisions? Is it a replacement of those?

MR McSKIMMING (AN): If I can take your quite specific question and make it a little bit broader, the place we're coming from on greenfield is that we think that the statute needs to give us adequate choice to look at a range of different options with both regulators and government before capital is sunk.

I think the thing that needs to be stressed is that the existing declaration mechanism was designed by the Hilmer Committee, looking out on the world of uniform government businesses, none of which were regulated, none of which provided access. Rather than looking at each individual asset, the Hilmer Committee said, "Let's put in place some mechanisms designed to ex post regulate these assets."

The environment now is very different, of course, because these greenfield assets haven't been built and the primary task is actually encouraging them to be built. Our answer is not that these assets shouldn't be open access; it's that, "Let's look at the mechanisms in the statute that allow investors to get comfortable with those regulatory arrangements before they make a financial commitment."

The issue with the ineligibility mechanism is essentially threefold. The first is that it's public and it's public at a very early stage of a project, so there are issues about confidentiality and there are issues about process. The second, as you refer to, is that the actual test for ineligibility is essentially exactly the same as declaration: does it meet the declaration criteria? So a negative finding on ineligibility is essentially a finding to declare. Though not in law, it is in practice.

The third thing is, they're very inflexible. When we look at a greenfield project in partnership with state governments, we're not looking at assets completely devoid of any regulatory arrangements and we're not looking at closed-access models. We're looking at open-access models. Ineligibility is, in a sense, an all-or-nothing proposition. You're either in the statute or out of the statute. So what we're looking for is more flexibility. Can we be in the statute but with less prescriptiveness, with more certainty, with more guarantee as to returns than would be the case using the ineligibility mechanism?

MS SCOTT: Okay. So it's not a replacement, it's part of your menu.

MR McSKIMMING (AN): Yes.

MS SCOTT: All right.

MR McSKIMMING (AN): In respect of ineligibility, I don't actually think the question about a negative finding on ineligibility being a positive finding for declaration is readily solved, but it is solved in a sense by providing that menu, as I refer to. Perhaps we can come to that. But I think the confidentiality aspect is solvable.

The Commission in its draft reports says, "Look, that would have a transparency cost," and we accept that. Perhaps a good analogy here is that, in the context of section 50 of the Competition and Consumer Act, the ACCC has no problems at all with providing a confidential merger assessment to parties to a transaction, providing a letter of comfort. A public process necessarily follows on that. The Commission isn't bound by it - it can change its mind - but it does allow you to just reach an additional level of certainty before capital begins to be sunk.

Particularly with these infrastructure projects it's important to bear in mind that there is in fact a very significant capital cost well before you get to financial close. Studies costs - pre-feasibility studies costs, feasibility studies costs - run to tens of millions of dollars. It would be good to have some degree of confidence from the NCC and the minister prior to that money being spent as to their thoughts on declaration.

I think the procedural aspects of ineligibility are solvable but I think that additional options in the statute around alternatives to ineligibility would solve the declaration criteria issue that I referred to earlier.

MS SCOTT: In terms of the greenfield option, in terms of before sunk costs and so on, how is this different from the state agreements that we have now in some locations?

MR McSKIMMING (AN): The state agreements obviously apply in WA and they apply to BHP and Rio's lines there. Look, I won't go into the pros and cons of those arrangements, but obviously they didn't avert a very lengthy access process. I don't want to comment specifically on the individual documents that have been discussed in the context of the greenfield proposals in WA, but I will say that they are far more comprehensive than those earlier state agreements.

It's important to note that those state agreements were put in place I think 40, 50 years ago and they really provide only a few lines of detail. We have moved on significantly in terms of government's understanding of open access since that time. No state government and no regulator would accept five lines on a page as being representative of one's intent as regards open access. Nevertheless, there is a readiness to acknowledge that greenfield infrastructure is risky, particularly in the

resources sector - it's often essentially a punt on a single mine - and that traditional regulatory models may not always fit that well.

So I think perhaps the key point there is that our understanding of open access has matured very significantly since those state agreements were drafted. In fact, one can see that now in terms of what the Western Australian Government has required with respect to greenfield infrastructure in the Pilbara now and, in fact, in relation to the Roy Hill railroad. They're covered by the Western Australian access regime until such time as they lodge an ACCC undertaking. So those old state agreements have not been reapplied.

MS SCOTT: No, okay. In your submission - I'm sorry, we haven't had sufficient time to study it - do you give an example of a greenfield agreement that you think would be the bee's knees that we should study to see if it could be more generally applied to improve economic efficiency?

MR McSKIMMING (AN): It's difficult for me to speak to the specifics in some of these agreements because these are still early-stage projects but, as we say in the submission, the company is involved in a number of greenfield projects, all of which have open-access components to them. That includes the line from the Galilee Basin; it includes the joint venture with respect to the Surat Basin railroad; it includes the Abbot Point Coal Terminal, which is a multi-user facility; and it includes our consideration of Pilbara railway lines.

MS SCOTT: Okay.

MR McSKIMMING (AN): All of those projects have some degree of open - sorry, let me clarify that. The open-access arrangements or multi-user arrangements for those assets are all in various stages of development.

MS SCOTT: If we tested these four examples that you've given us with users or potential users, do you think we would get a general endorsement of those as ideal-style agreements?

MR McSKIMMING (AN): With respect, you'd have to ask them. I mean, because these are all greenfield projects and open-access arrangements are key to the funding arrangements for those assets, it necessarily follows that the mines at the end of the line or the users of a coal terminal have to have some level of satisfaction with respect to those arrangements in order to ensure that the project is bankable.

MS SCOTT: Okay. In terms of the assessments that we have to make, I get a sense that we should have gone broader. That's the encouragement you're offering us. Other people have suggested that we should have gone broader and attempted a cost-benefit analysis, but we really do struggle with the availability of costs and

benefits. Is there anything that you have in relation to your broader remit to us that would go to estimates or actual figures on costs and benefits?

MR SHORT (AN): Can I just say before I hand it over to Sam, I agree with your earlier questioning in terms of, how broad does this actually become. Does it become too broad? So I think there is a significant risk that it can become too broad and, as it becomes broader, maybe even political considerations come into play. So my whole approach over many years working in regulated companies is to have a real evidence based approach in terms of quantifiable benefits and not to have too broad an approach that picks up even social policy issues. Social policy issues should be dealt with, for example, through social policy policies.

But our focus is very much on more the commercial aspects of it and the extent to which consenting adults, so to speak - to use that term - can actually sit down and negotiate commercial outcomes, which on the face of it should be in the best interests of both businesses, and in that manner and through the resultant developments produce the economic benefits that I think people in the community would be looking for.

MS SCOTT: Thanks, John. Sam, you're not going to volunteer any costs and benefits that you've got - - -

MR McSKIMMING (AN): No.

MS SCOTT: - - - in your briefcase that you can hand over to our modellers.

MR McSKIMMING (AN): It's a really good question and I appreciate the issues you have in your draft report on it. I think from our perspective, without telling a regulator to act in the absence of a cost-benefit analysis, it's important to not use the absence of the sort of data that you're looking for as an excuse to not go broader and look down some of these rabbit holes, and that's not to say that you act. It necessarily, though, means that, if we waited for a cost-benefit analysis of open access, we wouldn't have it at all. The Hilmer Committee would still be going.

MS SCOTT: Yes.

MR McSKIMMING (AN): Our point in terms of going broader is that we've now had national competition policy for some 20 years and it's realised enormous productivity benefits in the railroad sector. From our perspective we don't think that the next wave of productivity reform is going to be in the same place as we just found the last 20 years' worth, which isn't to say open access is necessarily going to be the vehicle by which it's found, but I necessarily think that there is an important question there in terms of, are the open-access arrangements still facilitating that reform, that increased efficiency, that increased cost efficiency and operational

improvements.

I suppose one of the points we do make - and perhaps this is an area where the Commission is able to go broader - is that from our perspective the mechanisms by which assets are brought into regulation have become less practically important than the mechanisms that control assets in regulation. To give you some idea, 95 per cent of Australian railroads are now covered by some sort of open-access regime, and we don't necessarily foresee over the short to medium term that that's likely to change.

From our perspective the risk of declaration and the greenfield issue are very important, but an equally important question is, now we have some 36,000 kilometres of railroad track in open access, are we regulating that effectively? Are we regulating that in a timely and efficient way? It's that question that I think perhaps is the vehicle by which the Commission can go broader. Yes, declaration is important, but when these access regimes are applied - when people live and breathe them day to day - do we actually think they're promoting social welfare?

MS SCOTT: Okay. That's good, that's clear. I'm finished.

MS MacRAE: Just coming back to the greenfields question, I just want to make sure I understand it. You're saying there are some problems in the national regime in relation to the current ineligibility provisions, and we've been through that so I understand that. From the examples that we gave - and I apologise that I hadn't had time to absorb your submission - those arrangements that are generally state based, if I'm understanding correctly, you would say are good models that should be copied at the national level. Is that the idea?

MR McSKIMMING (AN): In relation to greenfield infrastructure?

MS MacRAE: Yes.

MR McSKIMMING (AN): In our submission we say that probably the best exemplar for something - not necessarily that can be copied and pasted, but something to look at - would be the gas law; it does in fact have a number of options around it. There are options in the gas law around light-handed models of regulation.

MS MacRAE: Yes, okay.

MR McSKIMMING (AN): There are also options in the gas law with respect to price regulation exemptions, so you necessarily put in place the framework for open access but the regulator forbears from regulating the price or return outcome. So I think they're good models to look at.

MS MacRAE: In relation to then also the mitigation of risk, which is really what

you're looking for in your greenfields, how would you determine a time frame that might be put on sort of an agreement that, you know, "We'll put in an arrangement of a light-handed regime on the basis of what we can see at the moment. We think that would work pretty well and we'll give you 10 years' certainty under that," say.

What sort of time frame would meaningfully help you with that capital risk problem and what are the risks then, I guess, to the potential access seekers that the regulator at this early point sort of gets it wrong and the market develops in a different way than was foreseen at the time that these undertakings or agreements were given? I guess we're looking at the potential upside to the investor of these things, but there's also a potential downside if the regulatory arrangement that's agreed actually turns out not to be the most effective in hindsight.

MR McSKIMMING (AN): Can I say two things. The first thing is, we supported the Commission in 2001. We still support the Commission that it's the 20-year minimum. We don't think that the regulator should be able to impose a shorter period, because 20 years is, I think, the bare minimum.

MS MacRAE: Okay.

MR McSKIMMING (AN): In terms of that question as to whether one reopens it, I think it's something you have to be very careful to consider, because if you include generous reopeners, then the mechanism ceases to work.

MS MacRAE: It doesn't, yes.

MR McSKIMMING (AN): But at the same time things change for the access provider as well. Business models change, markets change and so on, and one doesn't necessarily want to commit to 30, 40 years, forever. I think, without going into the detail of it, the ACCC has kind of gone into this space a little bit with respect to NBN Co special access undertaking; kind of balanced the need for reopeners with the need to ensure that the certainty given before the capital is sunk is maintained for the life of the project.

MS MacRAE: Okay, thank you.

MS SCOTT: I'm sorry about curtailing people's lunchtime, but I do think we need to use this opportunity to ask a few more questions. You would have seen that we have suggested in our draft recommendations that there be an effort to consider coordination costs under criterion (b). We've had pushback on this in some quarters, saying, "Is it possible to know at an early stage? You'd need to have detailed understandings about what access is required, how frequently," and so on. On the other hand, we're aware from some international literature that for some ventures coordination costs will be considerable whether they're seeking 10 per cent or 25 per

cent of capacity.

What's your own view on our proposal on coordination costs? Do you think it's possible to arrive at some assessment without having precise estimates, or would you need a full working timetable of requirements from an access seeker to be able to come to a view about what your coordination costs would be?

MR McSKIMMING (AN): No. I think the first thing to note is that we support the retention of the private profitability test, so I wouldn't necessarily see it as relevant to that, but I would see it as relevant to criterion (f). Of course there's case law to that effect that was considered in the context of criterion (f) by the Tribunal in the Pilbara case.

I think that a view on coordination costs can be reached without reams and reams and years and years of analysis. Obviously the more analysis that you do the more you understand that nature of those coordination costs; the more you understand too whether those coordination costs can be mitigated. But to answer your question very simply, yes, we do think it's possible and, yes, we would support the consideration of coordination costs within the context of criterion (f).

MS SCOTT: Okay. Two more quick questions. We've drawn attention in our draft report to bulk commodity exports in the Pilbara and the fact that we consider them to be price takers and we think that therefore has implications in terms of whether the entry or exit of a firm would have any real impact on competition in that market and proffer the view that, in light of that, we think there would be a natural alignment between the incentives of an infrastructure provider to use their spare capacity, if it was in their interests to do so, and that there wouldn't be anything to be gained from denying capacity but, for all intents and purposes, the entry of a new player into the market doesn't affect the old player's price. I hope I've been clear.

MR McSKIMMING (AN): Yes.

MS SCOTT: Admittedly we were talking about the Pilbara and iron ore. Do you have any views about whether that has any appropriate application to, say, the coal sector or other export sectors where people may be price takers or if you think that the Pilbara argument is just that for the west and what happens in the east is something altogether different? I guess I would draw your attention to Glencore's comments to us earlier in testimony. I don't know if you were here for their testimony. Would you like to make some responses to their statements regarding multi-use operations?

MR McSKIMMING (AN): I won't respond in the large to Glencore's submission.

MS SCOTT: All right.

MR McSKIMMING (AN): But I will say that we would agree with the Commission that an investor in multi-user infrastructure has an incentive to do two things. The first is to maximise throughput and the second is to get as many different counterparties on that network as they can to mitigate some of that stranding risk.

We know that the risk associated with a greenfield investment is greatest when there's one mine at the end of the line. It goes to reason that, if you have two, that's better; three, that's better again. So as a proponent of greenfield infrastructure we're always motivated by signing up new customers, new tonnes, and ensuring that the network is fully utilised. So we would agree with the Commission that, in the context of resources companies being price takers, an infrastructure company is incentivised to ensure that they can maximise throughput as well.

MS SCOTT: Okay. Thank you, gentlemen. I'm sorry for the small delay. We're going to reconvene at 1.30 with the NCC. Because we are the Commission, we do encourage you to take a break now but we don't provide lunch. Thank you very much.

(Luncheon adjournment)

MS SCOTT: Good afternoon, ladies and gentlemen. Thank you for returning on time. We're very pleased to have at the table the NCC. Welcome, David and John. Maybe you'd like to identify yourself for the transcript purposes, David, and then if you wish to make an opening statement, I would welcome that and we then might go into questions.

MR CRAWFORD (NCC): Certainly. David Crawford, president, National Competition Council.

MR FEIL (NCC): I am John Feil. I'm the executive director of the NCC.

MR CRAWFORD (NCC): Just in opening, we appreciate the opportunity to be here and generally accept the majority of the recommendations, and perhaps I should simply say that there are a couple of areas that we would like to explore further, particularly in the criteria. Certainly the clarity that's provided by clearer definitions about what access means, the clarity that will be provided in what clause (b) means, is very helpful, we think, to make the regime more effective.

We have identified in clause (f) the public interest clause about whether that should be a positive proof, and I think that raises for us some issues, and we've also flagged the issue around the inclusion of size as a stand-alone definition of national significance as distinct from supporting it, and we find it difficult to imagine something that, by size alone, justifies its inclusion.

Some of the other elements that we've been keen on are the deeming and the deemed decision, which we think is very important to maintain the nature of the regime and any further review that it may take of any decision that they've maybe made, and then finally I think we still have some concerns about, in some sense, some of the open-endedness of the merits review regime and what that might mean and how clear we can be that the merits review process will be in a sense constrained, as we think it might have been after the High Court's recent decision. Any comments you wanted to add, John?

MR FEIL (NCC): If we don't get some of the points in the questioning, we can presumably - - -

MS SCOTT: Yes, you can - - -

MR FEIL (NCC): Come back?

MS SCOTT: That's fine. That's fair enough, John.

MS MacRAE: Maybe I'll start with criterion (b) as it's probably the hottest topic on the agenda for this. We understood that you're supportive of the recommendation

that we move from a private profitability test to a natural monopoly test. We have heard from some participants that the natural monopoly test is going to be unworkable in practice. Given your experience in applying both of these tests, how would you consider the natural monopoly test and private profitability test compare in terms of workability from your point of view?

MR CRAWFORD (NCC): May I just kick off and let John come in on the detail. I think we have established, through what we've done in the past, that the natural monopoly test is one we have applied and in practice that's what we have been doing, so I think it hasn't been difficult to apply. It's a well-accepted principle, I think, and it certainly requires a lot of inquiry. I think the private profitability test is not tested and how that might be applied will take years of jurisprudence to sort out, because I don't think we actually know what - in some sense, theoretically it can be very simple, but I don't know what is implied in the private profitability test.

MR FEIL (NCC): I think it's fair to say that since the High Court's decision that gave us private profitability, on the matters we have actually dealt with we've managed to duck it. Either everyone has accepted that it wasn't privately profitable, or was and didn't care, and that really some of the other criteria mattered and that one didn't; so we've been lucky, but that won't last.

I think partly the review being undertaken has deterred a few people from making it an issue, and one of the areas where it could arise as an issue, of course, is in revocation on things that are already less likely declared, but certainly some of the matters where a parallel provision exists in the gas law won't go unquestioned over time, and frankly we have struggled in our thinking about how we would approach it, because it's all very well to say that this is a test that lawyers and economists and accountants and business people apply every day, but you talk to each one of them and you get a different view of what it is, and we're going to be faced with competing parties, each trotting up their accountant to say that it is or isn't profitable, depending on which side of the answer they want it to come out on, and that's going to be very difficult, whereas the natural monopoly test is grounded in principles that economists generally understand. There are some linguistic twists about whether it applies to a market or a facility or whatever, but that's never caused us a problem in the past.

I think the area where people raise some concern is, we've at some times applied a gloss to the costs that you count in that, and some people like labelling that the social benefit test, but I don't think it can be one that's ungrounded. We're operating within a statute that has a set specific objective. I don't think that it gives us a licence to accept redoing environmental claims. So there are some limits on it and I think even if you look at what the High Court said about the public interest in criterion (f), the High Court said that was a broad discretion for the minister and for us on advising the minister, but also said in the next clause that of course it's bounded by the purpose of the statute, so it's not a licence. There's nothing I can do

to stop people writing long submissions about why we should take it into account, but I'm suggesting they're going to have some difficulty persuading the Council.

So I think the natural monopoly test is something we're relatively familiar with. It's not easy to apply. None of the criteria are easy to apply.

MS SCOTT: No.

MR FEIL (NCC): That's why you have a board and a council and a professional staff, and we accept submissions from a wide range of parties to inform our decision.

MS MacRAE: One of the other issues that's been raised with the people that prefer the private profitability is that there's been a concern that, if there was a finding of natural monopoly that they would want to contest under review, they feel that they've had no data. There's nothing they could easily come back with, given how you apply a natural monopoly test, whereas they would argue that, "Well, if it was a private profitability test, I can do NPV calculations, and if that was the test, I'd have some data, I'd have a defence, but if I was found to have a natural monopoly asset, I wouldn't have anything that I feel I could contest a decision of the NCC on" - that sort of question. Does that sound like a reasonable proposition to you?

MR FEIL (NCC): It's never stopped them contesting it before.

MR CRAWFORD (NCC): No.

MR FEIL (NCC): There are some fundamental indicators of natural monopoly. If we were to conclude in our report and advice to the minister that the long-run average cost was going up rather than down, or we produced an estimate of demand that we needed to consider that was unrealistic given the forecasts, there's plenty of material to challenge that. What you don't get to challenge, I guess, is the meaning of the provision, which is clearly what you will have all the challenge about under a private profitability test. Will it be a banker's view? Is it related to the cost of debt financing or equity financing? What net present value do you use? There's not only fact but - I don't want to use the word "fiction" - principles to be argued, whereas natural monopoly is at its core not an alien concept, even to accountants.

MS SCOTT: And are you comfortable as a Council with the economic problem as we defined it in the draft report and - the second part of that question - while you have concerns about particular aspects, which we should come to, are you confident that, as a whole, what we've suggested would adequately address the economic problem as we've defined it? So it's a two-part question. Have we got the economic problem right and as a whole, as a total, leaving aside your concerns on (f) and maybe a few other things, do you think it would address the economic problem?

MR CRAWFORD (NCC): I think, simply put, yes, and we're a long way towards some of the issues that we've seen develop and that have made it difficult for us sometimes to achieve what we think has been the intent of Part IIIA.

MS MacRAE: In relation to (b), again just coming back specifically to that, we've made some suggestions about certain costs that we think should be included there, but it's not an exhaustive list and it's not intended to be one. We've had a submission from Rio Tinto where they have been very concerned about which costs go in (b) and which costs go in (f), partly because of the nature of what the Tribunal now looks at and who gets to review which criteria. Do you see that as an issue? How do you feel about the proportion of costs between those criteria and how important do you think it is about where they go? The ACCC said earlier today - and I think I got it right - that "As long as all the costs are there, we're not too worried whether they're in (b) or (f). As long as they're only in one place and they're counted, we don't mind too much," but Rio had given us this other view.

MR FEIL (NCC): Yes. I get the distinct impression there's a number of parties perhaps, including Rio, who would like costs counted everywhere and as many times as possible, but none of the benefits; but that's unkind. I think there is a certain glib response of saying, "As long as they're counted somewhere, it doesn't matter." I think there's a little bit of a tendency to have every criterion try and do everything, and in the end, assuming that these proposals go ahead, we'll have essentially three criteria plus the national interest to decide it, and you can't look at any one of those in isolation. You do have to consider (a), (b) and (f) particularly as a package.

Partly, what you count where depends on what evidence you can get and what facts are before you. If you can get good information about how the cost function will change when there's more than one operator on a facility then it seems to me that logically that's part of the cost function, and it's cost functions that drive the natural monopoly test you consider in (b). If, however, you're presented with a whole swathe of costs, some of which might be there but it's not clear, others which are clearly costs that should be counted and might count against declaration, then my natural instinct is to consider that under (f) where you have a broader ability to consider things that might otherwise be reasons not to declare, whereas if you're doing it in (b) you have to link it to the test, which is about the costs of providing the service that someone is seeking declaration of, not about a broader range of benefits. So it depends on the evidence, it depends on the case, how it's presented, and you don't get a choice about that a lot of the time.

MR CRAWFORD (NCC): One of the risks if you run by, in a sense, being too prescriptive about what's included where is that it becomes then a very formulaic type of approach to what is in the end a question of judgment that has to be made about it, and being too prescriptive about what has to be included where and what has to be done seems to me to detract from what is essentially being asked of the

Council here, which is to make a judgment about these matters.

MS SCOTT: A considered judgment, yes.

MR CRAWFORD (NCC): Yes.

MS SCOTT: And if we can take away a sort of full sense of science - I mean, at the end of the day it is a carefully considered judgment. On that, John, we've heard an alternative view - and maybe it's a variation on a theme but where we were heading anyway - that (b) could be about the firm and (f) could be about the wider implications of making this particular declaration. (f) could be about the chilling investment and the sector or whatever. Have you got a reaction, David or John, to that idea?

MR FEIL (NCC): Again, if you look at each one of the (a), (b) and (f), some of our reports start with (b) and then do (a) and then do (f), and others the other way around, but the reality is you've got to meet all three before you can declare, so I have always regarded - until the High Court told me I was wrong - that criterion (b) was about the costs of providing the service and whether or not there was an economic case in the national interest of building a second facility, because if there is then there is no bottleneck and there's no, in my view, rationale for intervening in that market. The party that wants access can go and get someone else to build it, can build it themselves. There's no harm to the economy if that happens.

Natural monopoly is at the core of that. Whether you want to call it a natural monopoly test or an uneconomical to duplicate in the national interest one, I don't really mind about that. So it's about the facility that provides the service and is a relatively technical discussion about what the cost function looks like, what likely demand there's going to be and whether one or two is cheaper.

Criterion (a) is about the market that we're principally concerned about, which is the one that's behind the bottleneck, and what's the scope for promoting competition if that bottleneck is removed. If you look at that market and there are 50 players in it, it's highly competitive, then frankly I lose interest in criterion (b); it's going to fail on (a). So it's those two together. You know, you can recut the cake, but as long as you've still got the whole cake there. And (f), just to come to that, is really having passed criterion (a), so there is a promotion of competition that wouldn't happen absent access; (b), there's no other way of giving access; then you turn to criterion (f) and say, "Well, beyond those considerations," which would in themselves justify declaration and, I think, both in law and in good policy, "is there something else that still says you shouldn't do it?" and that's an open-ended opportunity, but it can only be used to say no. It can never be used to say yes, because that's the way it's structured. You have to meet all three.

So, having found that access will promote competition in the downstream market, having found that it doesn't make sense to have these things duplicated to provide access so access is the only way you're going to get that competition, is there a reason to say no? And we do look at the reasons to say no. They can be things like a specific chilling effect of regulation in that particular circumstance, but I think it can be a broader policy question, because that's answered by the existence of the statute, but if it was something unusual - "Is there something unusual about the costs of regulation that makes them massively larger than anyone contemplated?" - that might be a reason.

So I think those three, with the return to the natural monopoly test for (b), with the proposal you've got about access, just clarifying that it's access as a result of this rather than access because someone felt nice on a Tuesday - and I think that's part of the reason why we have a bit of a problem with your proposal around (f), because I think that makes it a third positive thing you've got to prove rather than proving a negative once you've already established that (a) and (b) are met.

MS SCOTT: Let's move then to (f) and explore this concern. You can see, I think, from our report what our intent is. We're clearly concerned that these are very difficult judgments and difficult decisions to make and that we want to ensure that the marginal, the one that just got over the line or was just borderline really doesn't come into the mix, because it's such an extraordinary power and, we think, potentially does have an impact on investment. So that's why we were keen to float this idea of a positive test.

Clearly you've got concerns. We have had a little bit of support - not a lot, but we've had a little bit of support in some quarters for a positive test because of concerns about marginal projects and so on, and regulatory overreach and regulatory uncertainty and sovereign risk and so on, but do you want to elaborate a bit more on your concern about (f)? Some participants have suggested that (f) needs to come to some sort of cost-benefit analysis, something which we may well have views on, so would you like to elaborate on (f), please?

MR CRAWFORD (NCC): Let me start off. I don't want to start off with a detailed cost-benefit analysis, but I do look at (f) in terms of a risk-reward.

MS SCOTT: Yes.

MR CRAWFORD (NCC): What risk are we trying to get rid of and what's the potential impact of getting rid of that risk? When I look at it, I think the risk of getting that marginal one in is relatively low in (f) as it is currently done, because (f) provides the capacity to look at where my mind was: what (f) is specifically there to do was when you've got that marginal case, to say, "Yes, the cost of regulation, in terms of the direct cost or the impacts of it, is going to adversely affect the broader

national interest." So I think the things we're trying to capture in (f) by going to a positive test, the chances are that we will probably get them mostly now.

The costs of doing (f) in a positive test I think are very, very substantial; the risks of actually changing to a positive test. In the simplest way, it's an uncertainty about what it means. How do you go about it? What is meant by a positive test? And practically, that will be determined through jurisprudence. So the impact of doing something I think will be a long period of uncertainty about what the positive test is, and I don't know what the gain is that comes from it.

MS SCOTT: Okay, let's explore this a bit more. I'm sorry if it sounds like I'm going to get increasingly difficult, but I just want to test the proposition a bit more. The people or organisations that have supported this proposition have said that this will reduce the marginal cases. You seem to be suggesting it will go well beyond that, potentially to exclude cases that you think would have passed a negative test. What are you talking about there? Why would that be the case? Why would just going from a negative test to a positive test suddenly exclude more than just at the margin?

MR CRAWFORD (NCC): Well, let's go back. I think that when it's expressed in the negative, then it gives you the opportunity to bring in all other matters. If it is a positive test and it has to meet all the positive tests, I can't quite understand the argument about what more you might capture in a positive test. It seems to me you're not going to lose anything out of the negative test, but I don't know that a positive test is going to exclude anything that would otherwise be included in a negative test. I don't understand the concept that's being developed about what's going to be potentially excluded or included under one test or the other, that somehow the current way it's done is insufficient to do what's being intended.

MS SCOTT: Okay, let's just clarify a bit further. In your submission, number 48, you state:

> If the Council does not know then it could not recommend declaration notwithstanding the other criteria may be met.

You've said that on page 14.

MR CRAWFORD (NCC): Yes.

MS SCOTT: So, just to be clear, is this saying that under the Commission's proposed test, if the Council is not 100 per cent convinced that declaration would be in the public interest, it could not recommend declaration, even after all the other criteria are met? So you'd have to be 100 per cent certain?

MR CRAWFORD (NCC): Under the positive test, it has to meet all the tests.

MS SCOTT: Yes, and you have to be 100 per cent certain?

MR CRAWFORD (NCC): Yes, in the end you have to be. That's what your judgment is. Whether you're 100 per cent certain or not, you end up making a 100 per cent decision so it satisfies the test.

MS SCOTT: Yes, I understand that. So how is this different from assessing whether access is not contrary to the public interest? Surely you have to be pretty certain there that it's not contrary to the public interest.

MR CRAWFORD (NCC): Except that in determining a positive test, what may be included in the matters that you would have to consider in terms of taking a positive test, I think, means that you - the range of matters you may have to consider under a positive test, when you have to consider it as a positive test, could be potentially substantial, whereas a negative one seems to be much more defined and clear.

MS SCOTT: Okay, let's see if I've got this right. So you're now concerned that the affirmative test is broader in scope than the negative test?

MR CRAWFORD (NCC): I think there is significant potential for it to be significantly broader in scope.

MS SCOTT: And what's the broader scope that you see being in that remit that you don't get with a negative test?

MR CRAWFORD (NCC): In my view, the way it is on a positive one, you would have to make inquiries into a whole range of areas to be positively satisfied that it is in the public interest, and not necessarily the residual issues that may have been raised by parties regarding other matters. It may be as simple as that. In the positive test you have to consider all matters. In the negative test you consider other matters. That's where the scope difference seems to me to be, that will be argued about what's included in a positive test.

MS SCOTT: Rightio.

MR FEIL (NCC): Can I have a slightly different go at the same question? It's not that I disagree with David, but it's not a positive and negative of the same test. At the moment the purpose in declaration: in the end we have to be satisfied that the declaration criteria are met, each one of them.

If we're getting to criterion (f) being determinative - we've ticked criterion (a), we've ticked criterion (b) and we've ticked that it's nationally significant - currently,

when we get to criterion (f) we start with promotion of competition in a downstream market, material promotion of competition in a downstream market that's served by a facility of national significance that can't be duplicated. So there is clearly some benefit already there.

What criterion (f) currently looks for is: despite that benefit, is there a reason to say no? And you focus, because that's the only evidence we ever get, on reasons to say no and why there are costs of national concern that are sufficiently high to override the benefit. The cost-benefit that we have to be satisfied of is (a) plus (b), plus or minus (f). It's the three together that gives you the satisfaction, but we have to be satisfied of each one eventually. We have to be affirmatively satisfied. If we're not, if we're in doubt and we can't reach a conclusion on criterion (a), we cannot recommend declaration. If the minister can't reach a conclusion on (a) then he can't declare the service. If we can't reach a conclusion on (b) we can't recommend declaration; same with the minister.

On the current formulation, if we're in doubt because, yes, we've been given a whole list of thousands of costs but in the end we don't think any of them are really worthwhile, we can still declare, because we're not satisfied of the negative.

MS SCOTT: That's right.

MR FEIL (NCC): And I think that's a perfectly satisfactory outcome, because you've passed (a), you've passed (b), no-one has managed to convince us that there's some countervailing reason to say no. The net result should, in my view, quite clearly be that the service is declared, because it's got the positive and no-one has shown a negative. It's a question of onus and burden of proof.

MS SCOTT: Okay. Good.

MR FEIL (NCC): Now, the difficulty we will run into with a positive test is, notwithstanding that you've said it's about marginal cases, we're telling you that the marginal case is already dealt with, because if it's a marginal case on (a) or (b), it's not going to get up. If there's a set of costs given to us and one of them looks significant enough, we'll have explored that and we would take it up as a possible reason to, notwithstanding ticking (a) and (b), cross (f) and deny a recommendation, and presumably the minister, the same thing.

If it's a positive statement, what we'll be told very much by the people who are supporting the change because it only has a marginal effect is that, "The statute requires that you be positively convinced that there's a public interest in declaration." Well, hang on. We've already established the public interest out of (a) and (b). We will then be told, "Well, the statute was changed though" - because that's the way we used to it - "You can't do it any more. You have to go out and be satisfied of

something beyond that it will promote competition in the market and that it was uneconomical to duplicate it on a reasonable test." We will be delivered truckloads of reasons why it's negative.

That will then expand the criteria even further, because by any logic, that's got to be a net test when it's a positive one, whereas a negative one, it's just enough to say no. So we will then get the alternative weight of submissions as to why, even if you count some of these costs you've been given, "Here's some other benefits," and that's when we start down the employment, regional development, employment of particular people. And, yes, we can say that there's a limit to that because we still have to go back to the objects clause of the Act, but the costs will broaden it out, and benefits - and frankly, you're asking them one criteria to answer the question that we see (a), (b) and (f) in combination answer.

MS SCOTT: Okay, that's a good answer. I just want to explore that a bit more.

MR FEIL (NCC): Oh, I thought it was a good answer.

MS SCOTT: It's a good answer in terms of clarity, and I just want to explore it a bit more. In your answer you talked about the shifting of the onus of proof or whatever, and when I read your submission, page 14, paragraph 3.13, you make the point that:

> ... would require the Council (and minister) be affirmatively satisfied that access is in the public interest for a declaration of a service to occur. If the Council does not know then it could not recommend declaration notwithstanding the other criteria may be met and if the minister does not know then he or she could not make a decision to declare a service.

That got me thinking that in some ways the current arrangement gives the benefit of the doubt towards declaration. Because you've looked at (a), because you're looked at (b), it gives the benefit of doubt towards declaration. How do you feel about that?

MR FEIL (NCC): I think that's correct and appropriate, because you've met (a) and (b). (a), (b) and (f) are a public interest test. It's segmented, a somewhat curtailed public interest test, because we don't have to look at other benefits beyond what arises under (a) and (b). So we have had people frequently saying, "This will preserve 100,000 jobs" in a particular region. Normally they try and get it under (a), (b) and there's a reason for not saying anything under (f). Now, there isn't really a licence to do that under (a) because (a) is about the effects of access. It certainly doesn't fit under (b), but there are some inventive people that try, but at the moment we don't have to consider that because it's met (a), it's met (b).

You're correct. The burden is on the access seeker and us. The other way to think about this is that the Council is not there as a judge. We are there as an active participant in an investigative process to work out the right answer, so the burden is on us to be satisfied of (a), the burden is on us and the applicant generally to be satisfied of (b), and under both of those there's plenty of opportunity to argue against.

Under (f) we start with, under the current scheme, that we're satisfied it's not neutral, it's positive because of what we've found under (a) and (b), but there is opportunity to say, "Notwithstanding that, there's a reason to say yes." If it's a positive, we have to be out there looking for public benefits, which could be broad, but my guess is that we'll get more of "There's nothing here you could be possibly be affirmatively satisfied about and therefore you can't declare," notwithstanding (a) and (b).

MS SCOTT: Thanks, John. Going back to your combined answers, gentlemen, about the positive test and the potential for - I think David was clear that he saw it having wider scope, and you raised scope as well, because you said people could start raising other issues, but then you also clarified in your answer that people could take this very wide interpretation.

Let's assume that we can impose some discipline - you know, go right back to the purpose, the economic problem as defined that you were comfortable about. If we didn't go with the net social benefit test, if we went with the natural monopoly test as we have defined it, and if attention was paid at all times to the economic problem as we have defined it, do you see (f) as an affirmative test naturally having a wider scope?

MR FEIL (NCC): Sorry, (f) as an?

MS SCOTT: Affirmative test having naturally a wider scope.

MR FEIL (NCC): I think on the way you've defined the economic problem, the benefits that you would arrive at criterion (f) from satisfaction of (a) and (b) are probably somewhat narrower than they would have been if you had a broader social test. We tended to say at the beginning of the discussion of criterion (f), prior to the High Court, "We've arrived here with the benefits from promoting competition in a downstream market 1, 2 and 3, and the benefits of avoiding duplication of a facility that's a natural monopoly and a cost to society." Well, I don't think you're going to let us say the second one, so we have a narrower view.

We then used to say, "Well, here's a bunch of costs we were given as reasons to say no. Is that likely to overwhelm the benefits?" I think following the High Court, the language has tended to be more to start at criterion (f), saying criterion (f) is a search for a reason to say no, notwithstanding what you've already found on (a) and

(b), without being much more specific, so it will end up as a somewhat - well, as a negative test, because we only have to look for noes, we don't have to worry about additional benefits.

I guess if someone comes up with a marginal increment above the costs - the benefits we saw from here, with the costs coming in here - we might have to go out seeking benefits, but frankly at that point it's starting to get to be a silly test and it's better not to do it that way.

MS SCOTT: Again testing your patience probably, gentlemen, but we heard from Bob Baxt today. David, you weren't here, but I will hopefully do justice to one of his last points. We discussed with him the strong incentives there are for people to test clearly the National Access Regime if they're an access seeker; that notwithstanding the considerable time and cost involved, the rewards potentially are so significant that it would be worth running at barbed wire just to see if you jumped over or got through somehow. Are you comfortable with that sentiment?

MR FEIL (NCC): I have the scratches to prove it, of trying to jump the barbed wire.

MS SCOTT: But even when their costs are four or five million, the potential gain is so considerable that it's still worth it.

MR CRAWFORD (NCC): I think that has to be true. It's the nature of what we're dealing with.

MS SCOTT: Yes, that's right.

MR CRAWFORD (NCC): And that's why the people who don't want access, similarly, are prepared to - - -

MS SCOTT: Yes.

MR CRAWFORD (NCC): There's a lot at stake.

MS SCOTT: There's a lot at stake, and the incentives in some ways are for the access seekers to try their hand, given the potential ratio of cost to rewards. Are you comfortable with that?

MR CRAWFORD (NCC): Yes, I think that's right.

MS SCOTT: These are extraordinary powers, whether they're normally government-owned assets or not normally government-owned assets. They're extraordinary powers in terms of a third party being able to say, "I'll use that spare

capacity over there. Thank you very much." So, extraordinary powers, and if they actually now have a test in (f) - and hopefully I'm going to quote your words correctly, John - that put the onus of proof on the access denier, put the onus of proof on the infrastructure owner to prove that it's not in the national interest, is that a fair weighting?

You've got all the incentives running this way for the access seeker to test the envelope at every point, and then test (f) as it is written, and I think you've agreed with me - I may not get the words exactly right, John, but (f) actually runs towards declaration and the onus of proof being on the infrastructure provider to prove that it's not in the national interest. Does that incentive structure look in total a little odd?

MR FEIL (NCC): If you add the words "in total" I think the answer is no, because (a) and (b), the onus is on the access seeker to have - sorry. I don't like the onus question because in the end it's our job to make a recommendation based on all the information and our consideration.

It's not just a matter of balancing what we're told by one party and we're told by the other, because they both suffer from the "They would say that, wouldn't they?" problem, but generally we get from access seekers - it difficult to get a service declared. It is very difficult. They have to prove to our satisfaction that criterion (b) is met and there aren't lots of natural monopolies floating around out there.

They also have to prove, or at least give us the starting point for us to get to the point of satisfaction, that it will promote competition to a material degree in the dependent market. The asset owner will have plenty to say about both those topics, as we've seen.

MS SCOTT: Yes, of course.

MR FEIL (NCC): Most applications for declaration fail before they get to us because they go to an adviser and they say, "Well, hang on, there's 15 of these that you could use. Why are we talking about this?" The ones that get to us generally have a tolerable argument around criterion (b) because they have done that, because that's a technical bit of analysis and they can get half a dozen people or more around the country to at least give them a first view.

Most of the ones that get to that point fail on (a) because it's not critical to competition in the downstream market. Most of the markets that fail on (a) are ones where there's already plenty of competition, and while it would be nice for me to be able to, as an access seeker, compete in that market, it's not really going to do anything different for the rest of the world, so they fail on those.

They are hard criteria. They're criteria where the access seeker still has an

enormous information asymmetry compared to the asset owner, because they don't know what the costs are. They probably, if they're doing their homework, have done a "Well, could we build this?" so at least they have done the engineering estimates of what some costs are, but they don't know the nitty-gritty, so they make the best case they can. You'd kind of hope they could make a case under criterion (a), but you do despair on occasions: why people are here after trying to say - you know, some of them sort of say, "Well, the market's pretty competitive, but it would be nice if we were there," and that's just failing the criteria.

So they have actually had a hard job. Having met that, I think we said in the submission that they have done their bit. Our job is to look after the public interest, and the asset owner has plenty of incentive to tell us why it should be a no under (f) and so - sorry, I didn't want to take too much time - I think (a), (b) and (f) together switch the combination of who knows, and frankly, the person best able to argue some of those costs is the asset owner. Some of them aren't very good at it and some of them sort of just pick a number out of the air and as long a list as they possibly can, but that's not all that helpful either.

MS SCOTT: Just for the purpose of the transcript, I've just given David and John a copy of a question that I'll read out now to everyone so we know what we're doing, but because it's hard to absorb just orally, I wanted to make sure that people had it in front of them.

In our report we drew attention to bulk commodity exports and used the Pilbara example to advance the economic argument that where prices are not going to change as a result of the entry or exit of one firm, then there may be no merit in going through the whole access process because at the end of the day all the firms are price takers. The chance of one firm's entry or exit affecting the long-term price is very small.

That was our argument we advanced in the draft report and we'd be interested, gentlemen, in hearing your views on that proposition in terms of what it means then for export infrastructure where infrastructure is used to serve export markets where Australia is a price taker. Do you think private incentives will be aligned with efficient use of that infrastructure? And if you felt that there were parts of that part of the report that were wrong, it would be good to hear now. I can give you a copy of the report if that helps. It's basically box 2 of that, John, if that helps you.

MR FEIL (NCC): This isn't a question we answer directly in considering an application.

MS SCOTT: Sorry, John, did you say - - -

MR FEIL (NCC): This isn't one of the criteria of the Act, so it's a little hard to get

to it, but if the only market that was affected was a market that was already competitive - and I assume that if we're a price taker, it's an internationally traded good, that there are plenty of suppliers, there are plenty of buyers and it's a competitive market - then it seems to me that it would be pretty hard to satisfy criterion (a).

MS SCOTT: That's right.

MR FEIL (NCC): And you'd probably fail to get declared on that basis. The Pilbara example we dealt with: in our recommendation, the Council picked up and put down the international iron ore market in about five minutes, notwithstanding arguments from the applicant that it was somehow segmented into a way that their entry did make a difference, and frankly no-one pursued that argument other than in the media at any other point in the discussion. That wasn't the market that was of concern and it wasn't the market that criterion (a) was satisfied for, so I don't disagree with this.

I think the practical problem will be, there are very few bits of infrastructure that are purely export infrastructure. If you put an exemption for export infrastructure, it will grow in amount magnificently, simply because more people will try and get themselves categorised in a way that gets it out. Where this situation is the fact, then it will not be declared because it will fail criterion (a), and if we get it wrong, the minister might get it right, and if he doesn't get it right, then someone on merits review is going to say, "This is an international market" - sorry, "This is a market that is already effectively competitive."

Excluding international markets I think is a slightly different problem because there's that provision that says a market is a market including an overseas market. Now, I assume that that is there for international trade agreement reasons, because it's not a market that we would normally be concerned about, but I presume for some comity reasons that if they don't let their monopolists screw our markets, we don't let our monopolists do theirs, but that's a different question.

MR CRAWFORD (NCC): And again, just to support that, if this is the only dependent market, that's fine, but all export industries have other dependent markets which we look at and it is not just the final downstream commodity market. That is an issue at all times.

MS SCOTT: Okay. At the weekend I try to relax by reading newspapers, but I can't get over how many times I pick up the newspaper now and I read about another potential small junior miner in the Pilbara region that thinks that there might be an opportunity for it to just test the waters and seek access, so I'm not finding it as relaxing as I used to, and I guess there's always an incentive for people, as we discussed earlier, to test things as much as possible. There's a strong commercial

imperative to do that and that then all leads people to search for potentially novel definitions of markets; you know, it looked like it was all about exporting iron ore, but now it's about a rail haulage market or it's about a tenement market or whatever.

We've talked about the strong incentives moving in one direction. How do you countervail that strong incentive to find new and novel versions of markets and how do you go about that? If I was a person over in WA thinking about next weekend's story, I'd be thinking, "Wait a minute, I've just got to look around a bit harder for a new market to find."

MR CRAWFORD (NCC): That's partly what our role is. We have to look at that in any submission that's made, about what is it, the market? We're the ones who make the judgment about whether that market is real and, secondly, whether the conditions for competition in that market will be significantly improved by granting access. So just the fact that someone might decide that they can find markets doesn't automatically mean they get recognised as markets. We have to make that judgment.

MS SCOTT: Okay, thank you for that. One of the discussions we had earlier today, John - and I think you heard it - was about asymmetries in bargaining power: people have found these valuable mineral deposits and it's not fair that they can't get them to market, and it's all about rent and rent-sharing and the role of the access regime. I hope I'm doing justice to their arguments. The role of the access regime is to in some ways improve the equity of outcome of the rents distribution. Do you think that's a fair summary of what we heard today from some of our participants?

MR FEIL (NCC): Certainly there are people who say this is all just rent-splitting and there can only be one lot of rents and unless it gets bigger it doesn't matter, and there's another group of people that say, "Who gets the rents between the miner and the infrastructure operator or the grain hauler and the infrastructure operator?" In the end, who gets the rents isn't the test for us. It's something that informs us - our consideration of criterion (a) in particular.

MS SCOTT: It does inform your - - -

MR FEIL (NCC): It can inform our decision on criterion (a).

MS SCOTT: Can inform your decision?

MR FEIL (NCC): Sorry, whether the rents get bigger in particular.

MS SCOTT: No, now I'm confused. So let's just check. You're not just going to take "Export market? Yes/no." You have to take into account applications from people that are identifying other markets, and one of the other markets they can be identifying is tenement markets or they could be identifying rail haulage markets. I

want to have a clear statement from you, if I can, about whether the sharing of - I'm going to define "economic rents" as the bit that it's above normal rate of return in which to undertake the investment. Are you comfortable with that as a definition of "economic rent"?

MR FEIL (NCC): Yes.

MS SCOTT: Okay. Is the distribution of economic rents of concern to you in making your assessment for declaration?

MR FEIL (NCC): Per se, my answer would be no, because it doesn't appear in any of the criteria. The criterion we're looking at under (a) is: does it promote a material increase in competition in the haulage market and tenements market? That's the question.

MS SCOTT: Okay.

MR FEIL (NCC): Sometimes people argue - and we do it ourselves; less in our decisions than our discussions. It's not uncommon, the phrase "Well, that's simply a split of the rents. It doesn't make any difference to competition", and if it's purely a splitting of the rents and the rents are defined in the way you define it, then that theoretical question isn't relevant, but you've also got a weight of submissions coming the other way - because I, like you, have read them - saying we actually don't give enough attention to the effects of rents on competition.

MS SCOTT: Yes, that's one of the arguments we heard today.

MR FEIL (NCC): That's the question that tests the Council. It's whether it's purely rent-splitting and the rents don't get changed and who gets the rents doesn't make any difference to the state of competition. Generally that's not how we think about it. We tend to think about, "Is there going to be promotion of competition?" and I noticed that G and T's submission, I think, was one where the "Who makes more profit?" can in some circumstances - maybe one day they will succeed in explaining which ones they are to us - promote competition in a relevant market, if that case can be made out.

MS SCOTT: David, just for the transcript, I can see that you appeared to be nodding at the right times with John.

MR CRAWFORD (NCC): Yes.

MS SCOTT: Just in terms of this critical question, especially when it comes to tenements - and you've probably seen the articles, as I have.

MR CRAWFORD (NCC): Yes.

MS SCOTT: People are saying, "Well, I've got a deposit there, but I haven't got means of transport, and I'm a little player, I'm a junior miner, and it doesn't seem terribly fair that this large firm won't avail me of an opportunity to put things on their line." So in terms of your view of the world, is it about equity in bargaining? Is it about who gets the rents? Or is it simply about competition in upstream and downstream markets?

MR CRAWFORD (NCC): The latter entirely, and in truth, again in the Pilbara case I think that's where we outlined it, and in a sense from our point of view it probably occurs one step back in the tenement market before someone becomes a miner, because essentially in the tenement market, the market is going to be "Who's going to actually hold the tenement long enough to get the right to develop it?" and that was the dependent market that competition was being encouraged in and where access actually allows new entrants to the market, potentially. They've still got to then go through the process. But I think that's entirely the case.

It's difficult where I sit, because competition in a dependent market is not about necessarily existing players. It's about potential new entrants to that market, and to talk about rent-splitting between people who don't yet exist in terms of potential entrants to the market would be challenging.

MS SCOTT: Okay. I'm going to let Angela take us in a different direction soon, but just on that, David, why would I be worried about new entrants if I've already established that at the end of the day it's not going to have any impact on the price-taking market to which they're serving?

MR CRAWFORD (NCC): Sorry, the price-taking. The price of tenements or the price of iron ore?

MS SCOTT: At the end of the day it doesn't matter really whether there are five or six or four if the price doesn't change ultimately.

MR CRAWFORD (NCC): Yes, right, if the price doesn't change, but I don't think that you would say that the price of tenements, for example, doesn't change just because the price of iron ore doesn't change. Because you're in a price-taking market for iron ore doesn't mean that you're in a price-taking market for tenements. It may be, but I don't think you can actually say it logically follows straight down the line.

MS SCOTT: Thank you.

MS MacRAE: This is somewhat related but not entirely. Coming back to looking at the key problem that we're trying to address, and I think we agree that we're really

interested in the issue of competition, Rio Tinto in their submission to us suggested adding a few words to criterion (a) and I'd just be interested in getting your response to it, such that for criterion (a) to be satisfied, declaration would need to promote competition, and they're suggesting adding "resulting in an overall material improvement in economic efficiency".

I maybe haven't got all their arguments down pat, but I think the main reason for their suggestion here is that they are concerned that criterion (a) is sometimes used to try and look at rent-splitting and some of these other issues that we would say aren't really germane to the issue of economic efficiency, and so you might call it belts-and-braces, but it's trying to ensure that when you're looking at (a) there's a clear link back to economic efficiency. I'd just be interested to know whether or not you think that would be a useful addition, an annoyance, possibly something worse?

MR FEIL (NCC): I'd be less kind than calling it belts-and-braces. I'd call it piling on as many reasons to say no as you could possibly invent. In the end, if it's going to promote a material increase in competition in a downstream market and there's a bottleneck and there's no public interest reason to say no, that's enough. That is a hard burden, and remember, that submission and I think a few others have proposed changes to the definition of "production process" so they can't be caught, increasing the criteria so they can't be caught, reversing the onus so they can't be caught, having multiple layers of merits review so they've got the best chance of getting one of us to side with them. I'm sorry, but there's a limit.

We have relatively settled jurisprudence on criterion (a) and I don't actually see a weight of submissions that suggest there's a problem. We have a problem with (b) that needs to be interpreted - something that we understood - but if you want to put more layers in, that's the same as adding another criterion, and a criterion that requires every one of them to be met with an affirmative satisfaction. I'm sorry, but it's hard enough now. Your report started out rightly pointing out that there are next to no declared services. Adding a further efficiency element will guarantee that there are absolutely no declared services.

MS MacRAE: Just in relation then, as you've raised that, to the production process, our report said relatively little about it other than it's sort of a first filter and it's there, and we didn't recommend any change or anything in that space. Is that something that you would see as good?

MR CRAWFORD (NCC): Yes, I think it is. Production process is as good as we're going to get on the definition around production process. I think there is a significant issue, when you look at particular production processes, in extrapolating to all production, trying to define a general issue around some specific issues. The production process that went to the High Court was about the iron ore industry. When the first judgment came out of the Federal Court, we did have an application

from an electricity generator to argue that transmission lines were part of the production process. So to use the specific case of one industry to start writing principles that govern all, that I think, to me, again opens up significant risks, and where we are on the production process I think satisfactorily lands us, without tinkering.

MS SCOTT: We're going to go over time, gentlemen, but that I think should be all right. We might take you on to the "have regard to" issue. The NCC opposes, as I understand, having a list of factors "in regard to" in criterion (f) but supports a list of documents to have regard to during the merits review process. Would you like to explain the contrast in those two positions?

MR FEIL (NCC): I think they're in an entirely different context. (a) We don't support reversing criterion (f), full stop, but if you were to - and I think what we've said in the submission is that if you put in a set of "have regard to" clauses, we're going to have to read 10 pages on each one of them from everybody whether they are relevant or not, because everyone will address every one of them, and the problem is that they invariably take on more importance than the things that aren't listed there and it becomes a sort of rote requirement that everyone write a couple of pages on every one.

As an administrative decision-maker, we have to consider all arguments put to us. Apart from the absolutely crazy, which I guess we might one day be able to write off as that, we have to respond to them. Six months is not a long time to do these things. We already get volumes of information that matters, plus a fair bit that sometimes doesn't. It's going to balloon the job, and I think we said in our response we already publish guidelines that don't limit those. In fact, if anything they're too broad. So I think in that context we have a problem.

The "have regard to": probably if I'd thought about the question, I wouldn't have used the same words. What we have asked in the merits review is simply to tell us what things are in and what things are out in terms of what we have to hand over, because otherwise on the first two or three Tribunal cases we're going to have a week of discussion and fight over what we have to give and what we don't.

The Gas Code has a list of things that the Tribunal gets automatically. It's objective. You can decide whether a document is in that list or not. The way the Part IIIA documents are, it's whatever the minister had regard to. Well, our report is in there, clearly, because we gave it to him as a recommendation. The submissions are all public documents, barring a few confidential bits we sometimes restrict. I think as a matter of practice now we actually do send the minister all of those, but whether he's had regard to them I have no idea.

So I think we're just asking, and generally with our merits review, let's just tie

down some of the fundamental, simple things so that we don't have to have an argument in front of a judge and potentially in front of another judge on appeal about "What's it about?" So I think they're in a different context.

MS SCOTT: But you'd accept, John, that a number of these things that we have specified would actually probably be quite reasonably in what you do now?

MR FEIL (NCC): Probably would be, yes.

MS SCOTT: Yes. So investment effects you'd look at now?

MR FEIL (NCC): Specific to that matter, yes, as opposed to the general. I don't disagree with any of your list. It's just that I think it will be a longer list by the time we get it.

MR CRAWFORD (NCC): And if there are any instances when making the decisions that we have made that it's been clear that we haven't taken regard of matters, then it's a matter of how prescriptive you would be and how much you rely on the Council's role and judgment in assessing these matters, as to whether you can trust the Council to actually make the proper inquiry about matters or how much you actually have to be prescriptive to ensure they do.

MS SCOTT: Prescriptive, yes.

MR FEIL (NCC): What worries me is that list will get something added about small business, and then it will get something added about regional development, and then it will get something added about employment, and those are things that are much more difficult to get in, particularly as a "no", on our view of criterion (f), and they might be beneficial things but they're not things that are addressed by access. I think it's that worry, because I've never seen a parliament that's capable of resisting adding to a list.

MS SCOTT: We might now turn to the standing of the NCC before the Tribunal. We've got a couple of quick questions on that. What do you consider would be the consequences if the NCC was excluded from the review proceedings?

MR FEIL (NCC): We would appeal to a court to be reinstated. At the moment, we consider our role to be to assist the Tribunal. We're not staunch advocates of our draft decision or our final decision because sometimes the minister has made a different one. We're there to assist the Tribunal, and that's the only role we've ever sought to play, but we have also faced in a significant number of matters a complaint from one or other party, and occasionally both, that the Council has no role here.

They cite a court case the name of which has completely gone out of my mind,

which said that essentially an administrative decision-maker has no place in the appeal. Firstly, we're not the decision-maker, but leaving that aside - Hardiman was the case, I think. No-one has succeeded in that argument, but it crops up not irregularly. It crops up when there's an appeal beyond that, or a judicial review of something going to the Full Court, be it arguments about whether we can be heard and on what grounds. The only place we didn't have a problem was the High Court, who welcomed us.

So it's on our list of things that could be tidied up and put beyond doubt. I'm not saying that anyone is going to succeed in keeping us out. We're certainly not going to go away.

MS SCOTT: You're suggesting that we do make a recommendation in this space on the basis that it could happen. It hasn't happened, and this morning you would have heard the very strong cautionary words that were given to Angela and I and our team about "Do no harm. Try not to fiddle where you can't be super-confident that you're going to make a positive benefit." So you're suggesting in this space - and I guess the same applies with the size of the infrastructure asset issue as well. You know, we can't see any harm at this stage.

I suppose with a good mind, maybe you could think of how there could be harm in the future, but are we jumping at shadows here? We're trying to confine our recommendations to the absolute things that we can say to ministers, the government, policy departments: "These are the ones. We have sifted through everything and these are the ones we think you absolutely need to do." Does your concern about the Hardiman principle amount to something in that space, John: nice to have but not essential?

MR FEIL (NCC): Clarity is always nice to have and I would suggest that that's simply clarifying and putting beyond doubt what the situation is, but is it of the same order, or if I say that you should do that, you should then fiddle with the criteria? No, it's not of that same order, and there are similar things with our quorum. The problem is that while you want to talk to the government and write a report about the big-ticket items, whenever we raise another lower-order item with the government, they say, "Wait for the PC review." So we're taking the view that we'll have a go everywhere and one day we'll get there.

MS SCOTT: I understand. Well, we had a number of people also in the course of this hearing, David, suggest that maybe access could be the regime that they fix up, triple-B trucks on highways, or today there was maybe we could get COAG to act faster if we did it through the access regime, or maybe you could address a few equity issues along the way. I have to say, our disposition is that if there's a real problem, I wonder whether we should be - - -

MR CRAWFORD (NCC): Yes.

MS SCOTT: We're not saying that there isn't benefit in you pursuing other alternative routes. I mean, there may be people in the room today that could help you in the fullness of time.

MR CRAWFORD (NCC): Yes.

MR FEIL (NCC): They're the people that told me we had to come to you, though.

MR CRAWFORD (NCC): They're a lower-order risk but they are not without risk where they sit now, and that's both in terms of our standing before the Tribunal - while we have got, under legal precedent, rights now, that may be. And under the size one, if we hadn't had a case where we have had to assess these issues - it's not plucking an issue out of the air.

MS SCOTT: No, I appreciate that.

MR CRAWFORD (NCC): It is a real issue we have seen, and the risks of dropping it out are very small, whereas the risks of leaving it in - because I don't think it gets to the economic problem, mere size. I think, as we said, when you sit down and argue "How long does a railway have to be before it's big?", "How many pipes have to connect under Sydney before it becomes big?" it's not what you really should be talking about.

MS SCOTT: No.

MR CRAWFORD (NCC): And if we hadn't had to talk about those things, it wouldn't matter to us, but we have had to talk about those things, and someone may have come to a different decision about that, about "It's big enough to do."

MS SCOTT: Okay. Well, I think this could be my last question. I'm still puzzling about (a), (b) and (f). Let's see if I can do justice to it. I think you basically outlined, John, earlier that if something has gone through your assessment processes for (b) and you've ticked the box there confidently, and you've ticked the box for (a), then by and large (f) can stay as a negative test because two positives, one negative, you feel that's a good balance of checks and balances.

MR FEIL (NCC): But remember, it's not two positives and a negative. We have to be satisfied of all three.

MS SCOTT: Yes, I appreciate that.

MR FEIL (NCC): Including that there's not something.

MS SCOTT: Yes, all right. I should have said that. "Not".

MR FEIL (NCC): "Not".

MS SCOTT: Not in the public interest.

MR FEIL (NCC): Yes.

MS SCOTT: Okay. But then I'm thinking about these final markets again, David, where for all intents and purposes, concern about a rail haulage market that may or may not exist, a tenement market that you may or may not have concerns about, at the end of the day it's going to make no difference to the final market - none. So it's passed your (a) and it's passed your (b) and it will pass (f) as a "not not in the public interest", but as an affirmative test maybe it wouldn't pass, because someone would say, "When it's all said and done, after all this kerfuffle, it isn't going to make any difference at all to competition."

MR FEIL (NCC): But to satisfy (a) it must have. It may not make any difference to competition in the final market.

MS SCOTT: Well, that's right.

MR FEIL (NCC): But somewhere along the line someone had to convince us that - - -

MS SCOTT: I'm still actually slightly troubled by that. I'm going to have to think a bit more about that. If something is genuinely a price taker at the end of the day, like overwhelmingly a price taker at the end of the day, can you have an upstream supplier that's not affected by that outcome? How can someone here in some ways exercise a whole lot of market power if at the end of the day they can't affect the final price? I mean, there's a limit. I can go up to the tenement guy and yell at him a lot or pressure him, or the road haulage guy, but at the end of the day the amount that I can extract from him is clearly limited to the fact that he is not a price setter and - - -

MR FEIL (NCC): But you also now have submissions from Gilbert and Tobin and from the airlines saying that it can matter, and I think that that's a factual question. It's a factual question as to whether there is a haulage market or a tenements market or an air services market or any number of other markets, intermediate to the final consumer.

The question we're asking under (a) - and let's do it in the context, as much as I hate to do it for David, of airlines and airports. If someone can show us that the approach to charging for airport services makes a difference to competition in the

airline market, that in terms of benefit - whether or not it's a benefit to the consumer, they have to be able to make that case out. Generally they haven't succeeded in doing that. In the Pilbara matter, at the Council - and remember, that was seven years or more ago - - -

MS SCOTT: It's still ongoing, John. There are still things happening in that space over there.

MR FEIL (NCC): Yes, but there's none in the declaration space.

MS SCOTT: No, but - - -

MR FEIL (NCC): And a different regulatory environment.

MS SCOTT: And a different regulatory environment. This is a very live issue.

MR FEIL (NCC): And there are certainly people that will tell you that throughout the boom period there could have been many millions of additional tonnes of export iron ore exported had there been better access arrangements that bypassed us. There are some who will tell you it won't make any difference to the final price, but it certainly would have made a difference to output.

MS SCOTT: Has it added to or displaced someone's productive effort?

MR FEIL (NCC): And given the safeguard provisions, you couldn't have chucked any BHP ore off to make room for it. And I don't want to rehearse it again, but there is a factual argument about how much that would have occurred or not. We took one view. The asset owners took another view. The access seeker took a view it made no effect at all. The court took a different view. Those are factual questions and, with respect, those are questions for us, and the framework doesn't make a difference to that.

MS SCOTT: Okay. I want to come back then. Sorry, this is the final question. So with (f) as a negative test "not not contrary to", it's passed (a) and it's passed (b), so even though it's going to make no difference to any consumers in any final market, because it's passed (a) and it's passed (b), in your mind with the negative test it's going to pass (f)?

MR FEIL (NCC): No. You have to consider the evidence you're given about what the effects of that will be. If someone came up with a credible argument, as in the end the Tribunal accepted, that there were likely to be delays in investment - not a view I happen to share, but that's neither here nor there. The court or the Tribunal found that there were in that case likely to be delays to investment and to development of additional capacity that would overall reduce the output, and it's on

that basis that they denied declaration. Had we had evidence to that and we had accepted it, then it would have been open to the Council to have also said no.

MS SCOTT: Okay, but could I go back to my hypothetical. I know it might not be the one you would like to deal with, but this one here, it's passed (a), it's passed (b), and in your assessment you come to the view that it's not going to impact on any consumers in any final market. Would it pass or not pass (f) as a negative test?

MR FEIL (NCC): It would depend on the evidence you had on (f), but if there was no evidence led on (f) then, yes, it would pass.

MS SCOTT: Gentlemen, thank you very much for your time today, and your patience too as we explored all those complex things.

MR CRAWFORD (NCC): Thank you very much.

MS SCOTT: We're now going to have a break. We're going to resume exactly at 3 o'clock. Thank you.

MS SCOTT: Good afternoon. Let's resume our hearings now and invite to the table Steve Davies, please, from the Australian Pipeline Industry Association.

MR DAVIES (APIA): Good afternoon.

MS SCOTT: For the purpose of the transcript, could you just state your name, please, and, Steve, would you like to make an opening statement?

MR DAVIES (APIA): Certainly. Steve Davies from the Australian Pipeline Industry Association. I'd like to start with just commenting on the aspects of the draft report that we're quite happy with. We agree with the Productivity Commission in its finding in terms of the importance of the primacy of - having economic efficiency as the prime objective of the National Access Regime. That's something that we are seeing - have its primacy decreased in energy regimes, and that's something that is a concern to the gas transmission industry; also the acknowledgment that the negotiation/arbitration framework is the foundation for access regimes is again something that's particularly important to the gas transmission industry but we are finding is having less of an emphasis under the energy regime; and, thirdly, the acknowledgment that it's important to retain merits review in the access regime. That's a debate that was had in the energy regimes again last year, and we are looking at some changes to that. There was consideration of removing the limited merits review regime entirely, and that was something that was quite concerning to investors.

The three things that I'd like to talk about specifically in the draft report and maybe offer an alternate view on are: certification of the energy regimes, the power to direct an extension or expansion and then some of the matters of economic efficiency and the potential for the National Access Regime to have a chilling effect on private investment.

There might be a little bit of crossover as I get going between some of those, but I'll start off with talking about certification. In the draft report the Commission has found that at this time it seems that it might be useful to remove the requirement to certify the energy regimes from the Australian Energy Market Agreement.

We agree with the Commission in identifying the purpose of certification being to improve consistency and quality of the access regimes, to promote certainty for investors and to reduce duplication between the various pieces of legislation that might govern access arrangements. We believe those three purposes, objectives, are all important to the energy regimes and are a reason for certification.

It's difficult to quantify the costs and benefits of something like certification. We do know that the energy regimes have operated without certification for close to five years and no-one has really made much of a fuss about it, save for the Victorian

government when certification was considered in 2010.

The only real cost that seems to be identified is the potential to have to continually recertify the regime in the face of multiple changes that occur in the electricity and gas regimes. That is true to some extent. I don't know what the cost of each recertification would be, but presumably if it's a single rule change there would be a relatively small incremental cost in assessing the impact of that sole rule change on certification rather than having to revisit every clause of the National Electricity Rules or the National Gas Rules.

We would say, particularly in the case of the National Gas Rules, there are four or five distinct parts of the rules that are relevant to access regulation, and many other parts of the rules talk about gas markets, wholesale markets, retail markets; similarly for the electricity rules. So the regimes are doing far more than just access regulation and it should be a relatively simple matter to quarantine the relevant parts to access regulation and then only consider the need to recertify when a change occurs to one of those.

As far as I'm aware, there's only been one gas rule change of the 14 or 15 that have occurred that has anything to do with access regulation, and that's been as a result of the energy reforms and the changes to the way rate of return is determined. But outside of that the rule changes have been dealing mainly with the establishment of short-term trading markets, the gas supply hub in Wallumbilla; things like that. So there should be able to be some sort of commonsense prevail in how changes to the National Gas Rules and the National Electricity Rules have an effect on the need to potentially recertify these regimes, if they are certified.

MS SCOTT: The total of that is that people may be exaggerating, either advertently or inadvertently, to us the substantial cost this constant reassessment requires, because in fact the reassessment only relates to the access arrangements and there's only been one rule change of the 14 or 15 that have occurred.

MR DAVIES (APIA): And that's in the gas regime.

MS SCOTT: Yes.

MR DAVIES (APIA): The electricity regime I can't speak for, but again the electricity regime doesn't deal with access in quite the same way, given that - - -

MS SCOTT: What about access implications? I mean, people have taken a very broad view about what "access regime" means in this inquiry. All sorts of issues have arisen that we might never have anticipated and close assessment may or may not fall within our remit. Could it be the case, Steve, that in order to assess whether something has an access implication you'd be looking at each of those 15 rule

changes in gas and 125 in electricity? I think it was 125 that someone mentioned the other day.

MR DAVIES (APIA): That sounds about right. There's always the potential for an implication. With some of them it should be fairly easy to assess whether or not there is an implication. Others may be more difficult. But ultimately we're talking about administrative costs and, when you look at the quantum or the investment in the infrastructure that's being regulated, do the administrative costs actually add up to a substantial resource compared to the resources that have to be put into a single access arrangement? How big a deal is recertification?

MS SCOTT: I'm not too sure that's the right point of reference. I thought I would look at the costs of certification versus the benefits of certification, not the total volume of investment out there - - -

MR DAVIES (APIA): Yes.

MS SCOTT: - - - because otherwise every proposition is going to look pretty good, because of the huge investments that are taking place in both the gas and electricity sectors, particularly in the network. Just about every proposition would get up on that basis, Steve.

MR DAVIES (APIA): That is true. So let's talk about the benefits.

MS SCOTT: Okay, good.

MR DAVIES (APIA): Again these are quite difficult to quantify too. The main benefit we see is the long-term consistency that might be more prevalent in the gas regime in particular, and this is particularly important to the gas transmission industry, which probably stands alone from the other energy infrastructure sectors in that we still do largely rely on negotiate/arbitrate. We're the only form of infrastructure in the energy sectors that isn't fully regulated and, you know, the access regime actually does have a bigger implication for gas transmission, in that you do have the potential to be covered or not covered.

So when we're bundled in with the other energy infrastructure, which are almost by default covered, it can be a bit more difficult to be regulated in a more open way or consideration of our access issues - we're treated more like the other energy networks.

The long-term consistency that we particularly like to see is the continued focus on the primary objective of economic efficiency. That's something we raised in our first submission, when the National Electricity Law and the National Gas Law were brought into effect. The objective of the long-term issues of consumers was

included in the National Electricity Objective and the National Gas Objective, but the second reading speech and all the discussions at the time made it quite clear that the promotion of economic efficiency was the primary objective and the long-term interests of consumers was almost a superfluous statement in there, because economic efficiency should serve the long-term interests of consumers.

Contrast that to the statement of policy intent that came out late last year, which has now said that the primary objective of the regime is the long-term interests of consumers and that that should be the deciding criteria when the regulator makes its decision and when the Tribunal considers any appeal in determining a more preferable decision.

So that's quite a substantial change in intent without ever changing the National Gas Objective. If the regime was certified, would that statement of policy intent have been able to be made with such certainty from SCER without at least asking the question, have we altered the fundamental objective of the regime?

MS SCOTT: Steve, just on that, this is an interesting issue, because we'd like to think there would be alignment, as you said, between long-term economic efficiency and the long-term interests of end users. I mean, they're not well served by a grossly inefficient system and so on. Where do you see, in practical terms, those two terms now having a potentially divergent outcome and therefore your concern that the primacy of economic efficiency is put asunder?

MR DAVIES (APIA): I guess energy is different, in that it affects everyone's lives and they've got a direct relationship with some part of the energy supply chain, so consumers do consider they have a greater role. But two things that have come through in recent times, lending themselves to the primacy of the long-term interests of consumers objective and changing the way gas transmission infrastructure is regulated, is in consideration of the limited merits review regime. An awful lot of attention has been given to that, as to how to get consumers involved in the appeals process.

For gas transmission infrastructure I think, in terms of energy infrastructure, we are the only sector that's actually already had our major customers initiate their own appeals. We have no direct relationship with consumers but we do have negotiated outcomes with every single one of our customers, which is quite a different standing to electricity infrastructure in particular.

One of the other reforms that's come through is the need for energy infrastructure to abide by the Australian Energy Regulator's currently under development consumer engagement guidelines, which will give - some weight will be given to your efforts to engage consumers in your access arrangement determination.

For the gas transmission industry, as I've said, we have negotiated agreements in place with all of our customers which are major corporations, typically bigger than the gas transmission company itself. We're talking about all the large energy retailers, the largest miners, the largest manufacturers in the country. So now there will have to be some requirement for gas transmission companies to engage with retail consumers to explain to them - I'm not sure exactly what - perhaps, "Gas transmission costs only comprise three to eight per cent of your final retail bill. It's not a big deal for you to worry about, but we still have to make the effort to engage you."

So these kinds of things add to the cost of regulation, and over time we may well see a decision where - we've already seen, I guess, in the five years since the energy laws came into effect a change in the statement of policy intent that puts the long-term interests of consumers as the deciding factor, if you will. Perhaps in another five years' time we'll see the long-term interests of consumers for this next regulatory period are actually more important than economic efficiency at the moment.

Energy prices seem to be subject to a bit more political interference than others, and so having the hook of long-term interests of consumers seems to leave the energy industry more vulnerable to reactive change.

MS SCOTT: How well are we advanced through your three points, because I keep interrupting you. We got through certification.

MR DAVIES (APIA): That was my long point.

MS SCOTT: And power to direct expansions and extensions - we've probably got questions we could ask you there.

MR DAVIES (APIA): Okay. Let me just say what I've got to say on that, because obviously I'm just the person who puts industry's comments together, so I might not have a really good response for your questions.

MS SCOTT: Okay, carry on.

MR DAVIES (APIA): The main thing that we're concerned about - the gas transmission industry is typically non-vertically integrated infrastructure providers. So the idea that you could be forced to expand your pipeline or your asset when your business is solely selling access to your asset is concerning, in that if it made business sense you would have done it already, because that is the only way you get remedy.

We can see how it might be more applicable to vertically integrated infrastructure providers, and we are seeing some particularly large ones up in Queensland at the moment, but the gas transmission industry's business is selling gas transmission capacity. So the idea that you might be forced to expand an asset - and with the associated dangers that come with that of average tariffs versus, you know, the cost of marginal capacity tariff, which is a big issue for long-term assets - is something that we are quite concerned about. It seems to be not just sort of the operational implications of having that imposed on your asset but then - especially as the gas regime is not certified - would this become a potential new tactic to influence investment in future expansions of a pipeline; the threat of expansion? It's all hypothetical, but extensions and expansions we see as quite different things and expansions do concern us.

MS SCOTT: So the power has existed. I mean, you weren't the first one to suggest that it existed. So you've had a concern about this for a long time, or this is now an emerging issue?

MR DAVIES (APIA): No. To make it explicit, in the Competition and Consumer Act that was the recommendation, wasn't it?

MS SCOTT: Yes, it was. I think because we've already got - I was going to say a Federal Court ruling. You've got the Tribunal ruling, have you? The Tribunal ruling suggests that that's the right interpretation. In fact, it also suggests that - well, the NCC has a view that there's a general power relating to extensions and expansions. So in some ways our draft report was to highlight this. We think there's a policy reason for it. Is there a policy reason to exclude your sector then? Is that what you're after?

MR DAVIES (APIA): I'll always take an exclusion for the sector, but I think maybe there needs to be a better distinction made between issues of vertically integrated infrastructure and non-vertically integrated infrastructure. It's difficult in a general National Access Regime to do that, but the need for regulation of those two types of asset is different and needs to be acknowledged. So when you're trying to have one effect there's the potential for unintended consequences. Both the Tribunal and the NCC are not infallible. I don't think that it needs to be a default "this is what needs to happen".

MS SCOTT: The legislation itself does include 44W and 44X. I mean, people aren't making it up. So you'd prefer that those original bits of drafting were now removed from the Act?

MR DAVIES (APIA): I can't comment on that exactly.

MS SCOTT: All right, fair enough.

MS MacRAE: It was just half a sentence, I think - interrupted - but you see in the gas area at least that you could make a distinction between an extension and an expansion. You wouldn't be so concerned about extensions but you are worried about expansions, or did I not hear you correctly?

MR DAVIES (APIA): I think gas transmission infrastructure - that's what my experience is in. So I think we could make the case that extensions would rarely need to be mandated, because when you're extending a piece of infrastructure almost invariably it's to build a lateral for a single customer so that they can access the pipeline itself.

So the directing of an extension to a new customer would be something that again - if the business case was there to build it, we would build it. But it can also be quite easily maintained as a discrete asset, so it doesn't have operational implications in the same way that - and again tariff implications, with getting an average tariff smeared over the expansion rather than the cost of the expansion itself. So not particularly concerned about extensions.

MS MacRAE: Yes, okay.

MS SCOTT: Chilling power of decisions on investment.

MR DAVIES (APIA): Yes. This is something that we tried to address in our original submission, and I think we raised the point that you can't really talk about what hasn't happened as a result of the National Access Regime, but what we would like to confirm to the Commission is that regulatory risk is something that investors take into account when designing their assets and their capacity. I think the draft report recognises some of those things, including the desirability of sizing an expansion to avoid regulation by being fully contracted.

Again in the case of the gas transmission industry you're doing that not to prevent other people from accessing your capacity; you're generally trying to make that expansion as big as possible. Regulatory risk is one element. I don't want to overstate the regulatory risk, though. Obviously financiers want to invest in gas transmission as a long-term secure asset, and it's all on the basis of the long-term contracts you have in place when you make your final investment decision as to what goes ahead. Building spare or speculative capacity in brownfield expansions is something that's pretty much unheard of.

We know why the regulatory risk exists in terms of average capacity versus marginal capacity and the costs associated with each. What we would like to see in an attempt to address the regulatory risk - and we don't say that this would change investment practice, but I think it would lead boards to consider options which

they're not currently considering when making investments. Two of the solutions that we see are - obviously there's already regulatory holiday provisions for greenfield investments, both under the National Access Regime and in the Gas Access Regime. The fact that they exist, there must be some implicit recognition that there is the potential for a chilling effect on investment at least, but the reality is that the majority of investment in this sector - and probably in most - is actually expansions of brownfield assets rather than greenfield assets.

We would say that the building of spare or speculative capacity on a brownfield asset is so unusual that it should pretty much qualify as a greenfield asset. So there is the potential to extend regulatory holidays to companies that are willing to expand their asset beyond what they can achieve contracted capacity for.

In addition, or separately, it would be good if the regime explicitly recognised that you can have multiple tariffs for a single asset, and they would be based on the cost of an expansion rather than having a depreciated asset, and the low tariffs associated with it drive down the regulated tariff on an expansion, which would create all sorts of headaches for your long-term contracts and the nature of your foundation contracts.

MS SCOTT: Steve, I think we might now cut to the chase. We've got a few questions. We've peppered your remarks with lots of questions on the way through. I've got a question about merits review and the consistency between Part IIIA and the National Gas Law.

MR DAVIES (APIA): Yes.

MS SCOTT: You made some on the way through, but let me read this question out and see how you react. In your draft report submission you noted that the proposed changes to the limited merits review of decisions under the National Gas Law mean that under that law merits review will share very few attributes with the Part IIIA merits review. If we correctly understand you - that's the case - why would differences between the NGL merits review and the Part IIIA merits review be a cause for concern? Is it just a case of horses for courses?

MR DAVIES (APIA): I think that was probably in our submission to the consultation paper rather than the draft report.

MS SCOTT: Let me just check. No. We might have it wrong, but it says here "draft report submission".

MR DAVIES (APIA): Well, we didn't touch on merits review in our second submission.

MS SCOTT: Okay.

MR DAVIES (APIA): At that time we did not have the results of the changes to the limited merits review through but we knew what was under consideration.

MS SCOTT: Yes.

MR DAVIES (APIA): And they were substantial differences. We think the differences being contemplated were significant enough to have an impact on investment in the energy regime. "Horses for courses" is to one extent appropriate but not so far that it skews investment out of a sector. When you're considering the removal of error correction from a merits review regime and the idea of a materially preferable decision in the long-term interests of consumers as opposed to error correction - our view was that the review of the limited merits review panel seriously envisaged a regime that wouldn't worry about correcting 15 or 20 million dollar mistakes, because that would add to the costs of consumers without really changing the - without sending a company bankrupt, was essentially the reasoning there.

So if that kind of review regime was to be put in place in an energy regime, our view is that investment would definitely be chilled.

MS MacRAE: In relation to the certification question, if I could just tease it out a little bit more, I think, if I understand you correctly, one of the main concerns you've raised is that the - I think in some parts of your submission you suggest that trying to have a common ground between gas and electricity itself creates a bit of an issue but that consistency is a good thing. So there seems to be a slight sort of disconnect there that maybe consistency with - I mean, gas and electricity you'd think might be closer than ports and gas or that sort of thing.

There's some value in consistency, but are you confident that, if you were to get a certified regime for your gas and electricity, the level of consistency you'd get would be the right amount? To the extent that you get something like the interests of consumers popping out as something that probably wouldn't pass or may well mean that something that had previously been certified may no longer be - just thinking in terms of the dynamics in the industry, if government were so minded that they wanted to change one of those sorts of objectives for the regime, would they find another way, so do it outside of the access regime so you don't upset the certification but you just find another bit of regulation you're going to put it in to, you know, give gas a different - I guess what I'm saying is, I can see that one of the reasons that we weren't so attracted to certification is that there seems to be in some cases good reason for consistency and sometimes not.

MR DAVIES (APIA): Yes.

MS MacRAE: And I think you'd agree with me that there's already a really heavy burden of regulation on your sectors and does another layer of oversight really help you?

MR DAVIES (APIA): The thing about consistency is, it's the level at which it comes in, and that's exactly what you said. Certification would give us high-level consistency with the primary objective of the regime, with access to merits review and those kinds of keystones of an access regime.

Our concern in the consistency that is coming through between electricity and gas is not particularly related to the access components of the regimes, although we would say gas transmission, as the only sector which really is governed by an access regime, given that electricity networks are, in effect, default regulated. So where we're getting our concerns in terms of consistency is sort of the conclusions that are being drawn about electricity and gas markets and that they should operate in similar ways, without recognising the fact one is a physical commodity and one is an energy commodity and so they actually have completely different physical realities. The whole network - national electricity market - has to be maintained in a pretty close balance so that, you know, nothing too horrible happens to all of our electric motors and TVs and everything else, whereas gas - what you put in the pipeline today will arrive at the market in three days' time. So why do we need the same kind of instant reporting capabilities in both?

MS MacRAE: Yes, okay.

MR DAVIES (APIA): So that's where our main concerns are, in consistency of electricity and gas, and it's in those high-level fundamental parts of the access regime - of your rights to review, primary objectives, the sort of criteria for coverage - that we'd like to see consistency across major infrastructure.

MS MacRAE: All right, thank you. Sorry, I'll just give you another question.

MR DAVIES (APIA): That's all right.

MS MacRAE: In our terms of reference they asked us to provide advice on ways to improve processes and decisions for facilitating third party access to essential infrastructure, including in relation to greenfield infrastructure projects and private sector infrastructure provision. What measures do you think are needed to support development of appropriate access arrangements for greenfield infrastructure? You've talked a little bit about brownfields, but is there anything else in relation to greenfields?

MR DAVIES (APIA): I'm not sure if the gas transmission industry is the right one

to comment on that question, because we don't build a pipeline and hope people will come and use it. The market approaches the gas transmission industry to build a pipeline. So that is a question for probably more vertically integrated infrastructure sectors.

One thing I would say - it may be not so relevant to greenfield but probably comes across both of them - is that what would be good for gas transmission is if negotiated outcomes were given greater recognition by the AER. I'm moving out of my comfort zone here but, as I understand it, the rail regime, the ARTC and its customers can come to an agreement, put that in front of the ACCC and just get it approved without having to go through a tariff determination.

That option doesn't exist for the gas transmission industry. If you're a regulated pipeline, regardless of the fact that all of your capacity is fully contracted under bilaterally negotiated contracts, you still have to go through a price determination. So the regulator does not have the power to recognise your existing agreements. To some extent you can say that that provides a basis for negotiation and lets the public know what terms your asset could be accessed under, but we would say it's a whole lot of effort and administrative cost for no real reason.

To the original question, the gas transmission industry doesn't really do greenfield investments without the customers already signed up.

MS MacRAE: Okay.

MS SCOTT: Steve, thank you very much for your time today.

MR DAVIES (APIA): Thank you.

MS SCOTT: I'm sorry, gentlemen, we're just a little bit behind schedule but we've still got plenty of time to hear from you and to ask you questions. Can I just check, before we do start with Law Council of Australia, I did say at the earlier part of the day that if there was anyone attending the hearing today that wished to make a statement at the end, that weren't formally part of our processes to date, that they could come forward. But I just want to check, is there anyone that does want to avail themselves of that opportunity? I'm not looking at the team. I'm looking at non team members who heard something today and thought they definitely need to get on public record as saying something. Is there anyone that would like to do that? No.

I think that therefore means you are our lucky last customers, so we'll just see how we go but we've got plenty of questions. For the purpose of the transcript, gentlemen, would you like to identify yourselves, please, and then would you like to make an opening statement?

MR JONES (LCA): Thomas Jones.

MR RIDGEWAY (LCA): Stephen Ridgeway. I'm a member of the Competition and Consumer Committee of the Law Council of Australia and a partner of law firm King and Wood Mallesons.

MS SCOTT: Thank you.

MR JONES (LCA): I suppose I should also add, for the record, I'm also a member of the committee and a partner of Corrs Chambers Westgarth.

MS SCOTT: And you're appearing today in your capacity as Law Council of Australia, though?

MR JONES (LCA): Correct.

MS SCOTT: Good, thank you, gentlemen. Now, would you like to make an opening statement?

MR JONES (LCA): Thank you, Patricia. I thought what we'd do is just make some brief observations on the recent submission on the draft report and then perhaps leave some time for the Commission to ask questions. At the outset I could also say, as you would appreciate, that whilst we're both seeking to represent the interests and the views of the members of the Competition and Consumer Committee of the Law Council, as you'd appreciate in such a complex and important area of the law, there's a wide variety of views amongst the committee members. I think it's fair to say there's a diversity of views between Stephen and myself on some matters and obviously also with other people who have appeared before you. I know Bob Baxt appeared in his personal capacity this morning as well.

What I'll seek to do perhaps initially, unless I express otherwise, is just to cover some of the points in our submission, but then perhaps we can seek to address questions you have. The Law Council has made two submissions to the Commission's inquiry and the first one was a very lengthy and detailed submission where we sought to respond to your questions in particular areas, namely criterion (b), the "uneconomical to duplicate" criterion; processes of certification of state based regimes; criterion (f), the public interest test, and of course the appropriateness of the current institutional arrangements. You may wish to ask us some questions on that submission. I don't propose to make any comments on that now.

I will say, in terms of our most recent submission, that we took a fairly targeted approach and we have sought to make some brief observations on areas where the Law Council, with its primary but not exclusive legal rather than policy focus, could perhaps add something constructive. So perhaps there I'll just briefly comment on the Commission's approach to criterion (a) or the Commission's proposed amendments to criterion (a) and to criterion (b), and perhaps make one very brief comment on criterion (f), which was not in our submission and with which Mr Ridgeway beside me will, I have no doubt, violently disagree - so that one will be a personal one merely for consideration - briefly on the proposed amendments to the deeming provisions, and finally perhaps just some thoughts about the questions you've asked on the 44X, 44V and 44W, and the question of extending and expanding facilities and how the costs of those extensions or expansions should be borne.

In terms of criterion (a) I think it's fair to say that this is an area where there was a fairly high level of consensus within the committee that I think we understand the proposed amendments there, and it's fair to say we generally support them. One of the very useful things about the approach that the Commission has taken to the inquiry is saying, "What's the question we need to ask? What is the mischief we're trying to target here? What can be achieved by way of regulation, whatever form this regime may take?" So I think your approach to say declaration, well-regulated access on reasonable terms and conditions, promote competition or promote a material increase in competition, is a sensible way to formulate the test. It essentially restores the position that was taken to apply before the Full Court decision in the Sydney Airport case.

Another good thing about it is that it does help to recognise explicitly that Part IIIA, or that the regime, is not just one part. It's not just the declaration stage that there's been so much focus on in recent times. It is, of course, the other part which may involve arbitration of disputes. So I think by making that reference to the terms and conditions of access it does help integrate those two parts. I don't think I'll make any further observations on that. Stephen may wish to add or comment on that.

In terms of criterion (b), obviously that inherently is potentially a more contentious area and it's true to say that within the members of the committee there was and remains a divergence of views on that, so I don't propose to comment specifically on the merits of the natural monopoly test vis-à-vis the net social benefit test or the private profitability test. I'd refer you there to our earlier submissions. I think we can certainly see the line of reasoning that the Commission has adopted there, and that's set out quite well and very clearly.

Assuming that the natural monopoly approach will be adopted, we certainly see some merit in ensuring that compliance costs and scheduling costs are taken into account, so I think that's very positive. I'll make another brief comment about costs in relation to criterion (f) in a minute. I suppose the observation we would make is that, as with any of these reforms, the drafting of the actual provisions will be very important. If the past 10 or 15 years of Part IIIA have told us anything, it's that often courts haven't interpreted these provisions in quite the way which the parliament or commentators, or indeed the participants, might have thought they would. That will be very important to get right and I think there are some observations in the Law Council's first submission on how that could be achieved in terms of a natural monopoly test, and I think it's true to say that it probably has the merit, at least as against a net social benefit test, that it's probably relatively easy to draft around, and the Tribunal did posit that pretty much in the Fortescue proceedings.

I should say also - and we said it in our earlier submission, again - but I think another area where there's perhaps not complete but fairly unanimous consensus within the committee is in relation to excluding the incumbent facility owner from the definition of anyone in terms of criterion (b). Otherwise I think, as you say, there's a real risk for outcomes that would not really promote the objectives of Part IIIA.

Whilst I'm being slightly controversial, my brief observation on criterion (f) - and I will just make one observation there, and this is a personal observation and it may not garner much support from my fellow committee members. The concern I have a little bit with the Commission's proposed approach to criterion (f) is, unlike some people, I'm not convinced that criterion (f) should necessarily have a high degree of overlap with the other criteria. This is not a question really about framing it in the positive or the negative although, having briefly read the NCC's submission on the draft, I do see their concern about being able to make a recommendation about the public interest. But look, that can probably be dealt with.

I actually tend to agree with Dyson Heydon's dissent on criterion (f) where he says that - and I'll just read from page 74 of the High Court's decision:

First, the Tribunal's approach to criterion (f) is so wide in scope -

he's referring there, obviously, to the Tribunal in the Pilbara proceedings -

> that criterion (f) must inevitably overlap with criteria (a)-(e). It thus tends either to make them redundant or to generate double-counting. These results are to be avoided, if an alternative construction is available.

As I said, it's not a consensus view of the committee at all, so I won't go much further other than to say that partly from my experience in working under Part XIC in the Telecommunications Access Regime where there were extensive challenges to consideration, not so much in declaration decisions but in arbitration decisions where there was a balancing of criteria. I think there's a lot to be said for an approach which gives each criterion its own independent significance and weight. Obviously the decision-maker must weigh them but there's case law that says that when you've got criteria like that, each one must be given fundamental weight by the decision-maker. It's a little bit hard to see quite how that can happen if one of them involves them going back and re-weighing the other ones as part of that. That's an area that needs to be thought through carefully in terms of criterion (f).

MS SCOTT: But doesn't that apply, Thomas, whether it's an affirmative test or a negative test?

MR JONES (LCA): Yes. As I said, I don't think it's really about whether it's an affirmative test or negative test. In one of your recommendations you take up the very sensible recommendation, I think in the Law Council's first report, that you might want to enumerate some of the things that could be taken account of in the public interest test. I think you suggest some of them might relate to competition and so on.

MS SCOTT: Yes.

MR JONES (LCA): My personal view - again it's a personal view - is that there's a risk in that approach where you're looking at things again, or enumerating things again, that might also have been considered under the other criteria. Now, I know Stephen, and I won't say any more because, as I said, Stephen I know has a different view, but that's a personal observation there. In terms of the deeming provisions, we certainly see merit to an approach which enhances the transparency of the process. Irrespective of one's views about the role of the minister - and that's an area where there's a diversity of views - I think it's quite important, particularly where you've got merits review and the availability of merits review which the committee supports, that where the minister has a role in the decision-making process, his or her reasons for making that decision are transparent and on the public record, both to enhance the transparency of the process for participants as a whole but also to permit review of those decisions, whether it be limited merits review on the record of the minister's decision, as the High Court said in the Pilbara case, or a judicial review.

MS SCOTT: Thomas, we're very pleased to have this opening statement but I'm just conscious of time.

MR JONES (LCA): I'm sorry, it's going too long.

MS SCOTT: Well, I'm conscious that Stephen wants to say something.

MR JONES (LCA): Yes.

MS SCOTT: And if the team had their way, which they won't, they would like me to ask 23 questions of you.

MR JONES (LCA): All right.

MS SCOTT: Angela and I have some questions of our own, so we're going to have to be quite judicious in our timing, otherwise we'll finish about midnight.

MR JONES (LCA): Yes. Well, why don't I stop there? The only other comments were really around the extension and expansion point, and they're explained fairly well by our submission.

MS SCOTT: Yes, we are going to ask you questions on that.

MR JONES (LCA): As I thought you might, which is another reason why I stopped there. Perhaps, Stephen, you'd like to say a few words.

MR RIDGEWAY (LCA): Thanks very much, Thomas. Commissioners, I will present the abridged version, given the shortness of time and the long list of questions, from the sounds of it. As Thomas said, there is a divergence of views amongst members of the committee. There are many members in the Competition and Consumer Committee, and many of us have had experience with Part IIIA and other aspects of access regulations. It is difficult sometimes to separate one's own views from the committee but hopefully the logic of the points speak for themselves and the Commission can take that into account.

One of the concerns amongst a number of the committee members is the difficulty in carrying out the Commission's objective of assessing the performance of the regime and meeting its rationale and objectives, and we note that the Commission states in the report that ideally it would like to have undertaken a detailed cost-benefit analysis. The committee does have the view, as reflected in the most recent submission, that the Commission is probably best placed to undertake that analysis.

MS SCOTT: It might be best placed but not well placed.

MR RIDGEWAY (LCA): Quite. If commodity prices remain relatively low, we may not see the like of the Pilbara case again, and perhaps Part IIIA will remain the white elephant that it has been and not emerge, in many cases, for another 10 years and not generate so much concern. But if the objectives are entry in a dependent market, identification of examples where that entry has occurred through the regime as opposed to the cost is a very important consideration, we would submit, in weighing up whether the regime has met its objectives.

I have often received the response of the backstop position, as noted by the Commission. Well, there may be cases in which it's altered behaviour, but no-one has offered up those cases. There are no examples. If you look at, for example, what's going on in the Pilbara now, you see very substantial entry that's occurred and very substantial entry that's proposed in those markets. So the committee is concerned that sometime there should be a full cost-benefit analysis of this regime in view of the costs.

MS SCOTT: I wonder whether this is a case, Stephen, where economists wonder why lawyers can't arrive at the plain English reading of a term, as we see it as economists, and lawyers can't understand why economists can't end up with a cost-benefit analysis, even though there is insufficient data and there's no clear counterfactual. Ideally we would do cost-benefit analysis. We just simply don't have the data to do it. While we have shown considerable daring and innovative practices in other areas, even with the best will in the world I just don't see how we could do it in this space. So your point is noted, and we can model in many areas, but I don't see how we could do this on the basis of such thin data.

MR RIDGEWAY (LCA): Look, I understand that, Commissioners, and perhaps it's incumbent on some of the industry participants to have offered that evidence. But I note that the Commission refers to the absence of conclusive empirical evidence in relation to impacts on investment. I was interested in that word "conclusive" and what is empirical evidence that is noted in the draft report. On the benefits of the regime, the Commission notes a few things which are certainly far from conclusive, such as the backstop argument and the fact that the regime may serve as a benchmark for state regimes, and a couple of other matters which are all put as hypotheticals, but I will leave that, in the interests of time. I note your comment, Commissioner, and I'll leave that point.

I did want to make a couple of points in relation to criterion (b) and criterion (f). One of the concerns with the natural monopoly approach is whether the natural monopoly approach as formulated by the Commission in the draft report meets the market failure identified by the Commission. The Commission notes particularly on page 2 of the report:

> The market failure that the National Access Regime should address is a lack of effective competition in markets for infrastructure services due to natural monopoly.

That's not to say that this is doing the work of criterion (a) and that the ultimate objective is not the promotion of competition in a dependent market, but the identification of that market failure is the lack of effective competition in markets for infrastructure services, due to natural monopoly. But the way in which the natural monopoly test is formulated by the Commission is looking at whether all foreseeable demand can be met by the particular facility. I'm familiar with dealing with that concept through the Pilbara infrastructure matter in various proceedings. This is the difficulty in grappling with the concept of a facility or a service with natural monopoly characteristics.

The Commission in the end makes its draft recommendation on the basis of efficiency considerations, rather than looking at whether there is a lack of effective competition due to natural monopoly. It seems to a number of us that the Commission makes its decision on the basis that the most efficient outcomes will be produced and focuses on productive, allocative and dynamic efficiency, but predominantly productive efficiency based on that approach to natural monopoly, which is applying a general natural monopoly test of what is going to be most efficient, but that test does not address whether there's a lack of effective competition.

One point in particular on which I would very much commend the Commission on is on page 9 under the heading "When might the benefits of regulated access outweigh the costs?" Under that heading there's the last sentence:

> In markets where two or more infrastructure service providers are able to provide the same service (or an effective substitute service), allowing competition between service providers will generally be preferable to access regulation.

That's very much on all fours with what the High Court said in the Pilbara infrastructure case about one of the reasons why it adopted that interpretation. It did actually say it might be the best test but, in any event, it said that's what the law says. But will the natural monopoly formulation, as identified by the Commission, address those situations where there has already been duplication of the facility, or where there is a prospect of effective competition? Certainly the test is cast more broadly and may have some basis in efficiency terms, but is it necessary for that effective competition in the market? I would say there's some tension between that formulation and that statement and the circumstances where duplication has occurred.

The only other point I would like to make is in relation to the double-counting point and the interpretation of criterion (f) that Thomas referred to. There are a number of submissions made to the Commission in relation to whether the promotion of competition should be in a nationally significant market or some suchlike, and Prof Fels in particular said that the previous approach to criterion (f) risks descending into a plethora of insignificant or trivial markets, and there's no capture of that.

MS SCOTT: Yes.

MR RIDGEWAY (LCA): I think the Commission quite rightly identifies that this could be taken up in the public interest criterion, and certainly I think it is the consensus of the committee that the imposition of a positive test is preferable to the current double negative, aside from the grammatical difficulty. When you get to criterion (f), a number of us would say, firstly, it's not a case of double-counting to count coordination costs. As the committee said in its first submission, either you consider the criterion separately, in which case it can't be double-counting because they're independent criteria, but even if you consider it cumulatively it's not a question of one plus two plus three. There is still a place for both because the coordination costs are important in weighing up the benefits.

If the Commission believes that the importance of the market and the benefits through declaration should be addressed in criterion (f), then it should find voice in criterion (f) as one of the matters to have regard to in some weighing up of those benefits. I have experienced over time that there is a bit of a mantra that any promotion of competition is beneficial in some way and therefore passes the threshold, and that - we would say - would lead to some fairly absurd outcomes and there should be some weighing up. I had a couple of other points to make but I think they're the most significant ones, so we should leave it to the questions. Thank you, Commissioners.

MS SCOTT: Thank you.

MS MacRAE: One of the things that we'd be interested in your views on, and it's not an issue that either of you touched on, but just in relation to the role of the Tribunal now and the way that its powers may have changed as a result of the recent - well, not so recent now - High Court decision. How appropriate do you think is the Tribunal's current power to request and consider additional information that it considers reasonable and appropriate, including information that was not available to the original decision-maker? Then, as part of that, would a more restrictive power be more appropriate? Say something like as applies under the National Gas Law, where additional information must not have been originally withheld from the original decision-maker. How do you see those powers with the Tribunal now?

MR JONES (LCA): I suppose I'll make an observation because I haven't specifically thought about that point. I think it's fair to say, as we say in our original submission, that there are still some - and perhaps this is what you are alluding to - there are still, I think, some things to be worked out in terms of the interaction with the amendments made in 2010 in relation to the provisions around the Tribunal's powers and the High Court decision, which is one of the reasons why we said in our first submission - and I think we still hold that view - that any changes to those provisions now should be approached with caution because there hasn't really been time to consider that direction, and I think it is very clear that there has been a significant reduction in the scope of the Tribunal's powers by the High Court.

In terms of the specific question you asked, on its face there does seem to be a degree of inconsistency there. I mean, the High Court seems to be saying, "Well, look, what the Tribunal can consider really is the issues that were before the minister." So that's one where on its face there seems to be a degree of inconsistency. Do you have a view on that, Stephen?

MR RIDGEWAY (LCA): I do, and this actually came up at Prof David Round's conference last year when talking about the role of the Tribunal more broadly in ACCC authorisation decisions. In particular, a number of the participants were involved in other matters and they pointed out how significant and influential the additional information gathered by the Tribunal and its power to compel witnesses has been in decisions and it was, I think, the impact of those powers of subpoena and those powers of direction as exercised by the Tribunal in the Pilbara case. Unfortunately, substantial sections of that material was confidential due to the nature of the plans but it was, I think, fairly influential in the Tribunal's decision.

I know that, without doubt, there was considerable time taken and expense in the Pilbara matter. It's one of the few matters that's taken up that time, but it dealt with Australia's main export supply chains and I would suggest that the findings of the Tribunal have been borne out by market events. There is no market failure of the types identified, so perhaps the Tribunal arrived at the correct decision. Having seen the process in action and talked to my colleagues who have seen similar circumstances, we would be in favour of the Tribunal retaining those powers, and believe that in the majority of cases it exercises them proportionately and appropriately. A lot of the delay in the Pilbara proceedings was due to the early production process detour and actually, if you subtract that, it's a much shorter period of time that you're talking about.

MS SCOTT: If we could turn to expansions and extensions, we had a lot of commentary in our hearings about this issue and also our consultations; very strong views and some suggesting that we're heading on the right course and others suggesting that we're heading on the wrong course. You seem to be quite wary that

we're going anywhere near suggesting some clarification on the law. You're sort of like, "Don't touch it. You're about to do harm." But we have had a Tribunal interpretation about what these words mean and we have got the NCC saying that they know exactly what it means and it gives considerable power.

Also, as we indicate in the draft report, a lot of people have said to us that whereas this mining boom this time round has been about spare capacity and in some cases additional capacity, next time round it will be all about additional capacity and great harm will be done to Australia's economic fortunes if this is isn't settled. Now, we're conscious that the ACCC can't point to draft guidelines. They put testimony today about some of the issues that would need to be considered in terms of principles, but I think that's really the first time that's on the public record.

So I want to question your view that we should be extremely cautious in this space when we're hearing other people saying it's untried, it's untested, it's unclear but it does exist. It would be better to clarify it and clear it up than to have it as an area of potential delay - strong incentives to test it out. We only get these reviews every now and again, and I'm just trying to work out why - contrast your hesitancy against other people's encouragement to either kill it or let it live. So back to you.

MR RIDGEWAY (LCA): I'm in the former category, as you probably would guess, of kill it. Thomas, correct me if I'm wrong, but I think our submission was in relation to the text of the provisions rather than the guidelines.

MS SCOTT: Yes, it was about the provisions. We're only seeking to clarify what we - well, maybe you're saying that we've entirely misinterpreted what the clarification should be.

MR JONES (LCA): I think it's consistent with the tenor that - I mean, I'm not in the "kill it" camp but I do agree that, as the ACCC I think acknowledges in their submission, there's been no consideration of those provisions in a dispute under Part IIIA. In fact, to my recollection - and I was trying to remember this morning - there's been almost no consideration of them in an actual dispute under the equivalent provisions under the former Part XIC of the Telecommunications Regime.

So in those cases I think our view would be - I know this seems like saying "extend or expand" seems like you're just adding another word in, and I think, for what it's worth, that the Tribunal is correct in its construction of the provisions, in particular the preamble saying "anything relating to access to a service including". I think the Tribunal is correct in its construction of those provisions, but I think if that's right then there isn't really a problem, so why do you want to add the words in? I know that seems like a cop-out.

The other part of that is just adding "or expand". I just wonder if it's necessary

or appropriate where it's really a hypothetical issue at this point, rather than a real actual issue that was confronted in a proceeding.

MS SCOTT: Okay, fair enough, it's hypothetical. We're trying to be cautious in our approach as we go to this issue but people are telling us that potentially within our lifetime people will have to turn to this issue and it will get tested at some stage. I mean, there's such strong economic incentives to do so. Isn't it better to have it all sorted out than have the ACCC, potentially governments, general public and investors, making critical decisions, not have any clarity about the powers that we think and you think exist?

MR JONES (LCA): The one thing I'll say there is that we're singling this one out but there are in fact a lot of criteria in the second part of Part IIIA which give an administrative decision-maker, maybe the ACCC, extremely wide powers. We can't actually delineate all of them. It's a necessary aspect of an administrative regime like this that the decision-maker who is then still under Part IIIA merits review and judicial review will have virtually those words that Finkelstein J refers to, "Any matter relating to access including". There's half a dozen paragraphs under there of which we are focusing on one. I understand completely why the Commission is doing it but the legitimate interests of the access provider and the interests of access seekers are incredibly broad.

So I'm just saying there's always a danger and by focusing on one and being quite prescriptive about it, but leaving the others fairly very high level, I'm not sure how much you achieve and perhaps you upset the balance slightly, but perhaps Stephen has something more.

MS SCOTT: Just before we go to Stephen's response, what about the fact that the QCA is trying to deal with this, is grappling with this issue as we speak, and a number of participants to this inquiry have drawn to our attention - both QCA itself, but clearly Glencore and others, and I suppose really you can say Aurizon - that these arrangements have thrown up a variety of issues that have taken a considerable amount of time to resolve, and that there are clear learnings or clear questions or issues that arise from their experience based on their legislation as it applies to the National Access Regime. So if someone is blowing a whistle on a playing field not far from our earshot, it would be hard to ignore it.

MR JONES (LCA): I know Stephen is certainly more involved in the legality of those matters than I am, so notwithstanding that I will let him respond.

MR RIDGEWAY (LCA): Thanks, Thomas. Commissioners, my recollection is that the Queensland Competition Authority Act actually refers to "extend and expand", as opposed to Part IIIA, so there is some provision there. Most of the actual participants, when faced with it, including the QCA, resort to other means.

There were proceedings over whether a particular terminal was included in the access declaration or not, rather than go to these "extend and expand" powers. There are also provisions in the most recent ARTC undertaking and in some of the other regimes there are more specific provisions about expansion, and small extensions have been undertaken under pressure.

MS SCOTT: Yes.

MR RIDGEWAY (LCA): But whether there's going to be a significant expansion situation, I think that the lack of take-up in those other regimes indicates - how do you grapple with this problem? I'm just sceptical that the ACCC will be able to manage directing a detailed substantial expansion.

The Commonwealth should be wary. There are provisions in Part IIIA that where an infrastructure owner has not been adequately compensated for loss through access prices, the Commonwealth has an obligation to make up that loss. That's one thing that perhaps should be taken into account in this area. The difficulty is, is there an up-front payment or is it going to be amortised over time? Having had to deal with this, it is much more difficult to judge how you make the up-front payment, and the default position appears to be amortisation over time. Will the infrastructure owner in fact recover those costs or will the Commonwealth have to bear it?

I think the devil will be in the detail of these proposals, and certainly I commend the Commission for looking at the ACCC preparing guidelines, and I don't envy them that task. Perhaps before a decision is made in that regard we should see those draft guidelines because I think the devil will be in the detail.

MS SCOTT: Maybe that will draw out the workability of this arrangement and the suitability of this arrangement. Certainly we've had people push back on expansions. Small extensions seem to be acceptable to most people. Anyway, we've had a lively coverage. Now we'd better quickly turn to some of these other questions.

MS MacRAE: I might just turn briefly to the production process exception and you did mention that there was a bit of a detour along the way from some of the early cases. Some participants have suggested to us that the way that the courts now interpret that provision, it's unlikely ever to apply. On the other hand, other people have said that's a major kind of overstatement of what this means and it was particular to those circumstances and still has some weight and it carries some value to still have it there in the law. What would your view be in terms of, firstly, what the production process exception should be doing, and whether or not it does that effectively and if there's reforms that should be made there?

MR RIDGEWAY (LCA): Although I note it was a unanimous decision of court - the chief justice didn't sit but it was 6-nil against in the High Court production

process judgment, but a number of us believe that what the High Court was saying was that unless the facility is itself involved in the process of transformation of something in the production sense, then the production process exception didn't apply. The basis of the reasoning is, in the Pilbara cases, because the rail was not directly involved in the process or necessary for the purpose of - and I'm paraphrasing here - the process of transformation, it was therefore not use of a production process because the test is whether the use of the service involves use of a production process.

You could argue that in that case a conveyor belt within a factory is open to be declared and not part of the production process. A number of us believe that to serve the purpose it would be better to posit the test as interference with a production process or that the facility forms a necessary part of the production process - some sort of formulation like that. The High Court's formulation does appear to rob it of use in the sort of circumstances that you'd imagine. A pipeline within a desalination plant shouldn't be available for declaration if the concept of the desalination plant itself is not excluded. That's the view that a number of us hold.

MS MacRAE: Yes, okay. Do you think, with that alternative formulation that you've just proposed there, that would then end up being a bit too broad? That's one of the issues we've had. It seems that it's been narrowed substantially, very substantially, but then if you go for something broader do you end up effectively neutering Part IIIA? I'm just trying to think of the words that you just suggested there because we've looked at some alternatives. You'd end up counting out almost everything.

MR RIDGEWAY (LCA): It is hard, on the spot, to look at formulating the test but I think in terms of interference with the actual production process itself, the nature of the production process in relation to the Pilbara railways - both BHP and Rio - is that ore from various mines is blended through sequencing of the trains in a complicated process at the port. So a test that said that the rail formed an intrinsic part or a necessary part of the production process would exclude the rail, but not exclude something which is not directly part of that process. Even to say it's part of the production process may be a more applicable test.

I think that such a test would still have a lot of work to do. There are many things which are not part of the production process or that wouldn't be an unreasonable interference with the production process. If it's a highway, for example, or something that's ancillary to the main facilities, it would still not come within the exception.

MS MacRAE: Okay, thank you.

MS SCOTT: I might turn now to that issue you raised with us earlier, Stephen,

where you mentioned in our findings that where there are two or more facilities that can provide the same service or an effective substitute service exists, access regulation is not necessary. I was thinking I'm agreeing with you and we're all in agreement, and then you said, "Wait a minute," and went on a bit further and potentially said something that you didn't find of comfort. I thought, well, a dive into the report will reveal all. Now, I have found a sentence that I'm not feeling completely comfortable with at this point in time but I just thought I'd test out if I'm in the same line of thinking as you.

Maybe it's a good thing to talk about intent when we get to draft reports because then we can check it out and then see whether the final report could be clearer. Look, we had proposed a test for criterion (b) that is met "where the facility can meet the total market demand" - so we're clearly trying to exclude the case of twos and threes and fours and so on - "where the facility can meet total market demand at least cost, and where total market demand includes demand for any substitute service," so I think we're heading in the right direction. Now, you're comfortable with that direction, Stephen?

MR RIDGEWAY (LCA): Subject to the expansion power issue, because one of the arguments that came up in the Pilbara proceedings is whether it refers to "the facility as expanded" - especially when you're declaring for 30 years and, for example, when railway triplication is planned. If it is the facility as at the date of the application, I don't disagree with you at all and I note that there is a line in the report where the Commission does say it's got to meet the demand of both another existing facility plus that facility.

MS SCOTT: Yes.

MR RIDGEWAY (LCA): If the facility is not expanded, then I'm not so troubled by the position, but it was thrown in and applied on the basis that the facility is able to be expanded under this expansion power. The trouble is that a railway, for example, will always meet that test unless you accept the coordination costs, but there is a point of expansion. I mean, if you turned it into six tracks, there is a point at which the coordination costs are removed. Who wears the cost of that expansion and how that's - - -

MS SCOTT: All right. You're putting in a further wrinkle, because I hadn't thought in your earlier commentary that you had talked about expansion. I thought you'd referred to the fact that - well, you had then made a statement that there could be two or three providers in a market. The expansion issue - we do talk about foreseeable demand. Yes, people are nodding. Does that address then - because, I mean, foreseeable demand - I'd like to think that people can look ahead maybe five years, 10 years. Have we got wise people that can look ahead 30 years, because if they can we'd be pretty keen to see them in the forecasting profession.

MR RIDGEWAY (LCA): Well, Marshall McLuhan predicted the introduction of the Internet about 30 years before it happened. He's about the only one.

MS SCOTT: The only one? All right. What if I said that you and I - we might be in agreement about the market test and total demand meaning that we head towards one provider and that, if we use foreseeable demand, we'd like to think we preclude then people being clever enough to think about 30 years ahead. What about then this issue about twos and threes? Does the testing for natural monopoly in a market context as we propose address the issue of two or more substitute facilities? We think it does. I just want to check that you think it does.

MR RIDGEWAY (LCA): The difficulty is treating the facility as static, but whether it's necessary for effective competition, that's the issue - I have still got a bit of a concern that if you identify the market failure as the lack of effective competition for the natural monopoly facility and if there are already two facilities. Now, I'm not an economist but your economics I think would tell you that, all other things being equal, if the coordination costs do not outweigh the benefits of providing access, then you would permit access.

I think that's why those two mining companies fought so hard for so long, it was because of their concern about the loss of production and coordination costs; not anything downstream. In theory that's right, but I think the difficulty is still whether it is just at less cost. Where the facility is already duplicated, how do you apply the test - - -

MS SCOTT: Okay. Duplicated? I mean, now we're going to have trouble with this word. We have had in Australia - and maybe people could talk about telecommunications in this space - you know, a dominant player and another player and maybe at various places - specific geographic locations - there is a duplication of facilities. But we talked about effective competition; competing effectively in dependent markets in our definition of what the economic problem is. So I guess we'd like to think that we've addressed that issue of maybe less than vigorous competition or hardly any competition at all or competition only in name's sake.

MR RIDGEWAY (LCA): In the draft report "effective competition" is used both in relation to the dependent markets and also in relation to the natural monopoly facility.

MS SCOTT: It is, yes. Does that satisfy you then?

MR RIDGEWAY (LCA): I'll just point out that I'm not sure the test meets that question of effective competition in the natural monopoly market. It is really identifying the facility having natural monopoly characteristics rather than it being necessary for effective competition.

MS SCOTT: All right. Well, that's food for thought, thank you. That leaves a whole lot of free legal advice we were going to ask you about. Maybe we'll just have to be a bit more judicious about what we were going to ask. We had a lot of little practical questions like, do you think the NCC should be given a statutory role before the Tribunal and the courts?

MR JONES (LCA): Without having thought about it, again I don't see that it's necessary. I think that the court can make the appropriate decisions about joinder of parties. I don't see that as being necessary personally.

MR RIDGEWAY (LCA): I'd agree with Thomas about that. The NCC has intervened in a number of cases and, so far as I know, never been excluded, much to some parties' chagrin. But it's had a role; it hasn't been excluded.

MS SCOTT: It seems to be worried about the possibility that it will be adversely affected in time by the Hardiman principle. But that's good; that's a good answer. What about this one? Given we've had limited experience with the Tribunal post the High Court decision, when reviewing decisions made under Part IIIA should the Tribunal be permitted to summon witnesses, require the production of documents and take evidence under oath? What's your response to that? Why and why not?

MR JONES (LCA): My answer to that, which may be different to Stephen's, would be that, if that can be done - and this is not really perhaps a very satisfactory answer - in a manner that's consistent with the narrowing of the Tribunal's role that the High Court required or found, I think that would be okay. There's always a value judgment. It's always a balancing in terms of the regime between the interests of getting the perfect answer, if such a thing is possible, and getting a good answer within a reasonable time, but I personally think there was a need to circumscribe the Tribunal processes to some extent. Others on the committee would disagree; Stephen may well be one of them.

I would have no objection to that, provided that it could be done in a way that didn't enlarge the process. That said, it is possible to have Tribunal hearings on the papers. There were many such hearings under the Telecommunications Access Regime, which I participated in. Some of them had defects and problems, and there is this issue, which I think is largely dealt with by the 2010 amendments, that the Tribunal will sometimes need to get updated information on the record, because there will have been factually something that happened between when, say, the minister made the decision under IIIA and when it's hearing a matter that it needs some information on.

So I think that it's important that the Tribunal have that power to effectively update the record. Whether it's required to hear witnesses on oath - again if it doesn't

slow down the process, I think that would be okay.

MR RIDGEWAY (LCA): For centuries we regarded - and it's the cornerstone of our system - that we regard the current judicial process as the best way of getting to the facts and important circumstances. This is a situation where we're talking about interfering with property rights, and I think the Pilbara case is a bit of an anomaly, in that the hearing took three months, but it was our major export supply chain that we were talking about and there were very serious consequences, as the Tribunal found.

In a very important case I think it's the best way of getting the facts, but in many cases it can be done quickly - the current chief justice of the High Court, when he was a judge of the Federal Court, heard the AGL v ACCC case in a matter of days and made a decision in a matter of a couple of months. So most of the time the process is actually much shorter, but it is in important cases where you need to get to the facts. Nothing focuses the mind of the witnesses and establishes those facts like that process.

MS SCOTT: I'll make this my last question, and it looks like it's going to be the last question. You made the point, Stephen - I think it was you - that maybe in some ways we won't see such level of activity in Part IIIA as we have in the past. Is that a reasonable interpretation of what you said?

MR RIDGEWAY (LCA): Yes, depending on commodity prices.

MS SCOTT: Commodity prices, yes. What about the argument that we've put to a couple of people today - you haven't heard it - and that is that there are such strong incentives to test the envelope at every point, notwithstanding the high legal costs, the complexity, legal delays, multiple steps, because even if it's a $2 million investment in legal costs or it's $10 million or even if it's $100 million, for the access seeker there's so much potentially available that you always give it a go; you'll always test it; there will always be pressure to test it. Early retirement is not likely for competition lawyers.

MR RIDGEWAY (LCA): Not necessarily on Part IIIA grounds. In the Lakes R Us matter that was looking at declaration of the hydro lakes, that matter came to a conclusion at a fairly early stage, and most of the matters do. The difficulty is where there are high stakes, there are strategic reasons. People talk about gaming, but there's gaming on both sides. Two of the railways in the Pilbara have been declared under Part IIIA. If you read the papers, you'd believe that nothing has been declared – that is, none of the Pilbara railways were declared under Part IIIA - but two were. So far there have been no access applications or approaches, but - - -

MS SCOTT: But does that suggest gaming in itself?

MR RIDGEWAY (LCA): It's better for me to leave the Commission to draw its own conclusions about those circumstances, but too much has been done ex ante and not enough ex post facto about what has happened about market entry and what has happened in those circumstances. If commodity prices remain relatively low and the stakes are lower, we may see relatively little activity in that area. I mean, the Pilbara matters aside, Part IIIA has been rarely used. Just to close, I'd say: where has been the market entry in any of these cases? There was one price arbitration, but that's all that's occurred in that period of time.

I do want to distinguish my comments from general access regimes and industry-specific. I think that's very different.

MS SCOTT: Yes. Thomas, do you want to make a comment here?

MR JONES (LCA): I'll perhaps make a brief comment on Stephen's comment on the two services being declared. I mean, it is true to say that there hasn't been any access there, but I perhaps think there are two points that need to be borne in mind. One is, that's perhaps in part attributable to the length of the process and, as Stephen rightly points out, that included the production process hearing and so on. But obviously when you seek declaration initially - many circumstances may change eight years down the track. So to draw the inference that, because there's been no access sought on those lines, it involved any sort of gaming I think would be entirely incorrect.

Secondly, I think the fact that there hasn't been access is not necessarily a sign that the regime doesn't work. I mean, it is a two-stage process. The ACCC has the immense and plenary power under the second stage of the process to decide not only the terms and conditions of access but whether there should be access. So I don't think you can conclude - and it perhaps is the backstop argument - that the fact that there's been a declaration but there hasn't been access necessarily means the process was flawed.

MS SCOTT: Thank you very much gentlemen, for your time today, and for the submissions from the Law Council. Much appreciated.

MR JONES (LCA): Thank you very much.

MR RIDGEWAY (LCA): Thank you, Commissioners.

MS SCOTT: It's my pleasure now to draw these hearings to a close. We look forward to completing the report to government in October. If there are any other people who are about to make submissions, could I suggest that you do them awfully quickly, as we're right into the drafting process. So thank you for your attendance today. To our transcriber and to our team of hard workers, thank you.

AT 4.40 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY