Law Council
OF AUSTRALIA
Business Law Section

National Access Regime
Productivity Commission
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20 February 2013

Dear Mr Barker,

I have pleasure in enclosing a submission in response to the Productivity Commission's Issues Paper on the National Access Regime.

The submission has been prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Michael Corrigan, on 02-9353 4000.

Yours sincerely,

Frank O'Loughlin
Section Chairman

Enc.

Productivity Commission Inquiry into National Access Regime

Submission by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia

20 February 2013

1. Overview of submission

The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to make a submission to the Productivity Commission in relation to its inquiry into the National Access Regime (Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and clause 6 of the Competition Principles Agreement), and the operation and terms of the Competition and Infrastructure Reform Agreement (**Inquiry**).

On 30 November 2012, the Productivity Commission released an issues paper to assist individuals and organisations to prepare submissions to the Inquiry (**Issues Paper**). The Issues Paper covers a wide range of important issues, including in relation to the overarching framework for the National Access Regime provided by the Competition Principles Agreement and the regulatory provisions contained in Part IIIA of the CCA for determining access to services provided by nationally significant infrastructure facilities.

This submission focuses on the following issues in relation to which the Committee has particular experience and expertise:

(i) Declaration criterion (b) - the uneconomical for anyone to develop another facility test;

(ii) Declaration criterion (f) - the public interest test;

(iii) Certification and Undertakings; and

(iv) Institutions and processes involved in administering the Part IIIA regulatory framework.

In addition to making this submission, the Committee welcomes any further opportunity to comment on other issues that come to the fore during the course of the Inquiry.

2. Key Issues

The Committee considers that, in light of the recent decision of the High Court of Australia in *Re Pilbara Infrastructure*[1] and a number of issues arising from the operation of Part IIIA of the CCA, amendments are required to the current declaration criteria and process in Part IIIA.

2.1 The Declaration Criteria

One of the Law Council's long standing principles is that legislation should always, as far as reasonably practicable, be devised and construed to provide as much certainty as is possible in its application to those affected by it[2]. This is of particular importance to Part IIIA which creates a very significant and somewhat unique framework, by which property owners can, in the public interest, be compelled to share their assets with third parties, including competitors.

[1] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.
[2] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at [8] per Gleeson CJ, Gummow, Hayne and Callinan JJ.

In these circumstances the Committee submits that the process, by which major facilities may be "declared" to be subject to third party access rights, should be based on clear criteria set out in the legislation which can be objectively tested and, if appropriate, reviewed by an independent decision maker, such as the Australian Competition Tribunal.

In this context the Committee is concerned that imposing a criterion of declaration which seeks to apply a definition of a facility being "a natural monopoly" raises serious difficulties of application and is likely to be unworkable in practice, for reasons spelt out in this submission.

The Committee also notes that, in *Re Pilbara Infrastructure*, the High Court of Australia held that a facility could not be declared under Part IIIA if it would be "economic" for the owner of that facility to duplicate it, even if no-one else would be likely to do so. In the Committee's view, that interpretation creates a number of unintended consequences contrary to the objects of Part IIIA in the removal of entry barriers and promotion of effective competition in Australian markets. In the Committee's submission, amending legislation is appropriate to address that interpretation of the declaration criteria under Part IIIA.

2.2 The 'Public interest' criterion

A declaration decision under Part IIIA raises the prospect of potentially long lasting regulation of nationally significant infrastructure. The Committee therefore sees it as critical that such decisions reflect an appropriate and transparent weighing of the costs and benefits associated with declaration in a clearly defined and evidenced based manner, similar to the orthodox "cost benefit" analysis used elsewhere under the CCA to assess the public interest.

The Committee therefore does not support the suggestion that the current public interest test under criterion (f) should be seen to be one that is of a generally "political kind" best exercised by Ministerial discretion.

The Committee therefore recommends that criterion (f) be amended to require a test of a net public benefit such as:

> "*(f) that access (or increased access) to the service would result, or be likely to result, in a benefit to the public that outweighs or would outweigh any detriment to the public arising from access from (or increased access to) the service, including any costs of providing access (or increased access).*"

The Committee also recommends that the public interest criterion should be determined having regard to the following:

(i) any promotion of competition identified under criterion (a);

(ii) any costs of providing access under criterion (b) and any other costs of access; and

(iii) the objects of Part IIIA in Section 44AA.

2.3 Institutions and processes involved in Part IIIA

Re Pilbara Infrastructure has significant implications for the conduct of all declaration proceedings under Part IIIA and, in particular, reviews by the Tribunal. Also of significance are the amendments enacted in 2010 to Part IIIA in an effort to increase the timeliness and transparency of declaration outcomes. The Committee considers that careful consideration should be given to the

implications of the High Court's decision in light of the 2010 amendments before extensive changes to the Part IIIA are embarked upon.

That said, the Committee considers that some further clarification regarding the review processes may be desirable. Consideration can and should be given to whether, notwithstanding the High Court's findings, there are too many institutions and processes involved in the administration of Part IIIA, and whether the regime could be improved by eliding some of those processes. For example, one option may be to remove the role of the Minister in declarations, or circumscribe it to either an advisory or a veto role. Further, to the extent the Minister's role is retained, there should be greater transparency and accountability. In particular, if criterion (f) remains in its current form, the High Court's view in *Re Pilbara Infrastructure* that the National Competition Council may have a limited role to play in relation to it will be significant. It will also have the effect that the role of the Minister will be elevated. In those circumstances it may be desirable that the Minister be required to provide to the applicant and the facility owner a draft of the declaration decision which the Minister proposes to make and allow submissions on the public interest issues. It would also be appropriate for the Minister to provide detailed reasons in the event that the Minister makes a decision by reason of the public interest criteria.

Another option may be to collapse the processes for declaration and determination of terms and conditions under Part IIIA so that terms and conditions of access are considered at an earlier stage in the process. However, a number of issues would need to be considered including how to deal with changes in terms and conditions over time.

Without affecting the issues raised above, the Committee wishes to emphasize that the 2010 amendments to the CCA significantly changed the review process for declaration decisions, in particular by reducing the scope of the review process in the Tribunal. This is likely to simplify and shorten the review process. The scope of the Tribunal review process is likely to be further reduced by the findings of the High Court. However, the Committee notes that neither the 2010 amendments nor the High Court's decision have yet been given sufficient time to operate so as to enable their effect to be fully tested.

The Committee also makes some separate suggestions below regarding clarification of the role of the Tribunal in light of the High Court's decision and the 2010 amendments. The Committee also sets out its view that merits review of Part IIIA decisions continues to be appropriate, particularly given that the likely combined effect of the 2010 amendments and the High Court decision will be to expedite the conduct of those reviews, thereby reducing concerns about timeliness.

3. Declaration criterion (b) - the "uneconomical for anyone to develop another facility" test

3.1 Background

Declaration criterion (b) states that the Minister should not declare a service unless he or she is satisfied …

> *(b) that it would be uneconomical for anyone to develop another facility to provide the service.*

The key issue that has arisen in relation to criterion (b) is whether the test of economic duplication should be viewed from a social or private perspective, i.e. should the costs that are used to determine whether it would be economic to develop another facility include (some of) those that accrue to society more broadly or just to the individual entity looking to develop the alternative facility?

If a private profitability test is applied, then declaration is only warranted where the facility is a bottleneck that cannot be profitably bypassed by another firm. Under a broader social test, including a natural monopoly test, declaration would also be warranted where it would be more efficient from a social perspective that only one facility be used to provide the service (e.g. do not build two ports if one port could provide the required services at a lower cost). The private profitability test focuses on whether there is bottleneck infrastructure that is preventing upstream or downstream competition, whereas the broader tests, the natural monopoly test and particularly the net social benefits test, focus more on the efficient use of society's resources.

There have been, and continue to be, advocates for both approaches. In *Re Pilbara Infrastructure* the High Court decided that the test applied under criterion (b) is a private profitability test and, further, that "anyone" under criterion (b) includes the current infrastructure owner.

The Committee considers that there is a clear need for criterion (b) to be amended and/or clarified:

(i) if a natural monopoly test is to be preferred, then the criterion will need to be amended given the High Court's decision in *Re Pilbara Infrastructure*; and

(ii) if a private profitability test is preferred, the Committee does not consider that "anyone" should include the incumbent owner of the facility to which access is being sought, and the criterion should be amended accordingly.

3.2 Development of criterion (b)

(a) The Hilmer report

The Hilmer Report, in recommending the implementation of a national competition policy for Australia, examined the issue of allowing competitors access to "essential facilities".[3] The report ultimately recommended an access regime operating on the basis

[3] Independent Committee of Inquiry, *National Competition Policy* (1993) (**Hilmer Report**) p. 239. The Hilmer Report referred to "essential facilities" in describing facilities with natural monopoly characteristics, access to

of Ministerial declarations. Specifically, each declaration would be based on the recommendation of an independent and expert body, and only where:

(i) access to the facility is essential to permit effective competition in a downstream or upstream activity;

(ii) the making of the declaration is in the public interest, having regard to the significance of the industry to the national economy and the expected impact of effective competition in that industry on national competitiveness; and

(iii) the legitimate interests of the owner of the facility must be protected through the imposition of an access fee and other terms and conditions that are fair and reasonable, including recognition of the owner's current and potential future requirements for the capacity of the facility.[4]

Due in large part to a different formulation of what became criterion (a) in the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*), the draft criteria proposed by the Hilmer Committee did not include any reference to what is now criterion (b).

However, the beginning sentence of Chapter 11 of the Hilmer Report, titled *Access to "Essential Facilities"* states:[5]

> *In some markets the introduction of effective competition requires competitors to have access to facilities which exhibit natural monopoly characteristics, and hence cannot be duplicated economically.*

This point is repeated on the next page:

> *Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically.*[6]

(b) Interpretation of criterion (b) up until Pilbara Infrastructure

The initial focus: net social benefit

Prior to the *Fortescue Metals* decisions, the Australian Competition Tribunal (**Tribunal**) had relied several times on the use of a net social benefit test to describe the word "uneconomical". In *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 it stated that criterion (b) had to be construed in a broad social cost-benefit sense, in which the total costs and benefits of constructing another facility were to be taken into account, not on the narrower basis of whether it would be privately economical (or profitable) to develop another facility to provide the service. The Tribunal stated that:

> *If "uneconomical" is interpreted in a private sense then the practical effect would often be to frustrate the underlying intent of the Act. This is because economies of scope may allow an incumbent, seeking to deny access to a potential entrant, to develop another facility while raising an insuperable*

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which was necessary for effective competition in upstream or downstream markets (such as electricity generation or telecommunications services).

[4] Ibid at [251-252].

[5] Ibid at [239].

[6] Ibid at [240].

> *barrier to entry to new players (a defining feature of a bottleneck). The use of the calculus of social cost benefit, however, ameliorates this problem by ensuring the total costs and benefits of developing another facility are brought to account.*[7]

In *Re Duke Eastern Gas Pipeline Pty Ltd*[8], the Tribunal also considered that the meaning of "uneconomical" required consideration of whether duplication of a service would be efficient in terms of costs and benefits to the community as whole.

Subsequent rejection of the net social benefit test and adoption of the natural monopoly test

The Tribunal in *Re Fortescue Metals Group Ltd*[9] suggested that the net social benefit test was too broad for several reasons, including:

(i) Background/extrinsic materials consistently link criterion (b) and the term "uneconomic" to the notion of natural monopoly, which is defined in terms of production costs and not social costs/benefits.[10]

(ii) Reliance on a net social benefit test would give criterion (b) "a role that overlaps with, and perhaps usurps, the role of criterion (f), which requires consideration of the interaction between access and the 'public interest'".[11] On this point the Tribunal stated:

> *Importantly, in weighing up those costs and benefits, the criteria might arrive at different results. It must be borne in mind that many social costs and benefits are necessarily difficult, and sometimes impossible, to quantify. Accordingly, it may be difficult to conclude, at least in quantifiable terms, that there is or is not a "net social benefit". A requirement to be positively satisfied of such a matter -- which would be a requirement if criterion (b) were a net social benefit test -- would create a threshold which may, in practical terms alone, be difficult to satisfy.*[12]

(iii) The net social benefit test would require the analysis of social costs/benefits that are not static and thus hard to measure or quantify and impossible to consider fully (such as the cost of retardation of technological development, for example).[13]

In place of the net social benefit test, the Tribunal favoured a narrower economic analysis under criterion (b) that asked whether the facility was a 'natural monopoly' as a question of economic theory based on the costs of production (both capital and operating). This differed from the net social benefit test, in that it limited any assessment to the direct costs of providing access rather than allowing consideration of a wider set of costs and/or inefficiencies that may be claimed to be associated with declaration (e.g. delays to the introduction of innovation caused by third party

[7] *Re Sydney Airports Corporation Ltd* (2000) 156 FLR 10 at [205].
[8] *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1.
[9] *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256.
[10] *Re Fortescue Metals Group Ltd* (2010) 271 ALR 256 at [838].
[11] Ibid.
[12] Ibid.
[13] Ibid at [844].

involvement, delays to expansions, transaction costs, congestion and capacity constraints etc).

The Tribunal described the test as follows:

> *it is necessary first to determine the reasonably foreseeable potential demand for the facility (strictly the service provided by the facility), and compare the capital and operating costs of a shared facility to the sum of the capital and operating costs of an existing facility (or an expanded existing facility) and a new facility.*[14]

(c) The *Pilbara Infrastructure* decision – natural monopoly test replaced by private profitability test

In *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[15], the Full Federal Court rejected both the net social benefit test and the natural monopoly test in favour of the private profitability test.

The Full Court considered a range of background material for Part IIIA, including the HiImer Report, an explanatory outline to the draft Part IIIA issued by COAG, the intergovernmental Competition Principles Agreement and the Explanatory Memorandum to the *Competition Policy Reform Bill 1995* (Cth). It concluded:

> *The Parliament chose to frame criterion (b), so that it directed attention, not to whether the NCC or the Minister or the Tribunal judged that it would be "economically efficient" from the perspective of society as a whole for another facility to be developed to provide the service, but whether "it would be uneconomical for anyone" to do so. The perspective of this phrase is that of a participant in the market place who might be expected to choose to develop another facility in that person's own economic interests.*[16]

The High Court in *Re Pilbara Infrastructure* confirmed the private profitability test, rejecting both the net social benefit test and the natural monopoly test. The majority of the High Court considered that the private profitability test better reflected the legislative intention of criterion (b).

In applying the private profitability test, the majority found that in neither the net social benefit test nor the natural monopoly test was it relevant to ask whether there is "*anyone*" – existing market participant or new entrant – who would be likely to "*develop another facility to provide the service*" under consideration. Under these tests, the majority stated that:

> *the expression "for anyone to develop another facility" is thereby stripped of much, if not all, of its natural meaning. The sole focus of inquiry is upon the circumstance of development of another facility to the exclusion of consideration of the agent who brings about that circumstance.*[17]

The majority described its preferred test as follows:

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[14] Ibid at [855].
[15] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57.
[16] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57 at [76].
[17] Ibid at [82].

> *It would not be economical, in the sense of profitable, for someone to develop another facility to provide the service in respect of which the making of a declaration is being considered unless that person could reasonably expect to obtain a sufficient return on the capital that would be employed in developing that facility. Deciding the level of that expected return will require close consideration of the market under examination. What is a sufficient rate of return will necessarily vary according to the nature of the facility and the industry concerned*
>
> *... whether it would be economically feasible to develop an alternative facility – is a question that bankers and investors must ask and answer in relation to any investment in infrastructure. Indeed it may properly be described as the question that lies at the heart of every decision to invest in infrastructure, whether that decision is to be made by the entrepreneur or a financier of the venture.*[18]

The High Court also considered whether "*anyone*" could also include the incumbent infrastructure owner. The Full Federal Court had rejected this proposition, relying on the Tribunal's decision in *Sydney Airport* and stating that:

> *… "anyone" does not include the incumbent owner, that being "more consistent with the underlying policy of Part IIIA and economic and commercial commonsense.*[19]

However, the majority of the High Court found that "*anyone*" *should* include the current incumbent infrastructure owner, stating that:

(i) the Full Federal Court had relied on a decision (that of the Tribunal in *Sydney Airport*) that was based upon an incorrect construction of criterion (b), being the now discarded net social benefit test; and

(ii) no reason was otherwise shown to read "*anyone*" in criterion (b) as limited in its application.

The Committee considers that this construction of criterion (b) may result in declaration decisions that are not consistent with the overarching purpose of Part IIIA, particularly as articulated by the objects of Part IIIA (s 44AA(a)). This issue is discussed in detail in the response to Question 4 below.

For the reasons set out below in response to Question 4, the Committee considers that criterion (b) should be amended to exclude the incumbent owner of the infrastructure from the definition of "*anyone*".

3.3 Questions posed by the Productivity Commission

(a) Question 1: tradeoffs and practical implications of the different approaches

1. What are the tradeoffs between the different approaches to criterion (b)? What are the practical implications of the different approaches in terms of what types of

[18] Ibid at [104-106].
[19] *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 at [83].

facilities would and would not meet criterion (b)?

Tradeoffs

The private profitability test aligns well with a test for barriers to entry: if an investment in a bypass facility could be made commercially, then any perceived power wielded by the owner of a bottleneck will not be durable. Importantly, any distortion to markets upstream or downstream would only be transient. This test is also consistent with placing value and emphasis on the dynamic efficiencies often associated with investment in competitive infrastructure.

However, the private profitability test could be said to give rise to investments that are not optimal from a social perspective, at least in terms of maximising productive and allocative efficiency or which otherwise give rise to negative externalities. Such situations might include the duplication of natural monopoly facilities. Concern about these possible outcomes (and the view that it might give rise to wasteful investment) prompted the adoption of the net social benefit test and, later, the natural monopoly test.

The private profitability test approaches the goal of economic efficiency indirectly, by focusing on entry barriers and the promotion of competition. Competition is then expected to drive economic efficiency. It is not always more efficient to have more competition, however, so this approach trades off a potential loss of efficiency against an improvement in competition.

The natural monopoly test also approaches the goal of economic efficiency indirectly, by focusing on allocative efficiency. It does so by preserving natural monopolies, but regulating their owners (through the arbitration provisions of Part IIIA) so as to transfer monopoly rents to their customers. However, it is not always dynamically efficient to appropriate the rents and quasi rents of natural monopolists. This approach trades off a potential weakening of investment incentives against an improvement in static allocative efficiency.

Practical implications

The practical implications of the different approaches are summarised in Table 1 below.

Table 1: How the different approaches would affect different types of facilities

Test	criterion (b) would prevent declaration	criterion (b) would support declaration
Natural monopoly test	When the facility is a monopoly but not a natural monopoly, such as one arising from: • certain types of network effects; or • certain exclusive licenses when constant returns to scale prevail.	Despite the existence of bypass facilities that could defeat an entry barrier, as long as increasing returns to scale prevail for the facility over the relevant range of output.

Test	criterion (b) would prevent declaration	criterion (b) would support declaration
Net social benefit test	When another facility to provide the service has a social benefit-cost ratio of greater than one, even if there is no prospect of the investment receiving the necessary approvals and funding.	Despite the existence of a privately profitable bypass facility if development of the facility produces negative externalities that outweigh the benefits.
Private profitability test	When another facility to provide the service: • is already in existence; • is under construction; or • is, or could be, the subject of a valid business case, or a facility exists that can be used to bypass a bottleneck now or in the near future.	When the facility is a barrier to entry now and in the near future, taking account of commercially feasible investment opportunities.

(b) Question 2: long-term and practical implications of the recent High Court decision

2. What are the long-term and practical implications of the High Court decision on criterion (b) for economic efficiency and investment in infrastructure?

As discussed above, the High Court's decision on criterion (b) replaced the prior precedent under which the phrase '*uneconomic to develop'* was interpreted as a natural monopoly test, with the current precedent: a private profitability test. This change will alter the susceptibility to declaration of various types of facilities in the manner suggested by Table 1 above.

Another important consideration is that, with the adoption of the private profitability test, a range of social costs and benefits that may be important from a public policy perspective will no longer be considered under criterion (b). Given the High Court's decision in *Pilbara Infrastructure*, real questions arise as to whether these can be considered under criterion (f). This is discussed further below.

In most cases, although perhaps not all, the application of the private profitability test will have the effect of *increasing* the economic threshold for declaration – making it less likely that services will be declared.

However, since the definition of a natural monopoly focuses on the *costs* of providing the service, there may well be some facilities that would meet the private profitability test (in that they would not be privately profitable to duplicate), but would not meet the definition of a natural monopoly. Examples of such facilities might include payment systems, computer operating systems where participants derive greater benefits the more

other participants there are. The scale advantage in these examples does not relate principally to cost savings, but rather to leveraged benefits.

(c) Question 3: implications for state and territory and industry-specific access regimes

3. What are the implications for state and territory and industry-specific access regimes of the High Court decision on criterion (b)?

Depending on the wording used in state and territory and industry specific access regimes, the High Court's decision may have a significant impact. By way of example only, criterion (b) of s 15 of the National Gas Law uses mirror language to criterion (b) of the CCA.

(d) Question 4: implications arising from inclusion of the existing infrastructure owner as potential developer of an alternative facility

What are the implications of the incumbent operator of the facility being included or excluded in the definition of 'anyone' in criterion (b)? What are the implications of considering that the alternative facility could be developed as part of a larger project?

The Committee considers that the inclusion of the incumbent owner/operator of the facility in "*anyone*" under criterion (b) may result in declaration decisions that are not consistent with the overarching purpose of Part IIIA, particularly as articulated by the objects of Part IIIA (s 44AA(a)):

> *The objects of this Part are to:*
>
> *(a) promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets.*

Declaration overcomes a barrier to entry posed by a facility owner's refusal of third-party access. Criterion (b) represents the only direct test in s 44G(2) for a barrier to entry. Under this criterion, a barrier to entry does not exist if it would be economical for anyone to develop another facility to provide the service.

This test presupposes that a third-party access seeker could enter the relevant market(s) through the alternative path of access to the other facility when access to the facility in question is denied.

However, the existence of another facility does not overcome the entry barrier if it is also owned by the incumbent operator of the facility in question. In that case, access provision would remain a monopoly even though the facility in question may not be, and therefore effective competition in upstream and downstream markets would not be promoted. Indeed, it might be profitable for the incumbent operator (and only the incumbent operator) to develop another facility to provide the service but the incumbent

operator might choose not to (perhaps because it is more profitable to have only the one facility). In these circumstances, criterion (b) would prevent declaration leaving the incumbent operator and its one bottleneck facility unaffected by Part IIIA.

We submit that the inclusion of the incumbent operator of the facility in the definition under the private profitability test would cause the test for an entry barrier in criterion (b) to malfunction. Therefore, the wording of criterion (b) should be amended to exclude the incumbent from the definition of "*anyone*".

We note that this issue only arises if a private profitability test is adopted.

(e) Question 5: feasibility of a 'black letter' natural monopoly test

> *5. How difficult is it to draft and implement a natural monopoly or net social benefit test in 'black letter' law? Is a private profitability test easier to apply in practice?*

While the drafting of each of the three tests in "black letter law" does not necessarily present significant difficulties, substantial issues can arise with the practical implementation of each of them. We discuss each test further below.

Net social benefit test

While it would not be difficult to draft a "black letter" law net social benefit test, it is likely that ambiguities would arise in determining what costs and benefits should be included in the weighing process. However, we note that this issue is not unique, and solutions have been found to the formulations of public benefits and detriments elsewhere in the *Competition and Consumer Act 2010*.

Nevertheless, the identification and quantification of these costs and benefits can result in significant issues in practice.

These drafting problems would invite a host of practical problems in the implementation stage, as economic and other experts are bound to disagree on the scope of relevant benefits and detriments and on the method of quantification.

Natural monopoly test

A facility is generally accepted as a natural monopoly when it can meet all anticipated demands for the service at a lower cost than two or more facilities. We do not consider that it is difficult to draft a "black letter" legal definition for the natural monopoly test. Indeed, as noted above in section 3.2(b), the Tribunal in *Fortescue Metals* proposed its own definition of a natural monopoly.

However, regardless of the definition adopted, it is recognised that there are difficulties in putting it into effect. Although the concept of natural monopoly is straightforward in a textbook, it is often difficult to conclude, from observation of the real world, that a specific facility is a natural monopoly. Natural monopoly is recognised by increasing returns to scale or scope over a particular range of output. A facility that can supply the entire market more cheaply than can two or more facilities is a natural monopoly.

Further, it is difficult to perform a valid empirical test for a natural monopoly because it requires knowledge of cost functions for alternative asset configurations that may not

actually exist. However, a flipside of this is that because the natural monopoly test is generally carried out using a more abstract, hypothetical approach using publicly available information about typical cost curves for the relevant type of facility, there is arguably greater discipline upon experts to present economic evidence in an impartial way compared with the private profitability test where the relevant cost information will be private and may only be in the possession of the infrastructure owner.

When the facility in question has capacity limits, and these limits may prevent it supplying the entire market (either now or in the future as the market expands), its natural monopoly status is even more difficult to determine. Precisely such an issue arose in the *Duke Eastern Gas Pipeline* case.

Indeed, as the High Court noted in *Re Pilbara Infrastructure*, the Tribunal itself in *Fortescue Metals* acknowledged that testing for a natural monopoly is notoriously difficult.

Private profitability test

In relation to the difficulty of drafting this test, the High Court has already decided that criterion (b), as currently drafted is a private profitability test.

The majority of the High Court in *Re Pilbara Infrastructure* suggested that the private profitability test would not face the same difficulties as the natural monopoly test in its practical implementation:

> *Contrary to Fortescue's submissions asking whether it would be uneconomical in the sense of unprofitable for anyone to develop an alternative facility does not ask a question to which no answer can be given with any sufficient certainty. Of course it is a question that would require the making of forecasts and the application of judgment. But the converse question – whether it would be economically feasible to develop an alternative facility – is a question that bankers and investors must ask and answer in relation to any investment in infrastructure. Indeed, it may properly be described as the question that lies at the heart of every decision to invest in infrastructure, whether that decision is to be made by the entrepreneur or a financier of the venture.*[20]

Nevertheless, putting to one side instances where an alternative facility has already been developed (and in which case certain assumptions might be made about the profitability of the development of these facilities), a number of issues are likely to arise in context of applying the private profitability test.

[20] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [106].

These issues may include:

(i) What is the scope of the facility to be considered under the private profitability test? Is it sufficient if the facility is overall privately profitable even if it wouldn't be if only the revenues from the relevant services were considered?

(ii) What revenue assumptions should be used in applying the test?

(iii) Any profitability analysis will require a careful examination of both costs and revenues. What pricing level should be used, and what sales/traffic estimates should be employed? Is it permissible to assume that substantial sales/traffic will be won off the existing infrastructure operator? Would this require an analysis of the contractual relationship between the existing infrastructure operator and its customers? As anyone familiar with the recent history of investment in toll roads and tunnels will attest, producing reliable sales/traffic estimates for major infrastructure can be difficult.

(iv) What is a sufficient return on the investment to qualify as privately profitable?

Whether these issues cause any significant difficulty will depend in large part on the nature of the facility and whether or not there is an entrant who has already considered, or is considering, developing an alternative facility.

The adoption of a private profitability test will result in very different evidentiary issues for all of those involved in declarations decisions, including the Minister, the NCC, the access seeker and the infrastructure operator. Whereas under the previous tests independent expert economists were widely used to provide evidence relating to criterion (b), it is apparent that under the new test, evidence will need to be sought from bankers, professional investors, accountants, traffic forecasters and other professionals. This will present additional evidentiary challenges for all parties, and not all parties will necessarily have ready access to this evidence or the expertise required to address the issues that will arise under the new test.

(f) Other issues

We discuss two further issues of interpretation of criterion (b) that have arisen in practice over the past decade, and suggest amendments to clarify the intended operation of the criterion.

Does 'development' require any action at all?

If a substitute facility already exists, then it would be economical for its owner to 'develop' it by doing nothing at all, since doing nothing is costless. It may be advisable to ensure that 'development' is not interpreted to preclude doing nothing.

What constitutes 'another facility to provide the service'?

An issue in relation to any potential recommendation for declaration, and to this criterion, is the definition of the service. The facility or facilities identified under criterion (b) are ultimately relevant insofar as these are considered to be inputs to that service. One could take a highly literal approach and attribute to the incumbent's

service certain characteristics that are unique to that provider, even though these unique aspects may not be particularly important to the customer. What is important is the service characteristics that are important to the customers.

The most useful economic tool for assessing the service may be the SSNIP test that is used in market definition for antitrust purposes. If the substitute facility provides a service that is judged to be in the same antitrust market as the incumbent's service, then it is another facility to provide the service. While this approach would necessitate economic evidence in some cases, the type of this evidence would be familiar to courts that deal with competition law.

4. Declaration criterion (f) - the public interest test

4.1 Summary

(a) Pilbara Infrastructure and the changing role of criterion (f)

The recent decision of the High Court in *Re Pilbara Infrastructure* is significant for the role and further development of criterion (f) for at least four reasons:

(i) The majority found that criterion (f) is a criterion of a "generally political kind" that warrants different treatment by the NCC, Minister and Tribunal when compared with "technical" criteria involving a predominantly economic analysis (notably criteria (a) and (b)).

(ii) In assessing criterion (f) the Minister's discretion is very wide (best suited to the "holder of a political office") and limited only by the general administrative law requirement that any considerations not be wholly extraneous to the scope and object of Part IIIA.

(iii) It is unlikely that the Tribunal can take into account costs or benefits not identified by the Minister's original decision. Even in relation to those matters raised in the decision, the Tribunal should be slow to reach a contrary view, applying its own balancing exercise, except in the clearest of cases.

(iv) The NCC's role is focussed on providing technical advice to the Minister, predominantly on the technical criteria (a) and (b), and less focussed on the policy criteria (c) and (f).

When taken in conjunction with the majority's position on the private profitability test under criterion (b), these changes may have the effect of rebalancing the operation of the declaration criteria and could give criterion (f) a more central and persuasive role in declaration decisions in the future.

(b) Questions posed by the Productivity Commission

The Productivity Commission has sought views on two questions in relation to criterion (f):

(i) What are the advantages and disadvantages of the public interest test in criterion (f)?

(ii) What is the appropriate level of transparency regarding the Minister's determination of what is in the public interest if this becomes the key element in a facility being declared or not?

This paper responds to the Productivity Commission's questions in the following way:

(iii) The early development of criterion (f) will be discussed, including the advantages that justified the test and its scope being included.

(iv) A discussion of the treatment of criterion (f) by the High Court, including both the majority judgment and the dissenting judgment of Heydon J.

(v) Some views on the implications of the High Court's decision for the operation of criterion (f) and what this may mean in terms of responding to the questions raised by the Productivity Commission.

(vi) The Committee's views in response to the questions raised by the Productivity Commission as well as comments about potential reform.

4.2 The development, scope and function of criterion (f) prior to Pilbara Infrastructure

(a) The test defined and its historic role within the declaration criteria

As the Productivity Commission notes in its Issues Paper, criterion (f) is framed in the negative and provides that the Minister cannot declare a service unless satisfied that access (or increased access) would "*not be contrary to the public interest*". It is therefore not necessary for the NCC or Minister to be satisfied positively that access or increased access would be in the public interest.

The term '*public interest'* is not defined in the Act.

It has been long recognised that criterion (f) plays something of a residual role – applied after the other criteria have been passed and then testing whether there are any wider policy factors that should outweigh the economic arguments in favour of access. The leading description was provided in *Duke Energy* (in relation to an analogous criterion under the then Gas Code):

> *... criterion (d) does not constitute an additional positive requirement which can be used to call into question the result obtained by the application of pars (a), (b) and (c) of the [coverage] criteria. Criterion (d) accepts the results derived from the application of pars (a), (b) and (c), but enquires whether there are any other matters which lead to the conclusion that coverage would be contrary to the public interest.*

In *Virgin Blue*, the Tribunal found that this construction applied equally to criterion (f):

> *It requires consideration whether there are circumstances other than those raised for consideration by ss 44H(4)(a) to (e) which demonstrate that increased access (the issue in this proceeding) would be contrary to the public interest.*

In practice, except for the *Pilbara case*, this residual role has meant that criterion (f) seldom, if ever, plays a decisive role in declaration recommendations or decisions.

(b) The scope of the public interest test in its early development

The importance and potential breadth of public interest considerations in the declaration process was recognised as far back as the Hilmer Committee, which saw the possible political ramifications as a reason for the decision to be retained by a Minister:

> *As the decision to provide a right of access rests on an evaluation of important public interest considerations, the ultimate decision on this issue should be one for Government, rather than a court, tribunal or other unelected body. A legislated right of access should be created by Ministerial declaration under legislation.*

The Hilmer Committee went as far as to suggest that regulated access was only appropriate in cases of 'clear public interest':

> *The Committee is conscious of the need to carefully limit the circumstances in which one business is required by law to make its facilities available to another. Failure to provide appropriate protection to the owners of such facilities has the potential to undermine incentives for investment. Nevertheless, there are some industries where there is a strong public interest in ensuring that effective competition can take place, without the need to establish any anti-competitive intent on the part of the owner for the purposes of the general conduct rules. The telecommunications sector provides a clear example, as do electricity, rail and other key infrastructure industries. Where such a clear public interest exists, but not otherwise, the Committee supports the establishment of a legislated right access, coupled with other provisions to ensure that efficient competitive activity can occur with minimal uncertainty and delay arising from concern over access issues.*[21]

The COAG Competition Principles Agreement, upon which Part IIIA was modelled, reflected this broad view and found that competition policy required a balancing of costs and benefits that properly took into account a range of social and political objectives, including the following matters:

> *...*
>
> *(d) government legislation and policies relating to ecologically sustainable development;*
>
> *(e) social welfare and equity considerations, including community service obligations;*
>
> *(f) government legislation and policies relating to matters such as occupational health and safety, industrial relations and access and equity;*
>
> *(g) economic and regional development, including, employment and investment growth;*
>
> *(h) the interests of consumers generally or of a class of consumers*

[21] Hilmer Report, p. 248.

(i) the competitiveness of Australian businesses; and

(j) the efficient allocation of resources.

A number of early declaration applications (and Tribunal decisions) under Part IIIA sought to take advantage of this apparent discretion and tested the social policy boundaries of criterion (f). Examples include arguments based on the impact of declaration in relation to:

(i) planning and operation of airport land and airport security and safety;

(ii) interaction with proposed State-based access regimes and/or the benefits of alternative Commonwealth access arrangements (or price monitoring);

(iii) regional development and employment;

(iv) environmental impacts; and

(v) government water policy initiatives.

As noted above, these social and policy arguments were not influential in final decisions, often because they were difficult to quantify or were viewed as unduly 'speculative'.

As well as social policy considerations, it has also been recognised throughout the development of Part IIIA that criterion (f) could be used to take into account economic efficiency arguments, particularly where these have not been assessed under other criteria. So it was that, perhaps as a consequence of the early failures of social policy considerations, later development of criterion (f) centred less on social or equity considerations and more on bringing to account a range of primarily economic costs and benefits (such as dynamic efficiencies, the economic cost of regulatory delay and capacity/congestion arguments) not assessed under criteria (a) or (b).

Later debates under criterion (f) also centred on the extent to which these economic costs could be mitigated through any later terms of access, including access pricing.

(c) The public interest test in the Pilbara dispute – Tribunal and Federal Court

The *Pilbara case* represented the high watermark of this trend – both in terms of the volume and complexity of the economic and other material introduced under criterion (f). Before the Tribunal, the parties argued that in weighing the costs and benefits of access or increased access to the Pilbara railways, regard should be had to a wide range of potential costs, including:

(i) loss of dynamic efficiencies associated with technological developments in the rail and iron ore markets;

(ii) regulatory burden and delay – particularly as this impacted upon the rapid and continuing expansion of the railways by BHP Billiton and Rio Tinto;

(iii) increased congestion and associated loss of efficiency and system throughput; and

(iv) operational issues, including safety, increased train failures, new maintenance requirements and other sub-optimal new operating arrangements.

Much of the substantial volume of expert and other evidence tendered before the Tribunal went to establishing these public interest arguments. Ultimately, this led to criterion (f), together with criterion (b), becoming a primary basis for the Tribunal's decisions in relation to declaration of the four Pilbara rail lines.

This approach of the Tribunal, which endorsed a central and important economic function for criterion (f), was subsequently approved by the Full Federal Court.

4.3 The High Court - criterion (f) and the majority

The principal basis on which the majority disposed of *Pilbara Infrastructure* was that the Tribunal had overstepped the bounds of its task by deciding on the basis of a body of new evidence whether services should be declared.

This principal finding was not in response to any contention led by any of the parties during the hearing. Instead, its genesis can be found in a comment made by French CJ on second day of the hearing, where his Honour asked:

> *Then the key sentence is –*
>
> *This allows the parties to put before the Tribunal for its consideration any material that may be relevant to the issues raised, whether or not that material was before the Minister.*
>
> *Now, it is on that sentence that it rests 42 days of hearing, 15 economists, 130 affidavits and all of the rest of the material that we have seen in this proceeding. The question I forgot to ask is this. The Minister's function in making a declaration is to respond to a recommendation from the NCC. The NCC has power to invite submissions for the purpose and then it puts its recommendation to the Minister and, presumably, with that recommendation comes backing material and so forth.*
>
> *There is no express power to the Minister to undertake a similar process … The Tribunal is exercising the same powers as the Minister. Where does the Tribunal get the power to, as it were, range far and wide beyond the scope of what is being considered by the Minister and put to the Minister by the Council?*

When reading the majority's approach to the public interest criterion, it should be remembered that the Court (and notably the Chief Justice) were particularly concerned about defining and identifying appropriate bounds for each of the NCC, Minister and Tribunal in the declaration process.

(a) The potential scope of the public interest test is "very wide indeed", subject only to the scope and object of Part IIIA and the Act

Consistent with the early development of the criterion (as discussed above), the majority found that the expression "public interest" imports a "discretionary value judgment to be made by reference to undefined factual matters" and went on to conclude:

> *It follows that the range of matters to which the NCC and, more particularly, the Minister may have regard when considering whether to be satisfied that access (or increased access) would not be contrary to the public interest is very wide indeed. And conferring on the power to decide on the Minister (as distinct from giving the NCC a power to recommend) is consistent with legislative recognition of the great breadth of matters that can be encompassed by an inquiry into what is or is not in the public interest and with legislative recognition that the inquiries are best suited to resolution by the holder of a political office.*[22]

The majority therefore endorsed a "*very wide*" discretion for both the NCC and (particularly) the Minister when considering the matters which may be regarded for the purposes of criterion (f).

The only limitation referred to by the majority was that identified by Dixon J in *Water Conservation and Irrigation Commission (NSW) v Browning* (**Browning**), being that the discretion was:

> *unconfined except in so far as the subject matter and the scope and purpose of the statutory enactments may enable the Court to pronounce given reasons to be definitely extraneous to any objects the legislature could have had in view.*

The test of Dixon J in *Browning* was applied in the following terms by the Full Federal Court, in a judgement that included the then Justice French (with Branson and Stone JJ):

> *A regulation could not be made under that subsection that was not necessary or convenient to be prescribed for carrying out or giving effect to the [relevant Act]. To accept that constraint is, in practical terms, to do little more than meet the requirements applicable to the exercise of any discretionary power conferred by a statute namely that it fall within the scope and objects of the Act.*[23]

This characterisation makes clear that the only limitation on the Minister under criterion (f) would seem to be where public interest considerations relied upon by the Minister are wholly extraneous to the discretion under section 44H, and therefore fall outside of the scope and purpose of the declaration process and, arguably, the objects of Part IIIA.

(b) The decision of the Minister in relation to public interest is one that is of a 'generally political kind' to be contrasted with technical economic criteria (a) and (b)

The decision of the majority in the *Pilbara case* draws a distinction within the declaration criteria between those that are of a 'technical' or economic character and those which are of a 'generally political kind'. As noted in the excerpt above, the majority considered that criteria (f) and (c) (whether a facility is of national economic significance) fall within the latter category and are best suited to a decision of a political office holder.

[22] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [42].
[23] *Water Conservation and Irrigation Commission (NSW) v Browning* (1947) 74 CLR 492 at 505 (Dixon J).

By contrast, the majority appeared to view criteria (a) and (b) as of a "technical" or economic kind, where the input of the NCC (and, it may be assumed, the review of the Tribunal) are likely to be more appropriate:

> *Another [i.e. in addition to criterion (f)] criterion of which the NCC and the Minister must be satisfied (criterion (c)) may also direct attention to matters of broad judgment of a generally political kind. It required the NCC and the Minister to be satisfied that the facility in question is of national significance having regard to its size, or the importance of the facility to constitutional trade or commerce, or the importance of the facility to the national economy.*[24]

The other criteria that were to be considered (like criterion (a) about competition and criterion (b) about development of another facility) were of a more technical kind. The legislative scheme is consistent with it being expected that the conclusions reached, and reasoning adopted, by the NCC in relation to these more technical issues would likely be influential on the Minister.

As noted above, while earlier decisions had recognised the breadth of criterion (f) and its interaction with arguments under criterion (a) and (b), there had not previously been this kind of distinction drawn between 'economic' and 'political' criteria, with apparent implications for the roles of the Minister, NCC and the Tribunal.

The way in which these differences were intended to operate is apparent, albeit obliquely, in a further comment from the majority in *Pilbara*, which again suggests that the NCC's role is limited to providing a view of technical matters/criteria:

> *The content of those provisions of Pt IIIA to which reference has been made suggests that it was expected that, armed with a recommendation from an expert and non partisan body (the NCC), the Minister would make a decision quickly and would do so according to not only the Minister's view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made. And it is the Minister's decision, not the NCC's recommendation, that was the matter that was to be reviewed by the Tribunal.*[25]

One other issue raised by Fortescue before the High Court, but not clearly resolved by the majority, is the extent to which the Minister's (and Tribunal's) discretion under criterion (f) may allow considerations assessed under earlier criteria to be re-considered as part of a holistic 'cost-benefit' assessment. By contrast, as noted below, Heydon J directly addressed this point in his dissenting judgement by finding that criterion (f) has a narrow residual role and is limited to dealing with concrete costs not already considered or assessed under other criteria.

(c) The Tribunal should not 'lightly depart' from decisions of the Minister in relation to the public interest and the Tribunal is limited to the bases considered by the Minister

[24] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [44].
[25] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [47].

Once these various matters are taken into account, in the *Pilbara case*, the majority drew the natural conclusion – that both the breadth and 'political' nature of the public interest criterion, and the narrow role of the Tribunal in terms of it reviewing the bases of the Minister's decision, mean that the Tribunal should not depart from a conclusion reached by the Minister except in the "clearest of cases"

> *In neither case is it to be expected that the Tribunal, reconsidering the Minister's decision, would lightly depart from a ministerial conclusion about whether access or increased access would not be in the public interest. In particular, if the Minister has not found that access would not be in the public interest, the Tribunal should ordinarily be slow to find the contrary. And it is to be doubted that such a finding would be made, except in the clearest of cases, by reference to some overall balancing of costs and benefits.*[26]

Indeed, it was the very breadth of the criterion that, in the majority's view, necessitated a narrow role for the Tribunal. While any number of social or other costs could be relevant to the public interest test, it was the Minister who had been tasked with making the judgement and he or she would have identified whether criterion (f) had been satisfied in each case and the grounds on which that was so.

The Tribunal's role was summarised as follows:

> *[The Tribunal's] task was to reconsider what the Minister had decided. And performance of that task directed attention immediately to the bases on which the Minister was satisfied that access would not be contrary to the public interest.*[27]

It follows from this that the Tribunal's role has been substantially narrowed by the decision in *Pilbara Infrastructure*, insofar as it relates to criterion (f). There seems to be little, if any, scope for the Tribunal to explore public interest arguments not identified by the Minister in the declaration decision. Even where it does so, the Tribunal should be very reluctant to interfere with a Minister's conclusion as to social or policy considerations under criterion (f), on the basis of an application of a standard 'cost-benefit' analysis.

4.4 The High Court - criterion (f) and Heydon J (dissenting)

(a) Role of the Tribunal in relation to criterion (f)

Like the majority, in his dissenting judgement, Justice Heydon found that the role of the Tribunal was intended to be a narrow one (although for a number of different reasons) and that the Tribunal had therefore overstepped its jurisdiction in the Pilbara matter.

His Honour also agreed with the distinction drawn by the majority between expert or 'technical' criteria and those involving a broader political dimension. Indeed, his Honour characterised the role of the Minister under criterion (f) as the 'guardian' of the public interest.

[26] Ibid at [112].
[27] Ibid at [110].

(b) The public interest test has a narrow scope and does not allow matters addressed under other criteria to be reconsidered

Unlike the majority, however, Heydon J found that the scope of criterion (f) was a narrow one – "*directed only to whether there could be concrete harm to an identified aspect of the public interest which was not otherwise caught by criteria (a)-(e).*" Examples given included national security, national sovereignty and environmental harm.

Consistent with this very narrow scope, his Honour found that:

(i) Criterion (f) was not intended to reflect "broader issues concerning social welfare and equity, and the interests of consumer".

(ii) Benefits and costs of access, including those considered under criteria (a) and (b) should not be included in any analysis of criterion (f), because this creates an overlap with the earlier criteria and tends to make the other criteria either redundant or provides for double-counting.

(iii) Criterion (f) did not call for an assessment of what type of access was likely to be granted either by contract or by an access determination.

4.5 Implications of the High Court decision for the operation of criterion (f)

The Committee offers the following conclusions on the development of criterion (f), given the majority judgment in *Pilbara Infrastructure*:

(i) The Minister has a very wide discretion in terms of the matters that can be considered under criterion (f), provided only that these must not be wholly extraneous to the scope and object of Part IIIA.

(ii) While it may allow for some economic arguments to be considered by the Minister (such as dynamic efficiencies or the costs and delays associated with regulation), criterion (f) is a criterion with a social or 'political' flavour and not principally a technical or economic one.

(iii) It is not entirely clear whether, or to what extent, a decision under criterion (f) can reflect costs or benefits reflected in any assessment under earlier criteria, although it is likely that the role of criterion (f) remains a residual one (*Virgin Blue*) and one which should therefore focus on costs not yet brought to account.

(iv) The role of the NCC is to provide expert input to the Minister, focussed mostly on 'technical' economic criteria – notably criteria (a) and (b). The view of the NCC may be expected to be less influential in relation to criterion (f), which involves public interest issues of a broad political kind.

(v) In respect of criterion (f), the role of the Tribunal is strictly limited to reconsidering the decision made by the Minister, including the bases for any finding in relation to the public interest. There is little, if any, scope for the Tribunal to explore public interest arguments not identified by the Minister in the declaration decision.

(vi) The Tribunal should be very reluctant to interfere with a Minister's conclusion as to social or policy considerations on the basis of any application of a 'cost-benefit' analysis. Indeed, it may be that the criterion is no longer seen as requiring an objective balancing of costs and benefits to be undertaken by the Minister, in the orthodox sense.

4.6 Responses to the questions posed by the Productivity Commission

Q. What are the advantages and disadvantages of the public interest test in criterion (f)

(a) Advantages of a public interest test

A declaration decision raises the prospect of potentially long-lasting regulation of nationally significant infrastructure. The Committee therefore sees it as critical that such decisions reflect an appropriate and transparent weighing of the costs and benefits associated with declaration.

The Committee views it as important that any weighing exercise is carefully defined and can be applied in a manner which is clear, evidence-based and transparent.

The use of an orthodox 'cost-benefit' analysis to assess the public interest is also consistent with other decisions made by the ACCC under the Act, often with similarly important economic implications for markets and competition, including in the assessment of proposed mergers or asset sales under section 50 and the tests applied in connection with the authorisation of conduct under section 90.

The Committee considers that these ACCC analogues are better suited to assessing the intended operation of criterion (f) than the national interest test applied by the Treasurer under the *Foreign Acquisition and Takeovers Act 1975* (**FATA**), referred to by the Productivity Commission in its Issues Paper. Questions of foreign ownership under the FATA involve a range of social and/or political issues, such as national security, media ownership, tax and government policy and the character of the investor. It is not immediately apparent that these wider sensitivities should have the same prominence in access decisions – which the Committee considers should be grounded in the promotion of competition in markets and economic efficiency.

While the Committee therefore accepts that a cost-benefit exercise remains important and needs to be retained in some form, it considers that the description of the current test under criterion (f) by the High Court as being one of a '*generally political kind'* may lead to a lack of certainty about how it operates. This issue is explored in more detail below.

(b) Disadvantages of the public interest test in criterion (f) post Pilbara

Pilbara Infrastructure grants criterion (f) a breadth and influence which had not previously been recognised under the declaration process. In doing so, the Committee has a number of concerns with the way in which it now operates:

Uncertainty over whether or to what extent a traditional 'cost benefit' analysis is still required to be undertaken

Prior to the High Court decision, the application of a 'cost-benefit' analysis under criterion (f) was reasonably well understood, even if at times this led to some costs not being brought to account where they were not easily quantifiable.

However the comments of the High Court, extracted above, bring into question the extent to which the criterion requires the Minister to undertake an objective overall balancing exercise involving all of the costs and the benefits of access (or increased access).

As a criterion with a fundamentally 'political' flavour, there would now appear to be little certainty for investors, access seekers or their advisers about how Ministers will exercise the discretion to take into account economic costs of access which are not able to be brought to account under other criteria (notably criteria (a) and (b)).

The Committee would therefore support amending the language of the criterion to return the test to a form of 'net public benefit' test with a stronger economic flavour, as had been applied prior to *Pilbara Infrastructure*, and along the lines of the tests defined under section 90 for authorisations. For example, to adopt a similar formulation to that in section 90(7), the test might be stated as follows:

> *(f) that access (or increased access) to the service would result, or be likely to result, in a benefit to the public that outweighs or would outweigh any detriment to the public arising from access (or increased access) to the service, including any costs of providing access (or increased access).*

The Committee does not consider that a formulation of this kind would necessarily prevent social or political factors still being taken into account. However, it would require such political considerations be articulated and weighed against the economic costs of access.

Continued uncertainty surrounding criterion (f)'s interaction with the objects of Part IIIA and the other declaration criteria – particularly criteria (a) and (b)

There remains uncertainty about the way in which the public interest test is intended to interact with costs or benefits assessed under other criteria (notably criteria (a) and (b)) and the objects of Part IIIA.

In his dissenting judgment, Heydon J criticised a broad reading of criterion (f) on the basis that it would lead to overlap between the criteria and potential "*double-counting*". The Committee considers that there are two responses to this criticism:

(i) First, costs and benefits may be considered under more than one criterion where they are relevant to tests applied for different purposes. With respect, this is not double counting. For example, the Minister must consider under criterion (a) whether access (or increased access) would promote competition in related markets and, if satisfied, any promotion of competition will ordinarily constitute a public benefit. However, this analysis under criterion (a) does not then allow for the economic value of this benefit to be weighed against associated economic or other costs, which the Committee sees as the task of criterion (f).

Consistent with criterion (f) operating as a 'net public benefit' test, discussed above, the Committee prefers the earlier approach taken to criterion by the Tribunal in *Fortescue*. The Tribunal found:

> *"While the results of earlier criteria cannot be questioned, they are not to be ignored. The satisfaction of criteria (a) and (b) indicates that benefits will occur from access. Those benefits, and other benefits not considered under earlier criteria, as well as the costs of access, must be taken into account under criterion (f)".*

(ii) Second, both the private profitability test and natural monopoly test place limits on the costs which can be considered when assessing the cost of duplication under criterion (b). There are a number of costs that may often not be brought to account in this process. For example, his Honour recognised that the private profitability test would not have included consideration of issues such as damage to the "*visual environment"* or *"disturbance to ordinary life*" associated with construction of a second cable network.

The facts in the *Pilbara case* provide other examples, where the costs of congestion, delays in expansion and the potential to restrict innovation in the operation of the railways were not costs that fell within the scope of the natural monopoly test applied by the Tribunal under criterion (b), but which were instead recognised as considerations under the public interest test in criterion (f).

For these reasons, the Committee supports a net public benefit test under criterion (f) that is wide enough to interact with the earlier criteria, including any benefits from the promotion of competition in related markets identified under criterion (a) and any costs of access, including those used for the 'duplication' test under criterion (b).

One means of clarifying this interaction would be to insert in sections 44G and 44H a further provision that required the decision maker, in determining whether criterion (f) is satisfied, to have regard (without limitation) to:

A. as a public benefit – any promotion of competition identified under criterion (a);

B. as a cost of access - any costs of providing access considered under criterion (b) as well as any costs of access not included in that analysis; and

C. the objects of Part IIIA set out in section 44AA.

Clarifying the interaction between criterion (f) and the other criteria and objects of Part IIIA is consistent with other legislative regimes and with similar tests under the Act, including the 'long term interests of end users' standard defined in section 152AB and which performs a similar role to the public interest test in the context of the telecommunications access regime in Part XIC.

There is likely to be very limited scope for review by the Tribunal

As has been found in the context of an analogous national interest test under the FATA, based on the approach in *Pilbara Infrastructure*, it will now prove extremely difficult if not impossible to successfully challenge a decision of the Minister under criterion (f).

Gibbs J in *Buck v Bavone* noted the significant difference in the scope of administrative discretion between decisions involving "a matter of opinion or policy or taste" and those involving objective fact. His Honour noted that in the former:

> *the authority will be left with a very wide discretion which cannot be effectively reviewed by the court.*

While a broad and politicised 'public interest' discretion may have been seen as important when Part IIIA was originally introduced – given that it was at that time intended to apply in a wide range of industry settings – it must be queried whether this is still appropriate. Arguably, the declaration process is no longer the centrepiece national access framework and has been superseded in most industries by sectoral frameworks, leaving declaration for exceptional cases with a clear economic justification.

Arguably, an uncertain and largely unbounded political discretion is not consistent with an exceptional test to be applied within the context of an 'economic statute' and only in the clearest cases. A number of the proposals above are, in part, aimed to provide greater certainty and transparency in the operation of the criterion and to tie it more closely to the economic underpinnings of the Act and Part IIIA, in particular.

The High Court made the observation that a wide political discretion is best exercised by the holder of a political office, as distinct from economic analysis of a more 'technical kind'. A corollary is that if as the Committee submits criterion (f) is intended to operate as an objective or "technical" cost-benefit analysis, then it is not necessary for this function to be performed by the Minister. Indeed, it may be more appropriately undertaken by an economic regulator (i.e. the ACCC) with experience in weighing up economic counterfactuals.

The Committee addresses the wider question of whether the Minister is still the most appropriate decision maker in the declaration process elsewhere in this submission.

Q. What is the appropriate level of transparency regarding the Minister's determination of what is in the public interest if this becomes the key element in a facility being declared or not?

(a) Transparency and procedural issues

If criterion (f) remains unchanged, as a largely unbounded political discretion, the Committee accepts the view expressed by the Majority that the NCC probably has a limited role to play in relation to the criterion.

However, this creates further uncertainty in that it is not clear on what basis the Minister will obtain information from the access seeker, facility owner or other stakeholders about public interest issues that the Minister may be considering under criterion (f). Given the breadth and 'politicised' nature of the criterion, procedural fairness should require that parties be given an opportunity to respond to any public interest issues identified by the Minister before any final declaration decision is made.

Currently, under section 44HA the Minister may provide to the applicant and provider (and any other party the Minister considers appropriate) a draft of the declaration decision. Submissions are then due within 14 days.

Given that based on the breadth of the criterion identified by the High Court questions of public interest are unlikely to be capable of review by the Tribunal (and judicial review prospects are also very poor), it is important that all parties have a reasonable opportunity to make submissions directly to the Minister in those public interest issues which the Minister has identified as relevant to the decision. The obligation in section 44HA should therefore be made mandatory and extended to all stakeholders (not only those identified by the Minister).

5. Certification and Undertakings

5.1 Undertakings

The broad structure of Part IIIA contemplates that services could be the subject of access regulation in 3 ways:

(i) the services may be declared under Part IIIA;

(ii) the services could be subject to another access regime, for example, an access regime under State legislation;

(iii) the services could be the subject of an access undertaking under Part IIIA.

These 3 routes to access regulation work together as follows:

(i) Declaration enables a third party or service provider to seek that services be declared, with a right of arbitration if the parties are unable to agree on the terms and conditions of access.

(ii) Services that are subject to an access undertaking[28] or an access regime that has been certified as effective cannot be declared[29];

(iii) An access regime which has been certified as effective will apply to services the subject of that regime.

(iv) The services to which a certified access regime applies cannot be declared[30] and access undertakings cannot be accepted in respect of those services.[31]

Where the services are subject to an access regime which has not been certified as effective under Part IIIA, there is a prospect that the uncertified

[28] Section 44H(3)
[29] Section 44H(4)(e)
[30] Section 44ZZ(3AA)
[31] Section 44ZZA(3AA)

regime could apply to those services and at the same time the services be declared or an undertaking accepted under Part IIIA.

This is a constitutional inconsistency question that has not been tested, however, it is probable that the regime under Part IIIA prevails over an uncertified regime, to the extent of any inconsistency.

The undertaking path provides an opportunity for service providers to provide up front terms and conditions of access for acceptance by the ACCC. This might give greater certainty to the service provider because if such an undertaking is accepted the services the subject of the undertaking cannot be declared.[32]

In practice, voluntary access undertakings under Part IIIA have been very rare. As far as the Committee is aware, only one such undertaking has been lodged, by Duke Energy International in respect of the (then) newly conducted Eastern Gas Pipeline[33]. That undertaking was lodged and considered at about the same time as an application to the NCC from AGL Energy Sales and Marketing Ltd (**AGL**) to recommend coverage of the EGP under the he (then) National Gas Code.

All other access undertakings that have been lodged and accepted by the ACCC under Part IIIA have been contemplated by other legislation[34] or, in the case of ARTC, the Intergovernmental Agreement which established ARTC in 1997.

This raises the question whether it is necessary to include the access undertaking route in any general access regime such as that contained in Part IIIA.[35]

The Committee submits that the role of access undertakings needs to be considered as part of the overall scheme of access regulation under Part IIIA and its interrelationship with other access regimes and legislation.[36]

The Committee submits that if there is to be a general access regime such as that contained in Part IIIA, there is a role for a mechanism which:

(i) enables a service provider who is faced with the prospect that its services might be the subject of a declaration application to proactively seek to have the terms and conditions of access determined up front and so avoid the potential uncertainty and delay that can be associated with the declaration/arbitration process.

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[32] Section 44H(3)

[33] http://www.accc.gov.au/content/index.phtml/itemId/353234

[34] For example, the *National Electricity Code*, the *Wheat Export Marketing Act 2008* (Cth).

[35] Compare Part IIIA with the amended telecommunications access regime in Part XIC, under with a regime under which the terms and conditions of access to declared services (as defined in section 152AL) may be set:

- by an access agreement (defined in section 152BE) entered into by a carrier or carriage service provider and an access seeker (defined in section 152AG);
- pursuant to a special access undertaking lodged by a service provider and accepted by the ACCC (see Subdivision B of Division 5);
- by way of an access determination, under which the ACCC sets "up front" terms and conditions of access (see section 152BC); or
- by way of binding rules of conduct made by the ACCC (these are temporary with a maximum 12 month duration) (see section 152BD).

which access agreements negotiated and agreed between parties have primacy, followed by access undertakings and upfront determinations (with no negotiate-arbitrate mechanism for determination of access disputes by the ACCC).

[36] For example, the *Wheat Export Marketing Act 2008* requires a service provider to satisfy an "access test" to be eligible for accreditation as an Accredited Wheat Exporter.

(ii) addresses the issue of potential overlap between the general access regime in Part IIIA and specific but uncertified access regimes under other legislation.
(iii) ensures consistency in terms of objectives and underlying principles of access regulation.

5.2 Certification

The Certification regime plays an important role in promoting a consistent approach to the imposition and operation of access regulation by the Commonwealth, State and Territory governments. Regardless of the specific industry which a particular facility is a part of, there are certain fundamental questions which all access regimes must resolve, such as:

(i) When will a facility be subject to access regulation?
(ii) What will be the subject of regulation - the facility itself or the services it provides? If it is the services it provides, which services are likely to be subject to regulation? e.g. only below rail services or above rail services as well;
(iii) Who is the regulator which will determine disputes under the regime?
(iv) What approach will the regulator take to fundamental issues such as valuing the regulatory asset base or determining access pricing disputes if necessary?

Consistency across access regimes regarding these fundamental issues provides infrastructure investors, owners, operators and users with confidence as to when an access regime is likely to apply to a particular service or facility and the likely impact that the regime will have on their operations and return on investment.

The criteria in the Competition Principles Agreement, together with the National Competition Council's Guide to certification and recommendations regarding the eight applications for certification of access regimes for rail, electricity, water, port and coal terminal facilities, provide industry participants and governments with guidance as to what the expected components of an access regime are in Australia.

Currently, the major incentive for State and Territory governments to seek certification of their access regimes is the certainty that the relevant facility or service cannot be subject to regulation under Part IIIA via declaration or an access undertaking.[37] Incentives will be most effective in promoting the efficient use of, operation of and investment in infrastructure where investors can have confidence in them.

In this respect, the Committee suggests that the Productivity Commission should consider whether the qualification to certification preventing declaration in section 44H(e)(ii) of Part IIIA is desirable. The sub-section enables a service provided by a facility which is subject to an access regime certified under Part IIIA to be declared if the Minister is satisfied that since certification the access regime has been substantially modified.

The Committee submits that the mischief of a certified access regime subsequently being modified such that it no longer satisfies the criteria for certification should be dealt with directly as a ground for revoking certification rather than indirectly by introducing an element of uncertainty into the status of a certified access regime – that is, by providing that the defect in the regime will

[37] Sections 44H(4)(e) and 44ZZAA(3AA).

be taken into account only when the NCC is considering a later application for declaration.

As to the notion of what would constitute a substantial modification to an access regime which meant that it no longer satisfied the criteria for certification, the Committee considers that while hypothetical examples can be posited this is an issue which is unlikely to pose many difficulties in practice. For example, if an access regime was modified so as to remove any mechanism for resolving disputes between an access seeker and access provider it would clearly no longer satisfy the criteria.

The Committee understands that there is also some uncertainty as to how the certification regime under Part IIIA operates with respect to an access regime which includes its own rule making procedures and institutions, such as those which apply with respect to electricity and gas networks in some states and territories.

The Committee encourages the Commission to consider as part of its investigation whether amendments to the certification regime in Part IIIA regarding that issue would provide a further incentive, or at least remove an impediment, to the certification of additional current access regimes.

Overall the Committee considers that the certification regime is flexible enough to enable individual access regimes to address industry-specific issues within the current framework.

6. Institutions and processes involved in the administration of Part IIIA

Section 5 of the Issues Paper published by the Productivity Commission examines the institutions and processes involved in the administration of the Part IIIA regulatory framework. This section of the Committee's submission responds to certain of the questions posed by the Productivity Commission in relation to those institutions and processes.

6.1 The institutions currently involved in regulation

> *Q. "Do all the institutions involved in Part IIIA contribute to effective and efficient decision-making? If so, how? If not, how could their roles, or the interaction between them, be improved?"*

There are currently 5 separate institutions given a role in the regulatory process under Part IIIA:

(i) an expert body to assess and advise on whether a service should be regulated (the NCC);

(ii) an elected official to decide whether to regulate (the Commonwealth, State or Territory Minister);

(iii) an expert body to determine terms and conditions of access (the ACCC);

(iv) an expert body to review decisions on the merits (the Tribunal); and

(v) the Courts.

The Committee considers that the question set out above is chiefly concerned with the first three of these institutions (ie. the NCC, the Minister and the ACCC).

The future of merits review (and the role of the Tribunal) is the subject of a separate question, and the Committee is aware of no suggestion that the jurisdiction of the Court should be curtailed in any way (nor would the Committee support such a suggestion).

This leaves the role of the NCC, the relevant Minister and the ACCC. We discuss each of these below.

(a) The declaration decision

The Hilmer committee, at page 322 of its report, stated:

> *The Committee has recommended that a special access regime be established which, in appropriate circumstances, could be applied to assets irrespective of their ownership. Access regimes have the potential to intrude into the, prerogatives of owners and must be subject to safeguards to ensure that application in any particular case is clearly justified in the public interest. Ultimately, decisions of this kind should be made by an elected Minister, rather than an independent body. However, as an additional safeguard on the exercise of this power, the Committee has proposed that the Minister not be able to apply the regime to a particular asset without the consent of the owner unless application was recommended by the NCC after a public inquiry.*

It appears that the Hilmer Committee had two objectives in suggesting that the declaration decision involve both the NCC and the Minister:

(i) ensuring that independent technical expertise is brought to bear on the decision; and

(ii) ensuring that declaration is clearly justified in the public interest.

While both of these objectives remain central to the operation of Part IIIA, there is a question as to whether the second of these objectives still necessitates Ministerial involvement in the decision-making process.

The rationale for Ministerial involvement in the declaration decision appears not to have changed. Part IIIA remains concerned with access to infrastructure of national significance, and has the potential to intrude into the prerogatives of asset owners.

It must also be remembered that Part IIIA is a generic access regime. While the ACCC alone is empowered to declare services under the telecommunications access regime in Part XIC of the CCA, this is an industry specific access regime, which was enacted to give effect to a policy judgment that regulation in this sector was appropriate. Involving the relevant Minister in the declaration decision under Part IIIA provides an opportunity for similar policy considerations to be brought to bear in the decision to bring infrastructure under the national access regime.

However, it is also important to recognise that Ministerial involvement in decision making under the CCA has been steadily wound back in other Parts of the CCA. In

years past the CCA (and the *Trade Practices Act* before it) has given Ministers a greater role in decision making than it does today. When the *Trade Practices Act* was first enacted, the Commonwealth Minister did have power to give directions to the then Trade Practices Commission (the **TPC**) to take into account certain matters, or to act in a particular way, in dealing with various matters considered by the TPC under that legislation. That power was curtailed in due course.[38]

Now, the relevant Minister, in line with other persons who may wish to influence decisions to be taken by the ACCC (for example in authorisations or notifications etc) must make a submission in the same way as others do.

Against this background, the Committee considers that the Productivity Commission (**PC**) should consider whether it is more appropriate for Ministerial involvement in the declaration decision to take the same form. If a Minister (representing the views of the particular Commonwealth, State or Territory Government) believed that certain criteria or issues are so critical to the particular application for access being considered by the NCC (or arguably the Tribunal) the Minister could make submissions or provide information to the NCC or Tribunal. The decision maker would no doubt take into account, and give appropriate weight to, any submission or information provided to it.

If the PC is of the view that the Minister should continue to have a role in the declaration decision under Part IIIA, consideration should be given to the nature of that role. Under the existing legislation, the Minister makes the final determination, not only on public interest considerations, but on all declaration criteria. This begs the question - if the NCC is considered best qualified to make findings on economic and technical criteria, what is the rationale for allowing the Minister to review and reverse those findings? If the Minister is to have a role in the declaration decision, should this be limited to, in effect, a power to veto the declaration of a service on compelling public interest grounds? The Committee suggests that the basis for exercising such a power would need to be prescribed with care. Similarly, a Minister overriding the recommendation of the NCC should be required to set out in detail why that decision has been taken.

In a similar vein, there are sectors of the Australian economy that are excluded from aspects of competition law under the CCA.[39] Whilst the Commonwealth Government still has the power, pursuant to section 51(1) of the CCA, to exclude the operation of Part IV of the CCA by legislative instrument, and whilst the legislation still recognises the unique position of the overseas cargo shipping industry in Part X of the CCA, these are legislative judgments, rather than administrative decisions to exempt industry sectors from regulation. Authorisations are granted, for specific conduct, only by the ACCC or the Tribunal. If there are particular areas of the Australian economy that are regarded as so important that the exclusion of Part IIIA is justified, then the Committee questions whether it may be more appropriate for those areas to be excluded on a similar basis.

Finally, the Committee believes it is appropriate to consider the role of State and Territory Ministers in making declaration decisions. While the Committee recognises that some significant infrastructure facilities remain the property of States and Territories, it is not clear that this justifies a decision-making role for State and Territory Government in relation the declaration of such facilities. It is arguable that facilities that

[38] see CCA, s 29(1A).
[39] For example see CCA, s 173; *Payment Systems (Regulation) Act 1998*, s 15A.

are exposed to the possibility of regulation under Part IIIA are, by definition, facilities of national significance, access to which is properly a matter for the national Government. The principle of competitive neutrality (being one of the principles underpinning the Hilmer review) suggests that facilities should not be regulated on a different basis (especially one that is potentially more favourable to the asset owner) simply by virtue of their public ownership.

(b) The need for a separate decision maker in setting terms and conditions of access

The Committee considers that the effectiveness of decision-making by the ACCC, in the context of Part IIIA, is yet to be seriously tested.

The ACCC is responsible, under Part IIIA, for decisions on whether to accept access undertakings submitted by asset owners, and experience suggests that it has generally performed this function in a timely and pragmatic manner.

By contrast, access arbitrations under Part IIIA are extremely rare. While the proliferation of access disputes in other contexts (eg. under Part XIC) has resulted in cost and delay in setting terms and conditions of access in some cases, experience with Part IIIA to date suggests that we are unlikely to see similar problems arise under the national access regime.

The ACCC's experience in determining terms and conditions of access in other contexts (eg. telecommunications, energy and transport) suggests that it remains the body best suited to set terms and conditions of access under Part IIIA.

At the same time, the NCC has developed considerable expertise in the consideration and application of the declaration criteria, and there appears to be broad support for the NCC's role in this aspect of regulation to continue. The Committee does not believe there is a clear case to combine the decision to declare services and the determination of terms and conditions in a single body.

This does not, however, mean that the process for determining terms and conditions of access cannot be streamlined. We discuss options for this further below.

6.2 Improving decision making

> *Q. "Are there measures that could improve the flexibility and reduce complexity, costs and time for all parties involved in facilitating access to essential infrastructure?"*

Decision-making under Part IIIA could potentially be streamlined in a number of ways, focussing on two key points in this process:

(i) the declaration decision; and

(ii) the determination of terms and conditions of access.

(a) The declaration decision

One option to streamline decision making is to remove the role of the Minister in the declaration decision, although the Committee notes that with earlier reforms to the legislation, Ministerial involvement is unlikely to be a major cause of delay.

In the event that this proposal is not supported, consideration could be given to limiting the role of the Minister to considering the findings of the NCC only on the public interest criterion, rather than the technical and economic criteria. This would involve something more in the nature of a 'veto' power, rather than a re-consideration of each of the findings of the NCC.

(b) Determination of terms and conditions of access

While a number of previous matters have been the subject of extensive delays, such delays have arisen at the declaration stage, rather than the terms and conditions stage.

We do not know whether the resolution of Part IIIA access disputes by the ACCC would be the subject of similar delays, although the determination of terms and conditions by the ACCC under gas and telecommunications access regimes has, in some instances, been a lengthy process.

That said, it is at least possible that the second stage of the Part IIIA process, involving the terms and conditions of access, could result in undue delay in obtaining access on reasonable terms, especially if the declaration process has been protracted.

This risk is potentially heightened if Part IIIA retains a review mechanism in relation to both stages of the process, since this would provide an opportunity for persons who wish to resist access to seek to review all stages of the process, taking advantage of the rights vested in them.

One question is whether there is a need, at the present time, to consider additional reforms to streamline the Part IIIA process, by providing for terms and conditions of access to be considered by the ACCC at an earlier stage. An access provider currently faced with the possibility of declaration can move directly to determination of terms and conditions by submitting an access undertaking to the ACCC.[40] Should an access seeker be permitted to seek a ruling from the ACCC on terms and conditions in parallel with the declaration enquiry?

This could be achieved if the access application process was one in which the application contained not only the grounds upon which access should be granted (satisfying the current declaration criteria) but also the terms conditions, prices and related factors involved in granting the application).[41]

Declaration applications are rarely born in a vacuum. An application for declaration will often follow attempts to seek access on negotiated terms. In such a case, it is reasonable to expect the applicant to have a good idea of the terms under which access is sought. Similarly, the access provider is likely to have some idea of the terms which they might be prepared to accept in agreeing to allow access to be given. This creates an opportunity to streamline the Part IIIA process by providing for the ACCC to consider

[40] CCA, section 44ZZA.
[41] This was proposed in a paper presented to the University of Melbourne by Professor Bob Baxt AO in February 2008 entitled '*National Economic Regulation – the cost of (inadequate ?) reform'.*

the appropriate terms and conditions of access, while the declaration inquiry is underway.

The ACCC's experience in dealing with questions of access terms and the broader competition implications in this area (especially as a result of this fairly lengthy history in dealing with the telecommunications industry) suggests it is best suited to undertake these tasks. However, the PC may wish to consider whether the ACCC could consider this in parallel with the declaration inquiry.

The end result of the two measures suggested above (if adopted in full) would be to condense what is potentially a five stage process (*NCC > Minister > Tribunal > ACCC > Tribunal*) into a process consisting of, at most, two stages (*NCC/ACCC > Tribunal*).

This would ultimately require an assessment of the risk of delay that might arise in the future as a result of the two stage process contemplated by Part IIIA, and whether the costs of requiring the ACCC to consider terms of access for a service that has not yet been declared are outweighed by the benefits of achieving a faster overall resolution of access disputes.

6.3 The Pilbara High Court Decision and the Tribunal's Review

> *Q. "Looking ahead, and in light of the High Court decision and the legislative amendments to merits reviews, will review arrangements under Part IIIA be appropriate, cost-effective, timely, fair and transparent? If so, why? If not, how could this be remedied?"*

(a) The Fortescue Applications

In order to answer these questions, it is necessary to consider the High Court's decision and the legislative amendments that preceded it, in context. To do this, it is necessary to understand the nature of Fortescue's applications for access and the process that ultimately led to the High Court's decision.

Commencing in 2004, Fortescue Metals Group Ltd sought access to four iron ore rail lines and associated infrastructure (referred to as "below rail services"[42]) in the Pilbara. Two of the lines were owned by BHP Billiton and associated entities (the Goldsworthy and Mt Newman lines) and two were owned by Rio Tinto Ltd and associated entities (the Hamersley and Robe lines).

In March 2006, the National Competition Council (**NCC**) recommended that services over the Mt Newman line be declared for a period of 20 years. In May 2006, the Commonwealth Treasurer, not having made a decision, was deemed not to have declared the service. On 30 June 2010 the Tribunal affirmed the Minister's deemed decision. Fortescue sought review of the deemed decision not to declare the Mt Newman line service.

[42] A 'below rail' service involves the access seeker using its own trains, rolling stock, and other related equipment to haul loads over the access provider's railway line (and associated infrastructure). By contrast, an 'above rail' service is a haulage service requiring the access provider to use its own rolling stock to haul goods for the access seeker.

However, in October 2008, the Commonwealth Treasurer, on recommendation of the NCC, declared the services provided over the Goldsworthy, Robe and Hamersley lines, for a period of 20 years. BHP Billiton and Rio Tinto sought review of the Minister's decisions in the Tribunal. On 30 June 2010, the Tribunal set aside the Minister's decisions with respect to the Hamersley line, affirmed the Minister's decision regarding the Goldsworthy line and varied the decision with respect to the Robe line so that it expired in 10 years.

In 2010 both Fortescue and Rio Tinto sought judicial review by the Federal Court in respect of the Tribunal's decisions regarding the Robe and Hamersley lines. The NCC sought, and was granted, leave to intervene. A Full Bench of the Federal Court dismissed Fortescue's application and allowed Rio Tinto's.

(b) Outline of the High Court Appeal

Fortescue applied for, and was granted, special leave to appeal to the High Court against the orders by the Federal Court dismissing its application in relation to the Hamersley and Robe lines and allowing Rio Tinto's application in relation to the Robe line. The matter was heard by the High Court in March 2012.

In considering the appeals, the High Court focused, for the most part, on four questions[43]:

(i) what is the scope of the Tribunal's power when reviewing the Minister's decision;

(ii) what does criterion (b) (that it would be uneconomical for anyone to develop another facility to provide the service) mean;

(iii) what matters may be taken into account under criterion (f) (whether access would not be contrary to the public interest); and

(iv) is there a residual discretion to not declare a service if all of the declaration criteria are satisfied.

In this section of the Committee's submission, we will address issues (i) and (iii) above.

(c) The Tribunal's review exceeded the scope of the Tribunal's powers

One of the key issues considered by the High Court was what is the nature of the task which the Tribunal was required to perform when asked to review the Minister's decision. In particular, the High Court considered whether the Tribunal's task was to conduct a fresh hearing on new evidence of the question of whether a service should be declared, or whether the task was more limited.

When BHP Billiton and Rio Tinto applied for review of the Minister's decision to declare, s 44K of the CCA provided:

"(1) If the designated Minister declares a service, the provider may apply in writing to the Tribunal for review of the declaration.

[43] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [26].

(2) If the designated Minister decides not to declare a service, an application in writing for review of the designated Minister's decision may be made by the person who applied for the declaration recommendation.

(3) An application for review must be made within 21 days after publication of the designated Minister's decision.

(4) The review by the Tribunal is a re-consideration of the matter.

Note: There are target time limits that apply to the Tribunal's decision on the review: see section 44ZZOA.

(5) For the purposes of the review, the Tribunal has the same powers as the designated Minister.

(6) The member of the Tribunal presiding at the review may require the Council to give information and other assistance and to make reports, as specified by the member for the purposes of the review.

(7) If the designated Minister declared the service, the Tribunal may affirm, vary or set aside the declaration.

(8) If the designated Minister decided not to declare the service, the Tribunal may either:

(a) affirm the designated Minister's decision; or

(b) set aside the designated Minister's decision and declare the service in question.

(9) A declaration, or varied declaration, made by the Tribunal is to be taken to be a declaration by the designated Minister for all purposes of this Part (except this section)."[44]

In construing this section, the High Court held that central to the question of the proper scope of the Tribunal's review was the meaning of "the review by the Tribunal is a re-consideration of the matter".[45]

"The matter" in s 44K(4) was, it said, the thing referred to in sections 44K(1) and (2). Where the Minister has declared a service, the "matter" is "the declaration" made by the Minister. Where the Minister decided not to declare a service, the matter is the Minister's decision not to declare. It is the Minister's task, and the result of its performance, which is to be subject to "re-consideration" by the Tribunal.[46]

The High Court also held that the requirement that the Tribunal "re-consider" the Minister's decision "*neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared*."[47] This would not be a re-consideration of the matter in question (namely the Minister's decision) but a broader

[44] Section 44K *Trade Practices Act 1975* (Cth).
[45] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [36].
[46] Ibid at [37].
[47] Ibid at [48].

examination of the underlying issues involved. The Tribunal was required to limit its review to the Minister's decision, having regard (with limited exceptions) to the material that was before the Minister. The position is most clearly captured in the following statement of the majority:

> *"the Tribunal treated its task as being to decide afresh on the new body of evidence and material placed before it whether the services should be declared. That was not its task. Its task was to review the Minister's decisions by reconsidering those decisions on the material before the Minister supplemented, if necessary, by any information, assistance or report given to the Tribunal by the NCC in response to a request made under s 44K(6)."*[48]

In addition, the High Court contrasted the use of the statutory language 're-hearing' used to describe the task of the Tribunal reviewing a determination of the ACCC under s 102, with the use of 're-consideration' in s 44K(4), holding that 'some different meaning must presumably be intended by the use of the different words in identifying the review to be undertaken by the Tribunal'.[49]

It explained that:

> *"The contrast is best understood as being between a "re-hearing" which requires deciding an issue afresh on whatever material is placed before the new decision maker and a "re-consideration" which requires reviewing what the original decision maker decided and doing that by reference to the material that was placed before the original decision maker (supplemented, in this kind of case, only by whatever material the NCC provides in answer to requests made by the Tribunal pursuant to s 44K(6))."*[50]

This represented a significant departure from previous views of the Tribunal's powers. Traditionally, the Tribunal had approached its task of reviewing Ministerial declaration decisions under s 44K(4) of the Act as performing a fresh assessment of the merits of the application, exercising the same powers as those of the designated Minister, and not otherwise constrained by the Minister's decision or the material the Minister took into account: see, for example, *Re Freight Victoria Limited*[51]; *Re Services Sydney Pty Limited*[52]; *Re Fortescue Metals Group Limited*[53]; and *In the matter of Fortescue Metals Group Limited*[54].

In a rejection of the previous approach, the High Court held that the broad procedural powers under Division 2 of Part IX were not open to the Tribunal when conducting a review under s 44K, observing that:

> *"First, there was and is no textual link between s 44K and its specification of the functions of the Tribunal on review of a declaration or decision not to make a declaration and the provisions of Div 2 of Pt IX dealing with the procedure of and evidence before the Tribunal in "proceedings" as that term is defined in s 102A. ....Second, there is an evident contrast to be drawn between the provision*

[48] Ibid at [65].
[49] Ibid at [60].
[50] Ibid at [60].
[51] [2002] ACompT 1 at [22].
[52] [2005] ACompT 7 at [9].
[53] [2006] ACompT 6 at [29].
[54] [2010] ACompT 2 at [24].

made in Div 1 of Pt IX (by s 101(2)) – that the Tribunal's review of decisions of the kind with which that Division deals "is a re-hearing" – and the provision made by s 44K(4) that "[t]he review by the Tribunal is a re-consideration of the matter".” [55]

6.4 The 2010 amendments to merits review process

> *Q. “Looking ahead, and in light of the High Court decision and the legislative amendments to merits reviews, will review arrangements under Part IIIA be appropriate, cost-effective, timely, fair and transparent? If so, why? If not, how could this be remedied?”*

(a) Amendments to Part IIIA

In 2010, approximately two weeks after the Tribunal published its decision in relation to the BHP and Rio Tinto applications, Part IIIA was amended by the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth).[56]

Among other things, the *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) amended section 44K(4) to limit the Tribunal’s “reconsideration” of the Minister’s decision to the material before the Minister and introduced new sections 44K(6A) and 44K(6B) which provided a process by which the NCC could be required to provide information and evidence to the Tribunal. Sections 44K(4) to 44K(6B) now read as follows:

(4) *The review by the Tribunal is a re-consideration of the matter <u>based on the information, reports and things referred to in section 44ZZOAA</u>. [Emphasis added]*

Note: *There are limits on the information to which the Tribunal may have regard (see section 44ZZOAA) and time limits that apply to the Tribunal's decision on the review (see section 44ZZOA).*

(5) *For the purposes of the review, the Tribunal has the same powers as the designated Minister.*

(6) *The member of the Tribunal presiding at the review may require the Council to give assistance for the purposes of the review (including for the purposes of deciding whether to make an order under section 44KA).*

(6A) *Without limiting subsection (6), the member may, by written notice, require the Council to give information, and to make reports, of a kind specified in*

[55] Ibid at [56].
[56] The text of section 44K prior to the 2010 amendments is found in section [6.3(c)] above.

the notice, within the period specified in the notice, for the purposes of the review.

(6B) The Tribunal must:

(a) give a copy of the notice to:

(i) the person who applied for review; and

(ii) the provider of the service; and

(iii) the person who applied for the declaration recommendation; and

(iv) any other person who has been made a party to the proceedings for review by the Tribunal; and

(b) publish, by electronic or other means, the notice.

The new sections 44ZZOAAA and 44ZZOAA provide that the Tribunal must be provided with all of the information the Minister took into account in making his or her decision, or in the case of a deemed decision, all of the information the NCC took into account in making its recommendation, and that the Tribunal may request such additional information as it considers reasonable and appropriate for the purpose of making its decision. Section 4ZZOAAA(4) is not expressed to be limited to requests to the NCC and Minister. In fact, under the 2010 amendments the Tribunal now has a broader express power to request information, whereas prior to the amendments it only had the express power to request information from the NCC under s44K(6). Importantly, from the point of view of ensuring fair and transparent decisions that includes information that could not have reasonably been made available to the decision maker when the decision was made.

The latter provision, section 44ZZOAAA(7) is important as it significantly reduces the possibility of error on the part of the Tribunal as a result of it having to "turn a blind eye" to a significant change in circumstances such as an intervening decision to, say, construct alternative infrastructure or digitalise a network.

(b) The effect of the 2010 amendments

The 2010 reforms were aimed at addressing concerns that the objects of Part IIIA[57] were being frustrated by legal processes, and that delays and costs in decision making under the regime may be having an adverse effect on important infrastructure investment and national productivity.[58] In particular, the process was not seen as being sufficiently

[57] The objects of Part IIIA are: "(a) to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets and (b) to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry." See *Competition and Consumer Act 2010* (Cth) s 44A.
[58] Dr Craig Emerson, Second Reading Speech, Trade Practices Amendment (Infrastructure Access) Bill 2010 (Cth), House of Representative, Hansard, 29 October 2009, p11468.

timely or cost effective. The COAG agreements[59] and the *Trade Practices Amendment (National Access Regime) Bill 2005* had also sought to address similar concerns[60].

As a result, the language of section 44K is now different from that considered by the High Court in *Fortescue* and has still not been tested by a court. For that reason, it is important that any decision to significantly amend the review processes in Part IIIA take into account the likely impact of the 2010 amendments in conjunction with the High Court's decision, rather than simply focussing on the protracted and costly nature of one set of proceedings in the whole of Part IIIA's history - the Pilbara declaration process. Amendments may still be desirable, but they should proceed on an informed basis so as not to compromise regulatory, and investment, certainty.

6.5 Will the review arrangements be timely, cost effective and transparent?

> *Q. "Looking ahead, and in light of the High Court decision and the legislative amendments to merits reviews, will review arrangements under Part IIIA be appropriate, cost-effective, timely, fair and transparent? If so, why? If not, how could this be remedied?"*

(a) The scope of the review process

In order to answer this question, it is necessary to consider the combined effect of the High Court's decision and the 2010 amendments. The High Court's decision may well achieve some of the objectives the 2010 amendments sought to achieve. It may even go further, particularly as the 2010 amendments go simply to the information to which the Tribunal may have regard, not to the fundamental nature (and scope) of the review process.

The considered effect of the two would seem to be that the Tribunal must limit itself to a reconsideration of the matter in question, namely the Minister's decision to declare or not declare a service and, in so doing, must limit itself to the material that was before the Minister supplemented as permitted by ss 44K(6) and (6A), and 44ZZOAAA(4).

Overall, this represents a significant reduction in the scope of the Tribunal's review process. However, it contains safeguards such as the ability to obtain information that was previously unavailable to reduce the likelihood of regulatory error. Whether this is seen as desirable or appropriate is fundamentally a policy question and involves some degree of balancing between timely decision making on the one hand and perfectly informed decision making on the other.

What seems clear is that future reviews by the Tribunal are likely to be simplified, both in terms of the evidence that may be presented and the time which can be taken by the

[59] For example , the *Competition and Infrastructure Reform Agreement* (2006).

[60] The explanatory memorandum to the *Trade practices Amendment (National Access Regime) Bill 2006* (Cth), provides at 11.4:

> "*The Bill introduces a new process to expedite extensions of certifications, access undertakings and access codes. This process should benefit a wide range of stakeholders. It will allow service providers the opportunity to streamline any application for extending certifications, undertakings or codes, thereby avoiding potential regulatory uncertainty or delay. This will generate benefits to access seekers and consumers, by expediting regulatory certainty for the terms and conditions of access, and by increasing transparency through a public consultation process.*"

Tribunal to hear a matter. In addition, there will be practical effects on the manner in which declarations proceedings are undertaken. In particular, there will be a greater discipline imposed on applicants (and respondents) to submit their best evidence at the initial NCC stage. This should provide increased clarity at an early stage of the proceedings regarding the relevant issues, and limit the ability of access providers to prolong proceedings by introducing new issues, evidence and materials.

For those reasons, it seems likely that the High Court's decision and the 2010 amendments will result in a more cost-effective, timely and transparent decision making process than was previously the case.

However, given these developments have occurred very recently, there has not yet been an opportunity to see how well they are working. There have only been three declaration applications lodged since the 2010 amendments came into effect - the NCC made its recommendation on each of these within the 180 day expected timeframe, the designated Minister has made a decision (or in one case, failed to make a decision and so there has been a deemed decision) within the prescribed 60 day time limit – and none have gone on to review by the Tribunal. [61]

In addition, the full impact of the High Court's decision is only now being digested and its reasoning has not yet been applied or considered by the Tribunal or a lower court. That being the case, it may be premature to introduce any large-scale amendments to Part IIIA aimed at streamlining the declaration process and reducing delay, before the efficacy of the legislative amendments and the recent clarifications from the High Court which were aimed at these very issues have been tested.

(b) Some areas where greater clarity may be desirable

There are, however, a few areas where greater clarity may be desirable.

These include:

(i) How will the Tribunal's reconsideration be carried out in the case of deemed decisions where there is no record of decision?; and

(ii) What is the nature of the 'exceptional circumstances' in which the Tribunal can depart from the Minister's assessment of the merits in relation to criterion (f)?

[61] The 2010 amendments apply to applications made to the Tribunal after 14 July 2010.
(1) On 27 September 2011 BARA lodged an application for declaration of the jet fuel supply infrastructure at Sydney Airport. The NCC recommended that the service not be declared, and the Minister's decision followed this recommendation.
(2) On 27 September 2011 BARA lodged an application for declaration of the Caltex jet fuel pipeline services at Sydney Airport. The NCC recommended that the service not be declared, and the Minister's decision followed this recommendation.
(3) On 22 March 2010 North Queensland Bio-Energy Corporation Ltd lodged an application for declaration of the Herbert River district cane tram network. The NCC recommended that the service not be declared. The Minister failed to provide a decision within the 60 day period and hence the service was deemed to not be declared.
Note: Pacific National Pty Ltd lodged an application on 19 May 2010 for declaration of the Blackwater, Goonyella, Moura and Newlands coal railway facilities, however this was withdrawn by the applicant prior to the NCC's final recommendation.

In addition, although the High Court's decision excludes the possibility of the Tribunal relying upon the general procedural powers contained in Division 2 of Part IX of the CCA, it does not specify what procedural powers the Tribunal has when conducting a review under s 44K(4).

Provisions regarding Tribunal procedure are contained in various places throughout the CCA and the regulations, and often require an interpretation of words used in other sections to determine whether the procedural provisions in those sections apply (for example, assessing whether the relevant task is a 'proceeding' for the purposes of s 103 of the CCA). There is no clear, consistent statement of the procedural powers which apply to the Tribunal's various functions under the Act. Rather, parties and practitioners are required to try and elucidate the applicable provisions by looking at definitions, notes to sections, defined terms, and sections which refer back to other Parts of the CCA.

By way of example, the procedural provisions set out in Division 2 of Part IX apply to reviews by the Tribunal of ACCC non-merger determinations, which makes sense given the subject of Part IX is the review by the Tribunal of ACCC determinations. However, a careful review of various parts of the Act reveals that the procedural provisions found in Part IX also apply to a number of other functions of the Tribunal:

(iii) s 102A in Part IX (dealing with Tribunal review of ACCC determinations) defines 'proceedings' in s 103 as including applications made to the Tribunal under s 111 (review of ACCC decisions on merger clearances);

(iv) s 44ZZR in Part IIIA (dealing with access to services) provides that ss 103, 105, 106 107, 108 and 110 apply to the Tribunal when performing functions under a State/Territory energy law or a designated Commonwealth energy law;

(v) the note to s 151CJ in Part XIB (dealing with anti-competitive conduct and record-keeping rules in the telecommunications industry) states that 'Division 2 of Part IX applies to proceedings before the Tribunal';

(vi) the note to s 10.82B in Part X (dealing with international liner cargo shipping) states that 'Division 2 of Part IX applies to proceedings before the Tribunal'.

Further, for some functions, provision is made for the procedural powers the Tribunal may require in carrying out its task - for example, Division 2 of Part IX discussed above and the similar provisions set out in regulation 28M which governs Tribunal reviews of ACCC access dispute determinations under Part IIIA. However, for other functions – such as reviews under s 44K, the Act is silent and it is not clear where the Tribunal is to derive its power to undertake the practical measures required to perform its role.

It appears that, given the history of the Tribunal in which additional functions were added over time, insufficient consideration may have been given to what procedural powers the Tribunal needs in order to perform each of its tasks and provision for procedural powers has been made in a piecemeal way.

Then, notwithstanding the High Court's decision, the following issues remain at large to some extent:

(vii) Is there sufficient clarity as to which procedural provisions apply to each of the Tribunal's tasks under the CCA?;

(viii) In relation to reconsideration under s 44K:

- Is the Tribunal able to conduct an oral hearing when performing a review and, if so, can witnesses appear before it?[62]
- In the absence of a hearing, will the Tribunal's power to request additional information under s 44ZZOAAA(2)(4) be workable in practice? Will the Tribunal be required to issue a series of written requests and await written responses before it can ask further questions to clarify the material sought? Will this prevent it from questioning relevant individuals in person?
- Are parties able to present evidence to the Tribunal outside of a specific request from the Tribunal? Will this be necessary in order to comply with the procedural requirements?

Some guidance may be available from the Tribunal's conduct of similar proceedings under the telecommunications access regime in Part XIC of the Act. There the Tribunal has undertaken what is clearly a limited merits reviews for a number of years.

(c) Possible legislative changes

Case law is likely to be the most appropriate avenue for clarifying some of the issues raised. However, there are a number of issues which could perhaps be addressed by way of legislative reform:

(i) whether section 44K(4) should be amended to clarify the nature of the Tribunal's reconsideration in respect of deemed decisions;

(ii) The procedural powers of the Tribunal for each of its various functions could perhaps be clearly stated in one place, for example, to clarify whether the Tribunal has the power to conduct a hearing in respect of particular matters and to either provide for all matters the Tribunal may need in order to perform its task (e.g. the power to grant leave to withdraw an application) or to otherwise provide for a general grant of power (e.g. by making the procedure within the discretion of the Tribunal).

One way this could be achieved is by introducing a new division into Part III (*The Australian Competition Tribunal*) governing 'procedure and evidence'. This division could include the general provisions which apply in relation to all of the Tribunal's functions. Where additional procedural powers apply in relation to specific functions

[62] In the context of Part XIC the practice has been to conduct an oral hearing , but without the ability of the parties to call witnesses.

only, these could be included within each of the relevant Parts of the Act. This would be preferable to reliance upon notes which refer to a defined term in another Part.

6.6 Rationale for merits review and judicial review under Part IIIA

> *Q. "What is the rationale for merits review under Part IIIA? Could judicial review suffice?"*

(a) Merits review under Part IIIA

Part IIIA provides for the Australian Competition Tribunal to undertake merits review of the following decisions:

(i) Ministerial decisions on whether to declare a service (s 44K), and not to revoke declaration of a service (s 44L);

(ii) Ministerial decisions on making and revoking an "ineligibility decision" (ss 44LJ and 44LK);

(iii) Ministerial decisions on whether a regime is an "effective access regime" (s 44O);

(iv) ACCC decisions on whether to approve a competitive tender process for proposed government owned facilities, and revocation of such approval (s 44PG and 44PH);

(v) ACCC access arbitration determinations (s 44ZP); and

(vi) ACCC decisions on access undertakings and access codes (s 44ZZBF).

In practice, the experience with Part IIIA merits review to date has concerned the first category noted – merits review of declaration decisions. While the following analysis necessarily draws on that experience, it applies similarly to other types of merits review under Part IIIA.

(b) The rationale for merits review under Part IIIA

The extrinsic materials concerning the enactment of Part IIIA say little about the need for and role of merits review under Part IIIA. Similarly, subsequent COAG agreements[63] and legislative reforms to the Part IIIA merits review process[64] have sought to limit the cost, time and expense of merits review under Part IIIA, but have neither expressly articulated nor questioned the utility of merits review in this context.

Merits review serves the following useful purposes in the context of Part IIIA.

First, it serves the typical purpose of merits review, which is to promote "correct and preferable" decision making, both by achieving correct and preferable outcomes in

[63] For example, the *Competition and Infrastructure Reform Agreement* (2006).
[64] See section 6.4 of this submission.

particular cases in which merits review occurs, and by improving the quality and consistency of decisions generally. In this sense, merits review supplements and enhances the traditional process of ministerial and parliamentary accountability.[65] Arguably, merits review is particularly important in the context of Part IIIA, because it provides investors in nationally significant infrastructure, and investors in projects which depend on access to nationally significant infrastructure, with increased certainty about the manner in which Part IIIA will be applied.

Do the "public interest" and "national significance" elements of declaration decisions suggest that these decisions should be made by the exercise of Ministerial discretion, and be exempt from merits review?

Part IIIA declaration decisions address some matters in relation to which reviewing bodies may ordinarily be reluctant to intervene, such as determinations on the "*public interest"* and *"national significance*" declaration criteria (as the High Court has acknowledged).

However this is only one element of these decisions. Other elements, such as determination of the competition impact of access (declaration criterion (a)) and whether it would be uneconomic for anyone to develop another facility to provide the service (declaration criterion (b)) are potentially the type of regulatory, administrative decisions in relation to which merits review serves its most useful function.

Further, in practice it appears likely that the Minister's determination of the public interest criterion will have regard to the results of these more regulatory decisions on criterion (a) and (b).

Since the national significance and public interest matters are only one aspect of Part IIIA decision making and are likely to interact significantly with more archetypically administrative aspects of declaration decisions there is no basis for precluding merits review of Part IIIA declaration decisions on the grounds that they are "inherently political", or that it is otherwise appropriate for the Minister's decisions on such matters to be subject only to judicial review.

The availability of merits review also provides a potential safeguard against the politicisation of Part IIIA decisions, particularly Ministerial decisions. The nature and subject matter of Part IIIA means that such decisions will inevitably involve matters of national significance, which are likely to be of high commercial and/or political value to interested parties. The Hilmer Committee was expressly alive to this risk in the context

[65] See, for example, Administrative Review Council, *"Report to the Minister for Justice – Better decisions: review of Commonwealth Merits Review Tribunals"*, report no 39, 1995, pp 16-17 and 112. The Honourable Deirdre O'Connor, former President of the Administrative Appeal Tribunal, has stated that *"the availability of administrative review has led to increased awareness among decision makers about the exercise of decision making power within the terms of authorising legislation, promoted the consistent application of the law by decision makers and led to improvements in the quality of primary decision making"*. *'Lesson from the Past/Challenges for the Future: Merits Review in the New Millennium'* The Hon. Justice Deirdre O'Connor, Paper presented at the *2000 National Administrative Law Forum – Sunrise or Sunset? Administrative Law in the New Millennium, June 2000.*

of declaration decisions,[66] and recommended that the issue be resolved by requiring the Minister's discretion to be limited by specific declaration criteria, and by requiring that the Minister only be able to make a declaration where "*an independent and expert body*" – assumed to be the NCC – had affirmatively recommended the declaration having regard to the relevant criteria.[67] Part IIIA as introduced did not fully adopt this recommendation; in this context, the availability of merits review provides an important, alternative safeguard against politicisation of Part IIIA decisions, because it provides interested parties with certainty about the availability of merits review by a body which is rigorously independent of the political process.

Thirdly, the Tribunal's merits review function plays a role in developing the relevant law, and identifying matters requiring policy or other legislative attention. For example, the Tribunal's merits review function has been important in the development of the law concerning declaration criteria (a), (b) and (f). Even in cases where the Tribunal's decisions as to the interpretation of these criteria have not been adopted by higher courts, the Tribunal's articulation of the potential alternative legal approaches, and reasoning as to the merits and method of application of each approach, have assisted in the consideration of those approaches in cases determined by the courts.

Fourthly, merits review under Part IIIA has played an important role in promoting rigorous factual and economic analysis. This has been important in the context of declaration decisions, which inevitably involve determination of complex and disputed commercial, economic and legal issues, for which there is little if any "precedent" available to a regulatory body such as the NCC, which must consider these issues at first instance. Accordingly, whereas regulatory decision makers under (for example) gas, electricity, telecommunications, water and other access regimes at least have established bodies of Australian and international precedent on which to draw when approaching their task, this is not typically the situation of the NCC and the Minister in Part IIIA declaration cases.

(c) Could judicial review suffice, rather than having both judicial review and merits review of decisions under Part IIIA?

The discussion above tends to suggest that judicial review could not suffice as a substitute for merits review under Part IIIA.

First, the purpose served by judicial review is fundamentally different to the purpose served by merits review. Whereas merits review is concerned with substantive outcomes – ie promoting the quality and consistency of decisions – judicial review is concerned with the legality of decisions. This reflects the fact that judicial review is the means by which a supervising court determines the limits of the power of a public authority.[68] Judicial review does not have as its object the avoidance of administrative

[66] Hilmer Report p 250.
[67] Hilmer Report p 252.
[68] R Finkelstein QC, submission to the SCER on Limited Review of Merits Review, p 10.

injustice or error.[69] The role of judicial review is not to identify or correct either errors of fact, or illogical or otherwise flawed reasoning.

Secondly, the remedies available to a court on an application for judicial review are similarly designed for the purpose of promoting the legality of administrative decisions rather than the substantive quality of decisions. Specifically, the remedies available by way of judicial review do not serve to redress the substantive issues in question. The remedies used in judicial review are the prerogative writs of certiorari, prohibition and mandamus (a fourth writ, habeas corpus, is not relevant to Part IIIA); the equitable remedies of declaration and injunction; and the statutory remedies available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). None of these remedies can be used to address concerns about the substantive merits of the declaration decision. Rather, their effect is to require decisions to be made according to law, and to prevent the making of decisions other than according to law. It is not open to a court on an application for judicial review to remake the original decision maker's decision; rather, the options are for the decision to be quashed or returned to the original decision maker to be remade according to law. These outcomes are desirable on an application for judicial review, but are no substitute for the ability of a merits review body to remake the original decision, if that decision is determined not to have been the correct and preferable decision.

Thirdly, the importance of merits review (and the inadequacy of judicial review as a substitute for it) is underlined by the fact that key Ministerial decisions under Part IIIA can occur by deeming rather than positive decision.[70] In these situations, there is no record of the Minister's consideration of the application, and no decision upon which an action for judicial review could practically be based. Hence merits review is the only practical avenue for review of the declaration decision in this circumstance.

(d) Conclusion: merits review of ministerial and ACCC decisions is appropriate in the context of Part IIIA, and should be retained

For the reasons explained above, merits review of Part IIIA decisions is inherently appropriate, and in fact essential, in order to:

(i) promote the quality and consistency of Part IIIA decisions;

(ii) safeguard against the politicisation of those decisions;

(iii) assist in developing the relevant law; and

(iv) promote rigorous factual and economic analysis.

In contrast, judicial review achieves only one of those four objectives.

There is no principled basis for removing the role of the Tribunal, or the availability of merits review, in relation to Part IIIA decisions. The national significance, public interest and private property consequences of Part IIIA decisions heighten the imperative for merits review to be retained under Part IIIA.

[69] *AG v Quinn* (1990) 170 CLR 1, 35-36.
[70] Eg section 44H(9).