NATIONAL
COMPETITION
COUNCIL

The National Access Regime

Submission on the Productivity Commission draft report

3 July 2013

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Abbreviations

ACCC	Australian Competition and Consumer Commission
AEMC	Australian Energy Market Commission
CCA	*Competition and Consumer Act 2010*
Commission	Productivity Commission
Council, NCC	National Competition Council
CPA	Competition Principles Agreement
NGL	National Gas Law
Regime	National Access Regime in Part IIIA of the CCA
SCER	Standing Council on Energy and Resources
Tribunal	Australian Competition Tribunal

1 Summary

1.1 The Productivity Commission (**Commission**) in its draft report has established the continued need for access regulation, identifying the economic problem that the National Access Regime in Part IIIA of the Competition and Consumer Act 2010 (**CCA**) should address as the lack of effective competition in the provision of infrastructure services due to natural monopoly. The Commission considers that monopoly pricing and denial of access can each lead to inefficient provision of infrastructure services and potentially affect competition in dependent markets (Draft Finding 3.2).

1.2 The Council supports retention of the Regime. It considers that the Regime provides a net benefit to the community by promoting competition and investment in dependent markets where access to monopoly infrastructure services is required to compete effectively in those dependent markets. As the Commission itself notes:

> In circumstances where the service provider is not constrained from using its market power, access regulation can promote competition and investment in dependent markets, increasing output and putting downward pressure on prices in those markets (PC 2013, p 9).

1.3 In this submission, the Council is focusing on the Commission's draft recommendations that it considers are integral to enhancing the effectiveness of the Regime. In several key areas the Council supports the Commission's recommended approach. The Council agrees that:

- the competition test in criterion (a) should assess whether access (or increased access) on the basis of access being available on reasonable terms and conditions through declaration[1] would promote a material increase in competition (Draft Recommendation 8.3)[2]
- criterion (b) should be a test for natural monopoly such that it should assess whether an infrastructure facility can meet total market demand at least cost (Draft Recommendation 8.1)[3]

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1 The Council has adopted the Commission's wording to describe the intent of the proposed change rather than as a specification of the words to be included in a legislative amendment.

2 As proposed by the Commission (PC 2013, p 249), criterion (f) should also be amended to reflect the access-declaration distinction in criterion (a).

3 The Council notes the Commission's recommendation that if (contrary to its preferred recommendation) a private profitability test is retained as the basis for criterion (b), the term 'anyone' should be defined to exclude an incumbent service provider (Draft Recommendation 8.2). The Council considers that a private profitability basis for criterion (b) gives rise to inappropriate policy outcomes. Limiting the scope of the term 'anyone' would remove one of the particularly problematic aspects of such a test, but other significant issues will remain (including allowing cross subsidies providing the basis for profitability). The Council addresses this issue later in this submission.

- criterion (e) should become a threshold test rather than a criterion for declaration with provision for the Commonwealth Minister to revoke certification on the advice of the Council (Draft Recommendation 8.5)
- where a designated Minister does not publish a decision on a declaration application within the required timeframe (within 60 days of the Council's recommendation) this should be deemed to be acceptance of the recommendation of the Council (Draft Recommendation 9.1)[4]
- subsection 44V(2) of the CCA should be amended to confirm the prevailing interpretation that, when arbitrating an access dispute, the ACCC can require a service provider to expand the capacity of its facility (in addition to a geographical extension) (Draft Recommendation 8.7)
- the Commission should consider whether its recommendation that the ACCC develop and publish guidelines on how it would exercise its power to direct facility extensions (and expansions) should specifically include state and territory regulatory bodies with similar responsibilities such that the ACCC develops the guidelines in conjunction with those bodies (Draft Recommendation 8.8).

1.4 The Commission's draft recommendations above, particularly those relating to criteria (a) and (b), are instrumental to the effective operation of the Regime. The Council considers that the Commission should confirm these recommendations in its final report and should advise the Government to legislate to implement them as soon as possible.

1.5 The Council has identified various elements that it considers warrant further attention. The Council considers that:

- criterion (c) should be amended to remove size as a determinant of national significance
- criterion (f) should be amended in line with the change proposed to criterion (a) to consider the effects of access (or increased access) on reasonable terms and conditions through declaration (as the Commission has proposed).[5] However, criterion (f) should not be further amended, either to require an applicant to separately establish that access is in the public interest or to include specific factors to 'have regard to' in considering the public interest. Rather the criterion (f) test should remain so as to require the Council (in recommending) and the Minister (in deciding) be satisfied that such access is not contrary to the public interest (Draft Recommendation 8.4 refers)

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4 The Council considers that it would be desirable for decision time limits and deeming provisions similar to those in the National Access Regime to be introduced in relation to coverage decisions under the National Gas Law (**NGL**) (see paragraph 2.18).

5 See footnote 1.

- all state and territory access regimes should be certified (as recognised by the Commission), and energy regimes should not be exempt from the requirement to be certified (Information Request 6.1 refers)
- the principles for obtaining certification should be more closely linked to the principles in Part IIIA and ideally should be streamlined
- the Commission should outline the critical details of its preferred merits review model or (preferably) support the replacement of merits review by judicial review (Draft Finding 9.1 refers)
- the Commission should consider whether, if the declaration process in Part IIIA must be bypassed, deeming a service to be declared would be a preferable approach to mandating an undertaking, and whether options of full and light access regulation of declared services should be available (with providers of declared services subject to full regulation being required to have an access undertaking approved by the ACCC) (Draft Finding 6.1 refers).

1.6 The Council is of the view that further consideration in all of the above areas consistent with the approaches the Council is proposing would further enhance the effectiveness of the Regime. The most critical is the Commission's proposed change to criterion (f) so that the criterion becomes a test of whether declaration is in the public interest. The Commission's proposed change has significant potential to damage the effectiveness of the Regime, including by overturning established precedent. The Council urges the Commission not to proceed with this proposal.

1.7 In addition to the matters above, this submission reiterates some suggestions for improving the operation of the Regime that the Council raised in its earlier submissions which the Commission did not take up in its draft report. Implementing these suggested measures, while not critical to improving the effectiveness of the Regime, would help to improve the Regime's operation. These measures are summarised in chapter 4.

2 Support for the Commission's proposed approach

Amendment of criteria (a) and (f)

2.1 The Council supports the draft recommendation to amend the CCA to specify the test in criterion (a) as a test of whether access (or increased access) on reasonable terms and conditions through declaration would promote a material increase in competition in a dependent market (compared to the level of competition with the existing level of access).

2.2 Adopting this change will require equivalent reform to criterion (f) such that this criterion also involves assessment of the effects of access (or increased access) 'on reasonable terms and conditions through declaration', as the Commission has recognised (PC 2013, p 249). However the Council considers that criterion (f) should not be further amended to require an applicant to establish that access through declaration promotes the public interest or to introduce a 'having regard to' clause (see paragraphs 3.11-3.20 below).

2.3 Specifying the test in criteria (a) and (f) as a test of whether access (or increased access) on reasonable terms and conditions through declaration would promote a material increase in competition in a dependent market is in line with the decisions of the Tribunal in *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2; (2010) ATPR ¶42-319 (***Re Fortescue***) and the Full Federal Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58; (2011) ATPR ¶42-357 and reflects the approach taken by the Council. Amendment of the CCA to confirm this approach will remove uncertainty.

2.4 The Council considers that the intention of the Commission's recommendation is clear, although the legislative amendment to give effect to this should not necessarily adopt the specific words used by the Commission. Legislative drafting requires specific expertise and the Commission should avoid recommending the adoption of particular words. The value added by the Commission is to ensure the intent of recommended changes is clear.

Amendment of criterion (b)

2.5 The Council supports reframing criterion (b) as a test concerned with natural monopoly rather than the test of private profitability it is now, following the decision of the High Court in *The Pilbara Infrastructure Pty Limited v Australian Competition Tribunal* [2012] HCA] 36; (2012) 290 ALR 750 (***Pilbara HCA***). In the Council's view, this is the most important draft recommendation made by the Commission. Confirmation of this recommendation in the Commission's final report and expeditious implementation by the Government is critical to the continued effectiveness of Australia's access regulation arrangements.

2.6 The change recommended by the Commission would ensure that the criterion (b) test focuses on the central policy problem for which access regulation is a potential

remedy: a lack of competition in markets due to the inability to access infrastructure services due to natural monopoly. The recommended amendment would return the assessment to a test that is consistent with the Hilmer Committee's observation that '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' (Hilmer Committee, p 239).

2.7 The Commission's draft report sets out how the natural monopoly test should be applied: in sum it considers that the natural monopoly test should be satisfied where total (foreseeable) market demand could be met at least cost by the (one) facility.

2.8 The Commission considers that the estimate of total market demand should include the demand for the service in question and the demand for substitute services provided by other facilities (which could mean that criterion (b) would preclude the declaration of a service that faces meaningful competition from services provided by other facilities) and that the estimate of costs should encompass coordination costs where such costs are relevant to determining whether a facility can meet total market demand (including specifically the extra costs associated with additional maintenance and reduced operational flexibility including scheduling). The Commission notes that if (relevant) coordination costs are estimated to be high, then it might not be economically feasible to accommodate third party access. This approach is consistent with the Tribunal's view in the Pilbara Rail decision that the costs of operating a rail line on a shared basis are relevant to assessing criterion (b).

2.9 As statements of general principle, the Council has no concern with the Commission's approach. The Council cautions, however, that care will be needed to ensure that estimates of total market demand for a service take account of demand for other services that are genuinely substitutes. It is not the case for example that the service of transporting iron ore by trucks is always a substitute for transporting iron ore by rail. Usually, assessments such as this are best undertaken in consideration of criterion (a). Moreover, if there is a requirement for overly technical estimates of cost elements to support the assessment of criterion (b) that make the assessment impossible in practice, then it may be that a service is wrongly precluded from declaration (or declaration is inappropriately delayed through legal challenges) because of the difficulty in substantiating a challenge to technical estimates of the costs of coordination provided by a service provider. The Council considers that, where it can be established that access results in extraordinary coordination costs such that access would be contrary to the public interest, then the best place to address this is under criterion (f). If coordination costs are to be dealt with in assessing criterion (b), care needs to be taken to ensure the same costs are not double counted in assessing other criteria.

2.10 Further, relevant evidence on some of the coordination and maintenance costs occasioned by access may become available only in the context of an arbitration of a specific access dispute in the 'second stage' of the Part IIIA access process, once the level and nature of the access sought is known. Neither a declaration applicant nor a service provider is likely to have ready access to information about the coordination

or additional maintenance costs associated with giving access to a facility: the service provider, prior to declaration, is unlikely to have had cause to make a detailed forecast of the likely costs of giving access and the applicant is likely to have access to no more than published costs of operating the facility (if any) and its own estimate of the additional costs attributable to giving access. While the Council, in assessing criteria (b) and (f), does consider such material as is provided to it, the scope for lengthy and inconclusive debate on coordination and maintenance costs at the declaration stage should not be underestimated.

2.11 The Council agrees with the Commission that there is no practical benefit in amending the CCA to explicitly recognise situations where a binding physical or regulatory constraint prevents a potential competitor from developing a rival infrastructure facility. Where such constraints present a genuine barrier then a decision maker can take this into account in determining whether a facility is uneconomic to duplicate or in assessing whether access through declaration has an effect on competition in a dependent market. (Where a binding constraint prevents access having any effect on competition it seems unlikely criterion (a) could be satisfied).

2.12 The Commission has recommended that, if the Government does not support a change to the test in criterion (b) (so retaining the private profitability test), the definition of 'anyone' be amended to exclude the incumbent service provider (Draft Recommendation 8.2). The Council supports this draft recommendation. Having the incumbent duplicate, or say it will duplicate, its facility will not promote competition, as the Commission recognises. Notwithstanding this, the Council considers that retention of the private profitability test is highly problematic and should not be supported. The Council agrees with the Commission that the test is 'particularly difficult to apply', with the Council and decision makers having to estimate 'uncertain measures such as costs, process, demand, capacity and required rates of return' (PC 2013, p 163). In most circumstances any key data on these measures will be held by the incumbent service provider and likely difficult for decision makers to obtain and/or verify. The Council agrees, moreover, that determining whether a facility is profitable to duplicate is also problematic. Duplication could, for example, 'have a positive net present value but generate a rate of return that is insufficient to justify investment when ranked alongside alternatives' as the Commission recognises (PC 2013, p 163) and (whether or not the definition of 'anyone' is amended) there is scope for parties to make a case that duplication of a facility that is part of a production chain that is profitable overall is itself also profitable to duplicate when in fact duplication of the facility would be unprofitable because duplication of the facility can be cross-subsidised by the profitable elements of a business.

Amendment of criterion (e)

2.13 The Council supports the Commission's draft recommendation to remove criterion (e) as a criterion for declaration and establish it as a threshold for declaration (Draft Recommendation 8.5). Under such an approach, the Council would be able to reject

an application for declaration where the relevant service is subject to a certified access regime without having to make a detailed assessment against all of the declaration criteria and put the matters to a Minister for decision.

2.14 The establishment of criterion (e) as a threshold for declaration will improve certainty by removing the current ambiguity associated with the possibility that a service subject to a certified access regime may be declared: because there may have been substantial modification to the regime and/or to the Competition Principles Agreement (**CPA**). In the Council's view, this change would considerably reduce administrative costs because the Council (and the designated Minister) would not have to undertake a full assessment of an application for declaration against all of the declaration criteria. It would also likely overcome the apparent concerns of the Australian Energy Market Commission (**AEMC**) regarding certification of Australia's energy access regimes (see paragraph 3.24).

2.15 The Council also supports the establishment of a consequential process for revoking the certification of an access regime where there has been substantial modification to the certified regime and/or to the CPA since the access regime was certified. A potential applicant for the declaration of a service subject to a certified access regime would need to first apply for and have the certification revoked before embarking on any declaration application. The Council considers that, in line with the other processes in Part IIIA, an application for revocation of a certification should be made to the Council, which would make a recommendation to the designated Minister who should decide the application.

Deemed declaration decisions should follow the Council's recommendation

2.16 The Council supports a change to the CCA such that the Minister is deemed to have made a decision in accord with the Council's recommendation and to have adopted the Council's reasons where an affirmative decision is not made within the statutory time limit (Draft Recommendation 9.1). Any aggrieved party affected by such a decision (and not just the access seeker as is the case for a deemed 'no') would then have a basis for assessing the decision and for (potentially) seeking review. As recognised by the Commission, the change would also impose a requirement on a Minister to make an active decision in cases where the Minister does not want to follow a Council recommendation.

2.17 This change is particularly necessary if judicial review is to be effective in relation to declaration decisions and will assist in the resolution of merits review proceedings if these are retained. In the absence of this change, where the Council has recommended in favour of declaration but a deemed 'no' decision results there will be no reasons for the decision on which to base a review.

2.18 The Council also suggests that the Commission recommends the inclusion of a decision time limit and associated deeming provisions in relation to coverage decisions that arise under the NGL. These decisions are directly parallel to declaration

decisions under the National Access Regime but are subject only to best endeavours requirements for timely decision making.

Facility extensions and safeguards for asset owners

2.19 The Council agrees with the Commission that s 44V(2) of the CCA should be amended to confirm the prevailing view that the ACCC has the power to direct capacity expansions (Draft Recommendation 8.7).

2.20 The Tribunal in *Re Fortescue* gave seven reasons (at [715]-[733]) why Part IIIA empowers the ACCC to compel expansion of capacity. One of those was

> that the reference in the preamble [to s 44V(2)] to the ACCC making orders in respect of "any matters relating to access" indicates a legislative intention that the ACCC should have a broad, plenary power to deal with access disputes [and a] narrow reading of "extend" would be inconsistent with this (*Re Fortescue*, [728]).

2.21 It appears to the Council that the Tribunal's view should be the reasonably straightforward and uncontroversial result of applying basic principles of statutory interpretation to the words of the CCA. Section 44V(2) does not confine the matters that may be dealt with in a determination: it is permissive and describes the matters that may be dealt with by the ACCC by giving examples. However, the very existence of this dispute before the Tribunal in *Re Fortescue* shows that it is desirable to put beyond doubt that an ACCC determination may require expansion of capacity of a facility.

2.22 Regarding the rationale for such a power, the Council agrees with the Commission's two reasons (PC 2013, p 134).

- Where capacity is fully used but it would remain uneconomical to develop another facility, a service provider may have incentives to forgo or delay expansion to create scarcity.
- A facility developer may construct a facility with sub-optimal capacity in order to avoid access regulation.

2.23 The Council notes that the incentive and ability to extract monopoly rents or avoid access regulation may arise whether it is uneconomical to develop another facility because demand can be met at least cost by the existing facility or because it would be unprofitable for anyone to develop another facility.

2.24 The Council supports the Commission's draft recommendation that the ACCC develop guidelines (following public consultation) on how it would exercise its power to direct capacity extensions. Noting that the direction of capacity extensions is also relevant for at least one state economic regulator, the Council suggests that the Commission recommend that the ACCC develop the proposed guidelines in conjunction with state and territory economic regulators with similar responsibilities.

2.25 The Council also previously identified an issue regarding the nature of the protections available to infrastructure owners/service providers under an undertaking, which it

considers becomes important as a result of the 'mandating' of undertakings. The Council's concerns are discussed at paragraphs 3.38-3.50.

3 Matters for further consideration

3.1 In this section the Council addresses matters where it considers the Commission should give further consideration to its draft recommendations. In some cases, the Council has identified drawbacks with the Commission's proposed approach and in other cases the Commission has not advocated a pathway forward.

3.2 In the Council's view, the approaches it suggests in this chapter would, if adopted, materially improve the operation of the Regime. The Council has separately listed (in chapter 4) matters that it would like to see in place but which it accepts are not central to improving the operation of the Regime.

Criterion (c): remove size as a benchmark of national significance

3.3 In its earlier submission (NCC 2013, paragraph 4.44), the Council proposed that the size of the facility be removed as a benchmark for national significance. The Council considers that the inclusion of size as a benchmark has the potential to result in undesirable outcomes (where services provided by non-nationally significant facilities are declared that should not have been declared) given the prospect that a court or the Tribunal may interpret the word size to mean 'physically big'.

3.4 The Commission did not take up the Council's suggestion. It noted that no specific problems with the size element in criterion (c) had been identified and, citing the importance of legal precedence, said that it is 'not inclined' to make non-essential changes (PC 2013, p 180).

3.5 Although the size element in criterion (c) has not been agitated before the Tribunal or the courts, the experience of the application for declaration of the services of the Herbert River tramway network demonstrates the uncertainty introduced by the size element. Unlike the constitutional trade and commerce or national economy elements, there is no indication in criterion (c) of what should determine whether a facility is of a nationally significant size. Physical size, value and cost are all potential measures of 'size' and are not necessarily correlated with one another or a facility's contribution to the national economy.

3.6 It is important to note that the significance factors listed in criterion (c) must be considered independently: they are expressed as alternatives. A facility might not be significant in terms of importance to constitutional trade or commerce or the national economy, but criterion (c) might still be satisfied due to the facility's size.

3.7 The applicant in the Herbert River matter argued that the physical size of a facility is determinative and that, as the tramway is greater in total track length than some previously declared railways, it is nationally significant. The Council does not accept that physical size alone is determinative: rather it is something to have regard to in assessing national significance. The Council concluded that, while the tramway 'is "big" in certain dimensions, it is "not big" in others'. The Council on balance was not satisfied that the tramway is of such a size as to be nationally significant (NCC 2010, [7.18]-[7.19]).

3.8 In the event, there was a deemed decision to not declare the service and the applicant did not seek review by the Tribunal. However, had the Minister made a decision and/or the Tribunal reviewed the matter, it is conceivable that a different outcome may have been reached, with the decision as to whether the tramway is 'big enough' to satisfy criterion (c) predicated upon the decision maker's assessment of what test of size should apply. The High Court has indicated that the assessment of national significance directs attention to judgments of a political kind (*Pilbara HCA*, [43]). However, unlike the national economy and constitutional trade and commerce limbs of criterion (c), the indeterminate nature of the size element creates a discretion that is potentially unconstrained. Removal of this source of uncertainty would assist the effective operation of the Regime.

3.9 The Council notes that no precedent regarding the interpretation of criterion (c) would be affected if the criterion is amended as proposed.

3.10 The Council considers that the other elements of this criterion (dealing with importance to constitutional trade and commerce and the national economy) are sufficient to limit declaration to matters of national significance and that retention of a size factor adds nothing while increasing uncertainty in the application of this criterion.

Criterion (f): the existing test should be retained

3.11 The Commission proposes a change to criterion (f) to establish it as an affirmative test that requires 'declaration[6] to promote the public interest' rather than an assessment of whether access (through declaration) is not contrary to the public interest (Draft Recommendation 8.4). The Commission also proposes insertion of 'a having regard to' clause focusing on the effect of declaration on investment in markets for infrastructure services and dependent markets, and compliance and administrative costs (Draft Recommendation 8.4). The Commission considers that the two elements identified should not, however, be an exhaustive list of what constitutes the public interest.

3.12 Under the existing arrangements the Council is required to be affirmatively satisfied in relation to each and every declaration criterion before recommending declaration. If the Council 'does not know' then it cannot be so satisfied. The same applies to Ministerial decisions. As it is now, criterion (f) asks whether the Council (and Minister) is satisfied that access is not contrary to the public interest. It is important to recognise that this question is addressed in the context of (currently) four other declaration criteria. If the Council does not know, then it cannot be satisfied that access is not contrary to the public interest but it can still recommend declaration, but only if the other criteria are met. The criteria operate together to ensure the public interest is advanced.

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[6] Access on reasonable terms and conditions through declaration, consistent with the recommendation to amend criterion (a) (Draft Recommendation 8.3).

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

3.14 The Council considers such an outcome to be inappropriate. The Council's view is that where all the other declaration criteria are met it is only where it can be positively demonstrated that access would be contrary to the public interest that declaration should not be available.[7] Where an application for declaration has satisfied all of the other declaration criteria it should not have to meet a further public interest requirement.

3.15 The Council understands that the Commission intends the change to preclude the declaration of services in 'marginal' cases. However, the Council considers that the prospect of declaration in marginal cases is already extremely low and the change proposed by the Commission is likely to have significant unintended consequences. Reversing the onus as proposed by the Commission would, for example, preclude declaration where the other criteria are met prima facie establishing a benefit from declaration (unless the Council and Minister are also affirmatively satisfied that access is in the public interest).

3.16 The Commission's proposal will overwrite the High Court's comments on the nature of criterion (f): that is, the High Court's comment that criterion (f) involves a broad based 'political' judgement. A positive public interest test seems likely to push towards a cost benefit analysis approach to assessing criterion (f). This may also be a concern in relation to the addition of factors to 'have regard to' in relation to criterion (f).

3.17 The Commission's proposal may also see criterion (f) become an overall decision factor that sweeps in matters that are considered under other criteria rather than standing with the other criteria which together make up an appropriate test for declaration. It is also possible (and will be argued by some) that 'benefits' that arise from other than enhanced competition or efficiency must be counted in criterion (f), although, given each declaration criterion must be satisfied, this should not result in such benefits alone leading to declaration where another of the declaration criteria is not satisfied.

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[7] The Council is concerned that a decision to declare a service made on this basis may not survive challenge if the change proposed by the Commission proceeds. Such a decision would amount to a return to the position prior to amendment of criterion (f). If there has been a deliberate change to the law, then an argument that a service be declared where it meets the declaration criteria and there is no intervening public interest factor that would preclude declaration, may not be accepted by a Court. A Court must assume that an amendment is meant to make a change.

3.18 The Council also does not support the Commission's recommendation to introduce a 'having regard to' clause. Such a clause will encourage an overly formulaic approach to declaration, whereby applicants as a matter of course seek to address all of the 'having regard to' factors whether or not these are particularly relevant to their case. This will add unnecessary complexity: for applicants, service providers, the Council in considering applications and the Minister in making decisions. Under the current construction of criterion (f) it is already open to parties to raise (and for the Council and the Minister to account for) relevant matters (including administrative and compliance costs and effects on investment in infrastructure services and dependent markets).

3.19 The Council is concerned that despite the Commission's express intentions, the factors on the 'having regard to' list will be seen to carry more weight than unlisted factors. Moreover, the non-exhaustive nature of the proposed 'having regard to' list will inevitably see interested parties propose additional factors, some of which are more than likely to be unrelated to the availability of access. What is intended as a reasonably confined list could become a 'grab bag' of issues, adding unnecessary complexity to the declaration process. To the extent that additional guidance on the factors relevant to the consideration of the national interest under criterion (f) is desirable, the Council suggests this is more appropriately and meaningfully addressed in guidelines the Council could be expected to publish.

3.20 The Council asks the Commission to further consider its approach regarding criterion (f). In the Council's view, the current focus of criterion (f)–whereby for an application to succeed it must show that access (declaration) is not contrary to the public interest–is appropriate, and a 'having regard to' clause will introduce unnecessary complexity. With the construction of criterion (f) now satisfactorily settled by the High Court, any change runs a considerable risk of new legal challenge until the jurisprudence is again settled, bringing attendant risks to the effective and timely operation of the Regime.

Certification of energy access regimes is desirable

3.21 In its draft report, the Commission stated that it does not have sufficient evidence that certification of electricity and gas regimes is essential and that its preliminary view is to support removal of the obligation in the Australian Energy Market Agreement to certify the electricity and gas regimes. The Commission sought further views on the costs and benefits of certifying the electricity and gas access regimes, including: (1) the consequences of the potential for declaration of an electricity or gas network if the regimes remain uncertified; (2) the costs and benefits associated with certification of the energy regimes and the effect of applying criterion (e) as a threshold declaration test; and (3) the implications for consistency between the National Access Regime and the gas and electricity regimes (Information Request 6.1).

3.22 The Council acknowledges that the prospect of success of an application for declaration of a service that is subject to the NGL or the National Electricity Law is likely to be low. At the very least, as criterion (f) is currently formulated, there must be some prospect that introducing a second and different regulatory arrangement through declaration would not be 'not contrary to the public interest'. However, there is a potential danger, if the regimes remain uncertified, that an application for the declaration of an electricity or gas infrastructure service might arise at the same time that a significant reform action, such as a restructure and/or privatisation, is taking place. If this did occur, then it would likely impose additional costs by complicating or delaying the reform action.

3.23 As a case in point, Pacific National made a set of applications during the course of the restructure and sale of QR National for the declaration of the services of the Central Queensland Coal Network. Pacific National made these applications in circumstances where the existing Queensland rail access regime was not certified. Regulatory arrangements for rail were eventually resolved after the Queensland Government reformed its rail access regime and subsequently obtained certification of its access regime. Had the Queensland Government not obtained certification then there may have been some prospect of declaration of the state's coal network services (which would then be regulated by the ACCC) alongside the existing uncertified state access regime (regulated by the Queensland Competition Authority). The lesson to be drawn from these events for the energy sector is that uncertainty is likely to be reduced if the energy regimes are certified.

3.24 If criterion (e) is established as threshold test for a declaration application to proceed (as recommended by the Commission) rather than as a criterion for achieving declaration as at present, then the concern regarding certification expressed by the AEMC (PC 2013, p 206) may evaporate. The AEMC considers (mistakenly in the view of the Council) that the frequent changes to the energy regimes in response to rule changes, together with the lack of clarity as to what level of change constitutes significant modification of a regime, will mean that the regulatory schemes may need to be recertified following rule changes if they are to continue to provide protection from declaration, and that certification may require both the Council and the AEMC to consider each rule change so duplicating processes and delaying rule changes. However, if changes in regulatory arrangements following rule changes are at most the subject of an application for the revocation of the certification of a certified regime (and that revocation would need to occur before any application for declaration could be made), the AEMC should have significantly less concern about any requirement for renewing the certification of the gas and electricity access regimes.

3.25 The Council welcomes the Commission's draft view that it is not appropriate to deem the energy regimes to be certified or to exempt them from the Regime. It supports the Commission's reasoning that such an approach could set an unwelcome precedent for exempting other infrastructure services and would remove the

potential for the declaration of services provided by gas or electricity infrastructure if in the future such declaration is expected to have a net benefit.

3.26 In the Council's view, general consistency in the principles underpinning access regulation is desirable, particularly where businesses have involvement in a number of infrastructure areas. The failure by governments to obtain certification of (most) energy regimes does not encourage this consistency. At present the access regime in the NGL and the Regime diverge in at least two significant areas.

- Various amendments to Part IIIA have resulted in refinement of the declaration criteria. Equivalent changes to the coverage criteria in the NGL have not been made and, as recently as 31 May 2013 when the Standing Council on Energy and Resources (**SCER**) last met, do not appear to be contemplated (SCER 2013a).
- Arrangements for review of decisions are different: the merits review process available under the NGL has been closely specified since enactment (particularly in terms of the information that the Tribunal may consider) whereas following the *Pilbara HCA* decision the information that the Tribunal may consider is limited to that considered by the decision-making Minister.[8]

3.27 The Council agrees with the Commission's general view that there is merit in state and territory access regimes being certified. The Council's view is that this general view is also relevant in the case of the gas and electricity regimes. The Council advocates retention of the current obligation for the energy regimes to be certified.

The principles underpinning certification warrant revision

3.28 In its earlier submission the Council suggested that the language in clause 6 of the CPA be aligned to that of the criteria for declaration where there are clear parallels.

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[8] The SCER is undertaking work on the merits review framework for the energy sector. It proposes amendment of the NGL and the National Electricity Law such that merits review will require: (1) an applicant to demonstrate that the original decision-maker made an error of fact, an incorrect exercise of discretion or was unreasonable in its original decision and also make a prima facie case that addressing this would lead to a materially preferable outcome in the long term interests of consumers; and (2) the Tribunal to assess whether, taking into account any interlinked matters, addressing the grounds and the interlinked matters would deliver a materially preferable outcome (in the context of the overall decision) in the long term interests of consumers, as set out in the National Electricity Objective or National Gas Objective (SCER 2013b). It is unclear whether the SCER is taking into account the nature of merits review under the National Access Regime following *Pilbara HCA*. If the proposed changes to merits review under the NGL are applied to coverage decisions, then those processes will diverge further from the processes for review of the parallel declaration decisions under the National Access Regime. In the Council's view this is confusing and is likely to significantly diminish the precedential value of review decisions in relation to each type of decision for the other.

The Council noted that in the litigation concerning the Pilbara Rail proceedings in the Tribunal, Full Federal Court and the High Court, there was much made of differences in the wording of criterion (b) and (the 'equivalent') clause 6(3)(a)(i) of the CPA. It is also the case that the safe use of a facility by a person seeking access, which is the subject of clause 6(3)(a)(iii) of the CPA, is no longer a criterion for declaration.

3.29 The Council also advocated rationalisation of the principles for certification in clause 6(4) of the CPA, noting that the clause contains numerous overlapping and apparently conflicting principles. Rationalisation would likely be advantageous for all parties, particularly state and territory governments considering establishing access regimes and/or seeking certification of access regimes. (The Council assesses applications for certification using a streamlined approach under which it considers 'related' principles conjointly so undertakes its own 'rationalisation'.)

3.30 Conjointly with its recommendations to amend the declaration criteria, the Commission advocated that the Council of Australian Governments consider amending the principles in clause 6(3) of the CPA to align with Part IIIA (Draft Recommendation 8.6). In making this suggestion, the Commission acknowledged the time and effort required to update the CPA given that any changes would require the agreement of all states and territories and the Australian Government (PC 2013, p 205). The Commission did not take up the Council's suggestion that clause 6(4) be amended, noting that a smaller number of principles could impose just as significant a burden as the current list.

3.31 The Council accepts that changes to the CPA would likely involve time and effort and, moreover, that their status as guidelines means that updating (and the streamlining proposed by the Council) while desirable may not be essential. Nevertheless the Council sees benefit in minimising opportunities for unwarranted inconsistency in regulatory outcomes and in simplifying the task for governments wishing to develop access regimes and have those regimes certified.

3.32 The Council considers that the Commission should strengthen its recommendation that governments align the language of clause 6(3) and that of Part IIIA, and ideally support the streamlining of clause 6(4). An alternative to amending clause 6(3) of the CPA would be to amend s 44M(4) of the CCA and the related s 44N(2) of the CCA such that the Council in making a recommendation and the Commonwealth Minister in making a decision under s 44N must have regard to the relevant declaration criteria (other than criterion (c)).

Judicial review is preferable to limited merits review

3.33 In its earlier submissions the Council advocated the replacement of merits review of declaration decisions by the Tribunal with judicial review. The Council considers that judicial review provides an appropriate level of oversight for declaration decisions, which are properly viewed as akin to policy determinations by Ministers. The Council also considers that there is benefit in applying the generally applicable processes and standards for review available through judicial review, and the associated

jurisprudence, in preference to a scheme for merits review that applies only to some decisions under the CCA.

3.34 The preliminary view of the Commission is that merits review, following previous amendments to the CCA and the Pilbara HCA decision, will likely be more confined and the process shorter than it has been in the past. The Commission considers on balance that the process following the *Pilbara HCA* decision 'will provide for an appropriate form of limited merits review that should contribute to sound decision making' (Draft Finding 9.1).

3.35 The Council is not as confident as the Commission as to the nature of the merits review process following the *Pilbara HCA* judgment. It considers that the processes involved in conducting merits reviews following the judgment are not certain: it is unclear for example whether now there is the opportunity for cross examination of witnesses. In addition, there is uncertainty as to the range of evidence that the Tribunal is able to consider. Extensive new evidence and arguments to the Tribunal look to be precluded. However, clarity as to the evidence a Minister has considered in reaching his/her decision on a particular matter would assist the review process. The NGL for example specifies the information that is to be considered by the Tribunal in reviewing Ministers' decisions.

3.36 If the Commission is proposing to confirm its draft report view, then the Council asks that it set out what it sees as the process of merits review by the Tribunal following the *Pilbara HCA* judgment. If upon review the Commission considers that the process is not sufficiently certain, then the Council urges it to specify what it considers is an 'appropriate form of limited merits review that will contribute to sound decision making'. If the Commission takes the latter approach then the Council suggests that it consider a model generally along the lines of that in the NGL.

3.37 Notwithstanding this, the Council does not consider that merits review should be retained for the review of declaration decisions. The Council reiterates its support for reliance on judicial review (for the reasons outlines in its earlier submissions) rather than to attempt to redraw specific merits review arrangements.

Bypassing the declaration process

3.38 Part IIIA provides two principal routes to regulation of third party access to infrastructure facilities: declaration of a service and the provision of access undertakings by a service provider. Declaration engages a negotiate/arbitrate regime whereby the ACCC determines access disputes where parties are unable to reach commercial agreement on access terms and conditions. Provision of an access undertaking allows the ACCC to approve access terms and conditions and prevents the declaration of the services to which an approved undertaking applies.

3.39 Declaration involves compulsion in that it imposes regulated access whereas access undertakings are a means of voluntarily giving access (and having the terms for doing so approved by the ACCC, enabling service providers to avoid the risk of declaration). In recent times, however, access obligations have been imposed by requiring service

providers to give an access undertaking mandated by statute (for example, the operators of a number of port grain handling facilities were required to provide and have access undertakings approved by the ACCC on penalty of losing their grain exporting licences) or by the ACCC requiring access be given as a condition of agreeing not to challenge a proposed merger or authorising conduct that might otherwise be at risk under the CCA (for example, Toll gave an undertaking that Pacific National would make available train paths, locomotives and wagons, terminals and ancillary services in order to facilitate further entry in the east-west rail line-haul market). In effect, the ability for access undertakings to be offered has more often than not been used as the mechanism to mandate third party access, so bypassing the mechanism for declaring services. The requirement for mandatory undertakings has significantly enlarged the scope of access regulation.

3.40 Where third party access to services is compelled (ie, where the declaration process has confirmed that the relevant criteria are satisfied and the commercial parties remain unable to agree access terms and conditions) the terms and conditions on which such access may be required are circumscribed by a range of safeguards which limit the regulators powers when arbitrating an access dispute (s 44W of the CCA). Most relevantly, the ACCC is precluded from making a final determination that:

- prevents an existing user obtaining a sufficient amount of the service to be able to meet the user's reasonably anticipated requirements
- results in a third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider, or
- requires the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility.[9]

3.41 The approval of an access undertaking is subject to significantly less circumscription. None of the requirements listed in paragraph 3.40 above applies to the approval of an access undertaking. The constraints in respect of an undertaking are much more general (see s 44ZZA of the CCA). This may be appropriate where an access undertaking is volunteered, and an undertaking can be withdrawn at any time prior to approval. Where an undertaking is voluntary and a regulator seeks to include unacceptable additional requirements to approve the undertaking, a service provider can always withdraw it and risk declaration—in which case the additional safeguards will apply.

3.42 Of course, the situation is different where a service provider is required to provide an undertaking and must gain a regulator's approval.

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[9] Parallel requirements apply to access determinations made by the AER under the NGL including when the AER is considering pipeline access undertakings (see NGL s 188 and National Gas Rules r118).

3.43 In the Council's view it seems anomalous that there are fewer safeguards and reduced constraints on a regulator where third party access is mandated by way of an undertaking than there is where a service is declared.

3.44 In the Council's view any mandating of third party access should follow declaration of the relevant service. It is neither necessary nor desirable to bypass the declaration process. The Council understands that the Commission generally agrees with this view. The declaration process, particularly the requirement that each of the declaration criteria be satisfied, provides reasonable certainty that access regulation is necessary and desirable. Where this process is bypassed it cannot be assumed that access regulation meets either requirement.

3.45 If in a particular circumstance the declaration process is to be bypassed the Council is concerned that mandating the provision of an access undertaking is a more undesirable mechanism for achieving this result than statutorily deeming a service to be declared. At least where a service is deemed to be declared, safeguards to balance the interest of service providers and access seekers apply and the regulator's powers are appropriately circumscribed. Declarations are also subject to administrative revocation processes, whereas, unless subject to a sunset provision, a statutory requirement mandating access undertakings will endure until repealed.

3.46 The Council accepts that it may be necessary in some circumstances to limit the application of the safeguards that prescribe the regulator's determination of access disputes to allow competition in a dependent market. In particular, it may be that to foster competition in a dependent market a service provider's use of its facility must be curtailed and a service in effect made a 'common carriage' service where all users including the provider have equal access.

3.47 In an earlier submission the Council proposed the introduction of an additional form of regulation for declared services alongside the negotiate/arbitrate process (NCC 2013, [4.27]-[4.29]). The Council proposed a 'full regulation' form of regulation requiring the provider of a declared service to have pre-approved access terms and conditions. This form of regulation would provide additional flexibility in determining access to declared services. It might also be appropriate that the approval of terms and conditions under full regulation (at least in some situations) be subject to fewer constraints than arbitration of access disputes generally.

3.48 The Commission did not support the introduction of a fuller form of regulation, noting the limited number of declaration decisions to date, a lack of clarity as to how often full regulation would apply, what safeguards would be available for service providers and the disadvantages that would arise if inter-partes negotiation is supplanted by regulatory intervention (PC 2013, p 130).

3.49 While acknowledging the Commission's views, the Council reiterates that there can be advantages in having the ability to impose full regulation involving an ex ante approved undertaking. While full regulation would supplant opportunities for negotiation between parties, it may in practice reduce regulatory costs. This is because the *inter-partes* nature of the negotiation process and the prospect of

multiple and complex disputes will mean that multiple negotiations are sometimes necessary. In these circumstances, a more prescriptive approach may, by reducing the need for multiple and complicated negotiations, reduce the costs of access regulation. Importantly, the outcome where a declared service is 'fully regulated', while similar to that where an undertaking is mandated, would address the concern regarding service provider safeguards and constraints on the regulator discussed above.

3.50 If a fuller form of regulation is available for declared services, then it should be applied only following a considered declaration process. Current arrangements following declaration, whereby there is *inter-partes* negotiation with recourse to arbitration, should remain the default. The NGL provision for light and full regulation options in respect of covered pipelines provides a reasonable model for such an approach.

4 Other matters

4.1 In this chapter the Council lists a range of matters that it raised in its earlier submissions that the Commission either did not take up or did not address. The Council considers that implementation of these suggestions as appropriate would improve the operation of the Regime. The Council would welcome the Commission giving them further consideration.

Table 4.1: Remaining matters

Council proposal	Council objective	Commission view	Council comments
Ineligibility decisions: flexible periods	Flexibility could make these recommendations more available and help avoid inappropriately lengthy ineligibility periods.	Proposes no change to arrangements governing ineligibility on ground that the current measure is important for certainty	As in the case of declaration decisions, it is open to applicants and respondents to make submissions as to what period is necessary to provide the certainty necessary to encourage investment. If ineligibility is granted for a shorter period, the service provider is able to reapply if a further period of ineligibility is required. Alternatively, consideration should be given to introducing a mechanism for access seekers to apply for revocation of ineligibility decisions.
Declaration decisions by Commonwealth Ministers only	There is a conflict of interest in the service provider (ie state or territory minister) deciding whether a service should be declared. State and territory governments can exclude declaration by implementing an access regime and having it certified or providing an access undertaking to the ACCC.	Not addressed directly but said state and territory ministers should maintain their current responsibilities.	The Council reiterates its view that the conflict of interest in having state and territory ministers make declaration decisions about state or territory owned infrastructure is undesirable and in any case unnecessary since there are other means by which declaration can be avoided.

Table 4.1 cont

Council proposal	Council objective	Commission view	Council comments
Statutory role for the Council before the Tribunal	Providing the Council with a statutory role before the Tribunal and, to the extent possible, the courts would address the costs and delay arising from any challenges to its involvement in such access matters.	Not addressed	This is a straightforward amendment that would reduce the scope for unnecessary procedural disputes and would impose no additional burden on parties to access matters. Unless made within a package of amendments such as may arise in response to the Commission's current review, a minor amendment of this type may be overlooked until the problem has arisen.
Explicit support to legislate to improve the flexibility of the Council's quorum arrangements	Councillors are part-time appointees with other business and community roles. There is a significant prospect that the current quorum arrangements could affect the ability of the Council to make a decision on a particular matter.	Notes there may be benefit in the Government acting to address certain operational issues including the flexibility of the Council's quorum arrangements but no explicit recommendation	The risk remains that the Council will be unable to form a quorum. The package of amendments that may arise in response to the Commission's current review is the best opportunity to address this problem before it arises.

5 References

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