Law Council
OF AUSTRALIA

Business Law Section

Timeliness of processes under the National Access Regime

Treasury

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About the Business Law Section of the Law Council of Australia

The Business Law Section was established in August 1980 by the Law Council of Australia with jurisdiction in all matters pertaining to business law. It is governed by a set of by-laws adopted by the Law Council and the members of the Section. The Business Law Section conducts itself as a section of the Law Council of Australia Limited.

The Business Law Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, as well as enhance their professional skills.

The Law Council of Australia Limited itself is a representative body with its members being:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Operating as a section of the Law Council, the Business Law Section is often called upon to make or assist in making submissions for the Law Council in areas of business law applicable on a national basis.

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- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee
- Taxation Law Committee
- Technology in Mergers & Acquisitions Working Group

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- Mr Greg Rodgers, Chair
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- Ms Caroline Coops

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

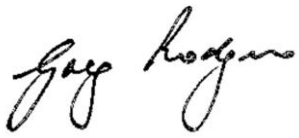
For Further Information

This submission has been prepared by the Competition & Consumer Committee of the Business Law Section.

The Section would be pleased to discuss any aspect of this submission.

Any queries can be directed to the chair of the Committee Jacqueline Downes at Jacqueline.Downes@allens.com.au,

With compliments



Greg Rodgers
Chair, Business Law Section

Executive Summary

Introduction

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Committee**) welcomes the opportunity to comment on the issues raised in the Treasury's consultation paper in relation to the timeliness of processes under the National Access Regime (**NAR**) in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) (**Consultation Paper**).

2. The Committee's comments are limited to the issues raised in the Consultation Paper, and Divisions 1 and 8 of Part IIIA (to the extent that they are relevant to Divisions 2 and 3).

3. The Committee thanks the Treasury for its consideration of this submission.

Summary

4. The Committee considers that a broader review into the operation and efficacy of the NAR in Part IIIA of the CCA might be warranted, having regard to the experiences of access seekers and access providers to date under the NAR (including the examples cited in the Consultation Paper) since the regime was enacted over 25 years ago.

5. While the timeliness of processes under the NAR can, and should, be improved so as to promote the efficient operation of, use of, investment in infrastructure of national significance by which services are provided, timeliness is not the only issue and a broader review might assist in developing a more workable framework.

6. The Committee's position on each of the reform proposals outlined in the Consultation Paper are summarised below.

Option 1 and Option 2

7. The Committee does not support the proposed repeal of merits review by the Australian Competition Tribunal (**Tribunal**) of declaration decisions of the designated Minister (Option 1), and of arbitration determinations of the Australian Competition and Consumer Commission (**ACCC**) (Option 2).

8. 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. The generic nature of the NAR (in contrast to other access regimes), its application to infrastructure of national significance and the need for decision makers to exercise considerable judgment on complex matters of economics, law and fact, strongly favour the ability of access seekers and access providers to seek review of the merits of NAR decisions.

9. The Committee does not see any principled basis for removing the role of the Tribunal, or the availability of merits review, in relation to decisions under the NAR.

Option 3

10. The Committee considers that there is some merit in further reforms to shorten the time limits for certain processes under the NAR. In relation to reviews of access determinations by the Tribunal, previous amendments to Part IIIA which fixed the time for merits review proceedings (subject to "clock stopping" provisions) appeared to have improved the timeliness of re-arbitrations. Recent experiences in the Tribunal suggest that the 180-day time limit is the minimum period within which complex Part IIIA arbitrations may occur.

11. However, the Committee believes that the timeliness of other decisions under the NAR could be improved, having regard to the experience of other access regimes (which, while allowing for some extensions by way of "clock stopping", set a statutory maximum decision period) and the potential for a more expeditious approach to the arbitration of disputes to achieve efficiency gains.

Option 4 and Option 5

12. The Committee supports the introduction of a "material change in circumstances" threshold for applications for declaration following a decision not to declare a particular service (Option 4), and for applications for revocation of declaration following a decision to declare the service (Option 5).

13. The ability for repeated applications for declaration or revocation in respect of the same service is contrary to the fundamental objects of the NAR and the common law doctrine of res judicata. It also involves a considerable expense of Commonwealth and private resources by access providers, applicants, decision makers, the Tribunal and courts. Although the criterion may well be the subject of court proceedings in the short to medium term, judicial interpretation of the threshold will provide increased certainty for parties and practitioners, and promote efficient NAR processes in the long run.

Option 6

14. Members of the Committee differ as to the proposal for arbitration proceedings and determinations under the NAR to terminate if the declaration of the relevant infrastructure service is revoked.

15. The Committee encourages the Treasury to evaluate the merits of reform option 6 - as well as each of the other reforms proposed in the Consultation Paper - by reference to the objectives of the NAR. These are discussed further in this submission.

The National Access Regime

Background to Part IIIA

16. The NAR was introduced as Part IIIA to the *Trade Practices Act 1974* (Cth) (**TPA**) in 1995 "*to establish a legal regime to facilitate third parties obtaining access to the services of certain essential facilities of national significance*". The NAR was a key recommendation of the *National Competition Policy Review* chaired by Professor Frederick Hilmer (**Hilmer Committee**). The Hilmer Committee proposed the establishment of a legal regime "under which firms could be given a right of access to essential facilities when the provision of such a right meets certain public interest criteria".[1]

17. The NAR is intended to address the potentially negative consequences for competition in up and downstream markets in the circumstances of natural monopoly infrastructure. The Hilmer Committee described the "essential facilities problem" giving rise to the need for regulated access to certain infrastructure of national significance:

> *Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term "natural monopoly", electricity transmission grids, telecommunication networks, rail tracks, major pipelines, ports and airports are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus "essential facilities" in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets.*

18. The Hilmer Committee recommended that concerns over access to such essential facilities be dealt with under a new legal regime that created a right of access on terms determined by an arbitral body in circumstances where commercial negotiations have not been successful.

19. The object of the NAR as envisaged by the Hilmer Committee was to "*provide a mechanism that will support competitive market outcomes by protecting the interests of potential new entrants while ensuring the owner of the natural monopoly element is not unduly disadvantaged*".

20. In April 1995, the Commonwealth and State and Territory Governments committed to legislating a NAR in response to the recommendations of the Hilmer Committee. That commitment was met by the introduction of Part IIIA of the TPA in 1995. The Second Reading Speech to the Competition Policy Reform Bill 1995 explained the legislative intent behind the NAR:

> *The notion underlying the regime is that access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets, such as electricity generation or gas production. Access to such facilities can be achieved if a person seeking access is successful in having the service "declared" and then negotiates access with the service provider.*

[1] Frederick G Hilmer, Mark Rayner and Geoffrey Taperell, 'National Competition Policy Review' (25 August 1993) <http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf> 239.

Objects of the NAR and history of amendments

21. As the Consultation Paper observes, "*the NAR exists to promote the economically efficient operation of and investment in infrastructure*".[2] The statutory objects of the NAR in Part IIIA are to:[3]

    (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and

    (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

22. Since its enactment in 1995, Part IIIA has been the subject of 16 legislative amendments. In particular, the timeliness of processes under the NAR have previously prompted amendments to Part IIIA, including in 2010 and 2017. The issues raised in the Consultation Paper suggest that these reforms have not achieved their legislative purpose to promote efficiency gains and regulatory certainty for Part IIIA processes. A summary of the amendments to Part IIIA of the TPA/CCA is provided at **Annexure A**.

23. The *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) (**2010 Amendment**) gave effect to the Council of Australian Governments' *Competition and Infrastructure Reform Agreement* and introduced other measures designed to streamline administrative processes under the NAR. The Explanatory Memorandum to the 2010 Amendment echoed many of the concerns expressed in the Consultation Paper:[4]

    > *Delays in decision-making under the National Access Regime have been a significant concern to infrastructure owners, access seekers and regulators alike. Since the introduction of Part IIIA in 1995, average decision-making times have been considerably longer than what is reasonable given the complexity of the decisions.*

24. The principal amendments enacted by the 2010 Amendments were the introduction of the time limits within which the NCC, designated Minister, ACCC and Tribunal are to make certain recommendations or (review) decisions under the NAR; and to limit merits review before the Tribunal to material considered by the original decision maker. These amendments are discussed further in the context of reform options 1-3 below.

25. The *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth) (**2017 Amendment**) enacted amendments to the declaration criteria in s 44CA of the CCA, in response to reviews by the Productivity Commission in 2001 and 2013, and then by the Harper Review in 2015, as to whether the declaration criteria were achieving the objectives of the NAR. The 2017 Amendment also modified the deeming provision in s 44H(9) such that, where the designated Minister does not make a declaration decision within the 60-day period, s/he is deemed to make a decision in accordance with the recommendation of the NCC (rather than being taken not to declare the service).

26. The Committee submits that any proposed reforms to Part IIIA should be assessed in the context of the statutory objects of the provisions, and by the extent to which the legislative objectives for the NAR are served by the proposed reforms.

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[2] Australian Government, Treasury, 'Timeliness of processes under the National Access Regime: Consultation Paper' (March 2021) 2.
[3] *Competition and Consumer Act 2010* (Cth) s 44AA.
[4] Explanatory Memorandum, *Trade Practices Amendment (Infrastructure Access) Bill 2009* (Cth) [1.2].

Merits review

27. Merits review is available under Part IIIA of the CCA for declaration decisions of the designated Minister, and for arbitration determinations of the ACCC. In each case, the Tribunal is the relevant review body.

28. Merits review enables a person aggrieved by the administrative action of the designated Minister or the ACCC reviewed on its merits, or to challenge a finding of fact. In general, merits review is the process by which a person or body:[5]

    (a) other than the primary decision maker;

    (b) reconsiders the facts, law and policy aspects of the original decision; and

    (c) determines what is the correct and preferable decision.

29. On review, the Tribunal stands in the shoes of the original decision maker, and exercises the powers of that decision maker. The result of the review is the affirmation, variation or setting aside of the original decision.

Box 1 - The objectives of merits review (Administrative Review Council, 1999)[6]

The principal objective of merits review is to ensure that administrative decisions are:

- ***correct*** - in the sense that they are made according to law; and
- ***preferable*** - in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.

This objective is directed to ensuring fair treatment of all persons affected by a decision.

Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.

30. The Committee believes that the existing rights of limited merits review under the NAR should be retained, having regard to the general (rather than industry-specific) scope of the access regime in Part IIIA, and the significant effect that declaration and arbitration decisions have on the rights and obligations of both access seekers and access providers.

31. However, the Committee considers that there is some merit in reforms to the consideration period within which review proceedings and decisions are to be made under the NAR to improve the timeliness of the declaration and arbitration process.

[5] Administrative Review Council, 'What decisions should be subject to merit review?' (1999) <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999> [1.1].
[6] Administrative Review Council, 'What decisions should be subject to merit review?' (1999) <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999> [1.3]-[1.5].

Option 1 - Repeal of merits review of declaration decisions

32. The Committee does not support reform option 1 to remove entirely the ability for parties to seek merits review of the designated Minister's decision on declaration by the Tribunal.

33. Declaration under the NAR gives rise to an enforceable right of access to a nominated service or facility. The decision as to whether to grant such rights of access requires an evaluation of important economic and public interest considerations according to the statutory criteria for declaration, being:

(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service; and

(b) that the facility that is used (or will be used) to provide the service could meet the total foreseeable demand in the market:

(i) over the period for which the service would be declared; and

(ii) at the least cost compared to any two or more facilities (which could include the first-mentioned facility); and

(c) that the facility is of national significance, having regard to:

(i) the size of the facility; or

(ii) the importance of the facility to constitutional trade or commerce; or

(iii) the importance of the facility to the national economy; and

(d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

34. The Hilmer Committee did not envisage a role for merits review of access decisions, noting that arbitration determinations "*would be binding and appeals would be limited to matters of law*". It considered that "[a]s *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*".

35. However, the Committee believes that declaration decisions are not in the category of policy decisions of a high political content so as to fall within the exception from merits review for issues of the highest consequence to the Government.[7] That the decision is made by a designated Minister of the Commonwealth is not, of itself, determinative of whether merits review of the decision is appropriate. Focus should be given to the content of the decision, not the identity of the decision maker.

36. Merits review provides the only means to correct decisions made by an administrative decision maker on the basis of incorrect facts. Judicial review rarely allows for factual errors (other than jurisdictional errors) in decisions to be revisited or corrected. The court's concern in judicial review proceedings is limited to whether the legal framework for decision-making was observed, and whether the law was properly

[7] Administrative Review Council, 'What decisions should be subject to merit review?' (1999) <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999> [4.2].

understood and applied by the decision-making in making the decision.[8] As the Full Court of the Federal Court has recently observed:[9]

> *Matters of fact and contextual economic analysis are for the Tribunal. As has been observed previously in a number of decisions in which review has been sought of a Tribunal decision under Part IIIA, it is not this Court's function to resolve the difficult and complex matters of judgment the Tribunal may be called upon to resolve…but is rather to ensure the decision of the Tribunal accords with the law*.

37. The decision to declare a service affects the interests of individuals (namely, the facility owner/operator and access seekers). It is not a legislative decision of broad application (which is subject to the accountability safeguards that apply to legislative decisions), or a decision that automatically follows from the happening of a set of circumstances (which leaves no room for merits review to operate).[10] It is therefore not, by its nature, a decision that is unsuitable for review on the merits.

38. Although the decision of the designated Minister follows the rigorous and independent assessment of the expert National Competition Council (**NCC**) (which includes draft and final recommendations to the Minister, on which interested parties may make submissions during the NCC's consideration period), the decision to declare a service is within the sole discretion of the Minister. The designated Minister may either adopt the recommendations of the NCC, reach a different decision to the NCC, or decline to make any decision (in which case the Minister is deemed to accept the recommendation of the NCC). Indeed, the Hilmer Committee itself recognised that "*the existence of a broad discretionary regime may create pressures on the Minister to declare an essential facility to advance private interests*". The provision for independent merits review by the Tribunal provides a necessary and important layer of oversight within the declaration process, and promotes confidence in the independence of administrative decision making and any apprehended bias.

39. The Tribunal is a specialist review body constituted with judicial and lay members having knowledge of or experience in industry, commerce, economics, law or public administration. The Tribunal is uniquely competent to deal with the complex legal, economic and factual matters that arise from declaration applications and the application of the criteria in s 44CA.

40. Merits review by the specialist Tribunal promotes certainty and consistency in regulatory decision making. The jurisprudence of the Tribunal in its review decisions provide a framework and guiding principles to encourage a consistent approach to access regulation - consistent with the object in s 44AA(b). As the Consultation Paper notes, merits review "*imposes a discipline on original decision-makers to ensure their decisions are reasonable, and based on sound economic principles and an accurate understanding of the relevant facts*".

41. The Consultation Paper observes that parties have frequently exercised their right to merits review by the Tribunal of declaration and arbitration decisions. Indeed, of the 18 applications for declaration, or revocation of declaration, to the NCC since the enactment of Part IIIA, 10 have been the subject of merits review to the Tribunal - and in 6 (60%) of those cases, the Tribunal has reached an alternative conclusion to that

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[8] *Glencore Coal Assets Australia Pty Ltd v Australian Competition Tribunal* [2020] FCAFC 145, [5].
[9] Ibid, citing *Australian Energy Regulator v Australian Competition Tribunal (No 2)* (2017) 255 FCR 274 at 293 [44], 309 [133].
[10] Administrative Review Council, 'What decisions should be subject to merit review?' (1999) <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999> [3.1].

of the designated Minister.[11] A summary of merits review proceedings of declaration decisions is at **Annexure B**.

42. The review of decisions under Part IIIA by the Tribunal is a limited (rather than *de novo*) merits review, following the amendments to the NAR enacted by the 2010 Amendment. The Tribunal is limited on review to the information that was before the original decision maker. The Tribunal may only seek additional information in two circumstances:

(a) for the purposes of clarifying information that was before the original decision maker; and

(b) from the ACCC or NCC in their role of assisting the Tribunal.

43. The limited merits review enacted by the 2010 Amendment was in response to concerns raised by interested parties about the ability in a review to provide additional information to the Tribunal that had not been provided to the original decision maker in her/his deliberations. The limited extent to which the power of the Tribunal to request new and further information not before the original decision maker suggests that the object of the 2010 Amendment to improve the timeliness of merits review proceedings under the NAR is being fulfilled. The Tribunal has only once contemplated the issue of a notice to produce new information on review, and declined to allow the material to be adduced.[12]

44. Although there is limited or no availability of merits review for declaration or similar administrative decisions under other access regimes, the declaration process under Part IIIA, as a general access regime of wide import, is distinguishable:

(a) **Telecommunications access regime** - Part XIC of the CCA provides a dedicated access regime for eligible telecommunications services (which are excluded from the NAR to the extent that Part XIC applies to them). Unlike the process under the NAR, where a person may apply to the NCC to recommend declaration to the designated Minister, the decision maker under Part XIC is the ACCC, which may propose to declare a telecommunications service on its own initiative, or at the request of any person. If the ACCC proposes to declare a telecommunications service, it must hold a public inquiry in accordance with Part 25 of the *Telecommunications Act 1997* (Cth), and publish a report about the inquiry, before declaring the service.[13] The inquiry process is required to run for 180 days.

A public inquiry under Part 25 differs significantly from the recommendation process of the NCC under the NAR. For example, the ACCC may hold public hearings for the purpose of an inquiry, and may adopt the findings of previous inquiries for the purpose of the declaration decision. Further, an inquiry about a proposal to declare a telecommunication service may be held by the ACCC at its own initiative, or if requested by a person.[14]

There are no declaration criteria per se which must be satisfied in order for the relevant telecommunications service to be declared. The ACCC need only be satisfied that declaration will promote the long-term interests of end-users (as defined in s 152AB).[15]

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[11] National Competition Council, 'Past applications' <https://ncc.gov.au/applications-past/past_applications>.
[12] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 [71]-[116].
[13] CCA s 152AL
[14] CCA s 152AM.
[15] CCA ss 152AB(2), 152AL; *Telstra Corporation Ltd v Australian Competition Tribunal* (2009) 175 FCR 201.

(b) **National Gas Rules** - The National Gas Rules (**NGR**) set out a negotiate-arbitrate regulatory model for "scheme" and "non-scheme" pipelines:

(i) *scheme pipelines* - Any person may apply to the NCC for "coverage" of a particular pipeline under the NGL. The NCC will assess whether access to a pipeline satisfied the coverage criteria (which broadly mirror the declaration criteria under the NAR). If so, the NCC can recommend to the jurisdictional Minister that the pipeline be covered under Parts 8-12 of the NGR.

(ii) *non-scheme pipelines* - Other gas pipelines which provide third-party access are subject to Part 23 of the NGR as "non-scheme" pipelines, which includes an arbitration framework for users of these pipelines to resolve disputes with pipeline operators.

45. These and other industry-specific regimes (including State-based access regimes) differ in a number of ways to Part IIIA, including in view of the objectives of the legislation and the roles of decision makers and regulators. For example, the national electricity and gas laws have a stated efficiency objective, as well as an objective to provide services "for the long-term interests of consumers" which does not appear in the NAR.

46. The Committee submits that the NAR is distinguishable from other industry-specific access regimes, having regard to the negotiate-arbitrate model in Part IIIA which does not underpin other regimes, and breadth of facilities to which the NAR can apply.

Option 2 - Repeal of merits review of arbitration determinations

47. For reasons similar to its opposition to option 1, the Committee does not support reform option 2 to remove the ability for parties to seek merits review of ACCC arbitration determinations by the Tribunal.

48. Subject to merits review before the Tribunal, arbitration determinations of the ACCC are binding on the provider, the access seeker and other persons accepted as having a sufficient interest.[16] The price and non-price terms of access which may be fixed by a determination are broad, and can include:[17]

(a) requiring the provider to provide access to the service;

(b) requiring the access seeker to accept, and pay for, access to the service;

(c) specifying the terms and conditions of the access seeker's access to the service;

(d) requiring the provider to extend the facility;

(e) requiring the provider to permit interconnection to the facility; and/or

(f) specifying the extent to which the determination overrides an earlier determination relating to access to the service by the access seeker.

49. The arbitration process is determinative of various proprietary, economic and other legal rights of the parties. Arbitration determinations can and do have a significant effect on the use of, operation of and investment in infrastructure facilities, and consequently, effects on the competitive process in upstream and downstream markets.

[16] CCA s 44U.
[17] CCA s 44V(2)

50. The non-exhaustive matters to be taken into account by the ACCC are provided in s 44X, which demand inquiry into, and investigation of, complex matters of economics, law and fact, including:

(a) the objects of Part IIIA;

(b) the legitimate business interests of the provider, and the provider's investment in the facility;

(c) the public interest, including the public interest in having competition in markets;

(d) the interests of all persons who have rights to use the service;

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

(f) the pricing principles in s 44ZZCA.

51. As a general principle, decisions that are made by an expert body, or that require specialist expertise, should be reviewable on the merits. In the normal course, if an expert external opinion is provided to a decision maker in the process of making a decision, and that decision is subject to review, then the opinion should also be subject to review. That review should be of a quality comparable to that applicable to the decision. These principles are consistent with those developed by the Administrative Review Council in its publication *What decisions should be subject to merits review?*[18]

52. In contrast to the declaration process, where the recommendation of the NCC is based on submissions made by interested parties in response to the application for declaration and the draft recommendation of the NCC (and the designated Minister's decision is, in turn, based on the recommendation of the NCC), the body of material before the ACCC in an arbitration is typically substantial and voluminous. It commonly comprises competing expert reports, economic modelling, factual and legal submissions and historical evidence. The complexity of arbitration proceedings under the NAR increases the risk of regulatory error and supports the retention of merits review before the Tribunal as an important means of administrative oversight.

53. There have been only two access arbitrations by the ACCC under Part IIIA:

(a) the access dispute between Port of Newcastle Operations and Glencore Coal Assets Australia (**PNO/Glencore dispute**) described in the Consultation Paper; and

(b) the access dispute between Services Sydney and Sydney Water.

54. Of these, only the PNO/Glencore dispute has been the subject of merits review before the Tribunal (as well as judicial review proceedings in the Federal Court and High Court of Australia). On that occasion, the Tribunal came to a different arbitral conclusion to the ACCC.

Box 2 - Case study: Access dispute between Services Sydney and Sydney Water

This dispute concerned the access pricing methodology for various declared sewage transportation services supplied by Sydney Water. The arbitration was

[18] Administrative Review Council, 'What decisions should be subject to merit review?' (1999) <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999> [5.17], [5.19].

limited to the access pricing methodology to be used to determine the price at which Sydney Water was to provide the declared services to Services Sydney.

The ACCC determined that a retail-minus pricing methodology was to be applied for the supply of the declared services by Sydney Water. The ACCC did not set an arbitral price under the model for the services to be supplied by Sydney Water; rather, the final access prices and other terms and conditions were to be the subject of further negotiation between the parties (with provision for arbitration by the ACCC subsequent to such negotiations).

The dispute was ultimately resolved by agreement of the parties (applying the price model determined by the ACCC). The arbitration was concluded in 228 days from the date of notification of the dispute.[19]

55. The Committee notes that merits review is not available for access arbitrations or dispute resolution between access providers and access seekers under other industry-specific regimes. Although there is no right to review of the merits of arbitrations under other industry-specific access regimes, the nature of the arbitration conducted by the ACCC under the NAR is unique. For the purposes of Part IIIA access arbitrations, the ACCC is constituted by two of its members who preside over a quasi-judicial bilateral dispute resolution process involving complex factual, legal and economic evidence and submissions. The process is distinct from that of a commercial mediation or arbitration; regulatory determination of the ACCC; or arbitration pursuant to the terms of an undertaking offered by a facility provider under other access regimes.

56. A summary of arbitration processes under other access regimes is provided in Box 3 below.

Box 3 - Arbitration processes under selected industry-specific access regimes

ARTC Undertakings

The Australian Rail Track Corporation (**ARTC**) was established out of a 1997 Inter-Governmental Agreement entered into between the Commonwealth and the governments of New South Wales, Victoria, Queensland, Western Australia and South Australia. ARTC is vertically separated, providing "below-rail" services (such as the rail track infrastructure) but not "above-rail" services (such as haulage). ARTC provides a single point of contact for parties seeking to run trains on the National Interstate Rail Network and the Hunter Valley Network in New South Wales.

Two access undertakings relating to rail infrastructure are currently in place, one for the Interstate rail network and one for the Hunter Valley Network in New South Wales (together, **ARTC Undertakings**). The ARTC Undertakings were offered by the ARTC to, and accepted by, the ACCC.

Under the ARTC Undertakings, access disputes between rail users and the ARTC are subject to dispute resolution provisions. These require that the parties attempt to resolve the dispute by mediation or, if resolution cannot be achieved, by arbitration conducted by the ACCC. Except where the arbitration determination is subject to judicial review, the parties are bound to comply with the lawful directions of the ACCC as arbitrator.

[19] The arbitration was conducted prior to the enactment of the time limited by s 44ZZOA for arbitration proceedings.

Telecommunications access regime

The CCA provides a distinct access regime for telecommunications service in Part XIC. The NAR does not apply to telecommunications services declared, and telecommunications service providers, under Part XIC.[20] While there is no provision for merits review of access determinations of the ACCC under the Part XIC regime, the role of the ACCC is distinguishable from that under the NAR.

Unlike the NAR where an access seeker is required to notify the ACCC of an access dispute to enliven the jurisdiction of the ACCC, the ACCC is empowered to make access determinations in relation to declared telecommunications services of its own volition absent any dispute between an access seeker and facility provider.

Merits review of decisions made under the telecommunications access regime was available when that regime was established, but was removed in 2011. The explanation given for this removal was: "*To promote regulatory certainty and timely decision-making, merits review of decisions under Part XIC is no longer available. Judicial review is still available, however, for parties wishing to appeal a point of law"*.

The access determination regime under Part XIC is also a public process (as opposed to the bilateral determination under the NAR) which requires the ACCC to hold a public inquiry and publish a report about the inquiry before making an access determination.[21]

National Gas Rules

On 14 December 2016, the COAG Energy Council agreed to the recommendations outlined in Dr Michael Vertigan's *Examination of the current test for the regulation of gas pipelines* (**Examination**). The Examination highlighted the unequal levels of bargaining power and access to information that shippers face when seeking access to pipeline services. The Examination recommended the establishment of a new commercial arbitration framework, pricing principles and information disclosure requirements, to apply to unregulated pipelines that provide access to third parties.

The framework became operational on 1 August 2017. It provides for a staged approach to assist shippers seeking to access pipeline services. The stages consist of information disclosure by non-scheme pipelines, access negotiations, and the arbitration of access disputes. The framework is intended to incentivise parties to negotiate rather than relying on arbitration.

The NGR provide a commercial arbitration process to resolve access disputes in relation to eligible pipelines by one of a pool of arbitrators selected by the Australian Energy Regulator (**AER**). Unlike the role of the ACCC as arbitrator under the NAR, the role of the AER is to supervise the process by referring the dispute to commercial arbitration.

The timeliness of arbitration processes under the NGR is discussed further in response to reform option 3 below.

57. The Committee considers that restricting the availability of review to matters of law risks significant errors in arbitration of disputes under Part IIIA. Access arbitration proceedings under the NAR are complex and technical, making the possibility of regulatory error is quite high. Given the "at large" nature of the NAR and its

[20]CCA s 152CK.
[21]CCA s 152BCH.

application to infrastructure of national significance, allowing merits review to correct errors is important, and contributes to investor and public confidence.

Option 3 - Shorter time limits for merits review processes

58. The Committee considers that there is some merit in reform option 3 to shorten the time limits for merits review processes for declaration and arbitration decisions under the NAR.

59. Section 44ZZOA requires that all decisions by the Tribunal on review under Part IIIA are made within 180 days (**Consideration Period**). Subsection 44ZZOA(3) provides for the Consideration Period to be extended in the following circumstances:

(a) by agreement between the Tribunal and the parties to the review proceeding;[22]

(b) where the Tribunal issues a notice requesting information in relation to the decision under review, the Consideration Period is extended to account for the period required to comply with the notice;[23]

(c) where the Tribunal issues a notice to the NCC or ACCC requiring information or a report to be given in relation to the review the Consideration Period is extended to account for the period required to comply with the notice;[24]

(d) where the Tribunal is unable to make a decision within the Consideration Period, it can extend the Consideration Period by notifying the designated Minister.[25]

60. Failure by the Tribunal to comply with the time limited by s 44ZZOA does not affect the validity of a decision made by the Tribunal.[26]

61. As discussed in section 2.2 above, the Consideration Period and "clock stopping" provisions in s 44ZZOA were enacted by the 2010 Amendment to Part IIIA, with a view to enhancing the timeliness of processes under the NAR.

Box 4 - Case study: *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1

This proceeding concerned a review by the Tribunal of the arbitration determination of the ACCC in relation to an access dispute between Glencore Coal Assets Australia Pty Ltd and Port of Newcastle Operations Pty Ltd.

The Tribunal determined at the initial case management hearing that the review "*could not*" be heard, "*much less decided by the Tribunal*", within the Consideration Period.[27] Ultimately, it was determined that an agreement to "stop the clock" for a period of approximately 90 days pursuant to s 44ZZOA(5) was the most appropriate means.

After the six-day hearing of the matter, the Tribunal again determined that it would not able to issue its decision within the revised Consideration Period due to "*a number of factors, including the nature of the disputation between the parties and the complex issues that arose for determination*".[28] Accordingly, the Tribunal

[22] CCA s 44ZZOA(5).
[23] CCA s 44ZZOA(3).
[24] ibid.
[25] CCA s 44ZZOA(7).
[26] CCA s 44ZZOA(11).
[27] *Application by Port of Newcastle Operations Pty Ltd* [2019] ACompT 1 [68].
[28] ibid, [70].

unilaterally extended the period by approximately 120 further days by way of written notice to the designated Minister under s 44ZZOA(8).

62. While the PNO/Glencore experience might suggest that the 180-day Consideration Period is realistically the minimum period within which Part IIIA review proceedings may be conducted, there is arguably some scope to limit the extent to which the clock stopping provisions are exercised by the Tribunal and parties to review proceedings other than of access determinations. For example:

(a) there is no limit as to the period by which the Consideration Period may be extended, nor any restriction on repeated extensions by the Tribunal or the parties; and

(b) the power of the Tribunal to extend the Consideration Period under s 44ZZOA(7) is unilateral. There is no statutory test or criteria which must be satisfied to enliven the power - all that is required is notice from the Tribunal to the designated Minister including an explanatory statement as to why the Tribunal has been unable to make a decision on the review within the Consideration Period. Provision of the notice to the designated Minister is sufficient to extend the Consideration Period – e.g. there is no requirement that the designated Minister approve or reject the extension.

63. The NAR was envisaged as a means by which infrastructure users "*could be **given a right of access** to essential facilities*" (emphasis added). However, the experience of processes under the NAR, including those described in the Consultation Paper, have rarely been concerned with grants of access rights to user applicants where no such right of access to an essential facility exists. Rather, in the overwhelming majority of processes, disputes between an access provider and access seeker relate to the price of access to facilities. (The Pilbara railway matters are a notable exception.) This suggests that arbitration disputes under the NAR are of a chiefly commercial character between infrastructure owners/operators and corporate infrastructure users - such that a more expeditious approach to arbitration of the dispute is warranted.

64. The experience under the NGR suggests that a more commercial arbitration process could expedite the resolution of access disputes, at least at first instance, under the NAR. Indeed, the Hilmer Committee envisaged that the ACCC would have the power to either arbitrate disputes itself, or appoint independent commercial arbitrators.[29] Part IIIA currently requires that the Commission be constituted by two or more of its members for the purpose of an access arbitration.[30]

Box 5 - Timeliness of arbitration processes under the NGR

Part 23 of the NGR provides for an arbitration process to resolve access disputes in relation to non-scheme pipelines. Unlike the procedure under the NAR, the role of the Australian Energy Regulation (**AER**) is to refer the dispute to commercial arbitration.[31] The parties to the access dispute have the opportunity to agree the identity of the person to act as arbitrator from the pool established by the AER.[32] The pool of arbitrators comprises former jurists, senior counsel and legal

[29] Frederick G Hilmer, Mark Rayner and Geoffrey Taperell, 'National Competition Policy Review' (25 August 1993) <http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf> 256.
[30] CCA s 44Z.
[31] *National Gas Law 2008* (NSW) s 216J; *National Gas (South Australia) Act 2008* (SA) s 216J (and equivalent legislation across Australia).
[32] *National Gas Rules* r 584.

practitioners experienced in regulated access, competition law and dispute resolution.

The arbitrator must determine the access dispute as speedily as a proper consideration of the dispute allows (a duty that mirrors that of the Tribunal on reviews under the NAR),[33] and in any case must make a final access determination within:

(a) 50 business days (approximately 70 calendar days) after the date the access dispute was referred to the arbitrator; or

(b) if agreed by the parties to the access dispute, any greater number of business days up to a maximum of 90 business days (around 126 calendar days) after the date the access dispute was referred to the arbitrator.

The two most recent access arbitrations under the NGR were completed in around three to four-and-a-half months (an average of 114 days).[34]

65. The arbitration procedure under the NGR described in Box 5 above appears to have facilitated the efficient and timely resolution of access disputes by experienced practitioners on a commercial basis. However, the Committee notes that there are some important differences between the circumstances of non-scheme pipelines and services declared under the NAR. These include that:

(a) declaration under the NAR is typically for a fixed ten or 15 year period, with the consequence that access dispute determinations generally need to be re-made once or twice during the period of declaration, so that the dispute resolution process must establish sufficient detail for it to be capable of being reapplied; and

(b) access dispute determinations under the NAR are published and so their detail is available to assist negotiations by other access seekers, whereas the substantive outcome and all relevant detail of non-scheme pipeline arbitral determinations remain confidential.

66. Such differences are likely to place constraints on the extent to which it should be expected that the timelines for non-scheme pipelines specified under the NGR either can or should be sought to be achieved under the NAR.

67. In addition to any proposed limits to the Consideration Period (or clock stopping provisions) for merits review proceedings before the Tribunal, the Committee considers that consideration should also be given to shortening the period within which the initial decision makers are to make their determination (**Decision Period**). Many Decision Periods under Part IIIA are also 180 days, and include clock stopping provisions substantively the same as those which apply to the Consideration Period:

(a) by s 44GA, the NCC is to make a final declaration recommendation to the designated Minister within 180 days of receiving an application for declaration; and

[33] *National Gas Law 2008* (NSW) s 198; *National Gas (South Australia) Act 2008* (SA) s 198 (and equivalent legislation across Australia).
[34] Australian Energy Regulator, 'Access Dispute - Carisbrook to Horsham Pipeline' <https://www.aer.gov.au/networks-pipelines/non-scheme-pipelines/arbitration-of-access-disputes/access-dispute-carisbrook-to-horsham-pipeline>; Australian Energy Regulator, 'Final access determination - Tasmanian Gas Pipeline' <https://www.aer.gov.au/networks-pipelines/non-scheme-pipelines/arbitration-of-access-disputes/final-access-determination-tasmanian-gas-pipeline>.

(b) by s 44XA, the ACCC is to make an arbitration determination within 180 days of receiving notification of an access dispute.

68. In the context of the 60-day period within which the designated Minister is required to make a decision on declaration (or revocation of declaration) following receipt of the NCC's recommendation, it may be reasonable to reduce the Decision Period for other administrative decisions under the NAR. The blanket 180-day period which appears throughout Part IIIA may not be suitable for all decisions or review processes under the NAR.

69. Prolonged declaration and arbitration proceedings create uncertainty for access seekers and access providers, and risk disincentivising the efficient use of and investment in the infrastructure by which essential services are provided, to the detriment of competition in upstream and downstream markets.

70. It is, however, important to recognise the need to balance the importance of timeliness against the long term and significant economic consequences of the decisions.

Repeat applications for declaration

Option 4 - Limit new applications for declaration

71. The Committee supports reform option 4 to limit new applications for declaration of a particular service for which declaration of that service has previously been refused, or where a declaration of that service has been revoked, unless there has been a material change of circumstances or a specified period of time has passed.

72. There is currently no limit to persons having standing to apply to the NCC for a recommendation that a particular service be declared for the purpose of the NAR.[35] Further, as the Consultation Paper apprehends, if the designated Minister (and/or the Tribunal on review) decides that neither the declaration criteria nor the objects of Part IIIA are satisfied to warrant declaration of a particular service - including after the rigorous and independent 180-day consultation and assessment of the NCC - there is no limit on any subsequent application in respect of access to the same service, including immediately after a decision is made, on the basis of the same factual and economic context.

73. Although the NCC may recommend that a service not be declared on the basis that an application for declaration is not made in good faith, there is a high threshold for establishing this standard. The NCC's stated position is that an application is not in good faith if it is "*obviously vexatious*" or "*motivated only to put the provider to the unnecessary expense of responding to the application*".[36] To date, the NCC has not exercised the power in s 44F(3) to dismiss an application for declaration on bad faith grounds.

74. The ability for repeated applications for declaration in respect of the same service is contrary to the fundamental objects of the NAR and, potentially, the common law doctrine of res judicata. The spectre of continued applications for declaration of the same service for which a decision has been made to refuse or revoke declaration creates uncertainty for access seekers and access providers alike, thereby discouraging investment in essential infrastructure by existing facility operators and prospective upstream and downstream market entrants. It fails to provide a consistent approach to access regulation and increases the risk of regulatory error,

[35] CCA s 44F.

[36] NCC, *Fortescue Metals Group Ltd: Application for declaration of a service provided by the Mt Newman railway line under section 44F(1) of the Trade Practices Act 1974: Final recommendation,* 23 March 2006, 213 <https://ncc.gov.au/images/uploads/DeRaFoFR-001.pdf>.

which the NCC has acknowledged is contrary to the public interest.[37] It also involves a considerable expense of Commonwealth and private resources by access providers, applicants, the NCC, the Tribunal and courts.

75. The Committee submits that the proposed criterion for a "material change of circumstances" (or similar) before an application for declaration can be made anew in respect of a service which has already been the subject of a decision not to declare will promote economic efficiency and regulatory consistency for NAR processes.

76. In relation to the proposed temporal limitation on applications for declaration, the Committee believes that this should only be legislated as an alternative basis for a right to apply for re-declaration, in addition to liberty to re-apply on a material change of circumstances. The Committee agrees with the concern expressed in the Consultation Paper that a temporal limitation "*may mean that an application for declaration could not be considered before that period expired, notwithstanding that there had been a material change of circumstances with the potential to change whether the declaration criteria would be satisfied*".

77. The Committee considers that a 10-15 year moratorium on applications for re-declaration (unless a material change in circumstances eventuates) is likely to provide certainty to access seekers and access providers, and promote economic efficiency gains. A fixed 10 to 15 year period before a further application could be made is consistent with other time-limited authorisations under the Part IIIA and the CCA more broadly, such as the period of declaration; certification of access regimes by the NCC; the duration of arbitration determinations of the ACCC, or the authorisation of conduct generally under the CCA.

78. Alternatively, the designated Minister (or Tribunal on review) could be required to specify a period within which no further applications for re-declaration of a particular service can made whenever a decision is made not to declare that service. This approach would ensure that the time-limit is tailored to the particular service provided by way of the particular facility, parties and dependent markets in issue to maximise efficiency in the relevant upstream and downstream markets and positive investment outcomes.

Option 5 - Limit requests for revocation

79. For reasons similar to those in relation to option 4, the Committee is supportive of reform option 5 to limit requests for revocation to where there has been a material change of circumstances since the decision to declare the services, or a specified period of time has passed.

80. Consistent with its position on option 4, the Committee believes that a material change of circumstances criterion for revocation applications will encourage a consistent approach to access regulation, and increase certainty for infrastructure operators that they would not be subjected to the cost and time of engaging with potentially unnecessary regulatory processes - thereby promoting efficient investment in facilities and upstream and downstream competition. Indeed, the Hilmer Committee envisaged that "*the showing of a material change in circumstances*" would be a pre-requisite for revocation of declaration in its report on which the NAR was based.[38]

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[37] NCC, *Application for declaration of certain services at the Port of Newcastle - Recommendation*, 18 December 2020 [10.26]-[10.27] <https://ncc.gov.au/images/uploads/NCC_-_NSWMC_application_for_declaration_-_Final_Recommendation.pdf>.

[38] Frederick G Hilmer, Mark Rayner and Geoffrey Taperell, 'National Competition Policy Review' (25 August 1993) <http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf> 253.

81. The Committee similarly considers that any time bar on applications for revocation should not foreclose applications to revoke declaration for a defined period in circumstances where a real and material legal, economic or factual change (such as a change in law) has occurred such that the objects of Part IIIA can no longer be achieved by declaration.

Box 6 - Case study: Revocation of declaration of certain services at the Port of Newcastle

Port of Newcastle Operations applied to the NCC for a recommendation that the declaration of certain services at the Port be revoked in July 2018. The relevant service at the Port had been declared since June 2016 (approximately two years).

The application for revocation was made following amendments to the declaration criteria by the 2017 Amendment, which inserted the words "*on reasonable terms and conditions, as a result of the declaration of the service*" to criterion (a), which now requires that the NCC be satisfied that (emphasis added):

> *access (or increased access) to the service, **on reasonable terms and conditions, as a result of a declaration of the service** would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service.*

The Explanatory Memorandum to the 2017 Amendment confirmed that the new test requires an assessment of whether and the extent to which access on reasonable terms and conditions from declaration is likely to impact on competition in dependent markets and on the public interest, when compared to the terms of access likely without declaration.[39]

Applying the amended declaration criteria, the NCC recommended that declaration of the service be revoked. The designated Minister did not make a decision within the statutory period, and so was taken to have made a decision to revoke the declaration under s 44J(7).

Arbitration when service is no longer declared

Option 6 - Termination of arbitration proceedings and determinations on revocation of declaration

82. The views of Committee members differ in relation to reform option 6, being the provision for arbitration proceedings and determinations under the NAR to terminate if the declaration of the relevant infrastructure service is revoked.

83. Currently, the expiry or revocation of a declaration does not affect the arbitration of an access dispute that was notified before the expiry or revocation, or the operation or enforcement of any determination made in the arbitration of an access dispute that was notified before the expiry or revocation.[40]

84. The NCC cannot recommend to the designated Minister the revocation of a declaration unless, at the time of the recommendation, the NCC is satisfied that the declaration criteria are no longer satisfied in respect of the service.[41] The designated Minister must also have regard to the objects of Part IIIA in deciding whether to

[39] Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth) [12.10].
[40] CCA s 44I(4).
[41] CCA s 44J(2).

revoke a declaration.[42] That is, revocation of declaration occurs where the decision maker (or the Tribunal on review) is satisfied that the relevant service does not meet the threshold criteria for regulation under the NAR.

85. The Committee understands that reform option 6 would only apply to cease arbitration proceedings currently on foot (rather than concluded arbitrations) at the time of revocation, and to terminate arbitration determinations in force from the date of revocation (rather than having any retrospective operation, including to retrospectively affect the rights of parties under concluded arbitration determinations).

86. The Committee encourages the Treasury to evaluate the merits of reform option 6 - as well as each of the other reforms proposed in the Consultation Paper - by reference to the objectives of the NAR described at paragraph 21 above.

[42] CCA s 44J(3A).

Annexure A - Summary of amendments to the NAR in Part IIIA

No.	Amending act	Summary of amendments to Part IIIA
1.	*Competition Policy Reform Act 1995* (Cth)	This Act introduced the national access regime provisions into the *Trade Practices Act 1974* (now the *Competition and Consumer Act 2010*) (**Principal Act**).[43]
2.	*Trade Practices Amendment (Industry Access Codes) Act 1997* (Cth)	This Act added a process to the Principal Act whereby the Australian Competition and Consumer Commission (**ACCC**) can now accept industry access codes prepared by industry bodies, following public consultation. Following the acceptance of an industry code, the amendments allow the ACCC to accept undertakings in accordance with the code without the need for further public consultation.[44]
3.	*Gas Pipelines Access (Commonwealth) Act 1998* (Cth)	This Act extended the application of Part IIIA of the Principal Act so that it now applies to external Territories, which ensures the Part IIIA regime applies to gas pipelines extending offshore.[45]
4.	*A New Tax System (Trade Practices Amendment) Act 2000* (Cth)	This Act sought to clarify the operation of the access undertaking provisions in Part IIIA of the Principal Act by making various amendments which made certain that the access undertaking provisions fell within the Commonwealth's legislative power.[46]
5.	*Corporations (Repeals, Consequentials and Transitionals) Act 2001* (Cth)	This Act made consequential amendments to the Principal Act as a result of references to the Corporations Law and other superseded legislation.[47]
6.	*Trade Practices Legislation Amendment Act 2003* (Cth)	The amendments made by this Act to Part IIIA of the Principal Act were directed at clarifying the requirements for imposing functions, powers and duties on the ACCC and the Australian Competition Tribunal (**ACT**).[48]
7.	*Trade Practices Amendment (Australian Energy Market) Act 2004* (Cth)	This Act made a number of amendments to section 44ZZAA and added section 44ZZAB into the Principal Act to clarify when the ACCC can rely on industry body consultations as opposed to undertakings in relation to an access code. [49]
8.	*Energy Legislation Amendment Act 2006* (Cth)	This Act amended Part IIIA of the Principal Act to accommodate the incentives for new pipelines in the cooperative gas access regime which were introduced in South Australia.[50]

[43] Explanatory Memorandum, Competition Policy Reform Bill 1995 (Cth).
[44] Explanatory Memorandum, Trade Practices Amendment (Industry Access Codes) Bill 1997 (Cth).
[45] Explanatory Memorandum, Gas Pipelines Access (Commonwealth) Bill 1997 (Cth).
[46] Explanatory Memorandum, A New Tax System (Trade Practices Amendment) Bill 2000 (Cth).
[47] Explanatory Memorandum, Corporations (Repeals, Consequentials and Transitionals) Bill 2001 (Cth).
[48] Explanatory Memorandum, Trade Practices Legislation Amendment Bill 2003 (Cth).
[49] Explanatory Memorandum, Trade Practices Amendment (Australian Energy Market) Bill 2004 (Cth).
[50] Explanatory Memorandum, Energy Legislation Amendment Bill 2006 (Cth).

No.	Amending act	Summary of amendments to Part IIIA
9.	*Trade Practices Amendment (National Access Regime) Act 2006* (Cth)	The amendments made by this Act were introduced as a result of the Productivity Commission's Inquiry Report No. 17, *Review of the National Access Regime.* The changes included enabling pricing principles to be determined by the Commonwealth Minister, and for those principles to be taken into account when the ACCC makes a determination in an access dispute. This Act also changed the declaration threshold to ensure that access declarations are only granted where the expected increase in competition is not trivial. The Act also introduced changes to the existing arbitration requirements in Part IIIA of the Principal Act. The Act introduced new provisions enabling access providers to lodge access undertakings and codes after a service has been declared, as well as new provisions prohibiting access undertakings where effective access regimes already exist. The Act also introduced immunity from declaration, for services delivered by government sponsored infrastructure, new appeal rights for access undertakings and access codes, and new non-binding target time limits for various decisions under Part IIIA. The Act also introduced provisions in relation to public input on declaration decisions, the requirement for the ACCC and the National Competition Council (**NCC**) to publish the reasons for their decisions, and the expedition of extensions for access undertakings and access codes.[51]
10.	*Australian Energy Market Amendment (Gas Legislation) Act 2007* (Cth)	This Act addressed technical issues with the conferral of functions and powers on the NCC, the Minister and the ACT by the new national gas regime. These provisions clarified the specific procedural provisions in the Principal Act which applied to the ACT's merits review functions, and ensured that the Principal Act does not override other energy laws which determine processes for the Australian Energy Regulator. The amendments mean that under Part IIIA of the Principal Act, the greenfields pipeline incentives need to be disregarded by the NCC and the Treasurer when determining whether a regime is an effective regime, and the NCC must not recommend for declaration, and the Minister must not declare services which are provided by pipelines which have been granted a price regulation exemption or a 15 year no coverage determination.[52]
11.	*Australian Energy Market Amendment (Minor Amendments) Act 2008* (Cth)	This Act amended the Principal Act to empower the NCC and ACT to perform key functions under the *National Gas (South Australia) Act 2007*.[53]

[51] Explanatory Memorandum, Trade Practices Amendment (National Access Regime) Bill 2005 (Cth).
[52] Explanatory Memorandum, Australian Energy Market Amendment (Gas Legislation) Bill 2006 (Cth).
[53] Explanatory Memorandum, Australian Energy Market Amendment (Minor Amendments) Bill 2008 (Cth).

No.	Amending act	Summary of amendments to Part IIIA
12.	*Australian Energy Market Amendment (AEMO and Other Measures) Act 2009* (Cth)	This Act amended the Principal Act to ensure references to existing legislation and new cooperative energy reform legislation in other jurisdictions were correct. [54]
13.	*Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth)	This Act gave effect to certain provisions of the Council of Australian Governments' *Competition and Infrastructure Reform Agreement* and introduced other measures to increase regulatory certainty, and to streamline administrative processes associated with the national access regime. These measures included the introduction of binding time limits for decisions, and the introduction of certain reviews being limited to merits review only. The Act also introduced the provision which allows for a person with a material interest in a proposed new infrastructure facility to apply for a decision that a service to be provided by that facility is ineligible to be a declared service. A provision allowing the ACCC to accept access undertakings with fixed principles, which then apply to subsequent undertakings in relation to that service was also introduced by this Act. This Act also allowed the ACCC to issue an amendment notice proposing amendments to proposed access undertakings submitted by a service provider. [55]
14.	*Australian Energy Market Amendment (National Energy Retail Law) Act 2011* (Cth)	This Act empowered the ACT and Australian Energy Regulator to exercise functions or carry out duties conferred under the National Energy Retail Law.[56]
15.	*Acts and Instruments (Framework Reform) (Consequential Provisions) Act 2015* (Cth)	This Act made minor consequential amendments to the Principal Act and repealed several provisions and made a number of minor technical corrections.[57]
16.	*Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth)	As a result of the 2015 Harper Review, this Act amended the national access regime to ensure it better addressed the economic problem of a lack of effective competition in markets for nationally significant infrastructure services. The main changes included: amending the declaration criteria that must be used by the NCC and the Minister, amending the default position if the Minister has not responded within 60 days, amending the scope of a determination made by the ACCC to 'extend' a facility in an access dispute, providing the Minister with the

[54] Explanatory Memorandum, Australian Energy Market Amendment (AEMO and Other Measures) Bill 2009 (Cth).
[55] Explanatory Memorandum, Trade Practices Amendment (Infrastructure Access) Bill 2009 (Cth).
[56] Explanatory Memorandum, Australian Energy Market Amendment (National Energy Retail Law) Bill 2011 (Cth).
[57] Explanatory Memorandum, Acts and Instruments (Framework Reform) (Consequential Provisions) Bill 2015 (Cth).

No.	Amending act	Summary of amendments to Part IIIA
		power to revoke certification on the recommendation of the NCC if the regime ceases to be effective.[58]
17.	*Competition and Consumer Amendment (Abolition of Limited Merits Review) Act 2017* (Cth)	This Act amended the Principal Act to prevent the ACT from reviewing certain decisions under national energy laws, and to ensure that decisions made by the Australian Energy Regulator are not subject to merits review by any other body.[59]

[58] Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (Cth).
[59] Explanatory Memorandum, Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017 (Cth).

Annexure B - Summary of applications for declaration or revocation under the NAR and merits review proceedings

	Application date	Application	Subject of Merits Review (Y/N)	Alternative conclusion by Tribunal (Y/N)
1.	23/07/2020	Port of Newcastle (NSWMC)	Y	*Pending*
2.	02/07/2018	Port of Newcastle (Revocation)	N	-
3.	13/05/2015	Port of Newcastle	Y	Y
4.	08/08/2014	Sydney Airport Terminal 2 (*Note: Application for declaration withdrawn)*	-	-
5.	27/09/2011	Sydney Airport jet fuel infrastructure services	N	-
6.	19/05/2010	Queensland Rail Queensland coal rail network (*Note: Application for declaration withdrawn)*	-	-
7.	22/03/2010	Herbert River tramway	N	-
8.	14/11/2008	Pilbara Railways	Y	Y
9.	18/01/2008	Robe Railway	Y	Y
10.	17/11/2007	Hamersley Railway	Y	Y
11.	17/11/2007	Goldsworthy Railway	Y	N
12.	03/05/2007	Tasmanian Railway Network	N	-
13.	08/10/2004	Snowy Hydro water storage and transport services	Y	(*Note: Application for review withdrawn*)
14.	15/06/2004	Mt Newman Railway	Y	N

15.	03/03/2004	Sydney Water / Sydney Sewerage	Y	Y
16.	01/10/2002	Sydney Airport airside services	Y	Y
17.	06/11/1996	Sydney and Melbourne Airports	Y	N
18.	24/04/1996	Austudy Payroll Deduction service	Y	N