



Submission to Treasury
consultation paper:
*Timeliness of processes under
the National Access Regime*

April 2021

The National Access Regime is intended to play a critical role in regulating monopoly infrastructure and, as such, the Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to contribute to policy consultations on possible reform of Part IIIA of the *Competition and Consumer Act 2010* (the Act).

The current review is timely, given the importance of fostering a competitive and dynamic economy as Australia recovers from the substantial disruption caused by the COVID-19 pandemic.

The ACCC has been concerned the National Access Regime is not operating as effectively as it should. We have noted that there are two reasons for this. First, the Part IIIA declaration processes can be lengthy and arduous, being subject to merits and judicial reviews that can take many years to resolve. Second, it has become even more difficult to obtain declaration of a service since amendments to the declaration criteria in 2017, particularly in relation to non-vertically-integrated infrastructure where monopoly pricing, not denial of access, is the main problem.

While we support improving the timeliness of the regime, without updating the coverage of the regime to adequately deal with non-vertically-integrated monopolies, making changes to elements of the administrative process will not address the underlying economic inefficiency caused by monopoly infrastructure owners charging monopoly prices to access their services.

The National Access Regime should clearly cover non-vertically integrated infrastructure

The National Access Regime was originally designed to deal with monopolists that are vertically integrated and that deny access to upstream or downstream competitors, following the Hilmer Committee's report on *National Competition Policy*. At the time it was implemented, while monopoly pricing was a potential concern, denial of access was the predominant issue. That has now changed and some of the biggest concerns are arising in the conduct of non-vertically-integrated monopolies.¹ In these cases it is inefficient monopoly pricing, not denial of access, causing significant economic harm.

When a monopolist is not constrained by regulation it has an ability to charge an economically inefficient price and thereby creating a deadweight loss in the market. They also damage incentives for investment for every business that is forced to deal with them, as any potential gains from innovation or investment risk appropriation by the monopolist.

Bottleneck infrastructure with natural monopoly characteristics, such as airports, rail and ports, must at least face a credible threat of regulation or economic activity will suffer.

In our recent [submission](#) to the National Competition Council's (NCC) consideration of the NSW Minerals Council's application for declaration of certain services at the Port of Newcastle, the ACCC argued that declaration would be consistent with the objects of the National Access Regime set out in Part IIIA of the CCA.

One of the objects of Part IIIA is to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting competition in upstream or downstream markets.

One of the key features of recent declaration decisions has been a focus on how criterion (a)² within section 44CA of the CCA should be applied. Since amendments in 2017,

¹ R Sims (ACCC Chair), [ACCC perspectives on transport issues](#), ACCC, 30 September 2019, accessed 12 April 2021.

² Paragraph 44CA(1)(a) of the CCA.

criterion (a) provides that declaration can only occur if ‘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 ACCC considers the declaration criteria should be interpreted in a manner which is consistent with the objects of Part IIIA. As such, an assessment of criterion (a) should give due weight to the promotion of competition that is likely to result from economic efficiency in the pricing of monopoly infrastructure services. To date, the NCC has not accepted this view and has focused its consideration of the competitive effect more on whether there is discrimination against upstream or downstream participants in relation to the terms of access.

Monopoly infrastructure by its nature faces no competition and monopoly owners have clear incentives to maximise short-term profits, causing inefficiency and deterring investment for users. The ACCC considers it vital that government amend the law to clarify that the regime applies to this inefficient monopoly pricing, irrespective of whether the infrastructure is vertically integrated.

Merits review could be removed

The consultation paper notes that merits reviews by the Australian Competition Tribunal of declaration and arbitration decisions have typically still resulted in subsequent judicial review. It suggests that removing merits review could remove a six-month step in the process and result in any outcomes from judicial review going back to the original decision maker.

Merits review is a mechanism that seeks to hold a regulatory decision maker to account for its decisions and afford the parties to the decision an opportunity for an independent review of the decision.³ The ACCC supports transparency and accountability of regulatory decisions. However, in the ACCC’s experience, access to merits review has not necessarily achieved these objectives. It has provided an opportunity for monopoly infrastructure providers to slow the regulatory process by using all legal avenues to avoid declarations and arbitrations.

Regulatory decisions involving access are by their nature complex and involve a considerable exercise of regulatory judgement. They typically involve extensive inquiry and analytical processes. The primary decision maker has been selected for such roles because it brings significant legal, economic and technical expertise to its decisions.⁴ Under a merits review process, the review body is the second and ultimate decision-maker for these complex decisions but it may not have the benefit of the time, resources and expertise available to the original decision-maker.

It is worth noting that in addition to our role under the National Access Regime, the ACCC has been responsible for a telecommunications-specific access regime (Part XIC of the CCA) since 1997.⁵ Initially under this access regime, most decisions were subject to merits review. This included decisions on access undertakings and arbitrations of access disputes. Decisions on declarations for access were not subject to merits review (although exemptions from the access obligations were).

³ See <https://www.ag.gov.au/sites/default/files/2020-03/Australian-administrative-law-policy-guide.pdf>

⁴ See <https://www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications/what-decisions-should-be-subject-merit-review-1999>

⁵ *Trade Practices Amendment (Telecommunications) Act 1997 (Cth)*.

In 2002 the Australian Government amended Part XIC of the Act to lessen the availability of merits review and reduce the cost and delay associated with such reviews.⁶ In particular, the amendment removed merits review for access undertaking and arbitrations of access disputes. However, some other decisions remained subject to merits review. In introducing the amendments, the then Minister stated:

A major initiative in this bill that will facilitate more timely access is the repeal of merits review of ACCC arbitration decisions by the Australian Competition Tribunal (ACT).

ACCC arbitration hearings involve a detailed and exhaustive assessment of access pricing and other issues. Repeating this process before the ACT can be costly and unnecessary, leaving access seekers to bear the contingent liabilities, given that final prices can be backdated by the ACT to the time of the access dispute. Lengthy delays in finally resolving access disputes impose costs on industry participants and create uncertainty for investors, particularly in a telecommunications industry that is subject to rapid technological change.

Parties to an arbitration will still be able to appeal the decision of the ACCC on a point of law to the Federal and High Courts.⁷

In 2010 further amendments to Part XIC fully removed merits review from the telecommunications-specific access regime.⁸ The ACCC notes that repeated challenges to arbitrations and undertakings were highly resource-intensive and time-consuming. Six ACCC undertaking decisions were appealed to the Australian Competition Tribunal, all of which were unsuccessful.

The ACCC has also been an observer of the outcomes of the Australian Energy Regulator's (AER's) experience with limited merits review regime. Until 2017 energy network service providers had access to limited merits review of the AER's decisions. Prior to this, network service providers would routinely seek review.

In 2016 the Council of Australian Governments Energy Council reviewed the limited merits review regime and found it imposed significant costs to all participants, presented barriers to meaningful consumer participation and led to significant regulatory and price uncertainty.⁹ In 2017, the Australian Government made a decision to abolish limited merits review in energy related decisions.

The ACCC considers that establishing sound regulatory processes are essential to ensure regulators are held accountable and that their decisions are transparent and robust. These processes can include steps such as:

- extensive consultation
- statements of approach and guidelines
- detailed decision documents
- statements of expectations
- annual reports

⁶ *Telecommunications Competition Act 2002 (Cth).*

⁷ Australian House of Representative, *Debates*, 2002, 13:7324-7 (see <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansard%2F2002-09-26%2F0017%22>)

⁸ *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010 (Cth).*

⁹ *Competition and Consumer Amendment (Abolition of Limited Merits Review) Act 2017 (Cth).*

- performance measurement reporting.

Further, judicial review provides an appropriate avenue for affected stakeholders to test the lawfulness and integrity of regulatory determinations. This enables stakeholders to bring applications to Court that relate to issues of jurisdiction, procedural fairness, consistency with obligations in law and preclude decisions that were not supported by evidence. Courts, in judicial review, will look at findings of fact in the context of whether an error of law has occurred, but not determine whether they are the 'correct' facts. In addition, it is the role of the Court to ensure that the original decision maker has not abused a discretionary power conferred by law. In contrast, in merits review the Tribunal is able to substitute its own view of whether that exercise of discretion was reasonable. Judicial review will consider whether a decision is within the bounds of legal requirements and that an appropriate process has been followed in reaching the decision.

As such, the ACCC considers there may be benefit in removing merits review of declaration and arbitration decisions under the National Access Regime. That is, adopting Options 1 and 2 in the consultation paper. This would bring the National Access regime in line with the telecommunications and energy access regimes. The ACCC does not support Option 3 in the consultation of putting further time constraints on merits review processes, as it further reduces the time and resources available to the review body without materially improving timeliness.

Repeat applications for declaration and applications for revocation should be limited

The consultation paper indicates that access seekers can initiate a fresh declaration process where a previous application was refused or a declaration has been revoked, but there has been no change in the facts or law.

The ACCC supports limiting new declaration processes or applications for revocation to where there is a change in circumstances or law. This will reduce regulatory costs from additional processes that are unlikely to yield a different result. We also note there is an existing ability in subsection 44F(3) of the CCA for the NCC to recommend against declaration if the application was not made in good faith.

However, we do not support the use of time limits in this context, as it would be arbitrary and may frustrate a legitimate application for declaration being made. The determining factor for whether a declaration application should be made is its reasonableness, not a set time limit.

Unnecessary restarts of the declaration process after revocations

Separately, if the Government decides to retain merits review, one reform that is not canvassed in the paper but which would be a straightforward way to prevent unnecessary restarts of the declaration process is to align the appeal rights for decisions on revocation of declarations. Currently, section 44L of the CCA provides that a decision by the Minister not to revoke a declaration can be appealed to the Australian Competition Tribunal by the provider. However, there is no such right of appeal in the law for an access seeker if a decision is made by the Minister to revoke the decision.

Not only is this incongruous, as an original declaration decision can be appealed by either the access seeker or infrastructure owner, it creates an imbalance in the legal rights of the parties and is likely to lead to an unnecessary and inefficient restart of the entire declaration process. This has most recently happened in relation to the Port of Newcastle in 2020, where the NSW Minerals Council was required to lodge a new application for declaration

and have the matter re-considered by the NCC and Treasurer (now appealed to the Tribunal), instead of a one-step process of appealing the decision to revoke the declaration.

Arbitration when service is no longer declared

The consultation paper notes that under the current law, if a declaration is revoked but there are existing arbitration processes underway or that have been made, they will continue to have effect between the parties.

It is incongruous for the determination to continue to have effect only in relation to certain parties if the underlying declaration is no longer in force. From a policy perspective, a key consideration is that the current situation provides a substantial imbalance in the way the law applies to access seekers that did not apply for an access determination, compared to those that did apply.

Currently the law could operate so that if a large access seeker sought an access determination and then the declaration was revoked, the large access seeker would continue to benefit from the certainty of the arbitrated outcome but its smaller competitors would not. This is particularly the case given that the credible threat of regulation of the monopoly would be removed, with the result the monopoly could act without constraint in the future.

We recommend that, should the government amend the law so that access determinations cease to have effect after a declaration is revoked, it should also provide that they do so after a specified period, such as 12 months. This would provide greater certainty for the relevant access seeker(s) in the event they needed to negotiate new access arrangements with the service provider after a declaration is revoked.

It would also be appropriate for arbitrations that were currently on foot to be allowed to be finalised and have effect until the end of the 'transition period' suggested above. Arbitrations can provide terms of access such as price backdated to an earlier date in the parties' negotiations, plus we would not recommend introducing any incentives for infrastructure owners to extend arbitration processes as much as possible in hope of a revocation occurring prior to finalisation. However, consideration would also need to be given to allowing the ACCC to expedite or cease an arbitration following revocation of a declaration if the circumstances warranted.