



Submission to Treasury

*Exposure draft legislation for improving
the timeliness of the National Access
Regime*

14 January 2022

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory agency that promotes competition, fair trading and product safety for the benefit of consumers, businesses and the Australian community. The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the *Competition and Consumer Act 2010 (CCA)*, regulate national infrastructure and undertake market studies.

The ACCC welcomes the opportunity to make a submission to the Treasury's consultation on the draft legislation to improve the timeliness of processes under the National Access Regime.

The ACCC's submission to the previous consultation paper supported amendments to improve these processes and were made in the context of our position that broader reform of monopoly infrastructure regulation is needed. While we still support broader reforms, this submission addresses the proposed amendments only.

We welcome the fact that much of the draft legislation is consistent with the ACCC's previous submission, including:

- removal of merits review for declaration decisions
- determinations ceasing to operate if the underlying declaration is revoked, after a transition period, and
- limiting repeat applications to where there is a material change in circumstances.

However, we have strong concerns that the draft legislation proposes differential treatment of declarations and determinations by removing merits review for declarations but not for determinations. Most importantly, the removal of merits review for declaration may shift the litigation to any subsequent determination processes. This could result in a framework that is little timelier than under current arrangements and which does not meet the stated policy objective of the amendments.

Merits review of access determinations should be removed, consistent with the treatment of declarations

The current proposed legislation removes merits review for declarations, yet the same is not proposed for access determinations. The ACCC recommends this be amended prior to introduction of the legislation.

- Creating this inconsistency may shift litigation to any access determinations, where merits review would be available, undermining timeliness gains from removing merits review for declarations.
- Some of the reasons in the draft explanatory materials and regulation impact statement that have been put forward as supporting the removal of the merits review for declarations could also apply to access determinations. Primary decision-makers for these technical matters are usually selected on the basis of their expertise and ability to conduct a rigorous evaluation process.

Shifting the litigation to determinations

The ACCC does not agree with the statement in the draft Explanatory Memorandum (at 1.22) regarding determinations that "the review of such decisions [*access determinations*] is unlikely to impact the effectiveness of the National Access Regime".

By removing merits review for declarations but keeping it for arbitration determinations, it may simply shift the arguments to arbitration determinations and retain many of the current delays in the regime's processes. Importantly, it would not remove the ability for monopolists to delay a regulatory outcome by seeking merits review of every arbitration outcome. Only by removing merits review for both stages will the objective of improved timeliness of the regime be achieved. Judicial review would, of course, remain available.

This is reflective of a broader issue with the incentive for monopolist businesses to delay when dealing with access regimes and regulation. This has seen the removal of merits review for arbitrations the ACCC has a role in for other industries. For example, the ACCC's submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation highlights that due to the "unavoidably resource intensive and time-consuming process due to the complex nature of the issues and the need to conduct the hearing fairly",¹ it should not be subject to merits review. Similar reasoning applies to merits review for determinations under the National Access Regime.

The Australian Energy Regulator's (AER) experience with limited merits review also highlights this issue above. The AER's submission to the Senate Committee to remove Limited Merits Review highlights that network energy companies' focus had shifted to the limited merits review, which ultimately harmed consumers by increasing their energy bills.² The Government subsequently removed merits review of the AER's determinations.

On a related point, the Regulation Impact Statement (RIS) states that removing the Tribunal's review of the ACCC's determination, "is not preferred because there is limited evidence on which to base a conclusion on Option 2, as the Tribunal has only reviewed one ACCC arbitration determination since 1995."³ The fact that merits review of declarations has been more frequent than those of determinations is neither surprising, nor a sound reason to retain merits review of determinations. Declaration processes come before any potential determination and will often resolve a dispute at that stage – either through the application for declaration failing or a successful declaration bringing parties to negotiate an outcome. While this has potentially avoided more frequent merits review of determinations to date, removing merits review for a successful declaration is likely to increase the likelihood of litigation around determinations, as noted above.

Further, the determination process can also be subject to extensive delays, which reduce the efficiency of the National Access Regime. The Glencore and Port of Newcastle determination has taken three years to reach the High Court and is still to be remitted to the Tribunal for further consideration. These extensive delays in the review timeframe for arbitration determinations can impact businesses' ability to use the facility on reasonable terms.

Difficulties in replicating full consideration of determinations

The ACCC also disagrees with the conclusion in the RIS that "arbitrations determinations are more technical in nature than declaration decisions, which suggests there is value in

¹ Administrative Review Council, The Office of Best Practice Regulation, *Regulation Impact Statement - Timeliness of processes under the National Access Regime*, (July 1999), quoted in Australian Competition and Consumer Commission Submission to the Productivity Commission Review of Telecommunications Specific Competition Regulation.

² Australian Energy Regulator, *Submission to the Senate Environment and Communications Legislation Committee regarding the Competition and Consumer Amendment (Abolition of Limited Merits Review) Bill 2017*, <https://www.aer.gov.au/system/files/AER%20submission%20-%20Bill%20to%20remove%20limited%20Merits%20Review%20-%20Submission%20to%20the%20Senate%20Committee.pdf>

³ The Office of Best Practice Regulation, *Regulation Impact Statement - Timeliness of processes under the National Access Regime*, p 23, https://obpr.pmc.gov.au/sites/default/files/posts/2021/05/national_access_regime_ris.pdf

retaining merits review by the Tribunal”.⁴ The Administrative Review Council’s guidelines at 4.53 (mentioned above and cited in the draft Explanatory Memorandum note) states that decisions that would be time-consuming and costly to review is another reason merits review may not be warranted.

To this point, the ACCC again notes that the body undertaking merits review may not have the benefit of the time, resources and expertise available to the original decision-maker.

For these reasons we recommend that declarations and determinations be treated in a consistent manner and remove merits review for access determinations.

Other matters

We note that the exposure draft legislation proposes to cancel arbitrations in progress immediately upon a declaration being revoked. This would create some uncertainty for the interim prices in the short term. The ACCC remains of the view indicated in our previous submission:

[I]t may 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’. 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.⁵

An access seeker in this situation would have already taken a risk and invested resources in the process. Not allowing those arbitrations to be finalised could further dissuade usage of the arbitration framework, even where it may be needed and appropriate.

Finally, the ACCC queries whether the currently proposed transition period of 6 months from revocation of a determination to the cancellation of a determination is sufficient. The businesses operating under a determination would be required to renegotiate significant and complex commercial agreements. For example, a six-month transition period could be insufficient to renegotiate access agreements if it coincided with end of financial year reporting, a key stage in an agricultural production cycle, or a holiday period. Accordingly, a 12-month transition period may allow for better outcomes for businesses involved.

⁴ The Office of Best Practice Regulation, *Regulation Impact Statement - Timeliness of processes under the National Access Regime*, p 23, https://obpr.pmc.gov.au/sites/default/files/posts/2021/05/national_access_regime_ris.pdf

⁵ ACCC, *Submission to Treasury consultation paper: Timeliness of processes under the National Access Regime*, April 2021, p 5, <https://www.accc.gov.au/system/files/Treasury%20consultation%20-%20Timeliness%20of%20National%20Access%20Regime.pdf>