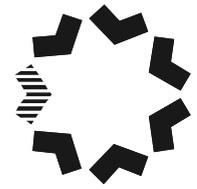


NATIONAL  
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COUNCIL



# Certification of State and Territory Access Regimes

A guide to Certification under  
Part IIIA of the  
*Competition and Consumer Act 2010*  
(Cth)



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**The National Competition Council**

The National Competition Council is established by s 29A of the *Competition and Consumer Act 2010*. It is a federal statutory authority which functions as an independent advisory body for all Australian governments on third party access matters.

Information on the National Competition Council, its publications and its current work program can be found on the internet at [www.ncc.gov.au](http://www.ncc.gov.au) or by contacting the Council on (03) 9981 1600.

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## Abbreviations, defined terms and glossary

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
clause 6 principles	The principles set out in clauses 6(2)-6(5) of the CPA
Council	National Competition Council
CPA	Competition Principles Agreement between the Commonwealth of Australia and the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania, and the Australian Capital Territory and the Northern Territory, entered into on 11 April 1995 and as amended 13 April 2007.
criterion (a)	CCA, ss 44G(2)(a) and 44H(4)(a)
criterion (b)	CCA, ss 44G(2)(b) and 44H(4)(b)
Gas Code	National Third Party Access Code for Natural Gas Pipeline Systems, agreed to by the Council of Australian Governments in 1997 and implemented by each state and territory incorporating it into local gas access law; superseded in 2008 by the National Gas Law and National Gas Rules
National Gas Law	National Gas Law, which is set out in a Schedule to the <i>National Gas (South Australia) Act 2008</i> and applied as law in other states and territories (excluding Western Australia) by local application Acts: <i>National Gas (New South Wales) Act 2008</i> , <i>National Gas (ACT) Act 2008</i> , <i>National Gas (Tasmania) Act 2008</i> , <i>National Gas (Queensland) Act 2008</i> , <i>National Gas (Victoria) Act 2008</i> and <i>National Gas (Northern Territory) Act 2008</i>
National Gas Rules	National Gas Rules 2008
Part IIIA	Part IIIA of the <i>Competition and Consumer Act 2010</i> (Cth)
<i>Pilbara HCA</i>	<i>The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal</i> [2012] HCA 36; (2012) 246 CLR 379
QCA Act	<i>Queensland Competition Authority Act 1997</i> (Qld)
responsible Minister	The Premier of a state or the Chief Minister of a territory (CCA, s 44B)

Tarcoola-Darwin Rail Regime	The regime, certified in 2000, for access to the railway from Tarcoola in South Australia to Darwin in the Northern Territory (see NCC 2000)
Tribunal	Australian Competition Tribunal
WARAR	The Western Australian rail access regime, certified in 2010 (see NCC 2010a)
WASCA	Full Court of the Western Australian Supreme Court

## Version history

Version	Edition	Modifications made
November 2013	Fifth	General redraft and update, including to take account of the High Court decision in <i>The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal</i> [2012] HCA 36; (2012) 246 CLR 379 ( <i>Pilbara HCA</i> ). General edit of text and correction of references and formatting.
August 2011	Fourth	Updating to reflect change in name from <i>Trade Practices Act 1974</i> to the <i>Competition and Consumer Act 2010</i> (with effect 1 January 2011) and minor updating following recent certification decisions.
October 2010	Third	Redraft and update, including to accommodate changes to Part IIIA (effective 14 July 2010) arising from the <i>Trade Practices Amendment (Infrastructure Access) Act 2010</i> (Cth).
May 2009	Second	Minor redrafting of second edition, in particular to make more explicit the requirement for the Council to have regard to the objects of Part IIIA and that the Council recommends on the duration of any certification.
January 2009	Second	Major redrafting and update, in particular to accommodate changes to the TPA and changes to the CPA.
February 2003	First	

# 1 Certification of access regimes

## Background to certification

- 1.1 At the 25 February 1994 meeting of the Council of Australian Governments, all Australian governments agreed to the principles for a national competition policy as outlined in the report of the Hilmer Committee (Hilmer Committee 2003). That agreement is embodied in the Competition Principles Agreement (as amended to 13 April 2007) (**CPA**).
- 1.2 Clause 6 of the CPA concerns reforms relating to third party access to significant infrastructure under which Australian governments agreed that the Commonwealth would establish a generic national third party access regime. This regime is established in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (**CCA**) and provides for regulated access to infrastructure services that are declared on a case by case basis or subject to an access undertaking. Governments also agreed that states and territories would retain the ability to regulate access to services within their jurisdiction and that the national access regime would not apply to services covered by effective state or territory regimes. An effective regime is one that conforms to the set of principles set out in clause 6 of the CPA (**clause 6 principles**; see Appendix **A**). Where the designated Commonwealth Minister has made a decision that the access regime is effective (that is, he or she has certified the regime), services subject to the regime can be neither declared (CCA, ss 44G(2)(e) and 44H(4)(e)) nor the subject of an access undertaking accepted by the Australian Competition and Consumer Commission (**ACCC**) (CCA, s 44ZZA(3AA)).
- 1.3 The process for access regimes to be certified as effective is set out in Division IIA of Part IIIA of the CCA. Applications for certification of state or territory access regimes are made by the government of the state or territory to the National Competition Council (**Council**). The Council conducts a public consultation on the application before making its recommendation to the designated Commonwealth Minister whether he or she should certify the regime as effective. On receiving the recommendation the Commonwealth Minister must decide either that the regime is effective (and specify the period for which that decision is in force) or that it is not effective.
- 1.4 State and territory governments have adopted two approaches to access regimes. The first involves legislation imposing access regulation on specified infrastructure services. For example the *Railways (Operations and Access) Act 1997* (SA) imposes access regulation on services provided by major intrastate railway networks in South Australia. The second approach establishes a generic mechanism for imposition of access regulation where certain criteria are met. For example the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) provides for declaration of services where criteria similar to those in Part IIIA are satisfied. However, a generic access regime is not certifiable in itself. Rather, the generic regime as it applies to specific services may be the subject of a certification application. The generic regime established by the QCA Act, for example, is not itself certified but its application to access to services provided by the

Dalrymple Bay Coal Terminal and the Central Queensland Coal Rail Network is the subject of two separate certifications. Similarly, services provided by water industry infrastructure in New South Wales would be the subject of a certified access regime once the area in which the infrastructure is located is included in Schedule 1 of the *Water Industry Competition Act 2006 (NSW)* and services provided by the infrastructure are the subject of either a Ministerial coverage decision or an access undertaking accepted by the Independent Pricing and Regulatory Tribunal.

## About this guide

- 1.5 This guide is intended to assist parties considering making an application for certification to assess the merits of such an application and if appropriate to prepare their application and to assist other interested parties in preparing submissions in response to an application. The guide reflects the Council's current approach. However, each certification application is considered on its particular facts and may raise unique issues. As such, the Council's thinking continues to evolve and the views expressed in the guide should not be taken to be definitive.
- 1.6 The current version of the guide is available on the Council's website at [www.ncc.gov.au](http://www.ncc.gov.au). Any person viewing a printed copy of this guide should check the Council's website or call the Council on (03) 9981 1600 to ensure they have the current version. (A version number and date appear on the front cover page of this document and the version history is on p 7.)

## Effect of certification

- 1.7 Where a state or territory regime is certified as effective, that regime will exclusively govern regulation of access to the services to which it applies. Services subject to a certified regime cannot be declared and the ACCC cannot accept an access undertaking in respect of a service that is subject to a certified access regime (CCA, s 44ZZA(3AA)).
- 1.8 Services that are subject to a certified state or territory access regime (so exempt from declaration) might potentially be open to declaration where there has been a substantial modification of the access regime or the clause 6 principles such that the access regime is no longer effective (CCA, ss 44G(2)(e)(ii) and 44H(4)(e)(ii)). An applicant for declaration would need to establish this is the case.
- 1.9 A certification remains in force for the duration specified in the Commonwealth Minister's decision (see paras 2.11—2.13 below), unless the relevant state or territory ceases to be a party to the CPA. The CCA contains no mechanism for revocation or early termination of a certification.
- 1.10 Certification is only available for state or territory access regimes. While a state or territory government is not required to have an access regime certified and such a regime will be enforceable whether or not it is certified, certification provides access

seekers, infrastructure operators, developers and other parties with certainty about how access will be regulated.<sup>1</sup>

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<sup>1</sup> Services may also be made exempt from declaration if made subject to an access undertaking approved by the ACCC under s 44ZZA of the CCA (CCA, ss 44G(1) and 44H(3)).

## 2 The certification process

- 2.1 The responsible Minister—the Premier of a state or Chief Minister of a territory—may apply in writing to the Council asking the Council to recommend that the Commonwealth Minister certify an access regime as effective. Advisors to prospective applicants are encouraged to contact the Council prior to lodging an application to ensure that the application satisfies the formal requirements in regulation 6B of the *Competition and Consumer Regulations 2010* (Cth) and addresses the criteria the Council is required to consider in making its recommendation.
- 2.2 Regulation 6B stipulates that applications for certification must include:
- (a) the name of the State or Territory on whose behalf the application is made
  - (b) the name and designation of the responsible Minister for the State or Territory
  - (c) the name and contact details of a contact officer for the State or Territory
  - (d) the responsible Minister’s address for the delivery of documents, including the notification of any decision of the Commonwealth Minister or the Council, relating to the application or the recommendation
  - (e) a description of the access regime (including a copy of any relevant legislation)<sup>2</sup>
  - (f) a description of the service, and
  - (g) grounds in support of the application.
- 2.3 The key factors in the Council’s assessment of a certification application are the clause 6 principles and the objects of Part IIIA (set out in s 44AA of the CCA). An application must demonstrate how each of the clause 6 principles is addressed in relation to the services covered by the regime and how the access regime promotes the objects of Part IIIA. Supporting evidence should be provided wherever possible. The application should also include an assessment of the appropriate duration for which the regime should be certified.
- 2.4 Upon receipt of an application for certification, the Council commences a public consultation process by publishing the application in a national newspaper and on its website and inviting interested parties to make submissions. After considering submissions, the Council publishes a draft recommendation, including the reasons for its proposed recommendation, and invites interested parties to make further submissions

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<sup>2</sup> In the Council’s experience, it is also helpful for the applicant to provide: any relevant historical versions of regime legislation; any explanatory memoranda, parliamentary speeches or papers that assist in interpreting the relevant legislation; and any guidelines or similar information that has been or will be provided to the public in relation to the regime.

on the draft recommendation before making its final recommendation to the Commonwealth Minister.<sup>3</sup>

- 2.5 The Council must make its recommendation within 180 days of receiving the application (s 44NC). There is provision to stop the clock during this period in certain circumstances. The Council may also extend the period for making its recommendation in certain circumstances, for example if an application is particularly complex or where significant public holidays such as the Christmas/New Year period or other factors restrict the Council's ability to gather information. If it does this, the Council must provide notice in writing to the Minister, the applicant and the service provider and must publish a notice in a national newspaper. In giving notice the Council must specify when it expects to make a recommendation on the application.
- 2.6 If the Council recommends certification then it must also recommend to the Commonwealth Minister how long that certification should be in force (s 44M(5)). A certification remains in force for the duration specified in the Commonwealth Minister's decision unless the relevant state or territory ceases to be a party to the CPA.
- 2.7 The Council informs the applicant and the service provider when it has provided its final recommendation to the Commonwealth Minister. As soon as practicable after the Commonwealth Minister makes a decision, the Council publishes its final recommendation and Minister's decision on its website ([www.ncc.gov.au](http://www.ncc.gov.au)) and provides a copy of the final recommendation to the applicant and the service provider (s 44NF).

## **The Minister's decision**

- 2.8 After receiving the Council's recommendation the Commonwealth Minister must decide whether the regime is an effective access regime or whether it is not an effective access regime. If the Minister decides to certify the regime then the Minister must also specify the period for which certification will be in force (s 44N(3)). The Minister is required to publish his or her reasons for the decision. If the Minister does not publish his or her decision on a recommendation within the period starting at the start of the day the recommendation is received and ending at the end of 60 days after that day the Minister is taken to have made a decision in accord with the recommendation of the Council and to have published that decision. If the Council recommended that the Minister decide that the regime is an effective regime then the decision is taken to be in force for the period recommended by the Council.

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<sup>3</sup> Parties submitting information to the Council are advised that the giving of false or misleading information to a Commonwealth entity, such as the Council, is a serious offence. Section 137.1 of the Commonwealth Criminal Code (*Criminal Code Act 1995* (Cth)) makes it a criminal offence for a person to supply information to a Commonwealth body knowing that the information is false or misleading in a material particular or omitting any matter or thing without which the information is misleading in a material particular.

## Review of Minister's decision

- 2.9 The applicant for certification can apply to the Australian Competition Tribunal (**the Tribunal**) for a review of the Commonwealth Minister's decision. The application for review must be made within 21 days after the publication of the Commonwealth Minister's decision. The Tribunal may affirm, vary or reverse the original decision and the Tribunal's decision is taken to be the decision of the Commonwealth Minister. The Tribunal must make a decision within 180 days of the application for review being made, although this period can be extended. (See ss 44O, 44ZZOAAA, 44ZZOAA and 44ZZOA)
- 2.10 To date, no certification decision has been reviewed.

## Duration of certification

- 2.11 When recommending that a state or territory access regime be certified as effective, the Council is required to recommend the period for which certification should remain in force. The Council therefore considers the duration of certification in its public consultation process.
- 2.12 Certification provides investors, infrastructure owners, operators and users with the confidence as to the regulatory regime that will apply to a service. This need to protect incentives and maintain regulatory confidence favours longer certification periods. For example, the Council recommended that the Tarcoola-Darwin Rail Regime be certified for 30 years because the regime partly covers an entrepreneurial greenfields project with considerable risk attached (NCC 2000, pp 96–7).
- 2.13 There may be circumstances in which shorter certification periods are appropriate. An example is where the likely operation and effectiveness of the regime is uncertain because of the novelty of the regime, the dynamic nature of the relevant markets or where broader regulatory circumstances are expected to change. In the case of the South Australian rail access regime, the applicant sought certification for 10 years but the Council in its draft recommendation proposed to recommend a five-year certification period because of concerns that the regime did not provide for periodic review of the coverage of the regime. Following an undertaking by the South Australian Government to amend the governing legislation, the final recommendation supported certification of the regime for 10 years, as sought by the applicant (NCC 2010d).<sup>4</sup>

## Extension of certification

- 2.14 Under s 44NA, the responsible Minister for the state or territory may apply to the Council asking it to recommend that the Commonwealth Minister extend the period for which a certification is in force. The certification decision must be in force at the time of the

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<sup>4</sup> The South Australian Parliament enacted the relevant amendments in the *Railways (Operations and Access) (Miscellaneous) Amendment Act 2010*.

application. An application for extension may specify proposed variations to the access regime.

- 2.15 The Council assesses applications for extension by applying the same principles as it does in the case of applications for certification: that is, the Council assesses whether the access regime (including any proposed variations) is effective by applying the clause 6 principles, having regard to the objects of Part IIIA and considering no other matters. After assessing the effectiveness of the access regime and any proposed variations, the Council must recommend to the Commonwealth Minister that the regime is or is not an effective access regime. If the Council recommends that certification be extended it must also recommend an extension period.

### **Variation of a certified regime**

- 2.16 If a state or territory amends or proposes amending an access regime after it has been certified, it may seek an informal view from the Council as to the ongoing effectiveness of the regime. The Council is not bound by an informal view should, for example, someone apply to have a service that is the subject of the regime declared under Part IIIA.
- 2.17 Where a state or territory requires greater certainty, it may apply to the Council for certification of the modified access regime or to have proposed modifications assessed as part of seeking an extension of the certification.

### 3 The criteria for certification

- 3.1 In determining whether to recommend that an access regime be certified as effective, the Council:
- is guided by the clause 6 principles (s 44M(4))
  - must treat each principle as having the status of a guideline rather than a binding rule (s 44DA)
  - must have regard to the objects set out in s 44AA of Part IIIA (s 44M(4)(aa)), and
  - is not permitted to consider any other matters (s 44M(4)).
- 3.2 The same requirements apply to the Commonwealth Minister when making a decision on a Council recommendation (s 44N(2)).<sup>5</sup>

#### Assessment against the clause 6 principles

- 3.3 The clause 6 principles identify the types of services that may be subject to access regulation and establish the principles that an access regime should incorporate. While an effective access regime needs to reflect each of the clause 6 principles, the assessment of an access regime against the clause 6 principles is not a matter of applying a binary test of compliance. Section 44DA gives the Council and the Commonwealth Minister considerable flexibility in applying the clause 6 principles. It provides that each clause 6 principle is to be treated as a guideline rather than a binding rule and that state or territory regimes may contain additional matters as long as they are not inconsistent with the clause 6 principles. Further, clause 6(3) of the CPA requires only that a state or territory regime takes a *reasonable* approach to incorporating the principles in clauses 6(4) and (5) and there may be a range of approaches available to state or territory governments. In this regard, the Council recognises that a range of regulatory arrangements are capable of delivering efficient outcomes. The Council also assesses the incorporation of the clause 6 principles by an access regime as a whole, recognising that there will often be significant interdependencies between one aspect of a regime and another.
- 3.4 While the underlying objective of access regulation is the promotion of efficiency, the CPA makes explicit that the goals of access regulation are to promote the efficient use and operation of, and investment in, significant infrastructure to promote competition in activities in upstream and downstream markets that rely on the use of the infrastructure. This is consistent with the Part IIIA objects clause which requires the Council and the

<sup>5</sup> Both the Council and the Commonwealth Minister must also disregard Chapter 5 of the National Gas Law, which provides for no-coverage determinations and price regulation exemptions for greenfields gas pipelines.

Minister, along with other regulators and decision makers, to have regard to efficiency and competition objectives in dealing with third party access matters.

- 3.5 In the reasons for its recommendations, the Council generally organises its consideration of an access regime into an assessment against the clause 6 principles, divided into the five categories set out in Box 1, and a consideration of the objects of Part IIIA.

**Box 1: Categories of clause 6 principles**

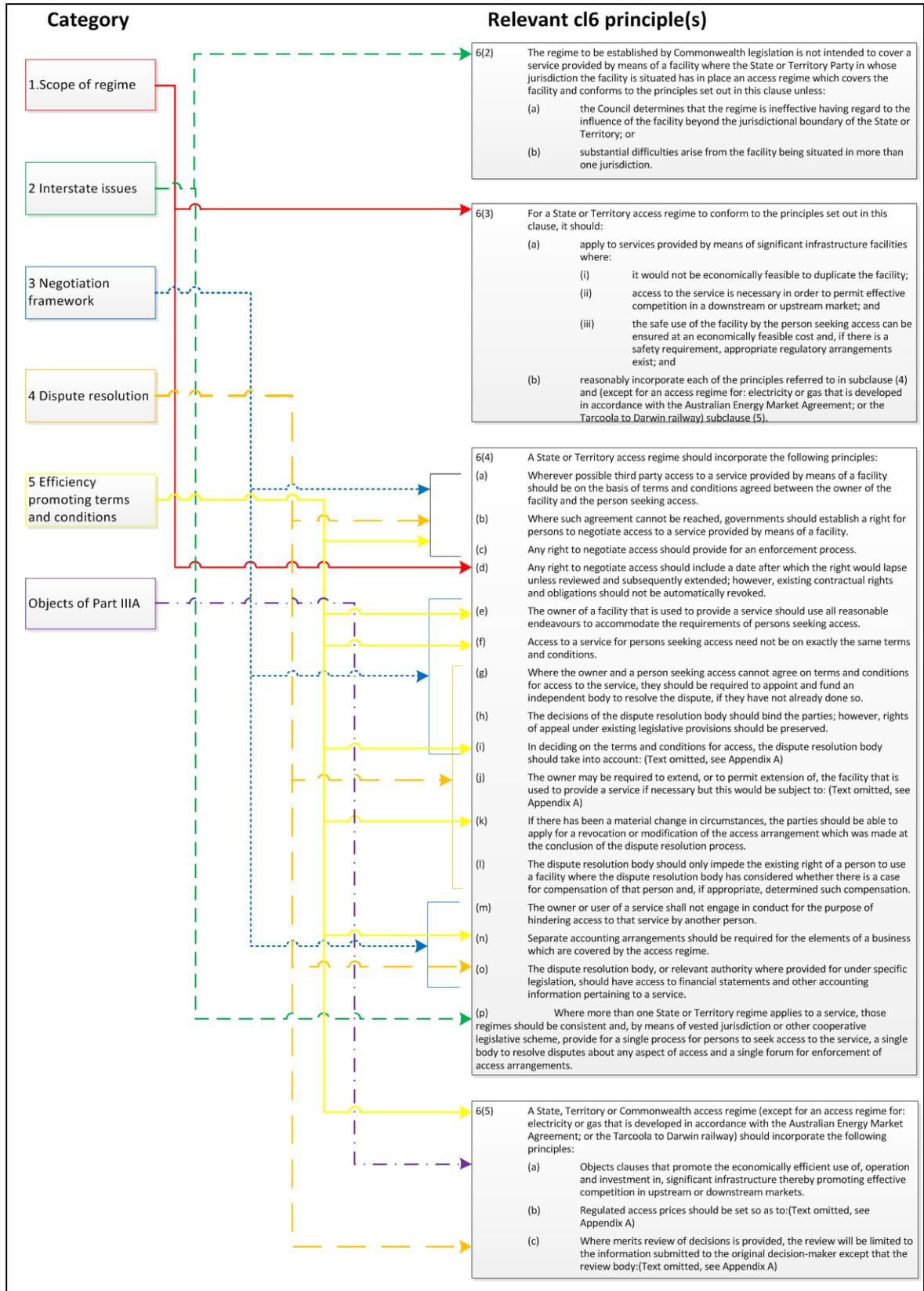
- |    |  |
|----|--|
| 1. | Scope of the regime: 6(3), 6(4)(d)   |
| 2. | Interstate issues: 6(2), 6(4)(p)   |
| 3. | Negotiation framework: 6(4)(a)-(c), (e)-(i), (m)-(o)   |
| 4. | Dispute resolution: 6(4)(a)-(c), g)-(l), (o), 6(5)(c)  |
| 5. | Efficiency promoting terms and conditions of access: 6(4)(a)-(c), (e), (f), (i), (k), (n), 6(5). |

- 3.6 The Council considers that this approach provides a logical framework for analysis and helps to identify whether (and how) a regime addresses the statutory requirements for an effective access regime. The linkages between these categories and the objects of Part IIIA with the relevant clause 6 principles are illustrated in Figure 1 on page 17. The Council's categorisation does not displace the clause 6 principles and the objects of Part IIIA as the basis for ascertaining whether a regime is effective. This guide therefore discusses each principle sequentially (except clauses 6(2) and 6(4)(p), which are considered together) in order to provide potential applicants and interested parties with the Council's views on each clause 6 principle. An application may consider the clause 6 principles sequentially or according to the Council's categories but it must identify how the access regime incorporates each clause 6 principle and is consistent with the objects of Part IIIA.

## Objects of Part IIIA

- 3.7 When assessing the effectiveness of an access regime, the Council and the Minister must have regard to the objects of Part IIIA. Section 44AA provides that the objects of Part IIIA are to:
- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
  - (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

Figure 1: Linkages to clause 6 principles



## Efficiency

- 3.8 Paragraph (a) of s 44AA reflects clause 6(5)(a) of the CPA that requires certain access regimes<sup>6</sup> to incorporate:

Objects clauses that promote the economically efficient use of, operation of, and investment in significant infrastructure, thereby promoting effective competition in upstream and downstream markets.

- 3.9 The Council considers that s 44AA(a) and clause 6(5)(a) together require that all state and territory access regimes should reflect that the goals of regulating access are the promotion of efficiency by removing barriers to effective competition. The combined effect of s 44AA(a) and clause 6(5)(a) is to reduce the scope for the interpretation of the operational provisions of an access regime to diverge from the efficiency goals of access regulation.

## Consistency

- 3.10 The objects clause ‘highlights the important role played by Part IIIA in terms of providing a framework for access regulation applying to specific industries’ (Pearce, 2005). Within this framework for consistency, industry-specific access regimes ‘may be divergent due to different market characteristics’ and the design and operation of state and territory access regimes is a matter for each [state or territory]’ (Revised Explanatory Memorandum, Trade Practices Amendment (National Access Regime) Bill 2005, p 18).
- 3.11 In its final recommendation on the application for certification of the Western Australian rail access regime (**WARAR**) (NCC 2010a), the Council assessed whether the regime promoted consistency within the rail industry in Western Australia. Recommending against certification, the Council concluded that, because Western Australian railways were subject to a variety of forms of access regulation (or no access regulation at all), the regime was incompatible with a framework and guiding principles that encourage a consistent approach to access regulation for railways in Western Australia. In his decision to certify the regime, the Commonwealth Minister took a different view. He said that s 44AA(b) requires consideration of whether the WARAR detracted from the framework and guiding principles in Part IIIA and that the phrase ‘in each industry’ referred to consistency ‘*across* different industries’ (Bradbury 2011).
- 3.12 The Council agrees that consistent access regulation across different industries is an important element of the objective of the reforms agreed to by the Council of Australian Governments but also considers that s 44AA(b) seeks to promote consistent regulation of similar infrastructure services including within industries. Depending on the

<sup>6</sup> The CPA was amended in 2007 with the insertion of principles requiring objects clauses, pricing principles and merits review to be included in certifiable access regimes. However, the Tarcoola-Darwin Rail Regime and the electricity and gas access regimes developed in accordance with the Australian Energy Market Agreement were exempted from these additional requirements (see clauses 6(3)(b) and 6(5)).

circumstances of a particular certification application, the Council considers that either aspect of the consistency objective (or both of them) may be relevant in having regard to the objects of Part IIIA.

### **Approaches to achieving the objects of Part IIIA**

- 3.13 The Council also considers whether the level of regulatory intervention provided for in a state or territory access regime, considered in light of the characteristics of the industries to which the regime applies, is likely to promote outcomes consistent with the objects of Part IIIA.
- 3.14 The clause 6 principles promote a negotiate-arbitrate model of access regulation, which is the model advocated by the Hilmer Committee (Hilmer Committee 1993, pp 255-6) and reaffirmed by all Australian governments in the Competition and Infrastructure Reform Agreement as the underlying principle for the establishing of access terms. Under this model, an access seeker negotiates the terms of access with the service provider and the parties have recourse to arbitration only if and when they fail to reach a commercial agreement. Since the regulator does not intervene and access terms are not imposed until commercial negotiations fail, this approach can be described as *ex-post* regulation. Its key advantage is that, being less interventionist than full regulation, it has the potential to limit regulatory costs while facilitating the achievement of outcomes that reflect those that would have emerged from commercial negotiations in a workably competitive market. This light-handed regulatory approach, with recourse to regulatory intervention only when the need arises, lends itself well to industries in which a single service provider deals with a few large, well-resourced and well-informed access seekers.
- 3.15 However, *ex-post* intervention may be less effective where a service is provided by more than one party or where there are multiple access seekers. This is particularly so where a large service provider deals with multiple, relatively small and less well-resourced access seekers. In such circumstances, in order for access seekers to be able to negotiate effectively, a more prescriptive access regime may be warranted to address significant information and negotiating power asymmetries. Such an *ex-ante* access regime would prescribe terms and conditions of access upfront, commonly in an approved access undertaking.

### **Transitional arrangements**

- 3.16 Transitional arrangements may provide breathing space to help parties adjust to a competitive market. However, they also delay the commencement of competitive arrangements, which may impose price penalties on consumers. For this reason, while an effective regime may incorporate transitional arrangements in response to demonstrated public policy issues, the arrangements should be necessary and phased out as soon as possible.

## **Changes to regimes while under Council consideration**

- 3.17 On occasion, regimes have been amended or undertakings have been made to amend a regime between the time of application for certification of the regime and the time the Council issued its final recommendation to the Commonwealth Minister (see, eg: NCC 2010b and 2010d). It is preferable that a regime be finalised (and operational) prior to an application for certification being made because later changes to a regime may affect the ability of interested parties to fully participate in the Council's public consultation process. If late changes are made to an access regime in order to secure certification, the Council may seek agreement to 'stop the clock' or extend the consideration period under s 44NC in order to ensure that the integrity of its public consultation is not undermined.

## 4 Clause 6(3)

### Clause 6(3): significant infrastructure

For a State or Territory regime to conform to the principles set out in this clause, it should:

- (a) apply to services provided by means of significant infrastructure facilities where:
  - (i) it would not be economically feasible to duplicate the facility;
  - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
  - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and
- (b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

- 4.1 Clause 6(3)(a) sets out threshold effectiveness principles, which require that the coverage of a certifiable access regime be limited to a narrow range of services—those that open up ‘bottlenecks’ to competition and thereby unlock the potential benefits that competition in dependent markets may bring, in particular, the economic efficiency benefits likely to flow to users and to the community more generally.
- 4.2 To demonstrate that an access regime meets the clause 6(3)(a) principles it is necessary to:
  - define the service(s) covered by the access regime, and
  - demonstrate that the access regime applies only to the services of a significant infrastructure facility in the circumstances described in clause 6(3)(a).

## ‘Services’ subject to access regimes

- 4.3 Access regimes must apply to services, which can include proposed services (s 44M(1) and clause 6(3)). An effective access regime (and an application for certification of the regime) should clearly and precisely define the services subject to it.
- 4.4 Section 44B of the CCA defines ‘service’ as meaning ‘a service provided by means of a facility’. It includes:
- (a) the use of an infrastructure facility such as a road or railway line;
  - (b) handling or transporting things such as goods or people;
  - (c) a communications service or similar service;
- but does not include:
- (d) the supply of goods; or
  - (e) the use of intellectual property; or
  - (f) the use of a production process;
- except to the extent that it is an integral but subsidiary part of the service.
- 4.5 A service is distinct from a facility but may consist merely of the use of a facility (*Rail Access Corporation v New South Wales Minerals Council Ltd* [1998] FCA 1266; (1998) 87 FCR 517, [524]). If the use of the service by the access seeker also answers the description of the use by the access seeker of the service provider’s production process, it is not a service for the purposes of Part IIIA. The fact that the service provider’s production process uses integers (for example, the use of a specific facility or an element of a process) which an access seeker wants to use for its own purposes does not necessarily mean that a service using those integers is excluded from the definition of service in s 44B (*BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45; (2008) 236 CLR 145, [41] and [43]).<sup>7</sup>
- 4.6 For example, the National Gas Law includes coverage criteria in s 15 analogous to clause 6(3)(a) and in Chapter 3 makes detailed provision, together with the National Gas Rules, for the making of coverage and coverage revocation determinations.<sup>8</sup>
- 4.7 In some cases, an access regime expressly excludes certain services, such as where the facility providing the excluded service is considered economically feasible to duplicate or where it has different and distinct ownership from the facility providing the covered

<sup>7</sup> See the Council’s guide to declaration (NCC 2013) for further discussion of the definition of ‘service’.

<sup>8</sup> The National Gas Law mechanism is in substantially the same form as the mechanism in the Gas Code which the Council found to be consistent with clause 6(3) (NCC 1997b, pp 13–16).

services. The exclusion of a service from an access regime may raise certification issues if the omission poses a barrier to access, such that the clause 6 principles are not satisfied. This would be the case if, for example, the excluded service is integral to accessing the services covered by the regime.

**Significant infrastructure facility**

4.8 To meet the clause 6(3)(a) principles, an access regime should apply only to services (or proposed services) of significant infrastructure facilities where:

- duplication of the facility is not economically feasible (clause 6(3)(a)(i)). Following the decision of the High Court in *Pilbara HCA*, this principle tests whether it would be profitable to duplicate the facility. (See para 4.15 below.)
- access is necessary to permit effective competition in an upstream or downstream market (clause 6(3)(a)(ii)). This principle is satisfied where the regulation of access by the regime will improve the conditions or environment for effective competition in a dependent market or markets. Whether the conditions for competition will be enhanced depends on whether, in the absence of the regime, the service provider has the ability and incentive to exercise monopoly power to adversely affect competition in a dependent market or markets.
- safe use of the facility by an access seeker is economically feasible and subject to appropriate regulatory arrangements (clause 6(3)(a)(iii)). This principle provides that third party access should not be required where it would pose a safety concern that appropriate regulation cannot address at an economically feasible cost.

4.9 In essence, the clause 6(3)(a) principles refer primarily to the services of significant infrastructure, that cannot be economically duplicated and that occupy a strategic position in the service delivery chain whereby access is essential for effective competition in a dependent market or markets.

**Consistency with the declaration criteria**

4.10 Despite some differences in expression, the principles in clause 6(3)(a) and sub-clauses (i) and (ii) are broadly equivalent to criteria (c), (b) and (a) (respectively) in ss 44G(2) and 44H(4) of the CCA. Table 1 sets out each element of clause 6(3)(a) and the corresponding Part IIIA criterion.

**Table 1 The clause 6(3)(a) principles and related declaration criteria**

Clause 6(3)(a)	CCA, ss 44G(2) and 44H(4)
For a State or Territory access regime to conform to the clause 6 principles, it should:	The Council cannot recommend and the designated Minister cannot decide to declare a service unless satisfied that:

Clause 6(3)(a)	CCA, ss 44G(2) and 44H(4)
(a) apply to services provided by means of significant infrastructure facilities where:	(c) the facility is of national significance, having regard to: <ul style="list-style-type: none"> <li>(i) the size of the facility; or</li> <li>(ii) the importance of the facility to constitutional trade or commerce; or</li> <li>(iii) the importance of the facility to the national economy.</li> </ul>
(i) it would not be economically feasible to duplicate the facility	(b) it would be uneconomical for anyone to develop another facility to provide the service
(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market	(a) access (or increased access) to the service would promote a material increase in competition in at least one market ..., other than the market for the service

4.11 The Productivity Commission has noted the differences between clause 6(3) and the declaration criteria Part IIIA and the clause 6 principles and the potential for further divergence should the declaration criteria be amended. This, according to the Productivity Commission, raises the possibility that state and territory access regimes may not be appropriately targeted to the economic problem access should address such that access regulation may be applied where it will not lead to an increase in competition in related markets or may not be applied and benefits from increased competition will be lost (PC 2013, pp 229-30).

4.12 Given that certification of an access regime displaces the availability of declaration of the services covered by the access regime and noting the requirement that the clause 6 principles are guidelines rather than binding rules, the Council considers it appropriate to interpret the clause 6(3)(a) principles as far as possible in a manner consistent with the declaration criteria.<sup>9</sup>

4.13 The Council makes the following observations on the specific distinctions between clause 6(3)(a) and the declaration criteria.

*Significant infrastructure facilities*

4.14 For a regime to comply with clause 6(3)(a), services subject to it should be provided by ‘significant infrastructure facilities’. The term ‘significant’ imposes a lower threshold than that imposed by the ‘national significance’ criterion in Part IIIA. Determination of national significance in criterion (c) (CCA, ss 44G(2)(c) and 44H(4)(c)) requires an assessment of a facility’s size, importance to constitutional trade or commerce, or importance to the national economy. The Council’s approach is to consider whether a

<sup>9</sup> Further information on the Council’s approach to interpreting the declaration criteria under Part IIIA of the CCA is in the Council’s declaration guide (NCC 2013, available on the Council’s website).

facility providing services subject to a state or territory regime is ‘significant’ in terms of its size and importance to the economy of the state or territory or, if applicable, the regional or national economy (NCC 1997a, pp 13–14 and 2010a, [5.25]).

*Facilities that cannot be economically duplicated*

4.15 Under clause 6(3)(a)(i), services subject to an effective access regime should be provided by a facility that ‘it would not be economically feasible to duplicate’. Criterion (b) requires that ‘it would be uneconomical for anyone to develop another facility to provide the service’. Although the terms ‘duplicate’ and ‘develop’ are distinct, the Council considers it appropriate to interpret the tests in the same way. The Council also considers that there is no practical distinction between ‘economically feasible’ and ‘uneconomical for anyone’.

4.16 Prior to *Pilbara HCA*, the Council and the Tribunal interpreted criterion (b) as being concerned with the waste of Australian society’s resources associated with duplication of facilities that exhibit natural monopoly characteristics; that is, where a single facility could meet all likely demand for a service at lesser cost than two or more facilities. In *Pilbara HCA*, the High Court determined that the criterion (b) test is one of profitability. It said:

[criterion (b)] uses the word “uneconomic” to mean “unprofitable” [and] is to be read as requiring the decision maker to be satisfied that there is not anyone for whom it would be profitable to develop another facility. (at [77])

4.17 The meaning of the word ‘anyone’ in criterion (b)—which does not appear in clause 6(3)(a)(i)—was pivotal in *Pilbara HCA*. According to the majority, ‘anyone’ in criterion (b)

should be read as a wholly general reference that requires the decision maker to be satisfied that there is no one, whether in the market or able to enter the market for supplying the relevant service, who would find it economical (in the sense of profitable) to develop another facility to provide that service. (*Pilbara HCA*, [77]; see also [83])

4.18 The majority also held that ‘anyone’ is not limited in application; it ‘includes existing and possible future market participants’ including the owner of the facility (*Pilbara HCA*, [105]). Justice Heydon, on the other hand, took the view in his dissenting judgment that the words ‘for anyone’

do not refer to the particular circumstances of each possible developer [but] focus on what would be true for anyone. ... If the development is uneconomical as that word is used in ordinary English—wasteful and inefficient—no matter whom one contemplates as a developer, criterion (b) is satisfied. (*Pilbara HCA*, [181])

4.19 The implications of this for the Council’s assessment of an access regime against clause 6(3)(a)(i) have yet to be considered in the context of a certification application. The Council is of the view that the absence of the word ‘anyone’ in clause 6(3)(a)(i) is

insufficient to distinguish the two tests and it is bound to apply the ‘private profitability test’ in its consideration of clause 6(3)(a)(i), rather than continue to apply a test of natural monopoly. Accordingly, the Council’s assessment of an access regime against this clause will be guided by a number of observations made by the High Court:

- It would be profitable for a person to develop another facility to provide the service if the person ‘could reasonably expect to obtain a sufficient return on capital that would be employed in developing that facility’. (*Pilbara HCA*, [104])
- If development of an alternative facility would be profitable as part of a larger project, it is necessary to consider the rate of return of the development of the alternative facility as part of the *whole* project. (*Pilbara HCA*, [104])
- The question of the profitability of develop an alternative facility is one that requires the making of forecasts and the application of judgment and ‘is a question that bankers and investors must ask and answer in relation to any investment in infrastructure.’ (*Pilbara HCA*, [106])

4.20 The Council has not had to consider a certification application since the High Court’s decision and expects that this issue may become more settled if and when it is subjected to scrutiny in the public consultation process.

#### *Competition in a dependent market*

4.21 There are subtle differences in the wording of clause 6(3)(a)(ii) and criterion (a). Clause 6(3)(a)(ii) requires that access is *necessary* for effective competition in a dependent market, while criterion (a) requires that access *would promote* a material increase in competition in a dependent market. Criterion (a), in including the term “increased access”, also expressly applies to situations where users already have some access to the service in question. However, the Council considers that these differences in wording create little or no practical distinction between the tests it is to apply. Similarly, the addition in 2006 of ‘material’ to criterion (a) served to clarify the interpretation of criterion (a) and as such creates no inconsistency between the certification principles and the declaration criteria.

#### *Safe use of facilities and public interest*

4.22 Unlike in Part IIIA, the clause 6(3)(a) principles do not include an explicit public interest assessment as provided (the public interest criterion in Part IIIA is criterion (f): CCA, ss 44G(2)(f) and 44H(4)(f)). While regulation that seeks to promote economic efficiency will generally be in the public interest, the generic nature of Part IIIA means that public interest considerations need to be assessed on a case-by-case basis. State and territory governments, however, can consider the public interest effects of implementing an access regime for a particular industry as part of regulatory impact assessment processes.

4.23 Clause 6(3)(a)(iii) requires that an access regime apply to services where ‘the safe use of the facility... can be assured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist.’ The ‘human health and safety criterion’ (ss 44G(2)(d) and 44H(4)(d)) was removed from Part IIIA in 2010. The Council does not consider that any substantive inconsistency arises from this difference between Part IIIA and the clause 6 principles. In the second reading speech for the Bill that effected the removal of the health and safety criterion from Part IIIA, the Minister said that ‘health and safety issues are properly managed by other relevant regulation, irrespective of whether access is available for third parties’ and can be considered by the ACCC in arbitrating an access dispute (Emerson 2009, p 11 470). Clause 6(3)(a)(iii) does not require an assessment of whether health and safety provisions are adequate. Rather, it requires a consideration of the cost of the safe provision of access and the appropriateness of any safety regulations.

## 5 Clause 6(4)

### Clauses 6(4)(a)–(c): negotiated access

- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
- (b) Where such agreement cannot be reached, Governments should establish a right for persons to negotiate access to a service provided by means of a facility.
- (c) Any right to negotiate access should provide for an enforcement process.

- 5.1 Clauses 6(4)(a)-(c) seek to ensure that an access regime provides an incentive for parties to reach agreement by commercial negotiation with recourse to regulatory intervention where negotiations are unsuccessful. Clause 6(4)(a) requires that an effective access regime allows parties to try to reach mutually beneficial agreements through commercial negotiation. Clauses 6(4)(b) and (c) recognise that regulatory measures can provide an incentive to reach commercially agreed outcomes but also require that an effective regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.
- 5.2 In some circumstances, access seekers may have insufficient information and bargaining power to negotiate with large service providers. Therefore an effective access regime should appropriately address information asymmetries to enable access seekers to enter into meaningful access negotiations. This involves striking a balance between obliging the service provider to disclose sufficient information for the access seeker to make informed decisions, while ensuring that the disclosure requirements are not unduly onerous.
- 5.3 Having regard to the objects of Part IIIA, clauses 6(4)(a)–(c), 6(4)(i) and 6(5) can be seen as operating together to require an effective access regime to encourage access outcomes that mirror, as closely as possible, those that would be derived in an effectively competitive market. The Council considers that for an access regime to encourage efficient access outcomes, it must incorporate regulatory processes that are transparent and consultative and are undertaken by a regulatory body that is independent and has the resources it needs to be effective.

### Clause 6(4)(d): regular review

Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

- 5.4 Clause 6(4)(d) is intended to ensure there is periodic review of the need for access regulation to apply to a particular service. A facility might not be economically feasible to duplicate at one time but as circumstances change may become so, in which case the justification for access regulation would be removed. The review provision in clause 6(4)(d) relates to the point in time of the decision to make a particular service subject to a regime.
- 5.5 Clause 6(4)(d) makes clear that a review of access regulation should not override commercially determined outcomes by automatically revoking any existing contractual rights. This does not mean that they could not be revoked, but rather that some process (such as a review) would first need to be undertaken. This principle recognises a legitimate need to maintain commercial certainty for infrastructure operators and users. It also recognises that foundation users, whose commitments underpin new infrastructure development, bear greater risks than those of businesses that decide to use the infrastructure after it has been built. Any review of existing contractual rights and obligations should consider these contexts.

### **Clause 6(4)(e): reasonable endeavours**

The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

- 5.6 Consistency with clause 6(4)(e) requires that an access regime require the service provider to use all reasonable endeavours to accommodate the requirements of access seekers. The Council considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect. Such requirements often relate to information disclosure, availability (for negotiation) and response times. They include obligations on the service provider to:
- provide access seekers with written information on spare capacity and indicative access terms and conditions, including sufficient information for access seekers to understand the derivation of access prices or tariffs
  - respond to access requests and negotiate terms and conditions within a reasonable timeframe
  - provide a written explanation as to why a particular request for access cannot be accommodated, including likely prospects for future access, or
  - use all reasonable endeavours to accommodate a person's request for access to spare capacity.
- 5.7 Information disclosure requirements are commonly the most contested of the 'reasonable endeavours' obligations. Information disclosure requirements need to be robust enough to ensure that access seekers have sufficient information to enable them to make informed decisions and to negotiate effectively. On the other hand, a 'reasonable endeavours' requirement should neither oblige disclosure (without appropriate confidentiality protections) of information that is genuinely commercially

sensitive nor impose an onerous burden or disproportionate costs on the provider of the information.

### **Clause 6(4)(f): access on different terms**

Access to a service for persons seeking access need not be on exactly the same terms and conditions.

- 5.8 An access regime will be consistent with this clause if it provides for access to be provided on different terms and conditions to different users. An access regime should not limit the scope for commercial negotiation. Rather, the terms and conditions set out in access arrangements should facilitate commercial negotiations and act as a safety net when a reasonable outcome cannot be negotiated. This is consistent with the principles of commercial negotiation enshrined in clauses 6(4)(a)-(c).
- 5.9 Clause 6(4)(f) envisages parties reaching agreement on access terms that may vary. However, under an effective access regime, a service provider cannot unfairly discriminate between access seekers. An effective access regime must also include provisions consistent with clauses 6(5)(b)(ii) and (iii). Accordingly, in the event of an access dispute resulting in regulated prices, price discrimination will only be allowed where it promotes efficiency (clause 6(5)(b)(ii)) and a vertically integrated service provider will not be able to set terms and conditions of access that favour its own downstream operations (clause 6(5)(b)(iii)). Further, an effective regime must also be consistent with clause 6(4)(m), so that a service provider is prevented from hindering access to the service by imposing unreasonable or discriminatory terms of access.

### **Clause 6(4)(g): independent dispute resolution**

Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

- 5.10 This principle recognises the need for an independent arbitration mechanism to complement and encourage genuine negotiations. Clause 6(4)(g) requires an effective access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes so promoting confidence among the parties.

#### **Independence of the dispute resolution body**

- 5.11 To engender confidence in the process, the dispute resolution body should be independent of service providers, current users, access seekers and governments. The Council considers that the arbitrator and the regulator may be the same body, provided that the potential for perceptions of conflict (such as where the arbitrator is resolving a dispute on prices it has set as regulator) is reduced by the inclusion of safeguards such as

ring fencing of the arbitration and regulatory functions or providing for the regulator to appoint an independent arbitrator.

- 5.12 The Council considers all of the mechanisms available for resolving disputes—including arbitration and appeals—as a package, with different elements capable of satisfying independence issues. Alternative approaches to independent dispute resolution may include:
- (a) separation of the regulator from the arbitrator (for example, by vesting each function in separate bodies)
  - (b) a mechanism enabling either party to a dispute to require the arbitrator to appoint an alternative body if a question of bias arises
  - (c) an independent appeals process to address questions of arbitrator bias or independence.
- 5.13 An effective access regime may or may not constrain the arbitrator from ruling on certain access terms, particularly reference tariffs. The Council considers that the question is not whether it is preferable to bind an arbitrator to apply reference tariffs but whether the approach taken by the access regime promotes good policy competitive access outcomes at fair and reasonable prices. Where the arbitrator is bound to apply reference tariffs and other terms of access set by the regulator, the independence and resourcing of the regulator are crucial. (See discussion in the context of the Gas Code, NCC 1997b, pp 28-29.)

### **Quality of process**

- 5.14 Parties to arbitration must have confidence in the process. Dispute resolution processes must be designed to produce outcomes that are efficient, effective, commercially viable and consistent. Access disputes commonly raise complex issues. Good outcomes require that the arbitrator has sufficient resources and expertise to resolve such as by:
- ensuring the arbitrator has sufficient resources and appropriate expertise
  - vesting the arbitrator with information gathering powers, particularly the ability to require production of financial statements and other accounting information consistent with clause 6(4)(o)
  - binding the arbitrator to observe previous determinations by an independent regulator, thereby ensuring consistency and shifting important skill requirements from the arbitrator to the independent regulator
  - allowing the arbitrator to seek expert advice from an independent regulator, thus facilitating information flows and a consistent approach across different arbitrations, and
  - vesting the arbitrator with the power to determine the dispute resolution process, including confidentiality and timeframe matters.

### **Appointment and funding of dispute resolution body**

- 5.15 Clause 6(4)(g) provides that an effective access regime should require the parties to a dispute to fund some or all of the costs of having an independent body resolve the dispute. At the same time, the costs of arbitration should not deter parties from seeking access.
- 5.16 Where parties cannot agree on the appointment of the dispute resolution body, an effective access regime should contain a mechanism for appointing an independent body to resolve disputes. Under the WARAR, the regulator appoints an arbitrator from a panel that is pre-selected by the regulator and the Chairman of the Western Australian Chapter of the Australian Institute of Arbitrators (NCC 2010a). Similarly, under the South Australian ports access regime, a dispute may first be referred to the Essential Services Commission of South Australia for conciliation. If the dispute is not resolved through conciliation or within six months of referral then the Essential Services Commission may refer the dispute to arbitration, to be arbitrated by a person or persons who is independent of the disputing parties and not subject to control or direction of the South Australian Government (NCC 2010c).
- 5.17 An effective access regime should require the parties to a dispute to fund some or all of the costs of independent dispute resolution but the costs of arbitration should not deter parties from seeking access. Under the South Australian rail access regime, for example, the costs of arbitration are borne by the parties in equal proportions unless the arbitrator decides that a different apportionment is appropriate or the access seeker terminates the arbitration or elects not to be bound by its outcome, in which case it must pay all costs (NCC 2010d, p 35).

### **Public access to arbitration determinations**

- 5.18 It is likely to be in the public interest to publish arbitration determinations on access disputes (subject to confidentiality issues being addressed). Making such information publicly available would help to address information asymmetry between the access seeker and service provider, as well as provide greater certainty about the arbitrator's likely approach to resolving subsequent disputes. This may encourage parties to resolve disputes themselves without arbitration.

### **Clause 6(4)(h): binding decisions**

The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

- 5.19 For arbitration to be a credible means of resolving access disputes, the arbitrator's decision must be binding on the parties. The ultimate decision of any dispute resolution appeals body must also bind the parties. This requires that the enforcement process has legislative underpinnings, with the regulator or the courts able to impose appropriate

sanctions and remedies for non-compliance. Existing rights of appeal should be preserved but this does not require the insertion of new appeals provisions.

- 5.20 Clause 6(4)(h) is generally satisfied by setting a time in which an arbitrator's decision must be reflected in a contract between the parties. It is appropriate to allow a limited period in which an access seeker can decide not to be bound by the arbitrator's ruling so an access seeker will not be compelled to accept terms that it would not have agreed to in a negotiated outcome. For example, 'opt out' provisions of this kind have appeared in the Gas Code, the Tarcoola-Darwin Rail Regime and the WARAR.

### **Clause 6(4)(i): principles for dispute resolution**

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

- (i) the owner's legitimate business interests and investment in the facility;
- (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
- (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
- (iv) the interests of all persons holding contracts for use of the facility;
- (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
- (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
- (vii) the economically efficient operation of the facility; and
- (viii) the benefit to the public from having competitive markets.

- 5.21 Clause 6(4)(i) covers both price and non-price terms and conditions of access. Where relevant, the dispute resolution body should also be obliged to take account of the clause 6(5)(b) principles in considering access prices. An access regime may require a dispute resolution body to take account of matters other than those specified in clause 6. To the extent that those matters are not inconsistent with clause 6(4)(i) the inclusion of additional matters does not affect the effectiveness of the regime (CCA, s 44DA(2) and clause 6(3A)(b) of the CPA).

- 5.22 In assessing the effectiveness of an access regime, the Council does not consider the outcome of any particular arbitration or decision made under a regime (clause 6(3A)(a)). Therefore, the Council's consideration of pricing issues tends to focus on:

- whether the price/revenue and underpinning cost identification and assessment principles in the regime reflect accepted methodologies, the clause 6(4)(i) principles and the clause 6(5)(b) principles where applicable, and
- whether mechanisms are in place to ensure pricing outcomes reflect these principles over time.

5.23 While the clause 6 principles do not specify particular outcomes, the Council considers that outcomes should give weight to all the factors in sub-clauses (i) to (viii) of clause 6(4)(i). No one factor will be determinative of the outcome; rather, each is considered in light of the other factors in clause 6(4)(i). Such an approach is consistent with the decision of the Supreme Court of Western Australia in *Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231; (2002) 25 WAR 511 (**Epic decision**) in which the Western Australian Full Court of the Supreme Court (**WASCA**) considered the meaning of a number of provisions of the Gas Code that are similar to the clause 6(4)(i) factors.

### The clause 6(4)(i) factors

#### *Factor (i)*

5.24 In assessing whether an access regime takes into account the ‘owner’s legitimate business interests and investment in the facility’, the Council would consider any pricing principles that form part of the regime and the extent that those principles are consistent with the objects of Part IIIA of the CCA.

5.25 The meaning of ‘legitimate business interests’ was considered by the WASCA in the context of s 2.24(a) of the Gas Code in the *Epic decision* and by the Tribunal in the context of Part XIC of the CCA in *Re Telstra Corporation Limited (ACN 051 775 556)* [2006] ACompT 4; [2006] ATPR 42-121 (**Telstra decision**). In the *Epic decision*, Parker J (with whom Malcolm CJ and Anderson J agreed), rejected the view that ‘the recovery of monopoly prices or tariffs, above the level of economically efficient prices, should not be seen as “legitimate”’ (at [130]), and that the regulator should have taken account of the price paid by the owner for the asset notwithstanding that the price included an expectation of monopoly profits (at [154]). However, the Tribunal in the *Telstra decision* said that ‘a carrier’s “legitimate business interests” is a reference to what is regarded as allowable and appropriate in commercial or business terms’ (at [89]) and did not consider that ‘Telstra’s legitimate business interests extend to it achieving a higher than normal commercial return’ (at [136]).

5.26 The Council considers that an access regime may be consistent with clause 6(4)(i)(i) if it provides for the actual price paid for and invested in a facility by a facility owner to be one factor to be taken into account in determining the terms and conditions of access (provided such acquisition or investment took place without contravention of the law).

However, legitimate business interests will be served so long as the service provider is able to receive a normal return on its investment.

*Factors (ii) and (iii)*

- 5.27 Factor (ii) requires that ‘the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets’ need to be taken into account.
- 5.28 Factor (iii) requires that ‘the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake’ be taken into account.
- 5.29 The Council considers that the ‘costs’ to be taken into account are the actual costs to the owner of providing access. Such costs do not include those incurred as a result of overcapitalisation, those unnecessarily incurred in providing access or those based on an inappropriate attribution of common costs. In addition, the second limb of factor (ii) expressly excludes any losses arising from increased competition in upstream and downstream markets. Accordingly, monopoly rents lost as a result of access and increased competition are not taken into account in determining the terms and conditions of access.
- 5.30 The inclusion of inappropriate costs in the determination of economic value under factor (iii) potentially arises, for example, where the access seeker does not have sufficient information to determine the additional investment that the facility owner is required to make.
- 5.31 Factor (iii) recognises that the infrastructure owner and users (or potential users) other than the access seeker may gain benefit or economic value from the additional investment required to facilitate access. Accordingly, the cost of the additional investment may be spread across a number of users (or potential users) rather than being levied entirely on the access seeker.

*Factor (iv)*

- 5.32 Factor (iv) requires that ‘the interests of all persons holding contracts for use of the facility’ be taken into account. In considering the corresponding provision under the Gas Code (s 2.24(f)), the WASCA noted that ‘the interests of users and prospective users are likely to be counterpoised to the service provider’s legitimate business interests and investment’. There may be scope, however, to benefit both owners/operators and the interest of users/prospective users through increased capacity by virtue of third party use (*Epic decision*, [135]).
- 5.33 The Council considers that there is significant overlap between factor (iv) and factor (v). As the WASCA noted, these two factors are linked to factor (i). Regimes need to consider

these varying interests and give weight to them against the remaining clause 6(4)(i) factors and the overall objectives of access regulation.

*Factor (v)*

5.34 Factor (v) requires that ‘firm and binding contractual obligations of the owner or other persons (or both) already using the facility’ be taken into account. Although the *Epic decision* did not raise specific issues in relation to the corresponding provision under the Gas Code (s 2.24(b)), the WASCA stated that

it is instructive to notice that prices that have been contractually agreed by a service provider, even if they include monopolist rents or returns, may continue to be charged by the service provider by virtue of section 2.25 and, by section 2.24(b), they are matters the Regulator must take into account. (*Epic decision*, [31])

*Factor (vi)*

5.35 Factor (vi) requires that the ‘operational and technical requirements necessary for the safe and reliable operation of the facility’ be taken into account. In considering the corresponding provision under the Gas Code (s 2.24(c)), the WASCA noted that ‘[e]xpenditure necessary for this purpose must be taken into account whether or not that would occur in a competitive market or according to theories of economic efficiency’ (*Epic decision*, [132]).

5.36 Consistent with the WASCA’s reasoning, the Council considers that actual expenditure on safety and operating reliability should be taken into account for the purposes of factor (vi) provided the expenditure was necessary. Overcapitalisation (for example, ‘gold plating’), or the inappropriate attribution of common costs or other unnecessary expenditure should not be considered under factor (vi); only those costs that are required to achieve the safe and reliable operation of the facility should be considered.

*Factor (vii)*

5.37 Factor (vii) requires that ‘the economically efficient operation of the facility’ be taken into account. The WASCA interpreted the corresponding provision under the Gas Code (s 2.24(d)) as the concept of economic efficiency as generally understood by economists. Economic efficiency should be viewed from the perspective of society as a whole rather than that of the facility owner and operator (*Epic decision*, [115]). The WASCA noted that

s 2.24(d) most naturally relates to the objective in the preamble of the promotion of a competitive market and, perhaps, also to the prevention of the abuse of monopoly power. (*Epic decision*, [133])

5.38 Economic efficiency is also interrelated with competition in a market. The WASCA noted views from experts that ‘competitive markets lead to conditions of economic efficiency’, ‘a universal goal of economic regulation is, as far as possible, to replicate the efficiency

outcomes that could otherwise be expected from the existence of effective competition’ and ‘competitive markets in equilibrium will be efficient’ (*Epic decision*, [116]).

- 5.39 The Council considers that factor (vii) requires consideration of the operation of a facility in an economically efficient manner as the term is generally understood by economists. The *Epic decision* indicates that there may be a tension between factor (vii) and the legitimate business interests of the facility owner, at least in the short run. (For further detail on the balancing of the various clause 6(4)(i) factors, see paragraphs 5.43–5.48). However, economic efficiency implies that the facility owner is able to earn a normal return over the long run and therefore factor (vii) would generally be consistent with legitimate business interests of the facility owner as well as the long term interest of end-users.

*Factor (viii)*

- 5.40 Factor (viii) requires that ‘the benefit to the public from having competitive markets’ be taken into account.
- 5.41 Although not directly relevant, in interpreting s 2.24(e) of the Gas Code which referred to the ‘public interest in having competition and markets’, the Court interpreted the term ‘competitive market’ as used in the Gas Code as referring to ‘a workably competitive market’. The WASCA noted that a workably competitive market is one in which no firm has a substantial degree of market power. The WASCA described a workably competitive market as ‘not a fixed and immutable condition with any absolute or precise qualities, but a process which involves rivalrous market behaviour’ (*Epic decision*, [128]). It went on to state:

As such, a workably competitive market will react over time and according to the nature and degree of various forces that are happening within the market. There may well be a degree of tolerance of changing pressures or unusual circumstances before there is a market reaction. The expert evidence and writings tendered in evidence suggest that a workably competitive market may well tolerate a degree of market power, even over a prolonged period. The underlying theory and expectation of economists, however, is that with workable competition market forces will increase efficiency beyond that which could be achieved in a non-competitive market, although not necessarily achieving theoretically ideal efficiency. (*Epic decision*, [128])

- 5.42 Applying this interpretation to factor (viii), the factor requires a consideration of the public benefit from having a workably competitive market (that is, one in which no firm has a substantial degree of market power in the longer term). The public benefit that must be taken into account under the factor is the efficiency gain from having a workably competitive market.

## Giving weight to the clause 6(4)(i) factors

- 5.43 Clause 6(4)(i) requires that a balancing of the various (sometimes conflicting) factors in determining the terms and conditions of access. Where the Council is satisfied with the regulatory processes by which access terms and conditions are determined, it leaves the interpretation and the balancing of the clause 6(4)(i) factors to the discretion of the regulator and/or the arbitrator responsible for determining the regulated outcomes within the access regime. In the *Epic decision*, the WASCA noted the potentially conflicting nature of the corresponding clause 6(4)(i) factors under the Gas Code and concluded that such conflict is 'to be resolved by the Regulator in accordance with the Act and the Code and the circumstances of each particular case' (*Epic decision*, [185]).
- 5.44 In giving weight to each of the clause 6(4)(i) factors the Council considers it generally appropriate to group the factors as follows:
- factors (i), (iv) and (v), which account for the interests of the facility owner and existing facility users
  - factors (ii), (iii) and (vi), which account for the costs of providing access. Such costs must be necessary and must not reflect gold plating or other unnecessary measures
  - factors (vii) and (viii), which expressly account for efficiency objectives and the benefits of competitive markets.
- 5.45 The Council considers that the first group of factors, by accounting for the actual investment and interest in the facility, is intended to consider the effect on the owner and existing users of any property rights being affected through access regulation. The second group of factors requires that the access regime account for only those costs necessary to facilitate access and the safe and reliable operation of the infrastructure. The final group of factors expressly requires a consideration of efficiency and the benefits of competition.
- 5.46 In considering the factors to determine an appropriate range of approaches to the incorporation of the clause 6(4)(i) principles, the Council notes that the underlying objective of Part IIIA (discussed above at paragraph 3.4) is to promote efficiency. The Council considers that a universal goal for economic regulation is to replicate (as far as possible) the efficiency outcomes that could otherwise be expected from the existence of effective or workable competition (that is, a situation where no firm within the market has the market power to act in a manner unconstrained by other competitors). Effective competition can be expected to increase efficiency from that in a non-competitive market, although it may not achieve the conditions of perfect competition.
- 5.47 With these principles in mind, the Council considers that the terms and conditions of access should be structured in a way that promotes efficient use of infrastructure and efficient investment in dependent markets. At the same time, efficient investment in infrastructure must not be deterred. As such, access prices and underlying cost

structures should allow infrastructure owners to generate sufficient revenues to meet the efficient costs of providing access to the service and to earn a return on the investment commensurate with the risks involved.

- 5.48 The Council accepts, in workably competitive markets, that instances of transitory market power may arise and lead to outcomes that may not fall within an efficient range in the short term. Over the longer term, competitive pressures should cause prices and other terms of access to fall within the range of outcomes that would be expected in an effectively or workably competitive market.

### **Approaches to pricing**

- 5.49 Price is a critical term of access. Without an appropriate mechanism to determine price, an access regime is unlikely to be effective. This is because in the absence of regulation, suppliers in natural monopoly markets are able to earn monopoly returns by setting prices that effectively deny access or distort production and/or consumption patterns. In specific circumstances, commercial negotiation/arbitration alone may not be able to deliver pricing outcomes consistent with those likely to be achieved in an effectively competitive market—that is, it may not be able to deliver prices that ultimately fall within an efficient range (see paragraph 5.48). Independent regulatory processes may also be required.
- 5.50 In competitive markets, efficient pricing equates to marginal cost (that is, the cost of providing an additional unit). In the absence of capacity constraints, this may exclude fixed costs. For natural monopoly infrastructure, however, with high fixed costs and declining average costs over the range of demand, this approach may not deliver viable outcomes. Setting price to marginal cost would result in the owner failing to recoup fixed costs. Access pricing therefore needs to be adapted to apportion fixed costs across users, while ensuring revenues are not so high as to distort demand for services.
- 5.51 These characteristics pose challenges in determining an appropriate approach to pricing services. In general, efficient outcomes can be expected to lie in a band between short run (avoidable) costs and the long term efficient (full) cost of supplying the services demanded. If price exceeds long term efficient cost, then demand is inefficiently constrained, which could also result in the construction of inefficient bypass facilities. (Such an enquiry relates to the provision of the service generally rather than to a particular customer.) These outcomes impose welfare costs on the community. Conversely, if price falls below short run cost, then the service would require cross-subsidisation, imposing a different set of resource allocation distortions.
- 5.52 The long term (or forward looking) efficient cost of supply should act as a cap on prices or revenues. Independent regulatory processes should be used to set the relevant benchmarks, including the optimised asset base, rate of return, rate of depreciation and operating costs. This process invariably involves regulatory discretion. In each case, well accepted valuation methods should be used.

- 5.53 The price or revenue cap may need to be adjusted periodically to account for changes in cost factors, including new investment, changing economies of scale and scope, efficiency gains and inflation. Over time, price/revenue caps can be structured to provide the supplier with efficiency targets and incentives for productivity gains in excess of these targets. Caps may need to be implemented in tandem with measures to ensure reductions in service quality are not disguised as efficiency gains.
- 5.54 In addition to costs, demand factors may also play a role in determining access pricing. To preserve economic efficiency, the proportion of fixed costs charged to each access seeker may need to account for differences in the access seeker's elasticity of demand (or 'willingness to pay'). The allocation of fixed costs to access seekers may be the subject of commercial negotiation between the facility owner and access seekers. However, the ability to price discriminate may raise concerns where the facility owner is vertically integrated and is thus able to offer preferential pricing to affiliated customers to the competitive detriment of independent access seekers (see para 6.11 below in relation to clause 6(5)(b)(iii)).
- 5.55 The approach to pricing should be sufficiently flexible to account for varying market conditions and reflect market realities. Pricing may need to be structured to account for congestion issues, for example, if the facility is subject to capacity constraints. In electricity, a consumer may be persuaded to switch to off peak consumption if peak prices reflect the costs of capacity expansion while off peak prices reflect only marginal cost. Such an approach can optimise the efficient use of existing infrastructure and reduce the risk of unnecessary capacity expansions.

### **Access pricing in secondary markets**

- 5.56 While regulatory intervention is an appropriate response to market power and information asymmetries in primary markets for access, the argument for its use is less convincing in secondary markets.
- 5.57 In a secondary market, a facility user sells capacity to other businesses that want to use the service (as opposed to the facility operator selling access to them, as occurs in the primary market). Businesses wanting to use the services of a facility can, therefore, directly approach an existing user that is not using all of its existing entitlement and seek to buy a portion of that entitlement.
- 5.58 Promoting secondary markets can bring three benefits:
- secondary markets can facilitate better use of existing infrastructure, so the need to expand capacity may be deferred or avoided
  - existing users gain flexibility to better manage risk if, for example, they are unable to use all the capacity they have contracted to purchase from the facility owner

- secondary markets can generate useful price signals, which may promote better informed commercial negotiation in primary markets.

- 5.59 Some secondary market arrangements seek to overcome the natural monopoly problem by creating competition between discreet bundles of capacity in the one set of infrastructure. These arrangements include auctions, whereby capacity is sold to a number of users, or other mechanisms to vest capacity rights in favour of more than one party.
- 5.60 Access regimes should not impose unreasonable barriers to capacity trading in secondary markets unless there is a compelling public benefit from doing so.

### **Clause 6(4)(j): facility extension**

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

- (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
- (ii) the owner's legitimate business interests in the facility being protected; and
- (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.

- 5.61 In some situations, the needs of an access seeker can be met only by an extension of the facility's geographic range or an expansion of its capacity. These matters should be subject, in the first instance, to negotiation between the parties. When parties cannot reach an agreement, the arbitrator should be empowered, subject to the safeguards in clause 6(4)(j)(i)-(iii), to require the owner to extend or permit extension of the facility.
- 5.62 The arbitrator may need to consider who is best placed to undertake the extension or expansion. It may be more efficient in some cases for the incumbent provider to extend the facility. In other circumstances, requiring the owner to extend their facility may be less efficient, such as where it is more cost-effective for the access seeker to construct the extension themselves with access provided through interconnection. Given the range of outcomes possible, the arbitrator needs the flexibility to make the most appropriate determination. In the interests of promoting efficiency, states and territories may want to consider including in their access regimes a power for the arbitrator to make rulings on interconnection, provided the clause 6(4)(j) conditions are met.
- 5.63 The question whether a power to order 'extensions' is broad enough to include a power to order 'expansions' was canvassed in detail by the Productivity Commission in its draft report on its second review of the national access regime (PC 2013, pp 133-145). The Productivity Commission found a rationale for an extension and expansion power but said that an amendment to Part IIIA is desirable to make clear that the power extends to

both extensions and expansions (PC 2013, pp 135 and 252-3). The Council is of the view that an extension power does include a power to order expansions and considers that this construction is consistent with the objects of Part IIIA because the most efficient way of increasing the supply of a service may often be for the existing provider to expand capacity, rather than requiring the access seeker (or someone else) to construct another facility to provide a service. This is likely to be that case for facilities where it is efficient to expand capacity incrementally, such as gas pipelines and rail track.

### **Clause 6(4)(k): dealing with a material change in circumstances**

If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

- 5.64 Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change of circumstances. The clause appears to derive from a suggestion by the Hilmer Committee that a ‘declaration could be revocable on the showing of a material change of circumstances’ (Hilmer Committee 1993, p 253). This does not mean that an effective access regime will undermine the certainty of contractual arrangements: once a contract is signed—whether through commercial negotiation or following arbitration—it should govern the relationship between the parties.
- 5.65 Given that different infrastructure users have different risk exposures, an appropriate way in which to address a material change of circumstances may be for the parties to identify in the contract any factors that would warrant the contract being reopened in the future. Parties may choose, for example, to limit the grounds to those available normally for commercial contracts under common law. At the same time, an access regime should not preclude the application of common law principles (for example, the doctrine of frustration) to matters of this nature.
- 5.66 An access regime could provide for parties to use an arbitrator to resolve disputes over what constitutes a material change in circumstances. This provision would allow for circumstances where commercial negotiations fail to achieve agreement.

### **Clause 6(4)(l): compensation**

The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

- 5.67 Clause 6(4)(l) does not mean that an access regime need allow a dispute resolution body to impede existing rights but, where a dispute resolution body can do this, it must also be empowered to consider and determine compensation, if appropriate.

## Clause 6(4)(m): hindering access

The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

- 5.68 Clause 6(4)(m) requires that an effective access regime prohibits conduct for the purpose of hindering access. This principle applies both to existing users (to address the risk of problems such as hoarding) and facility owners. The Council considers that an access regime should incorporate this clause explicitly or contain other provisions that have the same effect.
- 5.69 In the case of vertically integrated service providers, access may be hindered where the service provider unfairly provides favourable terms of access to an affiliated entity. For example, a vertically integrated rail track operator that provides track priority and the most favourable track use timetabling to its own above-track operator may effectively hinder access to the rail track by other above-track operators. An access regime that does not prevent such conduct would be inconsistent with clause 6(4)(m).

## Competitive neutrality

- 5.70 Where vertical integration issues arise, ring fencing provisions may need to be supported by competitive neutrality provisions to assure access seekers that the service provider will not discriminate against them. Concerns can arise because certain participants enjoy advantages (cost or otherwise) over others for reasons not related to competitive behaviour. If the advantages favour less efficient businesses it can lead to resource allocation distortions. Competitive neutrality refers to policies aimed at removing such distortions. In the context of access, competitive neutrality typically refers to neutralising competitive advantages enjoyed by a particular infrastructure user because it is affiliated with the infrastructure owner. This process can be distinguished from the competitive neutrality principles set out in clause 3 of the CPA, which relate to competitive advantages arising from public ownership of significant businesses.
- 5.71 Prohibition of anti-competitive price discrimination between affiliated users and third party access seekers operating in the same market is an example of the application of competitive neutrality in an access regime. In the Queensland rail access regime, for example, there are express prohibitions on unfair differentiation, both during access negotiations and in the provision of access for users of declared services. (The provider of the rail network services subject to the Queensland rail access regime also provides rail haulage services in competition with access seekers.) Together with other mechanisms in the regime, this provides an appropriate level of comfort that a vertically integrated service provider will be prevented from treating its related businesses more favourable than those of its competitors (NCC 2010b).

## Clause 6(4)(n): separate accounting

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

- 5.72 Under clause 6(4)(n), an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the regime. That is, facility owners must make available financial information that focuses exclusively on the elements of their business subject to the regime.
- 5.73 The availability of relevant accounting information is necessary for access seekers and regulatory bodies (including dispute resolution bodies) to assess the terms and conditions of access. Separate accounting also helps to address the potential for anti-competitive behaviour such as using cross-subsidies between covered and uncovered services as a means for disguising monopoly pricing.
- 5.74 To satisfy clause 6(4)(n), an effective access regime should include provisions that require a facility owner to at least:
- maintain a separate set of accounts for each service that is the subject of an access regime
  - maintain a separate consolidated set of accounts for all of the activities undertaken by the facility owner, and
  - allocate any costs that are shared across multiple services in an appropriate manner.

## Ring fencing

- 5.75 Vertical integration creates opportunities for transfer pricing and preferential treatment of affiliate businesses over third parties. Ring fencing arrangements may be required in some industries, particularly those where a facility owner operates, or has interests in, the same markets as those in which third party access seekers participate.
- 5.76 Ring fencing involves identifying and isolating all aspects of a business that could permit an integrated entity to engage in anti-competitive behaviour designed to eliminate competitors or deter potential competitors from entering the market. This includes activities, assets, costs and revenues relating to the monopoly element (or area of the business not subject to strong competitive pressures) of an integrated entity. It also includes potential incentives or practices of a non-accounting nature that may result in anti-competitive behaviour.
- 5.77 Apart from segregating access-related functions from other functions ring fencing arrangements should also include measures to:
- protect confidential information disclosed by an access seeker to the facility owner from improper use and disclosure to affiliated bodies, and

- establish staffing arrangements between the facility owner and affiliated bodies that avoid conflicts of interest.

### **Clause 6(4)(o): access to financial information**

The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

- 5.78 An effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the service. This principle seeks to ensure that the dispute resolution body and other relevant bodies have access to all information necessary to properly assess and settle any issues relating to third party access.

### **Clauses 6(4)(p) and 6(2): jurisdictional issues**

#### **Clause 6(4)(p)**

Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

#### **Clause 6(2): jurisdictional issues**

The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
- (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

- 5.79 These clauses establish principles for the treatment of:

- services that are subject to multiple state and territory access regimes, and
- facilities with an influence beyond a single jurisdiction.

#### *Multiple access regimes*

- 5.80 Clause 6(4)(p) provides that where a service is subject to access regimes in more than one state or territory, those regimes should be consistent and should provide for a single

process, a single dispute resolution body and a single enforcement forum. To satisfy this clause, the relevant state or territory access regimes could contain provisions to facilitate a seamless and consistent approach to accessing the service. The rationale is to ensure only one set of access provisions applies to the service, promoting timely and efficient outcomes. The Council considers that this is consistent with the objectives in s 44AA of the CCA.

- 5.81 Clause 6(4)(p) considerations arise in the context of a service located in more than one jurisdiction, such as a service provided by a cross-border gas pipeline or railway line. They also arise where multiple access regimes apply to a service located within a particular jurisdiction.
- 5.82 To satisfy this clause, the relevant state access regimes could contain provisions to apply a single regime to the entire service. For example, to establish the Tarcoola-Darwin Rail Regime, the Northern Territory and South Australia governments passed identical legislation that established a single regulator (NCC 2000).

#### *Interstate influence of facility*

- 5.83 Clause 6(2) suggests that a state or territory access regime may be found to be ineffective as a result of:
- its influence beyond the jurisdictional boundary of the state or territory, or
  - substantial difficulties arising because the infrastructure subject to the regime crosses a state or territory border.
- 5.84 The Council believes that clause 6(2), in conjunction with clause 6(4)(p), indicate that state and territory regimes should consider and, if necessary, specifically deal with the situation where a facility or service crosses jurisdictional boundaries. Clause 6(2) issues might need to be considered in the following scenarios.
- Where a facility that crosses a state border—for example, a cross-border railway track or gas pipeline— jurisdiction-based regulation could result in conflicting approaches to access on either side of the border, imposing substantial costs on business and inhibiting interstate trade. Another problem is that a piecemeal state-by-state approach could result in unregulated gaps in the network.
  - Where a facility that is wholly located within a jurisdiction but part of a wider interstate network—for example, a state rail network that also forms part of an interstate network— inefficiencies could arise if access to state-based services is determined without consideration of the requirements of interstate demand.
- 5.85 Clause 6(2) is not interpreted in a manner that prevents the development of state or territory regimes for services that have an interstate aspect. Rather, it is interpreted to ensure that regimes deal with issues appropriately.

5.86 Issues likely to need coordination include:

- ensuring the terms and conditions of access across borders are compatible so that an access seeker is not prevented from negotiating the seamless flow of a service across borders (for example, a seamless interstate train path)
- ensuring arbitration processes are consistent, so as to avoid imposing multiple costs on parties (for example, in the Tarcoola-Darwin Rail Regime, measures exist to provide for a common arbitrator in disputes involving cross-border services (NCC 2000)), and
- ensuring the regulatory framework accounts for regulatory arrangements in other relevant jurisdictions.

5.87 In some cases, mechanisms such as those noted above may be sufficient to address interstate issues. In other cases, a common approach to access regulation may be needed to achieve efficient outcomes. Mechanisms for achieving this commonality include:

- a coordinated intergovernmental process to implement a uniform framework for access, as has occurred in the gas and electricity sectors
- Commonwealth Government legislation, and
- cross-vesting arrangements across relevant jurisdictions to establish a single process for access to cross-border services.

5.88 While a high degree of consistency in access regimes for cross-border services is desirable, the Council recognises that complete consistency of a state access regime with national arrangements would be an overly high hurdle for satisfying clause 6(2).

*The relationship between clauses 6(4)(p) and 6(2)*

5.89 Clause 6(4)(p) elaborates on one issue that may also arise under clause 6(2): the application of multiple access regimes to a single service. The scope of clause 6(2) is however wider than 6(4)(p), because it also encompasses the influence of a particular facility beyond a state border.

## 6 Clause 6(5) and the objects of Part IIIA

### Clause 6(5)(a) and the objects of Part IIIA

A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principle:

- (a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.

The objects of Part IIIA of the CCA (s 44AA) are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

- 6.1 In respect of other state and territory access regimes, clause 6(5)(a) requires that an effective access regime incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation, use and investment in infrastructure thereby promoting competition in upstream and downstream markets.
- 6.2 A clear statement of objectives helps to guide all parties affected by the access regime. Importantly it provides clear guidance to regulators and arbitrators, which should result in more consistent decision-making. Clarifying the intent of an access regime is also likely to reduce opportunities for dispute and misunderstanding, which in turn saves time and reduces the cost of regulation.
- 6.3 As set out above (see paragraph 6.1), the application of an efficiency objective in access regulation has the following three broad components:
  - (a) ensuring the efficient use of bottleneck infrastructure, especially by denying infrastructure owners the opportunity to misuse market power (in either the market for their services or in related markets) by raising prices and/or refusing access to services
  - (b) facilitating efficient investment in essential infrastructure, especially by ensuring that
    - (i) infrastructure is maintained and developed appropriately
    - (ii) infrastructure owners (and potential owners) earn sufficient returns to provide incentives for efficient investment, and

- (iii) incentives for inefficient development of competitive infrastructure and for inefficient investment in upstream and downstream activities (that is, overinvestment and underinvestment) are minimised, and
- (c) promoting competition in activities that rely on the use of bottleneck infrastructure.

6.4 One of the advantages of each state and territory access regime containing an objects clause in respect of the promotion of the efficient operation of, use and investment in infrastructure is that it may help achieve consistency across the states and territories as to the operation of access regimes, which is consistent with the objective in s 44AA(b) of the CCA of ensuring a consistent approach to access regulation.

### **Clause 6(5)(b): pricing should promote efficiency**

- (b) Regulated access prices should be set so as to:
  - (i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;
  - (ii) allow multi-part pricing and price discrimination when it aids efficiency;
  - (iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
  - (iv) provide incentives to reduce costs or otherwise improve productivity.

6.5 The clause 6(5)(b) principles emphasise that the price of access should promote the efficient use of, operation and investment in infrastructure as a means of promoting effective competition in dependent markets (clause 6(5)(a) and s 44AA of the CCA). The pricing principles in clause 6(5)(b), while providing considerable discretion and flexibility in setting prices, require that regulated access prices be set to cover costs and provide a return on investment that is commensurate with the risks involved. The principles emphasise ongoing efficiency improvements by also requiring that regulated access prices provide incentives to reduce costs or otherwise improve productivity. A desirable outcome is that regulated prices mirror the outcomes that could be expected in an effectively competitive market.

6.6 In recommending that pricing principles be incorporated in Part IIIA and clause 6 of the CPA the Productivity Commission also noted that 'a key role of pricing principles is not so much to prescribe what should happen in a particular situation, but to rule out approaches and methodologies which would be inappropriate' (PC 2001, p 142). In addition, appropriate pricing principles:

- provide guidance on how the broad objectives of access regimes should be applied
- provide a measure of certainty to regulated firms and access seekers, in turn, improving the operation of the negotiation-arbitration framework, and
- help to prevent a regulator's own values from unduly influencing decisions relating to the terms and conditions of access.

6.7 In reviewing access regimes for consistency with clause 6(5)(b) the Council is mindful of the requirement in clause 6(3A) that the Council must not review specific pricing outcomes.

**6(5)(b)(i): Expected revenue sufficient to meet efficient costs; returns commensurate with risk**

6.8 Regulated prices should not give facility owners a free rein to extract rents but a facility owner's profits must not be constrained to such an extent that investment in facilities is deterred.

6.9 Prices should be set to reflect efficient costs, not actual costs. This provides an incentive for service providers to achieve cost efficiencies. In determining efficient costs, the regulator is to take account of the risks the service provider faces. The risks include those that would arise in a normal commercial setting as well as those that derive from being subject to regulation.

**6(5)(b)(ii): Multi-part pricing and price discrimination**

6.10 Multi-part pricing and price discrimination can promote efficiency, although discriminatory prices can be used for anti-competitive purposes. Thus clause 6(5)(b)(ii) supports clause 6(4)(m), which requires that an effective access regime prohibit conduct, such as anti-competitive price discrimination, for the purpose of hindering access.

**6(5)(b)(iii): No discrimination by vertically integrated access provider**

6.11 Clause 6(5)(b)(iii) recognises that incentives for anti-competitive behaviour are likely to be more prevalent in vertically integrated industries. An access regime consistent with this principle would expressly prohibit vertically integrated service providers from setting terms and conditions that discriminate in favour of its downstream operations. However, where the cost of providing access to an affiliate differs from the cost of providing access to other third parties terms and conditions may be varied to reflect those differences.

**6(5)(b)(iv): Incentives to reduce costs/improve productivity**

6.12 Firms in effectively competitive markets strive to improve their performance to gain cost and other advantages over their rivals or potential rivals. Clause 6(5)(b)(iv) seeks to

replicate the discipline of a competitive market by requiring that regulated access prices be structured to provide incentives to reduce costs or otherwise improve productivity.

### **Clause 6(5)(c): merits reviews of decisions**

- (c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:
  - (i) may request new information where it considers that it would be assisted by the introduction of such information;
  - (ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and
  - (iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.

6.13 Clause 6(5)(c) does not require that an access regime provide for merits review. A decision on whether or not to include merits review in an access regime may be informed by issues including the likely complexity and extent of regulatory intervention, the potential impact of regulation on property rights and values, the risk of ‘gaming’ of processes by participants and the need to balance potential delays to access against the need to protect the rights of affected parties.

6.14 The Council considers that, for an access regime to be consistent with clause 6(5)(c), any merits review ought not allow parties to have a ‘second bite of the cherry’ by seeking a de novo rehearing or redetermination of the initial decision or by allowing parties, as of right, to put before the reviewing body material that was not before the original decision maker.

6.15 In the Council’s view, Part 5 of the National Gas Law is an example of a limited merits review regime (albeit uncertified) that appropriately balances the need for oversight of regulatory decision making against the need to reduce the scope for delay. Merits review under Part 5 is limited in that applications to the Tribunal may only be made for ‘reviewable regulatory decisions’ on certain specified grounds and the Tribunal is only permitted (with exceptions similar to those in clause 6(5)(c)(i)-(iii)) to have regard to certain ‘review related matter’. Further, amendments made in 2013 imposed additional limitations on the Tribunal in reviewing certain access arrangement decisions. The Tribunal is required to take reasonable steps to consult with users and consumers before making a determination. Before making its determination, the Tribunal must have regard to the interrelationship of the constituent components of the decision under review and must be satisfied that its decision will result in a materially preferable decision contributing to achieving the national gas objective and will not require such a complex assessment that the preferable course is to set the decision aside.

## References

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### **Tribunal and court decisions**

*BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45; (2008) 236 CLR 145

*The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36; (2012) 246 CLR 379

*Rail Access Corp v New South Wales Minerals Council Ltd* [1998] FCA 1266; (1998) 87 FCR 517

*Re Dr Ken Michael AM; Ex parte Epic Energy (WA) Nominees Pty Ltd & Anor* [2002] WASCA 231; (2002) 25 WAR 511 (**Epic decision**)

*Re Telstra Corporation Limited (ACN 051 775 556)* [2006] ACompT 4; [2006] ATPR 42-121 (**Telstra decision**)

### **Legislation**

*Competition and Consumer Act 2010* (Cth)

*Criminal Code Act 1995* (Cth)

National Gas Law

National Gas Rules 2008

National Third Party Access Code for Natural Gas Pipeline Systems (**Gas Code**)

*Queensland Competition Authority Act 1997* (Qld)

*Railways (Operations and Access) Act 1997* (SA)

*Railways (Operations and Access) (Miscellaneous) Amendment Act 2010* (SA)

*Water Industry Competition Act 2006* (NSW)

### **Other sources**

Australian Energy Market Agreement

Competition and Infrastructure Reform Agreement

Competition Principles Agreement

Revised Explanatory Memorandum, Trade Practices Amendment (National Access Regime)  
Bill 2005

## Appendix A The clause 6 principles

6(2) The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or
- (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.

6(3) For a State or Territory access regime to conform to the principles set out in this clause, it should:

- (a) apply to services provided by means of significant infrastructure facilities where:
  - (i) it would not be economically feasible to duplicate the facility;
  - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and
  - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and
- (b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

6(3A) In assessing whether a State or Territory access regime is an effective access regime under the *Trade Practices Act 1974*, the assessing body:

- (a) should, as required by the *Trade Practices Act 1974*, and subject to section 44DA, not consider any matters other than the relevant principles in this Agreement. Matters which should not be considered include the outcome of any arbitration, or any decision, made under that access regime;
- (b) should recognise that, as provided by ss44DA(2) of the *Trade Practices Act 1974*, an access regime may contain other matters that are not inconsistent with the relevant principles in this Agreement.

6(4) A State or Territory access regime should incorporate the following principles:

- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.
- (b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.
- (c) Any right to negotiate access should provide for an enforcement process.
- (d) Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and

- obligations should not be automatically revoked.
- (e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.
  - (f) Access to a service for persons seeking access need not be on exactly the same terms and conditions.
  - (g) Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.
  - (h) The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.
  - (i) In deciding on the terms and conditions for access, the dispute resolution body should take into account:
    - (i) the owner's legitimate business interests and investment in the facility;
    - (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;
    - (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;
    - (iv) the interests of all persons holding contracts for use of the facility;
    - (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;
    - (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;
    - (vii) the economically efficient operation of the facility; and
    - (viii) the benefit to the public from having competitive markets.
  - (j) The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:
    - (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
    - (ii) the owner's legitimate business interests in the facility being protected; and
    - (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.
  - (k) If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.
  - (l) The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.
  - (m) The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.
  - (n) Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.
  - (o) The dispute resolution body, or relevant authority where provided for under specific

legislation, should have access to financial statements and other accounting information pertaining to a service.

- (p) Where more than one State or Territory regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other cooperative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

6(5) A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principles:

- (a) Objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets.
- (b) Regulated access prices should be set so as to:
  - (i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;
  - (ii) allow multi-part pricing and price discrimination when it aids efficiency;
  - (iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and
  - (iv) provide incentives to reduce costs or otherwise improve productivity.
- (c) Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:
  - (i) may request new information where it considers that it would be assisted by the introduction of such information;
  - (ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and
  - (iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.