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The Pilbara Railways: Restricted Access

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Between 2004 and 2013 a series of battles was fought over access to private railways used to transport iron ore mined in the Pilbara to port. The battles were fought in administrative decision-making processes and subsequently in courts. The field of battle was the expression of economic policy objectives in legislation that provides for a National Access Regime. The facts about the railways and demand for the services provided by them are central to the opposing arguments. But the facts, while complex, became largely settled, and the argument turned to legal interpretation, at times reflecting an underlying conflict between economic and legal thinking. Consequently, a central theme of this story is the chasm between how economic policy practitioners expected the National Access Regime to work and the way in which, through legal decisions, it worked in practice.

Background[1]

Western Australia's Pilbara region is one of the largest producers in the world of iron ore, exporting most of its production to China, Japan and South Korea. The largest producers are BHP Billiton and Rio Tinto, each of which operates a number of mines. Fortescue Metals Group (Fortescue) has become, in the last decade, a major producer. BHP Billiton and Rio Tinto operate railways to transport iron ore from their mines to ports. Fortescue sought access to these railways to run its own trains over the lines. The National Access Regime potentially provides an avenue for gaining such access.

The National Access Regime found in Part IIIA of the Trade Practices Act 1974 (now the Competition and Consumer Act 2010) is a set of statutory provisions that enables a third party to obtain access to services provided by 'essential facilities'. (In the United States the 'essential facilities' doctrine developed by the courts (rather than stipulated in legislation) provides that facilities that cannot practically be duplicated by would-be competitors must be shared on fair terms by those in possession of them.) The National Access Regime had its genesis in the inquiry into competition policy, chaired by Professor Fred Hilmer, which reported in August 1993. Part of the context for the report's recommendation that a statutory access regime be established was that most utilities in Australia were public monopolies. These included electricity transmission lines and distribution networks, electricity generation, telecommunications, railways, gas pipelines, ports, airports, and water and sewerage. The Pilbara railways were an exception in being privately owned. Many but not all of the facilities providing such services have natural monopoly characteristics, in which case it is often assumed that competition is not possible, but exceptions are central to the Pilbara saga.

In many cases a natural monopoly facility was vertically integrated with production processes that could be open to competition if it were not prevented by law. Examples are: natural monopoly electricity transmission and distribution vertically integrated with potentially competitive generation and retailing; a natural monopoly telecommunications lines network vertically integrated with potentially competitive services to users; and natural monopoly railway lines and associated infrastructure such as signalling facilities vertically integrated with potentially competitive running of trains over the tracks.

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[1] Much of this background is sourced from the 2010 decision of the Australian Competition Tribunal, discussed below. See also: http://www.australianminesatlas.gov.au/education/fact_sheets/iron.html.

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In the case of vertical integration the owner of the essential-service facility could have an incentive not to provide access to competitors in the upstream (for example, electricity generation) or downstream (for example, electricity retailing) markets where it also operated, and to sabotage (financially) such competitors who did gain access. (The literature on sabotage[2] largely post-dates the Hilmer Report.) By contrast, an airport has no incentive to deny access to airlines, but will have an incentive to extract monopoly profits by limiting capacity to the extent that it has market power.

Following the Hilmer Report the Council of Australian Governments developed a Competition Principles Agreement by which the federal and state governments would be bound, including agreement that the Commonwealth would put forward legislation to establish a regime for third party access to services provided by means of significant infrastructure facilities where:

> (a) it would not be economically feasible to duplicate the facility;
>
> (b) access to the service is necessary in order to permit effective competition in a downstream or upstream market;… [3]

Part IIIA was enacted in 1995 and amended in 2006 (The Trade Practices Amendment (National Access Regime) Act 2006) following a review by the Productivity Commission in 2000-01, to insert a clause stating that the object of Part IIIA is to:

> (a) promote the economically efficient operation and use of, and investment in, essential infrastructure services, thereby promoting effective competition in upstream and downstream markets….

Following the amendments, Part IIIA set out the following criteria for 'declaration' of a service:

> (a) access (or increased access) to the service would promote competition in at least one market (whether or not in Australia), other than the market for the service;
>
> (b) it would be uneconomical for anyone to develop another facility to provide the service;
>
> (c) the facility is of national significance, having regard to:
>
> (i) the size of the facility; or
>
> (ii) the importance of the facility to constitutional trade or commerce; or
>
> (iii) the importance of the facility to the national economy;
>
> (d) access to the service can be provided without undue risk to human health or safety;
>
> (e) access to the service is not already the subject of an effective access regime;
>
> (f) access (or increased access) to the service would not be contrary to the public interest.

Declaration creates a right of access. The second stage is to negotiate terms of access or, failing that, have them arbitrated by the Australian Competition and Consumer Commission (ACCC).

Fortescue's Application for Access

Four railways in the Pilbara are designed to transport iron ore are at issue:[4]

- the Mt Newman line, operated by BHP Billiton, running 210km from the south-east Pilbara to Port Hedland;
- the Goldsworthy line, operated by BHP Billiton, running 400km from the north-east Pilbara to Port Hedland;
- the Hamersley line, operated by Rio Tinto, running 235km from the south-east and central Pilbara to Dampier; and
- the Robe line, operated by Rio Tinto, running 182km from the western Pilbara to Cape Lambert.

Between June 2004 and January 2008[5] Fortescue applied to have services supplied by these railways declared. In each case the service applied for was the use of the railway track and associated infrastructure ('below rail' service) by contrast with the use of trains ('above rail' service) for which access was not sought. Access would allow Fortescue to run its own trains to transport iron ore.

When an application is made to the National Competition Council (NCC), it makes a recommendation to the relevant Minister, in this case the Commonwealth Treasurer, who then decides whether or not to grant access. The NCC in making a recommendation to declare, and the Treasurer in deciding to declare a service, must be satisfied that all six criteria (a) to (f) are met.

With some simplification regarding the process, the NCC recommended declaration of all four lines, the then Treasurer in 2006 declined to declare the Mt Newman line, and the then Treasurer in 2008

[2] See, for example, Mandy and Sappington (2007).

[3] *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 (30 June 2010) [564] ('*Fortescue*').

[4] Ibid [4].

[5] Ibid [10ff].

declared the Goldsworthy, Hamersley and Robe lines.

Review by the Australian Competition Tribunal[6]

BHP Billiton and Rio Tinto Iron Ore applied to the Australian Competition Tribunal to review the decisions that went against them. Fortescue applied to review the decision not to declare the Mt Newman service.

In 2010 the Tribunal found that:

- For many miners, rail may be the only viable, or at least the most cost effective, means of transporting iron ore.
- Both BHP Billiton and Rio Tinto operate on a 'run when ready' basis, rather than a scheduled basis, constantly adjusting their usage to needs at mine and port. This makes it potentially difficult for third parties to fit in with the owners' modes of operation, particularly on sections of the lines where demand is intense.
- Except for the Goldsworthy service, if access was not granted, new railways would be built which could be used by junior miners that might otherwise seek access to the owners' lines. Fortescue had already constructed its own railway running roughly parallel to the Mt Newman line for a considerable distance and planned to construct others.
- That new lines could be built did not necessarily mean that it would be efficient to build them. A substantial level of potential third-party demand for each service meant that expansions were likely to be needed. Except for the Mt Newman line, the cost of expansion would be significantly less than the cost of constructing a new line.

The point made by the owners that the railways are part of an integrated mine-rail-port production system has potential access ramifications.

Simplifying a little, Part IIIA states that a service (amenable to declaration) does not include the use of a production process. Before the Tribunal's review of the declaration decisions, BHP Billiton had argued that the service sought by Fortescue was exempt from declaration because it was part of a production process. This case reached the High Court.[7]

The railway is used by BHP Billiton in blending different ore grades as an integral part of producing cargoes of iron ore products with required product specifications, grade variability, tonnages and timeliness.[8] However, it did not follow from this that Fortescue's use of that track and infrastructure would be the use of a production process. Fortescue did not seek use of BHP Billiton's rolling stock or to add its stock to trains operated by BHP Billiton.

Thus it was established that the access services sought by Fortescue were indeed amenable to declaration. In 2009 the Tribunal, constituted by a Federal Court judge and two lay members with relevant expertise, embarked on a rehearing[9] over 42 days. As the Tribunal noted, the parties 'took the opportunity to present material far in excess of that which had been placed before the Minister.' They filed 130 affidavits from 73 witnesses and many documents (approximately 70 large lever-arch files). The transcript is over 3,300 pages. Fifteen witnesses were expert economists and others included bankers, computer simulation experts, engineers, environmental scientists, geologists, metallurgists, quantity surveyors, rail modellers and train schedulers

The Tribunal's decision ran to 1350 paragraphs. When its decision was inevitably appealed, the court hearing the appeal had before it a comprehensive statement of the facts and reasoning leading to the Tribunal's conclusions.

Broadly, the Tribunal saw its task as interpreting the criteria for declaration (set out above), and then deciding whether those criteria were met by the facts.

On criterion (a), the Tribunal found[10] that, for each of the services except Mt Newman, access would promote a material increase in competition in a rail-haulage market, but not in the markets for Pilbara tenements and for seaborne iron ore, for which Fortescue also contended.

On criterion (b),[11] the competing views on the meaning of 'uneconomical for anyone to develop another facility' were that 'uneconomical' means that: (1) it would not be profitable for anyone to develop the facility ('privately profitable' test); (2) the total net costs (including social costs) exceed the total net benefits (including social benefits) of developing another facility ('net social benefit' test); or (3) a single facility can meet market demand at less total cost than two or more facilities ('natural monopoly test').

In previous decisions, the Tribunal had adopted the net social benefit test.

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[6] *Fortescue* [2010] ACompT 2

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

[8] *BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2006] FCA 1764 at [77].

[9] *Fortescue* [2010] ACompT 2 [26].

[10] Ibid [1007] – [1159], Summary [17].

[11] Ibid [816] – [817].

It was accepted by all the economic experts appearing before the Tribunal that, depending on costs and prices, the existence of a natural monopoly does not necessarily preclude the profitable development of a second facility. But it would be inefficient, that is, wasteful of resources.

The question, said the Tribunal, is whether Part IIIA is intended to apply in circumstances where it is profitable – albeit less profitable, and potentially less efficient – to build a second line. The incumbents argued that Part IIIA is not intended to apply in those circumstances, because it is concerned with removing 'bottlenecks' and criterion (b) should be seen as a bottleneck test. In contrast, Fortescue and the NCC argued that, while bottleneck considerations may be relevant to criterion (a), criterion (b) is concerned with efficiency.

The Tribunal concluded[12] that this criterion tests whether a facility has natural monopoly characteristics. It then held that three lines (Hamersley, Robe and Goldsworthy) were natural monopolies, but that Mt Newman was not, given the possibility of extending Fortescue's existing line to cater for third-party demand in the vicinity of that line.

The Tribunal viewed the test for natural monopoly as purely technical, depending on the costs of production, excluding social costs. A distinction was needed between the costs of production of the service and the costs of providing access.

The Tribunal pointed out that social costs are nevertheless relevant to whether a service should be declared, and considered them under criterion (f). It took the view that declaration could occur even where costs exceed benefits and, by contrast, be denied where access would be manifestly unjust to a section of the community while, at the same time, benefiting the community as a whole. That is, its application of the public-benefit test went far wider than net social benefits in an economic sense.

The Tribunal said[13] that, in assessing the public interest under criterion (f), it is necessary to weigh up the benefits and costs of access to society. The key benefits were (1) savings from sharing the existing railways rather than duplicating them; and (2) making rail services available for some mining projects (bearing in mind that many would be able to access alternative railways in any event).

On the other hand, the Tribunal found that there was the likelihood that access would discourage the development of alternative lines that may be less constrained, and provide more certainty of use for third parties than would access to existing lines. In addition, high demand for a line imposes severe logistical and commercial constraints on third parties to ensure there was no interference with the owners' highly flexible business models. Access would also delay the owners' future expansion plans or changes in operating practices or technology, possibly resulting in billions of dollars of lost export revenues.

The Tribunal held that the costs from access to the Mt Newman or Hamersley services were so great that access would be contrary to the public interest. The Tribunal was satisfied that the benefits of access to both the Goldsworthy and Robe services outweighed the costs, so access would not be contrary to the public interest. Even so, the Tribunal commented that

> [i]t is particularly important that, if the services are not declared, alternative rail facilities are likely to be available for many access seekers. The situation in the Pilbara is unusual in that, notwithstanding the presence of facilities with natural monopoly characteristics, alternative facilities can be – and are highly likely to be – built if a declaration is refused. Other benefits which might ordinarily flow from access to a natural monopoly facility do not necessarily arise here. … [We] doubt that access will result in large gains for competition.[14]

The Tribunal's decision was to declare BHP Billiton's Goldsworthy line and Rio Tinto's Robe line, but not the Mt Newman or Hamersley lines.

Appeals against the Tribunal's Decision

The Tribunal's decision was appealed to a Full Court of the Federal Court by Fortescue and Rio Tinto, leaving the declaration of BHP Billiton's Goldsworthy line unchallenged. Necessarily, the grounds were alleged errors of law, since it was not open to anyone to challenge the merits of the Tribunal's decision. The Full Court decided[15] that the Tribunal had erred and that criterion (b) meant that the facility could not be profitably duplicated by anyone other than the facility owner: the so-called private profitability test.

It overturned the declaration of the Robe line, leaving Goldsworthy as the only one to which access was granted.

The Full Court undertook an extensive analysis of the extrinsic aids to statutory interpretation such as the Hilmer Report, the draft legislative package prepared for the Council of Australian Governments, the Explanatory Memorandum, the Second Reading

[12] *Fortescue* [2010] ACompT 2 at 18 in the Summary.

[13] Ibid 19-21 of the Summary and [1304].

[14] Ibid [1301].

[15] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2011) 193 FCR 57.

Speech, the Competition Principles Agreement, the 2001 Productivity Commission (PC) report and documents associated with subsequent amendments to Part IIIA. However, it said that those materials were of limited use and that it placed most emphasis on the actual words in which criterion (b) was expressed, giving them their natural meaning. Nevertheless, it cited the Hilmer Report, the Competition Principles Agreement and the PC report in support of its reasoning.

The Full Court exhibited a distaste for regulation and regulators, saw in the materials and words of the statute a legislative intention to minimise regulatory intervention (rather than simply to limit it appropriately), and considered that applying the natural monopoly test would be to hand decisions that ought to be made in the context of private investors in the market place over to some regulator's evaluation of efficiency.

The Full Court used the term 'market place' 14 times in its reasons. While economists are often accused of appealing too much to the claimed benefits of the market, it seems some judges have an at least equal devotion to market places.

The Full Court saw criterion (b) as striking the balance between the promotion of competition and economic efficiency and the legitimate interests of the incumbent facility owners. But the legitimate interests of the incumbents, which do not figure in the declaration criteria, are specifically protected in the second stage of the Part IIIA process, where arbitration of the terms of access may be required.

The Tribunal similarly seemed to have little faith in those protections, and certainly did not consider that they could be left to the second stage.[16]

The Full Court spoke of the natural monopoly test as 'broadening the gateway' and 'lowering the bar' to access 'based on an imagined state of affairs rather than the facts of the market place'. But the basic assertion is that the words of the statute, by themselves, constitute a clear statement that declaration is not to be granted if some entity – in fact a miner – would find it profitable to build a duplicate railway to transport iron ore to market, the profit being ensured by the degree to which iron ore prices provide revenue that exceeds the miner's costs of production and (duplicated) haulage.

Perhaps most tellingly, the Full Court said that, if the intention of the legislature had been to establish a regime in which a regulator would determine whether declaration would serve economic efficiency from the viewpoint of society as a whole, it could have been expected to express its intentions in very different terms.

The Full Court also considered that the private profitability test had the merit that it was easier to apply. The Tribunal had described[17] the 'privately profitable' test as one that 'is easy to apply but looks at the wrong thing'.

Appeal to the High Court

The Full Court's decision was handed down in May 2011 and was appealed to the High Court by Fortescue. The High Court decided[18] by a six-to-one majority in September 2012 that the Full Court of the Federal Court was correct about the private-profitability meaning of criterion (b).

But before canvassing the High Court's reasoning on criterion (b), it is important to report that, late in the hearing before the High Court,[19]

> there emerged an issue which had not previously been raised by any party or by the NCC, whether in the Tribunal, the Federal Court or this Court. What was the nature of the task which the Tribunal was required to perform when asked to review the Minister's decision? Was it, as the Tribunal and those who were represented before the Tribunal took it to be, a fresh hearing on new evidence of whether a service should be declared? Or was the task more limited?

The High Court was unanimous in overthrowing the Tribunal's previously undisputed practice. Part IIIA provides that a review is 'a re-consideration of the matter' and the High Court found[20] that

> [t]he requirement that the Tribunal review the Minister's decision neither permits nor requires a quasi-curial trial between the access seeker and the facility provider as adversarial parties, on new and different material, to determine whether a service should be declared.

In reaching its view about the Tribunal's task, the High Court explored the nature of the tasks undertaken by the NCC and the Minister, which involved a consideration of the six statutory criteria for declaration.

The High Court saw[21] criteria (c) – that the facility in question is of national significance – and especially

[16] *Fortescue* [2010] ACompT 2, [592] – [606].

[17] Ibid [849].

[18] *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36.

[19] Ibid [27].

[20] Ibid [48].

[21] Ibid [42] – [43].

(f) – that access (or increased access) to the service would not be contrary to the public interest – as directing attention to broad judgments of a generally political kind. The range of matters to which the Minister may have regard is very wide indeed.

It expected that the Tribunal, reconsidering the Minister's decision, would not lightly depart from a ministerial conclusion about whether access or increased access would not be in the public interest, and would be unlikely to do so by reference to some overall balancing of costs and benefits.

By contrast, the other criteria, and in particular criteria (a) and (b), were seen as being of a more technical kind in which the recommendations of the NCC were likely to influence the Minister. It was expected that the Minister would decide quickly.

The High Court found[22] that, if the Minister, having considered the matter, is satisfied of all six criteria, the Minister must declare the relevant service. The Minister not having a residual discretion, it followed that both the Tribunal and the Full Court had been wrong to proceed on the footing that there was a residual discretion to be exercised on review by the Tribunal.

Moreover, the Full Court had been wrong to consider that all the social costs and benefits ought to be considered, if not under criterion (b) then under criterion (f). Instead, the High Court majority considered[23] that the Tribunal, in a review, ought not make its own assessment of whether access or increased access would be contrary to the public interest.

As to criterion (b), the High Court majority opted for the private profitability test on grounds similar to those of the Full Court.

It said that criterion (b) uses the word 'uneconomical' to mean 'unprofitable', rather than in some specialist sense that would be used by an economist. Further, it 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, rather than as requiring the testing of an abstract hypothesis.[24]

> 102. By contrast, if criterion (b) is read as a natural monopoly test, a facility that is not a natural monopoly cannot be declared even if there is no (profit) incentive to duplicate it. In that case, the sole supplier would be left in control of the field with the attendant risks of abuse of market power and, no less importantly, with no incentive to price and produce efficiently. An outcome of that kind does not sit easily with the requirement that criterion (b) be understood in a way that will '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'. The Tribunal was wrong to conclude, as it did, that adoption of a privately profitable test of the kind being considered by the Tribunal would not adequately meet those objectives. A privately profitable test serves those objectives better than a natural monopoly test.

Dissenting Opinion in the High Court

Perhaps unsurprisingly, the opinion of the single dissentient is of interest to economists and public-policy analysts. In views diametrically opposed to those of the majority, Justice Heydon said that:

- The natural monopoly construction is more consistent with the object of Part IIIA.
- 'Uneconomical' is not an apt term for describing the private comparison of costs and revenue.
- 'Uneconomical' is more apt to refer to other matters. One lay meaning of 'economical' is avoiding waste, 'uneconomical' in that sense means not avoiding waste. Another lay meaning of 'economical' is harmony with the principles of economics.
- In ordinary usage it is 'uneconomical for anyone to develop another facility' if it would be wasteful, increase excess capacity, or result in an inefficient use of scarce resources.
- The language of the Act did not suggest that interference with private property rights would be lightly done, but it did not treat it as 'distinctly exceptional'. The later provisions of Part IIIA provided safeguards for the service provider against whom access was granted.
- The evidence from the Tribunal's proceedings did not support the view that the privately profitable test was easier to apply.

He also took issue with the Full Court's pejorative language, showed where it had quoted selectively from Hilmer, and questioned the accuracy of describing a Minister's decision based on expert advice as 'evaluation by a regulator' – and hence an inappropriate basis for declaration.

Summing up, he said,[25]

> 180. In short, the Full Court appears to have misunderstood the appellants' submission on the

[22] Ibid [116].

[23] Ibid [109] – [110].

[24] Ibid [102].

[25] Ibid [180].

construction of criterion (b); exaggerated the extent to which the 'philosophy' it assigned to Pt IIIA was manifested in s 44H; overlooked later provisions in Pt IIIA that operated to safeguard service provider interests against the concerns underlying that 'philosophy'; placed too much weight on the [extrinsic materials]; and interpreted them too favourably to the respondents.

Final Disposition of the Case in the Tribunal

The High Court majority found[26] that, since the Tribunal had failed to perform the task required of it by the Act, the Full Federal Court ought to have quashed its decision and returned the matter to the Tribunal to undertake a re-consideration of the Treasurers' decisions. Instead, the Full Court had revoked one of the Tribunal's decisions on declaration.

Many things had changed since the Treasurers' decisions, including the building of new railways. But the Tribunal[27] was limited to reconsidering the material that was available to the original decision-maker. That material was presented on the basis that the criterion was whether the railway was a natural monopoly, whereas the Tribunal now had to work with the criterion being one of private profitability.

The Tribunal checked what material had been available to the original decision-maker and ascertained that, being based on a previous understanding of the criterion, it did not provide sufficient information to form a view based on the recently announced 'correct' criterion. In considering whether it could use a power in the legislation to seek additional information, the Tribunal decided that to do so would require a major consultation process that would amount to a rehearing, inconsistent with the High Court's decision.

As a consequence, the Tribunal decided that the original appeals should be denied.

The High Court's decision led to a review of the National Access Regime by the PC – the terms of reference were announced in October 2012, the draft report was released in May 2013, and its final report was released by the Government in February 2014.

An Insider's Comment on Criterion (b)

Further light was thrown on the Full Court's thinking by the Chief Justice at the time of its decision, Patrick Keane. He was a member of that Full Court, and has since become a Justice of the High Court.

He gave a very interesting and informative – and to a degree provocative – paper at the 11th Annual University of South Australia Competition and Consumer Workshop on 16 November 2013. Justice Keane has kindly given permission for his paper to be cited.

In discussing criticisms of the decision, Justice Keane suggested that there is little point in criticising a bunch of black letter lawyers for approaching the solution of a problem submitted to them like a bunch of black letter lawyers.

In explaining the Full Court's view of criterion (b) he made a number of references to economics and economists that are telling or revealing, depending on one's point of view:

- The privately profitable test was less fraught with contestable economic theory. The differing views taken by the Tribunal in earlier cases and in this case pretty clearly owed something to the differences in membership of the Tribunal.
- Since the extrinsic materials seemed to have something for everyone, one looked for an interpretation which departed least from the language of the text. This approach was unlikely to please economists from whose professional perspectives the statutory language was apt to be seen as carrying more baggage than is apparent to the laity.
- The other candidates offered greater scope for evaluative judgements by regulators and those required to review their decisions on the merits concerning matters such as allocative and dynamic efficiency to intrude into the decision-making process, making it more remote from the concrete problem which affects business people in a particular field of commerce.

In his paper Justice Keane concluded with a series of 'musings', drawn from his experience, on how the path from Hilmer to the enactment of Part IIIA may have confounded expectations. Comments on economic input are also found there:

- The constant pressure for the production of legislation generated by the ruthless and unremitting demands of the news cycle, the government's legislative program, policy advisers, political superiors, colleagues and stakeholders demands responses that limit the opportunity for reflection.
- Policy formulation and legislative drafting do not proceed in the obviously desirable way, in a logical sequence of orderly and discrete processes. The expertise of political minders who

[26] Ibid [65].

[27] *Applications by Robe River Mining Co Pty Ltd and Hamersley Iron Pty Ltd* [2013] ACompT 2 (8 February 2013). The author was a member of this Tribunal.

are involved in the process will often be in areas other than the one in question, and their involvement only tends to delay and confuse the work of professional officers.

- Political compromises of competing values or interests underpinning most legislative measures cause ambiguity and uncertainty.
- The pressures force the antagonists to accept a deal on the basis that near enough is good enough. This problem is likely to be particularly acute where rival economic theories, or rival economists, are competing for attention.
- Antagonists, who may be from different governmental departments or different political factions, will often be able to reach a measure of agreement which they are prepared to live with precisely **because** of ambiguity in the terms of the deal.
- Part IIIA may reflect these features in a particularly acute form because of the competition between economic theories and economists for the attention of those charged with formulating policy and drafting the legislation.
- With respect to Part IIIA, it is difficult to suppress the suspicion, when one looks at the extrinsic materials (save perhaps for the Hilmer Report), that several economic theories, or theorists, were speaking, and that there was no single authoritative voice to resolve the nuances and expound the statutory objective and the strategy to be pursued for its attainment. The different approaches taken in the Tribunal to the scope of criterion (b) lend some support to the concern that different economists may have brought differing theories to the task.
- Both the text of Part IIIA, and the extrinsic materials (other than the Hilmer Report) evidence drafting by committee such as the variations in language between 'economic efficiency' and 'uneconomical'. The effect of a measure will be tested in the fires of the adversarial process, so it is important to try to understand and anticipate that process by and before black letter lawyers closely attending to the text in which the measure is ultimately framed.

Justice Keane also canvassed the recommendations in the PC report, which at the time of the conference was still a draft.

He noted that his ruminations about the legislative compromise that seems to be expressed in criterion (b) implied speculation about the prospects for a satisfactory solution to problems with the operation of Part IIIA following a government response to the PC report.

Where Does All That Leave Us?

First, only one of the Pilbara railways is now declared. The NCC, which as the High Court said repeatedly was an expert body, had recommended that all four be declared. Two Treasurers had between them declared three, not having found that access would be contrary to the public interest, a matter that the High Court said was quintessentially one for political decision. This retreat took over nine years of enormously expensive litigation.

In making its recommendations, the NCC, itself a child of the Hilmer reforms, was imbued with the spirit of Hilmer, which was undoubtedly to open up competition by creating a right of access to natural monopoly essential facilities.

Certainly the Hilmer Report made it clear that requiring by law a business to make its facilities available to another business was not to be undertaken lightly, and that the owner's interests must be protected. But the natural monopoly test is hardly a recipe for granting access willy-nilly. Any suggestion that the Hilmer Report itself had in mind a 'privately profitable' test is fanciful.

Rod Sims, Chair of the ACCC, made a fascinating comment in the discussion session at the conference where Justice Keane's paper was presented. Mr Sims, who has consented to have his comment repeated here, was a senior officer in the Department of the Prime Minister and Cabinet in the 1990s. He recalled the occasion when two of his staff came to his office and proposed a national competition policy inquiry, which led to the Hilmer Report, which led to the national access regime. He said it never occurred to any of them that the test for access was anything other than a natural monopoly test.

In the same vein, it has been common over the years to hear economists involved in public policy express thoughts along the lines: 'If Part IIIA wasn't intended to lead to the provision of access to private railways, what was it intended for?' Those of that view are adamant that, whether or not the Courts have interpreted the declaration test correctly – and of course more or less by definition it is now the case that they have – the public policy outcome is wrong, and other than that intended.

The PC, which the Full Court also cited in support of its views, no doubt approached the access regime in its several investigations with its usual scepticism about regulation in general, distaste for interference in private property rights, and concern about chilling investment. Whatever the Full Court might have suggested about disputatious economic 'schools', that approach is very much the norm for regulatory economists. The fact remains that on each occasion the PC, perhaps holding its collective nose, came to the view that the access regime was justified. It certainly never did so, in the period up to the Fortescue case, under the impression that criterion (b) meant 'privately profitable'.

The main reason that we have ended up with no declaration of Pilbara railways – except for the Goldsworthy line, against the declaration of which BHP Billiton did not appeal – is the courts' construction of criterion (b) as a privately profitable test, ostensibly on the grounds that this is uniquely consistent with the actual words of the statute.

One might ask who has ever heard the word 'uneconomical' used to mean 'unprofitable'? Do business people really say 'The investment would not be economical' when they mean that it would be unprofitable?

Despite all the protestations regarding the primacy of words of the provision, it is very difficult to see in the actual words a 'philosophy' of minimal regulatory intervention. Rather, one could get the impression that a pre-existing view that such an approach is desirable governed the manner in which the statue was interpreted.

Indeed, the impression is gained that the Full Court simply didn't like the idea of the Tribunal or the Minister (although the Full Court always referred to 'the regulator') deciding what would be most efficient/most in the interests of society. The perspective must instead be on what practical business people would think and do.

Some might think that Australia's premier piece of economic legislation, directed towards public policy purposes redolent with public economics and invested with a century of economic thinking, is not sensibly to be thus stripped of its objectives.

The non-lawyer is likely to find it difficult to understand how the introduction of the objects clause into Part IIIA supports an interpretation that declaration is not about promoting economic efficiency. The object, after all, is 'to promote the economically efficient operation and use of, and investment in, essential infrastructure services, thereby promoting competition in upstream and downstream markets…'

'What's not clear about that?' an economist would say. But Justice Keane's ready riposte would be simply to point out that different economists did take different views in assisting their clients. Economists were only too happy to argue that nothing was clear, and to muddy waters that most had thought were relatively tranquil.

Subsidiary strings to the courts' thinking are unpersuasive from a public-policy perspective.

Duplication would increase competition. The Tribunal was also strongly conscious of that fact. The High Court appears to have taken the view that additional competition was a higher order public policy objective than reduced inefficiency through sharing a natural monopoly facility. And the privately profitable test would lead to increased competition through duplication, compared to the natural monopoly test.

But bringing the competitive benefits of duplication into the question of how to interpret criterion (b) seems to confuse and conflate the roles of criteria (a) and (b). Moreover, it must always be remembered that declaration in no way prevents the building of duplicate railways. Rather, it changes the (private) cost/benefit analysis of the potential new entrant.

The High Court was also concerned that declaration is for the long term, while testing for natural monopoly is tied to contemporary technology and, in the words of the Tribunal, what is a natural monopoly today might not be one tomorrow. But, in fact, natural monopolies do not cease to be overnight, and the privately profitable is at least equally tied to contemporary technology.

Finally, the High Court, like the Full Court before it, was concerned at what it considered the difficulty involved in carrying out a natural monopoly test. One must resist any temptation to accuse the Courts of being attracted to tests that are easy to apply but test for the wrong thing.

Beyond those specific objections to the courts' arguments, some of the High Court's reasoning is rather difficult to follow. For example, some passages miss entirely the distinction between whether a facility can be profitably duplicated on a stand-alone basis or whether it would only be made profitable by the large economic rents in mining iron ore.

And yet... It must be acknowledged that the legislation nowhere mentions natural monopoly, and it is telling that, if the drafters had intended a natural-monopoly test, they could have used much clearer words. Despite Justice Heydon's persuasive discussion of the common-sense meaning of 'economical', in fact the term is more or less unknown to public-policy economics. As far as this writer is aware, the term 'uneconomical' is not found in economics text books. At most, such texts are likely to have a homily about how economics differs from, say, home economics, or notions of prudence, and that 'economic' does not necessarily connote the same things in the economics discipline as it does elsewhere.

An economist meaning 'inefficient' would say 'inefficient', not 'uneconomical'.

Why criterion (b) was drafted as it was is a mystery. It seems likely to this writer that there was a desire to avoid the use of the term ‘natural monopoly’, but not to avoid the use of the concept. But the experience of Justice Keane, related in his conference paper, is highly relevant and ultimately depressing.

In contentious policy areas, ambiguity may be tolerated, if not sought. That may have been the case for Part IIIA, and may be the case in the future if, as seems likely, Part IIIA is amended and possibly that a natural monopoly test is explicitly introduced.

The characteristics of the Pilbara case were special. It is close to inconceivable that a new entrant electricity generator would find it profitable to duplicate a distribution network so as to provide its service to customers. Unlike in iron ore production, economic rents to electricity generation could not overcome the barrier of natural monopoly. In that case, the natural monopoly would be an absolute bottleneck. So also is the case of a ‘normal’ railway line used for the transport of freight between cities.

Thus, it may be that the National Access Regime was derailed by the iron ore railways. When Hilmer used railways as an example, he did not have private iron ore railways in mind.

As Justice Keane reminded his listeners, the role of the Court is to ‘quell the controversies that are presented to it’. But it is surely a shame that the way courts have responded to the peculiar facts in the Pilbara railways case have led to declaration under the National Access Regime becoming so far detached from the heroic aspirations of Hilmer and national competition policy.

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Productivity Commission (2001), *Review of the National Access Regime*, Inquiry Report No. 17, 25 October.

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Critical Issues in Regulation – From the Journals

Learning from the Past: Insights for the Regulation of Economic Activity, Nancy Rose, National Bureau of Economic Research Project on Regulatory Reform, June 2013.

Nancy Rose is the editor of a recently published book titled *Economic Regulation and Its Reform: What Have We Learned?* It contains nine chapters on a variety of regulatory issues. The chapters include: on antitrust and regulation (Dennis Carlton and Randal Picker); cable regulation in the internet era (Gregory Crawford); competition in wholesale electricity supply (Frank Wolak); incentive regulation in theory and practice (Paul Joskow); and telecommunications regulation (Jerry Hausman and Gregory Sidak).

The introduction to the volume, by Nancy Rose, is titled 'Learning from the Past: Insights for the Regulation of Economic Activity'. It was previously available for free download. It notes that 'several broad themes … emerge from these studies of regulation, and … may be of value in considering regulatory policies going forward'. These themes are:

Institutions matter: Seemingly modest differences in institutional settings can lead to dramatically different impacts of otherwise similar regulations. This theme is illustrated through a range of analytical and empirical observations.

Incentives drive behaviour: An effort to 'harness the power of this insight fuelled the surge in incentive-based regulation' that Joskow's chapter on incentive regulation describes in detail. This theme is illustrated with the following observation:

> [t]o the extent that traditional cost-of-service utility regulation or state-ownership of utilities fully reimbursed firms for their incurred costs—which varied in effect over time and space—it dulled incentives to improve efficiency and reduce operating costs.

Innovation changes the game: Innovation can change the regulatory calculus in at least two ways. First, regulatory systems can distort incentives for innovation in products and services, leading to dynamic effects that may swamp static costs and benefits. The second sense in which innovation matters involves the game between regulators and regulated firms. Allan Meltzer is quoted in support of this second proposition:

> [T]he first law of regulation is: lawyers and bureaucrats write regulations. Markets learn to circumvent the costly ones.

Imperfect markets meet imperfect regulation: One of the most important themes identified as emerging from this volume 'is that markets and regulation both tend toward flaws, and neither may operate as the neoclassical ideal would dictate'. Choices about institutional arrangements are squarely in the world of 'second-best'.

Information about the book is available at:
http://press.uchicago.edu/ucp/books/book/chicago/E/bo17974093.html

'Cost Pass-through': Theory, Measurement and Potential Policy Implications, RBB Economics for the Office of Fair Trading, February 2014.

This comprehensive report on pass-through (defined as the price change in response to a cost change) has been prepared for the Office of Fair Trading (OFT) in the UK by a consultant, RBB Economics. The report is over two hundred pages in length and contains a comprehensive list of references to theoretical and empirical work. There are in excess of one hundred items. While there is a substantial amount of technical material (mainly in annexes), there are plenty of words of explanation and intuition.

'Cost pass-through' describes what happens when a business changes the price of products or services following a change in the cost of producing them. The OFT describes the report as providing a 'comprehensive and up-to-date review of the literature on the causes and consequences of differences in cost pass-through and their measurement'. An understanding of cost pass-through is relevant across much of the OFT's work including: prioritising which interventions to undertake; assessing the competitive effects of business behaviour in the course of those interventions; and designing and implementing remedies following them.

Amongst the many results and conclusions from this research are the following:

The extent of cost pass-through in a perfectly competitive market depends on the elasticity of demand relative to elasticity of supply. The more elastic is demand, and the less elastic is supply, the smaller the extent of pass-through, all else being equal. Hence, there is a classic observation in relation to tax incidence that the less price-sensitive side of the market bears most of the impact of a tax, carries over to cost pass-through in these settings. A related conclusion is that there is no scope for pass-through of business-specific cost changes in a perfectly competitive market environment.

Work evaluating the dynamics of pass-through relationships suggests that, while asymmetries between the effects of cost increases and decreases may prevail in the short run, these asymmetries do not persist over the longer-term.

There is no perfect approach to estimating pass-through rates, and there can be no guarantee that the practitioner will always be able to obtain robust estimates. Good practice suggests that the practitioner should: assess the empirical results in light of the limits of each approach; check for consistency of results across a range of different estimation strategies; and perform sensitivity analysis to assess the robustness of the results obtained. The weight given to particular pass-through estimates must be adjusted accordingly.

Ultimately, pass-through can only represent one aspect of the assessment of competitive effects. Moreover, the estimation of pass-through rates cannot take place in a vacuum. The practitioner must take account of the relevant market and competition context, including any key dynamic features, in identifying, analysing, and interpreting pass-through evidence.

How to Price the Unbundled Local Loop in the Transition from Copper to Fiber Access Networks?, Karl-Heinz Neumann and Ingo Vogelsang, *Telecommunications Policy*, 37, 10, November 2013, pp. 893-909.

Karl-Heinz Neumann and Ingo Vogelsang analyse the pricing of access in the transition from access based on copper (the 'legacy' network) to access based on emerging fibre networks. During the transition phase, the old and the new networks operate side-by-side, and both have to be priced. Copper networks in most countries are priced on a forward-looking (total service) long-run incremental cost (FL-LRIC) basis. The authors consider whether this costing basis is appropriate in the transition phase or whether a different approach is preferable. The authors propose to price the access to copper on a modern equivalent asset (MEA) basis, with a correction for the difference in performance (called the 'performance delta') between copper and fibre. The main part of the article is largely non-technical, and theoretical background is contained in an appendix. There is a reference list containing fifteen items.

The authors specify welfare targets – efficient investment; 'open and competitive networks' and the long-term interests of end users. They also specify the desirability of 'competitive neutrality' between copper and fibre access. They set out the characteristics of FL-LRIC as applied to copper; and review the current regulatory practice in European countries; with particular attention to Sweden ('most radical change') and France. They then set out what they see as 'pitfalls of applying FL-LRIC' in circumstances of declining volumes because of substitution of fibre for copper.

The bulk of the paper is about the novel solution to the 'performance delta', which makes the access seeker indifferent between FTTH and the copper-based service. The performance delta is often quantified on the basis of things such as capacity, bandwidth and quality of service. In contrast, Neumann and Vogelsang set out an approach based on the market value of services. The discussion has the following sub-headings: 'characterisation of a performance delta in idealised settings'; 'properties of the performance delta in idealised settings'; 'applying the MEA concept in numerical simulation exercises'; 'concerns and necessary steps for practical implementation'; and 'conjectured efficiency and investment properties'. Numerical simulations are performed in a quantitative competition model. The authors claim that their suggested method is 'conservative'.

Evaluating a Decade of Mobile Termination Rate Regulation, Christos Genakos and Tommasso Valletti, *CEIS Tor Vergata Research Paper Series*, 12, 1, 303, January 2014.

Christos Genakos and Tommasso Valletti have been writing about mobile termination for over ten years. They are closely associated with the idea of the 'waterbed effect'. This is where downward regulatory pressure on the price of mobile termination can result in an increase in retail prices of mobile services (for mobile subscription and calls made on mobile phones). In this paper the authors reconsider the impact that regulation of call termination on mobile networks has had on mobile-customers' bills.

Using a large panel of data covering 27 countries, the authors find that the waterbed phenomenon, initially observed until early 2006, has disappeared over the ten-year period from 2002 to 2011. The authors argue that the disappearance of the waterbed effect is due to the changing nature of the industry, whereby, in particular, mobile-to-mobile traffic now plays a much bigger role compared to fixed-to-mobile calling in earlier periods. This implies that regulation of mobile termination rates does not have the unintended consequences for mobile retail prices anymore. Further, over the same decade, the authors find no evidence that regulation caused a reduction in mobile operators' profits and investments.

In looking forward, Genakos and Valletti contend that ‘the case for regulation is now more compelling as unintended consequences of regulation, such as the waterbed, are much less likely to arise’ (p. 14). However, they also observe that regulatory cuts ‘cannot continue forever’ as rates are reaching the natural limit – incremental cost.

The paper can be accessed from this link:
http://ssrn.com/abstract=2377341

Market Power of Airports: A Case Study of Amsterdam Schiphol Airport, Volodymyr Bilotkach and Andreas Polk, *Competition and Regulation in Network Industries*, 14, 4, 2013, pp. 320-337.

In this paper, Volodymyr Bilotkach and Andreas Polk assess the market power of the Amsterdam Schiphol Airport in the Netherlands. The paper: is about fourteen pages in length; is substantially non-quantitative in approach; and lists 24 references.

Schiphol Airport is the fourth largest in Europe, located strategically as a hub for passenger and freight movements. Schiphol Airport is subject to economic regulation by the Authority for Consumers and Markets. The authors consider the effect of the Air Passenger Tax in 2008, which they consider to be a ‘natural experiment’ of the market division between servicing, on the one hand, origin-and-destination (O&D) passengers; and on the other hand, transfer passengers. Transfer passengers are revealed to be more responsive to price than O&D passengers.

The authors detail market definitions for the airport’s main activities: passenger handling (O&D and transfer); freight and mail handling; aircraft handling; refuelling services; and catering services.

The authors highlight some methodological innovations which could be applied to future studies of market power in airports. Overall, the paper finds that the airport can ‘wield market power’ in relation to passenger traffic; but that cargo traffic is ‘very competitive’ with other airports. They also conclude that the merger of KLM and Air France, and the emergence of joint hubbing, both influence Schiphol’s market power.

The Cost of Equity of Network Operators – Empirical Evidence and Regulatory Practice, Stephan Schaeffler and Christoph Weber, *Competition and Regulation in Network Industries*, 14, 4, December 2013, pp. 385-410.

This paper considers how regulators set the equity return for electricity and gas network operators; and whether the methodologies applied are consistent with state-of-the-art capital market models. The authors survey experience in: Europe; Australia and New Zealand; and North America. The paper: is more than twenty pages in length; uses tables to summarise literature and empirical results; and cites in excess of eighty references.

The authors find large differences in the magnitude of the cost of equity determined by regulators across the jurisdictions. Main drivers of these differences are: the valuation model used; leverage; the position in the value chain; and business size. There is no evidence to conclude that the nature of the regulatory scheme used (such as cost-of-service or incentive regulation) influences the outcome on the cost of equity. Of 21 regulatory agencies considered; only the Ofgem in the UK uses a second approach in addition to the capital-asset pricing model (CAPM). The authors argue that integrated utilities have different (higher) business risks, and should not be used in the same sample as either pure-transmission businesses or pure-distribution operators.

Regulatory Decisions in Australia and New Zealand

Australia

Australian Competition and Consumer Commission (ACCC)

MTAS Declaration Inquiry – Final Decision

On 17 June 2014 the ACCC announced that it had concluded its inquiry into the regulation of mobile terminating access services (MTAS) and that it has decided to continue to regulate mobile voice termination services for a further five years, and to regulate SMS termination services for the first time. Read the final decision.

ACCC Report finds no Cross-subsidy in Australia Post

On 6 June 2014 the ACCC issued its ninth report assessing cross-subsidy between the services provided by Australia Post. Australia Post has a statutory monopoly over the delivery of standard letters, which weigh less than 250g and cost no more than $2.80 to send. All other services provided by Australia Post are open to competition. According to the report, its regulatory accounts do not show that it is cross-subsidising its contestable services with revenue from its monopoly services. Read the ACCC report.

Non-price Terms of Access for Wholesale Telecommunications Services – Consultation

On 23 May 2014, the ACCC released a consultation paper seeking views on non-price terms of access for the regulated fixed line services supplied using Telstra's copper network, and the regulated transmission and mobile termination services. Read the consultation paper.

Telstra's Measures to Migrate Customers to the NBN – Approval

On 22 May 2014, the ACCC approved Telstra's proposed measures to support the migration of customers on to the National Broadband Network (NBN). These measures relate to a specific process that may be used by NBN Co in limited circumstances to connect premises to the NBN in fibre-to-the-premises deployment. Read about the proposed measures.

Water Monitoring of the Murray-Darling Basin – Report Issued

On 8 May 2014, the ACCC released its fourth annual Water Monitoring Report for the Murray-Darling Basin (MDB) under the Water Act 2007, detailing the impact of water market and water charge reforms on irrigation infrastructure operators (IIOs) and their customers throughout the MDB. These reforms reduced barriers to water trade and improved irrigators' access to water markets outside of their irrigation area. Read the report.

Fixed-line Telecommunications Services – Continued Regulation

On 17 April 2014, the ACCC released its final report into the regulation of six fixed-line telecommunications services. It has decided to continue regulating wholesale services supplied using Telstra's copper network for another five years. The ACCC will continue regulating the six fixed-line services until 2019. Read the final report.

Telecommunications Transmission Services – Continued Regulation

On 28 March 2014, the ACCC announced it had concluded its inquiry into the regulation of transmission services (known as the Domestic Transmission Capacity Service or 'DTCS') and has decided to maintain regulation for a further five years until 31 March 2019. Read about the inquiry.

Australian Energy Regulator (AER)

NSW and ACT 2014-15 Electricity Price Proposals Approved

On 17 June 2014 (AusGrid, Essential Energy, Endeavour Energy and SA Power) and 13 June 2014 (Aurora Energy, ActewAGL, Energex and Ergon Energy) the AER approved the tariffs to apply in the year commencing 1 July 2014.

Retail Energy Market Update Published

On 21 May 2014, the AER published the retail energy market update for the third quarter of 2013-14. Where available, historical disconnections data published by jurisdictional regulators have been added for comparative purposes. Read the retail energy market update.

AEMO's Revised Pricing Methodology Approved

On 1 April 2014 the AER announced it had made its final decision to approve the revised pricing methodology that the Australian Energy Market Operator (AEMO) proposed for its 2014-19 regulatory control period. This decision requires AEMO to use the most recent historical data on its customer's network usage to set the prices and charges for transmission services in Victoria. Read the AER final decision.

Transitional Revenue Determinations for TransGrid and Transend Published

On 28 March 2014, the AER issued its transitional determinations for TransGrid and Transend for the placeholder regulatory period of 1 July 2014 to 30 June 2015. These decisions will determine transmission prices for New South Wales and Tasmanian customers in this period. Read about determination of transmission prices.

Australian Energy Market Commission (AEMC)

Submission to the Review of the Renewable Energy Target

On 29 May 2014 the AEMC published its submission to the Review of the Renewable Energy Target. (Supplementary information was provided to the Review on 19 June 2014.) Read the submission.

Connecting Embedded Generators – Final Determination

On 17 April 2014, the AEMC published the final rule and associated final rule determination for the connecting embedded generators rule change request, which reduces the barriers to the connection of embedded generators to distribution networks. Read about the change.

Framework for Open Access and Communication Standards – Final Report Published

On 10 April 2014 the AEMC published its final report recommending open access and new communication standards for smart meters to help establish a competitive market for innovative electricity services. Read the final report.

Reliability Standard and Reliability Settings Review – Draft Report Published

On 13 March 2014 the AEMC published its draft decision in relation to the reliability standard, and draft recommendations in relation to the market price cap, cumulative price threshold and market floor price, to apply from 1 July 2016. Submissions on the draft report were due on 10 April 2014.

Australian Capital Territory

Independent Competition and Regulatory Commission (ICRC)

Retail Electricity Prices for Small Customers – Final Report

See 'Notes on Interesting Decisions'.

New South Wales

Independent Pricing and Regulatory Tribunal (IPART)

Solar Feed-in Tariffs – Final Report

On 16 June 2014 the IPART released its final report on solar feed-in tariffs in 2014-15, which outlines the benchmark range for voluntary solar feed-in tariffs in 2014-15. Read the report.

NSW Rail Access Undertaking – Draft Report

On 8 May 2014, the IPART released its draft report on the rate of return and remaining mine life that should apply to RailCorp's Hunter Valley Coal Network rail assets from 1 July 2014. This applies only to the five sectors (21 kilometres) of track between Newstan and Woodville Junction. IPART Draft

Retail Gas Prices – Final Report Released

On 10 June 2014 the IPART released its final report on its review of regulated retail gas prices for the two years from 1 July 2014 to 30 June 2016. Read the final report.

Northern Territory

Utilities Commission

Network Access Tariffs 2014-15 – Approval

On 30 May 2014 the Utilities Commission announced approval of network access tariffs and charges for 2014-15. The tariffs and charges take effect 1 July 2014.

2014 Network Price Determination

On 24 April 2014 the Utilities Commission published its Final Determination in relation to the maximum allowed revenue that PWC Networks can recover from the provision of regulated network access services during five-year regulatory control period from 1 July 2014 to 30 June 2019. Read the Final Determination.

Darwin-Katherine System Black Incident – Independent Investigation

On 15 April 2014 the Utilities Commission announced completion of the independent investigation of the Darwin-Katherine System Black incident that occurred on 12 March 2014. View the report.

Queensland

Queensland Competition Authority (QCA)

Regulated Electricity Prices for 2014-15 Released

On 30 May 2014 the QCA released its regulated electricity prices for 2014-15. If the carbon tax continues, the typical residential customer can expect a price increase of 13.6 per cent or $191 and the typical small business customer will face an 11.5 per cent increase or $219. Repeal of the carbon tax would cut the increases to 5.1 per cent ($72 increase) and 3.3 per cent ($63 increase). Read QCA MR

Regional Queensland Solar Feed-in Tariff

On 23 May 2014 the QCA released its final report into a mandatory solar feed-in tariff for customers in regional Queensland. Read the final report.

New Chief Executive Officer

On 6 May 2014 the QCA announced the appointment of Mr John Hindmarsh as Chief Executive Officer. Mr Hindmarsh will commence on 14 July 2014.

Queensland Government Industry Assistance – Review

On 24 April 2014 the QCA announced commencement of an inquiry into State Government assistance to industry with the release of an issues paper for public comment. Feedback was due 30 May 2014.

SEQ Water Retailers – Pricing Principles Proposed

On 27 March 2014 the QCA released a Position Paper proposing a set of principles to guide price decisions by water retailers in south east Queensland from 1 July 2015. View the pricing principles.

South Australia

Essential Services Commission of South Australia (ESCOSA)

SA Power Networks Service Standard Framework for 2015-20 – Final Decision

On 1 May 2014 the ESCOSA released its Final Decision on the jurisdictional service standards and Guaranteed Service Level scheme to apply to SA Power Networks for the 2015-20 regulatory period. Read the final decision.

Resignation of Dr Paul Kerin

On 26 March 2014 the ESCOSA announced the resignation of CEO Dr Paul Kerin, effective 11 April 2014. Read the announcement.

Tasmania

Office of the Tasmanian Economic Regulator (OTTER)

Standing Offer Electricity Prices for 2014-15

On 19 June 2014, the OTTER announced the approved standard offer prices for Aurora Energy's supply of electricity to residential and small business customers. Read OTTER media release.

Regulatory Reporting Guideline

On 4 June 2014, the OTTER released its reviewed Regulatory Reporting Guideline, having identified a number of changes to the Guideline which it believes would improve outcomes from the risk assessment process and, in turn, the independent appraisal process. Feedback was required by 20 June 2014.

Electricity Wholesale Contract Regulatory Framework

On 29 May 2014, the OTTER approved Total Existing Capacity Volume – Alternative Methodology, in accordance with clause 24.2(a) of the Wholesale Contract Regulatory Instrument. The OTTER's approval followed a period of public consultation on the proposed change.

Victoria

Essential Services Commission (ESC)

Variation to Standing Order Tariffs following the Removal of the Carbon Tax

On 18 June 2014 the ESC released a Position Paper on *Variation to Standing Order Tariffs following the Removal of the Carbon Tax*, and invited stakeholder submissions by 2 July 2014. Read the ESC Variation.

Minimum Electricity Feed-in Tariff to Apply from 1 January 2015 – Draft Decision

On 2 June 2014 the ESC released its Draft Decision on the minimum electricity Feed-in Tariff that should apply in Victoria from 1 January 2015. The determination must be made by 31 August 2014, or the current rate continues. The determination must be made by 31 August 2014, or the currrent rate continues.

Western Australia

Economic Regulation Authority (ERA)

The Method for Estimating the Weighted Average Cost of Capital for Railway Networks – Draft Determination

On 4 June 2014 the ERA sought public feedback on its draft determination for the method for calculating the weighted average cost of capital (WACC) values to apply from 1 July 2014. View a corrigendum to the draft determination.

Application for Expansion of the Goldfields Gas Pipeline to be Not Regulated

On 30 May 2014 the ERA announced its determination on an election by Goldfields Gas Transmission Pty Ltd for an expansion to the Goldfields Gas Pipeline to be not covered (not regulated), pursuant to the current GGP Access Arrangement. Read the determination.

Mid-West and South-West Gas Distribution System – Proposed Revised Access Arrangement

On 29 May 2014 the ERA announced receipt of submissions required by 21 May 2014, in response to its issues paper on the proposed revised access arrangement for the Mid-West and South-West Gas Distribution System. View the submissions.

Western Power's Electricity Network – 2014-15 Price List Determination

On 19 May 2014 the ERA released a determination to approve the 2014-15 Price List submitted by Western Power. The prices will commence on 1 July 2014.

Water Financial Hardship Policies – Decision

On 16 May 2014 the ERA released its Decision regarding financial hardship policies for licensees. Read the decision.

Brookfield Rail Pty Ltd Floor and Ceiling Cost Determination

On 16 April 2014 the ERA announced a further extension of time limit for public submissions and determination until 30 June 2014. Read about the cost determination.

Microeconomic Reform – Draft Recommendations Released

On 11 April 2014 the ERA released a series of Microeconomic Reform draft recommendations that target infrastructure, regulatory reform and competition barriers. The ERA will deliver its final report by 30 June 2014.

Values for Ancillary Service Margin Peak and Margin Off-Peak Parameters – Final Decision

On 27 March 2014 the ERA announced it has determined the values for the Ancillary Service Margin Peak and Margin Off-Peak parameters, with carbon price, for the 2014-15 financial year. Read the decision.

New Zealand

New Zealand Commerce Commission (CCNZ)

The WACC Percentile and the Rate of Return on Capital for Telecommunications – Expert Reports Released

On 23 June 2014 the CCNZ released expert reports on the WACC percentile (Ingo Vogelsang; Julian Franks; Martin Lally; Oxera; and Economic Insights) and on the rate of return on capital for telecommunications (Martin Lally and Oxera). Read more about the WACC and the Rate of Return.

Proposed Commercial UBA Services – Process Paper Released

On 30 May 2014 the CCNZ confirmed its process for assessing the proposed commercial unbundled bitstream access (UBA) services, Boost HD and Boost VDSL, submitted to it by Chorus on 14 May 2014. The CCNZ is required to assess whether the proposed commercial UBA services are materially different from the regulated UBA service and can be priced separately. A draft decision is anticipated in June and a final decision in late July 2014.

Telecom Granted Clearance to Acquire Unsold Radio Spectrum Block

On 30 May 2014 the CCNZ granted a clearance to Telecom New Zealand Limited (Telecom) that will enable it to acquire the management rights for the final block of 5MHz radio spectrum in the 700MHz range from the Crown. Read about the decision.

Telecommunications Development Levy – Final Determination

On 27 May 2014 the CCNZ released its final determination for the amount 22 telecommunications providers will pay towards the $50 million Telecommunications Development Levy (TDL) for 2012/13. Read about the Telecommunications Development Levy.

Copper Pricing Consultation Extended

On 22 May 2014 the CCNZ announced an extension to its timetable for determining wholesale prices under the final pricing principle (FPP) for both the unbundled bitstream access (UBA) and unbundled copper local loop (UCLL). A draft decision on both prices is anticipated by 1 December 2014, and a final decision by 1 April 2015.

Transpower's Expenditure Allowances for 2015-20 – Draft Decision

On 16 May 2014 the CCNZ released its draft decision on the allowances for operating expenditure and base-capital expenditure that will be used to set Transpower's price path for the period from 1 April 2015 to 31 March 2020. The price path sets the maximum revenues Transpower can recover from customers each year. A final decision is expected at the end of August 2014.

WACC Input Methodologies – CCNZ to Begin Further Work

On 31 March 2014 the CCNZ issued a notice of intention to do further work on the input methodologies relating to the percentile estimate of the weighted average cost of capital (WACC). Feedback was required by 1 May 2014.

High Court of New Zealand Judgment over UBA Challenge

On 8 April 2014 the CCNZ welcomed the High Court's judgment in relation to Chorus' appeal against the CCNZ's November 2013 decision setting cost-based prices for the unbundled bitstream access (UBA) service. Read about the judgment.

Notes on Interesting Decisions

Electricity Prices to Small Customers in the ACT, 1 July 2014 to 30 June 2017

On 13 June 2014 the regulator in the Australian Capital Territory (ACT), the Independent Competition and Regulatory Commission (ICRC), released its Final Report on Standing offer Prices for the Supply of Electricity to Small Customers. The ICRC had previously been asked by the ACT Government to provide a price direction for the supply of electricity to customers on ActewAGL Retail's regulated retail tariffs for the period commencing 1 July 2014 and ending 30 June 2017. The ICRC undertook a comprehensive price investigation, including public consultation on an issues paper and a Draft Report issued on 14 February 2014. The investigation concluded with the publication of the final report and price direction. The immediate effect of the ICRC's final decision will be to increase the average price of electricity for small customers on standard retail contracts with ActewAGL Retail by 4.3 per cent from 1 July 2014.

The ICRC maintained its existing approach to the form of regulation. In particular this comprises:

- controlling prices from one year to the next using a weighted-average price cap;
- using a cost-index model to set a maximum for the average price change across ActewAGL Retail's basket of regulated tariffs;
- pass-through arrangements to provide for the treatment of unexpected events that occur after the price direction has been made; and
- a number of price variation trigger mechanisms that allow the ICRC to vary a price direction under particular circumstances.

The ICRC set out a maximum price in the form of a weighted-average price cap. The ICRC calculated two maximum average percentage changes (or 'Y factors') in standing-offer prices determined in accordance with the cost-index model; one with a price on carbon and the other without. This reflects uncertainty about whether or not the carbon tax will be repealed in 2014-15. For the 2014-15 regulatory year, the with-carbon-price Y factor is calculated as plus 4.33 per cent, and the without-carbon-price Y factor is calculated as minus 7.30 per cent.

The principal change from the draft report is the inclusion of finalised charges for network services, as approved by the Australian Energy Regulator. These increased more than was expected at the time of the draft report, meaning that the cost allowance for network charges in the ICRC's cost-index model has risen by 11 per cent compared with the 2.45 per cent foreshadowed in the draft report. This is primarily due to increases in transmission costs and the expected commissioning of the ACT's first large-scale solar generator which is supported by a feed-in-tariff scheme.

The without-carbon-price maximum average percentage change in electricity prices is minus 7.30 per cent in ActewAGL Retail's basket of regulated tariffs compared to 2013-14 prices. This change will apply in the event that the Clean Energy Act is repealed. While the ICRC cannot cannot 'be sure if and when the price on carbon will be removed, this report and its associated price direction puts in place arrangements to ensure that the benefits flow to ACT electricity customers on regulated tariffs as quickly as possible'. The ICRC estimates that this nominal change is equivalent to a real decrease in the regulated retail price of about 9.5 per cent. **View the final report.**

Regulatory News

2014 ACCC/AER Regulatory Conference

The theme for the fifteenth ACCC/AER Regulatory Conference is 'Regulating for Efficient Infrastructure Outcomes'. The conference will be held in Brisbane on 7 and 8 August 2014. International speakers this year are: Johannes Bauer; Ahmed Faruqui; William Kovacic; Chris Nash; Karl-Heinz Neumann; Graham Shuttleworth and Ingo Vogelsang. The conference program and registration form are available on the ACCC website at:

http://www.accc.gov.au/about-us/conferences-events/accc/aer-regulatory-conference/accc-aer-regulatory-conference-2014

Places are limited so register now to ensure your attendance at this year's conference.

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