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Shaping utility regulation: Seminal court and tribunal decisions

Twelfth ACCC Regulatory Conference
Legal session – 29 July 2011

Harriet Gray
Doctoral candidate
The ANU College of Law

Australian National University

Why this topic?

	1999 1st conference	2011 12th conference
No. of cases	3	Over 160

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Brought to you by …

Table 1

Telco	29%
Gas	29%
Elec	25%
Pt IIIA	16%
Prices Surv	1%

Table 2

1995-99	4%	Pt IIIA
2000-04	27%	Telco & gas
2005-09	53%	Energy
2010-curr	16%	

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1. Objectives

- *Re Michael* & *Vodafone*: Replicate the economically efficient outcomes that would be expected in a competitive market
- 2008 Conference: Objectives really do matter eg *Pilbara*

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2. Policy development

- Cth Constitution s 51(xxxi): Acquisition of property on just terms
- *Telstra* (2007): Is a Cth access regime an acquisition of property?
- *ICM Agriculture* (2009): Implications for State policy makers?

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3. Form of regulation

TXU v Vic ORG (2001): CPI-X

X = expected gain in efficiency

X = smooth allowed revenue across regulatory period

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4. What assets should be regulated?

- industry-specific regimes: less contentious than Pt IIIA
- Part IIIA declaration:
  - States protecting turf eg *Freight Victoria* & *Services Sydney*
  - Vertically separated: hurdle drops (past monopolistic behaviour) eg *Virgin Blue*
  - Vertically integrated: hurdle rises eg *Pilbara*
    - sensible access seeker develops Plan B
    - fail: criteria (a) (won't promote competition) & (b) (commercially feasible even if economically inefficient)

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5. Regulatory process

GasNet (2003):

- no one correct figure
- regulator must accept proposal if it passes minimum statutory hurdle

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6. Non-price

SKIP

(scope of the service eg *Seven Network* (2007))

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7. Price/revenue

- DLA Piper 2010: 'Watershed year for regulated WACCs': Trend? All industries? All revenue components?
- Asset valuation
  - *Moomba-Adelaide* (2003): $360m + $9m
  - *Moomba-Sydney* (2004): $545m + $289m (53%)
  - *ElectraNet* (2008): +$36m (easements)
  - *EnergyAustralia* (2009): public lighting remitted to AER
  - *Ergon Energy* (2010): non-system property capex
  - Contrast *Telstra* (2010): ULLS TEA model: ACCC affirmed

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7. Price/revenue cont.

- WACC
  - *GasNet* (2003): 10 cp 5 year govt bonds
  - *Envestra* (2007): gamma
  - *SA & Qld elec dist* (2010): gamma
  - *NSW, ACT & Tas elec dist* (2009): averaging period
  - *ACT gas dist* (2010): debt risk premium (rate of return 9.72 to 10.04%; allowed total revenue + $5m)
  - Contrast *Telstra*: 2007, 2009, 2010 WACC challenges dismissed
- Two speed merits review?

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8. Review mechanism

Limited evidence merits review:

- *Seven Network* (2004)
- *East Australian Pipeline* (2005) -> 2008 energy model
- *Chime* (2008) -> 2010 Part IIIA amendments

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Conclusion

- case law: significant impact on regulation in practice
- comparison to other countries? Eg UK Ofgem

A paper for the Twelfth ACCC Regulatory Conference

Brisbane, Queensland, Australia

Friday 29 July 2011 (day two)

Breakout session 3: Legal – Review of Regulatory Decisions: Trends

Shaping utility regulation: Seminal decisions of the Australian Competition Tribunal and other review bodies

Harriet Gray

Doctoral candidate
Australian National University, College of Law

On leave from the position of Counsel, Regulatory Law Unit, Australian Competition and Consumer Commission

Comments on this paper would be welcome:

Email: grayh@law.anu.edu.au
Mobile: 0423 180 020

Abstract

This paper looks at the role of the Australian Competition Tribunal and other review bodies in Australian utility regulation. The paper identifies key decisions made by these bodies since the introduction of the regimes in the 1990s, and discusses the impact that the decisions have had on the development of utility regulation in Australia.

Keywords: regulation, utilities, case law

Acknowledgements

Thank you to Gavin Fox, Anthony Goh, Richard Home, Anne Plympton, Anthony Wing and Yong Xu for comments on drafts of this paper.

The views expressed in this paper should not be construed as those of the ACCC or AER.

Final version: 22 July 2011

Introduction

If this paper had been presented in 1999, at the first Australian Competition and Consumer Commission (ACCC) regulatory conference, it would have comprised three cases.[1] In contrast, in 2011, at the time of the twelfth regulatory conference, there are over 160 decisions on review in respect of Australia's utility regimes.

What impact have these decisions had on utility regulation in Australia? The paper aims to identify the key decisions made by the Australian Competition Tribunal and other review bodies since the introduction of the regimes in the 1990s, and to examine how these decisions have shaped utility regulation in practice.

The paper is divided into two parts. Part A, which sets out the background material for the paper:

- summarises the regimes covered by this paper and the relevant review mechanisms (section 1); and
- provides an overview of the areas of dispute (section 2).

Part B examines the impact that the cases have had on each of the following aspects of regulation:

- objectives of regulation (section 3);
- policy development (section 4);
- form of regulation (section 5);
- determining what assets should be regulated (section 6);
- regulatory process (section 7);
- non-price regulation (section 8);
- price/revenue regulation (section 9); and
- review mechanism (section 10).

It is apparent that courts and tribunals have had a significant impact on the practice of utility regulation in Australia. The paper concludes by contrasting the Australian approach to the impact of review bodies in the United Kingdom and the United States of America.

A complete list of Australian regulatory case law is set out in the Appendix.

[1] The cases concerned decisions on whether to regulate the following assets under the national access regime in Part IIIA of the former *Trade Practices Act 1974* (Cth): the Austudy 'Payroll Deduction Service' ([1997] ACompT 1); Hunter Valley railway line ([1998] FCA 1266); and railway lines in the Pilbara, Western Australia ([1999] FCA 867).

Part A Background

1. Regimes: Overview

This section provides the background for the cases discussed in Part B. It provides an overview of the following regimes (including the merits review mechanism where applicable): national access regime; telecommunications; electricity; and gas.[2]

1.1 National access regime

Part IIIA was introduced into the former *Trade Practices Act 1974* (Cth) (TP Act) (retitled the *Competition and Consumer Act 2010* (Cth) (CC Act) from 1 January 2011) in 1995. It sets out a number of mechanisms by which access may be obtained to infrastructure services including:

- declaration and arbitration;
- access undertakings and industry access codes;
- certification of a State or Territory access regime; and
- approval of a competitive tender process for the construction and operation of a facility that is to be owned by the Commonwealth or a State/Territory.

The declaration and certification processes are described below.

1.1.1 Declaration and arbitration

The objects of Part IIIA are to:[3]

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

Any person may apply to the National Competition Council (NCC) for a recommendation that a service provided by means of a facility be declared.[4] On receiving the NCC's view, the relevant Minister (the Commonwealth Minister or, where the service provider is a State or Territory body, the relevant State or Territory Minister) may declare the service provided that certain criteria are satisfied.[5] The criteria set out in s 44H of the CC Act include:

> (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia) other than the market for the service; [Note that criterion (a) was amended in 2006 by inserting the words 'material increase in'.]
> (b) that it would be uneconomical for anyone to develop another facility to provide the service;

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2 For further information on the development of the regimes, see Harriet Gray, 'Evolution of Infrastructure Regulation in Australia' (Working Paper No 1, Australian Competition and Consumer Commission, July 2009).

3 CC Act s 44AA.

4 CC Act s 44F.

5 CC Act s 44H.

(c) that the facility is of national significance …;

…

(f) that access (or increased access) to the service would not be contrary to the public interest.

Declaration does not prevent the provider of the declared service and a party that requests access to that service from negotiating the terms and condition of access to the service. However, if the parties are unable to agree, the ACCC may, upon notification of the dispute by either party, conduct an arbitration and make a determination that binds the parties.[6]

Since the enactment of Part IIIA in 1995, the service provider has been able to apply to the Australian Competition Tribunal (Tribunal) for review of the Minister's decision to declare the service. If the Minister decides not to declare the service, the applicant to the NCC may apply to the Tribunal for review.[7]

The review by the Tribunal is a reconsideration of the matter.[8] However, in 2010, Part IIIA was amended to limit the information that the Tribunal may consider.[9] In summary, the Tribunal is now limited to the information before the decision maker unless the Tribunal requests further information.[10]

1.1.2 Certification

A State or Territory Minister may apply to the NCC for a recommendation that a State or Territory access regime is an 'effective access regime'.[11] On receiving the NCC's view, the Commonwealth Minister decides whether the access regime is an effective access regime (informally described as 'certification') having regard to the objects of Part IIIA and the principles set out in the Competition Principles Agreement.[12] Subject to certain exceptions, a service that is the subject of such a regime cannot be declared.[13]

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6 CC Act ss 44S & 44V.
7 CC Act s 44K.
8 CC Act s 44K(4).
9 *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth).
10 CC Act s 44ZZOAA.
11 CC Act s 44M.
12 CC Act s 44N.
13 CC Act s 44H(4)(e).

1.2 Telecommunications

In 1997, the TP Act was amended to introduce a telecommunications-specific competition (Part XIB) and access (Part XIC) regime.[14]

1.2.1 Competition law

Part XIB of the CC Act prohibits carriers[15] and carriage service providers[16] from engaging in anti-competitive conduct (the competition rule).[17] Part XIB is similar to the economy-wide competition rules in Part IV of the CC Act but carriers and carriage services providers are subject to an additional prohibition against taking advantage of market power with the effect of substantially lessening competition.[18] In addition, in order for proceedings to be instituted under Part XIB (by the ACCC or a third party), a 'competition notice' (issued by the ACCC) must be in force at the time the conduct occurred. The maximum pecuniary penalty then increases each day that the conduct continues.[19] In certain cases, a competition notice reverses the evidentiary burden in a court proceeding.[20]

1.2.2 Access regime

Part XIC of the CC Act governs access to 'listed carriage services' and services that facilitate the supply of listed carriage services. In summary, a listed carriage service is a service for carrying communications (including voice and data) by means of electromagnetic energy between certain points.[21]

Under Part XIC, if such a service is 'declared' by the ACCC,[22] a provider of that service is required to comply with 'standard access obligations' (SAOs), including an obligation to supply the service to an access seeker (subject to certain exceptions).[23]

Until 1 January 2011, Part XIC, like Part IIIA, was based on a 'negotiate-arbitrate' model. Failing agreement (and in the absence of an undertaking), the terms and conditions of access were determined by the ACCC acting as arbitrator.[24] In addition, Part XIC provided for:

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

15 A 'carrier' is, in effect, an owner of a network unit that is used to supply carriage services to the public: CC Act s 151AB and *Telecommunications Act 1997* s 7 and Part 3.

16 Service providers are divided into two categories: carriage service providers and content service providers: *Telecommunications Act 1997* s 86. A carriage service provider supplies carriage services (e.g. phone or internet access services) to the public using network units owned by a carrier: *Telecommunications Act 1997* s 87. A content service provider supplies, using a carriage service, content services (e.g. a pay TV service) to the public: *Telecommunications Act 1997* s 97.

17 CC Act s 151AK.

18 CC Act s 151AJ.

19 CC Act s 151BX.

20 CC Act s 151AN (where the ACCC has issued a 'Part B competition notice').

21 CC Act s 152AL(1) and *Telecommunications Act 1997* ss 7 and 16.

22 CC Act s 152AL. The ACCC was also required to deem certain services to be declared services: *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997*.

23 CC Act s 152AR.

24 TP Act (as in force 30 April 1997) s 152AY.

- the ACCC to determine (non-binding) pricing principles at the time a service is declared[25] and model terms and conditions for certain 'core services';[26]

- the ACCC to grant specified carriers or carriage service providers exemptions from the SAOs;[27] and

- the ACCC to accept special access undertakings and grant anticipatory exemptions for services that are not yet declared or supplied.[28]

From 1997, an interested party could apply to the Tribunal for review of ACCC decisions in respect of exemptions, undertakings and arbitrations (but not declarations).[29] As in Part IIIA, the Tribunal's role was to consider the matter afresh (rather than to identify any error in the ACCC's decision).[30] However, the Tribunal was essentially limited to material that was before the ACCC. In 2002, merits review was removed for arbitrations.[31]

From 1 January 2011, failing agreement (and in the absence of a special access undertaking), the terms and conditions of access are as set out in an 'access determination' made by the ACCC (access determinations also include any exemptions from the SAOs).[32] The ACCC is also able to make 'binding rules of conduct' (similar in concept to an arbitration determination) but only if there is 'an urgent need to do so'.[33] Merits review is no longer available under Part XIC.

The key provision in Part XIC, which is discussed in Part B of this paper, is the objects clause. Section 152AB of the CC Act relevantly states:

> (1) The object of this Part is to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services.
>
> (2) For the purposes of this Part, in determining whether a particular thing promotes the long-term interests of end-users … regard must be had to the extent to which the thing is likely to result in the achievement of the following objectives:
>
> (c) the objective of promoting competition in markets for listed services;
> (d) the objective of achieving any-to-any connectivity in relation to carriage services that involve communication between end-users;
> (e) the objective of encouraging the economically efficient use of, and the economically efficient investment in:
> (i) the infrastructure by which listed services are supplied; and

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25 TP Act (as in force 27 September 2001) s 152AQA.
26 TP Act (as in force 19 December 2002) s 152AQB.
27 TP Act (as in force 30 April 1997) ss 152AS and 152AT.
28 TP Act (as in force 19 December 2002) ss 152ASA, 152ATA and 152CBA.
29 TP Act (as in force 30 April 1997) ss 152AV, 152CE and 152DO.
30 *Re Telstra Corporation Limited* [2006] ACompT 4 at [16].
31 *Telecommunications Competition Act 2002* (Cth) schedule 2 item 8. In addition, the scope of the information that could be considered by the Tribunal was extended to include 'any other information that was referred to in the Commission's reasons': TP Act (as at 19 December 2002) ss 152AW & 152CF.
32 CC Act s 152AY.
33 CC Act s 152BD.

(ii) any other infrastructure by which listed services are, or are likely to become, capable of being supplied.

(3) Subsection (2) is intended to limit the matters to which regard may be had.

(4)-(8) …

1.3 Electricity

In 1996, South Australia enacted the lead legislation, *National Electricity (South Australia) Act*, which set out the National Electricity Law (NEL) in a schedule. The Commonwealth, New South Wales, Victoria, Queensland, Tasmania and the Australian Capital Territory have enacted legislation that applies the NEL within their jurisdiction.[34] The NEL in turn provided for the Ministers of each participating jurisdiction to approve the National Electricity Code. In 2005, the *National Electricity (South Australia) (New National Electricity Law) Amendment Act 2005* (SA) substituted the schedule to the *National Electricity (South Australia) Act 1996* (SA) setting out the NEL. The new NEL provides for the National Electricity Rules (NER) in place of the National Electricity Code. The NER regulates electricity transmission and distribution networks that form part of the national electricity market.

1.3.1 Electricity transmission

In respect of electricity transmission services, the NER defines two categories of regulated services: prescribed transmission services and negotiated transmission services.[35]

Chapter 6A of the NER requires (subject to the NER) a transmission network service provider (TNSP) to provide these services, upon application by certain persons, on terms and conditions that are consistent with the requirements of the NER.[36] Access disputes in respect of the services are subject to Chapter 6A of the NER. Chapter 6A provides for the arbitration of access disputes by a 'commercial arbitrator' appointed by the Australian Energy Regulator (AER).[37] However, the service provider is also subject to a transmission determination made by the AER that includes a revenue determination in respect of prescribed transmission services, and a pricing methodology.[38]

The revenue determination determines the maximum revenue that the TNSP may earn in a regulatory year, which in turn provides the basis for deriving charges. The AER is required to publish the 'post-tax revenue model' which is then used to determine the annual maximum allowed revenue under the revenue determination.[39] The post-

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34 As at 5 May 2011, the relevant legislation is: *Australian Energy Market Act 2004* (Cth); *Electricity (National Scheme) Act 1997* (ACT); *National Electricity (New South Wales) Act 1997* (NSW); *Electricity – National Scheme (Queensland) Act 1997* (Qld); *Electricity – National Scheme (Tasmania) Act 1999* (Tas); and *National Electricity (Victoria) Act 2005* (Vic).

35 NER r 6A.2.1.

36 NER r 6A.1.3.

37 NER Chapter 6A Part K. Where the price for a prescribed transmission service is in dispute, the arbitrator must apply the approved pricing methodology: r 6A.30.4.

38 NER r 6A.2.2.

39 NER r 6A.5.

tax revenue model is required to specify the 'CPI - X methodology' that is to be used to escalate the annual maximum allowed revenue each year (other than the first year) of the period covered by a revenue determination.[40]

The annual revenue must be determined using a 'building blocks approach' comprising:[41]

> (1) indexation of the regulatory asset base …;
> (2) a return on capital for that year …;
> (3) the depreciation for that year …;
> (4) the estimated cost of corporate income tax of the provider for that year …;
> (5) certain revenue increments or decrements for that year arising from the efficiency benefit sharing scheme …;
> (6) the forecast operating expenditure accepted or substituted by the AER for that year …; and
> (7) compensation for other risks … .

The rate of return is determined using a 'weighted average cost of capital' (WACC) formula.[42] As part of this formula:[43]

- the return on equity is determined using the Capital Asset Pricing Model (CAPM) ($k_e = r_f + \beta_e \times MRP$) (the AER sets the equity beta and market risk premium in a 5 yearly review);
- the return on debt is calculated as the risk free rate plus the debt risk premium (r_f + DRP);
- (subject to the AER's 5 yearly review) the nominal risk free rate is derived from the annualised yield on Commonwealth Government bonds with a maturity of 10 years (or, if no such bonds are available, from the two Commonwealth Government bonds closest to the 10 year term and which also straddle the 10 year expiry date);
- (subject to the AER's 5 yearly review) the DRP is derived from the annualised Australian benchmark corporate bond rate for corporate bonds which have a BBB+ credit rating from Standard and Poors and a maturity equal to that used to derive the nominal risk free rate; and
- (subject to the AER's 5 yearly review) the market value of debt as a proportion of the market value of equity and debt, is deemed to be 0.6.

The determination of WACC is further discussed in section 9 of this paper.

1.3.2 Electricity distribution

In respect of distribution, the NER provides for the AER to classify a distribution service as a: direct control service (which in turn is divided into two subclasses: standard control services and alternative control services); or a negotiated distribution service.[44]

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40 NER r 6A.5.3.
41 NER cl 6A.5.4.
42 NER cl 6A.6.2(b).
43 NER cl 6A.6.2.
44 NER r 6.2.1 & 6.2.2.

Chapter 6 of the NER requires (subject to the NER) a distribution network service provider (DNSP) to provide these services, upon application by a 'Service Applicant', on the terms and conditions as determined under the NER.[45] Certain access disputes in respect of the services are subject to the dispute regime in Part 10 of the NEL.[46] Under Part 10, if a user or prospective user is unable to agree with a service provider about access to certain services, either party may notify the AER of the dispute, and the AER must (subject to certain exceptions) make a determination that binds the parties.[47]

However, the service provider is also subject to a distribution determination made by the AER that controls the price of, and/or revenue derived from, a direct control service.[48]

For a standard control service, the control mechanism must be of the prospective CPI-X form, or some incentive-based variant of the prospective CPI-X form, in accordance with Chapter 6 Part C of the NER. The control mechanism for an alternative control service may, but need not, utilise the elements of Part C.[49]

Part C of Chapter 6 of the NER requires the annual revenue requirement for a DNSP to be determined using a 'building blocks approach' which is substantially the same as for TNSPs.[50] However, differences include:

- for the determination of the return on capital, there is no starting deemed value for the credit rating and the ratio of debt to equity; and
- a distribution determination can depart from the values, methods or credit rating levels specified in the AER's 5 yearly WACC review if there is 'persuasive evidence' justifying the departure.[51]

Merits review of transmission revenue and distribution determinations was not available until 2008.[52] An affected or interested party may apply to the Tribunal for review of the AER's revenue determination (but not the 5 yearly WACC review).[53] The Tribunal may only grant leave to apply if there is a serious issue, and the alleged error in revenue is above a specified threshold.[54] The applicant must establish that the AER has: made an error of fact; exercised its discretion incorrectly; or made an unreasonable decision.[55] In determining whether one of these grounds has been established, the Tribunal is essentially limited to the material that was before the

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45 NER r 6.1.3.
46 NER r 6.22.1.
47 A determination must give effect to any applicable 'network revenue or pricing determination': NEL s 130.
48 NER r 6.2.5.
49 NER r 6.2.6
50 NER r 6.4.3.
51 NER r 6.5.4(g).
52 *National Electricity (South Australia) (National Electricity Law—Miscellaneous Amendments) Amendment Act 2007* (SA) (commenced 1 January 2008). However, see footnote 281.
53 NEL s 71B. Although, as discussed above, in the case of a distribution determination, the WACC review can be indirectly challenged as the determination can depart from the WACC review if there is persuasive evidence justifying the departure.
54 NEL ss 71E & 71F.
55 NEL s 71C.

AER.[56] However, once a ground of review has been established, the Tribunal may allow new material in certain circumstances.[57]

1.4 Natural gas

In 1997, the Commonwealth and all State and Territory governments reached agreement on the enactment of legislation to apply a *National Third Party Access Code for Natural Gas Pipeline Systems* (Gas Code).[58] The Gas Code required the owners or operators of certain pipelines to lodge an access arrangement with the relevant regulator for approval (the ACCC for transmission pipelines[59] and the State regulators for distribution pipelines[60]). The access arrangement would set out the terms and conditions of access (including the tariffs at which the transmission/distribution services would be sold to gas producers, retailers and users).

The criteria against which a proposed access arrangement must be assessed were set out in the Gas Code. If the relevant regulator did not approve the proposed access arrangement, the regulator was required to draft and approve its own access arrangement to apply to the service provider.[61] An access arrangement was not enforceable. However, in the event of an access dispute, the terms and conditions of access to a service covered by the Gas Code were determined by the relevant arbitrator.[62] An arbitration determination had to be consistent with the relevant access arrangement.[63]

If a regulator approved its own access arrangement, the service provider or an adversely affected person who had made a submission, could apply to the relevant appeals body (the Tribunal in relation to ACCC decisions) for review of the decision.[64] The applicant was required to establish that the regulator had: made an error of fact; exercised its discretion incorrectly; was unreasonable; or that the occasion for exercising the discretion did not arise. In making this decision, the Tribunal was essentially limited to the material that was before the regulator.

The means by which a pipeline could become regulated (referred to as 'covered') were set out in chapter 1 of the Gas Code. In summary, Schedule 1 of the Gas Code deemed certain pipelines to be covered pipelines at the commencement of the Gas Code.[65] However, any person could apply to the NCC for coverage of an additional pipeline or revocation of coverage.[66] The decision was made by the relevant Minister after receiving the NCC's recommendation.[67] An adversely affected person could

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56 NEL s 71R.
57 NEL s 71R(3).
58 Natural Gas Pipelines Access Agreement (7 November 1997).
59 Except Western Australia.
60 Except the Northern Territory where the ACCC was the regulator.
61 Gas Code s 2.20.
62 Gas Code s 6.7.
63 Gas Code s 6.18.
64 *Gas Pipelines Access (South Australia) Act 1997* (SA) Schedule 1 s 39.
65 Gas Code s 1.1.
66 Gas Code ss 1.3 & 1.25.
67 Gas Code ss 1.13 & 1.34.

apply to the relevant appeals body (the Tribunal in respect of decisions by the Commonwealth Minister) for review of the Minister's decision.[68]

In 2008, the *National Gas (South Australia) Act 2008* (SA) was enacted which set out, in a schedule, a new National Gas Law (NGL). The NGL was implemented in all jurisdictions.[69] The NGL provided for National Gas Rules (NGR) in place of the Gas Code.

Under the regime, any person can continue to apply to the NCC for a recommendation that a pipeline be covered or that coverage be revoked.[70] However, in addition, the NCC must decide whether the pipeline services are light regulation services.[71]

Light regulation service providers are required to publish the terms and conditions of access (including price) on their websites.[72] They may also voluntarily submit a 'limited access arrangement' to the AER for approval.[73]

In contrast, service providers of fully regulated pipelines are, in general, required to submit an access arrangement to the AER for approval.[74] As under the former Gas Code, an access arrangement must include tariffs that are derived from the maximum revenue that the service provider may earn in a regulatory year.[75] The annual 'Total Revenue' must be determined using a 'building blocks approach' comprising:[76]

> (a) a return on the projected capital base for the year …; and
> (b) depreciation on the projected capital base for the year …; and
> (c) if applicable – the estimated cost of corporate income tax for the year; and
> (d) increments or decrements for the year resulting from the operation of an incentive mechanism to encourage gains in efficiency … ; and
> (e) a forecast of operating expenditure for the year … .

The rate of return is determined using a 'well accepted approach' such as the WACC and CAPM formulas.[77]

An affected or interested party may apply to the Tribunal for review of a Minister's coverage decision, NCC light regulation decision or AER access arrangement decision.[78] The review regime is substantially the same as in the NEL.[79]

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68 *Gas Pipelines Access (South Australia) Act 1997* (SA) Schedule 1 s 38.

69 See *Australian Energy Market Act 2004* (Cth); *National Gas (ACT) Act 2008* (ACT); *National Gas (New South Wales) Act 2008* (NSW); *National Gas (Northern Territory) Act 2008* (NT); *National Gas (Queensland) Act 2008* (Qld); *National Gas (Tasmania) Act 2008* (Tas); *National Gas (Victoria) Act 2008* (Vic); and *National Gas Access (WA) Act 2009* (WA).

70 NGL ss 92 & 102.

71 NGL s 110.

72 NGR r 36.

73 NGL s 116.

74 NGL s 132.

75 NGR r 48(1).

76 NGR r 76.

77 NGR r 87.

78 NGL s 245.

79 NGL Chapter 8 Part 5.

2. Overview of the case law

Before discussing the decisions of the Tribunal and other bodies on review, there are two preliminary questions: who is generating the case law; and how should the significance of the cases be assessed?

2.1 Source of case law

Out of the list of cases set out in the appendix to this paper (as at 3 June 2011), 46 cases were contributed by the telecommunications industry, 46 by the gas industry, 40 by the electricity industry, 26 by national access regime participants, and 2 by prices surveillance regime participants.[80]

The pattern of litigation has also changed over time. In the first 5 year period of the regimes (1995-1999), there were 6 decisions. In the second period (2000-2004), there were 43 decisions. In the third period (2005-2009), there were 85 decisions. In the fourth period (2010 – to date), there have been 26 decisions. In part, this can be explained by changes in the availability of merits review.

The six decisions in 1995-1999 are in respect of the national access regime (which commenced in 1995). The second period (2000-04) was dominated by telecommunications and gas cases (merits review was generally not available under the electricity regime until 2008). The initial telecommunications cases were mainly challenges to declaration and arbitration decisions. However, in 2002, merits review was removed from telecommunications arbitration decisions, and the litigation shifted towards undertakings and exemptions. In the third and fourth periods (2005 – to date), the energy industry became the principal source of the case law. This trend is likely to continue since the removal, from 1 January 2011, of merits review from the telecommunications regime.

2.2 Identifying the significant cases

The criteria that could be used to assess the significance of a case potentially include: subsequent citations; the sum of money at stake; the duration of the proceeding; or the number of pages in the decision (on this last basis, the most significant case appears to be the decision by the Tribunal on access to the Pilbara rail tracks[81]).[82]

Instead, this paper seeks to identify the decisions that have had the most significant influence on the practice of utility regulation in Australia. The paper generally focuses on decisions under national regimes although also includes decisions under State regimes that have had a national influence. The identification of significant cases is necessarily a subjective assessment. It will also change over time as ideas come in and out of fashion (for example, the shift away from the pricing methodology known as Total Service Long Run Incremental Cost (TSLRIC)).

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80 See the table at the end of the appendix to this paper.

81 See *In the matter of Fortescue Metals Group Ltd* [2010] ACompT 2 (Finkelstein J, Latta and Round). The decision is over 300 pages.

82 Other possible criteria include: whether the decision was reported in an authorised law report serries; the number of references in the media to the case; and how many counsel (or court trolleys) were involved.

Part B Impact on Australian utility regulation

This part of the paper identifies the seminal court and tribunal decisions by examining the impact of the decisions on the following aspects of regulation:

- objectives of regulation;
- policy development;
- form of regulation;
- determining what assets should be regulated;
- regulatory process;
- non-price regulation;
- price/revenue regulation; and
- review mechanism.

3. Objectives of regulation

Whilst Australia's regulatory regimes embody economic concepts, it is the legal profession that has the final say on the construction of the regime objectives. This raises two issues: how have judges construed the objectives; and to what extent does this determine the winner (and loser) of a case?

3.1 Why are public utilities regulated?

Biggar has recently argued that public utility regulation is not about determining the price that would prevail in a hypothetically competitive market. Rather, it is better viewed as the design of a governance mechanism which provides sufficient certainty for the parties to make their investments, while allowing adaption to changing market conditions over time.[83] However, Australian review bodies commonly adopt the former objective.[84]

In 2002, the Western Australian Court of Appeal considered an application for judicial review of a draft decision by the WA regulator under the national gas regime.[85] The Court found that certain terms in the Gas Code had accepted meanings in the field of economics concerned with competition policy and the regulation of essential infrastructure.[86] After hearing expert evidence from Greg Houston (for the regulator), Henry Ergas (for a gas retailer who was given leave to intervene) and Philip Williams (for the regulated gas pipeline), the Court concluded that:

- the term 'economic efficiency' has at least three well recognised dimensions, productive, allocative and dynamic efficiency. As expressed in the 1993 Hilmer

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83 Darryl Biggar, 'Is Protecting Sunk Investments by Consumers a Key Rationale for Natural Monopoly Regulation?' (June 2009) 8(2) *Review of Network Economics* 128.

84 An exception is the Full Federal Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 (Keane CJ, Mansfield and Middleton JJ). The Court concluded that the reference to 'economically feasible' in Part IIIA of the CC Act could not be construed as 'economically efficient' (at [79]).

85 *Re Michael; Ex parte Epic Energy* [2002] WASCA 231. Parker J wrote the lead judgment, with Malcolm CJ and Anderson J concurring.

86 At [107] & [119].

Report:[87] productive efficiency is achieved where individual firms produce the goods and services that they offer to consumers at least cost; allocative efficiency is achieved where resources used to produce a set of goods or services are allocated to their highest valued uses; and dynamic efficiency reflects the need for industries to make timely changes to technology and products in response to changes in consumer tastes and in productive opportunities;[88]

- competitive markets lead to economic efficiency.[89] The reference to a competitive market is to a workable competitive market;[90]

- in essence, a monopoly is the absence of competition. The pipelines regulated under the Gas Code are natural monopolies;[91] and

- the objective, as set out in s 8.1(b) of the Gas Code, is to 'replicate the outcome of a workable competitive market, because the achievement of competition in fact is not possible'.[92]

Similarly, the Tribunal stated, in the context of the telecommunications regime, that the objective is to 'set prices that promote economic efficiency, which is the outcome that could be expected in a competitive market'.[93] As all Australian governments have agreed to a common objects clause,[94] this approach should be consistent across access regimes.[95]

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87 Independent Committee of Inquiry, *National Competition Policy* (Australian Government Publishing Service, 1993) 4.

88 At [91], [115] & [120].

89 At [116].

90 At [124].

91 At [117].

92 At [127]. See also *Re Epic Energy South Australia Pty Ltd* [2003] ACompT 5 at [92] and *Re East Australian Pipeline Limited* [2004] ACompT 8 at [34] (the 'primary quest is for a proper contemporaneous value from which to deduce a tariff that will replicate a hypothetical competitive market').

93 *Re Vodafone Network Pty Ltd & Vodafone Australia Limited* [2007] ACompT 1 at [68]. The Tribunal continued: 'It is because mobile termination has been declared as a service that inherently lacks the discipline of competitive forces that it is subject to Pt XIC of the Act'. See also *Re Optus Mobile Pty Limited & Optus Networks Pty Limited* [2006] ACompT 8 at [122]; *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [445]; *Application by Telstra Corporation Limited* [2009] ACompT 1 at [80]; and *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [1].

94 Competition and Infrastructure Reform Agreement (10 February 2006) cl 2.4(a) (all access regimes for services provided by means of significant infrastructure facilities will include 'objects clauses that promote the economically efficient use of, operation and investment in, significant infrastructure thereby promoting effective competition in upstream or downstream markets').

95 See, for example:

- *Re Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [602] (the 'overall objective of economic regulation is to mimic the outcome of a competitive market');
- *Application by EnergyAustralia* [2009] ACompT 8 (12 November 2009) at [18] ('The national electricity objective provides the overarching economic objective for regulation under the NEL: the promotion of efficient investment and efficient operation and use of, electricity services for the long term interests of consumers. Consumers will benefit in the long run if resources are used efficiently, that is if resources are allocated to the delivery of goods and services in accordance with consumer preferences at least cost. As reflected in the revenue and pricing principles, this in turn requires prices to reflect the long run cost of

3.2 Impact of objectives on outcomes

As Paul Hughes, Justin Oliver and Rachel Trindade pointed out at the 2008 ACCC Regulatory Conference legal session, 'objectives really do matter'.[96] There have been a serries of decisions where the (sometimes controversial) construction of the objectives by the review body has been pivotal to the outcome of the case.

Perhaps the most notable case discussed in that paper was the High Court's 2007 decision in relation to the access arrangement for the Moomba to Sydney Pipeline System under the Gas Code.[97] All five judges agreed with the Tribunal that the ACCC failed to apply correctly the provision governing the valuation of the initial capital base. Gleeson CJ, Heydon and Crennan JJ justified their construction of this provision by concluding that regulatory discretion should be read down so as to curtail regulatory uncertainty and associated risk (despite the fact that neither certainty nor the rate of return appeared among the Gas Code's stated objectives).[98]

A more recent example is the Full Federal Court's decision to overturn the declaration, under the national access regime, of Rio Tinto's Robe rail track in the Pilbara, Western Australia.[99] As discussed in section 6 below, the Court, in construing the words 'economically feasible', adopted the 'privately profitable' test over the 'natural monopoly' test or 'net social benefit' test. This construction was, in essence, justified on the basis that (according to the Court) the legislature intended to strike a balance between the promotion of competition and economic efficiency, and the interests of incumbent owners of facilities.[100]

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supply and to support efficient investment, providing investors with a return which covers the opportunity cost of capital required to deliver the services'); and

- *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 at [15] & [192] ('It provides a valuation consistent with the long run marginal cost of service provision, supports the maintenance of the capital required to deliver the service looking forwards, and prices and investor returns which would be expected to occur in a competitive market and hence promotes the efficient allocation of resources').

96 Paul Hughes, Justin Oliver and Rachel Trindade, 'The Role of Courts and Tribunals in Providing Guidance to Regulators' (Paper presented at the Ninth ACCC Regulatory Conference, Surfers Paradise, 24-25 July 2008) 42.

97 *East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission* [2007] HCA 44.

98 At [50].

99 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58.

100 At [99] & [100].

4. Policy development

In contrast to the corporations law, there have been few constitutional challenges to Australia's utility regimes. Regulated businesses rarely seek to avoid a revenue or price decision by asserting that the primary legislation is contrary to the Commonwealth Constitution or other constitutional laws. The exception is Telstra which argued that the Commonwealth telecommunications access regime was an acquisition of property other than on just terms. This section discusses the potential constraints that this case places on both Commonwealth and State government departments at the policy development stage.

4.1 Is a Commonwealth access regime an acquisition of property? *Telstra v Commonwealth* [2008] HCA 7

The starting point is that a business is under no obligation to supply a good or service. In *Re Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* [1987] FCA 294, Pincus J observed (at [89]) that the refusal by BHP 'to supply a competitor with Y-bar to enable the latter to compete more effectively would not, I think, be regarded in commerce as deserving of criticism'.

In contrast, an access regime imposes an obligation to supply a service. Where the access provider is vertically separated (such as an electricity network, a gas pipeline, an airport or the Australia Rail Track Corporation's interstate rail track), this is less contentious (the dispute being over the terms and conditions of supply). In contrast, an access provider that also operates in a market in which the infrastructure service is a production input (vertical integration) has a potential incentive to use its market power to favour its operations in the related market (for example, by refusing to supply the input or charging a higher access price to its competitor).[101]

The decision to compel an access provider to supply an infrastructure service should not be underestimated. The Tribunal, in *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, reluctantly reached the conclusion that Part IIIA of the CC Act allows the ACCC to make an arbitration determination compelling an access provider to expand the capacity of a facility – but concluded (at [726]) that such a power 'would be a serious interference with a firm's right to go about its affairs, and undertake its own style of operation, as it thinks fit'.

This concern over the interference in a business was at the heart of Telstra's application in 2007 to the High Court where Telstra argued that Part XIC of the TP Act effected an acquisition of Telstra's property in some of its local loops, other than on just terms.[102]

Section 51(xxxi) of the Commonwealth Constitution provides the Commonwealth Parliament power to make laws with respect to 'the acquisition of property on just terms'. The proceeding focussed on the twisted pairs of copper or aluminium based

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101 In theory, the access provider will not agree to an access price less than a price equal to the direct per unit incremental cost of allowing the access seeker to use the facility, plus the opportunity cost to the provider of allowing the use of the facility (the Baumol-Willig price).

102 See Christopher Hodgekiss SC, 'Pass the parcel: Telstra Corp Ltd v Commonwealth (2008) 234 CLR 210' (2009) 17(1) TPLJ 47.

wire which run from an end-user's premises to a local exchange. These 'local loop' services (which can be used to carry both voice and data) were declared by the ACCC under Part XIC of the TP Act.

The High Court concluded that there was no 'acquisition of property' effected by Part XIC. The reason was, in essence, because of the access regime that applied at the time the assets were vested in Telstra. The Court reviewed the history of telecommunications regulation in Australia. The step in 1992 of vesting the assets in Telstra was preceded by the enactment of the *Telecommunications Act 1991* (Cth) (which included a statutory access regime). The Court concluded (at [53]):

> What is important is that the rights in the assets vested in Telstra were rights to use the assets in connection with the provision of telecommunications services but those rights were always subject to a statutory access regime which permitted other carriers to use the asset in question.

The Commonwealth's approach in telecommunications (where corporatisation or privatisation is preceded by the enactment of a new regulatory regime) has been followed in other sectors. For example, prior to the long-term lease of the Commonwealth's airports, the Department of Transport and Regional Development developed the CPI-X price cap to apply to aeronautical services.[103] However, the High Court's decision leaves open two questions: Does this limit the extent to which the Commonwealth may subsequently change the regime? And what happens where assets are privately owned before the access regime is enacted?

Parts IIIA and XIC of the CC Act have sought to address this issue by providing that, if a regulatory decision would otherwise be invalid due to insufficient compensation, then the Commonwealth must pay the required compensation.[104] The High Court concluded that this was sufficient to ensure that Part XIC did not contravene s 51(xxxi) of the Constitution.[105] However, Commonwealth policy makers (and regulators) are still left with the following questions: When will an access regime effect an acquisition of property? And when will the Commonwealth be required to supplement the access price set by the regulator?[106]

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103 Department of Transport and Regional Development, Commonwealth, *Pricing Policy Paper* (1996).

104 CC Act Part IIIA s 44ZZN (in respect of arbitration determinations); TP Act Part XIC s 152EB (as in force prior to 1 January 2011) (in respect of arbitration determinations); CC Act Part XIC s 152AQC (in respect of declaration) and s 152ELD (in respect of Part XIC in general); and *Water Act 2007* (Cth) s 254. (See also *Gas Pipelines Access (Commonwealth) Act 1998* (Cth) and *Moomba-Sydney Pipeline System Sale Act 1994* (Cth)). These provisions have not yet been tested in practice.

105 *Telstra v Commonwealth* [2008] HCA 7 at [42].

106 Until the mid 2000s, the ACCC's practice was to include, in Part XIC arbitration determinations, a clause providing that the determination had no effect to the extent that compensation would otherwise be required under s 152EB.

4.2 Cooperative federalism: Implications for State policy makers

In contrast to the Commonwealth, the States' Constitutions do not have a guarantee of compensation where a State law effects an acquisition of property. However, the issue is complicated by the trend towards cooperative regulatory regimes supported by a financial incentive provided by the Commonwealth.[107]

In *ICM Agriculture Pty Ltd v Commonwealth* [2009] HCA 51, the High Court considered whether the *National Water Commission Act 2004* (Cth) was invalid insofar as it authorised the CEO of the National Water Commission (a Commonwealth statutory body) to enter into a funding agreement with NSW which required NSW to reduce the water entitlements of licence holders.

The decision was effectively made on the basis that there had been no acquisition of property by NSW for the purposes of s 51(xxxi) of the Commonwealth Constitution. French CJ, Gummow and Crennan JJ considered that ground water was a natural resource, and NSW always had the power to limit the volume of water taken from that resource.[108] Hayne, Kiefel and Bell JJ considered that NSW gained no identifiable or measurable advantage from the steps taken in respect of the licences.[109]

However, the Court also confirmed previous decisions that the legislative power of the Commonwealth conferred by s 96 and s 51(xxxvi) does not extend to the grant of financial assistance to a State on terms and conditions requiring the State to acquire property on other than just terms.[110] Heydon J, in dissent, did consider that there had been an acquisition of property by NSW and that the *National Water Commission Act 2004* was invalid insofar as it authorised the CEO to enter into a funding agreement with NSW.[111]

Potentially, this means that a State access regime which is part of a cooperative national regime faces the same issues as the Commonwealth. For example, in the 1995 Agreement to Implement the National Competition Policy and Related Reforms, the Commonwealth agreed to make certain payments to the States subject to progress in implementing the reforms (including the national electricity and gas regimes).[112] The current National Reform Agenda and Agreement on Murray-Darling Basin Reform (3 July 2008) similarly link payments to the States with achieving agreed actions.[113]

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107 This section of the paper draws upon comments by Jannine Horner.

108 At [84].

109 At [149].

110 At [46] and [174]. (Although Hayne, Kiefel and Bell JJ concluded that it was not necessary to determine the intersection of s 96 and s 51(xxxi): at [141]).

111 At [248]-[249].

112 The assessment of governments' progress in implementing the National Competition Policy was made by the NCC: National Competition Council, *Assessment of Governments' Progress in Implementing the National Competition Policy and Related Reforms: 2005* (Melbourne, October 2005).

113 See Luke McInerney, Chris Nadarajah and Frances Perkins, The Treasury, Commonwealth, *Australia's Infrastructure Policy and the COAG National Reform Agenda* (2009) <http://www.treasury.gov.au/documents/1221/PDF/02_NRA.pdf>.

However, in practice, this ‘acquisition of property’ issue does not appear to have featured in policy debates on the development of Australia’s utility regimes. Government departments commonly develop legislation in the belief that any problems can be addressed through later amendments. Similarly, regulators defend review proceedings in the comfortable knowledge that a finding against the regulator may be addressed through legislative reform.

5. Form of regulation

Infrastructure regulation can be implemented using a variety of instruments including: primary and subordinate legislation; administrative decisions and instruments pursuant to legislation; public ownership; and moral persuasion.[114] Two cases have influenced policy choices over the form of regulation: *Re Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited* [1987] FCA 294 (which lead to the development of the current economic regulatory regimes); and *TXU Electricity Ltd v Office of the Regulator-General* [2001] VSC 153 (which facilitated the entrenchment of the 'building block' model in Australia).

5.1 The development of economic regulation: *Queensland Wire*

Would the national access regime in Part IIIA of the TP Act have been enacted in 1995 if the trial judge had found in favor of Queensland Wire Industries (QWI)? In summary, BHP manufactured Y-bar which it then used to make star picket fencing. QWI sought to acquire Y-bar from BHP so that QWI could also make star picket fences. QWI claimed that BHP's constructive refusal (by setting a high price) contravened s 46 of the TP Act.[115] The trial judge refused the claim on the grounds that BHP's refusal to sell was not reprehensible.[116] QWI's appeal was dismissed by the Full Court of the Federal Court on the basis that there had never been a market for Y-bar.[117]

In fact, the High Court allowed the appeal on the basis that s 46 did not require a refusal to sell to be reprehensible.[118] It was sufficient that BHP acted for a purpose proscribed in s 46(1). In refusing to supply Y-bar, BHP was taking advantage of its market power – BHP could only afford, in a commercial sense, to withhold Y-bar by virtue of its control of the market.[119] However, the Full Federal Court's decision (and, in particular, its view that s 46 did not readily accommodate the 'essential facilities' doctrine developed in the United States[120]) was cited in the 1993 Hilmer report to support the argument that general competition law was not sufficient to resolve access issues.[121] In addition to the difficulties in demonstrating a proscribed purpose, the

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114 See Giandomenico Majone, 'Regulation and its Modes' in Giandomenico Majone (ed), *Regulating Europe* (Routledge, 1996) chapter 1.

115 In summary, s 46(1) of the CC Act provides that a corporation that has a substantial degree of power in a market shall not take advantage of the power for the purpose of: eliminating or substantially damaging a competitor; preventing entry; or deterring or preventing a person from engaging in competitive conduct.

116 *Re Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Limited; Australian Wire Industries Proprietary Limited* [1987] FCA 294 (2 September 1987) per Pincus J at [89].

117 *Re Queensland Wire Industries Pty Limited v The Broken Proprietary Co Limited and Australian Wire Industries Proprietary Limited* [1987] FCA 497 (24 December 1987) per Bowen CJ, Morling and Gummow JJ.

118 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* [1989] HCA 6 (8 February 1989).

119 Mason CJ and Wilson J at [28]. See also: Deane J at [3]; Dawson J at [9]; and Toohey J at [29]. For a more recent 'access' case, see *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48. In summary, the Power and Water Authority (a Northern Territory statutory body) refused to provide NT Power Generation access to the NT electricity network for the purpose of selling electricity. The High Court held that the Authority's refusal contravened s 46.

120 At [38].

121 Independent Committee of Inquiry, *National Competition Policy* (AGPS, 1993) 242-244.

Hilmer Committee considered that courts would be reluctant to determine access prices.[122] As a consequence, the national access regime was inserted in Part IIIA of the TP Act in 1995 to supplement the control of monopoly pricing through the *Prices Surveillance Act 1983* (Cth).[123]

5.2 CPI-X and the building block model: *TXU Electricity Limited v Office of the Regulator-General* [2001] VSC 153

In 1982, the UK Secretary of State, in commissioning a study of alternative schemes for regulating British Telecommunications, expressed a desire for regulation with a 'light rein'[124] (later referred to as 'light handed' regulation). The resulting price cap approach (incentive regulation) stressed the attainment of regulatory goals in the most efficient manner possible by allowing regulated firms to make their own pricing decisions subject to the constraints of the marketplace and the price cap.[125] Under price cap regulation, the regulated price is adjusted each year by the rate of inflation (the Retail Price Index – RPI – in the UK and the Consumer Price Index – CPI – in Australia), plus or minus some predetermined amount ('X' representing the expected annual gain in the utility's efficiency) and without regard to changes in the firm's profits.[126]

In Australia, a 'CPI-X' price cap applied to airports from 1996 under the transitional (five year) regime administered by the ACCC under the *Prices Surveillance Act 1983* (Cth).[127] It was also to apply to electricity networks under the national electricity regime being developed by an inter-governmental advisory body established in 1990.[128]

However, 'CPI-X' has come to mean something different in Australia (along with other British words such as 'chips').[129] Under the Australian national electricity regime, the 'X' factor is merely used to smooth the allowed revenue across a regulatory period. The allowed revenue is determined using a

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122 See, for example, *Re Pont Data Australia Pty Limited v ASX Operations Pty Limited and Australian Stock Exchange Limited* [1990] FCA 30 per Wilcox J at [151].

123 The Independent Committee of Inquiry (chaired by Professor Fred Hilmer) was established in 1991. The Committee's 1993 report led to the National Competition Policy reforms in 1995.

124 Stephen Littlechild, 'Regulation of British Telecommunications' Profitability: Report to the Secretary of State', reprinted in Ian Bartle (ed), *The UK Model of Utility Regulation: A 20th Anniversary Collection to Mark the 'Littlechild Report' Retrospect and Prospect* (Centre for the Study of Regulated Industries, University of Bath School of Management, 2003) appendix, p 39, par 14.9.

125 See Darryl Biggar, 'The Fifty Most Important Papers in the Economics of Regulation' (Working Paper No 3, Australian Competition and Consumer Commission, May 2011) 27-28.

126 See Stephen King, 'Principles of Price Cap Regulation' in M. Arblaster and M. Jamison (eds), *Infrastructure Regulation and Market Reform: Principles and Practice* (ACCC and Public Utility Research Centre, 1998) 46-54.

127 See, for example, the initial Direction No 12 pursuant to s 20 of the *Prices Surveillance Act 1983* (Cth) in respect of Melbourne, Brisbane and Perth airports.

128 Industry Commission, *Microeconomic Reforms in Australia: A Compendium from the 1970s to 1997* (Research Paper, January 1998) 47. See clause 6.2.4(a) in the October 1996 version of the National Electricity Code (developed by the National Grid Management Council) and version 1 of the National Electricity Code (which came into effect at the start of the market on 13 December 1998).

129 This section of the paper draws upon comments by Derek Ritzmann.

'building block model'.[130] The entrenchment of this Australian construction of CPI-X is in part due to a decision by the Victorian Supreme Court in 2001.

In 1994, prior to the commencement of phase 1 of the national electricity market in 1997, Victoria introduced a competitive electricity market administered by the Victorian Power Exchange (VPX).[131] The Victorian Office of the Regulator-General (ORG) was required, under the *Victorian Electricity Supply Tariff Order 1995*,[132] to set the prices which distributors could charge for the period 2001 to 2005. Clause 5.10 of the Tariff Order required ORG to 'utilise price based regulation adopting a CPI-X approach and not rate of return regulation'. TXU (a distributor) sought judicial review in the Victorian Supreme Court (Gillard J) of ORG's determinations on the grounds that ORG used rate of return regulation.

The building block methodology was described by ORG as follows:[133]

> (a) Establishing forward looking cost or expenditure benchmarks for each of the distributors for operating expenditure, capital expenditure and cost of capital;
> (b) establishing an amount for depreciation;
> (c) determining an additional allowance called the efficiency carry over amount for operating and capital costs savings achieved by the distributors in the first period;
> (d) establishing a benchmark revenue comprising the amounts derived in accordance with the steps (a) to (c) above, which is known as the building blocks approach;
> (e) establishing demand projections for each distributor for the period 1 January 2001 to 31 December 2005;
> (f) modelling the X factors to produce a price path for the basket of Network Tariffs whereby an efficient distributor, based on the demand projections, can be expected to earn the benchmark revenue.

Gillard J concluded that this was a 'CPI-X' approach (at [372]):

> the building block approach to establish benchmark revenues did look at the financial positions of each of the distributors, but the benchmarks were established for each distributor by reference to an efficiently operated distribution business. It is not the actual business the benchmark addresses. It is the efficiently operated distribution business. [emphasis in original]

This 'building block' approach is now entrenched in the current national electricity and gas regimes.[134]

The most recent decision of the Tribunal under the telecommunications access regime continues this trend. In *Application by Telstra Corporation Limited* [2010] ACompT 1, Telstra sought review of the ACCC's decision not to accept Telstra's proposed undertaking in respect of the Unconditioned Local Loop Service. Telstra submitted that its proposed monthly charge was supported by the Telstra Efficient Access Model (TEA Model) which in turn appropriately modelled the TSLRIC+ methodology.

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130 The Australian 'building block' model has a Wikipedia entry: <http://en.wikipedia.org/wiki/Building_Block_Model>.

131 Industry Commission, *Microeconomic Reforms in Australia: A Compendium from the 1970s to 1997* (Research Paper, January 1998) 54.

132 The Tariff Order was made under s 158A of the *Electricity Industry Act 1993* (Vic).

133 *TXU Electricity Limited v Office of the Regulator-General* [2001] VSC 153 at [352].

134 See National Electricity Rules r 6.2.6, 6.4.3, 6A.5.3 and 6A.5.4; National Gas Rules r 76.

The ACCC, in its July 1997 access pricing principles paper, had stated that pricing based on total service long-run incremental cost (TSLRIC) would satisfy the statutory criteria in Part XIC.[135] In summary, 'long run' means that the concept refers to a period where all factors of production can be varied (as opposed to the short run, where the amount of at least one factor of production is fixed). 'Total service' recognises that the regulated entity uses the infrastructure to provide multiple services. 'Incremental cost' is the additional cost of supplying the regulated service over and above the situation where the service was not supplied. The '+' refers to the allocation of common fixed costs (costs common to two or more services and therefore costs which do not form part of the incremental cost of the individual regulated service). TSLRIC is based on forward looking costs – that is, the ongoing costs of providing the service in the future using the most efficient means possible and commercially available. This meant, in practice, that each time the ACCC considered pricing principles, an undertaking or access dispute, the replacement cost of the asset had to be recalculated.

The TSLRIC methodology was endorsed by the Tribunal in 2004.[136] However, by 2010, both the ACCC and Tribunal had concerns. The Tribunal stated (at [198]-[199]):

> the Tribunal has a basic difficulty with the proposition that the costs of a hypothetical new entrant … should form the basis for the access price.
>
> The Tribunal notes that the ACCC has said that it may revisit its pricing principles in the light of the evolving nature of the telecommunications industry and the lack of deployment of competing end-to-end infrastructure by access seekers. In those circumstances, a simpler and more appropriate pricing methodology might be, for example, to apply a 'regulated asset base' approach, like that used in relation to other regulated infrastructure providers. The Tribunal considers that such a review of the ACCC's pricing principles is highly desirable.

The first interim access determination made by the ACCC following the commencement of the amendments to Part XIC on 1 January 2011, calculates prices using a building block model.[137]

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135 Australian Competition and Consumer Commission, *Access Pricing Principles – Telecommunications: A Guide* (July 1997).

136 See *Re Seven Network Limited (No 4)* [2004] ACompT 11 (23 December 2004). The Tribunal stated (at [137]): '[I]t would generally not be in the LTIE to depart from TSLRIC pricing where access is regulated'.

137 See Australian Competition and Consumer Commission, *Interim Access Determinations for the Declared Fixed line Services: Statement of Reasons* (March 2011).

6. What assets should be regulated?

Every access regime must address two issues: what infrastructure services should be regulated, and on what terms / conditions the regulated services should be provided. In respect of the first issue, two approaches are available. An executive body may determine, after considering prescribed criteria, that the service should be regulated (for example, the national access and telecommunications regimes, and the 'revocation' process in the national gas regime). Alternatively, the service may be deemed to be regulated in a legislative decision (for example, Australia Post, airports and deemed covered gas pipelines).[138] This section discusses the principal decisions on review under the national access regime, and then contrasts this with the telecommunications access and national energy regimes.

6.1 National access regime

Since 1995, there have been 24 declaration applications to the NCC (as at 30 May 2011).[139] Out of these, there has only been one where the declaration was supported by the service provider.[140] In five cases, the application was withdrawn. In the remaining 18 cases, the matter ended up in the Tribunal or a court. The review decisions of particular interest fall into three categories: (a) reluctance to supply by a vertically integrated service provider (Pilbara cases); (b) pricing by a monopolist (airport cases); and (c) protection by States of their regimes (Sydney Water and Victorian rail cases).

6.1.1 Vertically integrated service provider: Pilbara

The Pilbara is a region in the north of Western Australia with vast mineral deposits. There are currently four main railways used to transport the iron ore to the ports: Mt Newman Line (BHP Billiton (BHPB)); Hamersley Line (Rio Tinto Iron Ore (RTIO)); Robe Line (RTIO); and Goldsworthy Line (BHPB). (A fifth line has also been developed by Fortescue Metals Group Ltd (FMG).)[141]

Since 1998, iron ore mines have sought to obtain access, under Part IIIA of the TP Act, to these four rail lines. The following table summarises the saga:

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138 As an aside, this illustrates the 'toothpaste' phenomenon – confining discretion at one point simply shifts discretion to another point. See Robert Baldwin, *Rules and Government* (Clarendon Press, 1995) 26.

139 This figure has been derived by simply adding the number of 'declaration' rows in the NCC's table of applications: http://www.ncc.gov.au/images/uploads/Applications_Register09.doc (accessed 30 May 2011). However, it should be noted that multiple related applications are treated inconsistently – in some cases, the applications have been recorded in one row, whereas, in other cases, the applications are recorded in separate rows.

140 In 2007, the Tasmanian Department of Infrastructure, Energy and Resources – Rail Unit applied to the NCC for declaration of certain segments of the Tasmanian rail network. The relevant Minister (Tasmanian Premier) declared the service for a period of 10 years.

141 This section of the paper draws upon discussions with Sarah Sheppard, Matthew Robertson and Simon Uthmeyer.

Date	Event
September 1998	Robe applies to the NCC to recommend that the Hamersley service be declared.
June 1999	Federal Court (Kenny J) decides that the service was the use of a production process.[142] (The definition of 'service' in Part IIIA excludes the 'use of a production process'.)[143]
June 2004	FMG applies to the NCC to recommend to the Treasurer that the Mt Newman service and Goldsworthy service be declared.
March 2006	NCC recommends to the Treasurer, Peter Costello, that the Mt Newman service be declared. NCC determines that the Goldsworthy service is not a 'service' for the purposes of Part IIIA.
May 2006	Treasurer makes no decision on the application of FMG with regard to the Mt Newman service. Under s 44H(9) of the TP Act, it is deemed that the line is not declared. FMG applies to the Tribunal for review of the decision not to declare the Mt Newman service.
December 2006	Federal Court (Middleton J) holds that the Mt Newman and Goldsworthy services are not the use of a production process.[144]
October 2007	Full Federal Court (Sundberg and Greenwood JJ; Finkelstein J dissenting) dismisses BHPB's 'production process' appeal.[145]
November 2007	The Pilbara Infrastructure PL (TPI) (subsidiary of FMG) applies to the NCC to recommend to the Treasurer that the Hamersley service (owned by RTIO) and the Goldsworthy service be declared.
January 2008	FMG applies to the NCC to recommend to the Treasurer, Wayne Swan, that the Robe line (owned by RTIO) be declared.
August 2008	NCC recommends to the Treasurer that the Hamersley, Goldsworthy and Robe lines be declared.
September 2008	High Court (unanimous – Gummow, Kirby, Heydon, Crennan & Kiefel JJ) dismisses BHPB's 'production process' appeal.[146]
October 2008	Treasurer declares the Hamersley, Goldsworthy and Robe services. The declarations were to commence on 19 November 2008 and expire on 19 November 2028. BHPB and RTIO apply to the Tribunal for review of the Hamersley, Goldsworthy and Robe decisions
September 2009 – February 2010	The Tribunal hears the case (there were 42 hearing days).
June 2010	The Tribunal (Finkelstein J, Latta and Round) hands down its decisions.[147] In summary: • the Mt Newman service was not declared (the Tribunal upheld the decision of the Treasurer); • the Hamersley service was not declared (the Tribunal set aside the decision of the Treasurer); • the Robe line service was declared (the Tribunal upheld the decision of the

142 *Hamersley Iron Pty Ltd v National Competition Council* [1999] FCA 867 (28 June 1999).

143 CC Act s 44B (definition of 'service').

144 *BHP Billiton Iron Ore Pty Ltd v The National Competition Council* [2006] FCA 1764 (18 December 2006).

145 *BHP Billiton Iron Ore v The National Competition Council* [2007] FCAFC 157 (5 October 2007).

146 *BHP Billiton Iron Ore Pty Ltd v National Competition Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45 (24 September 2008).

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

	Treasurer to declare the line but varied the duration of the declaration from 20 to 10 years. The varied declaration was to expire on 19 November 2018) • the Goldsworthy service was declared (the Tribunal upheld the decision of the Treasurer to declare the line. The declaration was to expire on 19 November 2028.)
August 2010	FMG applies to the Full Federal Court for review of the Tribunal's Robe and Hamersley decisions. RTIO applies to the Full Federal Court for review of the Tribunal's Robe decision.
4 May 2011	Full Federal Court (Keane CJ, Mansfield and Middleton JJ) dismisses FMG's appeal and allows RTIO's appeal.[148] The outcome is that the least important of the four disputed rail services (Goldsworthy) is declared under Part IIIA. FMG and the NCC apply to the High Court for special leave to appeal the Full Federal Court's decision.

The cases raise five significant issues:

- what is a 'production process';
- the construction of declaration criterion (a) (access would promote a material increase in competition);
- the construction of criterion (b) (uneconomical to develop another facility to provide the service);
- the interaction between criterion (f) (access would not be contrary to the public interest) and the residual discretion; and
- whether the declare-arbitrate process in Part IIIA can ever be made to work.

(1) Production process

The issue was whether the two services (Mt Newman line and Goldsworthy line) sought by FMG were 'the use of a production process' and therefore not 'services' that could be declared under Part IIIA. The High Court held unanimously that BHPB's Continuous Stockpile Management System was a 'production process' (in effect, this is the 500km conveyer belt analogy). However, the Court went on to say that, if a person wants access to an integer (railway track) of that production process, then that integer is not the 'use of a production process'.[149] Consistent with its track record, the High Court spent less than two pages analysing the issue,[150] and has left a quagmire for regime participants. A service provided by means of the whole factory is immune from declaration. However, a service provided by an integer of the factory is no longer safe. The end outcome may well be the same (due to application of the declaration criteria). However, there is less certainty for facility owners.

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148 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 (4 May 2011).

149 *BHP Billiton Iron Ore Pty Ltd v National Competition Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council* [2008] HCA 45 at [37]-[43].

150 The judgment in *Telstra v Commonwealth* [2008] HCA 7 is 23 pages (and left, unanswered, the issues discussed in section 4.1 of this paper). The judgment in *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* [2007] HCA 44 is 34 pages.

(2) Criterion (a): That access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service

In summary, the Tribunal found that three of these services (Hamersley, Robe and Goldsworthy) satisfied this criterion (the relevant market being the rail haulage market).[151]

The Tribunal's approach to this criterion is forward-looking – it involves a comparison of the future state of competition in the relevant market with access to the service and the future state of competition without access.[152] 'Access', in this context, means the right or ability to use the service. It does not mean the right or ability to use the service under Part IIIA.[153]

Contrary to the NCC's submission, the Tribunal considered that the satisfaction of this criterion is to be determined having regard to whether or not access will be taken up.[154] For example, if there are no third parties capable of taking up available rail slots on a rail service, then it is unlikely that access to the rail service will promote a material increase in competition in at least one market. When determining the extent to which access will be taken up, it should be assumed that access is on reasonable terms and conditions, without speculating about any particular terms that might be imposed by arbitration under Part IIIA.[155]

As criterion (a) is concerned with promoting effective competition, it cannot be satisfied if the market is already 'effectively' competitive (i.e. where the market experiences at least a reasonable degree of rivalry between firms each of which suffers some constraint in their use of market power from competitors, actual and potential, and from its customers.)[156] The Tribunal compared the future with access and the future without access. In relation to the Mt Newman service, the Tribunal concluded that the outcome under each scenario is the same as an alternative line will be built by FMG in the event of no access.[157]

As the Tribunal itself recognised,[158] this approach can lead to peculiar outcomes. First, the Tribunal's analysis focused on the market closest to the infrastructure market (rail haulage). However, from a public policy perspective, increased competition in this market is of little benefit if the global seaborn iron ore market and the Pilbara iron ore tenements market are already effectively competitive. Secondly, the construction of criterion (a) reinforces the incentive of providers to delay the process under Part IIIA. If an access seeker becomes so frustrated by the process that the access seeker starts to plan an alternative facility (economically inefficient but commercially feasible), then the relevant service will cease to satisfy criterion (a). The construction of criterion (a) is further discussed in section 6.1.2 below.

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151 *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 (30 June 2010) at [1147].
152 At [1048].
153 At [1059].
154 At [1064].
155 At [1066].
156 At [1068].
157 At [1148].
158 At [1071].

(3) Criterion (b): That it would be uneconomical for anyone to develop another facility to provide the service

The Tribunal found that three of the services satisfied criterion (b) (Goldsworthy, Robe and Hamersley lines).[159] However, this was ultimately set aside for Robe and Hamersley by the Full Federal Court (Goldsworthy was not appealed).[160]

The Tribunal noted that the service provided by another facility must be an equivalent service (being one which is capable of satisfying the particular need for which the service is sought).[161] The Tribunal considered whether 'uneconomical' meant:[162]

- it would not be profitable for anyone to develop the facility (the privately profitable test);
- the total net costs (including social costs) exceed the total net benefits (including social benefits) of developing another facility (net social benefit test) (the approach adopted by the Tribunal in 2000)[163]; or
- a single facility can meet market demand at less cost than two or more facilities (natural monopoly test).[164]

The Tribunal rejected the 'privately profitable' test (as it does not meet the objective in Part IIIA to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided).[165] The Tribunal preferred the natural monopoly test to the net social benefit approach (as the concept of natural monopolies only takes into account costs of production, and to allow social costs and benefits of access to be considered would mean that criterion (b) substantially overlaps with criterion (f)).[166] The Full Federal Court, however, adopted the privately profitable test (based on the wording of criterion (b)).[167] Essentially, in the view of the Full Federal Court, where it is commercially feasible for someone in the market

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159 At [986]-]1006].

160 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58.

161 At [809]. For example, if there is a road and a rail line which start at Point A and end at Point B, they will not be the same service if the road cannot handle trucks which are carrying iron ore. Further, merely because two or more services could transport iron ore between the same points does not make it an equivalent service. For example, trucking iron ore by road is likely to be too expensive over longer distances and at large volumes. Rail is the only practically possible or economically feasible means of hauling iron ore over long distances.

162 At [815].

163 See *Sydney International Airport* [2000] ACompT 1 (1 March 2000).

164 To determine whether a facility is a natural monopoly, the Tribunal stated it is necessary to: First, determine the reasonably foreseeable potential demand for the service provided by the facility. Demand consists of the incumbent's demand plus reasonably foreseeable third party demand. Secondly, compare the capital and operating costs of a single shared facility to the sum of the capital and operating costs of an existing facility (or an expanded existing facility) and a new facility (at [855]). Although the Tribunal adopted the natural monopoly test, it may not have applied the test correctly. If an access seeker is concerned that it may not obtain timely access under Part IIIA, it may commence construction of an alternative facility. Under the Tribunal's approach, criterion (b) will no longer be satisfied where it is cheaper to finish the new facility than expand the old facility. However, this fails to consider whether the original facility had natural monopoly characteristics.

165 At [824].

166 At [838].

167 *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2011] FCAFC 58 at [100].

place to develop an alternative to the facility, then there is no problem requiring regulation.[168]

On the face of it, the Full Federal Court's construction narrows the circumstances in which criterion (b) will be satisfied, and, in my view, seems to be contrary to the policy intent of Part IIIA – it may be commercially feasible but not efficient to build another facility. However, ultimately, it may not make much difference to the end outcome – an access seeker, when faced with a process like Part IIIA, is likely to develop an alternative plan where it is commercially feasible to do so.[169] The only difference is that they will now fail on criterion (b) as well as criterion (a).

(4) Discretion & criterion (f): That access (or increased access) to the service would not be contrary to the public interest

The Tribunal found that two of the services satisfied criterion (f) and the residual discretion (Goldsworthy and Robe (until 2018)).[170] The Hamersley service, which had satisfied criteria (a) and (b), did not satisfy criterion (f) nor the residual discretion.[171] The Tribunal's approach was affirmed by the Full Federal Court (although there was an issue of procedural fairness[172]).

In the Tribunal's view, criterion (f) requires consideration of the welfare, particularly the economic welfare, of the Australian community as a whole.[173] The task is to consider whether the costs of access do not outweigh the benefits (although the Tribunal noted that the criterion may not be satisfied where access will be manifestly unjust to a section of the community even if benefits the community as a whole).[174] However, criterion (f) and the discretion do not require a precise quantifiable cost/benefit analysis.[175] To be consistent with the Full Court's decision in *Sydney Airport (No 2)*,[176] the only issue to be considered under criterion (f) is the impact on public welfare of the mere fact that a third party has access to the service on reasonable terms and conditions (although the Tribunal regarded the Full Court's decision as problematic – in the real world, many consequences will only arise if access is actually taken up which in turn will be a reflection of the terms upon which access is obtained).[177] However, in any event, the Tribunal also has a broad discretion whether or not to declare the service. Issues which arise because of the specific operation of Part IIIA are considered under the discretion.[178]

This approach has not been universally endorsed. For example, at last year's ACCC Regulatory Conference, Stephen King argued that this criterion was intended to deal

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168 See [86] & [100].

169 However, I also note that the Tribunal rejected the private cost benefit test in other contexts. See, for example, *Application by Telstra Corporation Limited* [2009] ACompT 1 at [16]. Compare *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 at [64].

170 At [1300]-[1345].

171 The Mt Newman service failed criteria (a), (b) and (f) and the residual discretion.

172 See [137].

173 At [1161].

174 At [1161].

175 At [1305].

176 See section 6.1.2 of this paper.

177 At [1166].

178 At [1166].

with major issues such as national security or the Great Barrier Reef. Instead, the Tribunal's cost-benefit approach is an exercise of 'crystal ball gazing'.[179] There is, however, a more immediate practical issue (at least for the ACCC). Under the 2010 amendments to Part IIIA, a Tribunal declaration review and arbitration may be conducted concurrently.[180] Given the Tribunal's approach to the residual discretion, it is possible that an ACCC draft arbitration determination can now impact on the outcome of the declaration review.

(5) Effectiveness of Part IIIA

The declare-negotiate-arbitrate model in Part IIIA is potentially an 11-step process for an access seeker.[181] In the Pilbara case, the Tribunal noted that even when a Part IIIA declaration application proceeded expeditiously, it would take a minimum of four to five years to resolve.[182] In reality, the process can only be successfully pursued by an applicant with substantial financial resources and a long time frame. Would Fortescue have been better off commencing proceedings for a contravention of section 46 of the TP Act? Can the declare-arbitrate process in Part IIIA ever provide an effective and efficient solution to a public policy issue?[183]

6.1.2 Pricing by a monopolist (airport cases)

The second category of Part IIIA declaration cases relate to Sydney airport (a vertically separated business). The events are summarised below:

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179 Stephen King, 'Whatever Happened to National Competition Policy' (Presentation at the Australian Competition and Consumer Commission Eleventh Annual Regulatory Conference, Gold Coast, 29 July 2010).

180 See CC Act ss 44I and 44ZZCBA.

181 The steps are: negotiate; NCC recommendation; Minister decision; Tribunal review (plus judicial review: Full Federal Court & High Court); negotiate; ACCC arbitration; Tribunal review (plus judicial review: Full Federal Court & High Court).

182 At [1350].

183 Even if a matter is resolved under Part IIIA, it may not be the best policy outcome. For example, Part IIIA could potentially provide below-rail track access to a mine railway but not haulage which might be more efficient. Even where the service is appropriate, the process may not result in a single set of rules for the regulation of particular infrastructure, or coordination across infrastructure in an end-to-end supply chain (eg. mine-to-port or farmgate-to-port). Possible reforms to Part IIIA were discussed at the 2010 Trade Practices Workshop: Geoff Taperell, 'The Future of Part IIIA - Incremental Amendment or Fundamental Reform?'; Ted Hill, 'Some Observations on the Application of Part IIIA in Practice'; Vince FitzGerald, 'Would a Different Part IIIA Make a Better Contribution to Economic Welfare? (Papers presented at the Trade Practices Workshop, August 2010).

November 1996	Australian Cargo Terminal Operators Pty Ltd (ACTO) submits three applications to the NCC for the declaration of certain services at Melbourne and Sydney International Airports. ACTO provided a freight handling service for certain airlines. The core commercial issue was that, in ACTO's view, the selection criteria used at the airports to determine access to the facilities was biased towards the incumbent airlines (Qantas and Ansett), and precluded competitive entry by lower cost operators.
June 1997	Minister declares certain services in respect of Melbourne and Sydney International Airports. Federal Airports Corporation (FAC) (subsequently, Sydney Airports Corporation Ltd (SACL)) applies to the Tribunal for review of the Sydney airport decision.
March 2000	Tribunal affirms the declaration (although varies the service description).[184]
October 2002	Virgin Blue applies to the NCC for declaration of an airside service at Sydney Airport. The core commercial issue was SACL's decision to change from a charge based on the aircraft's maximum take-off weight to a charge on a per-passenger basis. The revised tariff structure put low cost carriers (Virgin) at a competitive disadvantage to full service airlines (Qantas).
January 2004	Minister (Ross Cameron) accepts the NCC's recommendation not to declare the service.
December 2005	Virgin Blue applies to the Tribunal for review of the Minister's decision. The Tribunal decides to declare the airside service for 5 years.[185]
January 2006	SACL applies to the Full Federal Court for review of the Tribunal's decision. The Full Court dismisses the appeal.[186]
January 2007	Virgin Blue notifies the ACCC of an access dispute in respect of the declared service.
March 2007	High Court refuses SACL's application for special leave to appeal.[187]
May 2007	Virgin Blue withdraws its arbitration notification following negotiated commercial settlement of the dispute.

The cases raise two main issues (although, in hindsight, these issues have turned out to be less significant than expected at the time): the construction of criterion (a); and whether it is necessary to show that the service provider has used its market power.

(1) Criterion (a): That access (or increased access) to the service would promote [*a material increase in* – inserted by a 2006 amendment] *competition in at least one market (whether or not in Australia), other than the market for the service*

The Full Federal Court, in the Virgin Blue case, concluded that criterion (a) merely requires a comparison of the future state of competition in the dependent market with a right or ability to use the service, and the future state of competition in the dependent market without any right or ability (or with a restricted right or ability to

184 *Sydney International Airport* [2000] ACompT 1 (1 March 2000).
185 *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 (12 December 2005).
186 *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 (18 October 2006).
187 Transcript of Proceedings, *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2007] HCATrans 98 (2 March 2007).

use the service).[188] The Court did not accept the Tribunal's view that 'it is necessary to undertake an analysis of the future with declaration (… the 'factual') as against the future without declaration (… the 'counterfactual')' (emphasis added).[189]

The Productivity Commission, in its 2006 review of the airports regime, recommended that Part IIIA be amended to 'ensure that the Part IIIA entry bar remains at a high level'.[190] The Howard Government, in its response to the report agreed to amend s 44H(4)(a)) to 'reinstate its interpretation to that which prevailed prior to the decision of the Full Court of the Federal Court'.[191]

However, as it turns out, lowering the hurdle in criterion (a) has not opened the floodgates to access seekers. The following table summarises the outcome of declaration applications (as at 30 May 2011):[192]

Number of applications	Access	No access	Application withdrawn or no jurisdiction	Not yet finalised
24	6 declared[193]	11 not declared	7	0

Out of the 24 applications, five were submitted to the NCC after the date of the Full Federal Court's decision (18 October 2006). Two of these resulted in declarations (Tasmanian railway – which was proposed by the infrastructure owner; and the Pilbara Goldsworthy railway service).

As the NCC observed, at least in the following two scenarios, the outcome from applying criterion (a) is likely to be the same irrespective of whether any effect on competition results from 'declaration' or 'access':[194]

- if a dependent market is already effectively competitive, then access would be unlikely to promote an increase in competition that is material; and
- conversely where there are high barriers to entry or other conditions that foreclose additional competition in a dependent market, which are unrelated to the facility that provides the service to which access is sought, then access may not result in a material promotion of competition.

In any event, if declaration is futile due to existing access arrangements to the facility, then this issue could still be addressed under the residual discretion. In the 2010 Part IIIA amendments (enacted in response to a number of Productivity Commission

188 *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 (18 October 2006) at [83].

189 [2005] ACompT 5 at [148].

190 Productivity Commission, *Review of Price Regulation of Airport Services* (Inquiry Report No 40, 14 December 2006) recommendation 3.1.

191 Peter Costello, Treasurer, 'Productivity Commission Report - Review of Price Regulation of Airport Services' (Media release, No 32, 30 April 2007) Response to recommendation 3.1.

192 See footnote 139 above.

193 The declarations relate to: Tasmanian railway; Sydney and Melbourne International Airports; Sydney Airport airside service; Sydney Water; and Pilbara Goldsworthy railway.

194 National Competition Council, *Goldsworthy Rail: Application for Declaration of a Service Provided by the Goldsworthy Railway under section 44F(1) of the Trade Practices Act 1974: Draft Recommendation* (20 June 2008) 32.

reports),[195] the proposed amendment to criterion (a) was quietly dropped off the policy agenda.

(2) Is it necessary to show use of market power?

In the first Sydney Airport case, the Tribunal accepted that there was no evidence that SACL had sought to extract monopoly rents, and that this is not a precondition for declaration.[196] However, the Tribunal referred to FAC as 'a seemingly lazy monopolist' who, in conducting the tender process for access to the airport facilities, 'did not see its role to promote competition'.[197]

In the second Sydney Airport case, the Tribunal rejected SACL's submission that, in respect of criterion (a), the relevant question is whether SACL will engage in anti-competitive conduct.[198] However, the Tribunal considered that:

- past or present conduct of the service provider informs us as to the likely future conduct of the service provider and the effect on competition in the dependent market;[199]

- then one looks at declaration and asks whether that will enhance competition in the dependent market by creating opportunities and an environment in which the impact of such conduct and its effect on competition may be lessened or diminished;[200] and

- whether competition will be promoted depends upon the extent to which SACL has the ability, in the absence of declaration, to use its market power to affect adversely competition in the dependent market.[201]

The Tribunal drew particular attention to evidence given by a SACL manager (under cross-examination) that SACL chose the pricing structure 'because Qantas preferred it' to conclude that there had been a misuse of market power.[202] The Full Federal Court held, on appeal, that such an enquiry was not mandated by criterion (a) but

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195 The amendments were a culmination of a number of processes including: 2001 Productivity Commission report on Part IIIA (partly reflected in 2006 amendments to Part IIIA); 2005 Exports and Infrastructure Taskforce report; 2006 Competition and Infrastructure Reform Agreement, reflected in 2007 amendments to the 1995 Competition Principles Agreement; 2007 Productivity Commission report on airports; and 2008 National Partnership Agreement to Deliver a Seamless National Economy.

196 *Sydney International Airport* [2000] ACompT 1 at [233].

197 At [125].

198 *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [151]. In the Full Federal Court, SACL submitted that criterion (a) mandates the identification of whether the supply of the relevant service had in fact been denied or restricted, in order to compare the future state of affairs with the denial or restriction as found and the future state of affairs without such (found) denial or restriction on access: *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [69].

199 At [151] & [516].

200 At [151] & [162].

201 At [156] & [163].

202 At [215], [218], [222], [271] & [294].

recognised that past monopolistic behaviour may be a relevant consideration affecting the making of the decision.[203]

6.1.3 Protection of State regulation

In general, review bodies have proven to be sympathetic towards vertically integrated access seekers who are potentially being forced under Part IIIA to supply a service to a competitor. In contrast, review bodies have been less accommodating of State governments who are seeking to protect their turf.

In 2001, Freight Victoria Ltd applied for declaration of services provided by the rail lines it leased from the Victorian Government (regulated under the Victorian Rail Access Regime). If the services were declared, then the terms of access could be determined under Part IIIA arbitration, rather than under the Victorian regime. At the time, one of the criteria for declaration was that 'access to the service is not already the subject of an effective access regime'. (This did not necessarily require the State to have obtained certification from the Commonwealth Minister that the State regime was an effective access regime under section 44N. This loop hole was removed under the 2010 amendments).[204] The Minister accepted the NCC's recommendation not to declare the service (although not on the basis that the Victorian regime was an effective access regime). The Tribunal, however, refused Victoria's request to stay the review proceeding whilst Victoria amended its regime and sought certification from the Commonwealth Minister.[205]

In 2004, Services Sydney applied for the declaration of sewage transmission and interconnection services provided by Sydney Water Corporation Ltd (a vertically integrated corporation wholly owned by the NSW Government). The NSW Minister, in effect, rejected the application (a deemed decision not to declare). However, in 2005, the Tribunal set aside the deemed decision, and declared the services. The Tribunal rejected an application by the NSW Premier to intervene but allowed the Premier to make a written statement.[206] The statement foreshadowed that the NSW Government intended to establish a state based water access regime, and argued that the services should not be declared under Part IIIA. This argument was rejected by the Tribunal which declared the services for 50 years on the basis that, if an effective access regime was established, steps could be taken to revoke the declaration.[207]

Pacific National's application in 2010 (during the Queensland Rail privatisation) for declaration of certain Queensland coal railways similarly demonstrates how an access seeker can use the Part IIIA declaration process to place pressure on State governments.[208]

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203 *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [85].

204 *Trade Practices Amendment (Infrastructure Access) Act 2010* (Cth) schedule 5 items 6 & 9.

205 *Freight Victoria Limited* [2002] ACompT 1 (27 March 2002). Freight Victoria later withdrew its application following an agreement with Victoria.

206 *Application by Services Sydney Pty Ltd* [2005] ACompT 2 (11 April 2005).

207 *Application by Services Sydney Pty Ltd* [2005] ACompT 7 (21 December 2005).

208 Asciano, 'Declaration of the Services Provided by the Blackwater, Goonyella, Moura and Newlands Railway Facilities' (Application to the National Competition Council, 18 May 2010). The core concern was that a privatised vertically integrated QR National would use its

6.2 Comparison with other regimes

The cases in respect of the telecommunications access and national energy regimes illustrate two points: the ubiquitousness of the 'future with and without' test; and the extent to which litigation is influenced by the design of the regulatory regime.

6.2.1 'Future with and without' test

As in Part IIIA, the 'future with and without test' (first developed to assess mergers and acquisitions)[209] has been used by the Tribunal in its review of telecommunications exemption decisions.

Under Part XIC, the ACCC must not make an exemption order unless it is satisfied that the making of the order will promote the long-term interests of end-users.[210] In *Seven Network Limited (No 4)* [2004] ACompT 11, Seven Network sought review of the ACCC's decision to grant Foxtel and Telstra an anticipatory exemption from the SAOs in respect of a proposed digital pay TV carriage service.[211] The Tribunal stated:[212]

> we compare the future situation with the exemption orders having been made with the future situation without the exemption orders having been made. We then ask the question: which situation is in the LTIE … .

Similarly, in *Telstra Corporation Ltd v Australian Competition Tribunal* [2009] FCAFC 23, the Full Federal Court affirmed that the future with and without test is an essential part of the analytical enquiry required by s 152AT(4).[213]

6.2.2 Extent of litigation

Not surprisingly, there is less litigation where there is a clear understanding at the commencement of the regime as to the services to be regulated. The telecommunications access regime required the ACCC, at commencement, to deem

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monopoly of the rail track for the benefit of its freight business, and to the detriment of competitors such as Pacific National.

209 See *Re QIW Ltd* (1995) 132 ALR 225 at 276 (Trade Practices Tribunal).

210 See TP Act s 152AT(4) and CC Act s 152ATA(6). If the ACCC is satisfied that an order should be made to promote the LTIE, it does not have a residual discretion: *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 (11 March 2009) at [141] and [144].

211 A peculiar feature of this case was that, in 2002, the ACCC had accepted undertakings under s 87B of the TP Act from Telstra and Foxtel arising out of the ACCC's concerns that the proposed Foxtel/Optus content sharing agreement contravened Part IV of the TP Act (competition law provisions). An important obligation arising from those s 87Bs was that in the event Foxtel and Telstra commenced the supply of a digital pay TV service, they would supply the service on terms and conditions set out in the s 87Bs. The Tribunal concluded that, without the exemption orders, digitisation would still occur, access would be available immediately under the s 87Bs, plus there would still be the opportunity for an access seeker to seek declaration, and then arbitration under Part XIC. See [223]-[238].

212 At [119].

213 At [159]. See also *Application by Telstra Corporation Limited* [2009] ACompT 1 (22 May 2009) at [11]; and *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 (27 May 2009) at [12].

certain services to be declared.[214] The ACCC may also, after a public inquiry, declare a service.[215] In contrast to Part IIIA, the ACCC's decision to declare a service is not subject to merits review. However, a service provider could apply to the ACCC for an exemption from the SAOs in respect of a declared service, and the ACCC's decision was subject to review by the Tribunal.[216] (From 1 January 2011, a party may only apply for an anticipatory exemption, and there is no Tribunal review).

Since the commencement of the regime in 1997, there has only been one case where judicial review has been sought of a declared service. (The proceeding related to the (now redundant) analogue pay TV carriage service, and, in effect, upheld the ACCC's regulation of this service.)[217] There have been four cases where Telstra sought an exemption, and then an application was made to the Tribunal for review of the ACCC's decision.[218] However, the first review decision in respect of an 'ordinary individual exemption' did not occur until 2008 (over ten years after the regime commenced).

There have been even fewer cases under the national gas and electricity regimes. The national gas regime deemed certain gas pipelines to be covered, although included a process by which coverage could be revoked (or applied). There have been two cases in which review has been sought of a coverage decision. (In one case, the Tribunal set aside the Commonwealth Minister's decision to cover a transmission pipeline from Victoria to New South Wales.[219] In the other, a party sought review of the Minister's decision to revoke coverage for part of the Moomba to Sydney gas pipeline system,

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214 *Telecommunications (Transitional Provisions and Consequential Amendments) Act 1997* (Cth) s 39.

215 CC Act s 152AL. For a list of services declared under Part XIC, see the ACCC Register of Declared Services <http://www.accc.gov.au/content/index.phtml/itemId/323824>.

216 From 1997, a service provider could seek an exemption from the SAOs in respect of a declared service. In 2002, Part XIC was amended to introduce anticipatory exemptions, where a person could seek an order that, in the event that a service became an active declared service, the person would be exempt from the SAOs.

217 In 1997, the ACCC was required, for the purposes of Part XIC, to deem a service for the delivery of pay television signals using the HFC cables owned by Optus and Telstra. In light of uncertainty over the validity of the deemed service, the ACCC also, in 1999, declared the service after holding a public inquiry. Foxtel then sought judicial review of the 1997 deeming statement and 1999 declaration. At first instance, the Federal Court upheld both the 1997 and 1999 services. Foxtel and Telstra appealed these decisions. On appeal, the 1997 statement was held to be invalid, and the 1999 declaration valid. The High Court then refused Foxtel's application for special leave to appeal. See: *Telstra Corporation Ltd v Seven Cable Television Pty Ltd* [2000] FCA 1160 (18 August 2000); *Foxtel Management Pty Ltd v Australian Competition Consumer Commission* [2000] FCA 589 (8 May 2000); and Transcript of Proceedings, *Foxtel Management Pty Ltd v Australian Competition and Consumer Commission* (High Court of Australia, Nos S227/2000, Gleeson CJ and McHugh J, 10 August 2001).

218 *Seven Network Limited (No 4)* [2004] ACompT 11 (Telstra and Foxtel's digital pay TV carriage services); *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 (27 May 2009) (Telstra's local call service and wholesale line rental service); *Application by Telstra Corporation Limited* [2009] ACompT 1 (22 May 2009) (Telstra's supply of declared services to Optus where Optus has its cable network) (this case was also discussed in the context of the national broadband network: see <http://www.aph.gov.au/hansard/joint/commttee/J32.pdf>); and *Application by AAPT Limited* [2009] ACompT 5 (24 August 2009) (Telstra's public switched telephone network originating access service).

219 *Duke Eastern Gas Pipeline Pty Ltd* [2001] ACompT 2 (4 May 2001).

but ultimately withdrew the application.)[220] In relation to the national electricity regime, there has been one case where a regulated entity has sought judicial review on whether a particular service is within the scope of the regulated services.[221]

220 *Application By Orica IC Assets Ltd Re Moomba To Sydney Gas Pipeline System* [2004] ACompT 1 (12 February 2004) and *Application By Orica Ic Assets Ltd Re Moomba To Sydney Gas Pipeline System* [2004] ACompT 2 (4 March 2004).

221 A Queensland electricity distributor (Energex) sought judicial review on whether street lighting services met the definition of 'distribution service' in the NER. As at 3 June 2011, the Federal Court had not handed down its decision. See also *Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)* [2010] ACompT 14 (24 December 2010).

7. Regulatory process

A decision, as Baldwin argues, is not merely the outcome of a mechanical application by the regulator of a rule.[222] A regulator could apply an identical rule but reach two different outcomes if an aspect of the regulatory process (such as the burden of proof) was altered. This section sets out the key decisions in which the Tribunal has fashioned the original decision-making process.

7.1 Optimal access terms and conditions

Can the regulator construct and impose its ideal set of terms and conditions of access? Or is it required to accept the regulated entity's proposal if it passes the minimum statutory hurdle?

In Application by *GasNet Australia (Operations) Pty Ltd* [2005] ACompT 6 (Cooper J, Davey and Round), GasNet sought review of the ACCC's decision to draft and approve an access arrangement for GasNet's Victorian gas pipeline. The Tribunal concluded (at [29]):

> where the [Access Arrangement] proposed by the Service Provider falls within the range of choices reasonably open and consistent with Reference Tariff Principles, it is beyond the power of the Relevant Regulator not to approve the proposed [Access Arrangement] simply because it prefers a different [Access Arrangement] which it believes would better achieve the Relevant Regulator's understanding of the statutory objectives of the Law.

According to the Expert Panel on Energy Access Pricing (majority), this 'propose-respond' model was introduced essentially through legal interpretation:[223]

> Indeed in the first six years after [the Gas Code's] introduction, with no demur from the sponsoring governments, it was interpreted as supporting a conventional consider-determine regulatory approach [where the regulator's role was to determine 'best value'].

The Tribunal then applied this approach to the telecommunications access regime.[224] In *Telstra Corporation Ltd* [2006] ACompT 4 (Goldberg J, Davey and Round), Telstra sought review of the ACCC's decision not to accept an access undertaking proposed by Telstra in respect of Telstra's line sharing service. The Tribunal stated (at [63]):

> In this area of analysis there is no one correct or appropriate figure in determining reasonable costs or a reasonable charge. Matters and issues of judgment and degree are involved at various levels of the analysis. In considering whether Telstra's estimates of its costs are reasonable we are not driven to considering whether the Commission's or other parties' views or assessment of those costs are more reasonable. Nor do we enquire whether Telstra's method or approach in estimating its costs is the correct or appropriate approach. If Telstra's

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222 Robert Baldwin, *Rules and Government* (Clarendon Press, 1995) 25.

223 Expert Panel on Energy Access Pricing, *Report to the Ministerial Council on Energy* (April 2006) 75 and 77.

224 See also *Telstra Corporation Limited v Australian Competition Tribunal* [2009] FCAFC 23 (11 March 2009) at [150], [282] and [283]. In that case, the Full Federal Court considered the scope of the ACCC's power to make an objection order subject to conditions. The Court held that the ACCC must 'at all times keep in mind whether the order could be made if appropriate conditions and limitations were imposed'. Once the ACCC reaches the level of satisfaction provided for in s 152AT(4), the order must be made.

> method or approach in estimating its costs is reasonable having regard to the statutory matters set out in ss 152AH and 152AB then the matter rests … .

This approach was subsequently extended in 2006 and 2007 to chapters 6 and 6A of the National Electricity Rules.[225] The 2006 majority report on energy access pricing, however, considered that a propose-respond model would over time lead to a systematic increase in the returns to regulated entities relative to the receive-determine model.[226] Most recently, the approach was rejected in the 2010 amendments to the telecommunications access regime in Part XIC of the CC Act. In contrast to the energy regime, when the ACCC makes a telecommunications access determination, the process does not commence with a proposal by the regulated entity.[227]

7.2 Balancing the overall outcome

It is now standard practice in a Tribunal proceeding for *GasNet* to be cited as authority for the proposition that there is no single indisputable value for a parameter.[228] But does the Tribunal also recognise the balancing that occurs in practice across a regulatory decision?

A regulated entity may dispute one parameter (such as the equity beta). However, there are a number of parameters used in determining a rate of return. Under the building block model, other components are then used to provide the total revenue requirement and, from this, regulated prices. In fact, price may form only one part of the overall terms and conditions of access. In reality, there will be multiple issues requiring an exercise of judgment. Regulators tends to perform a balancing act – the regulator might give the regulated entity the benefit of the doubt on one issue, but take a tougher approach on another issue.

In *GasNet*, the ACCC spent eight pages of its Statement of Facts, Issues and Contentions itemising areas where it had 'accommodated' GasNet's interests.[229] In fact, the ACCC even went so far as to quantify the net benefits to GasNet from some of these items. The ACCC put forward two arguments. First, that the judgment made by the ACCC when selecting a point within a range is made in the context of the other parameters. Even if the outcome on a discrete issue may be thought to be debateable when viewed in isolation, it may be appropriate when viewed in the context of the other outcomes. Secondly, even if GasNet satisfied the Tribunal that the ACCC had made an error within s 39(2)(a) of the Gas Pipelines Access Law, this is not sufficient,

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225 See National Electricity Rules r 6.12.3(d) and 6A.14.3; Australian Energy Market Commission, *National Electricity Amendment (Economic Regulation of Transmission Services) Rule* 2006 No 18; and Ministerial Council on Energy, *National Electricity (Economic Regulation of Distribution Services) Amendment Rules 2007*.

226 Expert Panel on Energy Access Pricing, *Report to the Ministerial Council on Energy* (April 2006) 78.

227 *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Act 2010* (Cth) (commenced 1 January 2011).

228 See, for example, *Re Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [189]; *Re Optus Mobile Pty Limited & Optus Networks Pty Limited* [2006] ACompT 8 at [15]; *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 at [208]; and *Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3)* [2010] ACompT 11 at [68].

229 Australian Competition and Consumer Commission, 'Statement of Facts, Issues and Contentions', Submission in *Application by GasNet Australia (Operations) Pty Ltd*, Australian Competition Tribunal File No 1 of 2003, 11 June 2003, 227.

by itself, to result in a revision to the tariffs. The Tribunal, however, made no reference to this submission in its reasons.[230]

The ACCC has complained about the ability this creates for a regulated entity to 'cherry pick' through the regulator's decision.[231] However, the Tribunal's approach could potentially also disadvantage the regulated entity. For example, the Tribunal's approach, in determining whether the terms and conditions in a proposed telecommunications access undertaking were 'reasonable', was to apply the statutory criteria to each individual disputed issue, rather than to ask whether the terms and conditions as a whole were reasonable.[232]

230 The Tribunal did refer to a similar (but far less detailed) submission by an intervener but concluded that the errors impacted on actual costs and thus GasNet should be allowed to recover these costs: *GasNet Australia (Operations) Pty Ltd* [2005] ACompT 6 at [62]-[63].

231 See, for example, Mark Pearson, 'Exploring the Latest Issues in Regulation' (Speech delivered at the Regulatory Reform Conference, Melbourne, 12 April 2011).

232 See, for example, the structure of the Tribunal's first review decision on telecommunications undertakings: *Telstra Corporation Ltd* [2006] ACompT4.

8. Details of regulation: Non-price terms and conditions

In most cases, the key issues in dispute relate to revenue or price. However, one significant non-price issue to emerge is the interaction between different forms of regulation within a regime. It is also of interest to see the types of non-price access terms and conditions that are most likely to be a source of dispute.

8.1 Interaction between different forms of regulation within a regime

The national access, telecommunications and gas regimes are (or were) based on a negotiate-arbitrate model. However, a service provider (or a State government) can avoid the risk of arbitration by submitting an access undertaking[233] (or, in the case of a State government, obtaining certification of a State regime as an effective access regime). This in turn raises the question: When is a service the subject of an undertaking (or State access regime[234])?

In 2005, Foxtel lodged a special access undertaking with the ACCC, under Part XIC of the TP Act, relating to the terms and conditions of access to Foxtel's digital set top unit service (DSTUS).[235] The undertaking included a 'tying' clause: Foxtel will only supply the DSTUS to an access seeker where the set top unit (STU) is in use by a Foxtel subscriber.[236] Foxtel contended that the undertaking was in respect of the service not only in relation to end users who are Foxtel subscribers, but also those end users who are currently not Foxtel subscribers. In contrast, Seven Network argued that the ACCC could still potentially arbitrate a dispute about the supply by Foxtel of a DSTUS to non-Foxtel households. The Federal Court (Buchanan J) accepted Seven Network's construction.[237] In effect, a regulated entity, by including a tying clause in its undertaking, limited the scope of the service that it was able to protect from the risk of arbitration.[238]

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233 Under the national gas regime, a 'fully regulated' service provider is required to submit an access arrangement. The telecommunications regime was amended from 1 January 2011 to limit undertakings to 'special access undertakings' (where the service is not declared).

234 This issue has been raised under Part IIIA in respect of the national gas regime. Under Part IIIA, a service cannot be declared if it is the subject of a State access regime. (Similarly, in 2006, Part IIIA was amended to provide that the ACCC could not accept an access undertaking in respect of a service subject to a certified State regime.) Clearly, a covered gas pipeline could not be declared (or the subject of a Part IIIA undertaking). But what about a pipeline that has been determined by the relevant Minister not to be a covered pipeline? Or an extension or expansion to a covered pipeline which is not part of the covered pipeline under the terms of the relevant access arrangement? Or a pipeline that could potentially be regulated under the gas regime? In 2006, Part IIIA was amended to provide some clarification on the scope for declaration in respect of gas pipelines (see CC Act s 44H(6B)).

235 Part XIC provides that a special access undertaking 'may be without limitations or may be subject to such limitations as are specified in the undertaking' (CC Act s 152CBA(5)). The ACCC retains the power to arbitrate matters outside the scope of the limitation.

236 There was also a 'bundling' clause: Foxtel will only supply the DSTUS to an access seeker as a total package and not as one or more component parts (eg STU, Conditional Access Services, EGP Services and Modem Services).

237 *Seven Network v Australian Competition and Consumer Commission* [2007] FCA 1929 and *Seven Network Ltd v Australian Competition & Consumer Commission* [2008] FCA 411 (28 March 2008).

238 My view is that Foxtel's tying clause should have been seen as a term or condition of supply, rather than a limitation to the service definition. It would then be up to the regulator to decide whether or not to accept the undertaking.

8.2 Non-price terms and conditions: Areas of dispute

I am aware of only two cases (as at 3 June 2011) where a review body has had to determine non-price terms and conditions: *Application by Jemena Gas Networks* [2011] ACompT 6 and *Application by Telstra Corporation Limited* [2010] ACompT 1.[239] The issues in dispute covered:

- liability and indemnity clauses;[240]
- security for payments due from the access seeker to the service provider;[241]
- the minimum billing period interval;[242] and
- whether a service provider should require an access seeker to comply with technical standards that are already mandatory under other legislation.[243]

Both decisions briskly dealt with the non-price issues, with most of the analysis focussed on the regulated price.

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239 Non-price terms were also disputed in *Envestra Ltd v Essential Services Commission of South Australia (No 2)* [2007] SADC 90 (27 August 2007). However, this ground of review was abandoned.

240 *Application by Jemena Gas Networks* [2011] ACompT 6 at [57]-[82].

241 *Jemena* at [83]-[108].

242 *Jemena* at [109]-118].

243 *Application by Telstra Corporation Limited* [2010] ACompT 1 at [175]-[177].

9. Details of regulation: Price/revenue

The law firm, DLA Piper, memorably described 2010 as a 'watershed year for regulated WACCs',[244] and observed:[245]

> the Tribunal's review decisions on the AER's estimation of WACC tells us something about its future appetite for engaging with, and finding error in, the original regulator's approach to estimating WACC … .

This in turn raises the following questions: Is this a continuation of a trend over the last fifteen years? Does it also apply to the other components used to derive the regulated revenue or price? And have regulated entities in other infrastructure sectors been similarly successful in using the review process to increase their regulated revenue/price? This section provides an overview of the main cases (as at 3 June 2011) in respect of asset valuation and rate of return.

9.1 Asset valuation

The most contested area (at least in the past) has been asset valuation (rather than the rate of return).[246] Under the 1997 national gas regime, the relevant regulator was required to determine the initial capital base (ICB) for a gas pipeline service provider.[247] The asset value was then automatically rolled forward at the start of each new regulatory period (adjusted for new capital expenditure (capex) and depreciation).[248] There were three challenges to the ICB decision:[249]

- Western Australian Dampier to Bunbury pipeline – where the Supreme Court of Western Australia concluded that the regulator's draft decision erred in adopting an ICB of $1.234 billion (rather than the price paid by the service provider of $2.407 billion);[250]

- Moomba to Adelaide pipeline – where the Tribunal concluded that the ACCC erred in adopting an ICB of $360.4 million (increased to $369.9 million by the Tribunal);[251] and

- Moomba to Sydney pipeline – where the Tribunal concluded that the ACCC erred in adopting an ICB of $545.4 million (increased to $834.66 million by the

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244 Fleur Gibbons, Simon Uthmeyer and Geoff Taperell, DLA Phillips Fox (now DLA Piper), 'Competition & Market Regulation Update: 2010 in Review – A Watershed Year for Regulated WACCs' (December 2010).

245 At 5.

246 This is likely to change now that: the initial capital bases have been resolved under the national gas regime; the national electricity regime has been amended to, as in the gas regime, automatically roll forward the value of the regulatory asset base; and the telecommunications regime has been amended to provide for access determinations and fixed principles.

247 Gas Code s 8.10.

248 Section 8.9.

249 The ICB was also challenged in *Envestra Ltd v Essential Services Commission of South Australia (No 2)* [2007] SADC 90 (27 August 2007). However, the issue in dispute related to the adjustment of the asset value for inflation.

250 *Re Michael; Ex parte Epic Energy (WA) Nominees* [2002] WASCA 231 (23 August 2002).

251 *Application by Epic Energy South Australia Pty Ltd* [2003] ACompT 5 (10 December 2003).

Tribunal).[252] (The Tribunal's decision was set aside by the Full Federal Court,[253] but reinstated by the High Court.[254])

More recently, in *Application by Jemena Gas Networks (NSW) Ltd (No 3)* [2011] ACompT 6, the Tribunal held that the AER erred in categorising mine subsidence expenditure as operating expenditure rather than capital expenditure.[255] The Tribunal did, however, confirm that, where the service provider's actual capital expenditure was less than its estimated expenditure, the AER is able to reduce the opening capital base for the next regulatory period to remove the effect of the rate of return on the difference.[256]

The electricity capital valuation cases are relatively recent (commencing in 2008 when merits review was introduced). In summary, the cases include:

- South Australian transmission network (ElectraNet)[257] and distribution network (ETSA Utilities)[258] – the Tribunal concluded that the AER erred in excluding easement costs, and (in the case of ElectraNet) increased the regulated asset base (RAB) by $36.1 million;

- New South Wales distribution network (EnergyAustralia) – the Tribunal remitted the AER's decision on the control mechanism for public lighting, referring to possible issues with the calculation of the RAB;[259] and

- Queensland distribution network (Ergon Energy) – the Tribunal concluded that the AER had erred in not allowing the proposed cost of certain projects to be included in the capex forecast.[260]

In contrast, under the telecommunications TSLRIC methodology, the hypothetical replacement cost of the asset is recalculated in each decision. In reality, Telstra's proposed TEA model limited the optimisation by assuming the use of existing locations of pillars, manholes and pits. In *Application by Telstra Corporation Limited* [2010] ACompT 1, the Tribunal rejected Telstra's 'argument that the ULLS should be priced on the basis of the up-to-date costs of replacing a historical relic while keeping most of its essential design features and merely updating its equipment'.[261] In contrast to the serries of energy cases, the Tribunal affirmed the ACCC's decision to reject Telstra's ULLS undertaking.

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252 *Application by East Australian Pipeline Limited* [2004] ACompT 8 (8 July 2004).

253 *Australian Competition Consumer Commission v Australian Competition Tribunal* [2006] FCAFC 83 (2 June 2006) and *Australian Competition Consumer Commission v Australian Competition Tribunal (No 2)* [2006] FCAFC 127 (18 August 2006).

254 *East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission* [2007] HCA 44 (27 September 2007).

255 At [41].

256 At [55].

257 *Re: Application by ElectraNet Pty Limited (No 3)* [2008] ACompT 3 (30 September 2008).

258 *Application by ETSA Utilities* [2010] ACompT 5 (13 October 2010).

259 *Application by EnergyAustralia and Others* [2009] ACompT 8 (12 November 2009).

260 *Application by Ergon Energy Corporation Limited (Non-system property capital expenditure) (No 4)* [2010] ACompT 12 (24 December 2010) and *Application by Ergon Energy Corporation Limited (Non-System Property Capex) (No 8)* [2011] ACompT 2 (10 February 2011).

261 At [238].

9.2 Rate of return

As the South Australian District Court observed, the rate of return is 'both complex and difficult to absorb'.[262] The rate of return refers to the dollar earnings achieved on an annual basis from a sustained investment in a project expressed as a percentage relative to the amount of funds committed. In effect, it is the rate required by investors to induce them to fund a business project. Debt and equity are the two main sources of finance to fund a project. The rate of return is commonly determined by the weighted average of the return applicable for each source of funds (the weighted average cost of capital (WACC)).

Investors may invest in risk free securities (such as Government bonds) and will require a certain rate of return (the risk free rate (r_f)). If investors invest in a project with risk, they will require a higher return in compensation – a premium will be added to the risk free rate.

The promised return on debt (r_d) is the risk free rate (r_f) plus a 'debt margin' (DRP or debt risk premium). In reality, the return on debt is negotiated with the lending institution and will be higher if the institution perceives default risk for the business to be relatively high (due to business risk or high borrowing levels, for example). For regulatory purposes, the debt margin is derived from corporate bonds with a certain benchmark credit rating (rather than using the regulated entity's actual credit rating or borrowing cost). The return on debt can be written as: $r_d = r_f + DRP$.

The Capital Asset Pricing Model (CAPM) is commonly used to estimate the expected return on equity required by investors. As in the case of debt, investors in equity require a premium to be added to the risk free rate. This premium for the equity market as a whole (usually represented by the stock market) is the market risk premium (MRP). The MRP is defined as $r_m - r_f$ where r_m is the expected return on the market portfolio and r_f is the risk free rate.

The MRP is essentially the measure of reward for holding a well diversified portfolio of risky assets relative to holding a risk free asset. The MRP only takes into account systematic risk (non-diversifiable) or market wide risk. Such risk cannot be diminished by diversification. It is systemic within the economy as a whole. However, the returns for a particular firm may be more or less uncertain (volatile) than the market average. The sensitivity of this return for a particular firm to the return for the whole market is called the equity beta (β_e) (with the market having an equity beta of one).[263] The CAPM thus specifies the expected return on equity as: $r_e = r_f + \beta_e (r_m - r_f)$.

The WACC formula then weights the expected return on equity (r_e) and the promised return on debt (r_d) according to a benchmark gearing ratio (commonly assumed to be

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262 *Envestra Ltd v Essential Services Commission of South Australia (No 2)* [2007] SADC 90 (27 August 2007) at [42].

263 The equity beta is a measure of the riskiness of the particular asset relative to the riskiness of the diversified portfolio of risky assets. That is, the extent to which a business is vulnerable to systematic risks as compared with the vulnerability of a diversified portfolio of assets to such risks.

60 per cent debt funding (D) and 40 per cent equity funding (E)). The (post-tax) WACC can be written as:

$$\text{WACC} = r_e \left(\frac{E}{D+E} \right) + r_d \left(\frac{D}{D+E} \right)$$

The cost of a firm's capital would be the WACC applied to the total value of debt plus equity (the asset valuation issue discussed in section 10.1 above). If the cost of capital requirement is assessed on a post tax basis (as under the national electricity regime), tax liabilities is another cost that needs to be included in the target revenue in order for the cost of capital requirement to be met.

'Gamma' (or 'γ') refers to the assumed utilisation of imputation credits. The cost of capital of an Australian firm is arguably lower where its investors are taxpaying Australian residents who can redeem franking credits distributed to them.[264] However, under the national electricity regime, the impact of gamma is accounted for by reducing the allowance for corporate income tax.[265] The effect of a higher gamma is to reduce a regulated entity's required revenue. A commonly accepted approach is to define the value of gamma as a product of the imputation credit 'distribution ratio' (F) and the 'utilisation rate' (theta or θ) ($\gamma = F \times \theta$).

This formulaic approach to determining the cost of capital explains the pattern of litigation. By challenging one parameter, a regulated entity can significantly increase its regulated revenue (and thus the prices paid by consumers). In summary, the energy cases where a WACC parameter has been in dispute include:

- Victorian gas transmission pipeline (GasNet) – the Tribunal concluded that the ACCC erred in using 5 year Commonwealth government bonds[266] (which matched the term of the regulatory period) rather than 10 year bonds to derive the risk free rate.[267] As, at this time, interest rates were expected to increase, this meant that the real risk free rate sought by GasNet (3.33%) was higher than the ACCC's rate (3.08%);

- South Australian gas distribution (Envestra) – the SA District Court concluded that the regulator had not erred in setting an equity beta range of 0.8 to 1.0 and a

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264 A company pays tax on its profit. This profit (after tax) is then distributed to shareholders who in turn pay tax on the dividend. However, under the Australian taxation system, the company can attribute the tax that it paid on these dividends to the shareholder (franking credits). If the investor is a tax paying resident, they can use the franking credit to offset their personal tax liability.

265 NER r 6.5.3 and 6A.6.4.

266 A bond is a security issued by a borrower that obligates the borrower to make specified payments to the holder over a specified period. A bond can subsequently be traded in the market, and the interest rate required by the market for such a bond can be deduced. The implied interest rate is the number of dollars earned per dollar invested in the bond per period. The implied interest rate to maturity on bonds issued by the Commonwealth Government is a commonly accepted proxy for the risk free rate in Australia as the Government guarantees the coupon and capital payments.

267 *Application by GasNet Australia (Operations) Pty Ltd* [2003] ACompT 6 (23 December 2003).

debt margin of 124.5 basis points; but had erred in using a gamma range of 0.35 to 0.6 (rather than a range of 0.35 to 0.5);[268]

- Victorian gas distribution (Multinet Gas) – the Essential Services Commission Appeal Panel held that the regulator had not erred in using an equity beta of 0.8 and a gamma of 0.5;[269]

- South Australian (ETSA) and Queensland electricity distributors – the Tribunal concluded that the AER erred in using a gamma of 0.65 rather than a gamma of 0.25 (derived from a distribution ratio of 0.7 and a utilisation rate of 0.35).[270] (Ironically, ETSA, in its regulatory proposal to the AER had proposed a gamma of 0.5.);

- NSW, ACT and Tasmanian electricity distributors – the Tribunal concluded that the AER, in determining the risk free rate, erred in the period over which it averaged the yields of Commonwealth bonds. (The AER had followed the standard practice of using a period close to the start of the regulatory period). However, the Tribunal affirmed the AER's decision to determine the debt risk premium using Bloomberg fair value yields;[271]

- ACT gas distribution (ActewAGL) – the Tribunal concluded that the AER erred in determining the debt risk premium using CBASpectrum fair value yields. (ActewAGL argued for an average of Bloomberg and CBASpectrum).[272] The Tribunal's decision increased ActewAGL's debt risk premium to 3.89 per cent (from 3.35 per cent), resulting in an increase in the rate of return to 10.04 per cent (from 9.72 per cent) and an increase in allowed total revenue by about $5 million to $283.5 million. In effect, the network component of an average residential customer's bill increased by 12 per cent, rather than the 9 per cent approved by the AER, plus CPI.[273]

As Tom Parry commented:[274]

> The regulator and the regulated now use lawyers extensively at all stages of the process. Appeals (on merit) against the regulator's determinations are standard and the regulator has lost some appeals before the Australian Competition Tribunal. These appeals are increasingly about arcane elements of the cost of capital (the angels on pinheads of regulation) that are increasingly accounting for large increases in network charges.

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268 *Envestra Ltd v Essential Services Commission of South Australia (No 2)* [2007] SADC 90 (27 August 2007).

269 *Multinet Gas Distribution Partnership*, Essential Services Commission Appeal Panel (11 Nov 2008).

270 See: *Application by Energex Limited (No 2)* [2010] ACompT 7 (13 October 2010); *Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)* [2010] ACompT 9 (24 December 2010); and *Application by Energex Limited (Gamma) (No 5)* [2011] ACompT 9 (12 May 2011).

271 *Application by EnergyAustralia and Others* [2009] ACompT 8 (12 November 2009) and *Application by EnergyAustralia and Others (No 2)* [2009] ACompT 9 (25 November 2009).

272 *Application by ActewAGL Distribution* [2010] ACompT 4 (17 September 2010).

273 Australian Competition and Consumer Commission, 'Australian Competition Tribunal Makes Decision on AER Access Arrangement for ACT, Queanbeyan and Palerang Gas Distribution Network' (Media release, 20 September 2010).

274 Tom Parry, 'Lawyers' Picnic Drives Up the Cost of Electricity', *The Australian*, 29 June 2011, 14.

How does this compares with review decisions under the telecommunications access regime? As far as I am aware, there have been three cases in which an ACCC decision on a WACC parameter was challenged:[275]

- In a 2007 case, Telstra sought review of the ACCC's decision not to accept Telstra's unconditioned local loop service undertaking. The Tribunal concluded that Telstra's estimate of WACC was not reasonable.[276]

- In a 2009 case, Telstra sought judicial review of arbitration decisions made by the ACCC in relation to the local loop service and unconditioned local loop service. Lindgren J dismissed the applications.[277]

- In a 2010 case, Telstra sought review of the ACCC's decision not to accept Telstra's unconditioned local loop service undertaking. The Tribunal did not accept Telstra's proposed approach to determining the risk free rate and equity beta.[278]

The difference between the regimes can be illustrated by the example of gamma. In telecommunications, the ACCC has traditionally used a gamma of 0.5. Although Telstra sought a gamma of zero, the issue has never been raised in review.[279]

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275 In one case another party challenged a regulated entity's WACC. The argument was rejected by the Tribunal: *Application by Vodafone Network Pty Ltd* [2007] ACompT 1 at [261].

276 *Telstra Corporation Ltd (No 3)* [2007] ACompT 3 at [474].

277 *Telstra Corporation Limited v Australian Competition and Consumer Commission* [2009] FCA 757 (17 July 2009).

278 *Application by Telstra Corporation Limited* [2010] ACompT 1 (10 May 2010).

279 See, for example, *Application by Telstra Corporation Limited* [2010] ACompT 1 at [364].

10. Review process

This section examines how the Tribunal has shaped the review model under which it operates. It summarises the key decisions in which the Tribunal has determined the boundary limits of its jurisdiction, and discusses the role that the Tribunal has played in policy development.

10.1 Limits of the Tribunal's jurisdiction

Since 1995, the ACCC/AER has operated under at least eight different models of merits review. The following table summaries the models, and the key decisions on the limits of the Tribunal's jurisdiction. (The first seven models are ranked according to the extent to which the Tribunal can consider new evidence).

Models	**Regimes**
Model 1: Hearing de novo: Tribunal considers matter afresh and can admit new evidence.	• authorisations & notifications (CC Act Part IX) • national access regime until amended in 2010 (TP Act Part IIIA) • Australia Post bulk mail disputes (review body is the Administrative Appeals Tribunal)[280]
Model 2: Tribunal may: • by written notice, request a person to provide information; • request information / reports / assistance from ACCC/NCC.	• national access regime 2010 amendments (CC Act Part IIIA) As at 30 May 2011: No cases
Model 3: Tribunal may: • seek information to clarify existing information; and • request information / reports / assistance from ACCC.	• merger clearances (CC Act Part IX s 116) As at 30 May 2011: No cases
Model 4: • grounds for review: applicant must establish: error of fact, discretion incorrect, or decision unreasonable; • leave to apply: error must be greater than $5,000,000 or 2% average annual regulated revenue;	• 2006 Ministerial Council on Energy (Review of Decision-Making in the Gas and Electricity Regulatory Frameworks) reflected in 2007 amendments to 2005 National Electricity Law (commenced 1 Jan 2008) and new National Gas Law (commenced 1 July 2008) Cases: See section 10.1.3 below

280 A person may notify the ACCC of a dispute with Australia Post over the price for the delivery of bulk quantities of letters. The ACCC makes a recommendation to the Minister who may issue a direction to Australia Post. The Minister's decision may then be reviewed by the Administrative Appeals Tribunal: *Australian Postal Corporation Act 1989* (Cth) s 32B and *Australian Postal Corporation Regulations 1996* (Cth) Part 3.

• no new evidence or submissions except: - AER may make new submission; - if ground is established: Tribunal may allow new information/material if it would assist and was not unreasonably withheld from the AER.	
Model 5: No new evidence can be admitted but parties may make new submissions. (Tribunal may also request the ACCC to provide information / reports / assistance – but has not been interpreted as allowing new evidence).	• telecommunications access regime until 1 Jan 2011 (as enacted in 1997 and amended in 2002) (TP Act Part XIC) Cases: See section 10.1.1 below
Model 6: No new evidence can be admitted.	• 1997 Gas Pipelines Access Law until replaced in 2008 by the National Gas Law: no new evidence or submissions; grounds of review • 2005 Exports and Infrastructure Taskforce report • 2006 Competition and Infrastructure Reform Agreement cl 2.4(c). However 2007 amendments to the Competition Principles Agreement 1995 cl 6(5)(c): review body: - may request new information where it considers it would be assisted by the introduction of such information; - may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; - should have regard to any regulator policies / guidelines. Cases: See section 10.1.2 below
Model 7: No merits review is available.	• price notifications (CC Act Part VIIA) • telecommunications access regime (CC Act Part XIC) from 1 Jan 2011 • Water Charge (Infrastructure) Rules 2010: Approval or determination of regulated charges of Part 6 operators • 1996 and 2005 national electricity regime (until 1 Jan 2008)[281]

[281] Merits review by the National Electricity Tribunal was available for certain decisions by the National Electricity Code Administrator (NECA) and National Electricity Market Management Company (NEMMCO). The National Electricity Tribunal was dissolved under the new National Electricity Law that commenced on 1 July 2005. Merits review of State regulator decisions was also available under certain State-specific electricity legislation (eg Victorian Essential Services Commission Appeal Panel; and South Australian District Court).

Model 8: Ministerial review[282]	• Australia Post's reserved services[283]

The principal decisions on the Tribunal's jurisdiction are discussed below. Although the 1997 telecommunications and 1997 gas merits review models no longer operate, the cases are included to highlight the convolutions that can arise from jurisdictional limits.

10.1.1 1997 telecommunications access regime (model 5)

From 2002 to 2010, Part XIC provided that the Tribunal could have regard only to:[284]

> (a) any information given, documents produced or evidence given to the Commission in connection with the making of the decision to which the review relates; and
> (b) any other information that was referred to in the Commission's reasons for making the decision to which the review relates.

This in turn raised the question: If a document given to the ACCC cross-referenced another document, could the second document be considered by the Tribunal? And what if that second document cross-referenced a third document (and so on)? To what extent was the ACCC required to track down cross-referenced material during the original decision-making phase, in order to avoid being placed at a disadvantage in the Tribunal proceeding?

In practice, the Tribunal adopted a 'one direct footnote rule'. In *Application by Optus Mobile Pty Ltd* [2006] ACompT 8, Optus sought review of a decision by the ACCC to reject Optus's proposed mobile terminating access service undertaking. In the Tribunal, Optus sought to rely on an article that had not been given to the ACCC. The article was referenced in a footnote in a report that had been given to the ACCC. However, the report cited the article as general background material, rather than as support for a particular argument. On day 8 of the proceedings, Justice Goldberg decided that the article was not admissible:[285]

> I don't consider that … the article … was information given, a document produced or evidence given to the Commission. If it had been referred to in a footnote at a particular page to support a particular proposition the situation might be different, but that is not what has occurred in this case.

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282 Another possible example of Ministerial review is the decision by the Queensland government not to allow State owned electricity distribution businesses to pass on higher revenue allowed by the Tribunal: Queensland Minister for Finance and Arts, The Honourable Rachel Nolan, 'Electricity Regulator's Decision will not Push up Power Prices for Queenslanders' (Media release, 25 May 2011).

283 Australia Post is required to notify the ACCC, under the prices surveillance regime in Part VIIA of the CC Act, of a proposed price increase for its statutory monopoly letter services. A decision by the ACCC to object to the proposed price increase is not binding. However, in relation to 'standard postal articles by ordinary post', the Minister may disapprove the price increase: *Australian Postal Corporation Act 1989* s 33 (although it is possible that the Minister would be required to make a decision before the ACCC process has been completed).

284 See, for example, TP Act s 152CF(4). On the nature of the review under Part XIC, see *Seven Network Limited* [2004] ACompT 10 (23 December 2004).

285 Transcript of Proceedings, *Application by Optus Mobile Pty Ltd and Optus Network Pty Ltd* (Australian Competition Tribunal, No ACT 3 of 2006, Goldberg J, Davey and Shogren, 30 August 2006) 582.

However, as Counsel for Optus pointed out, to what extent were Tribunal members precluded from recalling knowledge of their prior study or experience?[286] Could parties provide the Tribunal with background information? If the Tribunal could consider a recent High Court decision on market power, then why not an economic article on this subject?

10.1.2 1997 national gas regime (model 6)

In contrast to the 1997 telecommunications access regime, section 39(2)(a) of the 1997 Gas Pipelines Access Law required an applicant to establish:[287]

> (i) … an error in the relevant Regulator's findings of facts; or
> (ii) that the exercise of the relevant Regulator's discretion was incorrect or was unreasonable having regard to all the circumstances; or
> (iii) that the occasion for exercising the discretion did not arise.

The Tribunal was essentially limited to the material before the original decision-maker.[288] However, in addition, the Tribunal was not permitted to consider 'any matter not raised in submissions before the decision was made'.[289]

In *Application by the Epic Energy South Australia Pty Ltd* [2002] ACompT 4, Epic Energy sought review of the ACCC's decision to draft and approve an access arrangement for Epic Energy's Moomba to Adelaide gas pipeline. The Tribunal concluded (at [20]) that the power of review 'although involving a re-hearing on the merits, ought to be construed as one to be exercised for the correction of error'. For the purposes of section 39(2)(a)(ii), error is made out if it is demonstrated that (at [30]):

- 'the exercise of the discretion was so unreasonable on the basis of the matters available to the decision maker that no reasonable decision maker could ever come to it' (Wednesbury test); or
- 'the decision is so far outside the range of decisions open to a reasonable decision maker that it bespeaks of error even though the particular error cannot be identified (House v The King test).

However, a denial of procedural fairness could not establish unreasonableness for the purposes of s 39(2)(a)(ii) (see [29]) (although the Tribunal reached a different view in subsequent cases)[290].

In respect of the 'no new submissions' limit, the Tribunal stated (at [24]):[291]

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286 This issue was also raised in *Application by Chime Communications Pty Ltd (No 2)* [2009] ACompT 2 at [11].

287 Gas Pipelines Access (South Australia) Law s 39(2)(a).

288 Gas Pipelines Access (South Australia) Law s 39(5).

289 Gas Pipelines Access (South Australia) Law ss 39(2)(b) & (5)(a).

290 See *Application by Energy Australia* [2009] ACompT 8 at [316] and *Application by Energex Ltd (No 2)* [2010] ACompT 7 at [34].

291 See also *Envestra Ltd v Essential Services Commission of SA* [2007] SADC 28 (16 March 2007) and *Envestra Ltd v District Court of South Australia* [2007] SASC 177 (18 May 2007).

> If any matter, whether by way of argument or evidentiary material, cannot be identified as broadly arising out of a matter fairly raised in submissions to the relevant Regulator before the decision under review was made, it will not be permitted to be raised in the review. That is not to say that a reformulation of an argument or contention previously put to the relevant Regulator on material which was before it before the decision was made would be excluded.

10.1.3 2008 energy regime (model 4)

The grounds of review in the current electricity and gas regimes are similar to the 1997 gas regime. An applicant must establish one or more of the following grounds:[292]

> (a) the AER made an error of fact in its findings of facts, and that error of fact was material to the making of the decision;
> (b) the AER made more than 1 error of fact in its findings of facts, and that those errors of fact, in combination, were material to the making of the decision;
> (c) the exercise of the AER's discretion was incorrect, having regard to all the circumstances;
> (d) the AER's decision was unreasonable, having regard to all the circumstances.

The key differences are the ability for the Tribunal to allow new evidence once a ground for review has been established (see section 10.2 below) and the requirement for an applicant to seek leave to apply. Where the ground for review is related to the amount of revenue, the applicant must show, amongst other things, that: 'the amount that is specified in or derived from the decision exceeds the lesser of $5 000 000 or 2% of the average annual regulated revenue'.[293]

Does this mean that the revenue which might flow from each particular issue must satisfy this threshold? Or is it sufficient if the aggregated revenue satisfies the threshold? In *Application by Energex Ltd (No 4)* [2011] ACompT 4 at [52], the Tribunal concluded that the aggregated effect of all the alleged errors must be taken into account. In *Application by Jemena Gas Networks (NSW) Ltd (No 2)* [2011] ACompT 5 at [6], the Tribunal expressed the opinion that only revenue which will be earned in the revenue period to which the determination relates can be included when deciding whether the financial threshold has been met.

10.2 Merits review policy: Tribunal's role

A restriction on the evidence that can be considered by the Tribunal has been seen by some policy makers as the 'magic bullet' that allows merits review to be retained whilst reducing cost, delay and the incentive to withhold information from the original decision-maker. However, the current energy merits review model (enacted in 2007 and 2008) and national access regime model (enacted in 2010) depart from the strict 'no new evidence' models. This was in part due to the influence of the Tribunal.

The first case in which the Tribunal expressed concern with the 'no new evidence' rule was *Seven Network Limited (No 4)* [2004] ACompT 11 (Goldberg J, Latta and Round). The ACCC had granted an exemption, under Part XIC of the TP Act, to Telstra from the SAOs in relation to the carriage of digital pay TV services. One issue was whether Telstra was less likely to undertake the investment without the

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[292] National Electricity Law s 71C; National Gas Law s 246.
[293] National Electricity Law s 71F; National Gas Law s 249.

exemption. In fact, the investment occurred during the course of the Tribunal proceeding. The Tribunal concluded that it was not permitted to have regard to this information, but noted (at [146]): 'Lay people in the community may regard such an approach … as being one where the Tribunal has proceeded blindfolded'.

In *Application by East Australian Pipeline Limited* [2005] ACompT 3, the Tribunal found that the ACCC, under the 1997 gas regime, had used the wrong methodology in determining the initial capital base for a gas pipeline, and that a new approach (not advocated by either party) should be used. The Tribunal then rejected further material on how the new methodology should be applied. In response to this decision, the current energy merits review model allows new evidence to be admitted once a ground of review has been established.

The Tribunal's concerns were even more strongly expressed in *Application by Chime Communications Pty Ltd* [2008] ACompT 4 (Finkelstein J, Davey and Round). Telstra had applied to the ACCC, under Part XIC of the TP Act, to be exempt from access obligations in 387 exchanges in relation to the supply of the local call service and the wholesale line rental service. The ACCC had, in part, granted the exemptions. Chime applied to the Tribunal for review. The Tribunal stated (at [39]) that the 'no new evidence' limitation 'has the potential of imposing significant limitations upon the Tribunal's capacity to adequately resolve a dispute in the most analytically-appropriate contemporaneous sense'.

Most recently, in 2010, Justice Finkelstein appeared before the Senate Economics Legislation Committee in its inquiry on a bill to amend the national access regime. The Bill proposed to introduce the 'mergers clearance' model into Part IIIA of the TP Act (that is, no new evidence although the Tribunal could require the NCC/ACCC to provide new information).[294] His Honour argued that the Bill should provide the Tribunal with a power to obtain any further information that the Tribunal considers material to the review.[295] The Coalition supported his Honour's proposal.[296] As a consequence, the amendments enacted in 2010 allow the Tribunal to require any person to provide new information.[297]

The question of whether merits review should be retained and, if so, in what form, is open to debate. Rather, the point to be drawn from this section is that, in assessing how the Tribunal has shaped utility regulation in Australia, the role of the Tribunal in policy development should be recognised.

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294 See the Trade Practices Amendment (National Access Regime) Bill 2005 (Cth) as introduced into the House of Representatives on 2 June 2005: Commonwealth, *Parliamentary Debates*, House of Representatives, 2 June 2005, 1 (Christopher Pearce, Parliamentary Secretary to the Treasurer).

295 Evidence given to Senate Economics Legislation Committee, Parliament of Australia, Canberra, 5 February 2010, 30 (Justice Finkelstein).

296 Senate Economics Legislation Committee, Parliament of Australia, *Trade Practices Amendment (Infrastructure Access) Bill 2009* (March 2010) 31 (Additional comments by Coalition senators).

297 See Commonwealth, *Parliamentary Debates*, House of Representatives, 24 June 2010, 6576 (Richard Marles, Parliamentary Secretary for Innovation and Industry).

Conclusion

Although it is not within the scope of this conference session, it would be interesting to compare the impact of decisions of Australian review bodies with those in other countries. In the United Kingdom, for example, the Office of the Gas and Electricity Markets (Ofgem) sets five year price controls on energy transportation businesses. Under the *Electricity Act 1989* (UK), a party may request Ofgem to make a reference to the Competition Commission.[298] Despite a 2010 guide on the reference process,[299] there have been no review decisions.[300]

In contrast, in the United States, the courts appear to have driven rate of return regulation. The legality of decisions of the energy regulator, the Federal Energy Regulatory Commission (FERC) (the successor to the Federal Power Commission), is reviewed by the Court of Appeals.[301] In *Federal Power Commission v Hope Natural Gas*, 320 US 591 (1944), the US Supreme Court, in a challenge to a rate order, held that a utility's revenues should be sufficient to cover operating expenses and the capital cost of the business, with the return to the equity owner commensurate with returns on investment in other businesses with corresponding risks.[302]

Australian review bodies (in particular, the Tribunal) have similarly had a significant impact on the practice of utility regulation in Australia (although not to the extent of prescribing an entire pricing methodology). Whether this is desirable or not is a separate question. This paper is not an assessment of the value (or otherwise) that review mechanisms add to the regulatory process. Nor does it consider how the mere existence of merits review (and the form of that review) may alter the behaviour of regime participants, and the outcomes obtained under the regime. That is a topic for another regulatory conference.

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298 Section 12.

299 Office of Gas and Electricity Markets, United Kingdom, *A Guide to Price Control Modification References to the Competition Commission - Licensee and Third Party Triggered References* (4 October 2010).

300 The only related review appears to have been in 1996-1997 when a decision by Ofgas (replaced by Ofgem in 2000) was referred to the Monopolies and Mergers Commission (replaced by the Competition Commission in 1999). The reference was made by Ofgas after British Gas rejected Ofgas' proposal for a new price control. British Gas reportedly ended up with a worse result than the initial regulator's decision. The Commission recommended an initial cut in charges of 21% (Ofgas had requested 20%) and a further adjustment of RPI-2% for the subsequent years of the control period (equivalent to Ofgas' proposal of RPI-2.5% when revised volume forecasts are taken into account): see http://www.prnewswire.co.uk/cgi/news/release?id=57926 (accessed 3 June 2011); Monopolies and Mergers Commission, *BG plc: A Report under the Gas Act 1986 on the Restriction of Prices for Gas Transportation and Storage Services* (May 1997).

301 However, there is an extensive review process within FERC conducted by a FERC Administrative Law Judge.

302 At 603.

Appendix: Economic Regulation: List of Cases (as at 3 June 2011)

1. Communications

1.1 CC Act Part XIB

Title	Citation	Summary
Australian Competition & Consumer Commission v Telstra Corp Ltd	[2000] FCA 28 (14 January 2000)	Commercial churn – use, in FOI proceeding, of statements filed in Fed Crt proceeding
Telstra Australia Limited and Australian Competition and Consumer Commission	[2000] AATA 71 (7 February 2000)	Commercial churn – FOI request
Telstra Corporation Limited v Australian Competition and Consumer Commission	[2006] FCA 737 (14 June 2006)	JR – PSTN - HomeLine Part and Home Access - discovery
Telstra Corporation Limited v Australian Competition and Consumer Commission (No 2)	[2007] FCA 493 (5 April 2007)	JR - PSTN - HomeLine Part and Home Access – competition notice set aside
Telstra Corporation Limited v Australian Competition & Consumer Commission (No 3)	[2007] FCA 1905 (12 December 2007)	JR - PSTN - HomeLine Part and Home Access – competition notice set aside – ACCC sought to argue a further point (AI Act s 46) – leave not granted – AIA s 46 does not apply – orders made
Australian Competition and Consumer Commission v Telstra Corporation Limited	[2010] FCA 790 (28 July 2010)	TP Act Pt XIB & XIC & Telco Act – Telstra's SAOs for ULLS and LSS – denial of access to seven metropolitan exchanges on basis no capacity – Telstra admitted contravention of Pt XIC – ACCC argued $40m – Telstra argued $3-5m – court imposed $18.55m penalty

1.2 CC Act Part XIC

Pricing principles

Title	Citation	Summary
Vodafone Australia Limited v Australian Competition Consumer Commission	[2005] FCA 1294 (16 September 2005)	JR – MTAS pricing principles

Undertakings

Title	Citation	Summary
Telstra Corporation Limited	[2006] ACompT 4 (2 June 2006)	LSS AU
Application by Optus Mobile Pty Limited & Optus Networks Pty Limited	[2006] ACompT 8 (22 November 2006)	MTAS AU
Application by Vodafone Network Pty	[2007] ACompT 1 (11 January 2007)	MTAS AU

Ltd & Vodafone Australia Limited		
Telstra Corporation Ltd (No 1)	[2006] ACompT 7 (14 November 2006)	ULLS AU - document index
Telstra Corporation Ltd (No 2)	[2006] ACompT 10 (4 December 2006)	ULLS AU - documents - conf
Telstra Corporation Ltd (No 3)	[2007] ACompT 3 (17 May 2007)	ULLS AU
Seven Network v Australian Competition and Consumer Commission	[2007] FCA 1929 (12 December 2007)	Foxtel SAU – would only apply service if customer using Foxtel digital set top unit – ACCC accepted SAU – FC declared clauses are a limitation – but ACCC decision valid
Seven Network Ltd v Australian Competition & Consumer Commission	[2008] FCA 411 (28 March 2008)	Foxtel SAU – orders
Application by Telstra Corporation Limited	[2010] ACompT 1 (10 May 2010)	ACCC rejected Telstra 2008 ULLS AU - Tribunal affirmed decision

Arbitrations

Title	**Citation**	**Summary**
Telstra Corporation Ltd	[2001] ACompT 1 (21 February 2001)	PSTN – application to intervene
Telstra Corporation Ltd	[2001] ACompT 4 (7 December 2001)	PSTN – ruling on retrospective determination
Telstra Corporation Limited	[2002] FCA 108 (15 February 2002)	PSTN – retrospective determination – Telstra application to restrain Tribunal – motion to expedite
Telstra Corporation Ltd v Australian Competition & Consumer Commission	[2008] FCA 1436 (19 September 2008)	LSS – ASs: Chime, Primus & Request – AP: Telstra – ACCC final arbitration determinations – Telstra ADJR – ACCC decision upheld except for backdating provision
Telstra Corporation Ltd v Australian Competition & Consumer Commission (No 2)	[2008] FCA 1640 (7 November 2008)	LSS arbitration determinations - orders
Telstra Corporation Ltd v ACCC	[2008] FCA 1758 (24 November 2008)	ULLS in multi-dwelling units – AS: Optus – AP: Telstra – final arbitration determination set aside
Australian Competition and Consumer Commission v Telstra Corporation Limited	[2009] FCAFC 68 (5 June 2009)	ULLS in multi-dwelling units – ACCC appeal re obligation to determine comprehensive model terms and conditions – appeal allowed
Telstra Corporation Limited v Australian Competition and Consumer Commission	[2009] FCA 757 (17 July 2009)	ULLS and LSS arbitration determinations – 14 applications (lead: Primus) – ACCC decisions upheld

Deeming / declaration / arbitration

Title	Citation	Summary
Seven Cable Television Pty Ltd v Telstra Corp Ltd	[2000] FCA 378 (14 March 2000)	Pay TV – Telstra amend pleadings (costs)
Seven Cable Television Pty Ltd v Telstra Corp Ltd	[2000] FCA 350 (27 March 2000)	Pay TV - contractual rights single judge
Foxtel Management Pty Ltd v Australian Competition Consumer Commission	[2000] FCA 589 (8 May 2000)	Pay TV deeming & declaration & CSP - single judge
Seven Cable Television Pty Ltd v Telstra Corp Ltd	[2000] FCA 650 (17 May 2000)	Pay TV – Telstra amend pleadings (costs)
Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd	[2000] FCA 1159 (18 August 2000)	Pay TV contractual rights - Full FC
Telstra Corporation Ltd v Seven Cable Television Pty Ltd	[2000] FCA 1160 (18 August 2000)	Pay TV deeming & declaration - Full FC
Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd	[2000] FCA 1161 (18 August 2000)	Pay TV carriage service provider - Full FC
Foxtel Management Pty Ltd v Seven Cable Television Pty Ltd	[2000] FCA 1399 (5 October 2000)	Pay TV PCR – Full FC dismissed Foxtel notice of motion
Foxtel Management Pty Limited v Australian Competition & Consumer Commission	S227/2000 (10 August 2001)	Pay TV deeming & declaration – HC tpt – Foxtel refused special leave to appeal from Full FC decision

Exemptions

Title	Citation	Summary
Seven Network Limited (No 1)	[2004] ACompT 5 (15 April 2004)	Pay TV - bias – Tribunal member
Seven Network Limited (No 2)	[2004] ACompT 6 (15 April 2004)	Pay TV - bias – Tribunal member
Seven Network Limited	[2004] ACompT 10 (23 December 2004)	Pay TV - nature of review
Seven Network Limited (No 4)	[2004] ACompT 11 (23 December 2004)	Pay TV exemption set aside
Application by Chime Communications Pty Ltd	[2008] ACompT 4 (22 December 2008)	Local Call Service and Wholesale Line Rental Service – Telstra exemption in 387 exchanges – ACCC granted exemptions subject to conditions – Tribunal set aside ACCC decision
Telstra Corporation Limited v Australian Competition Tribunal	[2009] FCAFC 23 (11 March 2009)	LCS and WLRS exemption – Telstra application for judicial review – Tribunal decision set aside
Telstra Corporation Limited v Australian Competition Tribunal (No 2)	[2009] FCAFC 34 (20 March 2009)	LCS and WLRS – costs
Application by Telstra Corporation Limited	[2009] ACompT 1 (22 May 2009)	Telstra exemption re Singtel Optus HFC network – ACCC refused exemption – Tribunal affirmed decision

Application by Chime Communications Pty Ltd (No 2)	[2009] ACompT 2 (27 May 2009)	LCS and WLRS exemption – Telstra application for judicial review – remitted to Tribunal – Tribunal granted exemption subject to conditions
Application by Chime Communications Pty Ltd (No 3)	[2009] ACompT 4 (24 August 2009)	LCS and WLRS exemption – orders
Application by AAPT Limited	[2009] ACompT 5 (24 August 2009)	Telstra exemption re PSTN OA (same exchanges covered by WLR/LCS exemptions, plus CBD exchanges) – ACCC granted exemptions subject to conditions – Tribunal affirmed ACCC CBD decision & granted metropolitan exemption subject to same conditions as for WLR/LCS
Application by AAPT Limited (No 2)	[2009] ACompT 6 (9 September 2009)	PSTN OA exemption - orders

Standard access obligations

Title	Citation	Summary
Telstra Corporation Limited v The Commonwealth	[2008] HCA 7 (6 March 2008)	Telstra PSTN ULLS and LSS – s 152AR acquisition of property on unjust terms

2. National Gas Regime

Access arrangements

Title	Citation	Summary
DEI Queensland Pipeline Pty Ltd v Australian Competition & Consumer Commission	[2002] ACompT 2 (10 May 2002)	Wallumbilla to Rockhampton – Qld derogation - review triggers
Southern Cross Pipelines Australia Pty Ltd v WA Independent Gas Pipelines Access Regulator	[2002] WASC 149 (12 June 2002)	WA Dampier to Bunbury – application to be joined
Re Michael; Ex parte Epic Energy (WA) Nominees	[2002] WASCA 231 (23 August 2002)	WA Dampier to Bunbury – WA regulator draft decision on AA
WMC Resources v Southern Cross Pipelines Australia Pty Ltd	[2002] WASCA 308 (21 November 2002)	WA Dampier to Bunbury – appeal – application to be joined
Epic Energy (WA) Nominees v WA Independent Gas Pipelines Access Regulator	[2003] WASC 156 (15 August 2003)	WA Dampier to Bunbury – funding / cost recovery
Re Michael; Exp Parte WMC Resources Ltd	[2003] WASCA 288 (2 December 2003)	WA Dampier to Bunbury – taking into account a State agreement
Application by Epic Energy South Australia Pty Ltd	[2002] ACompT 4 (27 November 2002)	MAPS – scope of review
Application by Epic Energy South Australia Pty Ltd	[2003] ACompT 5 (10 December 2003)	MAPS – ACCC decision set aside
Application by GasNet	[2003] ACompT 6	Vic gas transmission – risk free rate & inflation

Australia (Operations) Pty Ltd	(23 December 2003)	
Application by East Australian Pipeline Limited	[2004] ACompT 8 (8 July 2004)	Moomba to Sydney – ACCC decision set aside
Application by East Australian Pipeline Limited	[2005] ACompT 1 (18 March 2005)	MSP – further orders
Application by East Australian Pipeline Limited	[2005] ACompT 3 (3 May 2005)	MSP – further orders
Australian Competition Consumer Commission v Australian Competition Tribunal	[2006] FCAFC 83 (2 June 2006)	MSP – ACCC appeal
Australian Competition Consumer Commission v Australian Competition Tribunal (No 2)	[2006] FCAFC 127 (18 August 2006)	MSP – ACCC appeal – further reasons
East Australian Pipeline Limited v ACCC	[2007] HCATrans 62 (9 February 2007)	MSP - HC tpt – EAPL granted special leave to appeal
East Australian Pipeline Pty Limited v ACCC	[2007] HCATrans 125 (17 April 2007) [2007] HCATrans 141 (18 April 2007)	MSP - HC tpt hearing
Alinta Asset Management Pty Ltd v Essential Services Commission	[2007] VSC 32 (26 February 2007)	Vic Multinet distribution system - ESC asserts Alinta is a service provider – Multinet application to be joined
Envestra Ltd v Essential Services Commission of SA	[2007] SADC 28 (16 March 2007)	SA gas distribution AA – scope of review
Envestra Ltd v District Court of South Australia	[2007] SASC 177 (18 May 2007)	SA distribution - scope of review - appeal
Envestra Ltd v Essential Services Commission of South Australia (No 2)	[2007] SADC 90 (27 August 2007)	SA distribution – rate of return, ICB, network management fee, payment terms, environmental management costs – ESCSA decision set aside
East Australian Pipeline Pty Limited v Australian Competition and Consumer Commission	[2007] HCA 44 (27 September 2007)	Moomba to Sydney pipeline – Appeal by EAPL from FCFC decision setting aside Tribunal decision on the ICB – Appeal allowed
Alinta Asset Management Pty Ltd	Essential Services Commission Appeal Panel 17 October 2007	Vic gas distribution – appeal from ESC notice to produce – appeal allowed
Multinet Gas Distribution Partnership	Essential Services Commission Appeal Panel 11 Nov 2008	Vis gas distributor – ESC approved own AA – DNSP applied for review – cost of capital / taxation and opex – appeal dismissed
SPI Networks (Gas) Pty Ltd	Essential Services Commission Appeal Panel 11 Nov 2008	Vis gas distributor – ESC approved own AA – DNSP applied for review – cost of capital / taxation and unaccounted for gas – appeal dismissed
The Albury Gas Company Ltd (EnvestraAlbury)	Essential Services Commission Appeal Panel 11 Nov 2008	Vis gas distributor – ESC approved own AA – DNSP applied for review – cost of capital / taxation, network management fee, opex, efficiency

		carry over mechanism – network management & efficiency carry over mechanism grounds upheld
Vic Gas Distribution Pty Ltd (Envestra)	Essential Services Commission Appeal Panel 11 Nov 2008	Vis gas distributor – ESC approved own AA – DNSP applied for review – cost of capital / taxation, network management fee and opex – network management fee ground upheld
Application by ActewAGL Distribution	[2010] ACompT 4 (17 September 2010)	ActewAGL's ACT, Queanbeyan and Palerang gas distribution network - AER final decision AA – debt risk premium – AER used CBASpectrum – ActewAGL wanted an average of CBA & Bloomberg – AER decision varied
Application by Jemena Gas Networks	[2010] ACompT8 (13 October 2010)	NSW distribution – AER final decision AA (2010-15) – leave granted to JGN and interveners
Application by Jemena Gas Networks (NSW) Ltd (No 2)	[2011] ACompT 5 (11 February 2011)	NSW distribution – AER final decision AA (2010-15) – leave granted to JGN in respect of 'capital expenditure mine subsidence ground' – sufficient that, in aggregate, grounds of review meet financial threshold
Application by Jemena Gas Networks (NSW) Ltd (No 3)	[2011] ACompT 6 (25 February 2011)	NSW distribution – AER final decision AA (2010-15): – capital base: mine subsidence(AER error – capex, not opex) – capital base: adjust for difference between estimated capital exp & actual (no error) – terms: liability & indemnity clauses; security for payment & minimum billing period intervals (no error) Remaining issues: debt risk premium & gamma
Application by Jemena Gas Networks (NSW) Ltd (No 4)	[2011] ACompT 8 (29 April 2011)	NSW distribution – AER final decision AA (2010-15) – Tribunal can only make one determination on an application

Coverage

Title	**Citation**	**Summary**
Duke Eastern Gas Pipeline Pty Ltd	[2001] ACompT 2 (4 May 2001)	Set aside Minister's decision to cover Vic-NSW pipeline
Duke Eastern Gas Pipeline Pty Ltd	[2001] ACompT 3 (4 July 2001)	Costs
Application By Orica IC Assets Ltd & Ors Re Moomba To Sydney Gas Pipeline System	[2004] ACompT 1 (12 February 2004)	MSP part revocation – scope of proceedings
Application By Orica Ic Assets Ltd & Ors Re Moomba To Sydney Gas Pipeline System	[2004] ACompT 2 (4 March 2004)	MSP part revocation – application to intervene

Other gas decisions

Title	**Citation**	**Summary**
AGL Victoria Pty Ltd v TXU Networks (Gas) Pty Ltd	[2004] VSC 225 (2 July 2004)	AGL challenged Victorian Energy Networks Corporation (VENCorp) determination of the reconciliation amount for unaccounted gas for the TXU distribution system – held the under the MSO Rules and Connection Deed the calculation could not be challenged (as it was an expert determination)

Alinta Asset Management Pty Ltd v Essential Services Commission	[2007] VSC 32 (26 February 2007)	Whether Alinta an operator under National Gas Code – joinder application
Alinta Asset Management Pty Ltd v Essential Services Commission (No 2)	[2007] VSC 210 (22 August 2007)	Held Alinta an operator under National Gas Code
Alinta Asset Management Pty Ltd v Essential Services Commission (No 3)	[2007] VSC 353 (21 September 2007	Alinta an operator under National Gas Code – orders
Alinta Asset Management P/L v Essential Services Commission	[2008] VSCA 273 (18 December 2008	Whether Alinta an operator under National Gas Code – appeal by Alinta - dismissed
Multinet Gas (DB No 1) Pty Ltd Anor v Alinta Asset Management Pty Ltd Anor	[2009] VSC 18 (10 February 2009)	Whether Alinta a related party of Multinet – Vic ESC guideline requiring a licensed distribution company to provide actual costs incurred by a related party in providing services to distribution business – held was a related party & required to prepare regulatory accounting statements
United Energy Distribution Pty Ltd v Alinta Asset Management Pty Ltd Anor	[2009] VSC 19 (10 February 2009)	Whether Alinta a related party of United Energy – held was a related party & required to prepare regulatory accounting statements
Multinet Gas (DB No 1) Pty Ltd Anor v Alinta Asset Management Pty Ltd Anor (No 2)	[2009] VSC 80 (13 March 2009)	Orders
United Energy Distribution Pty Ltd v Alinta Asset Management Pty Ltd Anor (No 2)	[2009] VSC 81 (13 March 2009)	Orders
TruEnergy Pty Ltd v Dispute Resolution Panel (appointed under Chapter 7 of the Victorian Gas Industry Market and System Operations Rules)	[2009] VSC 581 (10 December 2009)	Judicial review – gas industry market rules – dispute resolution panel – no error of law by dispute resolution panel – application dismissed.
Truenergy Pty Ltd v Dispute Resolution Panel & Ors (No 2)	[2009] VSC 612 (18 December 2009)	Costs

Note: This list may not include all State/Territory review decisions under the first national gas regime. The State appeals bodies were: Queensland Gas Appeals Tribunal; District Court (South Australia); Essential Services Commission Appeals Panel (Victoria); and Western Australian Gas Review Board.

For ESC Appeal Panel decisions: see http://www.legalonline.vic.gov.au/wps/wcm/connect/Legalonline/Home/Legal+System/Essential+Services+Commission/

3. National Electricity Regime

Economic regulation

Title	Citation	Summary
Application for Review of a NEMMCO Determination on the SNI Interconnector dated 6 December 2001	National Electricity Tribunal Application No 1 of 2001 (31 October 2002)	SNI - Tribunal dismissed application for review of NEMMCO's decision that TransGrid's proposed interconnector was justified
Murraylink Transmission Company Pty Ltd v National Electricity Market Management Company Ltd	[2003] VSC 51 (25 February 2003)	SNI - appeal from Tribunal's decision – joinder of parties
Murraylink Transmission Company Pty Ltd v National Electricity Market Management Company Ltd	[2003] VSC 265 (24 July 2003)	SNI - set aside Tribunal's decision
Alinta Network Services Pty Ltd	Essential Services Commission Appeal Panel 12 September 2005	Vic elec distribution – appeal from ESC notice to produce – appeal allowed
United Energy Distribution Pty Ltd	Essential Services Commission Appeal Panel 17 February 2006	Vic elec distribution – appeal from ESC determination –operating expenditure - appeal dismissed
Powercorp Australia Ltd	Essential Services Commission Appeal Panel 17 February 2006	Vic elec distribution – appeal from ESC determination –operating expenditure – succeeded on one ground
Citipower Pty	Essential Services Commission Appeal Panel 17 February 2006	Vic elec distribution – appeal from ESC determination – operating expenditure for clearing vegetation – appeal dismissed
SPI Electricity Pty Ltd	Essential Services Commission Appeal Panel 17 February 2006	Vic elec distribution – appeal from ESC determination – momentary average interruption frequency targets – appeal allowed
Re: Application by ElectraNet Pty Ltd	[2008] ACompT 1 (23 June 2008)	AER electricity determination – SA TNSP – application for leave to apply for review
Re: Application by ElectraNet Pty Limited (No 2)	[2008] ACompT 2 (28 July 2008)	AER electricity determination – SA TNSP – application by Energy Consumers Coalition for leave to intervene
Re: Application by ElectraNet Pty Limited (No 3)	[2008] ACompT 3 (30 September 2008)	AER electricity determination – SA TNSP – RAB – varied ACCC decision
Application by Energy Users' Association of Australia	[2009] ACompT 3 (18 June 2009)	AER electricity determination – ACT/NSW/Tas distribution & transmission – application by Energy Users' Association to intervene - refused
Application by EnergyAustralia	[2009] ACompT 7 (16 October 2009)	AER electricity determination – ACT/NSW/Tas distribution & transmission – EnergyAustralia public lighting control mechanism
Application by EnergyAustralia and Others	[2009] ACompT 8 (12 November 2009)	AER electricity determination – ACT/NSW/Tas distribution & transmission – AER decisions varied & remitted to AER – issues: averaging

		period (risk free rate and debt risk premium); Bloomberg (debt risk premium); inflation forecasts; operating expenses; pass through; public lighting; defect maintenance
Application by EnergyAustralia and Others (No 2)	[2009] ACompT 9 (25 November 2009)	AER electricity determination – ACT/NSW/Tas distribution & transmission – orders
Application by United Energy Distribution Pty Ltd	[2009] ACompT10 (23 December 2009)	Vic govt introduced smart meters – part of DNSP charges (management fees) rejected by AER – Tribunal varied decision Vic ESC Act 2001 limits grounds of review
Application by Jemena Electricity Networks (Vic) for Federal Court review of AER smart meter decision	Hearing: 21 December 2009	Vic govt introduced smart meters – part of DNSP charges (management fees) rejected by AER – uncertain whether Tribunal had jurisdiction so JEN also sought review under s 39B – following Tribunal's decision of 18 January 2010, on 20 January 2010, orders were sought by consent to discontinue the judicial review application
In the matter of Energex Limited	[2010] ACompT 3 (24 August 2010	Qld & SA electricity distribution networks (Energex, Ergon Energy and ETSA Utilities) – AER determinations – application to intervene by EnergyAustralia – refused
Application by ETSA Utilities	[2010] ACompT 5 (13 October 2010)	SA AER determination (6 May 2010) – opening regulatory asset base in respect of easements – AER erred – Tribunal sought report
Application by Ergon Energy Corporation Limited	[2010] ACompT 6 (13 October 2010)	Qld Ergon AER determination (6 May 2010) – alternative control services – quoted services – AER formula – excluded component for one-off costs – AER error of fact – Tribunal sought report
Application by Energex Limited (No 2)	[2010] ACompT 7 (13 October 2010)	Qld & SA AER determinations (6 May 2010) – imputation credits (gamma) – AER erred – Tribunal sought report
Application by Energex Limited (Distribution Ratio (Gamma)) (No 3)	[2010] ACompT 9 (24 December 2010)	Qld & SA AER determinations (6 May 2010) – imputation credits (gamma) – AER erred – Tribunal sought report - Tribunal determined distribution ratio of 0.7 for gamma
Application by Ergon Energy Corporation Limited (Customer Service Costs) (No 2)	[2010] ACompT 10 (24 December 2010)	Qld Ergon AER determination (6 May 2010) – forecast customer service costs allocated to standard control services – Tribunal affirmed AER decision
Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 3)	[2010] ACompT 11 (24 December 2010)	Qld Ergon AER determination (6 May 2010) – AER rejected Ergon's proposal to base its labour cost escalators on rates specified in a 2008-2011 Union Collective Agreement – Tribunal affirmed AER decision
Application by Ergon Energy Corporation Limited (Non-system property capital expenditure) (No 4)	[2010] ACompT 12 (24 December 2010)	Qld Ergon AER determination (6 May 2010) – AER excluded any allowance for non-system property expenditure for Townsville and Rockhampton projects – AER conceded error in discretion – Tribunal sought submission from AER
Application by Ergon Energy Corporation Limited (Service Target Performance Incentive Scheme) (No 5)	[2010] ACompT 13 (24 December 2010)	Qld Ergon AER determination (6 May 2010) – AER set the national distribution STPIS targets for Ergon Energy 10% lower than its minimum service standards under the Queensland Electricity Industry Code – Tribunal affirmed AER decision
Application by Ergon Energy Corporation Limited (Street Lighting Services) (No 6)	[2010] ACompT 14 (24 December 2010)	Qld Ergon AER determination (6 May 2010) – AER classified street lighting services as alternative control services – no submissions received – Ergon could not challenge

Application by Ergon Energy Corporation Limited (Other Costs) (No 7)	[2011] ACompT 1 (10 February 2011)	Qld Ergon AER determination (6 May 2010) – alternative control services – quoted services – AER formula – excluded component for one-off costs – AER error of fact – Tribunal sought report – Tribunal agreed to variation proposed by parties
Application by Ergon Energy Corporation Limited (Non-System Property Capex) (No 8)	[2011] ACompT 2 (10 February 2011)	Qld Ergon AER determination (6 May 2010) – AER excluded any allowance for non-system property expenditure for Townsville and Rockhampton projects – AER conceded error in discretion – Tribunal sought submission from AER – AER accepted Ergon's cost estimates – Tribunal accepted
Application by Ergon Energy Corporation Limited (Labour Cost Escalators) (No 9)	[2011] ACompT 3 (10 February 2011)	Qld Ergon AER determination (6 May 2010) – AER rejected Ergon's proposal to base its labour cost escalators on rates specified in a 2008-2011 Union Collective Agreement – Tribunal affirmed AER decision – parties made joint submission – Tribunal agreed to inflation rate of 2.5% for 2010-11
Application by Energex Limited (No 4)	[2011] ACompT 4 (11 February 2011)	Qld & SA AER determinations (6 May 2010) – leave applications – only serious issues but effect of all alleged errors aggregated to determine whether financial threshold satisfied – also discusses power of Tribunal to revoke leave
Application by Ergon Energy Corporation Limited (Service Target Performance Incentive Scheme) (No 10)	[2011] ACompT 7 (29 March 2011)	Qld Ergon AER determination (6 May 2010) – parties identified an error (incentive rates) – Tribunal cannot correct as no grounds of review
Application by Energex Limited (Gamma) (No 5)	[2011] ACompT 9 (12 May 2011)	Qld & SA AER determinations (6 May 2010) – imputation credits (gamma) – AER erred – Tribunal sought report – gamma is 0.25

Note: This list may not include all State/Territory review decisions prior to the transfer, from the State/Territory regulators to the AER, of electricity distribution functions. The State appeals bodies include: District Court (South Australia); and Essential Services Commission Appeals Panel (Victoria).

Other electricity decisions

Title	**Citation**	**Summary**
TXU Electricity Limited v The Office of the Regulator General	[2001] VSC 4 (30 January 2001)	Vic electricity tariff order – Hardiman principle
TXU Electricity Limited (formerly known as Eastern Energy Ltd) v Office of the Regulator-General	[2001] VSC 153 (17 May 2001)	Vic electricity tariff order
Braemar Power Project Pty Ltd v The Chief Executive, Department of Mines and Energy in his Capacity as the Regulator Under the Electricity Act 1994 (Qld)	[2008] QSC 241 (15 October 2008)	Braemar gas-fired power station - Electricity Act 1994 (Qld) Chapter 5A - Braemar entitled to create gas electricity certificates (GECs) which can be sold – entitlement of GECs depends upon power station's 'annual QUF' fixed annually by regulator (Chief Executive of the Department of Mines and Energy) – regulator fixed Braemar's annual QUF for the year ending 30 June 2008 - Braemar sought review under the Judicial Review Act 1991 (Qld) – regulator's decision set aside
Braemar Power Project	[2009] QCA 162 (12	Appeal by regulator dismissed

P/L v The Chief Executive, Dept of Mines and Energy in his Capacity as the Regulator under the Electricity Act 1994 (Qld)	June 2009)	
AGL Energy Ltd v Queensland Competition Authority; Origin Energy Retail Ltd v Queensland Competition Authority	[2009] QSC 90 (28 April 2009)	Qld electricity retailers able to offer own prices to customers but 'non-market customers' may purchase electricity at a 'notified price' - notified prices fixed by Minister for Mines and Energy or by delegate (QCA) under Electricity Act 1994 (Qld) – regulator must decide prices each year in accordance with regime for annual indexation of prices – QCA applied formula to fix prices for year ending 30 June 2009 – retailers (AGL and Origin) sought judicial review – regulator's decision set aside
AGL Energy Ltd v Queensland Competition Authority; Origin Energy Retail Ltd v Queensland Competition Authority (No 2)	[2009] QSC 116 (14 May 2009)	Orders
AGL Energy Ltd v Queensland Competition Authority; Origin Energy Retail Ltd v Queensland Competition Authority (No 3)	[2009] QSC 147 (29 May 2009)	Varied orders

4. National access regime: CC Act Part IIIA

Declarations

Title	**Citation**	**Summary**
Re: Application for review of the decision by the Commonwealth Treasurer & published on 14 August 1996 not to declare the "Austudy Payroll Deduction Service" under Part IIIA of the Trade Practices Act 1974; by Australian Union of Students	[1997] ACompT 1 (28 July 1997)	Austudy pay roll - affirmed decision not to declare
Rail Access Corp v New South Wales Minerals Council Ltd	[1998] 1266 FCA (9 October 1998)	Hunter Valley railway line (NSW) – "government coal-carrying service"
Hamersley Iron Pty Ltd v National Competition Council (includes corrigendum dated 3 August 1999)	[1999] FCA 867 (28 June 1999)	Pilbara rail track - production process
Hamersley Iron Pty Ltd v National Competition	[1999] FCA 1078 (3 August 1999)	Pilbara - costs

Council		
National Competition Council v Hamersley Iron Pty Ltd	[1999] FCA 1370 (5 October 1999)	Pilbara – whether NCC precluded from appealing
Hope Downs Management Services Pty Ltd v Hamersley Iron Pty Ltd	[1999] FCA 1652 (22 November 1999)	Pilbara - application withdrawn – appeal stayed
Sydney International Airport	[2000] ACompT 1 (1 March 2000)	Review of decision to declare services at Melbourne and Sydney International Airports
Freight Victoria Limited	[2002] ACompT 1 (27 March 2002)	Vic railway – application for review of decision not to declare – application for stay of proceeding until determination of application for certification of access regime
Asia Pacific Transport Pty Limited	[2003] ACompT 1 (10 March 2003)	Wirrida and Tarcoola rail, SA – decision to declare set aside as not contested
Virgin Blue Airlines Pty Limited	[2005] ACompT 5 (12 December 2005)	Syd Airport - declared
Sydney Airport Corporation Limited v Australian Competition Tribunal	[2006] FCAFC 146 (18 October 2006)	Syd Airport - Full FC appeal
Sydney Airport Corporation Limited v Australian Competition Tribunal	[2007] HCATrans 98 (2 March 2007)	Syd Airport – HC tpt – refused special leave to appeal
Application by Services Sydney Pty Ltd	[2005] ACompT 2 (11 April 2005)	Syd Water - application to intervene – NSW Premier
Application by Services Sydney Pty Limited	[2005] ACompT 7 (21 December 2005)	Declare Syd Water
Lakes R Us Pty Ltd	[2006] ACompT 3 (31 May 2006)	Leave to withdraw application for review
6/06 Application by Fortescue Metals Group Limited	[2006] ACompT 6 (7 September 2006)	Pilbara, WA – application to intervene
BHP Billiton Iron Ore Pty Ltd v The National Competition Council	[2006] FCA 1764 (18 December 2006)	Pilbara, WA – production process
BHP Billiton Iron Ore Pty Ltd v National Competition Council (No 2)	[2007] FCA 557 (19 April 2007)	Award of costs by FC against BHP
BHP Billiton Iron Ore v The National Competition Council	[2007] FCAFC 157 (5 October 2007)	Pilbara – Fortescue – Appeal by BHP dismissed – not a production process (Finkelstein dissent)
Rio Tinto Limited v The Australian Competition Tribunal	[2008] FCAFC 6 (14 February 2008)	Pilbara – Fortescue – deemed decision to declare – application to Tribunal for review – application to FCFC that Tribunal had no jurisdiction on basis that NCC recommendation did not match declaration application (therefore no recommendation or deemed decision) – application dismissed
Hamersley Iron Pty Limited v The National Competition Council	[2008] FCA 598 (5 May 2008)	Pilbara – Hamersley (Rio Tinto) access provider - Pilbara Infrastructure (Fortescue) – 1999 Kenny J decision – 2007 application to NCC by AS – AP argued AS could not make, and NCC could not

		consider, application due to court undertakings and doctrine of res judicata – application dismissed
Hamersley Iron Pty Ltd v The National Competition Council (No 2)	[2008] FCA 779 (27 May 2008)	Pilbara – Hamersley – application to stop NCC proceeding with declaration application – costs awarded against AP
BHP Billiton Iron Ore Pty Ltd v National Competition Council; BHP Billiton Iron Ore Pty Ltd v National Competition Council	[2008] HCA 45 (24 September 2008)	Pilbara – Fortescue – Appeal by BHP dismissed – not a production process
In the matter of Fortescue Metals Group Limited	[2010] ACompT 2 (30 June 2010)	Pilbara Goldsworthy BHP declaration: affirmed (20 years) Robe Rio rail declaration: varied (reduced from 20 to 10 years) Mt Newman BHP deemed not to declare: affirmed Hamersley Rio declaration: set aside
Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal	[2010] FCA 1118 (14 October 2010)	Pilbara – appeal from Tribunal Hamersley & Robe decisions – NCC leave to intervene & BHP made a party
Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal	[2011] FCAFC 58 (4 May 2011)	Pilbara – Rio Tinto's tracks - Hamersley & Robe – criterion (b) (privately profitable test) - confirmed Tribunal's approach to criterion (f) & residual discretion – procedural fairness issue – but declarations set aside as criterion (b) not satisfied

5. Prices surveillance

Title	Citation	Summary
TNT Australia Pty Ltd v Fels	(1992) ATPR 41-190	Challenge to s 155 notice – pursuit of PS investigation – discovery ordered
Canberra International Airport Pty Ltd v Australian Competition & Consumer Commission	[2001] FCA 289 (23 March 2001)	Cbr airport - whether taxi rank was "landside road"
Canberra International Airport Pty Ltd v ACCC	[2001] FCA 1172 (24 August 2001)	Cbr airport - appeal

6. State access regimes

Title	Citation	Summary
Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd	[2002] WASC 224	Agreement between WA govt and BHP – requirement to provide access to rail system – held a party not actually operating a mine is not a 'third party'
Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd	[2003] WASCA 259	Appeal – held access provider required to negotiate and enter into a contract with a prospective mine operator
Freight Victoria Ltd	Essential Services Commission Appeal Panel 9 January 2004	Appeal from ESC determination – scope of regulated service & access pricing – ESC decision set aside
Pacific National (ACT) Limited v Queensland Rail	[2006] FCA 91 (16 February 2006)	Access by Pacific National (formerly National Rail) to Acacia Ridge terminal owned by QR – TP Act s 46 & estoppel claim based on 1991 intergovernmental agreement – claim failed

Summary of sources of cases

	1995-1999	2000-2004	2005-2009	2010- current	Total
Comms	0	18	26	2	46
Gas	0	15	26	5	46
Electricity	0	5	19	16	40
Part IIIA	6	3	14	3	26
Prices surveillance	0	2	0	0	2
Total	6	43	85	26	160

Postscript (cases from 3 June 2011 to 22 July 2011)

Title	Citation	Summary
Application by Jemena Gas Networks (NSW) Ltd (No 5)	[2011] ACompT 10 (9 June 2011)	NSW gas distribution – AER final decision AA (2010-15) – debt risk premium – AER used CBASpectrum – ActewAGL wanted an average of CBA & Bloomberg – Tribunal adopted average – – JGN wanted Bloomberg – Tribunal adopted Bloomberg
ActewAGL Distribution v The Australian Energy Regulator	[2011] FCA 639 (8 June 2011)	AER electricity determination – ACT/NSW/Tas distribution & transmission – EnergyAustralia but not ActewAGL sought merits review – following Tribunal decision, ActewAGL applied for judicial review (averaging period) – application for extension of time dismissed