The Role of Courts and Tribunals in Providing Guidance to Regulators

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1 Introduction

Regulation typically involves vesting a degree of discretion in regulators. Review mechanisms can be effective in addressing the need for accountability in regulatory decision making and are widely recognised as a principle of good regulation. Courts and Tribunals can contribute a body of precedent that helps to provide certainty and reduce regulatory risk, as well as enhancing our understanding of what can be done to improve the design of regulatory regimes.

This paper examines selected decisions under three regimes – Part XIC of the Trade Practices Act 1974 (Cth) (TPA) (the telecommunications specific access regime), the National Third Party Access Code for Natural Gas Pipeline Systems and Part IIIA of the TPA (the general access regime) – for the purpose of illustrating the development and application of principles thought to be of significant guiding value for regulators.

It starts with some basics - these touch on the rationale for the review role of Australian Courts and the Australian Competition Tribunal (the Tribunal), the review models available to regulatory designers and the importance for the interpretation of statutory regimes of their context and objects – and concludes with some tentative conclusions about some of the themes emerging from the Court and Tribunal decisions to date.

2 Guidance for what?

2.1 The problem to be solved

We focus in this paper on guidance from Courts and Tribunals for the making of decisions by regulators in regulated industries.

Normally, the competitive process is relied upon to help bring about efficiency in production, resource allocation and investment decisions. But of course it has long been acknowledged that, in the real world, we see various types of market failure, including the inability of industries to exhibit workable or effective competition.

A classic example is provided by industries exhibiting so-called ‘natural monopoly’ characteristics. In those industries, average costs continue to fall as production increases. There are increasing returns to scale. Major infrastructure facilities – such as natural gas pipelines, telecommunications networks and electricity grids – can exhibit increasing returns to scale. In the extreme case, it is more efficient to have one infrastructure owner than to have several infrastructure owners. Markets with these characteristics are not seen as readily contestable.

For a good description of natural monopolies generally, see Productivity Commission, Review of the National Access Regime, September 2001, at page 41.
Single ownership without competition from other firms, however, can leave us with ‘the monopoly problem’. A firm which faces no competition will naturally seek to maximise profit by restricting output and charging higher prices than would occur in a comparatively competitive industry.²

Nevertheless, the case for regulatory intervention in these circumstances is not clear cut, as the US Supreme Court has acknowledged:

“The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices at least for a short period is what attracts business acumen in the first place; it induces risk taking that produces innovation and economic growth.”³

The Productivity Commission articulated this dilemma in its 2001 Report on Part IIIA, casting it as an issue of short-term market power (which may be beneficial to long-term competition) versus enduring market-power:

“Transitory market power is a feature of virtually all markets. That is, new products or cost-saving innovations will give firms an advantage over competitors and temporarily allow them to earn above normal profits. However, the competitive responses of rival firms will typically see that market power eroded. As the Institute of Public Affairs argued:

… most … monopolies are short-lived since if they extract high prices this rapidly attracts competition. (sub.18, p.3)

Indeed, this process of innovation and competitive response underpins the dynamism of the market system. As recent experience in the telecommunications sector illustrates (PC 2001c), this process may be just as influential in infrastructure markets as in other parts of the economy. Yet, at the same time, there is the concern that, unlike most other parts of the economy, demand and supply conditions for essential infrastructure services are such that providers may sometimes have enduring market power...⁴

Whilst there is public interest in ensuring that effective competition can take place in markets that are dependent on monopoly facilities which create a ‘bottleneck’ problem – especially where the owner of the infrastructure is also vertically integrated, allowing it to leverage market power into upstream or downstream markets and exclude competition – there is the risk that regulatory intervention to regulate price will impede the incentives to invest in necessary infrastructure and result in long term harm to welfare. Community and political concerns often swing back and forth over time between these concerns.

The decisions with which we are concerned in this paper occur under ‘access’ regimes which face the issue of how to maintain the flexibility to address both of these concerns without creating undue regulatory risk.

2.2 The access regimes

The philosophy underlying our various access regimes is that they function as surrogates for the normal competitive process. In Australia, we see regimes of this


⁴ Productivity Commission, Review of the National Access Regime, above, note 1, at page 40.
nature in several industries. To a considerable extent, these regimes owe their existence to the conclusions and recommendations of the Hilmer Committee in 1993.

A pivotal conclusion of that Committee was that Part IV of the TPA – and, in particular, section 46 which prohibits corporations taking advantage of a substantial degree of market power for certain proscribed exclusionary purposes – could not be relied upon to provide an appropriate access regime for nationally significant infrastructure. There were thought to be difficulties in respect of both establishing a proscribed purpose and for the Courts in determining appropriate terms and conditions of access, particularly price.\(^5\)

The Committee recommended ‘light-handed regulation’.

While they vary in their detail, the resulting access regimes share several features:

- the industries are of considerable economic significance;
- the decisions entrusted to regulators involve highly complex topics. Access pricing normally combines the disciplines of economics, corporate finance, engineering, accounting and law;
- the regulatory decision maker is given a discretion to assess price by reference to broad statutory criteria. Typically, the direction to the regulator in the regime is to ‘take into account’ or ‘have regard to’ a list of matters or factors. The Courts have consistently interpreted these directions as merely requiring that those matters be taken into account and be given weight ‘as a fundamental element’ in reaching the relevant decision;\(^6\)
- it is recognised that, particularly in relation to price, there is a significant amount of judgment involved. The Hilmer Committee, while it saw access pricing as key, concluded that ‘neither the application of economic theory nor general notions of fairness provide a clear answer as to the appropriate access fee in all circumstances’;\(^7\)
- information asymmetry. The regulator normally has less information available to it than the firms being regulated; and
- it is critical that there be on-going investment in the underlying infrastructure. Uncertainty of regulatory outcomes can diminish the incentive to invest.

This suggests a relatively high risk of regulatory error. It also suggests that the consequences of such error will be significant and it underscores the importance of the review role.

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\(^5\) Report by the Independent Committee of Inquiry into a National Competition Policy for Australia (Hilmer Report), August 1993, at page 243. Note, however, that the prohibition against taking advantage of market power continues alongside the rights under the national access regime in Part IIIA: see section 44ZZNA. See also the successful use of section 46 in dealing with this type of access problem in NT Power Generation Pty Ltd v Power and Water Authority (2004) 219 CLR 90.

\(^6\) Mason J in R v Hunt ex parte Sean Investments Pty Ltd (1979) 180 CLR 322 at 329.

\(^7\) Hilmer Report, above, note 5, at page 253.
3 Judicial guidance through the review role

3.1 The need for review

Most fundamentally, effective review mechanisms address the need for accountability in respect of such decisions and, to some extent, reflect a basic requirement of constitutional law.8

In characteristically emphatic fashion, Ky P Ewing put it this way:

“The whole deregulation effort of the United States from the 1970’s to the present shows that market mechanisms usually work far better than the ‘experts’. Thus, to the extent that the competition policy agency – which should certainly employ expert lawyers and economists – lets itself become enamored of its own expertise, and desires to intervene at every opportunity to impose its own ‘expert’ view of how the competitive process should work, it is standing good competition policy on its head. Unfortunately, human nature being what it is, the temptation to do that is always present. It must be curbed. Accountability of the competition agency to an independent judiciary or other independent body is essential.”9

Accountability is widely recognised as a principle of good regulation.10

Other aims are also served through effective review by Courts and Tribunals. Clearly, to the extent that decisions on review contribute to a body of precedent, they assist with consistency over time and as between industries. This can reduce the level of uncertainty and facilitate efficient investment.

The High Court recognised the significance of regulatory uncertainty in East Australian Pipeline Pty Limited v ACCC11 where it said:

“The greater the degree of uncertainty and unpredictability in the regulatory process, the greater will be the perceived risk of investment. The greater the perceived risk of investment, the higher will be the returns sought.”12

It has also been recognised that review mechanisms can be an important discipline providing an incentive against inappropriate decision making and something which can contribute to the level of regulatory efficiency and certainty.13

3.2 Models for review

Our legal system recognises two broad avenues for review of decisions which are believed to have been made incorrectly - judicial review and administrative review.

In the context of the regulatory decisions with which we are concerned in this paper, judicial review offers quite a limited form of review. The principal grounds of review relate to whether or not the decision maker has followed the correct process for making a decision – that is, considering all relevant matters or considering matters

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8 The problem is that, absent judicial review, there is a risk of having some administrative body making a decision of law on a final basis (and therefore exercising a judicial function).
10 See, for example, the discussion of decision making accountability in the Administrative Review Council’s Best Practice Guide, August 2007.
11 East Australian Pipeline Limited v ACCC & Anor [2007] HCA 44.
12 Above, note 11, at paragraph 50.
13 See, for example, Productivity Commission, Review of the National Access Regime, above, note 1, at page 391.
which are not relevant, whether the decision has been made for an improper purpose, whether the decision is one which no reasonable person would reach, whether there has been a denial of natural justice, or whether the decision maker has made an error of law or gone beyond power.

The focus in judicial review is on the legality of the decision making process. Judicial review does not involve:

- any re-examination of the merits of the decision made;
- the Court on review performing the function assigned to the decision maker; or
- the Court on review substituting its own conclusion for that of the decision maker because it would have been minded to reach a different conclusion in circumstances where it was reasonably open to the decision maker to reach that conclusion.

This limitation is not necessarily a deficiency. It has been observed that:

“… the fact that a Court cannot, under judicial review, substitute its own decisions for that of the original decision maker should not be regarded as a deficiency. Review, whether judicial or merits, is an incentive to the decision maker to make a correct initial decision. The incentive will be high if the decision maker knows that the decision will be returned to it for remaking: in particular, any inclination on the part of the decision maker to act in the expectation of having its decisions substituted by a review body would be avoided. Equally, regulated entities will have little incentive to hold back critical information from the decision maker or otherwise ‘game’ the process (compared to, say, merits review without limitations on admissible evidence).”

Administrative review (sometimes referred to as merits review) is a different concept. The objective here is for the review body to identify the ‘correct’ or ‘preferable’ decision. It covers a range of models. At one end, there is the full merits review. This involves the review body standing in the shoes of the original decision maker. It substitutes its decision for the regulator’s decision.

There are also limited merits reviews where the review rights are limited in some way – for example, there are limitations on the grounds of review, the powers available to the review body or the evidence that the review body may take into account.

To some extent at least, judicial review will always be available in respect of regulatory decisions. Those responsible for regulatory design will need to decide whether, and if so the extent to which, there will be provision for merits reviews in addition to judicial review. There will be a tension between minimising delay and the risk of regulatory gaming on the one hand and the risks and consequences of regulatory error on the other.

Merits reviews are available in respect of many, but by no means all, decisions in regulated infrastructure industries. Mostly, the reviews which are available are limited in some way. It is apparent that, in some respects, the regulatory design has

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14 Commonly described as Wednesbury unreasonableness: see Associated Provincial Picture Houses Limited v Wednesbury Corporation [1948] 1 KB 223.
15 See, for example, the general discussion of the limits on judicial review in Visy International Services Association v Reserve Bank of Australia (2003) 131 FCR 300 at paragraphs 8-12.
17 See, for example, the discussion about removing merits reviews of ACCC arbitration determinations in the Explanatory Memorandum for the Telecommunications Competition Bill 2002, at page 12.
Judicial guidance through the review role

proceeded by way of trial and error with refinements being made to merits review rights over time.  

3.3 The judicial approach to statutory interpretation

Whether we are considering judicial or merits reviews, a significant part of the judicial function is statutory interpretation. The approach to statutory interpretation is a field of law and study in its own right. There are texts and numerous articles in legal periodicals devoted to the subject.  

Like most areas of law, the judicial approach to statutory interpretation has evolved over time.

At common law, there are two basic approaches to statutory interpretation. The first is the literal approach, which mandates that 'a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole.' This approach is qualified by the ‘golden rule’, which Pearce & Geddes note 'contemplated the modification of the language of the legislation to overcome an error or defect perceived in the text.' That is, if the literal interpretation of a statutory provision gives an absurd, capricious, irrational or obscure result, an alternative interpretation (consistent with the Act’s purpose) must be preferred.

The second method is the purposive approach, which allows the Court to determine the purpose of (or the mischief intended to be avoided by) a statutory provision, and to then adopt an interpretation consistent with that purpose.

The approach also includes the notion of giving a statute a field of operation to avoid it being a nullity, which 'is essentially a shorthand version of the purposive approach to interpretation'.

The common law principles have been largely superseded through the enactment of section 15AA of the Acts Interpretation Act 1901 (Cth). It provides that:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

In Mills v Meeking, Dawson J noted in respect of an equivalent Victorian provision that even where there is no ambiguity or inconsistency, such a provision means that the common law must now 'give way to statutory injunction' and 'prefer a construction which would promote the purpose of the Act to one which would not'.

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18 For example, in respect of Part XIC of the TPA, the telecommunications specific access regime, initially a full merits review was available in respect of arbitral decisions in notified access disputes. Since 2002, however, it has not been possible to seek a merits review in respect of arbitral decisions.

19 See, for example, D. C. Pearce and R. S. Geddes, Statutory Interpretation in Australia, Butterworths, Sydney, 5th Ed, 2001.

20 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129 at page 161-2.

21 Above, note 19, at paragraph 2.4.


23 Above, note 19, at paragraph 2.5.


25 Above, note 19, at paragraph 2.33.

26 Above, note 24, per Dawson J at page 235.
has been confirmed by Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC v Bankstown Football Club*, where it was noted that:

“…the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses ‘context’ in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.”

A similar view was expressed by McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority*, where it was noted that the process of statutory construction ‘must always begin by examining the context of the provision that is being construed’ and the context is to be considered ‘regardless of the apparent clarity of the literal terms of the relevant provision itself’.

Accordingly, in general, statutes can always now be read by reference to the mischief intended to be addressed. The literal approach is no longer preferred. The point to note for present purposes is the importance under the modern approach to statutory interpretation of statutory context. It was a point emphasised in approaching the interpretation of Part IIIA by Middleton J at first instance in *BHP Billiton Iron Ore Pty Limited v NCC*. His Honour was, however, careful to observe that the judicial role was one of construction not legislation. It was accepted that:

“… if the words of a legislative provision are capable of only one construction, taking into account the purpose and context of the provision, then a Court cannot ignore them and substitute a different construction because the Court considers it somehow furthers the object of the legislation.”

In the context of access regimes, statements of objects have attracted attention and have come to play an important role. For example, in recommending an objects clause for Part IIIA (discussed later in this paper), the Productivity Commission in 2001 saw that an objects clause would have several advantages – providing greater certainty; emphasising the need for the application of the regime to give proper regard to investment issues; promoting consistency in the application of the regime; and to help ensure decision makers are accountable for their actions.

In short, the overall statutory context (and in particular stated objects) matter. They need to be kept uppermost in the minds of the regulators when they are applying the regimes.

This is then the setting against which we consider the three access regimes that are the subject of this paper and the guidance provided by the Courts and the Tribunal in relation to those regimes.

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28 *Project Blue Sky Inc & Ors v Australian Broadcasting Authority* (1998) 194 CLR 335 at 381.
29 *Fox v Commissioner for Superannuation (No 2)* (1999) 88 FCR 416 at 420 per Black CJ.
30 *BHP Billiton Iron Ore Pty Limited v NCC* [2006] FCA 1764 at paragraphs 88 to 102.
31 Above, note 30, at paragraph 91.
32 Above, note 1, at pages XXII to XXIII.
33 As per statements of principle from the High Court. See, for example, *CIC Insurance Limited v Bankstown Football Club Limited* where the High Court said: ‘Moreover, the modern approach to statutory interpretation … insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise...’ (emphasis added), above, note 27 at page 408.
4 Telecommunications – the ULLS Decision – *there are no absolute answers and it is not about whose price is more reasonable*

### 4.1 Introduction

The Tribunal’s May 2007 decision regarding Telstra’s ULLS undertaking is a useful illustration of several points of general application to infrastructure access regimes. The decision, which we refer to as *Telstra (2007)*, is also notable because it required a close economic analysis of incentives affecting firm conduct under alternative pricing approaches with reference to a variety of statutory criteria and markets.

In this paper, we focus on two particular aspects of the decision – the application of the principle that there is ‘no single correct access price’; and the assessment of the objective of promoting competition. We also comment briefly on the issue of burden of proof in undertaking assessments.

It is first necessary to understand something of both the legislative and regulatory context for the decision.

### 4.2 Legislative Context

The legislative context was Part XIC of the TPA, the telecommunications specific access regime. It deals with access to services (as opposed to the facilities used to provide those services). Services are brought within the scope of the regime by being declared. Normally, declaration follows a public inquiry conducted by the Australian Competition & Consumer Commission (ACCC).

The regime requires declared services to be supplied on request, and sets out certain basic supply obligations. However, it envisages that primarily the terms and conditions of supply will be determined through commercial negotiations and agreement. Failing agreement, the terms and conditions of supply are to be determined either in accordance with an access undertaking accepted by the ACCC or by ACCC arbitration in a notified access dispute.

The object of Part XIC is to promote the long-term interests of end-users (LTIE). That object is also specified as a factor to which the ACCC must have regard in making regulatory decisions.

Importantly, the object of Part XIC was amended in late 2005 following a concern that the legislation did not make it clear that the regulator should consider the risk of investing in new infrastructure.

The Tribunal’s decision concerned the ULLS, a service declared by the ACCC in 1999. As its name suggests, the ULLS – the unconditioned local loop service – is the service of accessing the twisted pairs of copper or aluminium based wire between

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34 *Re Telstra Corporation Limited (No 3) [2007] ACompT 3.*

35 Sections 152AL and 152AM.

36 See generally Division 5 of Part XIC.

37 See generally Division 8 of Part XIC.

38 Section 152AB(1).

39 See, for example, section 152AB(2)(a) in the context of assessing the reasonableness of terms and conditions of access.

40 See the discussion in the Explanatory Memorandum for the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005, at page 6. The amendment is reflected in section 152AB(2)(e).
the local exchange and the end-user’s premises. This local loop is ‘unconditioned’ in
that ‘… the electrical characteristics of the loops are not changed by equipment
located along the loop’.41

The ULLS is an input used by access seekers supplying fixed line services in
competition with Telstra. It is seen as a service of high competitive significance. The
ACCC has observed that it:

“… essentially gives an access seeker the use of the copper pair without
any dial tone or carriage service. This allows the access seeker to use its
own equipment in an exchange to provide a range of services, including
traditional voice services and high speed internet access, to the end user.”42

4.3 Regulated retail price parity

In late 2005, Telstra lodged an access understanding proposing a ULLS price of
$30 per month regardless of location. In the past, Telstra had proposed different
ULLS prices for 4 bands or areas – band 1 being the central business district; band 2
being metropolitan areas; band 3 being provincial areas; and band 4 being rural
areas. Such a geographically de-averaged approach reflected the differing underlying
costs of supplying the ULLS in these areas.

The position for Telstra changed following a Ministerial Determination which
effectively required it to charge the same price for certain retail line rental in all
areas.43 It has been described as Telstra’s Retail Price Parity Obligation (RPPO).
This requirement reflected a policy of retail price parity between urban and rural
areas. With such a requirement in place, there would be an inconsistency of pricing
approaches at the wholesale and retail levels – at wholesale, pricing would be
geographically de-averaged, while for corresponding retail services it would be
geofraphically averaged. That inconsistency, it was considered, would encourage
‘cream skimming’, threatening both the recovery of costs and competitive activity in
rural areas. The concern was that, with the benefit of relatively low ULLS input prices,
access seekers would undercut Telstra in urban areas and Telstra would be unable
to lower its retail prices to match because, with retail price parity, that would threaten
its cost recovery in rural areas.

In support of the distortionary impact of the requirement under the RPPO combined
with a requirement for de-averaged ULLS (wholesale) prices, Telstra cited an OECD
report which read in part:

“… if the regulator wishes to preserve the geographically averaged structure
of end-user prices, it is essential to geographically average ULLS prices.”44

41 See the description of the ULLS adopted by the High Court in Telstra Corporation Limited v The
Commonwealth [2008] HCA 7 at paragraph 6.
42 ACCC, Assessment of Telstra’s ULLS Monthly Charge Undertaking, Final Decision, August 2006, at page 10.
43 More precisely, the requirement, under clause 19A of the Telstra Carrier Charges – Price Control
Arrangements, Notification and Disallowance Determination No. 1 of 2005 (as amended by the Telstra Carrier
Charges – Price Control Arrangements, Notification and Disallowance Determination No. 1 of 2005
(Amendment No. 1 of 2006)) was that Telstra must offer ‘basic line rental services’:

- to residential, charity and business end-users, in non-metropolitan areas, at the same or a lower price and
  on the same price-related terms it offers to such end-users in metropolitan areas; and

- within a bundle in all non-metropolitan areas at the same or lower price and on the same price-related
terms as it offers ‘basic line rental services’ in a comparable bundle in metropolitan areas.
44 OECD Competition Committee, The Regulation of Access Services (with a focus on telecommunications),
Paris, November 2003, at page 101. The ACCC in its assessment considered the reference to the OECD
report as being selective and set out a fuller quote which it said showed that the ‘… OECD’s support for
averaged ULLS charges, as a mechanism to combat the distortions from uniform retail prices, is limited to
situations where network bypass in natural monopoly areas is banned by the regulator’. Above, note 42, at
page 87.
4.4 The task for the ACCC (and the Tribunal)

Against this background, Telstra sought the ACCC’s acceptance of an undertaking with a uniform monthly charge – that is, charges which were geographically averaged. The undertaking therefore called for an analysis of a fresh issue of principle – whether, in the context of regulated geographic average retail prices, wholesale prices should follow suit or conform with an economically conventional approach of more closely matching the underlying costs of supply. It was not a case focussed merely on an analysis of cost models, the reasonableness of critical inputs (such as the WACC) and the allocation of costs over various services.

The ACCC rejected Telstra’s undertaking.45 Telstra applied to the Tribunal for a (limited) merits review of that decision, the Tribunal’s role being limited to having regard to the material which was before the ACCC46. As with the ACCC, the Tribunal’s responsibility was to either accept or reject the undertaking.

The Tribunal could not accept the undertaking without being satisfied that its terms and conditions were reasonable.47 In assessing reasonableness, it was necessary to have regard to a range of matters, including the LTIE (which in turn requires a consideration of the promotion of competition and economically efficient use of and investment in infrastructure) and the legitimate business interests of the access provider and its investment in facilities.48

4.5 No single correct price

Consistent with previous Tribunal decisions under Part XIC, the Tribunal in Telstra (2007) recognised that, in assessing reasonableness, ‘… there are no absolute answers, nor is there necessarily one correct approach’.49 This is an important observation and reflects the inherent difficulty of the access pricing task and the significant element of judgment involved.

The Tribunal explained its thinking most clearly in an earlier 2006 decision involving an undertaking lodged by Telstra in respect of the Line Sharing Service (LSS). It said in that case:

“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 judgement 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 method or approach in estimating costs is reasonable having regard to the statutory matters set out in ss152AH and 152AB then the matter rests ....”50

This approach has important implications for how parties should support access undertakings lodged for ACCC assessment. It is not, for example, to the point to try to demonstrate that the undertaking price is ‘more reasonable’ than would apply in

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45 Above, note 42.
46 Section 152CF(4).
47 Section 152BV(2)(d).
48 Section 152AH.
49 Above, note 34, at paragraph 13.
the absence of the undertaking. A submission to that effect by Optus in an earlier case dealing with mobile termination services was rejected by the Tribunal.  

The approach should not surprise. It is consistent with the statutory language. The task for the ACCC (and the Tribunal) under the relevant statutory provisions is to assess the reasonableness of the terms and conditions in any lodged access undertaking. It leaves the regulator with an essentially negative role – to reject undertakings where it is not satisfied that the terms and conditions are reasonable.

But this is no bad thing. It is consistent with principles of regulatory restraint and avoids regulators imposing a price they would prefer or believe would be more reasonable or would better promote statutory objectives than the price proposed in the undertakings.

The Tribunal paid particular attention to this principle in having regard to the legitimate business interests of Telstra and its investment in facilities used to supply the ULLS for the purposes of section 152AH(1)(b) and concluded that:

“… averaging of Telstra’s ULLS charges would, in principle, be in its legitimate business interests and is, to that extent, reasonable for the purposes of s152AH(1)(b). The nature of the averaged charge and its structure is designed to recover no more than Telstra’s overall costs of its infrastructure, its operating costs and to obtain a normal return on its capital.”

The Tribunal reasoned that, in assessing this factor, the primary focus of its analysis should not be:

“… whether averaging is necessary to enable Telstra to recover its costs of, and investment in, the Customer Access Network (CAN), but rather on whether averaging is reasonable having regard to the legitimate business interests of Telstra and its investment in the CAN.”

It is not to the point, said the Tribunal, that:

“… some other method of setting a monthly charge for the ULLS is, or may be, in Telstra’s legitimate business interests because it will also enable Telstra to recover the costs of its infrastructure, its operating costs and a normal return on its capital rendering averaging unnecessary.”

“If de-averaged ULLS charges are expected to lead to cream-skimming, it may be said that averaging is in Telstra’s legitimate business interests if that is the only way in which it may recover its costs of its infrastructure, it operating costs and obtain a normal return on its capital. However, if de-averaged ULLS charges are not expected to lead to cream-skimming, it does not follow that averaging is not in its legitimate business interests.”

In short, the Tribunal did not subject its assessment of this statutory factor to a counterfactual analysis. Rather, the focus was on whether averaging was in the legitimate business interests of Telstra because it enables Telstra to recover its cost of the ULLS and the CAN over which it is provided. It was ‘not to the point’ that Telstra may be able to recover those costs by means other than averaging. This lead to the Tribunal rejecting as irrelevant arguments by the ACCC and Optus to the

51 Re Optus Mobile Pty Limited & Optus Networks Pty Limited[2006] ACompT 8 at paragraph 93.
52 Above, note 34, at paragraph 261.
53 Above, note 34, at paragraph 187.
54 Above, note 34, at paragraph 189.
55 Above, note 34, at paragraph 190.
56 Above, note 34, at paragraph 247.
effect that Telstra makes above normal profits from the provision of other services over its CAN.\textsuperscript{57}

The Tribunal closely examined the economic impact of the RPPO and averaging versus de-averaging. It considered that de-averaged access charges could lead to cream-skimming where Telstra is subjected to the RPPO\textsuperscript{58} and that the RPPO does, to some extent, constrain Telstra’s pricing of bundled offerings that incur the provision of line rental services (which would in term limit the extent to which Telstra could seek to recover its costs of providing line rental services in rural areas through the use of bundled service offerings).\textsuperscript{59} On this basis, it concluded that averaging would \emph{in principle} be in the legitimate business interests of Telstra.

Nevertheless, it was unable to be satisfied, on the basis of the material before it, that the specific charge being proposed in these undertakings ($30 per month) was in Telstra’s legitimate business interests.\textsuperscript{60}

### 4.6 Promotion of competition

\textbf{The test}

All three regimes we discuss in this paper require the relevant decision-makers to consider the promotion of competition when making decisions concerning access to services\textsuperscript{61}. In \textit{Telstra} (2007), the Tribunal closely analysed this criterion.

In Part IIIA, the decision maker must have regard to whether ‘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’ before declaring a service.\textsuperscript{62}

In Part XIC, when considering whether a particular thing promotes the LTIE, ‘regard must be had to the extent to which the thing is likely to result in the achievement of … the objective of promoting \emph{competition} in markets for listed \emph{services}’.\textsuperscript{63}

The Tribunal described what the ‘promoting competition’ criterion in Part IIIA requires in \textit{Sydney Airport} (2000) when it said:

“…the Tribunal considers that the notion of "promoting" competition in s 44H(4)(a) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise.”\textsuperscript{64}

Subsequently, the Tribunal accepted that this observation equally applies in the context of the objective of promoting competition in Part XIC.\textsuperscript{65}

In \textit{Telstra} (2007), however, the Tribunal qualified the application of this statement in the context of Part XIC. The Tribunal observed that the promoting competition objective in Part XIC not only requires the decision-maker to consider whether something will promote competition (as is the case in Part IIIA), it also requires the

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  \item \textsuperscript{57} Above, note 34, at paragraphs 185, 192 and 259.
  \item \textsuperscript{58} Above, note 34, at paragraph 209.
  \item \textsuperscript{59} Above, note 34, at paragraph 224.
  \item \textsuperscript{60} Above, note 34, at paragraph 261.
  \item \textsuperscript{61} See section 44H(4)(a) (Part IIIA), section 152AB(2) of the TPA (telecommunications access), section 1.9 of the Gas Code (now repealed) and section 15 of the new \textit{National Gas Law}.
  \item \textsuperscript{62} Section 44H(4)(a).
  \item \textsuperscript{63} Section 152AB(2).
  \item \textsuperscript{64} \textit{Re Review of Declaration of Freight Handling Services at Sydney International Airport} (2000) 156 FLR 10 at paragraph 106.
  \item \textsuperscript{65} \textit{Re Seven Network Limited & Anor (No 2)} (2004) 187 FLR 373 at 124.
\end{itemize}
decision-maker to consider the extent to which that thing will promote competition. In that respect, the Tribunal said:

“When, for example, s152AB(2)(c) directs the Commission (and the Tribunal on review) to have regard to the extent to which averaging is likely to result in the achievement of promoting competition in rural areas, the Commission (and the Tribunal on review) must consider the extent of the competitive impact of averaging in rural areas and the likelihood of that extent, not only the improvement of the environment for competition.”

The Tribunal also elaborated on what it means for something to achieve the objective of promoting competition in the context of the LTIE, and emphasised two propositions:

“it is in the interests of consumers that efficient producers of services survive the process of competition”; and

“it is important not to confuse the objective of promoting competition with the outcome of ensuring the greatest number of competitors.”

There must also be a causal connection between the relevant ‘thing’ – in this case, proposed geographically averaged price – and competition. The Tribunal has many times recognised the need to undertake a wholly forward looking analysis when applying competition tests and to take a long run perspective in undertaking competition analysis. The Courts have also consistently emphasised the need to distinguish between competition and competitors when doing so.

In explaining its concern with ‘promoting competition’ as the primary focus for access regulation, the Productivity Commission in 2001 noted that:

“…it is possible to have too many competitors as a result of providing access on terms and conditions which are too favourable to third parties. This can promote wasteful activity in downstream markets and deny the community the benefits of dynamic efficiency gains – for example, by deterring investment in new essential infrastructure.”

“…Hence, the objectives of Part IIIA need to recognize that the promotion of competition is desirable from a community perspective only when such competition is efficient.”

Applying the promote competition test in the context of Telstra’s proposal to have ‘averaged’ pricing across rural, regional and metropolitan areas, the Tribunal said:

“Whether averaging will promote competition in the relevant markets for listed services depends upon whether averaging will enable efficient suppliers to operate in dependent markets. The aim is not to ensure that the greatest number of competitors – irrespective of their level of efficiency – can enter and successfully remain in relevant markets. Rather, it is to ensure the existence of the conditions necessary to promote effective competition.”

66 Above, note 34, at paragraph 96.
67 Above, note 34, at paragraph 98.
68 Above, note 34, at paragraph 99.
69 See classic comments of the Tribunal in Re Tooth & Co Ltd and Toohey’s Ltd (1979) ATPR 40-113 such as: “In our judgement, given the policy objectives of the legislation, it serves no useful purpose to focus attention on a short run transitory situation...We consider we should be basically concerned with substitution possibilities in the longer run” (at 18,196).
70 Above, note 1, at page 128-129.
71 Above, note 34, at paragraph 100.
Given the centrality of the averaging versus de-averaging question, the Tribunal’s analysis distinguished between competition in urban areas and competition in rural areas.

**Urban competition**

In relation to competition in urban areas, the Tribunal accepted that:

> “… in principle … it is possible that cost-based de-averaged access charges for the ULLS could prevent Telstra from responding to competition from access seekers in urban areas in a way that would enable it to recover the costs of its CAN.”

For two reasons, however, the Tribunal concluded that it should not accept that averaging is likely to promote competition:

- it reasoned that Telstra would still find competing in urban areas profitable (as long as access charges were cost based and Telstra was at least as efficient as access seekers in the other aspects of fixed line service supply); and
- it considered that, because the RPPO only applied to a limited range of Telstra’s line rental service offerings, Telstra would have considerable freedom to respond to competition from access seekers in urban areas by reducing the price of unregulated services offerings (and in that way avoiding the need to reduce the price of retail line rental services in rural areas as a result of its competitive response).

**Rural competition**

The analysis was different for competition in rural areas.

The Tribunal saw averaging as ‘opening the door’ for access seekers to enter and compete in rural areas. Nevertheless, the Tribunal concluded it was not satisfied that averaging would be likely to promote competition in rural areas because of the technical limitations on the use of the ULLS in rural areas and the minimal take-up of those services to date.

This seems an unusual finding given the earlier emphasis by the Tribunal on the test in *Sydney Airport* (2000) that the focus should be on whether or not there is an improvement in the conditions of competition. By reducing the ULLS charges in rural areas relative to the particularly high costs of supplying the ULLS in rural areas, averaging was improving the prospect of competition (although there may have been other factors affecting whether, and the extent to which, entry actually occurred).

On one view, the Tribunal in this context confused actual entry (and the presence of competitors) with the conditions of the competitive process — and therefore failed to heed its own warning about the importance of the distinction. Alternatively, it could be that the Tribunal applied its own refinement of the promoting competition test in the Part XIC context (discussed above) and had regard to the extent to which competition would be promoted. In any event, it is regrettable the Tribunal’s decision is not clearer on this aspect.

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72 Above, note 34, at paragraph 122.
73 Above, note 34, at paragraph 123.
74 Above, note 34, at paragraph 124.
75 Above, note 34, at paragraph 144.
76 Above, note 64.
4.7 Burden of proof

The Tribunal addressed the issue of burden of proof in Optus (2006), a decision dealing with the assessment of an access undertaking in respect of the mobile terminating access service. In that decision, it said:

“The Commission must accept or reject the undertaking …, but it must not accept the undertaking unless it (and the Tribunal when reviewing a decision of the Commission) is affirmatively satisfied that … the undertaking is consistent with the applicable standard access obligations and that the terms and conditions specified in the undertaking are reasonable … When we say that the Commission and the Tribunal must be “affirmatively satisfied” we are not seeking to impose any particular onus of proof upon the parties submitting the undertakings. Rather, we are identifying the fact that the Commission and the Tribunal must be satisfied, based on all the material before it, that the terms and conditions specified in the undertaking are reasonable.”

A potentially inconsistent observation was made in Telstra (2006). There, the Tribunal made this observation in the context of a consideration of whether the parties were limited to submissions made before the ACCC:

“Telstra was well aware that the statutory scheme required the Commission (and on review the Tribunal) to be satisfied affirmatively of the reasonableness of the terms and conditions of the access undertaking proffered by Telstra before it could approve the access undertakings. Not only was Telstra aware of the fact that it bore this onus of affirmatively proving the reasonableness of the terms and conditions of the undertaking, it was also aware of the fact that if it received an adverse result from the Commission and wished to have the Tribunal review the decision of the Commission, then it was limited to the material which it could place before the Tribunal…”

In Telstra (2007), the Tribunal frequently indicated that Telstra had not satisfied it of particular facts or that it did not have material or evidence to satisfy it of a particular fact.

For example:

• in respect of the LTIE, the Tribunal concluded that:
  – the material before it ‘does not enable us to determine whether Telstra makes sufficient above normal profits from the provision of services over its CAN, other than line rental, to balance any losses it may make from the provision of below-cost retail line rental services’; and
  – it did not know whether an averaged charge of $30 does no more than recover cost of ULLS infrastructure, operating costs and a normal return.

• in respect of legitimate business interests, it concluded that:
  – it was not satisfied that the Universal Service Fund (USF) does not outweigh losses from supplying rural line services in accordance with the RPPO; and

77 Above, note 51.
78 Above, note 51, at paragraph 9.
79 Above, note 51, at paragraph 20.
80 Above, note 34, at paragraph 114.
81 Above, note 34, at paragraph 165.
it was not able, on the material before it, to determine the extent to which bypass would occur in urban areas, efficient or otherwise.\(^{83}\)

- in respect of PIE II (Telstra’s cost model), it concluded that:
  - there was no evidence that the forward-looking network in years covered by the undertakings would be the same as the forward-looking network modelled by PIE II (which used 2004/2005 dimensions);\(^{84}\)
  - there was no evidence to support the proposition that the aggregate number of services in operation in any given year would be distributed around the CAN in proportion to how they were distributed in October 2000;\(^{85}\) and
  - it was not satisfied that Telstra had provided sufficient evidence to support its contention that the exogenous adjustments should be made to PIE II costs estimates.\(^{86}\)

- in respect of international benchmarking, it concluded that:
  - it was not satisfied that Telstra provided sufficient evidence to support the use of international benchmarking.\(^{87}\)

- in respect of the WACC, it concluded that:
  - it was not provided with enough specific material to satisfy it that two distinct WACC values were reasonable;\(^{88}\) and
  - it is not possible on the material before it to form a concluded view as to where the greatest long run social damage would lie when considering the impact of a WACC set too high as opposed to too low.\(^{89}\)

Clearly, however the Tribunal might describe it in terms of burden of proof, it is in practical terms critical for an access provider to assemble a considerable body of evidence in support of the undertaking and to ensure this is lodged with the ACCC. It can also be observed that few undertakings under Part XIC have been accepted and that all merits reviews by the Tribunal of ACCC rejections have failed.

Several issues may arise in this context which have not yet been addressed squarely by the Tribunal:

- how will the Tribunal go about its overall assessment in circumstances where the statutory criteria point to different conclusions. For example, in *Telstra (2007)*, it could well have been, with additional evidence, that the Tribunal concluded averaging was in the legitimate business interests of Telstra while other statutory factors pointed against averaging and in favour of de-averaging. The Tribunal has indicated that it is inevitable that the weight given to each of the elements or matters to which it must have

\(^{82}\) Above, note 34, at paragraphs 238 and 239.
\(^{83}\) Above, note 34, at paragraph 253.
\(^{84}\) Above, note 34, at paragraphs 355 and 365.
\(^{85}\) Above, note 34, at paragraph 356.
\(^{86}\) Above, note 34, at paragraph 373.
\(^{87}\) Above, note 34, at paragraph 385.
\(^{88}\) Above, note 34, at paragraph 430.
\(^{89}\) Above, note 34, at paragraph 457.
regard will vary and that it will have regard to the objective of Part XIC in its overall assessment of reasonableness.\textsuperscript{90}

- does natural justice require the Tribunal to inform Telstra, in explicit terms, what information or evidence is required before it can satisfied?; and
- does natural justice require the Tribunal to exercise its power under section 152CF(3)\textsuperscript{91} in circumstances where it has insufficient material or evidence to be satisfied of a particular matter?

Perhaps the fundamental unanswered question is this: to what extent is the ACCC’s assessment of undertakings under Part XIC regarded as adversarial as opposed to inquisitorial in nature. Part XIC does not expressly impose a ‘burden of proof’ on the party lodging the undertaking. Part XIC requires the ACCC to engage in public consultation, consider submissions from parties other than the access provider lodging the undertaking\textsuperscript{92} and have regard to a wide range of factors in its assessment.\textsuperscript{93} There is no reason why the access provider is likely to be the sole (or even the best) source of information on all of these factors. In addition, the ACCC is likely to receive relevant information in its role as arbitrator in notified access disputes under Division 8 of Part XIC. In that role, the ACCC arguably has a duty to investigate and obtain relevant information.\textsuperscript{94} In our view, it would be inconsistent with the statutory context to impose such a burden on the lodging party.

5 National Gas Code – the MSP decision - the importance of minimising uncertainty

5.1 Introduction

In September 2007 the High Court handed down its decision in \textit{East Australian Pipeline Limited v ACCC & Anor.}\textsuperscript{95} This decision related to the access arrangement for the Moomba to Sydney Pipeline System under the Gas Code.\textsuperscript{96}

This was the first time the High Court has deliberated on the construction of the Gas Code and (since it has been replaced by the \textit{National Gas Law} and \textit{National Gas Rules}) will almost certainly be the last.

This might lead one to conclude there is little to be learned from this decision, but it is a very useful illustration of the theme of this paper - the guidance provided by Courts and Tribunals and the importance of objectives.

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\textsuperscript{90} See the comments at note 34 above, paragraphs 281-283.
\textsuperscript{91} The power to require the ACCC to give such information, make such reports and provide such other assistance to the Tribunal as the presiding member specifies.
\textsuperscript{92} See, for example, section 152BV(2)(a).
\textsuperscript{93} Section 152AH.
\textsuperscript{94} Section 152DB(1)(b) imposes an obligation on the ACCC to ‘act as speedily as a proper consideration of the dispute allows, having regard to the need to carefully and quickly inquire into and investigate and dispute and all matters affecting the merits, and fair settlement, of the dispute’ See also the powers in section 152DC.
\textsuperscript{95} Above, note 11.
\textsuperscript{96} \textit{National Third Party Access Code for Natural Gas Pipeline Systems}, which is Schedule 2 to the \textit{Gas Pipelines Access (South Australia) Act 1997}. It is adopted by application laws in each participating jurisdiction. The Code commenced operation in NSW upon the commencement of the \textit{Gas Pipelines Access (New South Wales) Act 1998} (NSW) on 14 August 1998.
5.2 History

The history of the access arrangement for the Moomba to Sydney Pipeline (MSP) is a lengthy one.

The MSP is a critical component of Australia’s energy infrastructure. Constructed by the Commonwealth Government in the mid 1970’s, it is over 2000 km long, delivering gas from the Cooper-Eromanga Basin to the Sydney market.

In 1994, the Commonwealth sold the pipeline to East Australian Pipeline Limited (EAPL) then a subsidiary of AGL and Gasinvest Australia Pty Ltd. In 2000, EAPL became a subsidiary of the Australian Pipeline Trust (APT) and continues to operate the MSP on behalf of APT to the present day.

The MSP was one of the pipelines deemed to be covered by the gas access regime in 1998 by virtue of section 1.1 of the Gas Code.

In April 2000, EAPL applied to the National Competition Council (NCC) under section 1.25 of the Gas Code to revoke coverage of the pipeline (ie to remove it from the gas access regime). In October 2000, the Commonwealth Minister accepted the NCC’s recommendation not to revoke coverage.

In June 2001, EAPL lodged a further application with the NCC for revocation of coverage. In November 2002, the NCC again recommended that coverage not be revoked. However, in November 2003, the Commonwealth Minister decided that, with effect from 11 December 2003, coverage over the part of the pipeline running from Moomba to Marsden would be revoked, while coverage would be retained for the part of the pipeline running from Marsden to Sydney. An application to the Tribunal for review of this decision was withdrawn.  

The first version of EAPL’s access arrangement for the MSP was lodged with the ACCC in May 1999. The ACCC’s final approval was handed down in December 2003.  

While this process certainly exceeded the six months notionally allowed under the Gas Code, it was deferred due to EAPL’s application to revoke coverage and further delayed to consider the implications of the decision of the WA Court of Appeal in Re Michael.  

The ACCC’s final approval decision was to reject EAPL’s access arrangement and substitute its own. A key element of this decision was to reject EAPL’s initial capital base (ICB) of between $784 million and $997 million and instead set the ICB for the whole pipeline at $545.4 million. This was the critical issue in the proceedings that followed.

EAPL sought review of the ACCC’s decision by the Tribunal under the Gas Code’s limited merits review. The two chief limitations to merits review under the Gas Code are that the Tribunal:

(a) may only consider the matters raised before the regulator and the material specified in section 39(5) of the Gas Pipelines Access Law; and

(b) may only set aside the ACCC’s decision on the grounds specified in section 39(2), namely:

(i) an error of fact by the regulator;

98 The Gas Code provides for a ‘final decision’ (s 2.16) and a “further final decision” (s 2.16). The ACCC describes this second decision as a ‘final approval’.
99 Section 2.21.
100 Re Michael; Ex Parte Epic Energy [2002] WASCA 231.
101 Section 2.20. Note that under rule 64 of the new National Gas Rules, the AER has an equivalent power.
on 8 July 2004, the Tribunal set aside the ACCC’s access arrangement. The Tribunal:

(a) rejected the ACCC’s methodology for the calculation of the ICB, ruling that the ICB should be set using Depreciated Optimised Replacement Cost (DORC) with depreciation based on the net present value of forecast costs;
(b) overturned the ACCC’s refusal to include a contingency allowance in the ICB; and
(c) determined the WACC on the basis of a 10 year bond rate and a BBB credit rating.

After hearing further argument on the implementation of its methodology, the Tribunal ruled, in May 2005, that the ICB for the entire pipeline should be $834.66 million (in 2003 dollars) with 39.63% allocated to the covered part of the pipeline system and 60.37% allocated to the uncovered part.

The ACCC sought judicial review of the Tribunal’s decision with respect to the ICB. Because the presiding member of the Tribunal was a Federal Court judge (Gyles J) the application for review was heard by a Full Federal Court consisting of French, Finkelstein and Goldberg JJ.

In June 2006, the Full Federal Court set aside the Tribunal’s decision. The Full Court found there was no error in the methodology used by the ACCC to set the ICB and that the Tribunal therefore had no basis to set aside this part of the ACCC’s decision.

EAPL was granted special leave to appeal to the High Court. This appeal was heard in April 2007 before Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

In September 2007, the High Court allowed EAPL’s appeal. While there were two joint judgments, the decision was unanimous. The Court set aside the orders of the Federal Court, with the effect of reinstating the ICB for the pipeline set by the Tribunal in May 2005 ($834.66 million). A number of remaining grounds in the ACCC’s application for judicial review were remitted to the Federal Court for further directions. In December 2007, the Federal Court ordered, by consent, that these remaining grounds be dismissed.

The end result is that the access arrangement for the MSP approved by the Tribunal in May 2005 is the access arrangement applicable to the covered part of the pipeline under the Gas Code.

5.3 Section 8.10 - The Initial Capital Base

The central issue in both the Federal Court and High Court was the proper construction of section 8.10 of the Gas Code. This section sets down the factors that must be considered by the regulator when first setting the ICB of a pipeline that existed at the time of the Code’s commencement. These factors are:

102 Application by East Australian Pipeline Limited [2004] ACompT 8.
103 Application by East Australian Pipeline Limited [2005] ACompT 1; Application by East Australian Pipeline Limited [2005] ACompT 3.
104 ACCC v Australian Competition Tribunal [2006] FCAFC 83.
105 (1) Gleeson CJ, Heydon and Crennan JJ; (2) Hayne and Gummow JJ.
"(a) the value that would result from taking the actual capital cost of the Covered Pipeline and subtracting the accumulated depreciation for those assets charged to Users (or thought to have been charged to Users) prior to the commencement of the Code;

(b) the value that would result from applying the ‘depreciated optimised replacement cost’ methodology in valuing the Covered Pipeline;

(c) the value that would result from applying other well recognised asset valuation methodologies in valuing the Covered Pipeline;

(d) the advantages and disadvantages of each valuation methodology applied under paragraphs (a), (b) and (c);

(e) international best practice of Pipelines in comparable situations and the impact on the international competitiveness of energy consuming industries;

(f) the basis on which Tariffs have been (or appear to have been) set in the past, the economic depreciation of the Covered Pipeline, and the historical returns to the Service Provider from the Covered Pipeline;

(g) the reasonable expectations of persons under the regulatory regime that applied to the Pipeline prior to the commencement of the Code;

(h) the impact on the economically efficient utilisation of gas resources;

(i) the comparability with the cost structure of new Pipelines that may compete with the Pipeline in question (for example, a Pipeline that may by-pass some or all of the Pipeline in question);

(j) the price paid for any asset recently purchased by the Service Provider and the circumstances of that purchase; and

(k) any other factors the Relevant Regulator considers relevant."

In its 2003 decision, the ACCC set the ICB by starting with the Optimised Replacement Cost (ORC) valuation of the pipeline. However, instead of depreciating ORC on a straight line basis to arrive at DORC, the ACCC used a ‘kinked’ depreciation profile, in which the pipeline was depreciated on the basis of a 50 year life up to 2000 and an 80 year life thereafter. The ACCC justified this by reference to section 8.10(f) (ie. the basis on which the pipeline had been depreciated in the past).

The High Court was faced with two conflicting approaches to section 8.10.

The construction advanced by EAPL (which was adopted by the Tribunal) required the factors in section 8.10 to be considered in a particular sequence. Specifically:

(a) the values derived from the methodologies described in section 8.10(a), (b) and (c) are to be considered first;

(b) the advantages and disadvantages of each of these methodologies are to be considered next (in accordance with section 8.10(d));

(c) finally, the factors in section 8.10(e) to (k) are to be considered. These factors might assist in choosing between the values established in accordance with section 8.10(a) to (c). They may even justify some adjustment to the chosen methodology. However, they would normally (and perhaps never) permit well-recognised valuation methodologies to be put to one side.\textsuperscript{106}

\textsuperscript{106} Above, note 102, at paragraph 19.
Based on this construction, the Tribunal found that the ACCC erred in its determination of the ICB for the MSP. The Tribunal held that ORC was merely the starting point in establishing the DORC valuation for the pipeline. To adjust ORC having regard to past depreciation (in accordance with section 8.10(f)) did not reflect the terms of the Gas Code and was wrong in principle. The Tribunal found that the ACCC’s approach involved a misconstruction of section 8.10 and therefore set aside this aspect of the ACCC’s decision.

Under the construction advanced by the ACCC (and adopted by the Federal Court) the Gas Code did not require the factors in section 8.10 to be considered in any sequence. It required only that each factor be taken into account. Read this way, it was permissible for the ACCC to start with ORC (being an element of DORC) and to adjust it by reference to section 8.10(f) in order to arrive at an ICB. As a result, the Full Court found there was no error of law in the ACCC’s decision.

Gleeson CJ, Heydon and Crennan JJ preferred the approach of the Tribunal to that of the Full Federal Court. Their Honours held:

“Section 8.10 mandates a process for setting an ICB in which there are essentially three steps. First, a value for the asset base needs to be chosen by reference to well recognised asset valuation methodologies (pars (a)-(c)). Secondly, the advantages and disadvantages of each of the possible well recognised valuation methodologies is to be assessed (par (d)). Thirdly, the factors set out in pars (e) to (k) must be considered as they may bear on the choice of methodology and/or oblige an adjustment of value derived from the chosen methodology. No factor is an independent factor. Further, it is not unusual for any asset valuation methodology to require the taking of sequential steps. The DORC methodology itself requires steps to be taken, such as the establishment of ORC, as a preliminary to establishing DORC. Just as no factor in s 8.10 is independent of the others, no step on the way to establishing a factor is independent of the process laid down by s 8.10.”

It followed that Gleeson CJ, Heydon and Crennan JJ agreed with the Tribunal’s conclusion that the Gas Code did not permit the ACCC to establish the ICB by taking ORC (being only the starting point for calculating DORC) and then adjusting it by reference to section 8.10(f).

Gummow and Hayne JJ arrived at the same conclusion. However, their Honours’ explanation suggests an even narrower approach to the construction of section 8.10 than the one adopted by Gleeson CJ, Heydon and Crennan JJ:

“From the internal structure of s 8.10 several relevant considerations appear. First, pars (a)-(d) are directed to “the value” which would result from the "well recognised asset valuation methodologies" specifically identified in pars (a), (b) or any other valuation methodology which is “well recognised” (par (c)). Then, as required by par (d), it is the advantages and disadvantages of each of the methodologies identified in pars (a), (b) and (c), and of no other valuation methodology, which are to be considered in establishing the ICB for the pipeline in question. In particular, and contrary to oral submissions by the ACCC in this Court, par (k) cannot be relied upon by the regulator to sidestep the dictates of pars (a)-(d) by introducing a novel asset valuation methodology.

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107 Above, note 102, at paragraphs 25-27.
108 Above, note 104, at paragraph 193.
109 Above, note 11, at paragraph 48.
110 Above, note 11, at paragraph 57.
111 Above, note 11, at paragraph 58.
112 Above, note 11, at paragraph 104.
Paragraphs (e)-(j) are not addressed specifically to any valuation methodology. Rather they are expressed as factors to be considered in establishing the ICB and so might bear upon the subject of par (d), namely advantages and disadvantages of the various well recognised asset valuation methodologies identified in pars (a)-(c).”

The words highlighted in the above passage suggest that it may be permissible to use the factors in section 8.10(e) to (k) only to assist in choosing between the valuations established in accordance with section 8.10(a) to (c), not to modify or adjust any of those values. This would give section 8.10(e) to (k) a narrower role than the one given to it by Gleeson CJ, Heydon and Crennan JJ, who held that the factors in section 8.10(e) to (k) ‘may bear on the choice of methodology and/or oblige an adjustment of value derived from the chosen methodology’.

Ultimately, the outcome of the case did not turn on this distinction, as all five judges agreed that ORC was not a well recognised valuation methodology that could be modified having regard to section 8.10(f). Rather, the ACCC combined ORC with section 8.10(f) to create a methodology that the Court described as ‘novel’ and ‘idiosyncratic’.

5.4 The High Court’s reasons

Gleeson CJ, Heydon and Crennan JJ started from the position that the task of establishing an ICB under the Gas Code is to be considered in light of the Code’s purpose and objectives. Two objectives were singled out by their Honours.

Firstly, their Honours stated:

“The framework for third party access to natural gas pipelines set out above directs attention to the multiple objectives of an approved access regime. Stripped to essentials, such a regime is at least intended to allow efficient costs recovery to a service provider and at the same time ensure pricing arrangements for the consuming public which reflect the benefits of competition, despite the provision of such services by monopolies. The balancing of those objectives properly has a natural flow-on effect for future investment in infrastructure in Australia.

The greater the degree of uncertainty and unpredictability in the regulatory process, the greater will be the perceived risk of investment. The greater the perceived risk of investment, the higher will be the returns sought. Various methodologies referred to in the Code must at least not be inconsistent with the principles stated by the legislature, which are directed to economic efficiency.”

Secondly, their Honours stated:

“It is clear that a range of well recognised asset valuation methodologies can be considered and within that range a choice of value may be made. The discretion permitted is wide but limited. The reference to well recognised asset valuation methodologies emphasises that valuation, in this context, is a practical exercise. Idiosyncrasy in valuing an initial capital base is capable of distorting the proper calculation of a rate of return.

113 Above, note 11, at paragraph 87-88.
114 Above, note 11, at paragraph 57.
115 Above, note 11, at paragraphs 24 and 48.
116 Above, note 11, at paragraphs 49-50. Also see Gummow and Hayne JJ at paragraph 82.
‘commensurate with prevailing conditions in the market’ for funds and the risk involved, as provided in s 8.30.”  

It is clear that their Honours were heavily influenced section 8.30 of the Code. This section, which relates to the rate of return, provides as follows:

“The Rate of Return used in determining a Reference Tariff should provide a return which is commensurate with prevailing conditions in the market for funds and the risk involved in delivering the Reference Service (as reflected in the terms and conditions on which the Reference Service is offered and any other risk associated with delivering the Reference Service).”  

In addition to the specific reference to section 8.30 quoted above, the need for a rate of return ‘commensurate with prevailing conditions in the market for funds and the risk involved’ was repeatedly emphasised by Gleeson CJ, Heydon and Crennan JJ throughout their Honours’ judgment:

“Commencing the process of setting an ICB by reference to values derived from well recognised asset valuation methodologies is entirely consistent with the reasons for setting an ICB in the first place, namely establishing a fair rate of return on the value of the capital base commensurate with prevailing conditions in the market for funds and the risk involved. Thus is the ICB a key factor in setting a Reference Tariff.”  

“When the express terms and the logical structure of s 8.10 are construed, particularly in the context of the Code, it is clear that the factors which should be considered are to be dealt with in a particular manner. The context of the Code, considered widely, includes the objectives to be achieved in setting a Reference Tariff and the purposive relationship between an ICB and a rate of return, commensurate with prevailing market conditions for funds and the risk involved.”

“A construction of s 8.10 which permitted the process set out in s 8.10 to be put aside would render it difficult, if not impossible, for either service providers or the consuming public (through the consultation processes) to treat s 8.10 as a certain list of factors to be taken into account in a particular manner in setting an ICB. This would complicate the task of any service provider in preparing a proposed Access Arrangement of an established pipeline, as required by s 2.2 of the Code. The complicated nature of that process can be gleaned from the chronology of the approval process in this case, set out above. Further, the task of establishing a rate of return on investment, for regulatory purposes, commensurate with prevailing market conditions for funds and the risk involved would be rendered a much less certain process than it is already. Such a result could distort future investment decisions about essential infrastructure.”

From these passages, the approach of Gleeson CJ, Heydon and Crennan JJ to the construction of section 8.10 can be summarised as follows:

(a) one of the objectives of the Code is to provide a return on investment that is commensurate with prevailing conditions in the market for funds and the risk involved;

117 Above, note 11, at paragraph 51.
118 Above, note 11, at paragraph 55.
119 Above, note 11, at paragraph 56.
120 Above, note 11, at paragraph 59.
(b) regulatory uncertainty increases this risk, thus distorting the required rate of return; and

(c) accordingly, the regulator’s discretion, while wide, must be limited. Section 8.10 should not be construed so as to permit the ICB to be calculated in a manner that is novel or idiosyncratic.

While they do not use the words, it could be argued that Gleeson CJ, Heydon and Crennan JJ have interpreted the Gas Code so as to limit the regulatory risk that arises from the need to vest discretion in the regulator. In a paper presented to the ACCC’s regulatory conference in 2001, Ergas, Hornby, Little and Small described this regulatory risk as the ‘inevitable companion of regulatory discretion’. The level of uncertainty associated with the ACCC’s discretion under section 8.10 was plainly a critical issue for Gleeson CJ, Heydon and Crennan JJ. Their Honours emphasised the need to give the Gas Code a construction consistent with providing a rate of return ‘commensurate with prevailing market conditions for funds and the risk involved’. Achieving this objective required section 8.10 to be read so as to limit the regulator’s discretion, thereby minimising the risk arising under the Code.

What is noteworthy about this decision is that Gleeson CJ, Heydon and Crennan JJ focussed on the need to provide a rate of return commensurate with market conditions and to limit regulatory uncertainty, despite the fact that neither of these principles appear among the stated objectives of the Gas Code.

The Gas Code contains an ‘Introduction’ which states:

“The objective of this Code is to establish a framework for third party access to gas pipelines that:

(a) facilitates the development and operation of a national market for natural gas; and
(b) prevents abuse of monopoly power; and
(c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
(d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users; and
(e) provides for resolution of disputes.”

Section 2.24 set out matters that the regulator must take into account in approving an access arrangement, namely:

(a) the Service Provider’s legitimate business interests and investment in the Covered Pipeline;
(b) firm and binding contractual obligations of the Service Provider or other persons (or both) already using the Covered Pipeline;
(c) the operational and technical requirements necessary for the safe and reliable operation of the Covered Pipeline;
(d) the economically efficient operation of the Covered Pipeline;
(e) the public interest, including the public interest in having competition in markets (whether or not in Australia);
(f) the interests of Users and Prospective Users;


122 This introduction is not part of the Code but can be used in its interpretation (sections 10.4, 10.5).
Section 8.1 lists the objectives that a Reference Tariff should be designed to achieve, which are:

"(a) providing the Service Provider with the opportunity to earn a stream of revenue that recovers the efficient costs of delivering the Reference Service over the expected life of the assets used in delivering that Service;

(b) replicating the outcome of a competitive market;

(c) ensuring the safe and reliable operation of the Pipeline;

(d) not distorting investment decisions in Pipeline transportation systems or in upstream and downstream industries;

(e) efficiency in the level and structure of the Reference Tariff; and

(f) providing an incentive to the Service Provider to reduce costs and to develop the market for Reference and other Services."

While Gleeson CJ, Heydon and Crennan JJ highlighted the need to provide a rate of return commensurate with prevailing market conditions and the risk involved, the appeal was not directly concerned with section 8.30. Despite the suggestion at paragraph 29 of their Honours' judgment (which appears to identify section 8.30 as one of the provisions by which the ICB for a new pipeline is established) section 8.30 does not relate to the ICB, but to the rate of return to be applied to the ICB in determining the Reference Tariff (see section 8.4). Despite this, Gleeson CJ, Heydon and Crennan JJ saw section 8.30 as reflecting a principle of broader application that was relevant to the construction of the provisions relating to the ICB.

In their interpretation of section 8.30, Gleeson CJ, Heydon and Crennan JJ were guided not by the objectives expressly stated in the Code, but by objectives drawn from the surrounding context and the recognition that limiting uncertainty and unpredictability is consistent with the objectives of a statute that is directed towards economic efficiency.

Gummow and Hayne JJ also refer to the objectives in section 8.1 of the Code:

“Section 8.1 sets out certain ‘General Principles’ with which Reference Tariffs included in an Access Arrangement must comply. To the extent possible, service providers are to be given a ‘market-based incentive to improve efficiency and to promote efficient growth of the gas market’. Further, service providers should be provided with ‘the opportunity to earn a stream of revenue that recovers the costs of delivering the Reference Service over the expected life of the assets used in delivering that Service, to replicate the outcome of a competitive market, and to be efficient in level and structure’. These concerns with market-based incentives and the replication of the outcome of a competitive market would be shared with service providers by their financiers who are lending or providing other accommodation on the strength of such matters.”

Gummow and Hayne JJ state that these general principles are important when construing the more detailed provisions of the Code relating to the approval of a Reference Tariff. However, while the objectives of the Code have guided their
Honours thinking, paragraph 87 quoted above\textsuperscript{127} suggests their construction of section 8.10 was based more on the ‘internal structure’ of the provision.

5.5 Lessons from the MSP decision

It is hardly controversial to contend that minimising uncertainty is a factor to be taken into account in the interpretation of an access regime. After all, who would seek to interpret a statute so as to increase regulatory uncertainty and unpredictability? But this does not tell the full story of the Moomba to Sydney decision. If section 8.10 is read cold, it is not immediately obvious that there is a sequence in which the factors must be applied. The Full Federal Court, comprised of three judges noted for their expertise in competition law, did not think such a sequence existed.

The High Court, however, took a different approach to the construction of section 8.10, interpreting this provision so as to limit the scope of the regulator’s discretion. This much is clear from paragraph 51 of the judgment of Gleeson CJ, Heydon and Crennan JJ quoted above\textsuperscript{128}. They did so for the purpose of limiting regulatory uncertainty and because they considered this to be consistent with the objects of the Gas Code. This was done despite that fact that neither certainty nor the rate of return appear among the Code’s stated objectives.

At some point, every access regime will confer some measure of discretion on the regulator. Such ‘discretion’ is rarely (if ever) unconstrained. It is typically guided by principles and criteria that require the regulator to consider and balance various (and often conflicting) interests. It is also typically located within an overall scheme of checks and balances (the discussion in section 6.6 of this paper). However, as with section 8.10 of the Gas Code, such laws will usually permit the regulator to choose from what may appear to be (at least at face value) a wide range of outcomes.

An approach to construction that emphasises certainty and the minimisation of regulatory risk will necessarily frown upon regulatory decisions that could be characterised as novel. In its decision on the access arrangement for the MSP, the ACCC departed from the straight-line DORC methodology that it had traditionally used in the valuation of gas pipeline systems. Even if this departure had been permitted by the Code, it could not be denied (and indeed it was conceded) that the ACCC’s approach was novel.

This novelty is perhaps the most important practical lesson to be taken from the Moomba to Sydney decision. There are many cases where access legislation will give the regulator discretion of sufficient width to allow it to consider and adopt different methodologies in making pricing decisions. However, this discretion must be exercised with care. A regulator runs the risk of falling into error if it adopts methodologies that are novel, overly innovative, or idiosyncratic. Change, where it is necessary, is best undertaken gradually, and only where it is well supported by sound economic theory.

Economic regulation cannot be static. It should evolve and adapt with increased knowledge, experience and expertise. However, to the extent that regulators seek to engineer change within the scope of their discretion, it should be a process of evolution, not revolution. Radical change, where it is required, is more sensibly the province of legislators and rule makers.

\textsuperscript{127} See note 113.
\textsuperscript{128} See note 117.
6 General Access Regime - Part IIIA of the TPA – *what the words say is what they mean and some things are intended to be simple*

6.1 Introduction

In this part of the paper, we look at two decisions of the Full Federal Court dealing with the national third party access regime in Part IIIA of the TPA.

The first is the October 2006 decision of the Full Court (French, Finn and Allsop JJ) in *Sydney Airport Corporation Limited v Australian Competition Tribunal*. This was an application by Sydney Airport Corporation Limited (SACL) for judicial review of a decision by the Tribunal in December 2005 to declare airside services at Sydney Airport under Part IIIA.

The second is the October 2007 decision of the Full Court (Sundberg, Finkelstein and Greenwood JJ) in *BHP Billiton Iron Ore v The National Competition Council*. This was an appeal from a decision by Middleton J of the Federal Court in December 2006 regarding the ability of the NCC to consider a Part IIIA application by Fortescue Metals Group Limited (Fortescue) in respect of sections of the Mt Newman and Goldsworthy rail lines operated by BHP Billiton Iron Ore (BHPBIO) in the Pilbara.

The Part IIIA access regime involves two separate and distinct stages, described in more detail below. The first is declaration of a service by a decision-making Minister upon the recommendation of the NCC. The second is arbitration of access disputes in relation to declared services by the ACCC at the request of either the access seeker or the access provider. So, for example, one access seeker may be successful in getting a service declared and then reach satisfactory agreement on the terms of its access, while another access seeker who was not involved in the declaration process triggers an arbitration in relation to the terms of its access.

Declaration and arbitration decisions are subject to review by the Tribunal, which can re-hear the matter exercising the same powers as the original decision maker (merits review).

Both Federal Court decisions deal with aspects of the declaration process. The *Sydney Airport* matter deals primarily with the ‘promote competition’ criterion mentioned earlier in this paper. The *Mt Newman and Goldsworthy* matter deals with the exception which removes ‘the use of a production process’ from the services which are susceptible to declaration under Part IIIA. However, the decisions also contain some interesting judicial commentary as to the operation of Part IIIA as a whole, how it achieves its objectives and the checks and balances built into its design.

One of the themes that emerges from both cases from a regulatory design perspective is that, within a complex multi-step system of checks and balances, some decisions can be kept simple; every decision at every stage does not need to try to balance all competing interests within the decision if they are adequately balanced within the process.

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129 *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146.


131 Above, note 30.

132 Section 44K and section 44ZP.
6.2 The Part IIIA mechanism

The two basic (alternative) access mechanisms under Part IIIA are either declaration of a service by a decision-making Minister or the submitting of a voluntary access undertaking by an access provider to the ACCC (which if accepted by the ACCC precludes declaration). The Full Court decisions discussed in this paper relate to the declaration mechanism.

The declaration process can be triggered by the decision-making Minister 'or any other person' (section 44F(1)) making an application to the NCC in relation to a 'service' provided by means of a facility. The nature of the service that can be the subject of an application is described in section 44B as follows:

"'service' means a service provided by means of a facility and includes:
(a) the use of an infrastructure facility such as a road or railway line;
(b) handling or transporting things such as goods or people;
(c) a communications service or similar service;
but does not include:
(d) the supply of goods; or
(e) the use of intellectual property; or
(f) the use of a production process;
except to the extent that it is an integral but subsidiary part of the service."

The application of paragraph (f) of this definition was at issue in the Mt Newman and Goldsworthy matter.

Upon receiving an application, the NCC must advise the access provider (the owner or operator of the facility that is used to provide the service) that it has received an application and it must, after having regard to the objects of Part IIIA, make a recommendation to the decision-making Minister as to whether or not the service should be declared (section 44F(2)). The obligation to have regard to the objects of Part IIIA was introduced in 2006 along with the objects in section 44AA which are to:

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

The decision-making Minister will typically be the Commonwealth Treasurer (or by delegation the Parliamentary Secretary to the Treasurer) unless the access provider is a State or Territory body, in which case the decision-making Minister will be the State Premier or Territory Chief Minister (section 44D).

Section 44G provides for a number of limitations on the NCC’s ability to recommend declaration of a service. For present purposes, the key limitation imposed by section 44G is the requirement that the NCC be satisfied as to a number of criteria before it can make a recommendation for declaration. These criteria in section 44G(2) are:

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133 Sections 44G(1) and 44H(3).
"(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;

(b) that it would be uneconomical for anyone to develop another facility to provide the service;

(c) that the facility is of national significance, having regard to:
   (i) the size of the facility; or
   (ii) the importance of the facility to constitutional trade or commerce; or
   (iii) the importance of the facility to the national economy;

(d) that access to the service can be provided without undue risk to human health or safety;

(e) that access to the service is not already the subject of an effective access regime;

(f) that access (or increased access) to the service would not be contrary to the public interest."
party who it accepts as having a sufficient interest to become a party to the arbitration (section 44U).

An arbitration determination only covers access by the relevant party to the dispute but it may deal with any matter relating to that party’s access, including matters that were not the basis for notification of the dispute (section 44V). However, there are a number of restrictions placed on the ACCC in exercising this arbitration power. For present purposes, the key restrictions are as follows:

Under section 44W(1), the ACCC cannot make a determination that would have any of the following effects:

"(a) preventing an existing user obtaining a sufficient amount of the service to be able to meet the user’s reasonably anticipated requirements, measured at the time when the dispute was notified;

(b) preventing a person from obtaining, by the exercise of a pre-notification right, a sufficient amount of the service to be able to meet the person’s actual requirements;

(c) depriving any person of a protected contractual right;

(d) resulting in the third party becoming the owner (or one of the owners) of any part of the facility, or of extensions of the facility, without the consent of the provider;

(e) requiring the provider to bear some or all of the costs of extending the facility or maintaining extensions of the facility;

(f) requiring the provider to bear some or all of the costs of interconnections to the facility or maintaining interconnections to the facility."

Under section 44X(1), the ACCC must take into account the following (in addition to any other matters it thinks relevant):

"(aa) the objects of this Part;\textsuperscript{138}

(a) the legitimate business interests of the provider, and the provider’s investment in the facility;\textsuperscript{139}

(b) the public interest, including the public interest in having competition in markets (whether or not in Australia);

(c) the interests of all persons who have rights to use the service;

(d) the direct costs of providing access to the service;

(e) the value to the provider of extensions whose cost is borne by someone else;

(ea) the value to the provider of interconnections to the facility whose cost is borne by someone else;

(f) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(g) the economically efficient operation of the facility;\textsuperscript{138}

\textsuperscript{138} Introduced in 2006.

\textsuperscript{139} Note that, in the design of Part IIIA, this comes in at the arbitration stage, rather than the declaration stage. Although not considered by the Tribunal or the courts in relation to Part IIIA, consideration of an equivalent provision to paragraph 44X(1)(a) under the Gas Code and Part XIC has shown how this can assist the access provider. For example, see the discussion in section 4.5 of this paper regarding Telstra (2007). Similarly, in Re Michael, the decision regarding the Dampier to Bunbury pipeline, the WA Supreme Court noted that recovering the actual investment in a pipeline, even if it assumed some monopoly profits, together with a reasonable return could nonetheless be categorised as a legitimate business interest of the pipeline owner: note 100, at paragraph 130.
(h) the pricing principles specified in section 44ZZCA."

The pricing principles were introduced in 2006 which the ACCC must take into account under section 44X(1)(h). These are as follows:

"(a) that regulated access prices should:
   (i) be set so as to generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services; and
   (ii) include a return on investment commensurate with the regulatory and commercial risks involved; and

(b) that the access price structures should:
   (i) allow multi-part pricing and price discrimination when it aids efficiency; and
   (ii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and

(c) that access pricing regimes should provide incentives to reduce costs or otherwise improve productivity."

Finally, under section 44ZZP, a party to an arbitration determination may seek re-arbitration of the access dispute by the Tribunal (merits review). Questions of law from an arbitration decision by the Tribunal may be appealed to the Federal Court (section 44ZZR).

6.3 The objectives of Part IIIA

Part IIIA was introduced as part of the 1995 National Competition Policy (NCP) reforms following consideration of the Hilmer Report by the Council of Australian Governments.

Part IIIA did not originally contain any statement of objects. However, at the same time as Part IIIA was introduced in 1995, a general statement of objects was inserted into section 2 of the TPA:

"The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

In its 2001 submission to the Productivity Commission’s review of Part IIIA, the NCC described its view of the relationship between Part IIIA and section 2 as follows:

“Part IIIA is one of the regulatory tools included in the TPA to achieve this overall objective, through its capacity to ‘unlock’ natural monopoly infrastructure and in so doing, promote competition and consumer benefits in related markets.”

and later:

“While the TPA does not set out an explicit, dedicated objective for Part IIIA, the Council has drawn on the general objective of s.2 of the TPA and the explanatory memorandum to the enactment of Part IIIA (through the

140 Above, note 5.
In support of its 2001 recommendation that a statement of objects should be included in Part IIIA, the Productivity Commission noted concerns raised to it that “access regulators in Australia have focused too heavily on the short-term interests of consumers.” These concerns were echoed in the Productivity Commission’s 2005 review of National Competition Policy Reforms, where it noted that criticisms had included ‘an undue emphasis on encouraging the efficient usage of existing services rather than promoting appropriate incentives for new investment and asset maintenance’.

The Productivity Commission took the view that the inclusion of a statement of objects would assist in interpreting the intent of Part IIIA in relation to these tensions between short term interests and long term interests and between the efficient use of existing facilities and efficient investment in new infrastructure.

The Government’s response to the Productivity Commission’s recommendation was to introduce the present statement of objects in section 44AA. The Government noted that:

“Part IIIA should continue to provide decision-makers with sufficient scope to balance various stakeholders’ interests and to take into account a broad range of public interests considerations. The Government considers the adoption of the Commission’s proposed objects clause, with some amendments, meets these objectives.”

As is typically the case with objects statements, the process did not involve detailed consideration of the role of the objects in the overall design of the regime and how they would be used by the courts. The language of the objects proposed by the Productivity Commission simply refers to both efficient use and investment notwithstanding the Productivity Commission’s recognition of the tension between the two. The Government’s response similarly opts out of introducing a tie-breaker by simply shifting the issue on to the regulatory decision maker (which, as discussed in the conclusion to this paper, is likely to have the effect of increasing regulatory risk and encouraging litigation).

6.4 The Sydney Airport matter

The Sydney Airport matter arose as a result of an application by Virgin Blue to the NCC in October 2002 seeking a recommendation that the following airside services be declared under Part IIIA:

“the services required for the use of runways, taxiways, parking aprons and other associated facilities necessary to allow aircraft carrying domestic passengers to:

(i) take off and land using the runways at Sydney Airport; and

(ii) move between the runways and the passenger terminals at Sydney Airport.”

In November 2003, the NCC recommended against declaration and in January 2004, the relevant decision-making Minister (in this case, the Parliamentary Secretary to the Treasurer) made his decision not to declare these services. In February 2004,

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143 Above, note 142, at page 65.
144 Above, note 1, at page 92.
Virgin Blue applied to the Tribunal for review of the Minister’s decision and in December 2005 the Tribunal set aside the Minister’s decision and declared the services.

SACL challenged the Tribunal’s decision in the Federal Court, arguing that the Tribunal had erred by not directing itself to the correct question in relation to the ‘promote competition’ criterion in section 44H(4)(a). The Full Federal Court found that the Tribunal’s approach to this criterion was flawed (although not in the manner SACL had argued) but that this did not sufficiently affect the Tribunal’s decision to warrant setting it aside:

“Having regard to the exhaustive and meticulous reasons of the Tribunal, after a full hearing, we do not think that the decision should be interfered with. Whilst we consider that the Tribunal misconstrued s 44H(4)(a) by infusing an overly elaborate body of considerations into that criterion, the nature of those detailed considerations (the comparison of the future with and without declaration) are not such as to be irrelevant (as understood by reference to Peko-Wallsend) to the enquiry as a whole as to whether to declare the service, even though they were irrelevant to a consideration of s 44H(4)(a).”

SACL sought and was denied special leave to appeal to the High Court in March 2007. Put simply, the High Court did not seem to believe that the differences in approach to the ‘promote competition’ criterion made a material difference to the outcome:

“We think there are insufficient prospects of success of an appeal to warrant a grant of special leave in this matter. In saying that, we do not wish to be taken to be expressing any opinion upon the apparent difference in the interpretation given to the legislative provision in question by the Australian Competition Tribunal on the one hand and the Full Court of the Federal Court on the other. It seems to be common ground that that difference is not material to the dispute between the parties that would occupy the Court if special leave to appeal were granted.”

There are two interesting aspects of this decision that provide guidance as to Part IIIA. The first is clarification as to the ‘promote competition’ criterion given the significant differences in interpretation discussed in this matter and the second is the Full Court’s approach to understanding Part IIIA as a whole.

To start at the beginning, the NCC articulated its approach to the ‘promote competition’ criterion as follows (noting that the NCC typically looks at criterion (b) before examining criterion (a)):

“The process the Council adopts for considering the s. 44G(2) criteria can be broadly summarised as follows:

(a) Define the service provided by means of the infrastructure facility, delineate the physical assets that comprise the facility and identify the provider of the service.

(b) For the purposes of criterion (b), examine whether it is economic to develop another facility to provide the service. Declaration is confined to facilities exhibiting natural monopoly characteristics — that is, where it would be cheaper over a likely range of reasonably foreseeable demand for one facility to provide that service, rather than two or more facilities.

(c) For the purposes of criterion (a), assess whether declaration of the service would improve the conditions or environment for

147 Above, note 129 at paragraph 94.
competition in a dependent market. Whether the conditions for competition would be enhanced depends critically on whether the natural monopoly characteristics associated with the provision of the service confer substantial market power on the service provider that can be exercised to adversely affect competition in a dependent market(s). As part of this evaluation, dependent markets need to be identified, as do factors affecting the ability and incentive to exercise market power to adversely affect competition in a dependent market(s).”

One of the issues for the NCC was the fact that Virgin Blue already had access to airside services at Sydney Airport. The NCC concluded that this was not a bar to considering the application and that declaration is available where a user seeks access on more efficient terms and conditions. However, the NCC ultimately found that while SACL had the ability to exercise market power, its incentive to do so was constrained. Therefore it could not be satisfied that declaration would promote competition. In reaching this conclusion, the NCC approached its analysis as if the issue was whether there would be an adverse effect on competition if SACL exercised its market power rather than focusing on the environment for improving competition as considered by the Tribunal in Sydney Airport (2006):

“On the basis of the information available to it, the Council cannot be satisfied that SACL’s ability and incentive to exercise market power is such that it would cause a material adverse effect on competition in any of the identified relevant dependent markets.”

The Tribunal took a different approach in finding that criterion (a) was satisfied. It took the view that SACL was not subject to any effective constraints and that pricing and non-pricing issues between SACL and airlines were likely to be resolved by SACL using its monopoly power to produce outcomes that would be unlikely to occur in a competitive environment.

The different approaches to the application of criterion (a) put to the Tribunal by the various parties were summarised by the Tribunal as follows:

“The expressions ‘access’ and ‘increased access’ are not defined in Pt IIIA of the TPA. Virgin Blue’s primary submission was that criterion (a) required determination of whether a right or ability (or an increased, or greater, or enhanced right or ability) to use the service, as opposed to no right or ability (or only a limited or restricted right or ability) to use the service, would promote competition in the dependent market....

The NCC and Qantas sought to equate the terms ‘access’ and ‘increased access’ in criterion (a) with regulated access in the form of declaration under Pt IIIA of the TPA. Such an approach was said to reflect earlier Tribunal decisions interpreting the terms, in particular, the Tribunal decision in Sydney International Airport at [106], 40,775. The NCC submitted that increased access included accommodation of terms and conditions of access, including access on more favourable terms.

SACL rejected this approach, submitting that the actual consequences of declaration would need to be identified and assessed to see whether access or increased access in terms of more competitive use of the facility would in fact be achieved. In its view, the fact of declaration itself was not

149 Final recommendation from the National Competition Council on the application from Virgin Blue for declaration of the airside service at Sydney Airport, January 2004, at paragraph 2.11.

150 Above, note 149 at paragraph 3.16.

151 Above, note 149 at paragraph 6.276.

152 Above, note 149 at paragraph 6.278.

153 Above, note 136 at paragraphs 16 and 17.
enough to constitute access or increased access. SACL agreed that an aspect of ‘access’ would include the terms and conditions or the price upon which access was granted, but only where it could first be shown that such terms would have an effect upon the level of access, that is upon the right or opportunity to use the service.”  

In essence, the implication of Virgin Blue’s approach is that current terms of access have little role to play in relation to criterion (a) - all that is required is to establish that access is an essential input. The Tribunal rejected this argument, stating that the counterfactual should be the ‘current conditions of access projected into the future’. However, the Tribunal also rejected SACL’s assertion that it was necessary to ascertain precisely what regulated access would look like in the future, stating that: 

“... It forms no part of our inquiry to assess whether increased access would result in any particular outcome in an ACCC-arbitrated dispute over terms and conditions of use of Sydney Airport. We should not opine as to, speculate, or second-guess the methodology that the ACCC might adopt in relation to the setting of the price or other terms and conditions of infrastructure services.”

Rather, the Tribunal saw the appropriate approach as follows:

“When one considers the counterfactual, the current scenario may be used as a benchmark, taking into account past and current events and circumstances and extrapolating them into the future. A consideration of the factual involves an assessment of whether increased access on different terms and conditions would enhance the environment for competition in the dependent market and create or open up more opportunities for competitive conduct in the dependent market.

Put another way, the task of the Tribunal is to compare:

- the opportunities and environment for competition in the dependent market if the Airside Service is declared; with
- the opportunities and environment for competition in the dependent market if the Airside Service is not declared.”

The issue with looking at the future with and without declaration, is that it requires some assumption to be made as to the consequences of declaration. This is a difficult task in a two-staged process where declaration does not equate to any form of access or direct regulation, merely possible arbitration of a specific dispute at some point in the future. In a sense, it conflates the two stages of the process.

The matter then came before the Full Federal Court. The Full Court dealt quickly with SACL’s argument that the Tribunal had erred in that it is necessary to find some present denial or restriction of access in order to engage criterion (a) and in doing so relied heavily on an approach that took into account the context and structure of the regime in Part IIIA as a whole:

“Nowhere in the text or structure of Part IIIA, or the context of, and background to, its passing is there any foundation for the construction propounded by SACL. Part IIIA is not, and was never intended to be, a regime to set right what might be said to be unacceptable conduct. To require the Tribunal (and before it the NCC and the Minister) to conduct a factual investigation of this kind to identify and determine a denial or

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154 Above, note 136 at paragraphs 130-132.
155 Above, note 136 at paragraph 149.
156 Above, note 136 at paragraph 136.
157 Above, note 136 at paragraph 152-153.
restriction of access is to intrude into s 44H(4)(a) an enquiry not justified by
the text or structure of Part IIIA.

The context and background and evident purpose of the legislation make
clear that the regime is not only engaged when some denial, or restriction of
supply of the service can be demonstrated. Such a construction would limit
the operation of this Part and impede it by an anterior and collateral factual
enquiry. Further, to the extent that the found denial or restriction acts as a
focal point or governor of the enquiry as to the promotion of competition
contemplated by s 44H(4)(a) the section would be acting more like a
remedy for a wrong, rather than as a public instrument for the more efficient
working of essential facilities in the economy. 158

The Full Court agreed with the simple construction of criterion (a) put forward by
Virgin Blue:

"...However, Virgin's second argument that there is a simpler construction of
s44H (4)(a) to that which was applied by the Tribunal was fully argued and
should be dealt with. This is especially so given the central importance to
the Australian economy and business life of the efficient and timely working
of the Act.

We agree with the submission of Virgin that the relevant enquiry in s44H
(4)(a) is the comparison between access and no access and limited access
and increased access. That is what the words say. They do not say that it is
necessary to examine whether declaration of the service would promote
competition; they say 'access or increased access ... would promote
competition'. 159

The Full Court also dismissed the approach of the Tribunal (and the NCC) in looking
to the future with and without declaration. It outlined a much simpler approach to the
declaration stage of the Part IIIA regime, recognising that there is a two stage
approach and having regard to the plain language of Part IIIA, its background and
context:

“The Tribunal reached the view that the relevant enquiry was whether
declaration of the service would promote competition by construing ‘access’
as ‘regulated access under Part IIIA’. It correctly rejected the view that it
should surmise the outcome of any arbitration that may occur. It correctly
recognised that access (or increased access) may not be achieved by the
operation of Part IIIA. Even if the parties cannot agree on the terms of
access or increased access, there is no guarantee that an arbitration will
bring about access, or access on any particular terms. Thus, it considered
that the surrogate for ‘access under Part IIIA’ is ‘declaration under Part IIIA’.

We disagree with this approach whereby ‘access’ becomes ‘declaration
under Part IIIA’. Whilst Part IIIA is entitled ‘Access to Services’, the two
stage approach, if engaged, does not necessarily lead to access or
increased access to the service for anyone. It is a convenient and
meaningful heading, in particular in the light of the terminology and
nomenclature of the debate, discussion and background leading up to the
passing of the amending Act. But ‘access’ is an ordinary English word.
Taking into account the context and background, we think that in this part of
s 44H, the word ‘access’ is being used in its ordinary English sense. Virgin
is correct in its submission that all s 44H(4)(a) requires is a comparison of
the future state of competition in the dependent market with a right or ability
to use service and the future state of competition in the dependent market
without any right or ability or with a restricted right or ability to use the
service.

158 Above, note 129 at paragraphs 77-78.
159 Above, note 129 at paragraphs 80-81.
We do not accept the Tribunal’s basis for rejecting the submission that it would be unrealistic to undertake a counterfactual analysis which discounts the fact that Virgin has access. That, with respect, is not the point. The terms of s 44H(4)(a) do not incorporate the requirement for comparison with what is factually the current position in any given circumstances. Once a declaration is made any potential user can take advantage of it. Thus, it is an unnecessary constriction of a provision by way of pre-condition, to engage in a detailed factual enquiry heavily dominated by the past and the present.  

and later:

“This construction of s 44H(4)(a) conforms to the purpose of Part IIIA revealed by the background and context: see in particular the Hilmer Report, the COAG explanatory material referred to above and clause 6 of the Competition Principles Agreement referred to above. None of this material reveals any necessity to examine the current state of access or to engage in an enquiry based on assessing the future with and without declaration. The essential precondition discussed was that access (that is in its ordinary meaning) was necessary to permit effective competition in a downstream or upstream market.”

6.5 Responses to the Sydney Airport matter

Although the approach taken by the Full Court is consistent with the general attitude of the Courts to reading the actual words of the TPA and attempting to ensure that the TPA can be consistently and predictably applied, the decision has met with some criticism precisely because it simplifies the first step in the two stage process under Part IIIA (and possibly removes a traditional battle ground that has provided fertile ground for lawyers and economists).

SACL’s counsel expressed SACL’s concern with the Full Court’s simplified approach to declaration when seeking leave to appeal as follows:

“The effect and the surprising effect of the Full Court’s conclusion, which is unheralded, in our submission, by anything that has gone before, is that one really does not look at the facts at all. It is a 15 minute exercise, not a 15 day exercise and that is antithetical to the way in which all of the elements of these declaration matters have previously been addressed.”

Whilst somewhat of an exaggeration, this comment encapsulates the concern of others that the consequence of a less complex exercise at the declaration stage will result in making declaration easier to achieve and therefore increasing the degree of regulation on infrastructure owners. The Productivity Commission in its 2006 report on Airport Services, recommended that Part IIIA be amended to ‘restore the prevailing interpretation of section 44H (4)(a) prior to the Federal Court decision’ expressing concerns about ‘lowering the entry bar’ and ‘making Part IIIA more accessible’:

“...the Commission considers that the Federal Court decision is likely to make the Part IIIA declaration criteria easier to meet. Ostensibly, the decision has greatly reduced the relevance of conduct considerations to the promotion of competition test. Hence, as is the case for the ‘national significance’ and ‘uneconomic to duplicate’ tests (criteria (b) and (c)), assessments against this test seem likely, in future, to hinge primarily on structural considerations. Despite the new legislative requirement that the

160 Above, note 129 at paragraphs 82-84.
161 Above, note 129 at paragraph 86.
162 Above, note 148.
competition promoted by access be ‘material’ or ‘non-trivial’, it would seem to the Commission that any infrastructure service which meets criteria (b) and (c), will most likely meet criterion (a). ...

This in turn suggests that unless conduct considerations are reintroduced via the residual discretion available to the Minister, the Australian Competition Tribunal and the courts, then the Part IIIA entry bar will have been lowered.”

and further:

“The Commission further observes that the uncertainty which has been created by this decision may of itself deter investment, even if it ultimately transpires that the final resting point for the Part IIIA entry bar has not been significantly lowered. New interpretations of complex legislation will often give rise to some uncertainty. However, in this particular case, the apparent increase in the role of residual discretion in the application of the declaration criteria is likely to amplify such uncertainty and thereby heighten the prospect of adverse investment impacts. Moreover, in the Commission’s view, a greater role for residual discretion in the application of the Part IIIA declaration arrangements would also be undesirable on wider public policy grounds. Though an element of discretion for decision makers cannot be avoided in a complex area such as this, as far as possible, the intention of the Parliament should be given explicit effect through the legislation, rather than left to those applying it to interpret.”

The Government’s April 2007 response to this recommendation indicated that the Government would amend criterion (a) ‘to reinstate its interpretation to that which prevailed prior to the decision’ in order to ‘address uncertainty that has arisen following the Federal Court’s decision’ and to be ‘consistent with the objective of Part IIIA, which is to promote efficient investment in, and use of, major infrastructure’. 

In the authors’ view, attempting to do this would not address the concern but rather increase uncertainty and it would not be an effective way of ‘raising the entry bar’ if that is the intent.

6.6 The Mt Newman and Goldsworthy matter

This matter arose as a result of an application by Fortescue in June 2004 to the NCC seeking a recommendation that the service provided by sections of the Mt Newman and Goldsworthy rail lines be declared in order to allow Fortescue to haul iron ore from a siding at its Mindy Mindy mine to port facilities at Port Hedland using its own locomotives and rolling stock. The specific services identified by Fortescue in its application were as follows:

1. the use of the Facility, being:
   (a) that part of the Mt Newman Railway Line which runs from a rail siding that will be constructed near Mindy Mindy in the Pilbara to port facilities at Nelson Point in Port Hedland, and is approximately 295 kilometres long...;
   (b) the part of the Goldsworthy Railway Line that runs from where it crosses the Mt Newman Railway Line to port facilities at Finucane Island in Port Hedland, and is approximately 17 kilometres long...

163 Productivity Commission, Review of Price Regulation of Airport Services, 2006, at page 52.
164 Above, note 163 at page 55.
(2) access to the Facility’s associated infrastructure, including, but not limited to:

(a) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of the railway);

(b) bridges;

(c) passing loops;

(d) train control systems, signalling systems and communications systems;

(e) sidings and refuges to park rolling stock;

(f) maintenance and protection systems; and

(g) roads and other facilities which provide access to the railway line route.

These rail lines are controlled by BHPBIO in its capacity as manager for various joint ventures in which BHP holds a majority interest, conducts mining operations in four areas in the Pilbara. BHPBIO is responsible for producing ore to meet the requirements of the steel mills to which the ore is sold. Its argument is that it manages the mine, rail and port operations as an integrated system and, relying on earlier authority, in light of this the NCC cannot make a recommendation under Part IIIA because the use of the rail lines involves use of its production process.

Fortescue’s position is that it simply seeks access to a railway line that links a mine to a port so that it can operate a haulage service for its mines. It takes the view that it is not relevant that BHPBIO might be engaged in a process of production when it uses the rail lines because Fortescue does not seek to use BHPBIO’s process i.e BHPBIO’s trains or haulage service. In that sense, Fortescue’s approach rests on the recognised distinction between trains and track or ‘above rail’ and ‘below rail’.

The specific issue before the Federal Court was whether use of the rail lines would be use of a production process and therefore exempt from being a ‘service’ within the meaning of section 44B (and thus incapable of being declared). However, one of the interesting lessons from this case is the Federal Court’s approach to understanding Part IIIA as a whole.

In November 2004, the NCC published a statement of reasons in relation to certain preliminary issues, the relevant one for present purposes being whether use of the rail lines was a service to which Part IIIA applies. The NCC’s conclusion was that the relevant part of the Mt Newman railway line was a service to which Part IIIA applies and that it therefore had jurisdiction to proceed with the application in relation to that service, but that the production process exception applied to the relevant part of the Goldsworthy line. Subsequently, by the time the matter came to court, the NCC had changed its position with respect to the Goldsworthy line.

The NCC proceeded to recommend declaration of the Mt Newman service in March 2006. The Treasurer however allowed the statutory 60 day period to expire without making any decision and as a consequence was deemed to have decided not to declare the service (section 44H (9)).

In December 2004, BHPBIO filed an application for judicial review in the Victorian division of the Federal Court and in February 2005, Fortescue filed an application for judicial review in the Western Australian division of the Federal Court, each seeking declarations as to whether or not the relevant services were services within the meaning of section 44B. Both applications ended up before Middleton J who concluded that the relevant rail lines were not a production process:

166 The decision of a single Federal Court judge (Kenny J) in *Hamersley Iron Pty Ltd v NCC* [1999] FCA 867.
“...The issue of whether or not the infrastructure facility sought to be accessed is the use of a production process can be answered by reference to whether the process is actually creating or making a product or transforming one thing into another. The rail service involves the use of infrastructure or a facility that enables the transportation of one product from one location to another, but the infrastructure facility (the railway line and associated infrastructure) does not transform that product into something different. Even if the railway line is an integral and essential part of an overall process used by BHPBIO to produce an exportable iron ore product, this does not make the use of the railway line the use of a production process itself. The railway service represent the provision of a transport service, just as the use of a gas pipeline is a conveyance or transport service used to move gas from one place to another, or an airport runway is a landing strip used to ensure airplanes can take off and touch down. In none of these cases does the infrastructure facility itself involve a process of transformation; each constitutes an important or essential part of the overall operation of the supply of gas or the provision of air services, but does not in itself constitute a production process. It could not have been intended in Part IIIA for the use of an infrastructure facility to be treated as part of an overall process of production and then to qualify as being the ‘use of a production process’. Every process of infrastructure, in some way or the other, could be part of at least one production process. Such an approach would not be consistent with the underlying purpose of the access regime, and would either eliminate or limit unreasonably the services that could be considered at least eligible for declaration under Part IIIA of the Act.”

From here the matter went on appeal to the Full Court. It was common ground at both the trial and on appeal that the expression ‘production process’ is not a term of art and should be given its ordinary meaning. One of the consequences of this was to render economic expert evidence on this point inadmissible on grounds of relevance (but able to be received by way of a submission as helpful background as to the history or context of Part IIIA).

The Full Court majority judgment (Sundberg and Greenwood JJ) held that the correct approach is to start with identifying the service sought by the third party and asking whether that use is the use of a production process. This necessarily requires asking whose production process and what production process. Using this approach, the majority saw the conclusion as obvious:

“Paragraph (f) requires an analysis by the trial judge of the sequence of operations integrated or otherwise to determine the content of the production process in a particular case. In this case, the primary judge concluded on the facts that the appellant conducts, manages and operates an integrated and continuous process including all of the steps set out at [109] of these reasons in which the use of rail track infrastructure and the provision of haulage services to each unincorporated mining joint venture is an essential step (see [101] – [121] of these reasons and particularly [120] and [121]).

Having identified the production process in question and thus determined its scope and content, the question asked by paragraph (f) is whether the service sought to be used by the third party is the use of that production process.

In this case, plainly it is not.”

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167 Above, note 30, at paragraph 153.
168 Above, note 130, at paragraphs 183-185.
169 Above, note 130, at paragraph 163.
170 Above, note 130, at paragraphs 165-167.
On the other hand, Finkelstein J, in a separate judgment, took the view that without further detailed technical analysis of the mining processes involved, it is not possible to determine whether the rail link is a service capable of declaration under Part IIIA.\(^{171}\)

The majority judgment also discussed the objects of Part IIIA and the checks and balances in the regime:

“The s 44AA objects of promoting the economically efficient operation of, use of and investment in infrastructure so as to promote ‘effective competition’ in markets upstream and downstream of that infrastructure on the one hand and the preservation of the ‘legitimate business interests of the provider’ and the ‘provider’s interest in the investment in the facility’ (s 44X(1)(a)) on the other hand, lies in the application of important provisions of the Act in the arbitration process that address the scope of the subject matter the ACCC may determine in an arbitration (s 44V(2), s 44V(3)); the restrictions imposed on the ACCC in making a determination (s 44W); and the mandatory requirement upon the ACCC to take into account particular matters (section 44X (1)).\(^{172}\)”

“It can be seen from these provisions that the declaration process and ultimately the setting of the terms of third party access involves many checks and balances involving assessment of a third party application by the Council; a procedural and deliberative process undertaken by the Council; satisfaction by the Council of all of the s 44G(2) criteria; a recommendation to the Minister; independent consideration and satisfaction by the Minister of all of the same statutory criteria; agreement on terms between the provider and the third party and if no agreement, arbitration by the ACCC of any matter relating to access; and the striking of the balance sought to be effected by ss 44AA, 44W(1) and 44X(1) and the pricing principles prescribed by s 44ZZCA.\(^{173}\)”

The majority judgment clearly saw these checks and balances in the context of a two stage process under Part IIIA as important in responding to concerns about its approach:

“The appellant contends that such a view deprives the owner or operator of the production process of the exclusion by enabling a third party to secure access to a part of a production process. However, the Parliament defined the scope of the exclusion by the language it chose in the context of Part IIIA as an access code having regard to the objects of that Part and the Act as a whole. There is no reason to conclude that the Parliament did not say what it meant and meant what it said by confining the exclusion to the use of a production process comprising, according to orthodox language, the integers or sequence of operations comprising the production process and not expressly extending the exclusion to a part of that process. A service defined by a third party in terms of a step in a production process will ultimately only become accessible to the third party if the Council is satisfied of all of the s 44G(2) criteria; the Minister is satisfied of all of the s 44H(4) criteria and the ACCC is satisfied having regard to the provisions discussed earlier that access ought to be provided to the third party at all.\(^{174}\)”

In other words, declaration does not necessarily lead to access. Indeed, where the owner / operator of the relevant infrastructure uses it as part of an integrated production process (particularly if this is driven by competition in a competitive end

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\(^{171}\) Above, note 130, at paragraph 51.

\(^{172}\) Above, note 130, at paragraph 130.

\(^{173}\) Above, note 130, at paragraph 136.

\(^{174}\) Above, note 130, at paragraph 173.
product market), one might imagine that a proper application of sections 44W(1) and 44X(1) may make it very difficult for a third party to obtain access via arbitration post declaration.

The High Court granted special leave to appeal in this matter and the appeal will be heard on 29 July 2008.

7 Conclusions

7.1 Objects do matter

For a lawyer, it is tempting to be dismissive of objectives. It is not a case of wilful disregard. Lawyers generally know what it means to “have regard to” the objects of an Act or to take them into account (although the precise meaning can vary depending on the context in which it is used).\(^{175}\) The problem is that it is easy to be selective when having regard to the objectives of an access regime. There is rarely just one, they are never simple and they often conflict.\(^{176}\) Lawyers who know what it means to have regard to the objects of an Act also know that weight is a matter for the decision maker.\(^{177}\) It is perhaps then inevitable that the participants in the regulatory process will give the greatest weight to those objects that support their case; not arriving at their positions by reference to the objectives, but rather selecting from the objectives to justify a stance they have already taken.

This problem is exacerbated when high-level objectives are laid over, or sit alongside, specific decision making criteria. Failure to comply with a specific direction from the legislature is a sure recipe for error. Few regulators will defy a specific requirement in Act simply because there is an objects clause that suggests it should.

Courts and Tribunals have engaged in some heroic efforts to reconcile conflicting objectives in a multi-layered regime of principles, objectives and criteria.\(^{178}\) However, there is no escaping the fact that so long as our access laws contain numerous objectives, sometimes conflicting and sitting alongside more specific criteria, there will always be room for a lawyer to insist that ‘it is just an objects clause’.

The problem is that the objectives really do matter!

The objectives dismissed so lightly when making a decision are the same objectives that Courts and Tribunals will refer to in reviewing those decisions. In this paper we have identified a series of decisions where the Courts and the Tribunal have used the objectives of an access regime (sometimes expressly stated, sometimes inferred) to test the validity of regulatory decisions and to give meaning to legislation.

These decisions have not necessarily made the regulator’s task any easier. The High Court can reach conclusions on the construction of an Act, safe in the knowledge that there is no further avenue of appeal. The regulator’s life is very different. The regulator is still faced with the task of making decisions on the basis of different tiers of criteria, principles and potentially conflicting objectives.

\(^{175}\) eg. \textit{R v Hunt; Ex Parte Sean Investments} (1979) 180 CLR 322; \textit{Re Michael} see note 101; cf \textit{Singh v MIMA} (2001) 109 FCR 152 at paragraphs 52 to 59; \textit{Australian Retailers Association v Reserve Bank of Australia} (2001) 109 FCR 152 at paragraph 526.

\(^{176}\) The former \textit{National Electricity Code} is perhaps the worst example of this phenomenon. Part B of Chapter 6 contained no less than 43 objectives, principles and other matters to which regard must be had in setting a transmission revenue cap.

\(^{177}\) \textit{Minister for Aboriginal Affairs v Peko-Wallsend} (1985) 162 CLR 24 at 41.

\(^{178}\) \textit{Re Michael} (above, note 100) is one example of this.
However, what is quite certain is that the objectives of an access regime cannot be ignored. An objects clause, inserted into an Act, describes the outcomes that Parliament has sought to achieve though the legislation. This guidance comes from the legislature, not the judiciary; but Courts and Tribunals will interpret legislation so as to achieve these objectives and hold parties to account if they are set aside.

Sensible regulatory outcomes cannot be achieved through legislation alone. It is impossible to write an Act that will anticipate and deal with every combination of circumstances that will exist in a market. An access regime needs sufficient flexibility to ensure that regulatory outcomes are properly adapted to the relevant circumstances.

This is typically achieved by giving the regulator a degree of discretion in relation to the application and implementation of the regulatory regime. Within the boundaries of this discretion, the regulator is responsible for decision making, having regard to the relevant circumstances and the requirements of the legislation.

However, there is an inevitable trade off between discretion and uncertainty. Wider discretion gives the regulator a greater ability to adapt and respond to the changing circumstances in the market. However, this necessarily increases the range of outcomes that may result from the regulatory process, leading to increased uncertainty and, where the regulator might be able to adopt a novel approach, an increased level of regulatory risk. The stark choice faced by the architects of a regulatory regime is to balance the need for flexibility (discretion) with the need for prescription (certainty).

An objects clause is potentially an invaluable tool in the design of a regulatory regime. Properly drafted, it allows the legislature to achieve the necessary degree of flexibility by conferring discretion on the regulator, while providing guidance (but not prescription) as to how that discretion is to be exercised. While the regulator has the ability to adapt and respond to variable circumstances, an objects clause can help to guide and direct the nature of that response.

However, the full potential of an objects clause will only be realised if the objectives are concise and expressed in unambiguous language. Objectives that are overly complex or lengthy will provide too much latitude to be useful. Objectives that are unclear will be ignored.

It is equally important that the legislature pays attention to the function of the objectives in a regulatory regime and the overall design of that regime. While a decision maker might be directed to have regard to objectives when making a decision, it is within the legislature's power to give the objectives a more specific and productive role. For example, where a regulator is faced with a choice of outcomes, could it not be directed to favour the outcome that will best achieve the objectives of the regime? Provided that the objectives are expressed in concise and unambiguous terms, such a direction could strike an ideal balance between the need for certainty and the need for flexibility.

### 7.2 Objects must be used properly to be effective

If an objects statement is to be effective, two elements must be present:

(a) the design of the regime must anticipate how and where the objectives are to be used and require sufficient weight to be given to the objectives in such use; and

(b) the objectives must be concise and unambiguous; they should not merely recognise competing interests of different stakeholders.

If the first element is missing, the objectives can be considered but effectively ignored. While a Court or Tribunal may have regard to these objectives in a review, the objectives will fail to realise their potential to increase regulatory certainty (and indeed may encourage more applications for review).
If the second element is missing, it does not matter how much weight is given to the objectives. If the objectives are contradictory the end result will be increased complexity and confusion, and the selective use of those objectives which support a predetermined outcome. Again, this may have the effect of encouraging litigation.

In most regulatory regimes, the objectives fall well short of their full potential. It has usually been left to Courts and Tribunals to give meaning and purpose to the objectives of the legislation and, in doing so, to provide guidance to participants in the regulatory process. But it does not need to be this way. If greater care is taken in the formulation and use of objectives, much clearer guidance will be provided without the expense and delay associated with legal proceedings.

A final word of caution. Decision makers will usually do their best with the laws they are given, and Courts and Tribunals will hold them to account where they do not. But the buck, as always, stops with Parliament. If the key lesson for decision makers is to ‘read the instructions’ Parliament has given, then the key challenge for effective regulation is to make sure that Parliament says what it means and means what it says.