

Regulation impact statement – Timeliness of processes under the National Access Regime

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1. Background and context

On 16 February 2021, the Treasurer, the Hon Josh Frydenberg MP, announced that Treasury would examine whether the length of time that processes under the National Access Regime (NAR) can take is appropriate and consistent with a key objective of the Regime which is to promote the economically efficient operation of, use of and investment in infrastructure, thereby promoting effective competition in upstream and downstream markets.¹

Treasury released a consultation paper for stakeholder comment on 19 March 2021, with submissions due on 19 April 2021. Thirteen submissions were received.

National Access Regime

The NAR is a regulatory framework set out in Part IIIA of the *Competition and Consumer Act 2010* (CCA) under which a person (typically an infrastructure user) may apply to the National Competition Council (NCC) asking it to recommend that particular infrastructure services be 'declared', that is, made subject to the NAR. The designated Minister then decides whether or not to accept that recommendation. Where infrastructure is declared, infrastructure users may ask the Australian Competition and Consumer Commission (ACCC) to arbitrate their terms and conditions of access to those services.

The NAR was introduced in 1995 following the 1993 Hilmer National Competition Policy Review (Hilmer Review), which proposed a statutory regime to provide access to 'essential facilities' to address a competition problem relating to access to vertically-integrated natural monopolies ([see Appendix A](#)).

2. The problem – the timeliness of highly contentious matters

There have been a number of highly contentious matters² under the NAR, which have taken many years to reach an outcome. In particular, of the twenty NAR matters commenced since 1996, six have proved to be highly contentious, illustrated by the fact that they involved extensive litigation.

Since 2004, the proportion of contentious matters involving extensive litigation has increased compared to non-contentious matters ([see Appendix A](#)). The Mt Newman Railway, the Hamersley and Robe Railways and Sydney Airport matters are examples of contentious matters which involved more than one review process being undertaken and which took multiple years to be finalised.³

The Port of Newcastle matter provides a clear, significant and recent example of the problem of the timeliness of NAR processes.

- Glencore Coal applied for declaration of the Port in May 2015.

¹ Section 44AA(a), *Competition and Consumer Act 2010*.

² A 'matter' under the NAR has been defined to comprise declaration, revocation and arbitration processes involving the same infrastructure.

³ There were also delays in the Tribunal finalising merits review cases; for example, in the Goldsworthy Railway matter. Amendments to the CCA in 2010 imposed binding time limits on Tribunal decisions.

- In January 2016, consistent with the recommendation of the NCC, the acting Treasurer rejected the application.
- In June 2016 the Australian Competition Tribunal (Tribunal) set aside this decision and declared the Port until July 2031.
- The Federal Court affirmed that decision in August 2017, and an application by the Port for special leave to appeal to the High Court was refused in March 2018.
- Glencore notified an access dispute in November 2016, and the ACCC released an arbitration determination in September 2018.
 - This determination was to apply until the declaration of the Port expired in July 2031.
 - The Tribunal reviewed and amended the ACCC’s arbitration decision in October 2019.
 - The Full Federal Court released its decision on the Tribunal review in August 2020, remitting the matter back to the Tribunal for redetermination on the merits. The Full Federal Court’s decision is currently on appeal before the High Court.
- Following a request by the Port of Newcastle and recommendation from the NCC, the declaration of the Port was deemed to have been revoked in September 2019.⁴
- The NSW Minerals Council applied to have the Port declared in July 2020. The Treasurer accepted the NCC’s recommendation not to declare the Port in February 2021.
 - This matter is now before the Tribunal for review.

Appendix A contains further information on the NAR matters outlined above.

Stakeholder views

Stakeholder submissions highlighted that prolonged processes can impose unnecessary costs. The NSW Minerals Council described recent proceedings under the NAR as ‘litigious, lengthy and costly’.⁵ The Port of Newcastle submitted that:

the very considerable administrative, compliance and legal costs associated with current processes under the NAR, as demonstrated by PNO’s experience, are not in the public interest.⁶

⁴ Parties may request the NCC to recommend to the designated Minister that a declaration be revoked (there is currently no formal application process). The NCC may not recommend that a declaration be revoked unless, among other things, the infrastructure in question no longer meets the NAR declaration criteria (in s44CA). If the Minister does not make a decision on an NCC recommendation within 60 days, the declaration is deemed to be revoked (s44J).

⁵ NSW Minerals Council submission, 19 April 2021, p 1.

⁶ Port of Newcastle submission, 19 April 2021, p 3.

It further submitted that it had spent ‘approximately \$15 million defending access disputes’ and that it has been in a ‘state of constant uncertainty’ since the Port was declared in 2016 which has ‘undermined its investment decisions’.⁷

Glencore (from the perspective of an infrastructure user) submitted that:

the amounts of money involved in export infrastructure means that it is in the commercial interests of monopoly infrastructure operators to contest every issue to preserve their market power.⁸

At least some parties may be deterred from utilising NAR processes. Airlines for Australian & New Zealand submitted:

Airlines have ceased trying to use Part IIIA for two main reasons, according to the ACCC and the testimony of airlines themselves. The first is that Part IIIA declaration processes can be lengthy and arduous, and are subject to both merits reviews and judicial reviews that can take years – the focus of this consultation. A second reason is that it is exceedingly difficult to get a service declared, creating significant uncertainty about the investment required to pursue this course of action.⁹

Glencore stated that uncertainties in the NAR had ‘impacted investment decisions of new mines in the Hunter Valley’.¹⁰

The Business Law Section of the Law Council of Australia submitted that:

Prolonged declaration and arbitration proceedings create uncertainty for access seekers and access providers, and risk disincentivising the efficient use of and investment in the infrastructure by which essential services are provided, to the detriment of competition in upstream and downstream markets.¹¹

Conclusion

The examples above highlight the following concerns:

- given the substantial commercial issues at stake, parties in NAR matters can have a strong propensity to resort to litigation. As well as being a key driver of the length of processes, this can mean that Tribunal review does not finally resolve matters;
- ‘repeat’ applications for declaration relatively shortly after a previous declaration decision can extend processes; and

⁷ Port of Newcastle submission, *ibid*.

⁸ Glencore submission, 19 April 2021, p 1.

⁹ Airlines for Australia and New Zealand submission, 19 April 2021, p 2.

¹⁰ Glencore submission, 19 April 2021, p. 5.

¹¹ Business Law Section of the Law Council of Australia submission, 19 April 2021, p 21.

- arbitration determinations can, because of the design of the NAR, extend beyond when infrastructure is declared.¹²
 - While this may provide certainty for infrastructure users, it is arguably anomalous, as it means infrastructure can be subject to arbitrated terms and conditions of access after it ceases to be covered by the NAR.
 - It also potentially distorts competition in that some infrastructure users may be subject to arbitrated terms and conditions and others not.

Regulatory processes characterised by delay, uncertainty and anomalous outcomes create risks, particularly as declaration and arbitration decisions have significant commercial implications for infrastructure providers and users. For example, there is a risk that investment may be deferred, limited or otherwise changed.

More generally, the NAR is a key element of Australia's competition law framework. Issues with the design of NAR processes may undermine public confidence not just in the NAR itself but also in the effectiveness of regulation in addressing competition issues more broadly.

¹² Section 44I(4) of the CCA provides that the expiry or revocation of a declaration does not affect the arbitration of an access dispute that was notified before the expiry or revocation, or the operation or enforcement of any determination made in the arbitration of an access dispute that was notified before the expiry or revocation. The Port of Newcastle is the only matter where the operation of section 44I(4) has become contentious since the NAR was introduced in 1995 (noting that this arbitration matter is currently before the High Court).

Merits and Judicial Review

The NAR provides for merits review by the Australian Competition Tribunal of Ministerial decisions (or deemed decisions) on declaration¹³ and arbitration determinations made by the ACCC.

Tribunal review of declaration decisions is a re-consideration of the matter,¹⁴ while the Tribunal's review of an arbitration determination is a re-arbitration of the access dispute.¹⁵

2010 amendments to the NAR limited the material on which the Tribunal may base its review. Generally this is the information that the original decision maker took into account, information or reports that the Tribunal requires the NCC (in the case of declaration) or the ACCC (in the case of arbitration) to provide, and other information requested by the Tribunal that it considers reasonable and appropriate for the purposes of making its decision.¹⁶

The Business Law Section of the Law Council of Australia submitted that '[m]erits review provides the only means to correct decisions made by an administrative decision maker on the basis of incorrect facts. Judicial review rarely allows for factual errors (other than jurisdictional errors) in decisions to be revisited or corrected'.¹⁷

The principal objective of merits review is to ensure that administrative decisions are both correct and preferable in that they are both made according to law and the most appropriate decision that could have been made based on all the relevant facts. By contrast, judicial review undertaken by the courts is directed at determining only whether administrative decisions are legally sound – that is, made in accordance with the law.

This involves looking at whether appropriate procedures have been followed, and the law properly understood and applied in making the decision. When courts find an administrative decision is not legally sound, they typically may refer matters back to the decision maker whose decision is under review to remake the decision.

3. Case for government action

Government is responsible for ensuring that existing regulation such as the NAR operates effectively. Government action to address the problem outlined above, to the extent that it relates to the design of the NAR, is therefore warranted.

¹³ These include decisions of the Minister to declare a service, not declare a service or to not revoke declaration of a service.

¹⁴ Section 44K and 44L of the CCA.

¹⁵ Section 44ZP of the CCA.

¹⁶ Section 44ZZOAAA.

¹⁷ Business Law Section of the Law Council of Australia submission, 19 April 2021, p 11.

4. Policy options

Public consultation was undertaken on options in three broad areas to address the problem outlined in Section 2:

- merits review of declaration and arbitration decisions (options 1, 2 and 3 below);
- repeat applications for declaration and revocation of a declaration for the same infrastructure (options 4 and 5); and
- arbitration processes and decisions continuing after infrastructure is no longer covered by the NAR (options 6 and 7).

Other options were not considered feasible. For example, the examples noted in Section 2 above highlight that an important cause of the delay in finalising NAR processes is the propensity for parties to go to court to test whether declaration and arbitration decisions are legally sound. It would not be possible or appropriate to attempt to foreclose this option for parties to NAR matters.

Merits review

Three options have been identified to address timeliness concerns relating to merits review of declaration and arbitration decisions:

- Option 1: remove Tribunal review of Ministers' decisions on declaration of infrastructure;
- Option 2: remove Tribunal review of ACCC arbitration decisions; and
- Option 3: shorten the existing statutory timeframes for undertaking Tribunal review of arbitration and declaration decisions.
 - The Tribunal is currently required to make its decisions within 180 days, although the CCA provides for a range of 'clock-stoppers', and the Tribunal can extend the decision-making period by giving notice to the Minister.¹⁸

These options address timeliness by removing or shortening a step in the relevant processes.

The options are particularly relevant given the matters outlined in section 2 and Appendix A that Tribunal review is unlikely to finally resolve matters in a significant proportion of cases because of the propensity of parties in highly contentious matters to seek judicial review of Tribunal decisions.

There are precedents for removing merits review. For example, in 2002 merits review by the Tribunal of ACCC telecommunication arbitration determinations under Part XIC of the CCA was removed, to promote certainty for access seekers and recognising significant delays that had resulted from that review process in the past. In 2017, limited merits review of Australian Energy

¹⁸ The option would not affect the timeframe for making applications to the Tribunal seeking review of declaration and arbitration decisions, which is 21 days after the Minister's decision (s44K) or ACCC decision (s44KP).

Regulator decisions was abolished as it was failing to meet its policy intent and leading to higher prices for consumers.

While recent reviews of the NAR, such as the 2015 Harper Competition Policy Review, did not recommend removing Tribunal merits review of declaration or arbitration decisions, they did not take into account the possibility that merits review would, in practice, not finalise matters, as has been seen with the NAR particularly in recent years.

There is more limited evidence to assess whether Tribunal review of ACCC determinations has finally resolved arbitration matters. There have only been two arbitration determinations made since 1995 – in the Port of Newcastle matter (see above), which is currently before the High Court, and in a 2007 matter involving Sydney Water, which did not go to the Tribunal.

Infrastructure may be declared where it meets certain criteria, including that access (or increased access) on reasonable terms and conditions would promote the public interest.¹⁹ When considering the public interest, the Minister must have regard to the effect that declaration would have on investment in infrastructure and markets that depend on access to the infrastructure, and the administrative and compliance costs that would be incurred by the infrastructure provider if declaration occurs.²⁰

Removing Tribunal review of declaration decisions would be consistent with the view of the Hilmer Report, which stated that:

As the decision to provide a right of access rests on an evaluation of important public interest considerations, the ultimate decision on this issue should be one for Government, rather than a court, tribunal or other unelected body. A legislated right of access should be created by Ministerial declaration under legislation.²¹

Removing Tribunal review would also mean that, where judicial review of a Minister's decision was successful and the matter returned to the original decision maker, the matter would be returned to the Minister, rather than the Tribunal.

Stakeholder views

Most stakeholders opposed removing Tribunal merits review of *declaration* decisions. For example, Glencore submitted that merits review should be retained because it provides 'openness, transparency and accountability' for decisions of Ministers.²² The Business Law Section of the Law Council of Australia submitted:

¹⁹ Section 44CA(1), CCA.

²⁰ Section 44CA(3), CCA.

²¹ Hilmer Report, 1993, p 250.

²² Glencore submission, 19 April 2021, p 10.

The provision for independent merits review by the Tribunal provides a necessary and important layer of oversight within the declaration process, and promotes confidence in the independence of administrative decision making and any apprehended bias.²³

The main exceptions were the NCC, the ACCC and the Port of Newcastle. For example, the NCC submitted that merits review of declaration decisions ‘increases uncertainty for industry participants and adds unnecessary delay’ to the process. It also stated that merits review ‘undermines the basis, as envisioned by the Hilmer Committee, of having declaration decisions made by an elected member of the Government acting on independent expert advice’.²⁴

Most stakeholders also opposed removing Tribunal merits review of *arbitration* decisions. The New South Wales Minerals Council submitted that Option 2 (and Option 1) would ‘effectively remove one of the few limited options currently available to have applications re-heard’.²⁵ The Port of Newcastle also submitted that:

the declaration process is not characterised by the same volume of relevant factual evidence which is adduced in an arbitration of the terms of access and use of services supplied by means of nationally significant infrastructure.²⁶

Glencore supported removing merits review of arbitration decisions, submitting that the ACCC is ‘a competent administrative decision-maker and any merits review (possibly de novo) by the Tribunal... is of little to no utility’.²⁷

Repeat applications

Two options have been identified to address timeliness concerns relating to repeat applications for the same infrastructure:

- Option 4: limit when parties may apply to the NCC for a recommendation to declare infrastructure that has previously been subject to an unsuccessful declaration application or where a declaration has been revoked; for example, include a statutory test stating that applications to the NCC may only be made where a material change of circumstances has occurred.
- Option 5: limit when parties may request the NCC to recommend that declaration of infrastructure be revoked; for example, include a statutory test stating that revocation may only be requested where a material change of circumstances has occurred since the decision to declare the service.

The proposed limits would supplement existing provisions about when an application may be made. Currently, the CCA provides that any person may apply to the NCC asking it to recommend that particular infrastructure be declared, except in specific circumstances (for example, that the

²³ Business Law Section of the Law Council of Australia submission, 19 April 2021, p. 12.

²⁴ NCC submission, 19 April 2021, p 4.

²⁵ NSW Minerals Council submission, 19 April 2021, p 6.

²⁶ Port of Newcastle submission, 19 April 2021, p 4.

²⁷ Glencore submission, 19 April 2021, p 10.

infrastructure is subject to an undertaking under Division 6 of the NAR). If the NCC decides that an application falls within one of the exceptions, it must notify the applicant that the application cannot be made.²⁸

Stakeholder views

Infrastructure users generally did not express support for these options, although there was some support for Option 5.

Infrastructure owners supported options 4 and 5. For example, the Australian Airports Association stated that the options would ‘reduce unnecessary, time-consuming and costly repeat applications for declaration’.²⁹

The Business Law Section of the Law Council of Australia supported the options and submitted:

The ability for repeated applications for declaration or revocation in respect of the same service is contrary to the fundamental objects of the NAR and the common law doctrine of *res judicata*. It also involves a considerable expense of Commonwealth and private resources by access providers, applicants, decision makers, the Tribunal and courts. Although the criterion may well be the subject of court proceedings in the short to medium term, judicial interpretation of the threshold will provide increased certainty for parties and practitioners, and promote efficient NAR processes in the long run.³⁰

Addressing anomalies relating to ongoing arbitration processes and determinations

Two options have been identified to address the identified anomalies with arbitration processes that are underway and determinations continuing after the relevant infrastructure is no longer covered by the NAR.

- Option 6: Provide for arbitration processes that are underway under the NAR to terminate if the declaration of the relevant infrastructure service is revoked.
- Option 7: Provide for arbitration determinations under the NAR to terminate if the declaration of the relevant infrastructure service is revoked.

Stakeholder views

Generally, infrastructure owners support these options while infrastructure users oppose them.

For example, the Australian Airlines Association considered these options to be ‘sensible, practical and aligned with the objectives of the Regime’.³¹ However, Glencore is:

troubled with a proposal that would see an ACCC arbitration determination between private parties in which these parties have invested and operated suddenly ceasing to operate if the relevant declaration is revoked. This is particularly so in circumstances where there are very limited appeal rights from any revocation. Well-established principles suggest, indeed

²⁸ Section 44F(1) and (1A). Section 44J provides that the NCC may recommend to the designated Minister that a declaration be revoked. It does not currently provide for parties to apply to the NCC seeking revocation.

²⁹ Australian Airports Association submission, 21 April 2021, p 2.

³⁰ Business Law Section, Law Council of Australia submission, 19 April 2021, p 7.

³¹ Australian Airports Association submission, 21 April 2021, p 2.

dictate, that any such arbitration remain unaffected. To do otherwise, as noted by Treasury in the Consultation Paper, would affect investment decisions by the access provider and access seeker(s). It would also, significantly for present purposes, undermine the utility of parties seeking a declaration if "the rug could be taken out from under them".³²

The ACCC submitted that it is:

incongruous for the [arbitration] determination to continue to have effect only in relation to certain parties if the underlying declaration is no longer in force. From a policy perspective, a key consideration is that the current situation provides a substantial imbalance in the way the law applies to access seekers that did not apply for an access determination, compared to those that did apply.

Currently the law could operate so that if a large access seeker sought an access determination and then the declaration was revoked, the large access seeker would continue to benefit from the certainty of the arbitrated outcome but its smaller competitors would not. This is particularly the case given that the credible threat of regulation of the monopoly would be removed, with the result the monopoly could act without constraint in the future.³³

The ACCC also submitted a transitional period should be implemented to allow for finalisation of ongoing arbitration matters.

5. Impact analysis

This Regulation Impact Statement, and particularly the impact analysis in section 5, provides a qualitative assessment of the potential benefits and costs associated with each option.

The options would not fundamentally change the broader NAR framework. In particular, they would not change the criteria used to determine which infrastructure should be subject to the NAR,³⁴ nor the factors considered in making arbitration decisions applying to declared infrastructure.

As such, the options are unlikely to significantly change the broader economic impact of the NAR. Rather, the options aim to address concerns that specific elements of NAR processes are reducing the timeliness of resolving matters under the NAR.

The costs and benefits of the options therefore primarily accrue specifically to the parties to NAR processes. They generally relate to either resources allocated by parties to legal processes, such as court and tribunal proceedings or issues such as uncertainty.

It has not been possible to develop precise assessments of the costs incurred in legal processes associated with decisions under the NAR. Precise details of the parties costs' are not made public in judgments, with this information usually considered commercially sensitive. While estimates of hourly rates are used elsewhere in the regulatory costings, granular detail on the time spent in legal proceedings is not available and hence is not quantified here. Similarly, it has not been possible to

³² Glencore submission, 19 April 2021, p 15.

³³ ACCC submission, April 2021, p 5.

³⁴ These criteria are in section 44CA, CCA.

quantify matters such as uncertainty, as while uncertainty has real impacts by its general nature uncertainty is difficult to quantify.

This is consistent with the approach of the Productivity Commission (PC) during its review of the National Access Regime in 2013. This review examined the NAR as a whole and therefore could potentially have examined economy-wide impacts. However, the PC was unable to quantify these impacts because of a lack of empirical evidence.³⁵

³⁵ *National Access Regime*, Productivity Commission Inquiry Report, 25 October 2013, p 211.

Option	Benefits	Costs
<p><u>Option 1</u>: remove Tribunal review of Ministers' decisions on declaration of infrastructure</p>	<ul style="list-style-type: none"> • Would remove a 180-day step in the declaration process. While Tribunal review is optional, the case studies outlined in Section 2 and Appendix A indicate it is often sought in contentious matters. Further, judicial review is often sought of Tribunal decisions. The likely practical impact of removing Tribunal review would therefore be to bring forward the option of seeking judicial review, which would streamline the process overall. • Would mean that declaration decisions are taken by Ministers, which is arguably more appropriate given that a key criterion for whether infrastructure should be declared under the NAR relates to the public interest. 	<ul style="list-style-type: none"> • Would remove the opportunity for parties to seek merits review of declaration decisions, that is, it would limit them to judicial review.
<p><i>Status quo</i></p>	<ul style="list-style-type: none"> • Parties retain right to seek merits review. 	<ul style="list-style-type: none"> • In contentious cases, would likely add 180 (or more) days to the process for finalising a declaration decision. • Would have the Tribunal making declaration decisions involving public interest considerations, which may be less appropriate than having Ministers making these decisions.

<p><u>Option 2</u>: remove Tribunal review of ACCC arbitration decisions</p>	<ul style="list-style-type: none"> • Would remove a 180-day step in the arbitration process. Similar to Option 1, the likely practical impact of removing Tribunal review for future matters would be to bring forward the option of seeking judicial review by 180 days. 	<ul style="list-style-type: none"> • Would remove the opportunity for parties to seek merits review of arbitration decisions, that is, it would limit them to judicial review. This would be more significant for arbitration determinations, which are more technical in nature than declaration decisions, potentially increasing the risk of regulatory error.
<p><i>Status quo</i></p>	<ul style="list-style-type: none"> • Parties retain right to seek merits review 	<ul style="list-style-type: none"> • In contentious cases, would likely to add 180 days (or more) to the process for finalising an arbitration decision.
<p><u>Option 3</u>: shorten the timeframes for undertaking Tribunal review of declaration and arbitration decisions</p>	<ul style="list-style-type: none"> • Would shorten a 180-day step in the declaration and arbitration processes. 	<ul style="list-style-type: none"> • May undermine the ability of the Tribunal to conduct a thorough and considered review of Ministerial declaration decisions and ACCC arbitration decisions. • May result in more applications for judicial review.
<p><i>Status quo</i></p>	<ul style="list-style-type: none"> • No potential compromising of the Tribunal’s ability to consider a matter. 	<ul style="list-style-type: none"> • No time saving.
<p><u>Option 4</u>: limit when parties may apply for declaration for infrastructure that has previously been subject to an unsuccessful declaration application under the NAR or where a declaration has been revoked</p>	<ul style="list-style-type: none"> • Would reduce risk of declaration applications that are likely to be unsuccessful because a previous application for the same infrastructure services was unsuccessful or where declaration has been revoked, and there has been no material change in circumstances. 	<ul style="list-style-type: none"> • Could result in court cases challenging the validity of declaration applications on the grounds that a material change of circumstances has not occurred. • Could result in court cases challenging decisions to reject applications (made on the ground that a material change of circumstances has not occurred).

<p><i>Status quo</i></p>	<ul style="list-style-type: none"> • Would avoid new legislative test which could be the subject of court action. 	<ul style="list-style-type: none"> • Potential for declaration applications to be made which have inherently limited prospects of success because there has been no material change in circumstances since a previous unsuccessful application or past revocation, causing parties to incur costs.
<ul style="list-style-type: none"> • <u>Option 5</u>: limit when parties may apply for revocation of a declaration for infrastructure; for example, provide that revocation may only be sought where a material change of circumstances has occurred since the decision to declare the service. 	<ul style="list-style-type: none"> • Would reduce risk of revocation applications that are likely to be unsuccessful because a previous application for the same infrastructure was unsuccessful, and there has been no material change in circumstances. 	<ul style="list-style-type: none"> • Could result in court cases challenging the validity of revocation requests on the grounds that a material change of circumstances has not occurred. • Could result in court cases challenging decisions to reject requests (made on the ground that a material change of circumstances has not occurred).
<ul style="list-style-type: none"> • Status quo 	<ul style="list-style-type: none"> • Would avoid new legislative test and therefore potential court cases. 	<ul style="list-style-type: none"> • Potential for revocation applications to be made which have inherently limited prospects of success because there has been no material change in circumstances since a previous unsuccessful application, causing parties to incur costs.
<p><u>Option 6</u>: Provide for arbitration processes that are underway to terminate if the declaration of the relevant infrastructure service is revoked.</p>	<ul style="list-style-type: none"> • Would remove an anomaly under which arbitration of access disputes continued even though the infrastructure is no longer formally subject to the NAR. 	<ul style="list-style-type: none"> • Where revocation occurred while arbitration processes were underway, would result in costs incurred by parties in arbitration processes prior to revocation being wasted.

<ul style="list-style-type: none"> • Status quo 	<ul style="list-style-type: none"> • Expenditure on arbitration of an access dispute would not be wasted if revocation occurs while the arbitration process is underway. 	<ul style="list-style-type: none"> • Identified anomaly would remain.
<p><u>Option 7:</u> Provide for arbitration <i>determinations</i> to terminate if the declaration of the relevant infrastructure service is revoked.</p>	<ul style="list-style-type: none"> • Would avoid an anomaly under which infrastructure could continue to be subject to an arbitration determination when the infrastructure is not covered by the NAR. 	<ul style="list-style-type: none"> • Risk that uncertainty created by the potential termination of an arbitration determination affects investment decisions by infrastructure users, to the extent that these decisions rely on the arbitration determination.
<ul style="list-style-type: none"> • Status quo 	<ul style="list-style-type: none"> • No risk of affecting investment decisions of infrastructure users. 	<ul style="list-style-type: none"> • Identified anomaly would remain.

Regulatory burden estimate

Options 1, 2 and 6 would result in a small regulatory cost saving for businesses only. The remainder of these reforms have been assessed as having no increase or decrease in compliance costs for individuals, businesses and the community. Detailed explanations for each option are below.

Options 1 and 2 would remove the ability for parties to seek merits review of the decisions of the Minister (option 1) and the ACCC (option 2) by the Tribunal. In accordance with the regulatory burden measurement framework, the legal costs incurred in court and tribunal processes are not required to be considered when quantifying an estimate of regulatory burden. However, the removal of merits review would result in a small administrative cost saving to a potential applicant, by removing the cost of completing an application form seeking Tribunal review.³⁶

Option 3 would shorten the timeframe for merits review of either Minister or ACCC decisions. As parties would still need to complete the same forms as they would under the status quo, there would be no change to the regulatory cost relative to the status quo.

Options 4 and 5 would limit applications for declaration or revocation of existing declarations to where, for example, there is a material change in circumstances from a previous decision. In practice, this would not result in any change in compliance costs compared to the status quo. Applicants would meet this new compliance obligation by simply adapting their written applications to highlight a material change in circumstances, which would generally involve reframing existing material with regard to this new criteria. It is not anticipated these options will result in a change in the number of applications to the NCC, rather, they will reduce the rate of unsuccessful applications (and delay some applications).

Option 6 would provide for arbitration *processes* that are underway to terminate if the declaration of the relevant infrastructure service is revoked. This option would result in regulatory savings to the parties to such arbitration processes, as they would no longer be required to comply with any obligations arising from those processes (such as responding to directions by the Commission, developing a building block cost model or attending hearings). Treasury understands that arbitration proceedings imposed by regulation create a compliance obligation under the regulatory burden measurement framework. While legal fees are a component of this cost, as they are for court and tribunal processes, Treasury understands that arbitrations are not court or tribunal processes for the purpose of the regulatory burden measurement framework.

Option 7 would provide for arbitration *determinations* under the NAR to terminate under certain conditions. The practical consequence of termination of arbitration determinations would be that parties would need to negotiate new terms and conditions of access. However, as this would take place outside the NAR or any regulatory regime, there would not be any compliance costs for access seekers or asset owners as a result of the change.

³⁶ Forms are contained in the Competition and Consumer Regulations 2010.

Average annual regulatory costings

	Individuals	Businesses	Community Organisations
Option 1	Nil	-\$6,030.08	Nil
Option 2	Nil	-\$1,507.52	Nil
Option 3	Nil	Nil	Nil
Option 4	Nil	Nil	Nil
Option 5	Nil	Nil	Nil
Option 6	Nil	-\$91,925.28 to -\$659,295.45	Nil
Option 7	Nil	Nil	Nil

Option 6 is presented as a range. This reflects that revocation could occur at different points in an ongoing arbitration process. The higher regulatory saving reflects where revocation occurs, and proceedings therefore terminate, early in the arbitration proceedings. The lower regulatory saving reflects where revocation occurs later in the arbitration proceedings.

The assumptions underpinning these estimates are set out in [Appendix C](#).

6. Consultation

On 16 February 2021, the Treasurer announced that Treasury would undertake an examination of whether the length of time decision-making processes under the NAR can take is consistent with the NAR's objectives.

On 19 March 2021, Treasury released a consultation paper which sought stakeholder input on potential options to streamline and add greater certainty to decision-making processes under the NAR. The scope of the consultation paper was expressly limited to consideration of decision-making processes themselves and did not extend to consideration of the substantive aspects of decisions made under the NAR.

The consultation paper comprised six possible options for NAR reforms relating to:

- streamlining timeframes for, or availability of, merits review of Ministerial decisions on declaration or of ACCC arbitration determinations;
- the scope for parties to lodge repeated applications for declaration or revocation with respect to a service for which a decision has already been made; and
- whether arbitration proceedings and determinations should terminate if the declaration of the relevant infrastructure is revoked.

Stakeholder submissions were due by 19 April 2021. Treasury received thirteen submissions from a range of stakeholders, including infrastructure owners, infrastructure users (that is, parties that seek access to such infrastructure), as well as other interested parties.

Stakeholder views are outlined in [Appendix B](#).

The status of the RIS at each decision-point in the policy development process is set out in [Appendix D](#).

7. Preferred Approach

Having regard to the analysis above and the views of stakeholders expressed through the consultation process, the preferred approach is to implement options 1, 4, 5, 6 and 7 and not implement options 2 and 3.

While many stakeholders support retaining Tribunal review of declaration decisions, on balance, Option 1 is preferred primarily because the NAR matters outlined in Section 2 and Appendix A indicate that Tribunal review is in a significant proportion of cases not providing a final resolution, with parties in highly contentious matters often challenging the Tribunal's decision in the courts. Declaration decisions also involve public interest considerations, which suggests that final decisions should be made by a Minister.

While Option 2 raises similar issues to Option 1, on balance, it is not preferred because there is limited evidence on which to base a conclusion on Option 2, as the Tribunal has only reviewed one ACCC arbitration determination since 1995. Further, arbitrations determinations are more technical in nature than declaration decisions, which suggests there is value in retaining merits review by the Tribunal. Most stakeholders supported retaining Tribunal review.

Given their complexity and more technical nature, it is not proposed to shorten timeframes for Tribunal review of arbitration determinations as per Option 3.

Options 4 and 5 are preferred primarily because it is important that declaration and revocation processes are not able to be commenced which have little prospect of success because the facts or law have not materially changed since a previous process in relation to the same infrastructure. While unlikely to prevent disputes altogether (over whether material circumstances have changed) by sending a clear signal that repeat applications will not be considered, the change could be expected to result in positive behavioural change, reducing regulatory uncertainty.

Options 6 and 7 are preferred primarily because they would address an anomaly in the NAR under which infrastructure no longer formally subject to the NAR is nevertheless subject to NAR processes.

Complex transitional arrangements are likely to be required as part of implementing these options.

8. Implementation and evaluation

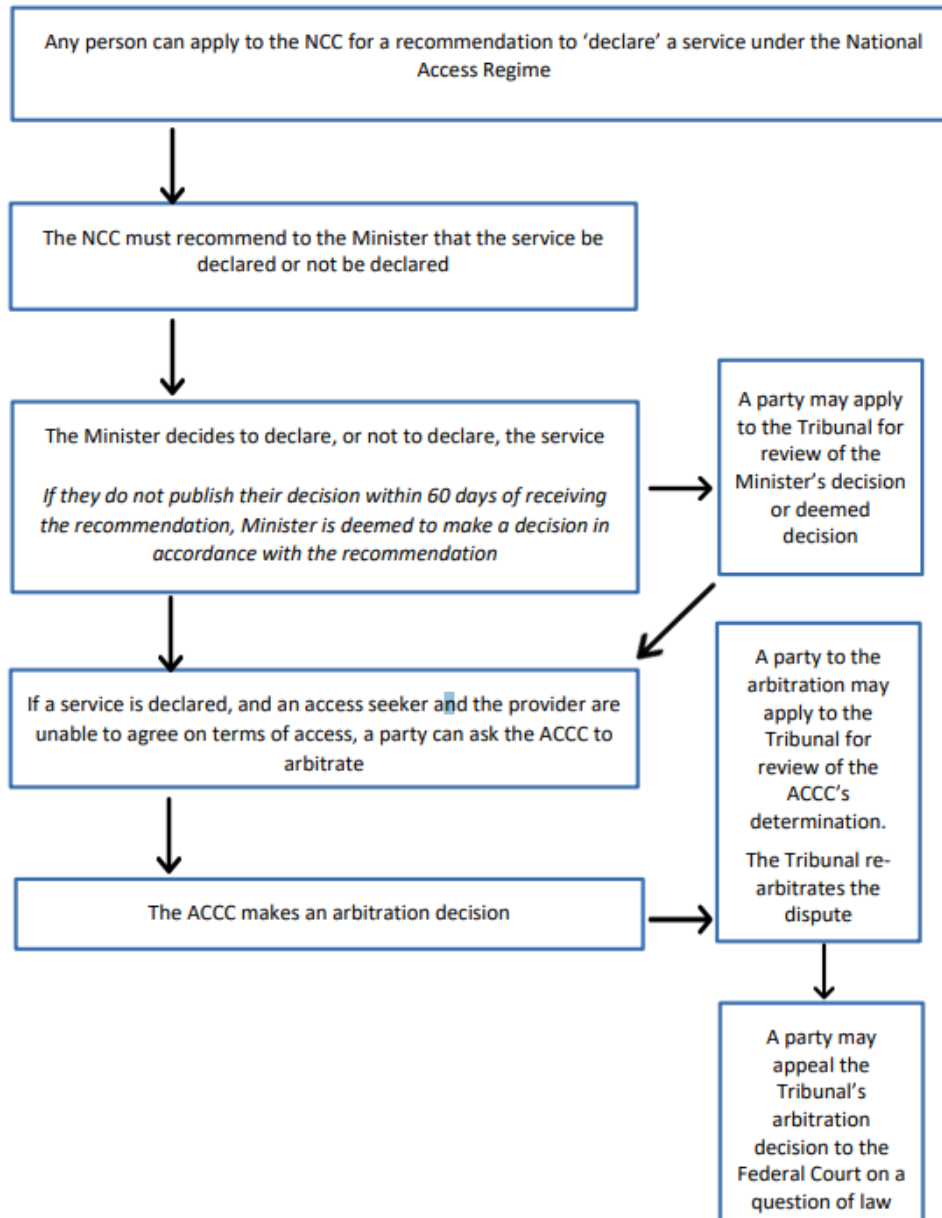
Implementation would require legislative amendments to Part IIIA of the CCA. No further implementation activity is anticipated.

Treasury would monitor the operation and practical impacts of the legislative amendments on an ongoing basis.

APPENDIX A

The National Access Regime – current declaration and arbitration processes

Outline of the declaration process



Why was the NAR introduced?

The NAR was introduced in 1995 following the 1993 Hilmer Review, which proposed a statutory regime to provide access to 'essential facilities' to address the following competition problem:

Some economic activities exhibit natural monopoly characteristics, in the sense that they cannot be duplicated economically. While it is difficult to define precisely the term "natural monopoly", ' electricity transmission grids, telecommunication networks, rail tracks, major

pipelines, ports and airports are often given as examples. Some facilities that exhibit these characteristics occupy strategic positions in an industry, and are thus "essential facilities" in the sense that access to the facility is required if a business is to be able to compete effectively in upstream or downstream markets...

Where the owner of the "essential facility" is vertically-integrated with potentially competitive activities in upstream or downstream markets — as is commonly the case with traditional public monopolies such as telecommunications, electricity and rail — the potential to charge monopoly prices may be combined with an incentive to inhibit competitors' access to the facility. For example, a business that owned an electricity transmission grid and was also participating in the electricity generation market could restrict access to the grid to prevent or limit competition in the generation market. Even the prospect of such behaviour may be sufficient to deter entry to, or limit vigorous competition in, markets that are dependent on access to an essential facility (Chapter 11, pp240-241).

The Hilmer Review led to the 1995 intergovernmental Competition Principles Agreement in which, among other things, the Commonwealth agreed to introduce legislation for a national access regime (clause 6). Legislation establishing the NAR came into force in 1995.

Case studies of National Access Regime matters

- The **Mt Newman Railway** declaration application commenced in June 2004 and was finalised in June 2010, around six years later.
 - The Minister's deemed decision not to declare the railway in May 2006 was subject to an application for merits review by the Tribunal lodged in June 2006. The Tribunal's final decision was handed down in June 2010.
 - In December 2004 while the declaration application was before the NCC, BHP challenged the NCC's finding that the Mt Newman Railway was a 'service' within the meaning of the legislation in the Federal Court. The Federal Court's decision to dismiss the application was handed down in December 2006, and subsequently appealed. The Full Court of the Federal Court's decision was then handed down October 2007 and finally appealed to the High Court, which dismissed the appeal in September 2008.
- The **Goldsworthy Railway** declaration application commenced in November 2007 and was finalised in June 2010, over two and a half years later.
 - The Minister's original decision in October 2008 was the subject to merits review by the Tribunal, which took twenty months to make a decision.
- The **Hamersley and Robe Railway** declaration applications commenced in November 2007 and January 2008 respectively, and were finalised in February 2013, over 5 years later.
 - The Minister's decision in October 2008 was subject to merits review by the Tribunal in June 2010, whose decision in turn was subject to judicial review, with the High Court handing down its decision in September 2012. The matter was referred back to the Tribunal, which made a final decision in February 2013 to set aside the Minister's

decision to declare the Hamersley and Robe Railway lines. Consequently, neither railway line was declared under the NAR.

- The application by Virgin Blue Airlines for declaration of airside services at **Sydney Airport** in October 2002 took almost four and a half years to resolve.
 - The Minister’s decision not to declare the infrastructure made in January 2004 was subject to merits review by the Tribunal in December 2005, which decided to declare the infrastructure for a five-year period. The Tribunal’s decision was judicially reviewed by the Full Court of Federal Court, with the Full Court’s October 2006 decision dismissing the appeal. Sydney Airport Corporation applied for special leave to appeal to the High Court, but this was refused in March 2007.
- The **Port of Newcastle** was first the subject of an application for declaration in May 2015. An arbitration process and declaration matter are currently ongoing.
 - In response to the May 2015 application, in January 2016 the Minister decided not to declare the service. In June 2016 the Tribunal set aside the Minister’s decision and declared the service, with the Federal Court affirming that decision in August 2017, and an application for special leave to appeal to the High Court refused in March 2018.
 - Glencore notified an access dispute in November 2016, with the ACCC releasing an arbitration determination in September 2018 which was to apply until the declaration of the Port expired in July 2031.
 - The Tribunal finalised its review of the ACCC’s arbitration decision in October 2019. The Full Federal Court released its decision on the Tribunal review in August 2020. The matter is currently before the High Court.
 - Following a request by the Port of Newcastle and recommendation from the NCC, the declaration of the Port was deemed to have been revoked in September 2019.
 - The NSW Minerals Council then applied to have the Port declared in July 2020. The Treasurer accepted the NCC’s recommendation not to declare the Port in February 2021. This matter is now before the Tribunal for review.

NAR matters

A ‘matter’ under the NAR comprises declaration, revocation and arbitration processes involving the same infrastructure.

Highly contentious matters are shaded.

NATIONAL ACCESS REGIME MATTERS SINCE 1995

Matter	Commenced	Finalised	Declaration (initial decision)	Tribunal	Litigation	Arbitration	Tribunal	Litigation	Revocation
Austudy Payroll Deduction Service	1996	1997	Not granted	Yes	No	No	No	No	No
Sydney International Airport – freight and cargo services	1996	2000	Granted in part	Yes	No	No	No	No	No
Melbourne International Airport - freight and cargo services	1996	1997	Granted in part	No	No	No	No	No	No
Queensland Rail Freight	1996	1997	Not granted	No	No	No	No	No	No
NSW Rail Track (Sydney to Broken Hill)	1997	1997	Not granted	No	No	No	No	No	No
NSW Rail Track Services (Hunter Valley)	1997	1997	Not granted	No	No	No	No	No	No

Western Australian Rail Infrastructure	1997	1998	Not granted	No	No	No	No	No	No
Victorian Intrastate Rail Track	2001	2002	Not granted	No	No	No	No	No	No
South Australian Rail Track - Wirrida-Tarcoola	2001	2003	Granted	Yes	No	No	No	No	No
Sydney Airport – airside services	2002	2007	Not granted	Yes	Yes	No	No	No	No
Sydney Sewerage Transmission	2004	2009	Granted	Yes	No	Yes	No	No	Yes
Mt Newman Railway Line	2004	2010	Not granted	Yes	Yes	No	No	No	No
Snowy Hydro Ltd and State Water Corporation Water Storage and Transport Services	2004	2006	Not granted	No	No	No	No	No	No
Tasmanian Rail Network	2007	2007	Granted	No	No	No	No	No	No

Goldsworthy Railway Line	2007	2010	Granted	Yes	No	No	No	No	No
Hamersley Railway Line	2007	2013	Granted	Yes	Yes	No	No	No	No
Robe Railway Line	2008	2013	Granted	Yes	Yes	No	No	No	No
Herbert River district cane tram network	2010	2010	Not granted	No	No	No	No	No	No
Sydney Airport – Jet fuel supply infrastructure	2011	2012	Not granted	No	No	No	No	No	No
Port of Newcastle	2015	Ongoing	Not granted	Yes	Yes	Yes	Yes	Yes	Yes

APPENDIX B

Key Points Raised by Stakeholders During Consultation

	Infrastructure Owners	Infrastructure Users	Regulators and other Interested parties
<p>Option 1: Removal of merits review of Ministers' decisions on declaration</p>	<p>The Port of Newcastle supported Option 1 given the declaration process involves a decision by a Minister following <i>'a rigorous and independent assessment process'</i> by the NCC. Further, it submitted declaration does not finally determine any rights under law.³⁷</p> <p>Other infrastructure owners were not supportive of removal of merits review for declaration decisions due to a perceived loss of fairness and the discipline it places on original decision-makers.</p>	<p>Infrastructure users were generally not supportive of option 1.</p> <p>Glencore submitted that merits review should be retained for declaration decisions of Ministers because it provides <i>'openness, transparency and accountability'</i>.⁴⁰</p> <p>The NSW Minerals Council submitted that, infrastructure owners would be <i>'inclined to take appeals on matters of law, irrespective of the elimination of merits reviews, as Part IIIA is a legally complex area, with many legal issues capable of being disputed through years of litigation'</i>.⁴¹</p>	<p>The Business Law Section of the Law Council of Australia opposed Option 1 and stated that, <i>'Merits review provides the only means to correct decisions made by an administrative decision maker on the basis of incorrect facts. Judicial review rarely allows for factual errors (other than jurisdictional errors) in decisions to be revisited or corrected'</i>.⁴³</p> <p>The NCC supported Option 1 and submitted that merits review <i>'increases uncertainty for industry participants and adds unnecessary delay to considerations of whether services should be declared'</i>.⁴⁴ It also stated that</p>

³⁷ Port of Newcastle submission, 19 April 2021, p 4.

⁴⁰ Glencore submission, 19 April 2021, p 10.

⁴¹ NSW Minerals Council submission, 19 April 2021, p 5.

⁴³ Business Law Section, Law Council of Australia submission, 19 April 2021, p 11.

⁴⁴ NCC submission, 19 April 2021, p 3.

	<p>The Australian Airports Association, Australian Rail Track Corporation and Sydney Airport were opposed to option 1. Sydney Airport submitted that merits review plays a <i>'vital role in obtaining the correct result from the National Access Regime'</i> and should not be removed.³⁸</p> <p>The Australian Airports Association submitted that declaration decisions and access arbitrations are necessarily complex, and that <i>'getting this wrong can have significant economic consequences by distorting the market in terms of competition and infrastructure investment'</i>.³⁹</p>	<p>The Minerals Council of Australia submitted that removal of merits review could <i>'have the unintended consequence of entrenching private monopoly power over critical export infrastructure'</i>.⁴²</p>	<p>merits review of Ministerial decisions <i>'undermines the basis, as envisioned by the Hilmer Committee, for having declaration decisions made by an elected member of the Government acting on independent expert advice'</i>.⁴⁵</p> <p>The ACCC considered there <i>'may be benefit'</i> in removing merits review. It submitted that it <i>'supports transparency and accountability of regulatory decisions'</i> but in its experience, access to merits review <i>'has not necessarily achieved these objectives'</i> and has <i>'provided an opportunity for monopoly infrastructure providers to slow the regulatory process by using all legal avenues'</i>.⁴⁶ It also noted that review bodies may not have the benefit of the time, resources and expertise available to the original decision-maker.⁴⁷</p>
<p>Option 2: Removal of merits review of ACCC</p>	<p>Infrastructure owners were not supportive of option 2.</p>	<p>Infrastructure users expressed mixed views.</p>	<p>The ACCC considered that there may be benefit in adopting option 2 and submitted removal of merits review would bring the NAR, <i>'in line with the</i></p>

³⁸ Sydney Airport submission, 19 April 2021, p 1-2.

³⁹ Australian Airports Association submission, 21 April 2021, p 1.

⁴² Minerals Council of Australia submission, 19 April 2021, p 3.

⁴⁵ NCC submission, 19 April 2021, p 4.

⁴⁶ ACCC submission, April 2021, p 2.

⁴⁷ ACCC submission, April 2021, p 2.

<p>arbitration determinations</p>	<p>Port of Newcastle did not support option 2 and submitted that merits review by the Tribunal of arbitrations by the ACCC <i>‘provides an important safeguard for infrastructure owners and access seekers in complex contested factual disputes’</i>. It submitted that in its absence, <i>‘the ACCC would be the single, final and binding arbitrator of access disputes, and its arbitral decisions would finally determine parties’ rights, subject only to judicial review’</i>.⁴⁸</p> <p>Other infrastructure owners, such as Sydney Airport, the Australian Airports Association and the Australian Rail Track Corporation, were not supportive of option 2. The Australian Airports Association submitted that merits review is important to ensure decisions are made based on <i>‘an accurate understanding of the relevant facts, which is important given the significant</i></p>	<p>NSW Minerals Council opposed option 2 because this <i>‘effectively removes one of the few limited options currently available to have applications re-heard’</i>.⁵⁰</p> <p>Glencore was supportive of removing merits review by the Tribunal of ACCC arbitral decisions. It submitted that the <i>‘ACCC is a competent body ... to make to make complex and significant economic and legal decisions such that there is no benefit in having the Tribunal reconsider the merits of the decision’</i>. Glencore also submitted, <i>‘any merits review (possibly de novo) by the Tribunal, which is simply another administrative decision maker, is of no to little utility’</i>.⁵¹</p>	<p><i>telecommunications and energy access regimes’</i>.⁵²</p> <p>The NCC submitted that <i>‘the rationale for removing merits review of Ministerial decisions on declarations is weaker in the case of ACCC arbitration determinations which are not made by an electorally accountable Minister’</i>.⁵³</p> <p>The Business Law Section of the Law Council of Australia considered that <i>‘arbitration determinations can and do have a significant effect on the use of, operation of and investment in infrastructure facilities, and consequently, effects on the competitive process in upstream and downstream markets’</i>.⁵⁴ It submitted that, <i>‘restricting the availability of review to matters of law risks significant errors in arbitration of disputes ... Access arbitration proceedings under the NAR are complex</i></p>
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⁴⁸ Port of Newcastle submission, 19 April 2021, p 1 and 5.

⁵⁰ NSW Minerals Council submission, 19 April 2021, p 5.

⁵¹ Glencore submission, 19 April 2021, p 10.

⁵² ACCC submission, April 2021, p 4.

⁵³ NCC submission, 19 April 2021, p 5.

⁵⁴ Business Law Section, Law Council of Australia submission, 19 April 2021, p 14.

	<i>potential economic consequences of these decisions</i> '. ⁴⁹		<i>and technical, making the possibility of regulatory error is quite high</i> '. ⁵⁵
Option 3: Shorten timeframes	<p>Infrastructure owners expressed mixed views about option 3.</p> <p>Sydney Airport supported option 3 in principle, on the condition shorter timeframes <i>'allow sufficient time and flexibility for the ACT to reconsider the facts and law thoroughly in order to make an informed decision</i>'.⁵⁶</p> <p>Australian Rail Track Corporation submitted that <i>'defined timelines can present difficulties however ARTC supports a review of the process to see where it can be shortened, and burdens reduced</i>'.⁵⁷</p> <p>Port of Newcastle did not support option 3. It submitted that, <i>'Merits review proceedings concerning declaration decisions and access</i></p>	<p>Infrastructure users expressed mixed opinions about option 3.</p> <p>Both Glencore and the Association of Mining and Exploration Companies were supportive of option 3.⁵⁹</p> <p>NSW Minerals Council submitted that the <i>'NCC should be able to take the time required to undertake a rigorous investigation of issues relating to an application. A longer time frame that allows a full and proper investigation and robust outcome is far preferable to a shorter timeframe that results in a deficient investigation and outcome</i>'.⁶⁰</p>	<p>The ACCC was not supportive of option 3 as it <i>'further reduces the time and resources available to the review body without materially improving timeliness</i>'.⁶¹</p> <p>The Business Law section of the Law Council of Australia submitted that <i>'there is arguably some scope to limit the extent to which the clock stopping provisions are exercised by the Tribunal and parties to review proceedings other than of access determinations</i>'. It also submitted, <i>'a more commercial arbitration process could expedite the resolution of access disputes</i>'. However, it also recognised, <i>'the need to balance the importance of timeliness against the long term and significant economic consequences</i>' of NAR decision-making.⁶²</p>

⁴⁹ Australian Airports Association submission, 21 April 2021, p 1.

⁵⁵ Business Law Section, Law Council of Australia submission, 19 April 2021, p 17.

⁵⁶ Sydney Airport submission, 19 April 2021, p 2.

⁵⁷ Australian Rail Track Corporation submission, 19 April 2021, p 4.

⁵⁹ Glencore submission, 19 April 2021, p 10-11; Association of Mining and Exploration Companies submission, p 2.

⁶⁰ NSW Minerals Council submission, 19 April 2021, p 6.

⁶¹ ACCC submission, April 2021, p 4.

⁶² Business Law Section, Law Council of Australia submission, 19 April 2021, pp 19, 20, 21.

	<p><i>disputes raise complex matters of fact, economics and law pertaining to infrastructure of national significance...</i></p> <p>It further submitted that it <i>'recognises the importance for the Tribunal to be subject to an appropriate decision period, while proceeding efficiently, in order to justly determine the correct outcome'</i>.</p> <p>It also submitted, that <i>'in the context where arbitrations can determine the terms and conditions of access for lengthy periods (10 or 20 years) ... a six month merits review period is not excessive'</i>.⁵⁸</p>		
<p>Option 4 and 5: Limit new applications for declaration or revocation</p>	<p>All infrastructure owners who provided submissions were supportive of options 4 and 5.</p> <p>Port of Newcastle supported options 4 and 5 and submitted, <i>'it is entirely inconsistent with the objects of Part IIIA to promote efficient investment, and to encourage a consistent approach to access regulation, for a party (either itself or as part of a representative group) to be permitted to bring a new application for declaration for</i></p>	<p>Infrastructure users expressed mixed views as to options 4 and 5.</p> <p>Glencore did not support option 4 submitting that the ongoing dispute with the Port of Newcastle raised unique factual issues, and that, <i>'the ability to seek declaration again effectively provided the only means to appeal against this decision'</i>.⁶⁵</p> <p>Glencore and the Association of Mining Exploration Companies were supportive of option 5.</p>	<p>Other stakeholders were generally supportive of options 4 and 5.</p> <p>The NCC submitted that the lack of a <i>'material change in circumstances'</i> requirement <i>'can encourage applications that have the effect of continually reconsidering declaration of essentially the same service. This is highly undesirable as it involves an inefficient use of resources and contributes to lengthy processes and</i></p>

⁵⁸ Port of Newcastle submission, 19 April 2021, p 7.

⁶⁵ Glencore submission, 19 April 2021, p 10-11; Association of Mining and Exploration Companies submission, p 11.

	<p><i>infrastructure where declaration has previously been refused or revoked, in the absence of any material change in circumstances or the passage of a substantial period of time</i>'.⁶³</p> <p>The Australian Airports Association was broadly supportive of options 4 and 5 to <i>'reduce unnecessary, time-consuming and costly repeat applications for declaration</i>'.⁶⁴</p> <p>Both Sydney Airport and the Australian Rail Track Corporation were also supportive of options 4 and 5.</p>	<p>NSW Minerals Council was not supportive of options 4 or 5 and submitted that the options would <i>'remove existing safeguards for users of the Port... and would introduce additional points in the process likely to result in litigation</i>'.⁶⁶</p> <p>The Minerals Council of Australia submitted that option 4 (and 1 and 6) <i>'could have the unintended consequence of entrenching private monopoly power over critical export infrastructure and the Australian Government should not proceed with them</i>'.⁶⁷</p>	<p><i>ongoing uncertainty for infrastructure owners and users</i>'.⁶⁸</p> <p>The Business Law Section of the Law Council of Australia was supportive of both options 4 and 5. It submitted, <i>'the ability for repeated applications for declaration in respect of the same service is contrary to the fundamental objects of the NAR and, potentially, the common law doctrine of res judicata ... it fails to provide a consistent approach to access regulation and increases the risk of regulatory error</i>'.⁶⁹</p> <p>The ACCC supported options 4 and 5 to, <i>'reduce regulatory costs from additional processes that are unlikely to yield a different result. However, the ACCC does not support the use of time limits in this context, as it would be arbitrary and may frustrate a legitimate application for declaration being made</i>'.⁷⁰</p>
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⁶³ Port of Newcastle submission, 19 April 2021, p 8.

⁶⁴ Australian Airports Association submission, 21 April 2021, p 2.

⁶⁶ NSW Minerals Council submission, 19 April 2021, p 6.

⁶⁷ Minerals Council of Australia submission, 19 April 2021, p 3.

⁶⁸ NCC submission, 19 April 2021, p 5.

⁶⁹ Business Law Section, Law Council of Australia submission, 19 April 2021, p 21.

⁷⁰ ACCC submission, April 2021, p 4.

<p>Option 6 and 7</p> <p>Termination of arbitration proceedings and determinations if declaration is revoked</p>	<p>The Port of Newcastle supported amending Part IIIA so that arbitration proceedings on foot, and final determinations under the NAR, would terminate automatically if declaration is revoked. It submits that the provisions of Part IIIA should only apply while the service is declared and that this would be <i>‘consistent with the policy objectives of Part IIIA and minimising regulatory burden, because it is only during the period when the criteria for declaration remain satisfied that the objects of Part IIIA... can be achieved’</i>.⁷¹</p> <p>Sydney Airport supported these options and submitted that it would be <i>‘inappropriate for infrastructure to be subject to an arbitration determination... after the infrastructure is found to no longer meet the declaration criteria set out in the regime and declaration is revoked’</i>.⁷²</p>	<p>Glencore, Minerals Council of Australia and the NSW Minerals Council were not supportive of termination of arbitral proceedings or determinations.</p> <p>Glencore was not supportive of these options, particularly where <i>‘there are very limited appeal rights from any revocation’</i>. Glencore submitted that these options would <i>‘affect investment decisions by the access provider and access seeker(s)... [and] undermine the utility of parties seeking a declaration if “the rug could be take out from under them”</i>’.⁷⁴</p> <p>The NSW Minerals Council did not support options 6 and 7 and submitted it <i>‘would undermine the legal rights obtained through declaration and any binding ACCC arbitration determination, would create significant commercial uncertainty for both users and operators that would affect investment in services’</i>.⁷⁵</p>	<p>Other stakeholders expressed mixed views on options 6 and 7.</p> <p>The ACCC submitted that it is, <i>‘incongruous for the determination to continue to have effect only in relation to certain parties if the underlying declaration is no longer in force’</i>. The ACCC also submitted that if option 6 and 7 were to be implemented, a specified transitional period should also be implemented to allow for ongoing matters to be finalised.⁷⁶</p> <p>The NCC submitted it is <i>‘arguably inconsistent for a service to be subject to regulation despite the Minister having found ... that it is no longer appropriate for that service to be declared’</i>. However, it also submitted that the <i>‘ability to terminate an arbitration determination before it was initially intended to end could generate regulatory uncertainty and negatively</i></p>
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⁷¹ Port of Newcastle submission, 19 April 2021, p 9.

⁷² Sydney Airport submission, 19 April 2021, p 3.

⁷⁴ Glencore submission, 19 April 2021, p 12.

⁷⁵ NSW Minerals Council submission, 19 April 2021, p 8.

⁷⁶ ACCC submission, April 2021, p 5.

	<p>The Australian Airports Association supported options 6 and 7 as they would be '<i>sensible, practical and aligned with the objectives of the Regime</i>'.⁷³</p>		<p><i>impact on efficient investment incentives</i>'.⁷⁷</p>
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⁷³ Australian Airports Association submission, 19 April 2021, p 2.

⁷⁷ NCC submission, 19 April 2021, p 6.

APPENDIX C

Regulatory costings – assumptions

The following assumptions were used in costing. These are based on a desktop analysis of historical Part IIIA arbitration matters and have not been tested with stakeholders.

Option 1

- *Four* applications for merits review of a declaration would take place every ten years (based on historical observations of the frequency of appeals to the tribunal under the NAR).
- The party making the application would be the only ones to experience a regulatory saving.
- On average, the applicant would engage the equivalent of *one* full time lawyer at a senior associate lawyer level for 40 hours to complete an application form. This estimate reflects the fact that while the form itself is relatively simple, an applicant would have around 20 pages of supporting material attached to their application which could be expected to take around this length of time to prepare.
- Senior associate lawyer hourly rate: \$376.88

Option 2

- *One* application for merits review of an arbitration determination would take place every ten years (based on historical observations of the frequency of appeals to the tribunal under the NAR).
- The party making the application would be the only ones to experience a regulatory saving.
- On average, the applicant would engage the equivalent of *one* full time lawyer at a senior associate lawyer level for 40 hours to complete an application form. This estimate reflects the fact that while the form itself is relatively simple, an applicant would have around 20 pages of supporting material attached to their application which could be expected to take around this length of time to prepare.
- Senior associate lawyer hourly rate: \$376.88

Option 6

- *One* arbitration would take place every ten years (based on historical observations of the frequency of arbitrations under the NAR).
- Each arbitration would have two parties: an access seeker and an asset owner.
- On average, each party would engage the equivalent of *three* full time lawyers at a senior associate lawyer level and *two* standard positions within the company to respond to ACCC directions and prepare material for the arbitration.
- Senior associate lawyer hourly rate: \$376.88
- Standard hourly rate for the company: \$73.05

- The maximum cost saving (-\$659,295.45) is based on the parties spending a combined total of 644 days on the arbitration that would be avoided through revocation. This is based on an analysis of historical arbitrations, and covers proceedings from the ACCC announcing an arbitration will take place through to a final determination. In this scenario, the notifying party pays the \$10,850 pre-hearing fee and the ACCC apportions its daily hearing rate of \$4340 between the parties, based on one day of hearings. The arbitration proceeding is assumed to be terminated (that is, revocation occurs) after the ACCC announces that arbitration will commence.
- The minimum cost saving (-\$91,925.28) is based on the parties spending a combined 90 days on the arbitration that would be avoided through revocation. This is based on similar analysis to scenario A, and covers arbitration processes from the ACCC sending a draft determination to both parties through to a final determination. The arbitration proceeding is assumed to be terminated after the ACCC releases a draft decision.

APPENDIX D

Status of the RIS at each decision point

On 16 February 2021, the Treasurer, the Hon Josh Frydenberg MP, announced that Treasury would examine processes under the NAR. This decision was not informed by a RIS.

On 19 March 2021, Treasury released a consultation paper on options to reform the NAR for stakeholder comment. The options presented in the consultation paper aligned with those in a draft preliminary assessment RIS.

It is expected that the Government will announce the reforms on 11 May 2021 as part of the 2021-22 Budget.